

**A COMPARATIVE STUDY OF THE ENFORCEMENT OF  
ENVIRONMENTAL LAW WITH REGARD TO THE CONSERVATION OF  
FAUNA AND FLORA IN THE RSA**

by

**RONALD VERNON KIRBY**

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**DEDICATED : TO MY MOTHER, MARTIE, MY WIFE LINDA, MY  
CHILDREN NADIA, REINETTE AND CARMEN AND IN LOVING  
MEMORY OF MY FATHER, JOHN KEITH KIRBY (JOHNNY)**

344.46068 KIRB



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## SUMMARY/ABSTRACT

Despite the rise in environmental awareness, the inclusion of an “environmental right” in the South African Constitution and the promulgation of new environmental legislation, such as the National Environmental Management Act 107 of 1998, the degradation of eco-systems in South Africa continues at an alarming rate because fauna and flora species are added to the endangered species list almost annually.

Inadequate enforcement of environmental laws has been identified as a reason for the continuing degradation of biodiversity in South Africa. The object of this study was to examine relevant laws and strategies currently used in South Africa to enforce environmental law and their effectiveness in the conservation of fauna and flora. Alternative/additional strategies were also explored in an attempt to find applicable, and possibly more effective, ways of enforcing compliance with environmental laws. For this purpose a comparative study of the enforcement mechanisms and additional strategies employed in Australia and New Zealand was undertaken.

Chapter one examines relevant basic concepts, such as “environment”, “fauna and flora”, “biodiversity”, “sustainable development” and “environmental law”, followed by a discussion of the principal laws applicable to fauna and flora in chapter two. Enforcement mechanisms currently employed in South Africa is the topic of chapter three, while possible alternative or additional strategies of enforcing environmental laws are investigated in chapter four. Throughout comparisons have been made to similar aspects of environmental law in Australia and New Zealand.

Chapter five contains conclusions and recommendations. It was found that South Africa has sufficient and adequate environmental laws to effectively conserve native fauna and flora. Despite the shortcomings of the criminal law sanctions no adequate mechanism exists to replace it as an enforcement mechanism. However, to successfully promote conservation efforts, alternative/additional strategies that would encourage compliance with relevant laws have to be explored and utilised. Through these strategies, the necessity of prosecution and litigation may be avoided.

Finally, the cultivation of public awareness through environmental education will ultimately be decisive to the success of fauna and flora conservation in South Africa.

## **KEYWORDS**

environment; biodiversity; sustainable development; fauna and flora; environmental laws of South Africa, Australia and New Zealand; enforcement mechanisms; additional enforcement strategies.

## TABLE OF CONTENTS

**SUMMARY/ABSTRACT**  
**TABLE OF CONTENTS**  
**TABLE OF ABBREVIATIONS**

	<b>PAGE</b>
<b>INTRODUCTION</b>	1
<b>CHAPTER 1</b>	
<b>BASIC CONCEPTS</b>	5
1. THE CONCEPT “ENVIRONMENT”	5
1.1 Extensive approach	6
1.1.1 The semantic meaning of “environment”	6
1.1.2 A South African perspective	7
1.1.3 The concept “environment” in foreign legislation	12
1.2 Limited approach	14
1.2.1 A South African perspective	14
1.2.2 The concept “environment” in foreign legislation	16
1.3 Conclusion	16
2. FLORA AND FAUNA	19
2.1 General	19
2.2 South Africa	21
2.2.1 Flora	21
2.2.2 Fauna	23
2.2.3 Protected Areas	25
2.3 Australia	27
2.3.1 General	27
2.3.2 Flora	29
2.3.3 Fauna	30

2.3.4 Protected Areas	32
2.4 New Zealand	34
2.4.1 General	34
2.4.2 Flora	35
2.4.3 Fauna	36
2.4.4 Protected Areas	37
2.5 Conclusion	39
3. BIODIVERSITY	40
3.1 General	40
3.2 South Africa	42
3.3 Australia	46
3.4 New Zealand	49
3.5 Conclusion	50
4. SUSTAINABLE DEVELOPMENT	50
4.1 General	50
4.2 South Africa	57
4.3 Australia	60
4.4 New Zealand	62
4.5 Conclusion	66
5. THE CONCEPT “ENVIRONMENTAL LAW”	68
5.1 General	68
5.2 South Africa	69
5.2.1 The scope of environmental law	69
5.2.2. Wildlife law	70
5.3 Australia	71
5.4 New Zealand	72
5.5 Conclusion	72
6. CONCLUSION OF THE CHAPTER	73

<b>CHAPTER 2</b>	
<b>ENVIRONMENTAL LAWS APPLICABLE TO FAUNA AND FLORA</b>	<b>74</b>
INTRODUCTION	74
1. SOUTH AFRICA	74
1.1 General	74
1.2 Constitution of the Republic of South Africa Act of 1996	75
1.2.1 General	75
1.2.2 The environment right clause (section 24)	81
1.2.3 Supporting rights	86
1.3 National legislation	92
1.3.1 National Environmental Management Act 107 of 1998 (NEMA)	92
1.3.2 Environment Conservation Act 73 of 1989	97
1.3.3 National Parks Act 57 of 1976	99
1.4 Provincial legislation (Acts and Ordinances)	101
1.5 Environmental policy	104
2. AUSTRALIA	107
2.1 General	107
2.2 Commonwealth Constitution Act 1900	108
2.3 Commonwealth legislation	111
2.3.1 General	111
2.3.2 Environment Protection (Impact of Proposals) Act 1974	111
2.3.3 Wildlife Protection (Regulation of Exports and Imports) Act 1982	112
2.3.4 Endangered Species Act 1992 (Cth)	113
2.3.5 National Parks and Wildlife Conservation Act 1975 (Cth)	114
2.4 States and Territory legislation	114
2.4.1 General	114
2.4.2 Protection of fauna	115
2.4.3 Protection of flora	117
2.5 The Commonwealth/State co-operation	118

3. NEW ZEALAND	123
3.1 General	123
3.1.1 Background	123
3.1.2 Institutional reform	124
3.1.3 Environmental law reform	127
3.2 Legislation	128
3.2.1 General	128
3.2.2 Resource Management Act 1991(RMA)	129
3.2.3 Environment Act 1986	138
3.2.4 Conservation Act 1987	140
3.2.5 Reserves Act 1977	142
3.2.6 Wildlife Act 1953	143
3.2.7 National Parks Act 1980	143
4. INTERNATIONAL TREATY (CITES)	144
4.1 General	144
4.2 <u>South Africa</u>	146
4.3 Australia	150
4.4 New Zealand	152
5. CONCLUSION	152
5.1 General	152
5.2 The Constitution	153
5.3 Integrated environmental management	153
5.4 Sustainable development/management	156
5.5 Public participation	158
5.6 Institutional structures	159
5.7 Ombudsman	160
5.8 International treaty (CITES)	161
<b>CHAPTER 3</b>	
<b>ENFORCEMENT OF APPLICABLE ENVIRONMENTAL LAWS</b>	162
INTRODUCTION	162

1. THE IMPACT OF THE CONSTITUTION ON ENFORCEMENT OF ENVIRONMENTAL LAWS	165
1.1 Introduction	165
1.2 Co-operative government and enforcement of environmental laws	166
2. ENFORCEMENT OF SPECIFIC ENVIRONMENTAL LEGISLATION	170
2.1 National Environment Management Act 107 of 1998 (NEMA)	170
2.2 Environment Conservation Act 73 of 1989	175
2.3 National Parks Act 57 of 1976	176
2.4 Provincial legislation	177
2.5 Conclusion	178
3. ENFORCEMENT MECHANISMS	179
3.1 Criminal sanctions	180
3.1.1 General	180
3.1.2 Criminal sanctions as a primary sanction	182
3.1.3 Specialist Courts/Tribunals	199
3.2 Administrative enforcement	203
3.2.1 General	204
3.2.2 Non-judicial enforcement of administrative actions	206
3.2.3 Judicial enforcement of administrative actions	210
3.2.4 Control of administrative actions	213
4. CONCLUSION	217
<b>CHAPTER 4</b>	
<b>ADDITIONAL/ALTERNATIVE STRATEGIES TO IMPROVE COMPLIANCE WITH ENVIRONMENTAL LAWS</b>	223
INTRODUCTION	223
1. ALTERNATIVE DISPUTE RESOLUTION (ADR)	224

1.1 General	224
1.2 South Africa	230
1.3 Australia	233
1.4 New Zealand	234
1.5 Conclusion	235
2. ENVIRONMENTAL EDUCATION	236
2.1 General	236
2.2 South Africa	238
2.2.1 General	238
2.2.2 Communities and nature conservation	241
2.3 Australia	245
2.4 New Zealand	247
2.4.1 General	247
3. ENVIRONMENTAL INTEREST GROUPS	248
3.1 General	248
3.2 The role of environmental NGOs	249
3.2.1 The indirect role of environmental NGOs in the conservation of fauna and flora	250
3.2.2 The direct role of environmental NGOs in the conservation of fauna and flora	252
3.2.3 Shortcomings of environmental NGOs	253
3.2.4 Conclusion	254
4. THIRD PARTIES (COMMERCIAL)	255
4.1 General	255
4.2 "Green" consumers	255
4.3 The financial community	260
4.3.1 Investors	260
4.3.2 Financial institutions/lenders	262
4.3.3 Insurance institutions	263
4.3.4 Government support to commercial third parties	264
4.3.5 Conclusion	265

5. VOLUNTARY AGREEMENTS	265
5.1 General	265
5.2 Agreements without a legal contract	265
5.3 Agreements with a legal contract	266
5.4 Co-regulatory instruments	267
5.5 Conclusion	268
6. MARKET MECHANISMS	269
6.1 General	269
6.2 Conclusion	270
7. ECONOMIC INSTRUMENTS	270
7.1 General	270
7.2 Economic incentives	274
7.2.1 Negative incentives	274
7.2.2 Positive incentives	279
7.3 Conclusion	279
8. COMBINATIONS OF STRATEGIES TO PROMOTE THE CONSERVATION OF FAUNA AND FLORA	280
9. CONCLUSION	283
9.1 General	283
9.2 ADR as alternative mechanism	284
9.3 Environmental education	284
9.4 Environmental NGOs and other third parties	286
9.5 Voluntary agreements	286
9.6 Economic and market instruments	286
9.7 Conclusion	287
<b>CHAPTER 5</b>	
<b>CONCLUSION AND RECOMMENDATIONS</b>	288
<b>INTRODUCTION</b>	288

1. BIODIVERSITY	289
2. INTEGRATED ENVIRONMENTAL MANAGEMENT	291
2.1 Co-operative governance	291
2.2 Environmental laws	294
3 ENFORCEMENT OF ENVIRONMENTAL LEGISLATION	295
3.1 <i>Locus standi</i>	295
3.2 Criminal sanctions	296
3.2.1 Human resources	296
3.2.2 Inadequacy of criminal penalties	302
4. OTHER STRATEGIES OF COMPLIANCE	305
4.1 General	305
4.2 Alternative strategies for compliance	305
4.3 Additional strategies	306
4.3.1 Environmental education	306
4.3.2 Economic instruments	308
5. CONCLUDING REMARKS	309
<b>BIBLIOGRAPHY</b>	311

## TABLE OF ABBREVIATIONS

ACF	Australian Conservation Foundation
ACT	Australian Capital Territory
ADR	Alternative Dispute Resolutions
AEC	Australian Environment Council
AEE	Assessment of Environmental Effects
ANC	African National Congress
ANZEC	Australian and New Zealand Environment Council
ANZECC	Australian and New Zealand Environment and Conservation Council
CBO	Community Based Organisation
CCMA	Commission for Conciliation, Mediation and Arbitration
CEC	Committee for Environmental Co-ordination
CITES	Convention on International Trade in Endangered Species of 1973
CONCOM	Council of Nature Conservation Ministers
CONNEPP Constitution	Consultative National Environment Policy Process Constitution of the Republic of South Africa Act 108 of 1996
CROWA SA	The Criminological Research Centre for Wildlife and Ecological Crime in Southern Africa
CRTK	Community Right to know
Cth	Commonwealth
DA	Designated Authority
DEAT	Department of Environmental Affairs and Tourism
DFA	Development Facilitation Act 67 of 1995
DNA	Deoxyribonucleic acid
DoC	Department of Conservation
EDR	Environmental Dispute Resolution
EIA	Environmental Impact Assessment

EJNF	Environmental Justice Networking Forum
EPA	Environment Protection Agency
ESA	Endangered Species Act
ESPU	Endangered Species Protection Unit
EWT	Endangered Wildlife Trust
GEAR	Growth, Employment and Redistribution
GEM	Group for Environmental Monitoring
HRSC	House of Representatives Standing Committee
IGAE	Intergovernmental Agreement on the Environment
IUCN	International Union for the Conservation of Nature
MfE	Ministry for the Environment
NEAF	National Environmental Advisory Forum
NEMA	National Environmental Management Act 107 of 1998
NGO	Non-government Organisation
NSW	New South Wales
NT	Northern Territory
OECD	The Organization for Economic Cooperation and Development
PCE	Parliamentary Commissioner for the Environment
PNA	Protected Natural Areas Programme
Qld	Queensland
RDP	Reconstruction and Development Programme
RMA	Resource Management Act 1991
RMLR	Resource Management Law Reform
SA	South Australia
SPCA	Society for the Prevention of Cruelty of Animals
Tas	Tasmania
TBVC	Transkei, Bophuthatswana, Venda and Ciskei
TRAFFIC	Trade Records of Flora and Fauna in Commerce
UNCED	United Nations Conference of Environment and Development
Vic	Victoria
WA	Western Australia
WWF	World Wide Fund for Nature

## INTRODUCTION

“Humankind is in a process of destroying the world in which it is living. As a result of population growth and the striving for higher standards of living, which resulted in the pollution and destructive use of limited natural resources, humankind, the crown of the creation, has proved to be the only species that is unable to adapt to the environment.”<sup>1</sup>

However, during the last three decades there has been a rise in environmental awareness brought about by concerned individuals, international powers, national governments as well as environmental groups and organisations.<sup>2</sup> This “awakening” is mirrored in the news media, books and articles on the environment, and in a number of conferences held both nationally and internationally.<sup>3</sup>

The environment has also caught South Africa’s first African National Congress (ANC) government’s attention. On a preliminary examination, the environmental policies pursued during 1994 to 1999 would seem to represent a triumph for environmental concerns. There has been unprecedented activity in the environmental area. This is evident in the number of departmental reports, white papers, commissions of inquiry, new policies related to the environment and the passing of new legislation, such as the National Environmental Management Act 107 of 1998 (NEMA).<sup>4</sup> This growing awareness and concern for the environment have led to the inclusion of an “environmental right”<sup>5</sup> in the Republic of South Africa Constitution Act of 1996.<sup>6</sup>

However, after the first term of the new government, a number of critics questioned the depth of the government’s commitment to environmental reform and the effectiveness of

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<sup>1</sup> Hugo, ML & Viljoen, AT & Meeuwis, JM *The Ecology of Natural Resource Management* (1997) Kagiso Publishers Pretoria 1.

<sup>2</sup> Examples of environment groups and organisations include, the Wildlife and Environment Society, the Endangered Wildlife Trust and Trees for Africa.

<sup>3</sup> Examples of conferences include, the United Nations Conference on Environment and Development held in Rio de Janeiro in 1992 and the Convention on Biological Diversity held in 1992 in Nairobi.

<sup>4</sup> Le Quesne, T “The Divorce of Environmental and Economic Policy under the First ANC Government, 1994-1999” (2000) 7 *SAJELP* 1.

<sup>5</sup> The meaning of an “environmental right” will be discussed briefly in chapter 1.

<sup>6</sup> Act 108 of 1996 (s24).

the measures adopted. Firstly, the government's commitment was questioned as there is evidence of major erosion in the priority given to environmental issues. This evidence includes the omission of a chapter on the environment in the Reconstruction and Development Policy (RDP) White Paper that had been included in the RDP base document. Further evidence is the absence of environmental issues in the Growth, Employment and Redistribution policy document (GEAR).<sup>7</sup>

Furthermore, according to Le Quesne,<sup>8</sup> NEMA provided for far weaker powers for the Department of Environmental Affairs and Tourism (DEAT) than had originally been envisaged in the Consultative National Environment Policy Process (CONNEPP). Instead of being focused on a strong DEAT as lead agent with powers over other government departments, NEMA is centred on two bodies, the National Environmental Advisory Forum (NEAF)<sup>9</sup> and the Committee for Environmental Co-ordination (CEC).<sup>10</sup>

Although NEMA achieves a number of important steps forward for environmental management in South Africa—at least in its statement of principles—the withdrawal of the concept of either a strong DEAT or an independent Environmental Protection Agency to oversee and enforce environmental policy across all government functions, demonstrates a drastic retreat by the ANC from the strong commitments made during the run-up to the first democratic elections.<sup>11</sup>

Secondly, despite the “good” intentions of the government, the effectiveness of the implementation and administration of environmental affairs to conserve the environment adequately is a cause for concern. This is because conservation attempts are hampered by the fact that legislative and administrative powers regarding the environment fall within

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<sup>7</sup> Le Quesne (2000) 7 *SAJELP* op cit 6, 7, 9.

<sup>8</sup> Le Quesne (2000) 7 *SAJELP* op cit 10-11.

<sup>9</sup> It is composed of a group of “stakeholders” which is intended to advise the minister on “any matter concerning environmental management”.

<sup>10</sup> The CEC is charged with “integration and coordination of environmental functions by the relevant organs of state,” principally the assessment of the Environmental Implementation Plans that NEMA requires government bodies to compose. However, the DEAT has only one voice on the CEC.

<sup>11</sup> Le Quesne (2000) 7 *SAJELP* op cit 11.

the authority of different government departments.<sup>12</sup> This fragmentation of legislative and administrative responsibility is due to the fact that environment is a concurrent functional area of both the national and provincial governments. This has resulted in poor co-operation and co-ordination between the various departments with regard to environmental issues. However, one of the goals of NEMA is to address this issue by promoting co-operative governance between different spheres of government and between different departments in the same sphere of government.<sup>13</sup>

A third aspect of concern is the enforcement of environmental laws, which is hampered by a serious lack of funding and of human resources. The shortage in human resources is aggravated by a transformation process in which many experienced officials have been replaced by new persons that were appointed on their potential rather than their knowledge, skills and proven experience.<sup>14</sup> This situation has a very negative impact on the effectiveness of the administration, implementation and enforcement of environmental matters as it usually takes many hours of training, lots of money and years of experience to acquire the skills and knowledge necessary to adequately conserve the environment. With the current rate of environmental degradation, time is a luxury that we simply cannot afford.

Given the problems<sup>15</sup> that South Africa as a developing country has to face, it is also unlikely that the budgetary allocation for administration of environmental affairs will improve to any satisfactory level in the near future. Environmental issues have, therefore, become secondary luxuries peripheral to the key social and economic challenges facing

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<sup>12</sup> Departments involved in the environment in one way or another, include the Departments of Transport, Forestry, Fishery, Minerals and Energy and Environmental Affairs and Tourism.

<sup>13</sup> NEMA, as well as the concurrent powers of the spheres, will be discussed further in chapter 2.

<sup>14</sup> Rabie, MA "Governmental Policy reviews and Reforms relating to the Environment" (1999) 6 *SAJELP* 147.

<sup>15</sup> Problems include unemployment (36,2% on 1/3/01 according to Statistics South Africa), poverty (income per capita is not available as different criteria are used by researchers) and the AIDS epidemic (*Volksblad* (21 March 2001) reported that 1 out of 9 South Africans (11%) are infected with the HIV virus. This figure represents almost 4,6 million people).

South Africa. This adds to the prevailing pessimism about the future management of the environment in South Africa.<sup>16</sup>

As inadequate enforcement of “environmental law”<sup>17</sup> has been identified as a reason for the degradation of the environment in South Africa,<sup>18</sup> this study will examine the relevant laws and methods currently used in South Africa to enforce the conservation of the environment in general, and fauna<sup>19</sup> and flora<sup>20</sup> in particular. Alternative/additional enforcement methods will also be explored in an attempt to find applicable and, possibly, more effective ways of enforcing environmental laws. For this purpose a comparative study of enforcement methods employed in Australia and New Zealand will also be done.

However, before addressing the crux of this study, namely the existing enforcement methods (chapter 3) and the possible alternative/additional methods (chapter 4) of getting the public, business sector and other stakeholders to comply with current environmental laws, there will be a discussion in chapter 1 of the relevant basic concepts, such as “environment”, “fauna and flora”, “biodiversity”, “sustainable development” and “environmental law”.<sup>21</sup> This will be followed by a discussion of the main legislation applicable to fauna and flora in chapter 2. In each chapter, comparisons will be made, where relevant, to similar issues in Australia and New Zealand. To start the discussion on basic concepts, the meaning of “environment” will be dealt with first. Thereafter, flora and fauna, biodiversity, sustainable development and, finally, environmental law will be discussed.

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<sup>16</sup> Rabie (1999) 6 *SAJELP* op cit 147; Le Quesne (2000) 7 *SAJELP* op cit 18.

<sup>17</sup> There is uncertainty as to exactly what legal rules pertaining to the environment constitute environmental law. This issue will be discussed in chapter 1.

<sup>18</sup> Kidd, MA “Integrated pollution control in South Africa: How easy a task?” (1995) 1 *SAJELP* 38; Bray, E “Fragmentation of the environment: another opportunity lost for a nationally coordinated approach?” (1995) 10 *SAPR/PL* 173; Kidd, M “Environmental Crime — time for a rethink in South Africa?” (1998) 5 *SAJELP* 181.

<sup>19</sup> Fauna is a collective term for all kinds of animals. In this study it will refer to living, wild (non-domesticated) terrestrial animals. See the discussion in chapter 1.

<sup>20</sup> Flora is a collective term for all kinds of plants. In this study it will refer to living, wild terrestrial plants. See the discussion in chapter 1.

<sup>21</sup> In chapter 1, only the concepts regarding the meaning of, scope and source of environmental law will be referred to and not the enforcement thereof.

## CHAPTER 1

### BASIC CONCEPTS

#### 1. THE CONCEPT “ENVIRONMENT”

“Environment” is a relational concept that indicates an interrelationship between humankind and its surroundings. The meaning of “environment” depends on how extensive this interrelationship is perceived, the context in which it is being used and the concerns and interests of the person using the term. This means that “environment” will mean different things to different people. For example, to a conservationist, “environment” may mean the natural living and non-living surroundings of persons; to the architect, the built environment; while to the social worker “environment” will be the circumstances in which people live.<sup>22</sup> Further, even more diverse perceptions of the environment are formed and influenced by cultural, political, religious and educational differences.<sup>23</sup>

Irrespective of the specific meaning that one might attribute to “environment”, it can usually be classified according to an extensive approach or a limited approach. The extensive approach with its comparative insights is discussed first and, thereafter, the limited approach.

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<sup>22</sup> Bates, GM *Environmental Law in Australia* (1987) (2<sup>nd</sup> ed) Butterworths Sydney 1; Rabie, A “Rationalisation of environmental legislation “ (1989) 4 *SAPR/PL* 272.

<sup>23</sup> These differences are reflected in different philosophical approaches. Examples of these approaches are the utilitarian, ego-centric, anthropocentric and eco-centric approaches. Some of these approaches are briefly discussed further on in this chapter. However, environmental ethics is beyond the scope of this thesis. For further detail, see Kidd, M *Environmental Law in South Africa* (1997) Juta Cape Town 14-16; Glazewski, J *Environmental Law in South Africa* (2000) Butterworths Durban 5-8; Fuggle, RF & Rabie, MA *Environmental Management in South Africa* (1998) Juta Cape Town 7-10.

## 1.1 Extensive approach

According to an extensive approach, “environment” is a concept that embraces numerous components, including the natural environment, spatial environment and social environment. “Natural environment” refers to the environment in its pure state or to renewable and non-renewable natural resources such as air, water, soil, plants and animals. “Spatial environment” refers to human-made and natural areas such as a town, river or forest, while “social environment” refers to groups of people such as a family or community.<sup>24</sup>

The extensive approach is found in most dictionaries and is widely supported by the legislation of various countries,<sup>25</sup> including South Africa, and by most academic commentators.

### 1.1.1 The semantic meaning of “environment”

The Concise Oxford Dictionary (1990) defines “environment” as:

1. “physical surroundings and conditions, especially as affecting people’s lives.
2. conditions or circumstances of living.
3. ecological external conditions affecting the growth of plants and animals.
4. a structure designed to be experienced from inside as a work of art.”<sup>26</sup>

The Cambridge International Dictionary’s (1995) definition of “environment” also covers the same components as the Oxford dictionary but divides “environment” into environment (surroundings) and environment (nature). The former is defined as “conditions that you live or work in and the way that they influence how you feel or how

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<sup>24</sup> Rabie, MA “Environmental law in search of an identity” (1991) 2 *Stell LR* 204. Also see page 204 for other components included in the extensive approach.

<sup>25</sup> Such as Australia, New Zealand, United States and Canada.

<sup>26</sup> Allen, RE *Concise Oxford Dictionary of Current English* (1990) (8<sup>th</sup> ed) Clarendon Press Oxford 392.

effectively you can work". The latter refers to the quality of the air, water and land in or on which people, animals and plants live.<sup>27</sup>

Both dictionaries thus have a wide or extensive approach to the concept "environment", embracing numerous components, such as the natural, social, political and work environments.

### 1.1.2 A South African perspective

Although the concept "environment" was introduced in the natural sciences during the last century, it was virtually unknown in legal terminology before 1970. Hereafter it featured in the titles of some legislation, such as the Environment Conservation Act 100 of 1982, but was not defined.<sup>28</sup> In South Africa, the first legislative attempt to define the concept "environment" was made in the Environment Conservation Act 73 of 1989. In terms of this Act "environment" means:

" the aggregate of surrounding objects, conditions, and influences that influence the life and habits of man or any other organism or collection of organisms".

This definition also illustrates an extensive approach in that it includes the natural, human-made and physical environment.<sup>29</sup> This catch-all approach was an attempt to deal with environmental matters that are regulated simultaneously by other legislation.<sup>30</sup> It was, however, seen as one of the Act's serious deficiencies.<sup>31</sup>

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<sup>27</sup> Procter, P *Cambridge International Dictionary of English* (1995) Cambridge Press Cambridge 463. For definitions in other dictionaries, see Rabie (1991) 2 *Stell LR* op cit 204-5.

<sup>28</sup> Rabie (1991) 2 *Stell LR* op cit 206.

<sup>29</sup> Kidd (1997) op cit 2.

<sup>30</sup> See Henderson, PGW *Environmental Laws of South Africa* Volume 1 & 2 (1996) Juta & Co Ltd Cape Town for examples of other legislation which deal with environmental matters.

<sup>31</sup> Van Reenen, TP "Reflections on the codification of South African Environmental Law (1): General Considerations" (1994) 2 *Stell LR* 218; Rabie, A "A new deal for environmental conservation: aspects of the Environment Conservation Act 73 of 1989" (1990) 53 *THRHR* 3; Rabie (1991) 2 *Stell LR* op cit 206; Loots, C "Environmental Law" *Annual Survey of South African Law* (1992) 188.

The Constitution<sup>32</sup> also uses the term “environment” in section 24 (a) and (b). This “environmental right” clause states:

“Everyone has the right —

- (a) to an environment that is not harmful to their health or well-being; and
- (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures ...”<sup>33</sup>

Unfortunately, the Constitution does not provide a definition of the term “environment”.

The National Environmental Management Act 108 of 1998 (NEMA) also provides for an all-encompassing definition of “environment” as does the Environmental Conservation Act 73 of 1989. It defines “environment” as:

“the surroundings within which humans exist and that are made up of –

- (i) the land, water and atmosphere of the earth;
- (ii) micro-organisms, plant and animal life;
- (iii) any part or combination of (i) and (ii) and the interrelationships among and between them; and
- (iv) the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and wellbeing”.

Although many sections<sup>34</sup> of the Environment Conservation Act 73 of 1989 were repealed by NEMA, the definition of “environment” contained in section 1 of the Act was not repealed.<sup>35</sup> This means that the definitions of both Acts are still applicable to their respective provisions.

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<sup>32</sup> Act 108 of 1996. In the Interim Constitution (Act 200 of 1993) the “environmental right” was stated in section 29 and read “Every person shall have the right to an environment which is not detrimental to his or her health or well-being”.

<sup>33</sup> Section 24 will be discussed in detail in chapter 2.

<sup>34</sup> Sections 2-14, 14A-C, 15, 27A and 38.

<sup>35</sup> Also see Glazewski (2000) op cit 9.

According to Barnard<sup>36</sup> the existence of two different definitions for the concept “environment” is unsatisfactory and can cause conflict as there are no legal technical grounds why one definition should be preferred to the other. He also points out that the definition in Act 73 of 1989 is in accordance with international environmental academic thinking and confirms the applicability of two major principles, namely:

- 1) that the definition of “environment” should be wide-ranging and
- 2) that humankind is a component of the “environment” and not master of it.<sup>37</sup>

According to Barnard, the definition in NEMA complies only with the first principle, and seems to be in conflict with the second principle, as it makes a distinction between humankind and his surroundings, implying that humankind is not a component of the environment. Barnard<sup>38</sup> is of the opinion that the definition of “environment” in NEMA should be redrafted to conform to this latter principle.

Apart from legislation there have been many attempts since 1989 from academic commentators to define the concept of “environment”. Hugo<sup>39</sup> states that “the environment consists of both a natural and a human component which form a continuum across a number of dimensions” while Spellerberg<sup>40</sup> describes the concept as meaning “all the surroundings, but that you can differentiate between the natural and the human-made environment”.

Fuggle and Rabie<sup>41</sup> are of the opinion that when the term “environment” is applied to human beings, it relates to “the totality of objects and their interrelationships that

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<sup>36</sup> Barnard, D *Environmental Law for All* (1999) Impact Books Pretoria 208.

<sup>37</sup> Barnard (1999) op cit 208-209.

<sup>38</sup> Barnard (1999) op cit 208-209.

<sup>39</sup> Hugo et al (1997) op cit 152.

<sup>40</sup> Spellerberg, IF *Conservation Biology* (1996) Longman Group Ltd London 236; also see McConnachie, J “Environmental Conservation in South Africa—its application to the built environment” (1998) 5 *SAJELP* 99.

<sup>41</sup> Fuggle & Rabie (1998) op cit 4.

surround and routinely influence the lives of human beings”. Other commentators<sup>42</sup> are also of the opinion that the concept must be used in a broad sense, including the natural, cultural, social, physical, economical and political components of the meaning of “environment”. This approach is also followed in the White Paper on Environmental Management Policy for South Africa.<sup>43</sup>

As “environment” is not defined in the Constitution, it has been suggested that this term should be interpreted extensively in order to give the widest protection possible to individuals against pollution of, and harm to, the environment.<sup>44</sup> The Kumleben Commission<sup>45</sup> also views “environment” as a broad concept and describes it as “...the physical condition surrounding an individual or a community”.

The courts have not yet interpreted the meaning of “environment”. In *Minister of Health and Welfare v Woodcarb (Pty) Ltd and Another* (1996 (3) SA 155 (N)) an application was lodged for an interdict to stop atmospheric pollution caused by the incineration process of sawdust at a saw milling plant. The court stated that the generation of smoke-producing noxious or offensive gases was not only unlawful in terms of the Atmospheric Pollution Prevention Act 45 of 1965, but also in terms of section 29 of the Republic of South Africa Constitution Act 200 of 1993.<sup>46</sup> Although the court referred to the “environmental

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<sup>42</sup> Hugo et al (1997) op cit 152, 199; Barrow, CJ *Environmental and Social Impact Assessment* (1997) Arnold Publishers London 2; Bray (1995) 10 *SAPR/PL* op cit 178; Rabie (1991) 2 *Stell LR* op cit 203-211, 214; Van Reenen, TP “Reflections on the codification of South African Environmental Law (2): A Suggested normative structure and content of a codification” (1994) 3 *Stell LR* 355; McConnachie (1998) 5 *SAJELP* op cit 99.

<sup>43</sup> Chapter 1 (GN 1096 of 1997 in GG 18164 of 28-07-1997).

<sup>44</sup> Ferreira, GM “Constitutional values and the application of the fundamental right to a clean and healthy environment to the private-law relationship” (1999) 6 *SAJELP* 185; Kidd, M “Suburban aesthetics and the Environmental right” (1999) 6 *SAJELP* 261; Ferreira, GM “Grondwetlike waardes a sosio-ekonomiese regte met verwysing na die reg op ‘n skoon en gesonde omgewing” (1999) 2 *TSAR* 290.

<sup>45</sup> A Board of Investigation into Institutional Arrangements for Nature Conservation in South Africa appointed by the government in 1998. (GN 426 of 1998 in GG 18742 of 13-03-1998). See Glazewski (2000) op cit 375 & 417.

<sup>46</sup> The Interim Constitution. The court was of the opinion that the smoke constitutes an infringement of the rights of the respondent’s neighbours to “an environment which is not detrimental to their health or well-being”.

right” in section 29, it did not define the term “environment”.<sup>47</sup>

In *Wildlife Society of Southern Africa and Others v Minister of Environmental Affairs and Tourism of the Republic of South Africa and Others* 1996 (3) SA 1095 (Tk) the applicants applied for a mandamus compelling the authorities to comply with their statutory obligations to protect the environment in terms of a former Transkei statute that prohibited certain developments on the Transkei coastline. The applicants contended that the respondents had granted rights of occupation and had allocated sites within the coastal conservation area to private individuals. It was conceded that considerable and irreversible environmental degradation of the Transkei Wild Coast had occurred and was occurring. The court granted the mandamus but again did not define “environment”.<sup>48</sup>

In *Director: Mineral Development, Gauteng Region, and Another v Save the Vaal Environment and Others* 1999 (2) SA 709 (SCA), the court held that the *audi alteram partem* rule applies when an application for a mining licence is made in terms of section 9 of the Minerals Act 50 of 1991. According to the court, the application of this rule is essential because of the enormous damage that mining can do to the environment and ecological systems.<sup>49</sup> “Environment” was not defined by the court but by using it separately from the phrase “ecological systems” it seems that the court views “environment” in a broader sense than only the “natural” environment that is represented here by the term “ecological”.<sup>50</sup>

Rabie<sup>51</sup> is of the opinion that what is to be considered as the “environment” seems to be a policy question and not a semantic or juridical one. It thus means that the meaning may change from time to time and from country to country depending on the context in which

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<sup>47</sup> Also see Bray, E “ ‘Cleaning the Air’—Industrial Polluters, Beware” (1996) 3 *SAJELP* 216-219.

<sup>48</sup> Also see De Waal “Omgewingsreg” (1996) *De Rebus* 655; Loots, C “ The impact of the Constitution on Environmental law” (1997) 4 *SAJELP* 61.

<sup>49</sup> Also see Kidd (1999) 6 *SAJELP* op cit 149.

<sup>50</sup> Ecology can be defined as “ the science of the interrelationships between living organisms and their environment”. See Spellerberg (1996) op cit 236.

<sup>51</sup> Rabie, MA *Criminal Sanction and Alternative Remedies for Environmental conservation* (1990) [Stellenbosch Department of Public Law University of Stellenbosch: Stellenbosch] 129.

it is being used. However, Bray<sup>52</sup> comments that in the final instance, the legislature or the Constitutional Court should determine the parameters of “environment”.

### 1.1.3 The concept “environment” in foreign legislation

As previously mentioned, legislation of other countries suggests that these countries have also adopted an extensive approach to the definition of “environment”.

#### 1.1.3.1 Australia

In Australia, the definitions of “environment” in Commonwealth and state legislation are generally cast so widely so as to exclude virtually nothing. The definition varies from state to state and from extremely wide to the more restricted approaches. This leaves Australian legislation with a rich variety of definitions for the concept “environment”.<sup>53</sup>

An example of an extremely wide definition is contained in section 3 of the Environment Protection (Impact of Proposals) Act 1974 (Cth) and in section 4(1) of the Environmental Planning and Assessment Act 1979 (New South Wales) according to which “environment” includes all aspects of the surroundings of human beings whether affecting them as individuals or in their social groupings.<sup>54</sup> According to Bates, this definition encompasses both the natural and built environment and possibly the work environment. He states that the different components are not mutually exclusive, but that the boundaries may overlap.<sup>55</sup>

Another example of a wide definition of environment, is section 4 of the Victorian Environment Protection Act 1970 that refers to the “physical factors of the surroundings

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<sup>52</sup> Bray (1995) 10 *SAPR/PL* op cit 178.

<sup>53</sup> Kidd (1997) op cit 2.

<sup>54</sup> Bates, GM *Environmental Law in Australia* (1995) (4<sup>th</sup> ed) Butterworths Sydney 4; Rabie, A “Environmental Law in Australia” (1995) 1 *SAJELP* 101; Norberry, J “Australia” in Del Frate, AA & Norberry, J *Environmental Crime, Sanctioning Strategies and Sustainable Development* (1993) Australian Institute of Criminology Publication no 50 Canberra 57.

<sup>55</sup> Bates (1987) op cit 2; Bates (1995) op cit 5.

of human beings including the land, water, atmosphere, climate, sound, odours, tastes... the social factor of aesthetics” and “the biological factors of animals and plants”. Section 4 of the Western Australian Environmental Protection Act 1971 has a similar definition while legislation in Queensland<sup>56</sup> simply refers to “the conditions and influences to which living matter is sensitive and is capable of reacting”.

A more limited definition of “environment” is the definition in the Environment Protection Act 1993 of South Australia which states that environment means “land, air, water, organisms and ecosystems and includes (a) human-made or modified structures or areas; and (b) the amenity values of an area (s 3(1))”.<sup>57</sup>

### 1.1.3.2 New Zealand

Section 1 of the New Zealand Resource Management Act 1991 (RMA) has the following wide definition of environment:

“environment” includes —

- (a) ecosystems and their constituent parts, including people and communities; and
- (b) all natural and physical resources; and
- (c) amenity values;<sup>58</sup> and
- (d) the social, economic, aesthetic and cultural conditions which affect the matters stated in paragraphs (a) to (c) of this definition or which are affected by those matters”.<sup>59</sup>

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<sup>56</sup> State and Regional Planning and Development, Public Works Organization and Environmental Control Act 1971 s5; Bates (1987) op cit 2.

<sup>57</sup> Rabie (1995) 1 *SAJELP* op cit 101. Also see Kidd (1997) op cit 2 and Bates (1987) op cit 2 for definitions in other South Australian legislation. For further definitions of “environment” in various statutes in different States in Australia, see Fisher, DE *Environmental law* (1993) The Law Book Company Brisbane 4-7.

<sup>58</sup> “Amenity values” are “those natural or physical qualities and characteristics of an area that contribute to people’s appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes”.

<sup>59</sup> Kidd (1997) op cit 2; Williams, DAR *Environmental & Resource Management Law in New Zealand* (1997) (2<sup>nd</sup> ed) Butterworths Wellington 6; Milne, CDA “Resource Management Act 1991” in Milne, CDA *Handbook of Environmental Law* (1992) Royal Forest and Bird Society of New Zealand Inc Wellington 35.

According to Williams<sup>60</sup> “environment” may thus include literally almost anything and everything.

Examples of a wide approach to the concept of “environment” are also found in Canada<sup>61</sup> and the United States of America.<sup>62</sup>

## 1.2 Limited approach

According to the limited approach, “environment” would be defined narrowly, embracing only certain components such as the natural environment or nature. “Natural” in this sense is opposite to the “human-made” environment that refers to the social, cultural, spatial and economic environment. “Nature” in its narrowest sense refers to indigenous wild animals and plants as well as freshwater fish.<sup>63</sup>

### 1.2.1 A South African perspective

The “natural” environment is the focus of the respective provincial ordinances and acts on nature conservation.<sup>64</sup> In a broader sense it refers to “all living and therefore renewable natural resources”. An even broader approach will include “non-renewable” natural resources such as habitats, biological organisms and communities. Usually

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<sup>60</sup> Williams (1997) op cit 6. Also see Milne (1992) op cit 35.

<sup>61</sup> The Ontario Environmental Assessment Act (s1(c)) defines “environment” as follows:

- “(i) air, land or water;
- (ii) plant and animal life, including man;
- (iii) social, economic and cultural conditions that influence the life of man or a community;
- (iv) any building, structure, machine or other device or thing made by man;
- (v) any solid, liquid, gas, odour, heat, sound, vibration or radiation resulting directly or indirectly from the activities of man; or (vi) any part or combination of the foregoing and the interrelationships between any two or more of them” (Kidd (1997) op cit 2).

<sup>62</sup> The extensive concept was first employed in legislation in the United States National Environmental Policy Act of 1970 that referred to the human environment. Interpretations by the courts gave it a wide meaning which included *inter alia*, noise, traffic and crime. (Rabie (1991) 2 *Stell LR* op cit 205).

<sup>63</sup> Rabie (1991) 2 *Stell LR* op cit 207.

<sup>64</sup> Examples of such legislation include, the Nature Conservation Ordinance 15 of 1974 of Kwa-Zulu Natal and the Mpumalanga Nature Conservation Act 10 of 1998. For other examples, see Van Wyk, *J Planning Law* (1999) Juta & Co Kenwyn 71.

“nature” refers to natural resources only and this limitation may have influenced the view that the concept “environment” should be restricted to the natural environment.<sup>65</sup>

Unfortunately, as mentioned previously, one component of the natural environment, namely humankind, has gradually transformed this environment to meet its ever increasing needs to such an extent that one can no longer speak of a natural environment in the true sense. This transformation has come about by poor agricultural practices, mining, industrialisation, urbanisation and technological developments.

Thus, to include only a “natural” environment represents too limited an approach to the concept “environment”. It would also be unrealistic to restrict conservation efforts only to the truly natural environment, such as wilderness areas, where the environment is still in its pristine state<sup>66</sup> as most of the fauna and flora to be conserved are found outside these areas.

Fuggle and Rabie<sup>67</sup> are of the opinion that although an approach to restrict the definition to the purely natural environment is unrealistic, it is also unsatisfactory to relate the concept “to every anthropogenic object, structure, installation and so forth that surrounds human life”.

A related, but different approach would restrict “environment” to the natural environmental elements such as air, water and soil, which have not been created by humankind and to the modifications thereof through use and exploitation. This view seems more realistic in that account is taken not only of the natural environment in its pristine state, but also of modifications imposed on it by humans. This approach is favoured by Fuggle and Rabie.<sup>68</sup>

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<sup>65</sup> Rabie (1991) 2 *Stell LR* op cit 207.

<sup>66</sup> Rabie (1991) 2 *Stell LR* op cit 208.

<sup>67</sup> Fuggle & Rabie (1998) op cit 91.

<sup>68</sup> Rabie (1991) 2 *Stell LR* op cit 209; Fuggle & Rabie (1998) op cit 89, 91; Rabie (1990) 53 *THRHR* op cit 3; Rabie, (1989) 4 *SAPR/PL* op cit 273.

According to Rabie,<sup>69</sup> there will probably be general agreement that “environment” in its core, refers to the earth’s natural resources, both renewable and non-renewable. It is basically these resources that are the object of conservation efforts and pollution control endeavours and it is in respect of them that development is sought to be reconciled with conservation. Against this background, he submits that “environment” should have a restricted meaning, covering only the interrelationship between humans and their natural surroundings,<sup>70</sup> where the latter includes not only nature in its pristine state, but also the modifications imposed on it by humans.

## 1.2.2 The concept “environment” in foreign legislation

### 1.2.2.1 Australia and New Zealand

The limited approach is supported in Tasmania which has the most restricted definition of “environment” in Australia. Section 2 (1) of the Environment Protection Act 1973 of Tasmania defines environment as “land, water and atmosphere of the earth”.<sup>71</sup> Here “environment” only refers to the basic components of the biosphere. In New Zealand however, it seems that only a wide meaning is given to “environment”.

## 1.3 Conclusion

In the light of the above discussions on both the extensive and limited approach to the concept “environment”, the author came to the conclusion that there is no general agreement on exactly what is understood by the concept “environment.” This is probably because the view one has of the meaning of this concept is influenced by cultural, political, religious and educational differences. Furthermore, the meaning depends on the context in which it is being used. In addition to these variables, the parameters of this concept also change as new aspects are added to be included in the ambit of “environment”. This results in the concept’s being viewed as dynamic and open-ended. In

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<sup>69</sup> Rabie (1991) 2 *Stell LR* op cit 211.

<sup>70</sup> Rabie (1990) 53 *THRHR* op cit 3.

<sup>71</sup> Rabie (1995) 1 *SAJELP* op cit 101.

both South Africa and Australia there is a rich variety of definitions for “environment”. The meanings vary from extremely wide, including almost anything and everything, to a more restricted meaning of including only land, water and atmosphere. It seems that most academic commentators prefer an extensive approach rather than a limited approach to the concept “environment.” This is probably to afford individuals the widest possible protection with regard to pollution of and harm to the environment. However, while this extensive approach may be applauded, it defeats any effort to distinguish environmental law as a distinct field of the law because the ubiquitous nature of the environment would render all law as environmental law.

For the natural scientist, the “natural” environment means living and non-living resources. Living resources are represented by fish, wild animals and plants, while the non-living resources comprise soil (including minerals), air and water. As a natural scientist, the author prefers the restricted approach to the concept “environment” as favoured by Fuggle and Rabie. That is, “environment” should represent only the natural environment, but in its pristine state as well as the modifications imposed on it by humans. No further attempt to give another definition of “environment” will be made and, for the purpose of this study, the concept is used in a restricted way as indicated above.

Regardless of which approach one follows, it is essential for effective communication, administration, implementation and enforcement of environmental issues, that the meaning of the concept “environment” is clarified as it is used in legal documents and by legal authors both nationally and internationally. Rabie<sup>72</sup> points out that it will not be a solution to avoid the term “environment” and instead refer to life-support systems or to foundations for life for example. This, he writes, is because one is faced with the same difficulty in defining these terms which also have an extensive or a limited meaning. The author agrees with Rabie on this point.

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<sup>72</sup> Rabie (1991) 2 *Stell LR* op cit 210.

Bray<sup>73</sup> is of the opinion that the legislature or the Constitutional Court should determine the legal content and the parameters of “environment”. It is agreed that this will result in the uniform understanding of the meaning of “environment” as defined in South African law. However, it must be submitted that it will be impossible for anyone to determine the content and parameters of an evolving concept such as “environment” which should also apply internationally.

It is suggested that whenever the concept is used in legal documents and literature, it should be defined within the relevant context.<sup>74</sup> In this way the meaning will not depend on the perception of the reader but will be interpreted as the author has intended it to be. Nevertheless, this recommendation will not assist in the attempt to distinguish environmental law as a distinct field of law.

To follow is a discussion of the two components of the natural environment that are relevant to this study, namely flora<sup>75</sup> and fauna.<sup>76</sup>

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<sup>73</sup> Bray (1995) 10 *SAPR/PL* op cit 178.

<sup>74</sup> There are different theories of interpretation. The theory supported by the constitutional system is the purposive theory. This approach requires that interpretation should not depend exclusively on the literal meaning of words according to semantic and grammatical analysis. The interpreter must “discover” the purpose which lies behind the words. In order to do this the interpreter should have a contextual approach, which allows an unconditional examination of all internal and external sources. Devenish, GE *Interpretation of statutes* (1992) Juta & Co Ltd Cape Town 35-36. Also see De Waal, J & Currie, I & Erasmus, G *The Bill of Rights Handbook* (2000) (3<sup>rd</sup> ed) Juta & Co Ltd Kenwyn 119-120. The law of interpretation of statutes falls outside the ambit of this study. For further detail on interpretation, see Devenish (1992) op cit 25-51; De Waal et al (2000) op cit 115-128.

<sup>75</sup> Flora is a collective term for all kinds of plants. In this study it will refer to living, wild terrestrial plants. Although forests and trees are per definition “flora” their legal control and administration has historically fallen under the national government, whereas nature conservation fell under the provincial government. This allocation of responsibility is probably because of the significant contribution that the commercial forestry sector has made to the South African economy. Because forests and trees are thus viewed as a separate entity, they will not be included as part of “flora” for the purpose of this thesis.

<sup>76</sup> Fauna is a collective term for all kinds of animals. In this study it will refer to living, wild

## 2. FLORA AND FAUNA

### 2.1 General

Plants and animals do not live in isolation, but are an integral part of an ecosystem.<sup>77</sup> Thus the survival of a particular plant or animal species depends on its effective interaction with all the components of the ecosystem. As previously mentioned, ecosystems in South Africa are destroyed by, *inter alia*, poor agricultural management, various forms of pollution and urbanisation. Therefore, conservation efforts should be aimed, not only at protecting a plant or animal species *per se*, but at protecting the total ecosystem of a particular species.<sup>78</sup> In this sense, a rhinoceros is no more important than an earthworm.<sup>79</sup>

Both a scientific and a legal classification of flora and fauna exist. The scientific community makes a basic distinction between plant kingdoms (Kingdom Plantae) and animal kingdoms (Kingdom Animalia). Various classification systems are used to classify plants,<sup>80</sup> but it is a complicated part of botany and falls beyond the scope of this thesis. It suffices, therefore, to mention that plants are classified in the Kingdom Plantae in terms of a division, class, order, family, genus and species to which they belong. Each species is called by its binomial name comprising the genus and species name, for example, *Quercus alba* (white oak).

Animals are classified in the Kingdom Animalia in terms of a phylum, subphylum class, subclass, order, suborder, family, subfamily, genus and species to which they belong.<sup>81</sup>

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(non-domesticated) terrestrial animals.

<sup>77</sup> An ecosystem is a term encompassing the living communities (biological communities) and their physical environment and the processes therein, including the flow of energy through the system. Also see other definitions in Obbes, D “Maintaining Biological Diversity — A Namibian Constitutional Perspective (1999) 6 *SAJELP* 163; Stern, KR *Introductory Plant Biology* (1997) (7ed) Wm.C Brown Publishers Sydney 542; Glazewski, (2000) op cit 301.

<sup>78</sup> A species represents a group of organisms, which has evolved distinct inheritable features and occupies a geographic area. Glazewski (2000) op cit 301; Stern (1997) op cit 550.

<sup>79</sup> Hugo et al (1997) op cit 158, 194.

<sup>80</sup> For detail on classification systems for plants, see Stern (1997) op cit 254-260; Moore, R & Clark, WD & Vodopich, DS *Botany* (1998) (2ed) Mc Graw-Hill Chicago chapter 24 op cit 3-20.

<sup>81</sup> Hickman, CP & Roberts, LS & Larson, *Integrated Principles of Zoology* (1997) (10ed) Wm.C Brown

For the purpose of this thesis, the Subphylum Vertebrata, that is animals with a spinal cord, is relevant. The vertebrates are divided into five classes,<sup>82</sup> of which Mammalia (mammals, which include wildlife) is one. As with plants, each species is called by its binomial name, for example, *Acinonyx jubatus* (cheetah).

The classification of plant and animal species in legal documents, such as the provincial nature conservation enactments, is based on the degree of their vulnerability. From a conservation point of view it is more important to categorise species on this basis, with the ultimate purpose of not allowing any species to become extinct.<sup>83</sup>

The International Union for the Conservation of Nature (IUCN) keeps a Red Data Book that categorises selected species of both wild animals and plants also according to the degree of their vulnerability. The original IUCN categories were rare, endangered or vulnerable in their natural habitats and have been translated in the local context in the South African Red Data Book series. In 1994 the IUCN produced new and refined criteria that are, “extinct”, “extinct in the wild”, “critically endangered,” “vulnerable”, “conservation dependent”, “low risk”, “data deficient” and “not evaluated”. More recently, the IUCN has produced draft guidelines for the application of the IUCN Red List Criteria at National and Regional Levels.<sup>84</sup> Although the Red Data Books are seen as a valuable tool for determining the “threatened” status of species, they need continued updating and do not cover all forms of life.<sup>85</sup>

Red Data Books are by no means the answer to the conservation of wildlife as they have no legal standing in South Africa. Despite this, the status of Red Data Book species is to some extent reflected in the various provincial nature conservation enactments. This is done by listing these species into schedules representing different levels of protection.

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Publishers 199. For detail on the classification of animals, see Hickman et al (1997) op cit 197-211.

<sup>82</sup> The other classes are, Pisces (fish), Amphibia (frogs), Reptilia (reptiles) and Aves (birds).

<sup>83</sup> Glazewski (2000) op cit 419.

<sup>84</sup> Glazewski (2000) op cit 419.

<sup>85</sup> Glazewski (2000) op cit 419.

These schedules are not titled according to the IUCN classification as indicated above, for example, wildlife is “classified” in the Nature Conservation Ordinance 15 of 1974 of Kwa-Zulu Natal as, “ordinary game”, “protected game”, “specially protected game” and “open game”. The nomenclature for wildlife in other provinces is similar but not identical.<sup>86</sup>

Despite Red Data Books having no legal standing, they are widely used as a “red flag” system in assessing and evaluating the potential impact of development on the natural environment. Ideally these Red Data lists of species should be incorporated into legal instruments protecting fauna and flora.<sup>87</sup>

It is beyond the scope of this study to discuss all the aspects of flora and fauna. However, for the sake of completeness, some relevant aspects of the flora and fauna in South Africa, Australia and New Zealand will be included and briefly discussed.

## 2.2 South Africa

### 2.2.1 Flora

South Africa’s vegetation<sup>88</sup> can be described on the basis of habitat types or biomes.<sup>89</sup> There are seven major biomes<sup>90</sup> that, in turn, can be divided into 68 vegetation types.<sup>91</sup> In terms of plants, South Africa is arguably the richest country in the world and, particularly the Cape Floral Kingdom, has been designated as one of the world’s six plant kingdoms. Because of the fynbos biome, the Western Cape has been classified as world diversity “hotspot”.<sup>92</sup> South Africa also has about 18,000 vascular plant species

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<sup>86</sup> Glazewski (2000) op cit 420. For the schedules in other provinces, see Glazewski (2000) op cit 430-431.

<sup>87</sup> Glazewski (2000) op cit 419.

<sup>88</sup> Synonymous with plant life.

<sup>89</sup> A biome can be defined as a broad ecological unit, representing a major life zone extending over a large area, which contains relatively uniform plant and animal life that is closely connected to environmental conditions, especially climate; (<http://www.gov.za/yearbook/environment.htm> 2).

<sup>90</sup> Examples are, savannah, fynbos, forest and grassland.

<sup>91</sup> <http://www.gov.za/yearbook/environment.htm> 2.

<sup>92</sup> The term “hotspot” describes areas that are characterized by a high richness species, a high

within its boundaries, of which 80% occur nowhere else, as well as one third of the world's succulent plant species.<sup>93</sup>

Plant conservation has often been neglected in favour of conserving wildlife (large mammals in particular), whereas in fact the upkeep of well adapted and diverse natural vegetation is essential for the survival of animal life and therefore fundamentally important to the existence of an entire ecosystem.<sup>94</sup>

Except for some endangered or rare<sup>95</sup> species, only indigenous plants<sup>96</sup> are conserved in various protected areas, such as nature reserves.<sup>97</sup> The conservation of plants is regulated by numerous national statutes<sup>98</sup> and in terms of the various provincial nature conservation enactments.<sup>99</sup>

The degree of protection that plants have under the nature conservation enactments differs, as it depends on the category<sup>100</sup> into which they have been classified. The categories are similar to those of the IUCN categories, but they vary from province to province.<sup>101</sup> Depending on the status of a plant within this category, it is usually protected by prohibiting, *inter alia*, the picking, purchasing, selling, donating, importing, exporting,

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concentration of endemic species and areas that experience high rates of habitat modification or loss. See Glazewski (2000) op cit 300.

<sup>93</sup> <http://www.gov.za/yearbook/environment.htm> 2; Glazewski (2000) op cit 300.

<sup>94</sup> Fuggle & Rabie (1998) op cit 239.

<sup>95</sup> "Rare" means that the species occur in such small numbers and/or in such unique habitats that they are more likely to disappear.

<sup>96</sup> An indigenous plant is defined as being any species of plant, shrub or tree that is indigenous to South Africa and includes the flower, seed, fruit, bulb, tuber, stem or root or any other part of such plant, shrub or tree; but not a plant, shrub or tree declared in terms of law to be a weed. See Fuggle & Rabie (1998) op cit 225.

<sup>97</sup> Protected areas will be discussed later in this chapter.

<sup>98</sup> These include, the National Forest Act 84 of 1998, the National Monuments Act 28 of 1969, the Conservation of Agricultural Resources Act 43 of 1983, the Mountain Catchment Areas Act 63 of 1970, the Sea Fishery Act 12 of 1988, the Lake Areas Development Act 39 of 1975, the Marine Living Resources Act 18 of 1998 and the National Parks Act 57 of 1976.

<sup>99</sup> For example the Mpumalanga Nature Conservation Act 10 of 1998. Van Wyk (1999) op cit 71.

<sup>100</sup> Examples of categories include, unprotected, protected, specially protected, rare, scarce and endangered. For more detail, see Fuggle & Rabie (1998) op cit 225.

<sup>101</sup> Fuggle & Rabie (1998) op cit 225.

conveying and possession thereof. These actions are administratively regulated by a permit system.<sup>102</sup>

### 2.2.2 Fauna

In addition to South Africa's extraordinarily varied plant life, a wealth of animal life exists in the region. The country hosts an estimated 5,8% of the world's total mammal species; 8% of bird species and 4,6% of the global diversity of reptile species.<sup>103</sup>

The National Parks Act 57 of 1976 defines "animal" as "any member of the animal kingdom" subject to the regulations. As already indicated, in this study the term "animals" refers to wild terrestrial animals and thus excludes farm and domestic animals.

Whereas the ownership of plants is usually not an issue,<sup>104</sup> the position is different with wild animals that move about freely. According to common law, a wild animal is regarded an unowned thing (a *res nullius*). Ownership can only be acquired on two conditions, namely, if the person has physical control over the animal (*occupatio*) and if the person has the intention (*animus possidendi*) to become the owner of the animal. If the animal escapes, it regains its natural state of freedom.<sup>105</sup>

A ramification of common law for the conservation of wild animals and for game farmers is that any animal not within the physical control of a person is *res nullius* and

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<sup>102</sup> Fuggle & Rabie (1998) op cit 225-228. Administrative regulation, of which the permit system is an example, will be discussed in chapter 3.

<sup>103</sup> <http://www.gov.za/yearbook/environment.htm> 1, 3; Council for the Environment *Environment in the new South Africa* (1993) Pretoria. South Africa also hosts 16% of the marine fish species; 5,5% of the insect species; 6000 species of spiders and 175 species of scorpion.

<sup>104</sup> Plants are owned by the landowner while they are fixed to the ground.

<sup>105</sup> For detailed information on acquiring ownership in general, see Van der Walt, AJ & Pienaar, GJ *Inleiding tot die Sakereg* (1999) (3de) Juta & Kie Bpk Kenwyn 201-220; Miller, DLC *The Acquisition and Protection of Ownership* (1986) Juta & Co Ltd Cape Town 1-2; Kidd (1997) op cit 108; Loon, R "The effectiveness of the law in the conservation of birds of prey in South Africa" (1995) 2 *SAJELP* 178; Fuggle & Rabie (1998) op cit 259; Glazewski (2000) op cit 313, 426.

thus not protected from being hunted (killed or captured)<sup>106</sup> by any other person. The implications are illustrated by *S v Frost and S v Noah* 1974 (3) SA 466 (CPD) and *Mbhele v Natal Parks, Game and Fish Preservation Board* 1980 (4) SA 303 (D & CLD). In the first case, the court decided who the owner of illegally captured (*res nullius*) snoek was. The court held that someone who unlawfully acquires a wild animal which is a *res nullius*, nevertheless acquires ownership. In the *Mbhele* case, the plaintiff had been attacked and injured by a strayed hippopotamus from one of the defendant's game reserves. In an action for damages in delict, the court had to decide if the escaped animal was under the control of the defendant at the time of the attack. It was held that the escaped animal was not under the control of the defendant at the time of the attack and, therefore, the defendant was not the owner of the escaped animal. The defendant could thus not be held liable for damages.<sup>107</sup> The common law position was thus unsatisfactory with regard to the ownership of game<sup>108</sup> and this led to the promulgation of the Game Theft Act 105 of 1991.<sup>109</sup>

The Game Theft Act addresses the ownership issue by providing that a person who keeps game on land that is "sufficiently enclosed" shall not lose ownership if that game escapes from such enclosed land. In this regard section 2(2)(a) of the Act deems land to be "sufficiently enclosed" if it is verified as such by the Premier of the province.<sup>110</sup>

As mentioned previously, nature conservation activities and legislation in South Africa have mainly focused on wild animals, especially large terrestrial mammals. Little

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<sup>106</sup> The various provincial nature conservation legislation provide for different but similar measures to control hunting of wild animals. Typical control measures include determining of hunting seasons and prohibition on the use of certain kinds of hunting methods (such as fire, poison, traps). For further information, see Glazewski (2000) op cit 433.

<sup>107</sup> Also see Glazewski (2000) op cit 428-429.

<sup>108</sup> Game is defined in the Game Theft Act 105 of 1991 as " ... all game kept or held for commercial or hunting purposes..." The Act applies to "game" as well as products of such game such as the meat, skin, or carcass. Glazewski (2000) op cit 428.

<sup>109</sup> Kidd (1997) op cit 108; Fuggle & Rabie (1998) op cit 259; Glazewski (2000) op cit 428.

<sup>110</sup> Glazewski (2000) op cit 428. The hunting of wild animals is controlled under the various provincial nature conservation enactments through the issuing of regulations and through a licence system. This will be discussed in chapter 2.

attention has been given to the protection of habitats and ecosystems.<sup>111</sup> As animals are always part of an ecosystem, it is necessary to protect them in order to conserve the whole ecosystem of which they form part. As such, an animal's position in the food chain<sup>112</sup> is very important and the extinction or removal of an animal can change the entire structure of that particular ecosystem and has unforeseen ripple effects on that and other systems.

As in the case of plants, wild animals are also conserved in protected areas such as nature reserves and national game parks<sup>113</sup> and are also categorised<sup>114</sup> according to their "threatened" status.<sup>115</sup> These categories are not matters of proof in a certain sense, but statements of probability that may be speculative. For example, it has been suggested that "critical" is a 50% probability of extinction within 5 years or 2 generations, and "endangered" is a 20% probability of extinction within 20 years or 10 generations.<sup>116</sup>

### 2.2.3 Protected Areas

There are many laws providing for formal declaration of protected areas. These include international conventions, national and provincial statutes, and private contractual agreements.<sup>117</sup> One of the ways to conserve fauna and flora, and in fact whole ecosystems, is to declare their natural habitats as protected areas.<sup>118</sup> The IUCN has

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<sup>111</sup> Fuggle & Rabie (1998) op cit 259, 271.

<sup>112</sup> A food chain is defined as "a natural chain of organisms of a community wherein each member of the chain feeds on members below it and is consumed by members above it, with autotrophic organisms (producers) being at the bottom": Stern (1997) op cit 543.

<sup>113</sup> There are 91 nature reserves and 17 officially proclaimed national parks in South Africa. The different protected areas will be discussed later in this chapter.

<sup>114</sup> The categories are, extinct, endangered, vulnerable, rare and uncommon. Vulnerable means that although the species still has sufficient numbers, the rate at which these species is being exterminated is cause for concern. See Hugo et al (1997) op cit 127. For a detailed description of each category, see Spellerberg, *IF Evaluation and Assessment for Conservation* (1995) Chapman & Hall London 91; Kidd (1997) op cit 113; Fuggle & Rabie (1998) op cit 252.

<sup>115</sup> "Threatened" is not usually a rating but a composite term meaning endangered and vulnerable and rare. Bradsen, J "The Green Issues: Biodiversity Conservation in Australia" in Boer, B & Fowler, R & Gunningham, N *Environmental Outlook* (1994) The Federation Press Sydney 193.

<sup>116</sup> For examples of other categories, see Bradsen (1994) op cit 193-194.

<sup>117</sup> Glazewski (2000) op cit 368, 391-406.

<sup>118</sup> Used here in a generic sense to mean all such areas ranging from national parks to nature reserves. According to Hugo et al (1997) op cit 161, South Africa has 12 Ramsar sites (Wetlands), 17 national parks, 6 wilderness areas, 91 nature reserves and 47 other conservation areas (eg private game reserves).

defined a protected area as “an area of land or sea especially dedicated to the protection and maintenance of biological diversity, and of natural and associated cultural resources, and managed through legal or other effective means”.<sup>119</sup>

In South Africa, however, there are a confusing number of terms used to describe protected areas. This is illustrated in the Environment Conservation Act 73 of 1989 where the term “protected area” is not used, but other terminology, such as “protected natural environment,” “special nature reserve” and “limited development area”. Judging by the nature and function of these areas, they all qualify as “protected areas” under the IUCN definition. However, it seems as if the different protected areas represent different degrees of protection provided to the fauna and flora. Other terms used in South Africa include “national park”, “conservation area” and “nature reserve”.<sup>120</sup>

In the international context it has been generally recommended that 10% of a country’s surface area be devoted to protected areas. In 1996, there were 422 officially declared protected areas, representing 5-6% of the country’s total area. However, a new conservation blueprint was announced by the Minister of Environmental Affairs and Tourism, Mr Valli Moosa, on 24 April 2001.<sup>121</sup> This policy aims to consolidate South Africa’s fragmented environmental management and increase the formal conservation areas in South Africa from 6% to 8% in the next nine years.<sup>122</sup>

New national parks<sup>123</sup> and the establishment of cross border parks<sup>124</sup> are planned as well as the enlargement of national parks.<sup>125</sup> The aim is to have about two million hectares of

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<sup>119</sup> Glazewski (2000) op cit 367. For the IUCN classification system for protected areas, see Glazewski (2000) op cit 371.

<sup>120</sup> Glazewski (2000) op cit 368.

<sup>121</sup> Louwrens, K “ ‘Meesterplan’ lui nuwe era vir SA bewaring in” *Die Burger* of 25 April 2001.

<sup>122</sup> The aim of the policy is also to increase the protected marine environment from 5% to 20% in the next nine years.

<sup>123</sup> For example a national park on the Wild Coast and at Nylsvlei. Community involvement in the management of parks will be dealt with in chapter 4.

<sup>124</sup> For example a cross border park at the Drakensberg with Lesotho and in the Richtersveld with Namibia.

<sup>125</sup> For example the enlargement of the Kruger National Park and the Tsitsikamma National Park.

land under conservation management by the year 2010. For the year 2001, the government has set aside R8 million for the purchase of land for conservation purposes. Legislation is being prepared to allow the national government to take steps if it becomes evident that the conservation of areas of national and international interest is being neglected because of a lack in capability at local or provincial level.<sup>126</sup>

Currently, South Africa has a vast, sophisticated and diverse system of protected areas<sup>127</sup> that are classified into eight different management categories.<sup>128</sup> However, most of South Africa's natural vegetation occurs on land that is privately or communally owned and thus falls outside protected areas. A lack of funds has unfortunately prevented the government to purchase or lease private land for conservation purposes. It is hoped that the new conservation blueprint will ensure that enough funds are made available for the purchase of more land for conservation purposes. This is important as the effective management of especially flora growing outside the protected areas will make a major contribution to the overall conservation of ecosystems in South Africa.<sup>129</sup>

## 2.3 Australia

### 2.3.1 General

The continent of Australia<sup>130</sup> is an ancient land with relatively poor soils and low rainfall, making it extremely vulnerable to environmental damage.<sup>131</sup>

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<sup>126</sup> Louwrens *Die Burger* of 25 April 2001.

<sup>127</sup> Glazewski (2000) op cit 370. For the regional distribution and area covered by the 422 protected areas, see Glazewski (2000) op cit 376. For information on protected areas at provincial and local level, see Glazewski (2000) op cit 407-409.

<sup>128</sup> They are scientific reserves, wilderness areas, national parks and equivalent reserves, natural and cultural monuments, habitat and wildlife management areas, sustainable use areas, wetlands and protected land and seascapes. For further detail, see and Hugo et al (1997) op cit 160.

<sup>129</sup> See Fuggle & Rabie (1998) op cit 240-241. Provisions in the Constitution (s24) and NEMA (s2) relating to the conservation of fauna and flora will be discussed in chapter 2.

<sup>130</sup> Australia consists of six States and two Territories. The States are, Queensland, Victoria, Western Australia, South Australia, Tasmania and New South Wales. The two Territories are the Northern Territory and the Australian Capital Territory.

<sup>131</sup> Cook, G *The Greening of Australia: Environmental Policy towards 2000* (1990) Sir Robert Menzies Centre for Australia Studies London 1.

As in South Africa, poor land management practices, various forms of pollution and urbanisation have had a profound impact on Australian ecosystems. What contributed especially to the degradation of the environment in Australia, was the clearing of vegetation as part of the “taming” of Australia. This clearing practice was even encouraged by government through subsidies and tax concessions. As the side effects<sup>132</sup> became evident to the government, the clearing of vegetation was discouraged through legislation<sup>133</sup> and other means such as heritage agreements.<sup>134</sup> Farmers are now actively replanting trees to try to stop the destruction of their land.<sup>135</sup>

In Australia (and throughout the world) some plant and animal species are in danger of becoming extinct and many have already disappeared. A list of extinct and endangered Australian species is also found in the IUCN Red Data Book. These species are also listed in the 1973 Report of the Australian House of Representatives’ Select Committee on Wildlife Conservation. Lists of scarce animal and plant species of the world, in which trade needs to be restricted, are contained in the schedules to the Commonwealth’s (Cth) Wildlife Protection (Regulation of Exports and Imports) Act 1982.<sup>136</sup> Through strict import and export control of animal and plant species, Australian native species are protected against foreign fauna and flora.

Fortunately, Australia is now following an ecosystem approach to conservation and management, thus emphasising the conservation of habitat as integral to the survival of species.<sup>137</sup> The geographical isolation of Australia has encouraged the conservation of unique, and often rare, species of fauna and flora.

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<sup>132</sup> These include an increase in salinity and soil erosion. Bates (1987) op cit 98.

<sup>133</sup> The Native Vegetation Management Act 1985. Native vegetation may now only be cleared with the consent of the Native Vegetation Authority. Bates (1987) op cit 100.

<sup>134</sup> Other examples are the creation of private reserves and the use of restrictive covenants. Bates (1987) op cit 101.

<sup>135</sup> Bates (1987) op cit 98.

<sup>136</sup> Bates (1987) op cit 184. This Act will be discussed in chapter 2.

<sup>137</sup> Bates (1995) op cit 249.

### 2.3.2 Flora

In terms of the Wildlife Conservation Act 1950 (WA) of Western Australia, “flora” is defined as including “all plant life native to the State, and any other plant declared by the Minister to be flora for the purposes of the Act”.<sup>138</sup> Under the Wildlife Protection (Regulation of Exports and Imports) Act 1982 (Commonwealth), plants include dead specimens, while “specimens” includes parts of plants or any article wholly derived or produced from a single plant.<sup>139</sup>

As in the case of the provinces of South Africa, plants in Australia are protected in terms of different enactments applicable in different States and Territories. For example, in the Australian Capital Territory (ACT), plants are protected in terms of the Nature Conservation Act 1980 while in New South Wales (NSW), plants are protected in terms of the Wilderness Act 1992 and the National Parks and Wildlife Act 1974.<sup>140</sup>

Although the title of the Acts in the respective States and Territories may differ, the protection provided to plants is similar and is regulated by a permit or licence system. For example, in the ACT, a permit is required to pick protected plants growing on unleased land of the Commonwealth while a licence is required for the sale, import and export of any protected plants. Also in NSW a licence is needed for the picking or possessing of protected native plants.<sup>141</sup>

The classification of flora also differs between the various states and the territories. In all of them plants may be declared as “protected” or “specially protected.” In the ACT, the plants are further classified as “restricted plant wildlife” or plants having “special

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<sup>138</sup> Bates (1995) op cit 334. The definition differs between the States and Territories. According to Bates (1987) op cit 189, “native” plants include plants no longer indigenous but present before 1788.

<sup>139</sup> Bates (1987) op cit 189.

<sup>140</sup> For examples in other States, see Bates (1995) op cit 332-333. These Acts will be discussed in more detail in chapter 2.

<sup>141</sup> Bates (1995) op cit 332.

protection status”, while in South Australia, plants are further classified as “endangered”, “vulnerable” or “rare”.<sup>142</sup>

All native flora, not only protected species, are conserved in “protected” areas such as nature reserves, wildlife refuges and conservation areas.<sup>143</sup>

### 2.3.3 Fauna

The definitions of terms such as “animal” and “wildlife” differ between the various States and the Territories. For example, in the ACT the term “animals” under the Nature Conservation Act 1980 includes any vertebrate species, other than humans, and protected fish and invertebrates. “Wildlife” includes any indigenous or migratory animal, other than invertebrates. In NSW, the term “animal” includes both vertebrates and invertebrates but not fish. In Queensland “wildlife” means any species of animal or plant, and animal means any member of the animal kingdom. In terms of the Wildlife Protection Act (Regulation of Exports and Imports) 1982 (Cth), “native” animals include periodic and occasional migrant animals or animals no longer indigenous but present before 1788. Reference to animals or fauna generally includes references to carcasses, skins or eggs of animals.<sup>144</sup>

Apart from the difference in the definition of the term “animal” between the various States and the Territories, the classification of the fauna based on their “threatened” status, also differs. For example, the National Parks and Wildlife Act 1974 (NSW) classifies fauna as “unprotected”, “protected” and “endangered” species while in Queensland (Qld) wildlife are classified as “native”, “prohibited”, “international”, “protected” and “threatened”.<sup>145</sup>

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<sup>142</sup> Bates (1995) op cit 332-334.

<sup>143</sup> Bates (1995) op cit 333. More detail on protected areas will be given later in this chapter.

<sup>144</sup> Bates (1995) op cit 316-317. For definitions in other States, see Bates (1995) op cit 316-318.

<sup>145</sup> For further detail on the classification of fauna in other States and the difference between the various categories, see Bates (1995) op cit 316-318; Bates (1987) op cit 193.

Australia is known for its unique wild animals. The proliferation of some of these animals, kangaroo, wallaby and possum, for example, necessitates control by means of culling in order to protect the species against its own imbalance. However, before culling is permitted, authorisation from the Minister for Environment is required or the animal must have been declared as “unprotected” in that specific area.<sup>146</sup>

The hunting and trapping of animals, as well as the methods<sup>147</sup> by which they may be taken<sup>148</sup> or killed, are strictly controlled and require a licence. The protective measures with regard to the hunting or trapping methods depend on various criteria,<sup>149</sup> including the protection status of the fauna, whether the animal is a native of Australia or not, or whether it is kept in a protected area or not. The protective measures are generally the same in all states and territories. Only “protected” animals may be hunted during a declared open season and not “endangered” animals.

In all States there are regulations with regard to noxious species, such as the dingo, fox, wolf and mink. For example, section 40 of the Wildlife Act 1975 of Victoria (Vic) states that it is not an offence to kill noxious wildlife, but it is an offence to keep or release them without the permission of the Director of National Parks and Wildlife.<sup>150</sup>

Protected areas, such as national parks and wildlife reserves are declared to conserve intact whole areas of unique and perhaps ecologically sensitive habitats for species that might otherwise disappear entirely.<sup>151</sup>

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<sup>146</sup> Bates (1987) op cit 184, 195.

<sup>147</sup> For example regulations with regard to equipment in Victoria. Protected wildlife may not be tagged or marked, trapped or netted or in any way be molested or disturbed. In NSW the types of firearms permitted are limited to those that do not require support to be fired. Bates (1995) op cit 321 & 325.

<sup>148</sup> In NSW, “take” includes “disturb”. Bates (1995) op cit 319.

<sup>149</sup> Other criteria are, whether the animal is going to be killed, sold or taken and if a licence is required, what type of licence. For specific detail of protective measures in various states, see Bates (1987) op cit 194-199.

<sup>150</sup> Bates (1987) op cit 195; Bates (1995) op cit 325. For regulations in other States, see Bates (1987) op cit 197-198.

<sup>151</sup> Bates (1987) op cit 18.

### 2.3.4 Protected Areas

The Commonwealth, States and Territories all possess legislation regarding the creation and management of nature conservation areas more commonly called “reserves”.<sup>152</sup> However, the types of conservation area that may be created and the mechanisms for the creation and management of these areas differ between jurisdictions. As mentioned, the declaration of areas such as national parks and wildlife reserves helps to conserve plant and animal species *per se* as well as ecosystems.<sup>153</sup>

However, as in South Africa, adequate conservation of ecosystems could not be achieved through these areas alone as the majority of plants and animals are, and always will be, outside these areas.<sup>154</sup> Measures to promote conservation outside reserves can take different forms. One method is through legislation intended to protect flora and fauna on land outside as well as within protected areas. All the States and Territories possess such legislation, for example, Flora and Fauna Guarantee Act 1988 (Vic) and the Wildlife Conservation Act 1950 (WA).<sup>155</sup> A second way of promoting nature conservation outside reserves is through voluntary assistance programmes. These programmes provide services, such as technical advice and grants, to assist landowners to promote conservation. Legislation<sup>156</sup> also makes provision for the entering into of conservation agreements between private landowners and authorities. Other means to conserve fauna and flora outside reserves, are programmes, such as Greening Australia.<sup>157</sup>

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<sup>152</sup> For example the National Parks and Wildlife Conservation Act 1975 (Cth), the National Parks and Wildlife Act 1975 (NSW) and the National Parks Act 1975 (Vic). These Acts will be discussed in chapter 2. For examples of relevant Acts in the other States, see Ramsay, R & Rowe, *GC Environmental Law and Policy in Australia* (1995) Butterworths Sydney 593-595.

<sup>153</sup> Approximately 6 percent of Australia’s land area are reserved areas. Ramsay et al (1995) op cit 609; Bates (1987) op cit 18.

<sup>154</sup> Approximately 94 percent of Australia’s ecosystems exist outside protected areas. Ramsay et al (1995) op cit 609.

<sup>155</sup> For examples in other states, see Ramsay et al (1995) op cit 609, Bradsen (1994) op cit 201.

<sup>156</sup> Examples of such legislation are the Conservation, Forests and Lands Act 1987 (Vic) and the Nature Conservation Act 1992 (Qld).

<sup>157</sup> For more detail, see Ramsay et al (1995) op cit 610.

As in South Africa, there are various types of reserves but the objectives, *inter alia*, to protect the flora, fauna and natural features are similar. For example, in NSW land may be reserved under the National Parks and Wildlife Act 1974 for the purposes of national parks, nature reserves, recreation areas and historic sites. Other reserves in NSW include wilderness areas<sup>158</sup> and Karst conservation reserves.<sup>159</sup>

In Queensland, “protected areas” are defined by reference to their management objectives. The types of protected area in Queensland include national parks, conservation parks, resources reserves, nature refuges, co-ordinated conservation areas and wilderness areas.<sup>160</sup> The other Australian States and Territories have similar reserves.<sup>161</sup>

Additional to these different types of reserve, certain “specialist” wildlife reserves may be declared under the provisions of the national parks or nature conservation legislation in all the Australian States.<sup>162</sup> Some types of reserve are totally protected for the purpose of reservation, others may be managed as multiple-use areas, subject to such conditions as befit their reserve status. Development in most is restricted, if not prohibited.<sup>163</sup>

The Commonwealth has the power to protect reserved or unreserved state land by using constitutional powers. The Commonwealth power to declare and manage reserved areas is, in practice, restricted to the Australian External Territories and Kakadu and Ayers Rock National Parks in the Northern Territory, which are leased from traditional Aboriginal owners and managed on a joint basis.<sup>164</sup> The Commonwealth and State

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<sup>158</sup> An aboriginal leader has argued that the term “wilderness” undermines indigenous rights and their role in environmental management. “Wilderness” implies that the land was uninhabited, which, according to the leader, was far from reality, and reinforced the legal fabrication that Australia was *terra nullius*. In fact the “wilderness” is often artificially contrived through forced migration and resettlement. For further information, see Jefferey, M “National Parks and Protected Areas: Approaching the new Millennium” (1999) *Acta Juridica* 176.

<sup>159</sup> For further detail on these reserves in NSW, see Bates (1995) op cit 256.

<sup>160</sup> For further detail on these reserves in Queensland, see Bates (1995) op cit 260.

<sup>161</sup> For further detail on reserves in other States and Territories, see Bates (1995) op cit 261-266.

<sup>162</sup> Bates (1995) op cit 270.

<sup>163</sup> Bates (1987) op cit 126; Bates (1995) op cit 252.

<sup>164</sup> Bates (1987) op cit 124; Bates (1995) op cit 249, 252; Jefferey (1999) op cit 180. Also see De Villiers, B

governments may cooperate through Joint Management Committee structures and through the Council of Nature Conservation Ministers (CONCOM) with regard to parks of national significance.<sup>165</sup>

## 2.4 New Zealand

### 2.4.1 General

New Zealand is home to a disproportionate number of the world's threatened plant and animal species. The protection of natural land is, therefore, important to provide safe havens for the indigenous plants and animals.<sup>166</sup>

As in the case of South Africa and Australia, the conservation of plants and animals in New Zealand initially focused upon species protection, rather than on the protection of ecosystems. Reforms in resource management law have changed the conservation efforts from a species approach to an ecosystem approach.<sup>167</sup>

However, the Resource Management Act 1991 (RMA) failed to provide adequately for the protection of plants and animals but it does contain a number of useful provisions. For example, section 9(4)(c) requires a land use consent for any activity which could result in "any destruction of, damage to, or disturbance of, the habitats of plants or animals in, on, or under the land". Habitat protection is also recognised as a "matter of national importance" in section 6(c) where reference is made to "indigenous vegetation", while section 7(d) recognises the "intrinsic values of ecosystems". The Act should also be consulted whenever wildlife or habitat is threatened and protection may now be sought for both ecosystems and specific features.<sup>168</sup>

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"Democratisation of conservation: involvement in the management of national parks" (2000) 15 *SAPR/PL* 184-187.

<sup>165</sup> Bates (1987) *op cit* 124.

<sup>166</sup> Milne (1992) *op cit* 207.

<sup>167</sup> Milne (1992) *op cit* 207 & 223.

<sup>168</sup> Milne (1992) *op cit* 207 & 223.

## 2.4.2 Flora

Although forests and trees are not regarded as part of flora in this study, it must be mentioned in the case of New Zealand that its native forests constitute the most important natural ecosystem. They once covered more than 75% of the country but have been reduced by the clearance of vegetation by Maoris and Europeans to less than 23%.<sup>169</sup> These forests supported a wealth of indigenous plants and animals, some of which are now extinct. The protection of the remaining native forests is thus essential for the survival of their dependent wildlife.<sup>170</sup>

Despite the importance of native forests, the protection of native forests and plants has been neglected in legislation such as the RMA.<sup>171</sup> The RMA does not provide them with general protection, but contains a number of provisions that can be used for their protection.<sup>172</sup> For example, section 6(c) lists as a matter of national importance, “the protection of areas of *significant* indigenous vegetation and significant habitats of indigenous fauna”.<sup>173</sup>

All indigenous plants are protected in terms of the Native Plants Protection Act 1934 except for some ten species. These species include the *Acaena* species (piripiri) and the *Coriaria* species (tutu). Additionally all species of algae, lichens, fungi, marchantia (liverworts) and moss are also without protection.<sup>174</sup> However, this Act has been of

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<sup>169</sup> This percentage represents a total of 7,4 million hectares of forest. Eighty percent is state owned and managed by the Department of Conservation. The rest is in private hands of which over half is in Maori ownership. Williams (1997) op cit 176.

<sup>170</sup> Milne (1992) op cit 223; Williams (1997) op cit 176.

<sup>171</sup> Milne (1992) op cit 208. The RMA will be discussed in detail in chapter 2.

<sup>172</sup> Examples of the provisions are, sections 6, 7, 30 (c), 31 (b) and 187-198. For more detail, see Milne (1992) op cit 228-229.

<sup>173</sup> Milne (1992) op cit 228. The RMA contains a number of other provisions that can be used to protect native forests, for example ss 6,7, 187-198, 30 (c) (i) & (ii) and 31 (b). For further detail, see Milne (1992) op cit 228-229.

<sup>174</sup> Milne (1992) op cit 230; Williams (1997) op cit 204. Examples of the other eight species that are not protected include, *Cassinis* species and *Erechtites* species. For the other examples, see Williams (1997) op cit 204; Milne (1992) op cit 230.

limited use<sup>175</sup> and is regarded as ineffective to protect native flora.<sup>176</sup>

Apart from legislation, there are also a number of initiatives for the protection or conservation of indigenous flora. For example, the Queen Elizabeth the Second National Trust has registered 741 protective covenants covering a total of 26,673 hectares of land throughout New Zealand. Also the New Zealand Native Forests Restoration Trust owns more than 2000 hectares of land and manages an active replanting programme.<sup>177</sup>

Although it is an offence to take any protected indigenous plant that is growing on Commonwealth land (also referred to as crown land), reasonable quantities may be taken for, *inter alia*, medical purposes, provided it does not deplete the species of the particular plant in any one area.<sup>178</sup>

#### 2.4.3 Fauna

“Wildlife” is defined in the Wildlife Act 1953 as any “animal” that is living in a wild state. “Animal” includes any mammal (not being a “domestic animal”, rabbit, hare, or marine mammal), any bird (but not a “domestic bird”), any reptile, some invertebrates or any native amphibian. Fish are not included.<sup>179</sup>

Schedules in the Wildlife Act 1953 define what level of protection is given to each species. Any “wildlife” (as defined in the Act) not listed in the schedules is totally protected under all circumstances. It is an offence to kill, move, liberate, hold or disturb any absolutely protected wildlife, or a protected species listed in the First, Second or

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<sup>175</sup> Milne (1992) op cit 207 & 230.

<sup>176</sup> The fines under this Act varies from \$10-\$40 (R4,80-R192), which can hardly be regarded as a deterrent. See Milne (1992) op cit 230; Williams (1997) op cit 205.

<sup>177</sup> Williams (1997) op cit 206.

<sup>178</sup> Williams (1997) op cit 204.

<sup>179</sup> Milne (1992) op cit 230.

Third Schedules<sup>180</sup> of the Wildlife Act 1953 (except during the game hunting season).<sup>181</sup> Species not protected are listed in the Fifth Schedule and include examples of mammals (for example the cat and ferret), birds, amphibians and reptiles.<sup>182</sup>

Wild animals are listed in the Sixth Schedule to the Wildlife Act 1953. These are animals declared to be “wild animals” by the Minister under the Wild Animal Control Act 1979 and include, goat, pig, possum, wallaby and all deer species.<sup>183</sup>

#### 2.4.4 Protected Areas

New Zealand also has a system whereby the central government declares specific areas as “protected areas” for the conservation of flora and fauna and ecosystems. Several statutes cover the protection of plants and animals, the principle Act being the Wildlife Act 1953,<sup>184</sup> which is supplemented by the Conservation Act 1987.<sup>185</sup> In terms of the Wildlife Act, fauna and flora are conserved in wildlife sanctuaries, wildlife management reserves and wildlife refuges. The extent of the protection provided to fauna and flora in these areas differs. For example, wildlife sanctuaries automatically and absolutely protect all wildlife and vegetation in the sanctuary. Public access is usually restricted. Wildlife refuges offer the lowest category of protection as they merely protect wildlife to the extent outlined in the promulgating *Gazette* notice. Refuges have proved to be inadequate in protecting wildlife habitat as they do not bind subsequent owners as sanctuaries do and they offer only limited protection as an area for wildlife habitat.<sup>186</sup>

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<sup>180</sup> Examples of First Schedule species are, game birds, ducks and partridges. Species listed in the Third Schedule are only partially protected because they may be killed if they cause damage to property.

<sup>181</sup> Milne (1992) op cit 231.

<sup>182</sup> Milne (1992) op cit 232.

<sup>183</sup> Milne (1992) op cit 232.

<sup>184</sup> This Act will be discussed in chapter 2.

<sup>185</sup> This Act will be discussed in chapter 2.

<sup>186</sup> Wildlife management reserves provide protection similar to that offered in sanctuaries, except the measure of protection is not automatic and must be included in the *Gazette* notice. See Milne (1992) op cit 210.

The Conservation Act 1987 provides for the protection of natural resources on public land administered in terms of the Act. There are three categories of publicly owned conservation areas: specially protected areas,<sup>187</sup> marginal strips and stewardship land. Fauna and flora on private land are protected through protected private land agreements<sup>188</sup> and conservation covenants.<sup>189</sup>

Since 1987 the Department of Conservation has pursued the Protected Natural Areas Programme (PNA). Its essential elements are the identification (through ecological surveys of ecological districts) and protection of New Zealand's best representative natural areas. Once surveys are completed, valuable areas that are not already PNAs are identified as "recommended areas" for protection. The programme allows priorities to be established and available funding to be used in the most beneficial manner. The PNA programme is being reviewed, not only for protection but also for the management and restoration of ecosystems.<sup>190</sup>

As already mentioned, additional protection of indigenous flora is provided by the Queen Elizabeth the Second National Trust and the New Zealand Native Forests Restoration Trust, which have registered protective covenants covering a total of 28 000 hectares of land throughout New Zealand.<sup>191</sup>

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<sup>187</sup> These areas include wilderness areas, conservation parks, ecological areas and sanctuary areas. Wilderness areas are designed to preserve indigenous natural resources. Conservation parks must be managed to facilitate public recreation and enjoyment, on condition that the natural and historic resources must first be protected. Ecological areas are required to be managed to protect the value for which each one is held, but that value must be scientific and must be specified. Sanctuary areas are to be managed to preserve indigenous plants and animals in their natural state, and for scientific and other similar purposes. Williams (1997) op cit 24 & 180; Milne (1992) op cit 208-222 & 267; Rabie, A "Environmental Law in New Zealand" (1998) 5 *SAJELP* 374; Rabie, A "Integrated resource management: the New Zealand model and some lessons for South Africa" (1998) 13 *SAPR/PL* 343.

<sup>188</sup> This type of agreement reserve status on land so that it can be managed as a scenic, historic scientific or nature reserve. If rare species of indigenous plants or animals are on the land, the land can be declared as protected private land by the Department of Conservation. The agreement may be registered against the title.

<sup>189</sup> A conservation covenant is an agreement between a private land owner and the Minister of Conservation where the former party wants to preserve the natural environment on his/her land. This agreement may be registered against the title of the land. For further detail see Milne (1992) op cit 209.

<sup>190</sup> Milne (1992) op cit 268.

<sup>191</sup> Williams (1997) op cit 206.

## 2.5 Conclusion

Of the three countries under discussion, Australia is the largest, almost five times the size of South Africa, and New Zealand the smallest, approximately the size of the Free State Province. Despite this, South Africa has by far the most diverse plant and animal life of the three countries. Although Australia and New Zealand have some unique animals, they do not have the variation in plant or animal species that South Africa is famous for. This lack of diversity can probably be ascribed to the fact that both Australia and New Zealand are islands, leaving little opportunity for the natural migration of plant and animal species to them. This situation is being maintained by strict custom controls that prohibit the importation of foreign plant and animal species.

In all three countries a sophisticated system of protected areas exists in order to aid in the conservation of flora and fauna *per se* and especially of ecosystems. Although the terminology with regard to the description and aims of protected areas differ between the countries, and even within a country, these areas generally have the same primary objective; namely, to conserve the fauna and flora living within their boundaries.

It is encouraging that South Africa is planning to step up its conservation efforts with the announcement of a new conservation blueprint. However, merely increasing the number of protected areas or enlarging existing areas will not necessarily improve conservation efforts. Enough funds must also be available to employ an adequate number of competent conservation officers to effectively enforce the applicable laws. It might also be worthwhile for South Africa to institute a Protected Natural Areas Programme similar to the one in New Zealand. Such a programme will ensure that priorities are established and available funds used in the most effective ways. It will also ensure that the declaration of protected areas takes place systematically and not in an *ad hoc* way. Finally it is concluded that with regard to the conservation of fauna and flora in protected areas, and the management of these areas, little difference exists between South Africa, Australia and New Zealand.

This concludes the part on fauna and flora as components of the environment. A discussion that focuses on the diversity of fauna and flora will now follow.

### 3. BIODIVERSITY

#### 3.1 General

It is impossible to assess accurately the diversity of life on Earth since the majority of species and ecological processes have yet to be discovered. Only an estimated 1,7 million species have been described to date while a conservative estimation of the total number of species that exist on earth, is 12,5 million.<sup>192</sup>

Thus not only must the ecosystem of a particular plant or animal species be protected, but also its richness or diversity. The importance of this was recognised in 1992 at a conference held on biological diversity<sup>193</sup> where the conservation of the Earth's biological diversity was placed on the international political agenda.<sup>194</sup> A landmark treaty, the Convention on Biological Diversity, was adopted and signed by more than 150 nations at the United Nations Conference on Environment and Development<sup>195</sup> and came into effect in December 1993.<sup>196</sup>

The Convention defines "biological diversity" as "the variability among living organisms from all sources including, *inter alia*, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems". It is thus the variety of life in all its many manifestations and encompasses all forms, levels and combinations of natural variation.<sup>197</sup>

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<sup>192</sup> Ramsay et al (1995) op cit 616.

<sup>193</sup> Held on the 22 May 1992 in Nairobi.

<sup>194</sup> Glavovic, PD "Protection of Biological Diversity: an introduction" (1995) 2 *SAJELP* 17.

<sup>195</sup> June 5, 1992 in Rio de Janeiro.

<sup>196</sup> Gaston, KJ & Spicer, JI *Biodiversity An Introduction* (1998) Blackwell Science Toronto 1; Summers, R "Legal and institutional aspects of community-based wildlife conservation in South Africa, Zimbabwe and Namibia" (1999) *Acta Juridica* 205; Glazewski (2000) op cit 302.

<sup>197</sup> Gaston et al (1998) op cit 2; Also see Glavovic (1995) 2 *SAJELP* op cit 15; Miller, MAL *The Third World in Global Environmental Politics* (1995) Lynne Rienner Publishers London 109; Hugo et al op cit 158; Barnard (1999) op cit 317; Spellenberg, IF (1996) op cit 235.

There are three main components of biodiversity: namely, genetic diversity,<sup>198</sup> species diversity and ecosystem diversity. Genetic diversity refers to the variation of genes within species, making it possible for species in the wild to adapt to changing conditions. Species diversity refers to the variety of species within a region. The term “species richness” is used as a measure of species diversity. An example is the fynbos biome in the Western Cape that is classified as a world “hotspot” because of the large number of species growing in this area. Ecosystem diversity refers to the variety of ecosystems, that is communities of plants, animals and micro-organisms and the air, water and soil on which they depend, within a particular geographical area.<sup>199</sup> A fourth component, regional diversity, is referred to in the Queensland’s (Australia) Nature Conservation Act 1992. This Act refers to the diversity of the landscape components of a region, and the functional relationship that affect environmental conditions within ecosystems.<sup>200</sup>

There are a number of philosophical explanations<sup>201</sup> as to why the diversity of our plant and animal life should be conserved. One approach is utilitarian, seeing the conservation of the environment as necessary to supply the needs of present and future generations, thus for the survival of humankind.<sup>202</sup> Based on this approach, the diversity of plant and

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<sup>198</sup> This component is most at risk in the bioprospecting trade. Uses for the genes include the development of new breeds of plants and domestic animals that can adapt better to changing conditions.

<sup>199</sup> It is beyond the scope of this study to discuss the three components of biodiversity in further detail. For further detailed reading on biodiversity, see Gaston & Spicer (1998); Cox, GW *Conservation Biology* (1997) (2<sup>nd</sup> ed) W&C Brown Publishers London; Snape III, WJ & Houck, OA *Biodiversity and the Law* (1996) Island Press Washington DC; Spellerberg (1995); De Klemm, C & Shine, C *Biological Diversity Conservation and the Law* (1993) IUCN — The World Conservation Union. Also see Glazewski (2000) op cit 301; Ramsay et al (1995) op cit 614.

<sup>200</sup> Fisher (1993) op cit 11.

<sup>201</sup> Examples are the ego-centric, anthropocentric and eco-centric approaches. A discussion of the different approaches, is part of environmental ethics. Environmental ethics is a branch of philosophy concerned with the moral values that relate to the natural environment and is beyond the scope of this study. For further detail, see Theron-Nelson, C “A Jurisprudential overview of the question what does the right to a decent environment mean?” (1999) 6 *SAJELP* 209-211; Hugo et al (1997) op cit 233-242; Cox (1997) op cit 347; Glazewski (2000) op cit 6-9; Ramsay et al (1995) op cit 16-26.

<sup>202</sup> See Kidd (1997) op cit 14, 102 and Kidd (1998) 5 *SAJELP* op cit 182. Two other reasons are noted by Obbes (1999) 6 *SAJELP* op cit 163. Firstly that a wide pool of diversity serves to maintain evolutionary options. Thus if the populations became too small, it may lead to inbreeding that results in the loss of variability, and in turn to extinction rather than evolution. The second reason for conserving biodiversity is that it improves the species capacity to adapt to variations in the biosphere. According to Hugo et al (1997) op cit 153-157, the value of a particular resource, for example plants, and implicitly of biodiversity, is determined by one or more criteria. These criteria include the following values: economic, ecological, scientific, cultural, nutritional, medicinal, ethical, tourist/recreational, educational

animal life has been called "...the Earth's life insurance...",<sup>203</sup> which description refers to its value as the main source of future medicines and food.<sup>204</sup>

An alternative approach is to conserve the environment for nature's own sake. This approach is based on religious and ethical considerations and the belief that humankind should re-orientate its conduct from homocentric to bio-centric.<sup>205</sup> Labuschagne<sup>206</sup> is of the opinion that animals should also have rights, but the courts have not yet accepted the idea that legally enforceable rights vest in animals. Even though South Africa has one of the most liberal constitutions in the world, it does not go so far as to extend rights to animals.<sup>207</sup>

Whatever philosophical approach one has towards conservation, it is clear that biodiversity should be conserved to ensure the survival of humankind since, "Nature can exist without humans, but humans cannot exist without nature".<sup>208</sup>

An international legal instrument with particular reference to the protection of diversity in fauna and flora in South Africa, Australia and New Zealand is the Convention on International Trade in Endangered Species of Wild Fauna and Flora of 1973 (CITES).<sup>209</sup>

### 3.2 South Africa

#### The White Paper on the Conservation and Sustainable use of South Africa's Biological

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and aesthetic. Also see Glavovic, PD "An Introduction to Wildlife Law" (1988) 3 *SALJ* 526 for reasons given to justify wildlife conservation.

<sup>203</sup> Barnard (1999) op cit 317.

<sup>204</sup> See Kidd (1997) op cit 14, 102 and Kidd (1998) 5 *SAJELP* op cit 182; Bradsen (1994) op cit 189.

<sup>205</sup> Burger, JC "Die wysgerige grondslae van Omgewingsbewaring" (1991) 1 *SAPR/PL* 12-13; Kidd (1997) op cit 15; Glavovic (1988) 3 *SALJ* op cit 526; Theron-Nelson, C (1999) 6 *SAJELP* op cit 209-211; Sands, P *Principles of International Environmental Law* (1995) Manchester University Press 368.

<sup>206</sup> Labuschagne, JMT "Actio popularis, omgewingsreg en regte van die natuur" (1994) 2 *SAPR/PL* 460.

<sup>207</sup> Glazewski (2000) op cit 423.

<sup>208</sup> Hugo et al (1997) op cit 152.

<sup>209</sup> CITES will be discussed in chapter 2. Another international agreement is the International Convention for the Regulation of Whaling of 1946. This agreement will not be discussed further.

diversity<sup>210</sup> describes biodiversity as “the number and variety of living organisms on Earth, the millions of plants, animals, and micro-organisms, the genes they contain, the evolutionary history and potential they encompass, and the ecosystems, ecological processes, and landscapes of which they are integral parts”.<sup>211</sup>

According to the White Paper, South Africa is the third most biologically diverse country in the world.<sup>212</sup> This is largely due to the mix of tropical and temperate climates that exist in the country. This diversity in natural resources has led to the phrase, “South Africa — a world in one country”.<sup>213</sup>

Acknowledging the need to conserve South Africa’s richness in biodiversity and the threatened state in which a high percentage of the fauna and flora is, South Africa became a party to the Convention of Biological Diversity<sup>214</sup> and is therefore obliged to implement its provisions in accordance with its objectives.<sup>215</sup> Part of what is expected of the state parties is to develop a national biodiversity strategy and to integrate the conservation of biodiversity and the sustainable use of its components into programmes and policies.<sup>216</sup>

South Africa’s response is contained in the White Paper<sup>217</sup> that states the government’s

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<sup>210</sup> GN 1095 of 1997 in GG 18163 of 28-07-1997.

<sup>211</sup> For other definitions, see Glazewski (2000) op cit 300; Cox (1997) op cit 345.

<sup>212</sup> Kidd (1997) op cit 114; <http://www.gov.za/yearbook/environment.htm> 1.

<sup>213</sup> Council for the Environment *Environment in the new South Africa* (1993) Pretoria.

<sup>214</sup> Ratified in November 1995; Glazewski (2000) op cit 62, 299.

<sup>215</sup> These objectives are:

- The conservation of biodiversity
- The sustainable use of biological resources and
- The fair and equitable sharing of benefits arising from the use of genetic resources. Summers (1999) *Acta Juridica* op cit 205.

<sup>216</sup> Glavovic, PD “A Commentary on the draft White Paper on Biological Diversity” (1997) 4 *SAJELP* 325.

<sup>217</sup> Glavovic (1997) 4 *SAJELP* op cit 325; Rabie (1999) 6 *SAJELP* op cit 126.

vision<sup>218</sup> and mission<sup>219</sup> and the country's policy<sup>220</sup> and strategy towards achieving the objectives of the Convention.<sup>221</sup> This Convention is refreshing in its approach in that its definition of conservation not only refers to the conservation of natural resources but also to the sustainable use thereof.<sup>222</sup>

The richness in biodiversity places a burden of responsibility on the government and all South Africans to conserve the fauna and flora. The public can be involved in the conservation of the biological diversity by, *inter alia*, taking emergency actions for seriously endangered species, restoring a damaged habitat or creating a new habitat appropriate for the species and by taking an ecosystem approach to conservation.<sup>223</sup> However, South Africans have failed in their responsibility as virtually every ecosystem in South Africa has been modified or transformed by human activities<sup>224</sup> resulting in the extensive degradation of plant and animal resources. The South African Red Data Book<sup>225</sup> lists over 3435 (15%) of South Africa's plant species, and 90 (37%) of the mammal species as threatened.<sup>226</sup> According to the 1997 IUCN Red List of Threatened

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<sup>218</sup> The vision is: "a prosperous, environmentally conscious nation, whose people are in harmonious coexistence with the natural environment, and which derives lasting benefits from the conservation and sustainable use of its rich biological diversity".

<sup>219</sup> The mission is: "...strive to conserve South Africa's biological diversity and to thereby maintain ecological processes and systems whilst providing lasting development benefits to the nation through the ecologically sustainable, and economically efficient use of biological resources".

<sup>220</sup> White Paper on Environmental Management Policy for South Africa (GN 1096 of 1997 in GG 18164 of 28-07-1997)

<sup>221</sup> Glavovic (1997) 4 *SAJELP* op cit 325; Rabie (1999) 6 *SAJELP* op cit 126.

<sup>222</sup> Summers (1999) *Acta Juridica* op cit 205.

<sup>223</sup> Botkin, DB & Keller, EA *Environmental Science* (1998) (2<sup>nd</sup> ed) John Wiley & Sons New York 246.

<sup>224</sup> Such as cultivation, urbanisation, population growth, over-exploitation of certain species and the introduction of exotic species pose a constant threat to our biodiversity. See Fuggle & Rabie (1998) op cit 212 & 220; Hugo et al (1997) op cit 193-194; <http://www.gov.za/yearbook/environment.htm> 4.

<sup>225</sup> The Red Data Book indicates the conservation status of "threatened" species and habitats. There are five categories namely endangered, rare, vulnerable, doubtful and recovered. The first three categories indicate a threatened state. "Endangered" means that a species is in immediate danger of becoming extinct; it is unlikely to survive unless special protected measures are applied.

<sup>226</sup> Examples of threatened (endangered) plant species are the Knysna lily (*Cyrtanthus obliquus*), cycads (*Cycads* spp), various types of Aloe species and numerous types of plants belonging to the Cape fynbos. For further examples see Hugo et al (1997) op cit 128; Spellerberg (1995) op cit 89-100. Mammal species that have become extinct include the quagga (*Equus quagga quagga*) and the blue antelope (*Hippotragus leucophaeus*).

Plants, South Africa has lost 53 plant species to extinction and another 11% of the country's 20,000 plant species are at risk of extinction.<sup>227</sup>

Despite this gloomy picture of conservation, there have been numerous conservation success stories particularly with regard to fauna. Examples are the relocation and breeding programmes of rhinoceros, elephant, roan and sable antelope, buffalo, cheetah and wild dogs.<sup>228</sup>

What is alarming is that the White Paper points out that South Africa is a favoured destination for biodiversity-prospecting companies,<sup>229</sup> and also expresses concern that the export and use of South Africa's biodiversity are virtually uncontrolled, and that commercial exploitation of the country's genetic resources is taking place in a policy and legal vacuum. It further states that an investigation will be done to determine the efficiency of existing and proposed biodiversity related legislation.

Environmental Non-government Organisations have also been actively involved in the conservation of biodiversity since the 1950s.<sup>230</sup> There are more than 400 organisations concentrating on conservation, wildlife and the general environment, and more than 30 botanical and horticultural organisations in the country. These organisations include the Wildlife and Environment Society, World Wide Fund for Nature (WWF), Endangered Wildlife Trust (EWT), The Green Trust and Trees for Africa.<sup>231</sup>

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<sup>227</sup> <http://www.gov.za/yearbook/environment.htm> 4.

<sup>228</sup> <http://www.gov.za/yearbook/environment.htm> 4.

<sup>229</sup> Bioprospecting is also a thriving trade in Namibia. The prospecting companies search for potential pharmaceutical, agricultural and industrial uses of genetic resources. See Obbes (1999) 6 *SAJELP* op cit 161.

<sup>230</sup> Miller (1995) op cit 121.

<sup>231</sup> <http://www.gov.za/yearbook/environment.htm> 16-19; Le Quesne (2000) 7 *SAJELP* op cit 3. The role of NGOs in the conservation of fauna and flora will be discussed in chapter 4.

### 3.3 Australia

Australia is one of 12 so-called megadiverse countries<sup>232</sup> particularly because of a high number of endemic species.<sup>233</sup> An illustration of the richness in endemic species is seen in the seven families of mammals, four of birds and twelve of flowering plants that exist there. On a species level, 90% of mammals, 88% of reptiles, 92% of frogs and 70% of birds and 85% of the 21-23,000 native species of vascular plants in Australia are endemic.<sup>234</sup>

Unfortunately, Australia also has a bad conservation record as 8% of the total land-based mammals are extinct, the worst record in the world. Regionally, 33% of all desert mammals are extinct and of the small mammals, 90% are extinct or endangered.<sup>235</sup> Australia has lost more plant species than continental United States, and twice the number Southern Africa has lost in a shorter period of time. Nearly two-thirds of the continent suffers from land degradation and over half of the original forests, including 75% of the nation's rainforests, have been destroyed.<sup>236</sup>

Australia is also party to the Convention of Biological Diversity.<sup>237</sup> This Convention empowers the Commonwealth to enact national legislation that applies to all biodiversity throughout Australia. The Commonwealth responded by way of the National Strategy for Ecologically Sustainable Development, which provides that conservation of biodiversity is one of its three core objectives. Under this umbrella strategy, Australia has two national strategies dealing with biodiversity: the National Threatened Species Strategy<sup>238</sup>

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<sup>232</sup> Of the 12 countries, Australia is the only developed nation. Bradsen (1994) op cit 188 & 211; Ramsay et al (1995) op cit 616; Gunningham, N & Grabosky, P "*Smart Regulation*" (1998) Clarendon Press Oxford 32.

<sup>233</sup> Endemic species are those species that occur nowhere else in the world.

<sup>234</sup> Bradsen (1994) op cit 188; Ramsay et al (1995) op cit 616.

<sup>235</sup> More native mammals have become extinct in the past 200 years than in any other country (in fact more than half of the world's total loss). For more information, see Ramsay et al (1995) op cit 616.

<sup>236</sup> Bradsen (1994) op cit 188; Cook (1990) op cit 1.

<sup>237</sup> For more detail on the Convention, see Bradsen (1994) op cit 196-199.

<sup>238</sup> Bradsen (1994) op cit 199.

and the National Biodiversity Strategy.<sup>239</sup> In response to these national strategies, most states in Australia either have developed or are developing strategies with regard to biodiversity.

Bradsen<sup>240</sup> is of the opinion that the national strategies do not meet the minimalist requirements of the convention nor their own assessment of the greatest threat, that is “habitat destruction, modification and fragmentation.” He also states that both documents appear quite impressive and contain fine policies but they overlap in a manner which may confuse the issues.<sup>241</sup>

The States and Territories also passed legislation to provide for the protection of Australia’s biodiversity. Examples include the National Parks and Wildlife Act 1974 (NSW), the Native Vegetation Act 1991 (SA) and the Nature Conservation Act 1992 (Qld).<sup>242</sup> Biological diversity is also addressed in the Intergovernmental Agreement on the Environment. Schedule 6 of this agreement demonstrates an intent by the Commonwealth, states and territories to adopt a co-operative approach regarding the implementation of the Biodiversity Convention.

Biodiversity can be protected by adopting different approaches: namely, the species

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<sup>239</sup> The National Biodiversity Strategy is the more global document of the two, but there is some overlap and similarities between the two documents as well as differences. Bradsen (1994) op cit 191; Ramsay et al (1995) op cit 629.

<sup>240</sup> Bradsen (1994) op cit 199, 200.

<sup>241</sup> The background information and the concept of biodiversity is similar in both documents. Although structured differently, both documents are concerned with managing threats, sustainable use, education and endangered species. For more detail on the two documents, see Bradsen (1994) op cit 199, 200.

<sup>242</sup> For further detail, see Ramsay et al (1999) op cit 631-643. Also see Fisher (1993) op cit 10-11.

protection approach (traditional approach);<sup>243</sup> the conservation area approach;<sup>244</sup> and a habitat protection approach.<sup>245</sup> Bradsen<sup>246</sup> explored these approaches or legislative models, as he calls it, to examine whether Australia is dealing effectively with the conservation of biodiversity. He concludes that the habitat model is the most effective way of conserving biodiversity because it is preventative in that no habitat may be disturbed before a report from scientific officers, who inspected the vegetation, is assessed by the Native Vegetation Council.

There are over 2500 environmental organisations in Australia representing a membership of more than 4000,000 people. These non-governmental organisations contribute to the conservation of biodiversity in Australia and include the Wilderness Society, Australian Conservation Foundation,<sup>247</sup> Greenpeace and the National Trust.<sup>248</sup>

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<sup>243</sup> This approach relies on identifying species at high risk of extinction and the imposition of restraints on activities such as taking or hunting which harm those species. Also to seek to protect them and to procure their recovery. This approach has shortcomings in that it tends to focus upon relatively few, high profile species. Consequently it gives little attention to overall biodiversity and the species which have not yet been identified. The Commonwealth, States and Territories all possess legislation which establishes schedules of species at risk and imposes restrictions on certain activities through a licence or permit system. Examples of legislation that follows a species approach for the conservation of biodiversity is the Nature Conservation Act 1992 (Qld) and the National Parks and Wildlife Act 1974 (NSW). These Acts will be discussed in chapter 2. This traditional approach will not be discussed further as it is beyond the scope of this study. For detail, see Bradsen (1994) op cit 200-205; Ramsay et al (1995) op cit 618.

<sup>244</sup> This approach entails setting aside conservation areas to allow for the protection of species and their habitats in those areas. As discussed previously, Australia has a diverse range of protected areas under different jurisdictions and different legislative schemes. Also see Ramsay et al (1995) op cit 618.

<sup>245</sup> This approach relies on protecting the habitat and automatically addresses species loss. An example of this approach is followed in the Native Vegetation Act 1991 (South Australia) which prohibits the clearance of native vegetation without permission by the Native Vegetation Council. The refusal rate in South Australia for clearance of vegetation for agricultural purposes is 95%. This demonstrates the destruction occurring elsewhere in Australia in the absence of an effective habitat model. See Bradsen (1994) op cit 205 for further detail. Also see Bates (1995) op cit 249-251 & 303; Ramsay et al (1995) op cit 619.

<sup>246</sup> Bradsen (1994) op cit 200-207.

<sup>247</sup> A nation-wide Australian Conservation Foundation (ACF) was formed in 1965. The aim is to protect, not only particular species of fauna and flora, but the habitats of such species. See Rabie (1995) 1 *SAJELP* op cit 115.

<sup>248</sup> Bates (1995) op cit 16; Rabie (1995) 1 *SAJELP* op cit 115; Cook (1990) op cit 4.

### 3.4 New Zealand

New Zealand has an internationally respected “clean and green” image which may be ascribed partly to a population that has a high degree of environmental awareness and a responsible attitude towards the use of natural resources, and partly to a low population and limited industrial development. However, the environment has been significantly changed by European immigrants and their descendants, with the result that the “clean and green” image is now a matter of contention.<sup>249</sup>

The first comprehensive survey of the condition of New Zealand’s environment was published by the government in 1997, titled *The State of New Zealand’s Environment*. In this survey it was concluded that biodiversity decline is the country’s most pervasive environmental issue, with 85% of lowland forests and wetlands now gone, and at least 800 species and 200 subspecies of animals, fungi and plants considered threatened. Currently, for example, some 18% of vertebrates and 16% of native flowering plants are threatened or endangered. Also some 27-40 species of terrestrial birds are believed to have become extinct between the Maori (first indigenous inhabitants) arrival in New Zealand and that of the Europeans. Much of this loss was due to direct hunting and loss of habitat, but also from competition by introduced exotic animals, such as possums and rats.<sup>250</sup>

Legislation in New Zealand also acknowledges the importance of protecting the biodiversity. The Resource Management Act 1991 (RMA) for example defines “intrinsic values” in relation to ecosystems as “those aspects of ecosystems and their constituent parts which have value in their own right, including their biological and genetic diversity; ...”.<sup>251</sup> As New Zealand also has a diverse system of protected areas, as discussed

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<sup>249</sup> Rabie (1998) 5 *SAJELP* op cit 363; Rabie (1998) 13 *SAPR/PL* op cit 339.

<sup>250</sup> Rabie (1998) 5 *SAJELP* op cit 363-364.

<sup>251</sup> Also see Ramsay et al (1995) op cit 27.

previously, its legislation<sup>252</sup> also supports the habitat approach to conserving biodiversity.

Non-governmental organisations also contribute to conserve biodiversity. Those that promote the environment at national level include Greenpeace (New Zealand branch) and the Worldwide Fund for Nature (New Zealand branch). There are also several professional associations, regionally and locally-based environment and conservation organisations active throughout the country.<sup>253</sup>

### 3.5 Conclusion

South Africa, Australia and New Zealand all possess a richness in biodiversity which they all realise must be conserved as a national asset. Although they all have a very poor conservation record (Australia has the worst) because many of their native species are extinct or threatened, all of them have legislative measures in place to prevent further loss of fauna and flora species. These measures are also applied in order to comply with their obligations under the Convention on Biological Diversity and under CITES. The effectiveness of these measures in conserving the biodiversity will be investigated in chapter 3.

It seems as if NGOs in all three countries play an active role in pressuring the authorities to comply with their conservation obligations. The role of NGOs in the conservation of biodiversity will be discussed in chapter 4.

## 4. SUSTAINABLE DEVELOPMENT

### 4.1 General

The concept of “sustainability” in relation to the environment is not new, as it

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<sup>252</sup> Examples include the Conservation Act 1987 and the Reserves Act 1977.

<sup>253</sup> Rabie (1998) 5 *SAJELP* op cit 384.

traditionally governed the use of natural resources by people living close to the land. The fact that it has become urgently necessary, both at international and national level, to re-introduce the principle of sustainability into modern society is a response to a perceived need to re-examine human relationships with the environment.<sup>254</sup>

The rediscovery of sustainability may be ascribed to a series of global environmental conferences or summits and other international initiatives, commencing with the Stockholm Declaration of the United Nations Conference on the Human Environment of 1972. This was followed by the World Conservation Strategy in 1980, the World Charter for Nature (1982), the Brundtland Report (1987), *Caring for the earth: a strategy for sustainable living* (1991) and the declaration of the United Nations Conference on Environment and Development held in Rio de Janeiro in 1992. At the latter, Agenda 21<sup>255</sup> was developed and designed to integrate environment and development concerns for, *inter alia*, better protected and managed ecosystems. It sets out actions that nations should take to preserve the environment and promote sustainable development.<sup>256</sup>

It was the Brundtland Report<sup>257</sup> in which the term “sustainable development” was formally coined. The report describes sustainable development as: “...development that meets the needs of the present generation without compromising the ability of future generations to meet their own needs”.<sup>258</sup>

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<sup>254</sup> Rabie (1998) 13 *SAPR/PL* op cit 344.

<sup>255</sup> Agenda 21 is an action plan and blueprint for sustainable development, adopted at the United Nations Conference of Environment and Development (UNCED). The document comprises 40 chapters and 120 action programmes. Agenda 21 is described as a “high-level political commitment rather than a legally binding, text”. Almost 200 states and numerous NGOs signed it in an effort to promote international and national co-operation regarding the environment and development. For a discussion on Agenda 21, see Bryner, GC “Agenda 21: Myth or Reality?” in Vig, NJ & Axelrod, RS *The Global Environment* (1999) CQ Press Washington DC 157-185; Glazewski (2000) op cit 46.

<sup>256</sup> Rabie (1998) 13 *SAPR/PL* op cit 345; Gunningham & Grabosky (1998) op cit 30; Cook (1990) op cit 10; Bates (1995) op cit 24; Vig, NJ “Introduction: Governing the International Environment” in Vig, NJ & Axelrod, RS *The Global Environment* (1999) op cit 1, 6, 7, 10.

<sup>257</sup> This is a report, titled “*Our Common Future*” of the World Commission on Environment and Development of 1987.

<sup>258</sup> “*Our Common Future*” UN General Assembly Res 4221186 (1987) 43. Also see Glazewski (2000) op cit 15; Knoetze, E “Sustainability in the South African National Environmental Policy” (1996) *Obiter* 306; Barrow (1997) op cit 8; Bray, E “Towards Sustainable development: are we on the right track?” (1998) 5 *SAJELP* 1-2; For general background on the concept sustainable development, see Ferreira,

The World Commission on Environment and Development (Brundtland Commission) described sustainable development as: “a process of change in which the exploitation of resources, the direction of investments, the orientation of technological development, and the institutional change are made consistent with future as well as present needs”.<sup>259</sup> The commission stated that it does not pretend that the process is easy or straightforward but acknowledged that painful choices will have to be made. The commission further stated that “in the final analysis, sustainable development must rest on political will”.<sup>260</sup>

This commission further stated that the concept of sustainable development implies limits, not absolute limits but limitations imposed by the present state of technology and social organisation on environmental resources and by the ability of the biosphere to absorb the effects of human activities. But, according to the commission, technology and social organisation can both be managed and improved to make way for a new era of economic growth.<sup>261</sup>

The World Conservation Strategy views sustainable development as requiring decision-makers to take account of social, ecological and economic factors.<sup>262</sup> According to this strategy, the process to ensure that the needs of current and future generations are met while still preserving the natural environment, includes recognition of the following:

- the integration of conservation and development;
- proper enforcement of environmental legislation; and
- the improvement of organisation, supply of personnel and information to disadvantaged communities, especially rural communities.<sup>263</sup>

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GM “Volhoubare ontwikkeling, regverdigbare ontwikkeling en die fundamentele reg op ‘n skoon en gesonde omgewing” (1999) 3 *TSAR* 438-441; Williams (1997) op cit 57; Sands (1995) op cit 13.

<sup>259</sup> Williams (1997) op cit 57.

<sup>260</sup> Williams (1997) op cit 57.

<sup>261</sup> Williams (1997) op cit 65.

<sup>262</sup> For definitions of sustainable development by other commentators, see Williams (1997) op cit 64.

<sup>263</sup> Knoetze (1996) *Obiter* op cit 306.

According to Cox<sup>264</sup> sustainable development is, “the process leading towards sustainability,<sup>265</sup> in which economic development does not reduce the capacity of the biosphere to sustain humanity”. Hugo<sup>266</sup> submits that sustainable development is not in a fixed state, but must be seen as a process of change “in which the exploitation of resources, the direction of investments, the orientation of technological development, and institutional change are made consistent with future as well as present needs”.

Despite the plethora of definitions<sup>267</sup> and explanations that have emerged since the 1987 Brundtland Report, a precise description of the term “sustainable development” remains elusive and it is often confused with the term “sustainability”.<sup>268</sup>

The concept of sustainability is multi-faceted and there is considerable uncertainty regarding its meaning. The main reason for this uncertainty is that sustainability has been used in several disciplines and in a variety of contexts, whether social, cultural, economic, political, technological or ecological. If it is borne in mind that the concept of sustainability developed as a strategy to combat environmental degradation, it seems logical that sustainability must be related to the environment, and that reference should be made to environmental, ecological or biophysical sustainability.<sup>269</sup> Although environmental sustainability has been recognised, it would have been less problematic if sustainability had been linked with the environment, rather than with the amorphous concept of development.<sup>270</sup>

The term “sustainable development” has also been criticised as ambiguous and open to a wide range of interpretations, many of which are contradictory. This is because the

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<sup>264</sup> Cox (1997) op cit 312.

<sup>265</sup> Sustainability in an ecological sense implies a stable relationship between human population and the capacity of the biosphere to provide resources and process wastes.

<sup>266</sup> Hugo et al (1997) op cit 176.

<sup>267</sup> According to Vig et al (1999) op cit 7, at least seventy (70) different definitions are in circulation.

<sup>268</sup> Hanks, J “Achieving industrial sustainable development in South Africa: What role for ‘self-regulatory’ and ‘co-regulatory’ instruments” (1998) 5 *SAJELP* 301; Miller (1995) op cit 146; Knoetze (1996) *Obiter* op cit 306; Barrow (1997) op cit 7; Bray (1998) 5 *SAJELP* op cit 6 & 8 ; Hugo et al (1997) op cit 175; Van Wyk (1999) op cit 243.

<sup>269</sup> Rabie (1998) 13 *SAPR/PL* op cit 346; Williams (1997) op cit 64.

<sup>270</sup> Rabie (1998) 13 *SAPR/PL* op cit 347.

definition is compounded when the word “sustainable” is used in combination with other words such as “growth”, “use”, “management” and “economy”. Some of these terms are intended to be synonymous with “development” and some are not. In *Caring for the Earth: A Strategy for Sustainable Living*, the international agencies that authored the report attempted to clarify the debate by stating:

“Sustainable growth” is a contradiction in terms: nothing physical can grow indefinitely. “Sustainable use” is applicable only to renewable resources: it means using them at rates within their capacity for renewal. “Sustainable development”...means: improving the quality of human life while living within the carrying capacity of supporting ecosystems”.<sup>271</sup>

Sustainable development has been described as the core of a “new” environmental ethic designed to encapsulate a new relationship between humankind and nature in an attempt to create harmony (balance) between economic development and environmental conservation.<sup>272</sup> This new relationship involves a stewardship position for humankind where the planet is being held in trust for future generations. Stewardship is an integral principle of sustainable development and thus not only an obligation of a government alone, but of all humans.<sup>273</sup>

Having said that, the reality is that the needs and agendas of developed nations (the “North”) and developing nations (the “South”) are fundamentally different and it is difficult to reach consensus on international policies, including environmental issues. While the North gives substantial attention to “environmental” issues that threaten ecological stability, the South has placed greater emphasis on immediate needs of economic growth to raise standards of living and alleviate poverty. The developing countries argue that the developed countries have benefited from environmental

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<sup>271</sup> *Caring for the Earth: A Strategy for Sustainable Living* (1991) 4; Williams (1997) op cit 51 & 65.

<sup>272</sup> Newson, M & Barnes, J et al *Managing the human impact on the Natural environment: patterns and processes* (1992) Belhaven Press London 5; Bray (1998) 5 *SAJELP* op cit 6.

<sup>273</sup> For a discussion on various ideologies and ethics with regard to the behaviour of humans in their relationship with the environment, see Bray (1998) 5 *SAJELP* op cit 3-9.

exploitation in the past and are thus primarily responsible for dealing with the environmental problems.<sup>274</sup> Relevant to this study it must be pointed out that South Africa is a “South” nation while Australia and New Zealand are seen as developed countries and thus “North” nations.

The objectives of sustainable development include the conservation of biodiversity, the sustained use of ecosystems and the development of a long-term sustainable economy.<sup>275</sup> The Brundtland Report seeks to integrate environmental policies and development strategies, and recommends that all countries should adopt sustainable development as an overall national policy with integration into provincial policies.<sup>276</sup> In order to achieve sustainable development, governments have to adhere to international principles. These include the principles of: intergenerational equity<sup>277</sup>, sustainable use<sup>278</sup>, equitable use<sup>279</sup>, and integration<sup>280 281</sup>.

Principles specifically relevant to the conservation of fauna and flora are the precautionary principle and the polluter pays principle. The precautionary principle provides that “where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation”. This principle provides guidance in the development and application of international environmental law where there is scientific uncertainty.<sup>282</sup> However, there is disagreement on the “value” of this principle. Some

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<sup>274</sup> For a further discussion on this North-South division, see Vig et al (1999) op cit 6.

<sup>275</sup> For other objectives, see Hugo et al (1997) op cit 176; Barrow (1997) op cit 8.

<sup>276</sup> Williams (1997) op cit 15. For an international perspective on sustainable development, see Sands, P “Environmental protection in the Twenty-first Century: Sustainable development and International law” in Vig, NJ & Axelrod, RS *The Global Environment* (1999) op cit 116-134.

<sup>277</sup> This principle refers to the need to preserve natural resources for the benefit of future generations.

<sup>278</sup> This principle refers to the aim to exploiting natural resources in a manner which is “sustainable”.

<sup>279</sup> This principle implies that the use of natural resources by one state must take account of the needs of other states.

<sup>280</sup> This principle refers to the need to ensure that environmental considerations are integrated into economic and other development plans, projects etc, and that development needs are taken into account in applying environmental objectives.

<sup>281</sup> These international principles regarding sustainable development will not be discussed. For further detail, see Sands (1995) op cit 198-208.

<sup>282</sup> Sands (1995) op cit 208; Fuggle & Rabie (1998) op cit 97; Barrow (1997) op cit 9; Barnard (1999) op cit 67.

commentators view the precautionary principle as an environmental protection measure as it prevents a detrimental impact on the environment by encouraging careful evaluation<sup>283</sup> of available development options before a development starts. Others view this principle as being over regulatory and limiting to human activity.<sup>284</sup> Kidd<sup>285</sup> points out that the principle cannot be absolute since every development poses a risk of causing some environmental damage that is unknown at the time of the development. He submits that this is the reason why it is necessary to balance the degree of likely risk with the cost of avoidance and the likelihood of the damage occurring.<sup>286</sup>

The polluter pays principle entails that the costs of pollution should be borne by the person responsible for causing the pollution and consequential costs. This principle has attracted broad support. Although not strictly a preventative tool for environmental degradation, Oosthuizen<sup>287</sup> is of the opinion that it is a “powerful and desirable environmental protection measure.”<sup>288</sup>

In summary it can be stated that governments not only have a responsibility to conserve the biodiversity, but to use the biological resources making up such diversity, in a sustainable manner.

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<sup>283</sup> This evaluation can be through impact assessment and eco-auditing. See Barrow (1997) op cit 9.

<sup>284</sup> Sands (1995) op cit 208-209.

<sup>285</sup> Kidd (1997) op cit 9.

<sup>286</sup> Section 2(4)(a)(vii) of the National Environmental Management Act 107 of 1998 of South Africa has raised this principle to a principle for environmental management by stating “that a risk-averse and cautious approach is applied, which takes into account the limits of current knowledge about the consequences of decisions and actions”.

<sup>287</sup> Oosthuizen, F “The Polluter pays principle: just a buzz word of environmental policy”? (1998) 5 *SAJELP* 360. NEMA endorses this principle in s(2)(4)(p) and also makes it applicable to persons responsible for the degradation of the environment, thus for harm or damage to fauna and flora.

<sup>288</sup> For further comments on this principle, see Sands (1995) op cit 213-217; Kidd (1997) op cit 8; Henderson, PGW “Fiscal Incentives for Environmental Protection—Conceptual Framework” (1995) 1 *SAJELP* 60; Raney, S “Green Taxes” (1994) 1 *Stell LR* 50, 54; Havenga, P “Liability for Environmental damage” (1995) 7 *SA Merc LJ* 187, 202.

## 4.2 South Africa

In South Africa sustainable development is referred to in the Constitution,<sup>289</sup> the Reconstruction and Development Programme (RDP),<sup>290</sup> NEMA,<sup>291</sup> the Development Facilitation Act 67 of 1995 (DFA)<sup>292</sup> and various other Acts.<sup>293</sup>

To achieve sustainable growth and long-term welfare, sustainable development must be recognised as an overall national (horizontal) policy with proper integration into individual policies vertically. This means that all laws and policies should be drafted in such a way as to bring about development that is economically, socially and ecologically sustainable.<sup>294</sup> The way in which this can be done is addressed by NEMA in essentially three ways: namely, by setting principles,<sup>295</sup> by creating plans,<sup>296</sup> and by using specific tools.<sup>297</sup> These environmental implementation and environmental management plans have

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<sup>289</sup> Section 24(b)(iii) states “secure ecologically sustainable development and the use of natural resources while promoting justifiable economic and social development.” Ferreira is of the opinion that section 24 causes tension between the protection of the environment and economic and social development. This means that in applying s24 a balance of interests must always take place. Ferreira (1999) 2 *TSAR* op cit 303.

<sup>290</sup> The *White Paper on Reconstruction and Development* GN 1954 of 23 November 1994. Also see Rabie (1999) 6 *SAJELP* op cit 122.

<sup>291</sup> Sections 2(4) and 29.

<sup>292</sup> For example sections 3(1) (c) (viii) and 3(1)(h)(iii). Other important public documents that contain provisions on sustainable development include, The National Environment Policy of South Africa and the *White Paper on the Conservation and Sustainable use of South Africa's Biological diversity*. See Van Wyk (1999) op cit 243 & 260 .

<sup>293</sup> Examples of these Acts are, the National Forest Act 84 of 1998 (s3(3) (c)(iii)) and the National Water Act 36 of 1998 (s 2(d)).

<sup>294</sup> Bray (1998) 5 *SAJELP* 6; Hugo et al (1997) op cit 186.

<sup>295</sup> Sustainable development is specifically elaborated on in the first of these principles, and underpins the set of 17 remaining, all-encompassing environmental management principles. These principles form the foundation-stones, not only of NEMA, but of environmental management in South Africa generally. Glazewski (2000) op cit 87-88. For more detail of NEMA on the concept of sustainable development, see Glazewski (2000) op cit 16; Van Wyk (1999) op cit 244.

<sup>296</sup> Chapter 3 of NEMA provides for the preparation of environmental implementation plans and environmental management plans. An environmental implementation plan must be prepared within one year of the promulgation of NEMA and at least every four years thereafter by national departments listed in Schedule 1, which exercise functions that may affect the environment and every province. Examples of these Departments are, the DEAT, Land Affairs, Housing and Trade and Industry. The same requirements are applicable to the environmental management plans except that national departments listed in Schedule 2 must prepare the plans. Departments listed in Schedule 2 include the DEAT and Departments of Minerals and Energy and Land Affairs. For detail on the plans, see Van Wyk (1999) op cit 245-246.

<sup>297</sup> One of the tools to ensure sustainable development is the environment impact assessment (EIA). The EIA is seen as the point where planning and environment interface. The EIA is a means of assessing the impact that a particular development may have on the environment before the development itself starts.

a specific purpose that includes the co-ordination and harmonisation of plans, policies, programmes and decisions of the relevant national departments.<sup>298</sup> NEMA has thus incorporated sustainable development as a core principle in the national environmental management system by providing for the preparations of plans to facilitate the co-operation and co-ordination between the spheres of government.

NEMA defines sustainable development as "...the integration of social, economic and environmental factors into planning, implementation and decision making so as to ensure that development serves present and future generations".<sup>299</sup> This definition includes social, economic and environmental factors, and thus rules out any notion of an environmental bottom line.<sup>300</sup> In other words, addressing environmental concerns will not be a precondition before social and economic factors may be considered. The inclusion of social and economic factors is important in a developing country such as South Africa because of the large-scale poverty, illiteracy and housing requirements.<sup>301</sup> It is also a way to create a society that is based on human dignity, equality and freedom (s1 of the Constitution) by ensuring the social and economic improvement of historically disadvantaged groups.

According to NEMA, "sustainable" when used in relation to development, indicates development that:

- does not reduce the availability of renewable resources to future generations; and

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For more detail on the tools, see Van Wyk (1999) op cit 246-260. Also see Bates (1995) op cit 10; Barrow (1997) op cit 2; Ridl, J " 'IEM': Lip-service and Licence?" (1994) 1 *SAJELP* 70; Winstanley, T "Environmental impact assessment: one year later" (1998) 5 *SAJELP* 387-394; Williams (1997) op cit 503.

<sup>298</sup> For more functions of the plans, see Van Wyk (1999) op cit 246; Ferreira (1999) 3 *TSAR* op cit 438. For further references to sustainability in NEMA, see s2(3) & s1(11) (xix) and Ferreira (1999) 3 *TSAR* op cit 440-441.

<sup>299</sup> According to Knoetze (1996) *Obiter* op cit 306, the World Conservation Strategy views the integration of conservation and development and the proper enforcement of environmental legislation as part of the process of meeting the needs of present and future generations while, at the same time, the natural environment is conserved. Also see Glazewski (2000) op cit 14-17.

<sup>300</sup> Rabie, A "Integrated Resource management: the New Zealand model and some lessons for South Africa" (1999) 14 *SAPR/PL* 170.

<sup>301</sup> This is typically the "South" characteristics mentioned previously in this chapter.

- minimises the rate of depletion of a non-renewable resource.

According to section 26(2)(a) of NEMA, the Minister must initiate an Annual Performance Report on Sustainable Development to meet the government's commitment to Agenda 21.<sup>302</sup> South Africa has committed itself to the development of a national strategy for sustainable development by the year 2002 and with the aim to ultimately establish a national council for sustainable development.<sup>303</sup> Meanwhile, the Department of Environmental Affairs and Tourism, which is responsible for the implementation of Agenda 21 at the national level, is also supporting the development of a local Agenda 21<sup>304</sup> by several local authorities.<sup>305</sup>

It is suggested, that section 24(b), along with the principles in NEMA, has opened the door considerably to include "sustainable development" criteria in the decision-making processes that might have an effect on the environment.<sup>306</sup>

Accelerated economic growth and social development are prerequisites for a successful South Africa. However, it could lead to a new onslaught on environmental resources because of the increased demands on natural resources. Uncontrolled economic growth can cause huge and irreversible damage to the environment. What is needed in South Africa is strong economic growth that is environment-compatible and a major campaign to convince individuals, business, communities and the government, who must set the example, to change their attitudes, values and perceptions towards the environment and development.<sup>307</sup> Only by this change in attitude will South Africans be able to successfully fulfil their role as trustees<sup>308</sup> to hold nature in trust for future generations. It

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<sup>302</sup> Agenda 21 includes chapters on poverty and environmental degradation. The commitment of the South African government to adhere to Agenda 21 is important to ensure that a balance is obtained between the conservation of the natural resources and social commitments.

<sup>303</sup> In the National Environmental Management Bill a Commission for Sustainable Development was proposed, but was not included in the final Act (NEMA).

<sup>304</sup> Chapter 28 of Agenda 21 is entitled "*Local Agenda 21*", which is a programme aimed at implementing sustainable development at the local level. See Glazewski (2000) op cit 46.

<sup>305</sup> Rabie (1999) 6 *SAJELP* op cit 125.

<sup>306</sup> Glazewski (2000) op cit 88.

<sup>307</sup> Bray (1998) 5 *SAJELP* op cit 11-13.

<sup>308</sup> NEMA also endorses stewardship by stating that "sustainable development requires the

is thus essential that the government and all South Africans acknowledge that: “A PROSPEROUS ECONOMY CANNOT BE ACHIEVED ON A BANKRUPT ENVIRONMENT”.<sup>309</sup>

#### 4.3 Australia

As already mentioned, one of the goals of the World Conservation Strategy (1980) is the integration of conservation and development. Australia responded in 1983 with the National Conservation Strategy for Australia,<sup>310</sup> which is subtitled “Living Resource Conservation for Sustainable Development”. It was adopted by the Federal Government in 1984 and subsequently endorsed by most states.<sup>311</sup> Victoria and Western Australia have drawn up their own state conservation strategies.

Following this development, and especially the Brundtland Report of 1987, the Federal Government set about the task of identifying comprehensively and systematically what Australians need to do to embrace ecologically sustainable development.<sup>312</sup> This process involved extensive consultation with industry, community groups and all spheres of government. The reports of various working groups provided the foundation on which the National Strategy for Ecologically Sustainable Development was developed. This strategy was eventually endorsed by the Council of Australian Governments in 1992.<sup>313</sup>

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consideration of all relevant factors including, *inter alia*, that the environment must be held in public trust for the people (s2(4)(a)(0)).

<sup>309</sup> Council for the Environment *Environment in the new South Africa* (1993) Pretoria; Rabie (1990) 53 *THRHR* op cit 6; Rabie (1998) 13 *SAPR/PL* op cit 347.

<sup>310</sup> This strategy has three major objectives that can briefly be summarised as: maintaining ecological systems and genetic diversity and to ensure the sustainable use of ecosystems and plant and animal species. It also has twelve goals and five principles which include integration of conservation and development and to educate the community about the interdependence of sustainable development and conservation. For further detailed information on the objectives, goals and principles of this strategy, see Bates (1995) op cit 17-19 & 30.

<sup>311</sup> Cook (1990) op cit 10; Bates (1995) op cit 24&19; Rabie (1995) 1 *SAJELP* op cit 113.

<sup>312</sup> The Australian government defines sustainability in terms of ecologically sustainable development as using, conserving and enhancing the community’s resources so that ecological processes are maintained and the total quality of life, now and in the future, can be increased. Rabie (1998) 13 *SAPR/PL* op cit 349.

<sup>313</sup> Rabie (1995) 1 *SAJELP* op cit 114; Fowler, R “New National directions in Environmental Protection and Conservation” in Boer, B & Fowler, R et al *Environmental Outlook* (1994) The Federation Press

It is encouraging that corporations in Australia are looking for environmental policies and strategies that seek to contribute to development in a “pro-active” way. This involves going beyond immediate compliance standards, developing comprehensive environmental management and audit systems and seeking specific environmental objectives (for example, sustainable use of natural resources). The Valdez Principles<sup>314</sup> require corporations to conduct, and make public, annual environmental audits.<sup>315</sup> The Business Charter for Sustainable Development of 1990 continues this corporate trend and provides 16 corporate principles for environmental management.<sup>316</sup>

A number of initiatives have been taken to improve intergovernmental co-operation on environmental matters. The most important of these are the Intergovernmental Agreement on the Environment (IGAE), concluded in May 1992 between the Commonwealth, States and Territories and the Australian Local Government Association.<sup>317</sup> The IGAE does not provide a definition of “sustainable development” but states that it can be achieved by the implementation of four principles, of which the precautionary principle is one.<sup>318</sup> In addition to strategies, principles and agreements, the concept of sustainable development is also incorporated into Australian legislation, for example the Nature Conservation Act of 1992 (Qld).<sup>319</sup>

According to Bates,<sup>320</sup> the emphasis in Australia is now more on development AND conservation rather than development OR conservation.

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Sydney 114, 141-142.

<sup>314</sup> The 10 Principles are on page 241-242. One of the principles is the sustainable use of natural resources.

<sup>315</sup> Bradsen (1994) op cit 239.

<sup>316</sup> One of the principles of the Charter is the endorsement of the precautionary principle. Bradsen (1994) 239 & 242-244.

<sup>317</sup> Fowler (1994) op cit 113-114. For further detail, see chapter 2.

<sup>318</sup> The other principles are, to strive for intergenerational equity, to conserve biological diversity and ecological integrity and to improve valuation pricing and incentive mechanisms.

<sup>319</sup> Also see Fisher (1993) op cit 11.

<sup>320</sup> Bates (1987) op cit 9.

#### 4.4 New Zealand

The purpose of the Resource Management Act 1991 (RMA) is “to promote the sustainable management of natural and physical resources”.<sup>321</sup> Sustainability has thus been elevated in the RMA as the sole and overarching purpose<sup>322</sup> that governs all facets of the Act. The stated purpose is of the utmost importance as it not merely sets the ground rules for interpreting the Act, but serves as a guide to rule-making and decision-making in terms of the Act. It is the only end to be pursued in resource management and remains the single and authoritative starting and finishing point for planning under the RMA.<sup>323</sup> This is unprecedented in resource management legislation.<sup>324</sup>

In order to achieve the purpose of sustainable management, the RMA sets out a number of other matters of significance, which are categorised in a hierarchy<sup>325</sup> as:

- “matters of national importance” (s6)<sup>326</sup> - which decision makers must recognise and provide for;
- “other matters” (s7)<sup>327</sup> - which decision makers shall have particular regard to; and
- the Treaty of Waitangi, (s8)<sup>328</sup> - which must be taken account of.<sup>329</sup>

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<sup>321</sup> Section 5(1) of the RMA.

<sup>322</sup> Note that the purpose stated, not to “achieve” sustainable management, but only to “promote” it. Peart, R “A New Generation of Environmental Law. The New Zealand Reform and lessons for South Africa” (1996) 3 *SAJELP* 129.

<sup>323</sup> Milne (1992) op cit 73; Rabie (1998) 13 *SAPR/PL* op cit 350.

<sup>324</sup> Rabie (1998) 13 *SAPR/PL* op cit 344 & 349; Rabie (1999) 14 *SAPR/PL* op cit 169.

<sup>325</sup> For a discussion on how a hierarchy between sections 6, 7 and 8 is implied by the introductory wording of each section, see Milne (1992) op cit 38; Rabie (1998) 13 *SAPR/PL* op cit 360-361.

<sup>326</sup> For example s6(c) states, “the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna”. For other examples, see Peart (1996) 3 *SAJELP* op cit 131-132; Milne (1992) op cit 37; Williams (1997) op cit 83; Rabie (1998) 13 *SAPR/PL* op cit 360.

<sup>327</sup> For example s7(d) states, “intrinsic values of ecosystems”. According to Milne (1992) op cit 39, s7 (d) reflects the view of the adoption of a new ethical approach where other species are valued for their own sake rather than in terms of their economic worth. For other examples, see Peart (1996) 3 *SAJELP* op cit 132; Milne (1992) op cit 38; Williams (1997) op cit 87; Rabie (1998) 13 *SAPR/PL* op cit 360.

<sup>328</sup> A treaty signed in 1840 between Maori tribes and the Crown guaranteeing Maori ownership of natural resources.

<sup>329</sup> Peart (1996) 3 *SAJELP* op cit 131; Rabie (1998) 5 *SAJELP* op cit 369. According to Milne (1992) op cit 38, specific Maori concerns may be more forcefully addressed by section 6(e) where they are treated

The New Zealand legislature opted for the concept of sustainable *management* rather than sustainable *development* and became the first country to institutionalise the concept of sustainability as a cornerstone of its resource management legislation. Section 5(2) of the RMA defines “sustainable management” as:

“managing the use, development, and protection of natural and physical resources in a way and at a rate, which enables people and communities to provide for their social, economic and cultural well-being and for their safety and health *while* —

- (a) sustaining the potential of natural and physical resources<sup>330</sup> (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
- (b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
- (c) avoiding, remedying or mitigating any adverse effects of activities on the environment.”<sup>331</sup>

There is quite a debate on the definition of “sustainable management” and the meaning of the word “while” in the definition (own emphasis). It is beyond the scope of this study to go into the detail of the arguments. Suffice it to note that “if” as a synonym for “while” is the view held by the Minister of Environment, the review group of the Resource Management Bill 1991, the judiciary and it is supported by commentators such as Kerkin and Wheen.<sup>332</sup> That means that the ecological function is afforded some priority over the management function. In other words, sections 5(2)(a), (b) and (c) constitute safeguards (non-negotiable environmental bottom lines) that must be met before the Act’s purpose is

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as a matter of national importance.

<sup>330</sup> The expression “natural and physical resources” is defined in s2 and it is important to note that it includes all structures as well as land, water, air, soil, minerals, and energy, and all forms of plants and animals. Williams (1997) op cit 73.

<sup>331</sup> Milne (1992) op cit 36 & 73; Williams (1997) op cit 73; Rabie (1998) 13 *SAPR/PL* op cit 350; Peart (1996) 3 *SAJELP* op cit 130.

<sup>332</sup> Rabie (1998) 13 *SAPR/PL* op cit 353-356.

fulfilled.<sup>333</sup> Williams<sup>334</sup> also points out that all three subparagraphs of section 5(2) must be met before an application for a resource consent can be successful. To avoid delays in development, the RMA has made provision for emergency action which may involve the use of resources not strictly compatible with the environmental parameters in section 5(2), and for parliament to intervene with *ad hoc* legislation to resolve the problem.<sup>335</sup>

The complexity and vagueness of section 5(2), coupled with the controversy regarding its interpretation, renders its application by administrators very difficult. It is unfortunate that parliament has left administrators who are responsible for the implementation of the Act without clear guidance as to what is intended by their obligation to promote sustainable management. It will be up to the judiciary to interpret s 5(2) and thus provide the necessary legal guidance.<sup>336</sup>

The concept “sustainable management” has not yet been the subject of a substantive decision of the courts and remains elusive. A call to give section 5 a wide interpretation has been adopted by the New Zealand High Court,<sup>337</sup> but the danger of such an approach is that the interpretation of the RMA is left to judges who are not politically accountable or representative of the community. However in practice, the New Zealand courts have taken a conservative approach to the interpretation of the RMA and this has arguably resulted in much of the RMA’s potential being lost.<sup>338</sup>

Peart<sup>339</sup> is of the opinion that the definition of “sustainable management” set out in

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<sup>333</sup> Rabie (1998) 13 *SAPR/PL* op cit 352. For further comments on this debate, see Rabie (1998) 13 *SAPR/PL* op cit 350-359; Rabie (1999) 14 *SAPR/PL* op cit 170; Peart (1996) 3 *SAJELP* op cit 130; Williams (1997) op cit 74; Milne (1992) op cit 36.

<sup>334</sup> Williams (1997) op cit 76 & 77.

<sup>335</sup> Rabie (1998) 13 *SAPR/PL* op cit 353.

<sup>336</sup> Rabie (1998) 13 *SAPR/PL* op cit 358; Rabie (1999) 14 *SAPR/PL* op cit 149; Rabie (1998) 13 *SAPR/PL* op cit 354.

<sup>337</sup> In *New Zealand Rail Ltd v Marlborough District Council* (1994) NZRMA 70, 86 Judge Harris stated: “[S] expresses in ordinary words of wide meaning the overall purpose and principles of the Act... There is a deliberate openness about the language, its meanings and connotations which I think is intended to allow the application of policy in a general and broad way.” For more information, see Peart (1996) op cit 133.

<sup>338</sup> Peart (1996) 3 *SAJELP* op cit 132 & 133.

<sup>339</sup> Peart (1996) 3 *SAJELP* op cit 130.

section 5(2) of the RMA provides for intergenerational equity (enabling future generations to meet their needs), sets an ecological bottom line (sustaining the life-supporting capacity of the natural environment) and seeks to increase the environmental efficiency of development (by reducing the negative impacts of activities on the environment through avoidance, remedy or mitigation).

The fact that the RMA refers to sustainable “management” and not sustainable “development” is important. This change in terminology was intended to exclude the social and economic development issues that are an integral part of the sustainable “development” concept.<sup>340</sup> The RMA is essentially neutral with regard to competition between development and environment *goals*, as it is primarily designed to control environmental *effects*. The RMA deals with the sustainable management of “natural and physical resources” and not with the “environment”. The definition of the latter is much wider, encompassing also social, economic, aesthetic and cultural elements. This is a narrowing of the scope of environmental legislation to exclude social issues. This attempt to separate environmental issues from social issues is arguably fundamentally misconceived, as the very notions of the environment and conservation are in themselves socially constructed and the issue of environmental management only arises because of a perceived need to change the relationship between people and the environment. It is also debatable as to whether this separation has, in fact, been achieved in the RMA, as it defines “environment” to include “peoples and communities”.<sup>341</sup>

Rabie<sup>342</sup> is also of the opinion that the definition of sustainable management refers to social, economic and cultural well-being as well as to the environment. He further points

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<sup>340</sup> Peart (1996) 3 *SAJELP* op cit 130; Rabie (1999) 14 *SAPR/PL* op cit 170. Rabie (1998) 13 *SAPR/PL* op cit 354. One disadvantage of the term “sustainable development” is that the concept embraces a very wide scope of matters, including social inequities and global redistribution of wealth. It is inappropriate for legislation of this kind to include such goals. Social and economic considerations are relevant within the definition of “sustainable management” but are limited in their scope and are subject to ecological considerations. Williams (1997) op cit 67. For a discussion on the disadvantage of the term “sustainable development” see, Rabie (1998) 13 *SAPR/PL* op cit 351.

<sup>341</sup> Peart (1996) 3 *SAJELP* op cit 131.

<sup>342</sup> Rabie (1999) 14 *SAPR/PL* op cit 170.

out that the definition of natural and physical resources does not relate purely to the bio-physical environment but includes all structures.

The precise meaning of “sustainable management” is of pivotal importance to the operation of the RMA and has been the subject of considerable debate. For example, questions to be answered are, how are the “reasonable foreseeable needs” of future generations to be determined; whose life should the air, water, soil and ecosystems support; and when should an adverse effect be avoided and when should it only be mitigated?<sup>343</sup>

The Minister for the Environment stated that, “sustainable management is not a concept which has a literal and absolute meaning. It is an ethic that has to be reflected into the reality of a situation.” The Ministry for the Environment has interpreted sustainable management as comprising two things. Firstly, it is about recognising more fully the environmental costs of activities and policies in order to protect the natural and physical resources (better environmental valuation). Secondly, it is about better consideration of the earth’s resources, with a view to conserving the potential of resources for future generations (better environmental stocktaking).<sup>344</sup>

It has been stated that if New Zealand fails to effectively implement sustainability, it is less likely that other countries will succeed. New Zealand has relatively few environmental threats compared to other countries and it is relatively easy to legislate, given its unitary constitutional dispensation and its single legislative chamber at national level.<sup>345</sup>

#### 4.5 Conclusion

There seems to be no consensus on the definition of sustainable development. This is

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<sup>343</sup> Peart (1996) 3 *SAJELP* op cit 132.

<sup>344</sup> Peart (1996) 3 *SAJELP* op cit 132; Williams (1997) op cit 66.

<sup>345</sup> Rabie (1998) 13 *SAPR/PL* op cit 339.

probably because the formulations reflect the different values and priorities of the holders. Despite this uncertainty, South Africa and Australia use “sustainable development” to generally describe their objective to strive for a balance between the conservation of natural resources, which include biodiversity, and economic growth.

Contrary to this, New Zealand opted to use “sustainable management” to reflect its commitment to achieve harmony between conservation and economic growth. Although this terminology was preferred to “sustainable development” to exclude social and economic issues, it is debatable if this objective was achieved.

It seems as if all three countries are committed to “sustainability”. In South Africa this commitment is reflected in the Constitution and NEMA. South Africa also aims to develop a national strategy for sustainable development by the year 2002 and to establish a national council for sustainable development. DEAT is also supporting several local authorities in the development of a local Agenda 21.

Apart from provisions in legislation, Australia has developed a business charter for sustainable development in 1990, adopted a national strategy for ecologically sustainable development in 1992 and has established principles to guide and assist corporations to operate towards the sustainable use of natural resources.

New Zealand’s commitment to sustainable management is primarily driven by the provisions in the RMA. What is important is that the definition of sustainable management in the RMA gives the ecological function a priority over the management function. In other words, a non-negotiable environmental bottom line is established by this definition. This “environmental” priority given over other matters is not found in South Africa or Australia.

It seems as if Australia and New Zealand have advanced further with their international and national obligations towards the sustainable use of their natural resources. South

Africa has a relatively new (from 1996) environmental management system, a sophisticated system of fundamental rights in the Constitution and adequate legislation that gives effect to the sustainable use of natural resources. Despite this, the implementation of provisions for sustainable development is very slow because of massive socio-economic and related problems. Given the priorities that South Africa as a developing country has, it is to be expected that Australia and New Zealand, both developed countries, would have advanced further and more successfully than South Africa with regard to the sustainable use of natural resources. However, based on budgetary and other announcements (regarding protected areas) made by the Minister of Environmental Affairs and Tourism in 2001, it seems as if the environment now has a higher priority than in previous years and that the implementation of relevant legislation will accelerate and, hopefully, be more effective.

## 5. THE CONCEPT “ENVIRONMENTAL LAW”

### 5.1 General

There is uncertainty as to exactly which legal rules pertaining to the environment constitute environmental law. This is because of the uncertainty regarding the meaning of the concept “environment.”<sup>346</sup> Thus, depending on one’s understanding of environment, environmental law may include all legal rules with regard to the conservation of natural resources, public health, pollution control and land use. These legal rules fall into several different branches of the law<sup>347</sup> and that is why environmental law has been described as cross-divisional with no systematic unity.<sup>348</sup> Rabie<sup>349</sup> is of the opinion that unless distinctive legal criteria are established which characterise environmental law, the subject will continue to lack coherence and logical structure. To complicate matters further, new

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<sup>346</sup> This concept has already been discussed.

<sup>347</sup> The branches include, constitutional law, criminal law, property law, insurance law and international law. The greatest portion of environmental law however falls within administrative law. Environmental law has thus been described as a “potpourri” of legal rules.

<sup>348</sup> Rabie (1991) 2 *Stell LR* 221-223; Van Reenen, TP “Constitutional protection of the environment: fundamental (human) right or principle of state policy?” (1997) 4 *SAJELP* 169.

<sup>349</sup> Rabie (1990) 53 *THRHR* op cit 26. For different approaches to identify environmental law, see Kidd (1997) op cit 5.

topics that are perceived as being environment-related, are added to the concept of environment and causes the parameters of environmental law to change constantly. This is why the definition of “environmental law” is regarded as open-ended.<sup>350</sup>

## 5.2 South Africa

### 5.2.1 The scope of environmental law

A prominent feature of South African environmental legislation is its diffuse nature, with provisions being contained in an extremely wide variety of parliamentary Acts, provincial ordinances and Acts, local by-laws and ministerial regulations. Although environmental law has never been comprehensively codified by a single statute<sup>351</sup> it can be classified according to the objectives of a law or the degree of environmental relevance of the norms.<sup>352</sup>

It was submitted that environmental law has become a fully-fledged branch of the law in South Africa and that it should be categorised as a branch of public law because it primarily manages the interaction between the state and the public with regard to environmental issues.<sup>353</sup> Barnard<sup>354</sup> is also of the opinion that although environmental law has emerged as a branch of law it does not mean that it should be considered in isolation from other branches of law; particular care should therefore be taken not to compartmentalise environmental law. He submits that for effective environmental management it is necessary to bear in mind that no other branch of law interacts quite as extensively and regularly with other disciplines. According to Barnard,<sup>355</sup> the development of environmental law as a separate branch of law has several benefits. One

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<sup>350</sup> Fuggle, RF & Rabie, MA *Environmental Concerns in South Africa* (1983) Juta Cape Town 32; Rabie (1991) 2 *Stell LR* op cit 215; Kidd (1997) op cit 5.

<sup>351</sup> Rabie (1990) 53 *THRHR* op cit 2. For a detailed discussion on the codification of the South African environmental law, see Van Reenen (1994) 2 *Stell LR* op cit 214; Van Reenen (1994) 3 *Stell LR* op cit 331.

<sup>352</sup> For different categories of delimitation of the field of environmental law, see Van Reenen (1994) 3 *Stell LR* op cit 338-347; Fuggle & Rabie (1998) op cit 92-95; Rabie (1991) 2 *Stell LR* op cit 215-219.

<sup>353</sup> Barnard (1999) op cit 14 & 15.

<sup>354</sup> Barnard (1999) op cit 14 & 15.

<sup>355</sup> Barnard (1999) op cit 14.

of these is that it becomes easier to coordinate and integrate the different environmental legal structures, laws and rules.<sup>356</sup>

Glazewski<sup>357</sup> is of the opinion that the only current certainty is that “environmental law is a young, dynamic and evolving branch of the law whose parameters are not yet fixed as it is still in the process of developing its own identity”. Van Wyk<sup>358</sup> agrees with Glazewski that environmental law is still evolving, but disagrees that planning law falls within the scope of environmental law. Clarity is required for the demarcation and analysis of the field of environmental law, if it is to protect the environment.<sup>359</sup> However, it must be pointed out that the demarcation of environmental law will be meaningless if it cannot be properly enforced and controlled.

### 5.2.2 Wildlife law

In addition to environmental law, some academics<sup>360</sup> support the existence of a clearly defined body of law that will give effective protection specifically to wildlife resources. This “wildlife law” should have as its primary purpose the regulation of human conduct in order to protect wildlife and its habitat, and contribute to the maintenance of genetic diversity and a healthy ecological system. The question is however, whether “wildlife law” will facilitate the protection (and enforcement) of the South African fauna and flora, or only add to the further fragmentation of environmental law.

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<sup>356</sup> Other benefits include that environmental law is more accessible to people who need to know what the applicable rules are; and that it encourages the teaching of environmental law as a separate subject at educational institutions. Such training courses develop the capacity of people such as government officials applying environmental legislation. See Barnard (1999) op cit 14.

<sup>357</sup> Glazewski (2000) op cit 11-12.

<sup>358</sup> For arguments as to why planning law is not part of environmental law, see Van Wyk, J “How far do the boundaries of environmental law lie? A review of Jan Glazewski's *Environmental Law in South Africa*” (2001) 16 *SAPR/PL* 229--239.

<sup>359</sup> Rabie (1991) 2 *Stell LR* op cit 203; Van Reenen (1994) 3 *Stell LR* op cit 357.

<sup>360</sup> Fuggle & Rabie (1998) op cit 257; Glavovic (1988) 3 *SALJ* op cit 519, 523, 528; Loon (1995) 2 *SAJELP* op cit 169.

Glavovic<sup>361</sup> and Loon<sup>362</sup> hold the view that the recognition and development of wildlife law as a discrete and important branch of the law, will assist in achieving a comprehensive, co-ordinated, and holistic approach to the protection of wildlife.

### 5.3 Australia

As in South Africa, Australia also experienced the same difficulties with regard to the meaning and content of environmental law. There are also various attempts to determine the parameters of environmental law, but there is no general agreement yet. One view is that environmental law is the rules relating to the protection of the environment and nothing more. According to Fisher,<sup>363</sup> this is too narrow an approach. Sometimes it is taken to be everything to do with nature, natural resources and their relationships with human beings. This again may be too wide an approach.

Fisher suggests that environmental legislation in Australia falls into one of three categories: resource legislation, which relates to the development, exploitation or use of natural resources; protection of specific elements such as scenic features, wildlife and Aboriginal remains, and environmental planning.<sup>364</sup> Contrary to this, Fowler categorises environment law into four components, namely developmental legislation; resource allocation legislation (legislation relating to the disposition of natural resources); conservation legislation (conservation of natural and cultural resources); and environmental planning and protection legislation.<sup>365</sup>

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<sup>361</sup> Glavovic (1988) 3 *SALJ* op cit 532.

<sup>362</sup> Loon (1995) 2 *SAJELP* op cit 170.

<sup>363</sup> Fisher (1993) preface (v). For a historical analysis of environmental law in Australia, see Fisher (1993) op cit 11 & 29.

<sup>364</sup> As in Bates (1995) op cit 3.

<sup>365</sup> For further information on categories, see Bates (1995) op cit 3.

## 5.4 New Zealand

Prior to law reform that commenced in 1988, New Zealand's environmental law also came into being, as in South Africa, in an *ad hoc*, uncoordinated and reactionary manner. The approach to environmental management was thus also incremental with various institutional structures involved, but no single agency to promote conservation.

Currently environmental law in New Zealand is viewed as a distinct and legitimate branch of study. According to Williams it is a distinct speciality in legal practice. He submits that while the existence of environmental law is not in doubt, its scope is less certain due to its constantly evolving and dynamic nature. He is also of the opinion that it is desirable to identify the parameters of environmental law. This, he submits, should be done by defining the concept "environment" so that the scope of environmental law flows logically from the definition. Another approach is to examine the subject-matter of, *inter alia*, legislation, law reports and publications. This will lead to a functional definition of environmental law.<sup>366</sup>

## 5.5 Conclusion

South Africa, Australia and New Zealand all have the same difficulty in defining "environmental law" and determining its parameters. This is primarily because the scope of environmental law largely depends on what is perceived as "environment". Because the parameters of "environment" change as new topics are added to the ambit of the concept so do the parameters of environment law change. This makes it impossible to determine the scope of environmental law.

I conclude the discussion of the concept "environmental law" with a statement made by Mc Gregor<sup>367</sup> in which he stated that "environmental law is not found in just one book

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<sup>366</sup> Williams (1997) op cit 4-7. This approach of consulting the subject matter will not be discussed further.

<sup>367</sup> McGregor, *GI Environmental Law and Enforcement* (1994) Lewis Publishers London 1.

on the shelf of a law library. It is not found in one volume of statutes or one set of published court decisions. It is not found in one compilation of local bylaws and ordinances. Environmental law takes many forms and no one government agency or court has a monopoly.”

## 6. CONCLUSION TO THE CHAPTER

With regard to the basic concepts discussed in this chapter it seems as if South Africa, Australia and New Zealand have the same difficulty in defining these concepts and in determining their parameters. It is concluded that with regard to these concepts there are generally few differences between the three countries.

In the light of the above discussion on what environmental law entails, it is evident that it is impossible to examine such a large body of legal material without setting limitations in one way or another. Therefore, in chapter 2 only those environmental laws that are specifically relevant to flora and fauna will be discussed.

## CHAPTER 2

### ENVIRONMENTAL LAWS APPLICABLE TO FAUNA AND FLORA

#### INTRODUCTION

The purpose of this chapter is to examine relevant provisions of legislation in South Africa, Australia and New Zealand that are applicable to the conservation of fauna and flora. This examination is necessary to determine if the current legislation, if enforced properly, is adequate to ensure the conservation of fauna and flora and their habitat. In addition, the most important international treaty relevant to fauna and flora, namely the Convention on International Trade in Endangered Species (CITES), to which South Africa, Australia and New Zealand is party, will also be discussed.

#### 1. SOUTH AFRICA

##### 1.1 General

As previously mentioned, environmental law is not only encountered in different branches of the law, but provisions affecting the environment directly or indirectly are scattered throughout many pieces of national, provincial and local legislation.

For this reason, an attempt to discuss the entire spectrum of laws affecting flora and fauna will be an impossible task. Therefore, except for the Constitution of the RSA of 1996 (Constitution) and the National Environmental Management Act 107 of 1998 (NEMA) that have a wide application, only legislation that is mainly applicable to the protection of fauna and flora (as defined in chapter 1) will be discussed. These are the Environment Conservation Act 73 of 1989 and the National Parks Act 57 of 1976.<sup>1</sup>

The provincial

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<sup>1</sup>Many other Acts have an indirect effect on fauna and flora although the conservation of fauna and flora is not their main focus. Examples of these Acts are, the National Water Act 36 of 1998; Conservation of Agricultural Resources Act 43 of 1983; Mountain Catchment Areas Act 63 of 1970; Lake Areas

Ordinances or Acts and environmental policies will also be discussed briefly. With regard to the Constitution and NEMA, only those sections that are of direct relevance to the environment and, consequently, to fauna and flora will be dealt with in detail.

## 1.2 Constitution of the Republic of South Africa Act of 1996

### 1.2.1 General

South Africa's legal system entered a new era in 1994 when the interim Constitution (Act 200 of 1993) came into force. The Constitution was drafted and adopted by a Constitutional Assembly and the final constitutional text certified by the Constitutional Court. The Constitution was signed into law by President Nelson Mandela at Sharpeville on 4 February 1997 and thereby established a constitutional democracy in South Africa.<sup>2</sup>

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Development Act 39 of 1975; Minerals Act 50 of 1991; Sea-shore Act 21 of 1935; Sea Fishery Act 12 of 1988; National Forest Act 84 of 1998; National Monuments Act 28 of 1969; Game Theft Act 105 of 1991; Agricultural Pests Act 36 of 1983; Sea Birds and Seals Protection Act 46 of 1973 and the Animals Protection Act 71 of 1962. These Acts will not be discussed. For a quick reference to all the Acts that have an impact on the environment, see Henderson, PGW *Environmental Laws of South Africa* (1996) Vol 1&2 Juta & Co Ltd Kenwyn. Also see Van Wyk, J *Planning Law* (1999) Juta & Co Ltd Kenwyn 70-71. For a useful summary of sections of various Acts applicable to the environment and which specifically refers to plants and animals, see Teurlings, P *Guide to Legislation concerning natural environment* (1993) Department of Environmental Affairs Pretoria. For comments on the role of the National Forestry Act 84 of 1998 in the conservation of flora and fauna, see Smith, FH "The role of State Forestry in managing and conserving ecological systems" (1998) 5 *SAJELP* 35-51. For comments on the role of the National Monuments Act 28 of 1969 in the conservation of flora and fauna, see Milton, J "The role of the National Monuments Council in the conservation of the Natural Environment" (1997) 4 *SAJELP* 296-299 and Kidd, M *Environmental Law. A South African Guide* (1997) Juta & Co Ltd Cape Town 105. For comments on the impact of conservation legislation on landownership, see Van der Walt, AJ "The effect of Environmental Conservation Measures on the Concept of Landownership" (1987) *SALJ* 469-477. Also see Loots, C "Environmental Law: Legislation" (1993) *Annual Survey of South African Law* 350 for comments on land use.

<sup>2</sup> For more detail on the history of the Constitution, see De Waal, J & Currie, I & Erasmus, G *The Bill of Rights Handbook* (2000) (3<sup>rd</sup>ed) Juta & Co Ltd Kenwyn 2-6.

### 1.2.1.1 Characteristics of the Constitution

The Constitution is the supreme law of the Republic of South Africa. Therefore, any law or conduct inconsistent with it may be declared invalid. Parliamentary sovereignty has thus been replaced by the supremacy of the Constitution. It is generally accepted that the Bill of Rights is one of the most important characteristics of the South African Constitution. It enshrines certain fundamental rights that the state has a duty to respect, promote and fulfil. Its primary objective is to protect the individual from the power of the state as the relationship between the state and the individual is not on an equal footing.<sup>3</sup> The Bill of Rights thus effectively prevents the encroachment of fundamental rights or the unlawful limitation of these rights, in that any limitation may only take place in accordance with the general limitation clause.<sup>4</sup> The individual enjoys a number of freedoms, rights and privileges under the Constitution, one of which is related to the environment and is contained in section 24 of the Bill of Rights.<sup>5</sup>

Another important characteristic of the Constitution is the principle of co-operative government as entrenched in chapter 3.<sup>6</sup> In South Africa, the government is constituted as national, provincial and local spheres that are distinctive, interdependent and interrelated. The principles of co-operative government and intergovernmental relations set out in section 41 of the Constitution, govern the relationship between these three spheres.<sup>7</sup> One of these principles (s41(g)) determines that the spheres must “exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere”.<sup>8</sup>

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<sup>3</sup> De Waal et al (2000) op cit 41; Burns, Y *Administrative Law under the 1996 Constitution* (1998) Butterworths Durban 18.

<sup>4</sup> The limitation clause will be discussed further on in the chapter.

<sup>5</sup> The environmental clause will be discussed further on in the chapter.

<sup>6</sup> NEMA also gives effect to the notion of co-operative government. NEMA will be discussed further on in chapter 2.

<sup>7</sup> Also see, De Waal et al (2000) op cit 19-20; Burns (1998) op cit 35.

<sup>8</sup> Another principle is that the spheres should co-operate with each other in mutual trust and good faith. For other principles, see section 41 of the Constitution.

The requirements for co-operative government are very important to the successful protection of the environment in general and to the conservation of fauna and flora, in particular, as the Constitution has designated “nature conservation” (excluding national parks, national botanical gardens and marine resources) as well as the “environment” as functional areas of concurrent national and provincial legislative competence. Thus the legislative and administrative<sup>9</sup> responsibility for the environment and nature conservation (which include fauna and flora) are shared by the national and provincial spheres. The effective co-operation between the national and provincial spheres is important to counter the negative consequences that the fragmentation of environmental matters may have on the conservation of fauna and flora. Furthermore, the public administration (which includes the administration of the environment) must be governed by the democratic values and principles enshrined in the Constitution. An example of such a principle is the promotion of efficient, economic and effective use of resources.<sup>10</sup>

Sections 146-150 of the Constitution, however, make provision for possible conflict which may arise between national and provincial legislation falling within a concurrent (shared) functional area. For example, national legislation prevails over provincial legislation if the national legislation is necessary for the protection of the environment (s146 (2)(c)(vi)). The implication of this is that although legislative responsibility regarding the environment is shared by the national and provincial spheres and co-operative governance is promoted, the national sphere is actually in a stronger “bargaining” position. It further implies that the national sphere has a “duty” or responsibility to promulgate legislation to protect the environment (including fauna and flora) if it seems necessary to do so.<sup>11</sup>

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<sup>9</sup>The fragmentation of administrative functions regarding the environment has been discussed in chapter 1.

<sup>10</sup> For other principles, see s 195(1) of the Constitution.

<sup>11</sup> Also see s146 (4) in this regard.

Glazewski<sup>12</sup> is of the opinion that the separate listing of “nature conservation” and “environment” reflects the tension between the “green” nature conservation issues and “brown” environmental management concerns.<sup>13</sup> The Kumleben Commission<sup>14</sup> report also refers to the dichotomy between environmental management and nature conservation. It states that the term “nature conservation” refers to “... the preservation and promotion of biodiversity, ecosystems and ecological processes and includes the sustainable use of plants and animals for the benefit of humankind”. “Environment” is seen as a broader concept, described as “... the physical condition surrounding an individual or a community”.<sup>15</sup> The Commission acknowledges that nature conservation is a subsidiary component of the environment and that the two cannot be divorced from each other.

Other characteristics of the Constitution include constitutionalism,<sup>16</sup> the rule of law,<sup>17</sup> democracy and accountability;<sup>18</sup> separation of powers and checks and balances.<sup>19</sup>

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<sup>12</sup> Glazewski, *J Environmental Law in South Africa* (2000) Butterworths Durban 426.

<sup>13</sup> “Brown” issues include environmental management issues such as the various types of pollution control. See Glazewski (2000) op cit 416, 418 & 426; Peart, R & Wilson, J “Environmental Policy-making in the New South Africa” (1998) 5 *SAJELP* 238.

<sup>14</sup> A Board of Investigation into Institutional Arrangements for Nature Conservation in South Africa appointed by the government in 1998. Glazewski (2000) op cit 417.

<sup>15</sup> Glazewski (2000) op cit 418 & 426.

<sup>16</sup> The basis of constitutionalism is that the power of the state is derived from a written constitution and that the state’s powers should be limited to those set out in the Constitution. See De Waal et al (2000) op cit 7; Burns (1998) op cit 3.

<sup>17</sup> The purpose of the rule of law is to protect basic individual rights by requiring the government to act in accordance with pre-announced, clear and general rules that are enforced by impartial courts in accordance with fair procedures. However, some academics use the concept to advocate respect for civil, social, economical and political rights. Others argue that the essence of the rule of law is the “principle of legality”, which requires decisions to be made by the application of known and general principles of the law. See De Waal et al (2000) op cit 9-12; Burns (1998) op cit 9.

<sup>18</sup> Democracy refers to the relationship between the state and the citizen. The traditional view of democracy is “government of the people, by the people and for the people”. This implies that government takes place with the consent of the people and towards the interests of the people. Accountability means that the administration must account to parliament for its actions. For further detail, see De Waal et al (2000) op cit 12-16; Burns, (1998) op cit 4, 36 & 40.

<sup>19</sup> The doctrine of the separation of powers (the trias politica) requires that the functions of government must be classified as either legislative, executive or judicial and that they must be performed by separate branches of government. A very important aspect is that the judiciary is independent. For

### 1.2.1.2 The applicability of the Bill of Rights (section 8)

The practical effect of the environmental right (s24 of the Constitution) and the extent to which fauna and flora will be conserved will depend largely on the applicability of the Bill of Rights in a given situation. This implies that the Bill of Rights, and thus the environmental right, might have only vertical application, meaning that it applies only to disputes between the state and its individuals; or it might also have horizontal application, meaning that it can be invoked in disputes between private parties.<sup>20</sup> Glazewski<sup>21</sup> and De Waal et al<sup>22</sup> are however of the opinion that this matter is largely clarified by section 8(2) of the Constitution which confirms both the vertical and horizontal application of the Bill of Rights.<sup>23</sup>

Nevertheless, Glazewski points out that most commentators are in agreement that the Bill of Rights, and therefore also the environmental right, does have horizontal application but that the extent of such application is still debated.<sup>24</sup> He also avers that the Constitution does not allow for the “full-scale” direct horizontal application of the Bill of Rights.<sup>25</sup>

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more detail, see De Waal et al (2000) op cit 16-19; Burns (1998) op cit 34.

<sup>20</sup> For a discussion on the applicability of the Bill of Rights under the interim Constitution, see Burns (1998) op cit 19-21.

<sup>21</sup> Glazewski (2000) op cit 88.

<sup>22</sup> De Waal et al (2000) op cit 41.

<sup>23</sup> Section 8 regulates the application of fundamental rights in the relationship between the state and the individual (the public-law relationship) (s 8(1)), as well as in the relationship between individuals (the private-law relationship) (s8(2)). See Ferreira, GM “Constitutional values and the application of the fundamental right to a clean and healthy environment to the private-law relationship” (1999) 6 *SAJELP* 175. For a detailed discussion on the application of the Bill of Rights, see De Waal et al (2000) op cit 41-52.

<sup>24</sup> Glazewski (2000) op cit 88; Loots, C “The impact of the Constitution on Environmental law” (1997) 4 *SAJELP* 59.

<sup>25</sup> Glazewski, J “Environmental Justice and the new South African democratic legal order” (1999) *Acta Juridica* 9.

### 1.2.1.3 Limitation clause (section 36)

Fundamental rights are not absolute. Their boundaries are set by the rights of others and by the legitimate needs of society. In the South African Constitution, a general<sup>26</sup> limitation clause (section 36) sets out specific criteria for the restriction of fundamental rights in the Bill of Rights. In terms of section 36, a law may legitimately limit the application of a right in the Bill of Rights, if it is (a) a law of general application<sup>27</sup> and (b) the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom,<sup>28</sup> taking into account all relevant factors prescribed in this section.<sup>29</sup>

Any restrictions imposed by or to the environmental right in a law of general application has to be weighed against the limitation clause. It may, for example, be possible to justify certain actions detrimental to the environment on the basis that such actions constitute a “reasonable and justifiable” limitation of the environmental right. The limitation clause can thus be applied to the benefit or detriment of the environment.<sup>30</sup>

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<sup>26</sup> The limitation clause is “general” because it applies to all the rights in the Bill of Rights. See Rautenbach, IM & Malherbe, *EFJ Constitutional Law* (1999) (3<sup>rd</sup> ed) Butterworths Durban 346; De Waal et al (2000) op cit 133; Burns (1998) op cit 7.

<sup>27</sup> The word “law” includes legislation, common law and customary law. The qualification “law of general application” means that a legislature may not in a law provide for the limitation of the rights of a specific person or a single set of circumstances. See Rautenbach & Malherbe (1999) op cit 348-349.

<sup>28</sup> According to Rautenbach & Malherbe (1999) op cit 349, (b) means that there must be a balance between the limitation and the purpose of the definition. This balance must be found in a “open and democratic society” based on *inter alia* human dignity.

<sup>29</sup> According to s36(1) these factors include the nature of the right and less restrictive means to achieve the purpose of the limitation. For a detailed discussion on these factors, see Rautenbach & Malherbe (1999) op cit 350-357. According to Devenish, these factors were adopted from the dictum of Chaskalson P in *S v Makwanyane* (1995) 3 SA 391 (*A Commentary on the South African Constitution* (1998) Butterworths Durban 91).

<sup>30</sup> For a detailed discussion on the limitation clause, see de Waal et al (2000) op cit 132-153.

### 1.2.2 The environmental right clause (section 24)

Despite a large body of environmental legislation, no environmental right previously existed in South Africa. The inability of the common law and statutory law to protect the environment, eventually led to the inclusion of an environmental right in the Bill of Rights of the Interim Constitution (Act 200 of 1993) in 1994.<sup>31</sup> Although this Interim Constitution attracted much criticism, it was acknowledged that it was the first time in South Africa that a legally enforceable environmental right had been introduced.<sup>32</sup> The environmental right was eventually included in the final Constitution as section 24 of the Bill of Rights. In this way South Africa joined fifty-four nation states that have included some form of environmental right in their constitution.<sup>33</sup> One of the advantages of the constitutional entrenchment of an environmental right is that this right now has overriding force over all ordinary legislation, administrative rules and decisions, as well as over judicial decisions.<sup>34</sup>

Before discussing section 24 of the Constitution in more detail, it is necessary to briefly discuss an environmental right's position in the "classification" of rights. There are four main interpretations of environmental rights, namely human rights, procedural rights, eco-rights and rights of future generations.<sup>35</sup> An environmental right is regarded

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<sup>31</sup> Glazewski, J "The Environment, Human Rights and a new South African Constitution" (1991) 7 *SAJHR* 168; Lyster, R "The protection of Environmental Rights" (1992) 109 *SALJ* 520; Winstanley, T "Entrenching environmental protection in the New Constitution" (1995) 1 *SAJELP* 94; Van Reenen, TP "Constitutional Protection of the environment: Fundamental (Human) right or principle of State Policy?" (1997) 4 *SAJELP* 279.

<sup>32</sup> Winstanley (1995) 1 *SAJELP* op cit 85-97; Bray, E "Fragmentation of the environment: another opportunity lost for a nationally co-ordinated approach?" (1995) 10 *SAPR/PL* 174; Labuschagne, JMT "Actio popularis, omgewingsreg en regte van die natuur" (1994) 2 *SAPR/PL* 458; Knoetze, E "Sustainability in the South African National Environmental Policy" (1996) *Obiter* 309.

<sup>33</sup> Winstanley (1995) 1 *SAJELP* op cit 94; Van Reenen (1997) 4 *SAJELP* op cit 279. A "right" is a legal norm applying to legal relationships in general. To have a legal right is to have a claim to something and against someone, the recognition of which is required by law. It is beyond the scope of this study to discuss the philosophy of what a "right" is or the various interpretations of environmental rights. For more detail, see Knoetze (1996) *Obiter* op cit 310; Loots (1997) 4 *SAJELP* op cit 61; Kidd (1997) op cit 12, 38.

<sup>34</sup> For more information on the advantages and disadvantages of a fundamental right, see Van Reenen (1997) 4 *SAJELP* 269 & 281-287.

<sup>35</sup> Theron, C "Environmental Rights: An overview of Interpretations" (1997) 4 *SAJELP* 24.

as a human right<sup>36</sup> because the goal of environmental protection is to enhance the quality of human life. To protect human life, the environmental life-support system must be maintained and protected (an anthropocentric approach).<sup>37</sup> Human rights are traditionally categorised into three “generations”<sup>38</sup> or blue, red and green rights. Environmental rights are classified as “third generation” or “green” rights<sup>39</sup> and are the only “green” rights in the Constitution.<sup>40</sup> A fundamental human right gives the individual an enforceable personal right<sup>41</sup> and forces the government to act in accordance with the stipulations in this right. Environmental rights are also regarded as solidarity rights<sup>42</sup> or social rights. The latter means that they are not seen as an individual right but as a collective (group) right that is not self-operating but requires legislation in order to be exercised.<sup>43</sup>

<sup>36</sup> According to Theron (1997) 4 *SAJELP* op cit 30, there is no general agreement as to what constitutes a “human right”. There is a difference of opinion whether a right is “human” on the basis of its source or because of its nature and substance. For further detail, see Theron (1997) 4 *SAJELP* op cit 28-29.

<sup>37</sup> Theron (1997) 4 *SAJELP* op cit 30.

<sup>38</sup> Examples of first generation rights are civil and political rights while second generation rights include economic, social and cultural rights. The right to nature conservation and to a clean and healthy environment are examples of third generation rights. All three generations of rights have specific characteristics, for example one of the characteristics of the third generation rights is that the emphasis is no longer on individual rights but on collective rights. For further information on these rights, see Van der Vyver, JD “State Sovereignty and the environment in International Law” (1992) *SALJ* 479-482; Theron (1997) 4 *SAJELP* op cit 33-34; Glazewski (2000) op cit 80.

<sup>39</sup> For further detail, see Theron-Nelson, C “A Jurisprudential overview of the question what does the right to a decent environment mean?” (1999) 6 *SAJELP* 205 & 209; Theron (1997) 4 *SAJELP* op cit 25-35; Van Reenen, TP “*Locus standi* in South African Environmental Law: A Reappraisal in international and comparative perspective” (1995) 2 *SAJELP* 143; Van Reenen (1997) 4 *SAJELP* op cit 275; Burger, JC “Die wysgerige grondslae van Omgewingsbewaring” (1991) 1 *SAPR/PL* 3-15; Glazewski (1991) 7 *SAJHR* op cit 172; Van der Vyver (1992) *SALJ* op cit 482; Ferreira, GM “Omgewingsbeleid en die fundamentele reg op ‘n skoon en gesonde omgewing” (1999) 1 *TSAR* 90; Barnard, D *Environmental Law for All* (1999) Impact Books Pretoria 49.

<sup>40</sup> For further comments on third generation rights, see South African Law Commission’s Report *Interim Report on Group and Human Rights* Project 58 (1991) 7; Van Reenen (1995) 2 *SAJELP* op cit 143; Van der Vyver (1992) *SALJ* op cit 482.

<sup>41</sup> Van Reenen (1997) 4 *SAJELP* op cit 278 states that s24 represents a fundamental right and not a state directive as indicated in the draft White Paper on Biological Diversity. Glavovic, PD “A Commentary on the draft White Paper on Biological Diversity” (1997) 4 *SAJELP* 328 is also not clear if this limited interpretation of s24 is correct. It is an important aspect as contrary to a fundamental right, a state directive does not give an individual a forcible right as it only requires the government’s attention and not its action. For a detailed discussion on fundamental rights and state directives, see Van Reenen (1997) 4 *SAJELP* op cit 270-275.

<sup>42</sup> According to Theron (1997) 4 *SAJELP* op cit 34, the right to the environment assumes solidarity with other human beings and humankind.

<sup>43</sup> Knoetze (1996) op cit 307 & 312; Glazewski (1991) 7 *SAJHR* op cit 172; Theron (1997) 4 *SAJELP*

From an environmental point of view, section 24 is probably the most important section of the Constitution. Section 24 reads:

“Everyone has the right —

- (a) to an environment that is not harmful to their health or well-being; and
- (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that—
  - (i) prevent pollution and ecological degradation;
  - (ii) promote conservation; and
  - (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development”.

Section 24 explicitly affords individuals a right against the state to enforce the protection and conservation of the environment. Section 24(a) is directed at health issues<sup>44</sup> and is a tool in the fight against pollution.<sup>45</sup> It is thus unlikely to be used in promoting conservation of the natural environment, unless the courts give a very wide interpretation to the word “well-being”.<sup>46</sup>

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op cit 34.

<sup>44</sup> The right to a decent environment is interpreted as a human right that is essentially anthropocentric. The environment is thus valued according to a human purpose, in this instance the health of humans. A description of an anthropocentric view is that it acknowledges humans as part of their environment; in fact as the dominant species who can control the environment. See Theron (1997) 4 *SAJELP* op cit 25, 30 & 35.

<sup>45</sup> In *Minister of Health and Welfare v Woodcarb (Pty) Ltd and Another* (1996) 3 SA 155 (N), it has been used by the state to enforce environmental law by way of a civil action. Loots (1997) 4 *SAJELP* op cit 58 & 60; Bray, E “ ‘Clearing the Air-Industry Polluters, Beware’ *Minister of Health and Welfare v Woodcarb (Pty) Ltd and Another*” (1996) 3 *SAJELP* 211; Barnard (1999) op cit 49.

<sup>46</sup> According to Kidd, M “Suburban Aesthetics and the Environmental Right” (1999) 6 *SAJELP* 262, the courts have not yet cast any light on the meaning of “well-being”, although it has been suggested that it includes notions of concern for the aesthetic dimensions of the environment. He is of the opinion that the environmental right is applicable in *McCarthy and Others v Constantia Property Owners’ Association and Others* 1999 (4) SA 847 (C), not in the sense to protect the environment, but rather as the aspect of the right that protects people’s environmental *well-being*. This he argues is because a “sense of place” of a location may fall under the concept of “well-being” and a quiet suburb would be harmed by excessive development as was intended by the developers of a shopping centre.

Section 24(b) is especially relevant to the conservation of fauna and flora as it imposes an obligation on the state to have the environment protected “through reasonable legislative and other measures” that prevent ecological<sup>47</sup> degradation and promote conservation.<sup>48</sup> Knoetze<sup>49</sup> is of the opinion that this obligation may lead to a more holistic and co-ordinated approach to environmental issues through clearly defined goals for administration, better planning and co-ordination in the protection of the environment and providing for the much-needed environmental ethos lacking in South African law.

However, Winstanley,<sup>50</sup> is of the opinion that the environmental right may be severely curtailed in that the measures must be “reasonable”. If “reasonable” is considered from the state’s perspective, it may well be that the lack of resources could be cited as a reason for the government failing to take the desired measures. However, section 2 of the Constitution clearly states that the obligations imposed by the Constitution “must be fulfilled”. The courts are competent to order state authorities to comply with their constitutional obligations as illustrated in *Wildlife Society of Southern Africa & Others v Minister of Environmental Affairs & Tourism of the Republic of South Africa & Others* 1996 (3) SA 1095 (Tk). In this case a mandamus was approved to compel the state (Minister of Environmental Affairs and provincial authorities) to fulfil its statutory responsibility towards nature conservation.<sup>51</sup>

However, there are also shortcomings in section 24(b) that may affect the protection of fauna and flora negatively. One of these shortcomings is that the list of purposes for which the measures are to be taken, is vague and lacks comprehensiveness. Firstly it is

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<sup>47</sup> I am of the opinion that “ecological” as used in section 24(b) indicates an intent of the legislature that not only species *per se* must be protected, but also their habitat. This habitat approach to nature conservation is essential to the effective conservation of fauna and flora.

<sup>48</sup> Also see, Knoetze (1996) *Obiter* op cit 310; Kidd (1997) op cit 12, 38; Loots (1997) 4 *SAJELP* op cit 61.

<sup>49</sup> Knoetze (1996) *Obiter* op cit 308. Also see Loots (1997) 4 *SAJELP* op cit 61; Kidd (1997) op cit 12, 38.

<sup>50</sup> Winstanley, T “The Final Constitution and the Environment” (1997) 4 *SAJELP* 138.

<sup>51</sup> For more discussion of this case, see Kidd (1999) 6 *SAJELP* op cit 257-263; Kidd (1997) op cit 30; De Waal, M “Omgewingsreg” (1996) *De Rebus* 655-666; Van Wyk (1999) op cit 62.

seen as vague because section 24(b)(ii) refers to measures that “promote conservation”, without specifying what is to be conserved. Secondly, it lacks comprehensiveness because section 24(b)(i) refers to the prevention of “pollution and ecological degradation”, but not rehabilitation of already polluted environments. Furthermore, although the ambit of the three sub-clauses of section 24(b) is very wide, it is conceivable that there are areas of environmental management that are not addressed in the list.<sup>52</sup> As there is no catch-all phrase that would address this problem, it is a source of concern that some issues may be excluded from the environmental right simply because the list is incomprehensive.<sup>53</sup> A further implication of this is that a judicial officer interpreting the section may not “read into” the provision considerations that are not specified.<sup>54</sup>

The wording of section 24(b) is in the nature of a socio-economic right implying a positive duty on the state to provide environmental quality. Glazewski<sup>55</sup> points out that section 24(b) should not be read as implying only that everyone is entitled to legislative and other measures (that promote 24 (b)(i) to 24 (b)(iii)), but also that in addition all “legislative and other measures” must comply with the criteria set in section 24(b)(i)-(iii). This means that the protection of the environment and the promotion of conservation must be taken into consideration when legislation and measures are formulated.

Another important benefit of the environmental right is that it acts as a “trigger” for the utilisation of other sections of the Constitution, the best example being the *locus standi* clause. There are several other sections in the Bill of Rights which do not concern the environment directly, but are important in assisting the government, individuals and environmental groups to conserve fauna and flora by means of “regulating”

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<sup>52</sup> According to Kidd (1997) op cit 138, an example of such an area would be measures aimed at preserving (rather than conserving) biodiversity.

<sup>53</sup> Winstanley (1997) 4 *SAJELP* op cit 138. Also see Knoetze (1996) *Obiter* op cit 311.

<sup>54</sup> This is called the *expressio unius est exclusio alterius* rule of interpretation. See Kidd (1997) op cit 38.

<sup>55</sup> Glazewski (2000) op cit 87.

fundamental rights that might have an impact on the environment. These provisions, which have an influence on the enforceability of environmental rights and legislation, will now be discussed briefly.

### 1.2.3 Supporting rights

#### 1.2.3.1 *Locus standi* clause (section 38)

*Locus standi* or “standing” refers to whether a person who approaches the court is legally permitted to present a matter to the court for adjudication.<sup>56</sup> The common law rules of *locus standi* require the applicant to have a sufficient, personal and direct interest in the matter and disqualify applicants from litigating in the public interest, thereby denying a person standing to protect the environment as a matter of public interest. The South African law has traditionally<sup>57</sup> followed these common law rules which have over a long time caused a serious impact on environmental protection in South Africa.<sup>58</sup> Fortunately, the Constitution not only provides for access to the courts,<sup>59</sup> but has also altered the *locus standi* position substantially. The Bill of Rights (s38) liberalises the *locus standi* requirement regarding litigation involving the rights contained in the Bill of Rights.<sup>60</sup>

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<sup>56</sup> Van Reenen (1995) 2 SAJELP op cit 121; Glazewski (1999) *Acta Juridica* op cit 18; Van Wyk (1999) op cit 60.

<sup>57</sup> According to Glazewski, this has not always been the case. Roman law recognised the *actio popularis* or citizen’s action, whereby any member of the public could bring an action in the public interest. According to the nineteenth century case of *Dell v The Town Council of Cape Town* ((1879) 9 Buch 2) it appears that in South African law two centuries ago, legal standing was not a requirement. He further points out that in following cases decided at the turn of the twentieth century, such as *Patz v Green & Co* (1907 TS 427) and *Dabrymple & Others v Colonial Treasurer* (1910 TS 372), the tide turned and the requirement of a special interest peculiar to the applicant before being given a hearing, was imposed into our law from the English law. This again severely curtailed the ability of both individuals and groups to litigate in the public interest. (Glazewski (1999) *Acta Juridica* op cit 18 & 19)

<sup>58</sup> Loots (1994) 1 SAJELP op cit 28, Van Wyk (1999) op cit 60; Glazewski (1999) *Acta Juridica* op cit 18, 20. For reasons given why it was necessary to apply the strict common law requirements for standing, and counter arguments, see Loots (1994) 1 SAJELP op cit 29.

<sup>59</sup> Section 34 of the Bill of Rights provides that “Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum”.

<sup>60</sup> If the right being relied on is not in the Bill of Rights, s38 does not apply and the common law rules for *locus standi* will apply. See Kidd (1999) 6 SAJELP op cit 263; Glazewski (1999) *Acta Juridica* op cit 20. However, it is relevant to refer to *McCarthy and Others v Constantia Property Owners*’

Section 38 provides that:

“anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant an appropriate relief, including a declaration of rights. The persons who may approach a court are —

- (a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;
- (d) anyone acting in the public interest;<sup>61</sup> and
- (e) an association acting in the interest of its members.”

The post-1994 position is thus that any person, whether acting in his or her own interest or in the public interest, who can invoke the environmental right in the

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*Association and Others* 1999 (4) SA 847 (C) although the environmental right is only tangentially involved in this case. The significance of the judgment in this case is that applicants who are relying on a right *which is not* in the Bill of Rights will not have to satisfy the common law rules relating to *locus standi* which existed pre-1994, but rather the common law rules in conformity with the “spirit, purport and object” as stated in section 39 of the Constitution. Judge Davis relied on section 39 of the Constitution, which provides that when interpreting any legislation and when developing *inter alia* customary law, every court or tribunal or forum must promote the spirit, purport and object of the Bill of Rights. The Judge was of the opinion that s39 entails a “generous regime of access to courts” (at 855C) as well as protection of the environment, to broaden the common law strictures on *locus standi*. See Kidd (1999) 6 *SAJELP* op cit 257-264 for a detailed discussion of the McCarthy case with regard to *locus standi*. Also Van Wyk (1999) op cit 62.

<sup>61</sup>In *Transvaal Canoe Union and another v Butgereit and another* 1986 (4) SA 207 (T) it was held that an organisation has interest/standing in its own right. Despite this, in three cases (for example *Natal Fresh Produce Growers' Association and others v Agroserve (Pty) Ltd and others* 1990 (4) SA (N) at 758G—559D) it was held that an association did not have *locus standi* to represent its members and that the members whose interests are adversely affected should be applicants themselves. (Loots, C “Making Environmental Law Effective” (1994) 1 *SAJELP* 31, 32). Thereafter South African courts have repeatedly reaffirmed that South African law knows no *actio popularis*. (Lyster (1992) 109 *SALJ* op cit 520). The Interim Constitution introduced an *actio popularis* in South Africa which was applicable to environmental matters. Also see Labuschagne (1994) 2 *SAPR/PL* op cit 458 and Van Reenen (1995) 2 *SAJELP* op cit 144 for arguments that an *actio popularis* exists in South Africa with regard to environmental issues.

Constitution will have *locus standi* irrespective of whether that person or organisation is adversely affected by the alleged infringement of rights. This provision is illustrated in *Minister of Health and Welfare v Woodcarb (Pty) Ltd and Another* (1996) (3) SA 155 (N) where the court held that the Minister of Health and Welfare had *locus standi* in terms of section 38 of the Constitution to claim an interdict in the interest of those people whose rights were being infringed.<sup>62</sup> In *Wildlife Society of Southern Africa v Minister of Environmental Affairs and Tourism of the Republic of South Africa* 1996 (3) SA 1095 (Tk) the court also held that the respondent (the environmental organisation) had *locus standi* in terms of section 7(4)(b) of the Interim Constitution and approved a mandamus to compel the state (the Minister of Environmental Affairs and Tourism) to fulfil its statutory responsibility towards nature conservation.

In *Van Huyssteen v Minister of Environmental Affairs and Tourism* 1995 (9) BCLR 1191 (C), the court was of the opinion that the requirement of a “direct interest” before *locus standi* could be established is an “archaic” interpretation which predated the Constitution (in this case the interim Constitution). The court held that section 7(4)(b) signalled an intention to end the restrictive approach to *locus standi* and thus that Van Huyssteen as trustee had *locus standi* to sue on behalf of a trust.<sup>63</sup>

Section 38(c) also introduces into South African law the concept of the “class action”. This is an action brought by one person on behalf of or in the interest of a group or class of persons. Contrary to the situation in the USA, the person claiming relief in terms of this section need not be adversely affected. Thus any person, a natural person, juristic person or state official, may claim relief in the interest of other persons who are adversely affected by the infringement of the environmental right.<sup>64</sup> It is interesting to note that in *Beukes v Krugersdorp Transitional Local Council* (1996) (3) SA 467 (W),<sup>65</sup>

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<sup>62</sup> Also see Loots (1997) 4 SAJELP op cit 60; Bray (1996) 3 SAJELP op cit 211.

<sup>63</sup> For more discussion on this case, see Bray, E “*Locus standi* in recent case law and its possible impact on environmental litigation” (1996) 11 SAPL/PL 592.

<sup>64</sup> Loots (1997) 4 SAJELP op cit 65; Kidd (1997) op cit 38. For further comments on citizen suit clauses, see Loots (1994) 1 SAJELP 29-33.

<sup>65</sup> This case dealt with the constitutionality of “flat rate” charges levied by a local authority in townships,

Judge Cameron held that attachments to the affidavit of the applicant were sufficient evidence to identify a group or class of persons, in this case ratepayers of Krugersdorp. Judge Cameron held that it would be counter to the spirit and purport of the Interim Constitution to require persons who identified themselves as members of a class to reiterate with formalistic precision the complaint with which they associated themselves.<sup>66</sup>

Section 32 of NEMA<sup>67</sup> reinforces and liberates the constitutional position regarding *locus standi* by extending it, firstly, to a breach (or threatened breach) of any provision of NEMA or any other statutory provision concerned with the protection of the environment or the use of natural resources and secondly, by incorporating subsection (1)(e) which makes provision for any person or group to seek appropriate relief in the interest of protecting the environment. The implication of section 32 is that an applicant who is seeking to enforce the provisions of any relevant statutory enactment does not have to rely on the *locus standi* provisions in section 38 of the Constitution. This is especially important if the alleged breach or threat concerns an environmental issue that is *not* covered in the Bill of Rights (such as in the *McCarthy* case already mentioned).<sup>68</sup> Thus, the liberalisation of the *locus standi* requirement by the Constitution, coupled with the extension thereof by NEMA, considerably increases the opportunities for public interest litigation in the environmental sphere.<sup>69</sup>

#### 1.2.3.2 Access to information clause (section 32)

One of the main objectives of the Constitution is to create an “open and democratic society”. One way of achieving this is by making provision for a right of access to

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as opposed to higher “user-based” charges in formerly white areas. The court examined the *locus standi* principle in terms of section 7(4)(b)(iv) of the Interim Constitution on class actions.

<sup>66</sup> For more detail on the case, see Bray (1996) 11 *SAPR/PL* op cit 594-595.

<sup>67</sup> NEMA will be discussed later in this chapter.

<sup>68</sup> Kidd (1999) 6 *SAJELP* op cit 2, 65; Bray, E “Co-operative Governance in the context of the National Environmental Management Act 107 of 1998” (1999) 6 *SAJELP* 8; Van Wyk (1999) op cit 61.

<sup>69</sup> Glazewski (1999) *Acta Juridica* op cit 21. A discussion of the provisions of NEMA specifically relevant to flora and fauna will follow later in this chapter.

information. Such a right is entrenched in section 32 of the Constitution and provides that everyone has the right of access to any information held by the state or its organs at any level (vertical application) or by another person (in stated circumstances) (horizontal application) if the information is required for the exercise or protection of any rights. Public access to information is fundamental to encourage transparency and accountability in the way government and public authorities operate and is a weapon in the fight against corruption.<sup>70</sup>

According to Du Plessis,<sup>71</sup> this is a passive obligation on the part of the state as it has to provide the information *only* when requested to do so. According to NEMA (s (31)(2)) the minister may make regulations to regulate a right to environmental information against private persons or institutions. However, there is also no obligation on the Minister to do so.

This “right to know” is important for members of the public who wish to participate in decision-making processes dealing with the protection of the environment, or who wish to effectively enforce environmental laws.<sup>72</sup> The recognition of a right to information on the environment does not guarantee the protection of the environment but provides a tool to monitor actions that may be detrimental to the environment.<sup>73</sup> According to Van Wyk, a knowledgeable and involved public can only be to the benefit of nature conservation as a whole.<sup>74</sup> The Promotion of Access to Information Act 2 of 2000 currently regulates access to information in South Africa.

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<sup>70</sup> De Waal (2000) et al op cit 438. For a detailed discussion on this right, see De Waal (2000) et al op cit 436-448.

<sup>71</sup> Du Plessis, W “Enforcement of environmental rights by way of a right to information” (1999) *Obiter* 99.

<sup>72</sup> It must be noted that NEMA has no reference to the time period in which the information should be disclosed. However, provisions are made for various time limits in the Promotion of Access to Information Act 2 of 2000.

<sup>73</sup> Du Plessis (1999) *Obiter* op cit 94, 103, 107, 108. It is uncertain what the position in South Africa is with regard to the access to raw data or incomplete information. For proposals with regard to the access of information, see Du Plessis (1999) *Obiter* op cit 109-112.

<sup>74</sup> Van Wyk (1999) op cit 51. Public involvement in decision making and the role of environmental education in the protection of fauna and flora will be discussed in chapter 4.

The right to environmental information is not an absolute right, but restrictions<sup>75</sup> are placed on it by section 36 of the Constitution, the so-called “limitation clause”.<sup>76</sup> However, there is no doubt that the validity of “secrecy clauses” found in many environmental-related statutes, for example in section 17 of the Hazardous Substances Act 15 of 1973, is subject to attack on the basis of section 32. Section 32 (1)(b) further provides that a right to information may be enforced against private persons if it is required for the protection of any rights.<sup>77</sup> The implication of section 32 (1)(b) is that essential information could also be obtained in civil cases on the environment.

This right to access of information will facilitate active participation of the public in decision-making processes that involve the environment. It will also enable the state to be more effective in the enforcement of environmental laws and thus in protecting fauna and flora, as disclosure of information can now be demanded constitutionally.<sup>78</sup>

### 1.2.3.3 Other supporting rights

There are other clauses in the Bill of Rights that have an indirect effect on the environment. These clauses include the right to just administrative action (s33),<sup>79</sup> the

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<sup>75</sup> For examples of exemptions, see Du Plessis (1999) *Obiter* 100, 101.

<sup>76</sup> NEMA (s31(1) (c)) also provides for restrictions on the access of information.

<sup>77</sup> Loots (1997) 4 *SAJELP* op cit 67; also see Kidd, M “Presumption as to illegal importation of ivory set aside” (1997) 4 *SAJELP* 331; Kidd (1997) op cit 40.

<sup>78</sup> Also see s195 (1) (e) where the public administration is required to encourage the public to participate in policy-making and (g) where it is required to foster transparency by providing the public with “timely, accessible and accurate information”.

<sup>79</sup> This clause provides that everyone has the right to administrative actions that are lawful, reasonable and procedurally fair. As the control and enforcement of environmental law is mainly in the hands of the administration, lawful, reasonable and procedurally fair actions that affect the environment are very important from a conservation point of view and for democratic, transparent and accountable environmental administration. For further comments, see Loots (1997) 4 *SAJELP* op cit 66; Kidd (1997) op cit 41; Burns (1998) op cit 125-130; De Waal et al (2000) op cit 449-475.

property clause (s25)<sup>80</sup> and the freedom of trade, occupation and profession (s22).<sup>81</sup> For the purpose of this study it is not necessary to discuss these sections in further detail.

### 1.3 National legislation

The national legislation applicable to fauna and flora in South Africa is administered by the Department of Environmental Affairs and Tourism (DEAT).

#### 1.3.1 National Environment Management Act 107 of 1998 (NEMA)

##### 1.3.1.1 General

NEMA is the product of an environmental management policy development process that included one of the most extensive public participation processes yet seen in South Africa. It came into effect on 29 January 1999<sup>82</sup> and, together with the Environment

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<sup>80</sup> The question posed by this clause for environmental conservation is whether the Constitution prevents the imposition of restrictions on property rights for environmental purposes. According to Kidd (1997) op cit 41 there seems to be no constitutional barrier to the imposition of such restrictions provided they are imposed for purposes of environmental conservation. Thus the property clause furthers the aim of nature conservation and allows for enforcement of environmental laws on private property. Van Wyk (1999) op cit 49 also cites "environmental conservation measures" as an example of measures that places restrictions on the use of property. On the other hand, nature conservation and the enforcement of environmental laws may be "ignored" in order to fulfil the government's commitment to land reform and to bring about equitable access to all South Africa's natural resources (the property clause must be read together with sections 9, 26 and 27 of the Constitution). Property may thus be expropriated in the public interest to ensure land restitution. This has serious implications for national parks and other nature reserve areas as well as natural resources other than land as "property" is not limited to land but can also include water, minerals and other resources. The effect of sections 9 and 25-27 on the conservation of fauna and flora will only become evident when these provisions are implemented. For more information on these sections, see De Waal (2000) et al op cit 181-207, 397-409; Du Plessis, W "Book review. Environmental Law: A South African Guide by M Kidd" (1998) 5 *SAJELP* 174-175.

<sup>81</sup> In terms of this section, every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade may have a negative effect on the environment, because it has been argued that s24 (environment clause) should not interfere with this right. Thus an environmentally harmful trade might be permitted in terms of section 22. Section 22 is closely related to section 25 where potential conservation land is occupied to exercise an occupation. Only the future will determine how the implementation of section 22 will effect the conservation of fauna and flora. For further discussion on this section, see De Waal et al (2000) op cit 346-358; Du Plessis (1998) 5 *SAJELP* op cit 174.

<sup>82</sup> According to Dr G Willems of the DEAT (telephonic conversation on 28-09-01), NEMA is currently

Conservation Act 73 of 1989, is the most important environmental legislation in South Africa.<sup>83</sup>

NEMA places the environment within the process of constitutional transformation and provides for a model framework<sup>84</sup> for the general environmental law-reform programme of the DEAT. Through NEMA, the state has indicated its seriousness about an integrated environmental management programme in South Africa. NEMA is the first national “umbrella” legislation with regard to the environment and will hopefully, in time, transform and co-ordinate most of the currently diverse and fragmented sectors of environmental management in South Africa.<sup>85</sup>

However, Bray<sup>86</sup> is of the opinion that much still needs to be done to “activate” this Act and to implement and concretise the principles of integrated environmental management. She points out that the success (or failure) of integrated environmental management will only materialise once effective and proper enforcement of its principles become visible.

The impact of NEMA on the conservation of fauna and flora will now be discussed.

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under revision with special focus on chapter 5 (Integrated Environmental Management).

<sup>83</sup> NEMA can be relied upon if environmental degradation is about to happen or has happened after the 29 January 1999, but not with regard to damage that occurred before this date, unless the problem is continuing. See Kidd (1999) 6 *SAJELP* op cit 21; Andrews, A “*National Environmental Management Act 108 of 1998*” (1999) (Guide1) Dept of Environmental Affairs and Tourism Pretoria 4.

<sup>84</sup> For a discussion on the practicality of the implementation of the environmental management framework and concerns with regard to the management of NEMA, see Lawrence, R “How manageable is South Africa’s new framework of Environmental Management” (1999) 6 *SAJELP* 61-65.

<sup>85</sup> Bray (1999) 6 *SAJELP* op cit 1; Soltau, F “The National Environmental Management Act and liability for environmental damage” (1999) 6 *SAJELP* 33.

<sup>86</sup> Bray (1999) 6 *SAJELP* op cit 10.

### 1.3.1.2 The importance of NEMA to the conservation of fauna and flora

- a) NEMA's importance is evident from the preamble where there is reference to, among other aspects, the:
- i) promotion of conservation;
  - ii) security of ecologically sustainable development and the use of natural resources while promoting justifiable economic and social development; and
  - iii) the desirability that the law should be enforced by the state and that the law should facilitate the enforcement of environmental laws by civil society.
- b) NEMA has a profound influence on the interpretation of statutory and administrative matters dealing with the environment because the national environmental management principles (s2) must guide the interpretation, administration and implementation of any law concerned with the protection or management of the environment. These principles apply throughout the Republic to the actions of all organs of state that may significantly affect the environment. Besides applying in a constitutional context, these principles must also serve *inter alia*, as a general framework against which plans, as set out in the Act, must be formulated.

With (a) and (b), NEMA has given effect to section 24(b) of the Constitution.<sup>87</sup> Its promulgation also fulfilled the duty placed on the state in terms of section 24(b) to protect the environment through "reasonable legislative and other measures".

A central principle (s2(3)) determines that "development must be socially, environmentally and economically sustainable". Another principle (s2(4)(a)) stresses sustainable development and provides that "sustainable development" requires the consideration of all relevant factors including:

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<sup>87</sup> The preamble of NEMA also states that "everyone has the right to an environment that is not harmful to his or her health or well being", thereby also giving effect to s24(a) of the Constitution.

- i) that the disturbance of ecosystems and loss of biological diversity are avoided, or,
  - ii) where it cannot be altogether avoided, are minimised and remedied; and that pollution and degradation of the environment are avoided, or, where they cannot be altogether avoided, are minimised and remedied.<sup>88</sup>
- c) One of the national environmental management principles (s2(4)(l)) states that there must be intergovernmental co-ordination and harmonisation of policies, legislation and actions relating to the environment. As already discussed in this chapter, NEMA reinforces the constitutional basis of co-operative governance (s40-41 of the Constitution) in the field of environmental management. NEMA (s7) also provides for the establishment of a Committee for Environmental Coordination with the objective of promoting the integration and co-ordination of environmental functions by the relevant organs of state and of promoting the achievement of the objectives of the environmental implementation plans and environmental management plans.<sup>89</sup> The concept of “co-operative governance” runs through the Act like a thread and may be regarded as the backbone of integrated environmental management in South Africa today. This is crucial in view of the fragmented and piecemeal approach to environmental legislation and its implementation in the past.<sup>90</sup>

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<sup>88</sup> Other principles include environmental justice (s(2)(4) (c)), equitable access to environmental resources (s(2)(4) (d)) and access to information (s(2)(4) (k)). For more principles, see Van Wyk (1999) op cit 244.

<sup>89</sup> As already discussed in chapter 1, NEMA provides for the preparation of environmental implementation plans by national departments (listed in Schedule 1) and by every provincial department. It also provides for the preparation of environmental management plans by national departments listed in Schedule 2. These plans have a specific purpose, *inter alia* to co-ordinate and harmonise the plans, policies, programmes and decisions of the relevant national departments; to give effect to the principles of co-operative government in terms of the Constitution. For more information on these plans, see Van Wyk (1999) op cit 246.

<sup>90</sup> Soltau (1999) 6 *SAJELP* op cit 33; Bray (1999) 6 *SAJELP* op cit 2, 6.

In practising co-operative governance, proper and effective “environmental departments should be established in the provincial and local spheres of government. Environmental managers and enforcement officers should be trained and equitable budget allocations made to enable environmental departments to govern their environmental affairs effectively. Furthermore, in order for the different government spheres to deliver a better service, they need to plan together<sup>91</sup> and share expertise and other resources. It seems that co-operative governance will result in a more focused approach to conservation efforts, which in turn will lead to the optimum utilisation of financial and human resources. This should result in the successful conservation of fauna and flora.

- d) Section 28 establishes a general duty of care on each citizen to prevent pollution or degradation of the environment and provides for liability in cases where this duty is breached. This section is not only important because it applies retrospectively, but because the inclusion of “degradation” enlarges the ambit of the duty to encompass also general reductions in the quality of the environment.

Even where harm to the environment is authorised by law (for example in terms of section 9 of the Minerals Act 50 of 1991) or cannot reasonably be avoided or stopped, there nevertheless exists a duty to minimise and rectify such degradation of the environment. However, care should be taken that the “cannot reasonably be avoided” criterion does not become a loophole for polluters.<sup>92</sup>

- e) As previously discussed,<sup>93</sup> the provisions of the Constitution with regard to locus *standi*, are reinforced and further liberated by section 32 of NEMA. For example, it ensures standing for anyone who wants to approach the court in the interest of the environment.

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<sup>91</sup> Section 17-19 of NEMA provides for conflict management to facilitate effective co-operation between the organs of the state.

<sup>92</sup> Bray (1999) 6 *SAJELP* op cit 8; Soltau (1999) 6 *SAJELP* op cit 44,47 & 51.

<sup>93</sup> See also *locus standi* discussion under “supporting rights” under the Constitution.

f) NEMA makes provision in section 2(4)(i) for the conducting of an environmental impact assessment (EIA).<sup>94</sup> As already discussed in chapter 1, this is a tool to achieve sustainable development. It ensures that all relevant factors, such as the social, economic and environmental impacts of activities (including their disadvantages and benefits) are considered, assessed and evaluated before a development starts. Decisions must be appropriate in the light of the consideration and assessment.

Other important provisions of NEMA that have an impact on the conservation of fauna and flora and relate to enforcement, will be discussed in chapter 3.

In the light of the above positive effects, it is not difficult to see why NEMA has been described as “breaking new ground”,<sup>95</sup> “a pioneering piece of legislation”,<sup>96</sup> “a landmark statute”,<sup>97</sup> “a milestone in South African environmental law”,<sup>98</sup> “a cornerstone of environmental management”,<sup>99</sup> and “a brave and innovative measure”.<sup>100</sup> But it is a new Act and its success depends to a large extent on the effective enforcement of its provisions.

### 1.3.2 Environment Conservation Act 73 of 1989

The preamble of this Act states that it intends “to provide for the effective protection and controlled utilisation of the environment and for matters incidental thereto”.

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<sup>94</sup> NEMA also refers to an EIA in s(24)(1)(c) and s(24) (7)(b) regarding the implementation of integrated environmental management. For more information on EIAs, see Peckham, B “environmental impact assessments in South African Law” (1997) 4 *SAJELP* 120.

<sup>95</sup> Kidd (1999) 6 *SAJELP* op cit 31.

<sup>96</sup> Soltau (1999) 6 *SAJELP* op cit 33.

<sup>97</sup> Bray (1999) 6 *SAJELP* op cit 1.

<sup>98</sup> Soltau (1999) 6 *SAJELP* op cit 51.

<sup>99</sup> Bray (1999) 6 *SAJELP* op cit 1.

<sup>100</sup> Milton, J “Sharpening the dog’s teeth: of NEMA and criminal proceedings” (1999) 6 *SAJELP* 53. For a detailed, easy to understand, explanation of NEMA, how, when and by whom it can be used, see Andrews (1999) op cit 1-20. For general comments on NEMA, see Ferreira, GM “Volhoubare ontwikkeling, regverdigbare ontwikkeling en die fundamentele reg op 'n skoon en gesonde omgewing” (1999) 3 *TSAR* 449-450.

As already mentioned, this Act,<sup>101</sup> together with NEMA, is South Africa's most important environmental legislation regarding indigenous terrestrial wild fauna and flora.<sup>102</sup> However, NEMA has repealed most of the provisions of the Act<sup>103</sup> while the remaining sections aim to conserve fauna and flora by declaring nature areas<sup>104</sup> such as protected natural environments (s16),<sup>105</sup> special nature reserves (s 18)<sup>106</sup> and limited development areas (s23).<sup>107</sup> The declaration of all three areas is subject to conditions

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<sup>101</sup> It is important to note the Environment Conservation Extension Act 100 of 1996 extends the application of the Environment Conservation Act 73 of 1989 and regulations and notices made in terms of it, to the areas of the former national states (so-called TBVC states: Transkei, Bophuthatswana, Venda and Ciskei) and self-governing territories (QwaQwa, Lebowa, KaNgwane and Gazankulu). This allows for uniformity throughout South Africa with regard to the provisions of the Act after the incorporation of these areas into South Africa.

<sup>102</sup> Indigenous flora and fauna are also conserved in the variety of protected areas covered by legislation other than the Environment Conservation Act 73 of 1989. Examples include:

- state forests, nature reserves and wilderness areas within state forests and national botanical gardens which are all declared in terms of the National Forest Act 84 of 1998;
- lake areas declared in terms of the Lake Areas Development Act 39 of 1975;
- marine reserves declared in terms of the Sea Fishery Act 12 of 1988;
- mountain catchment areas declared in terms of the Mountain Catchment Areas Act 63 of 1970. These Acts will not be discussed as it is beyond the scope of this study. For more detail on these Acts, see Kidd (1997) op cit 103-107.

<sup>103</sup> For example those sections dealing with issues other than specific land uses. These are sections 2-14, 14A-C, 15, 27A and 38. Section 21 (identification of activities that will probably have detrimental effect on environment), 22 and 26 (regulations regarding environmental impact reports) are repealed with effect from a date yet to be published by the minister. This means that sections 21, 22 and 26 are still in operation.

<sup>104</sup> The concept of nature areas was introduced in South Africa in 1967 through the Physical Planning Act 88 of 1967. Since it came into effect, four nature areas have been established, for example the Langebaan Nature Area in 1984. Subsequent legislation on nature areas was taken up in the Environment Conservation Act 100 of 1982 followed by the Environment Conservation Act 73 of 1989. See Visser, F "Nature Area Legislation in South Africa" (1988) *SALJ* 249. In terms of s 44(2) of the Environment Conservation Act 73 of 1989, land reserved as a nature area in terms of the repealed Physical Planning Act 88 of 1967, is deemed to be declared a protected natural environment in terms s16(1) of the Environment Conservation Act 73 of 1989. The Physical Planning Act 125 of 1991 no longer contains a provision to declare nature areas. Also see Rabie, A "The Environment Conservation Act and its implementation" (1994) 1 *SAJELP* 118.

<sup>105</sup> In terms of (s16(1)(a)), these areas are proclaimed only if there are adequate grounds to presume that the declaration will substantially promote the preservation of specific ecological processes, natural systems, natural beauty or species of indigenous wildlife or the preservation of biotic diversity in general.

<sup>106</sup> Subject to a few exceptions, no person may be admitted to, or perform any activity that might damage the environment in or on a special nature reserve. The Prince Edward Islands are an example of a special nature reserve. See, Rabie, A "A new deal for environmental conservation: aspects of the Environment Conservation Act 73 of 1989" (1990) 53 *THRHR* 18; Van Wyk (1999) op cit 163.

<sup>107</sup> In these areas no development or activity prohibited by the competent authority may be undertaken, unless an application has been made and authorisation was obtained from the competent authority. Needless to say that these areas aim to protect the environment in its natural state and in so doing

and the fauna and flora in these areas are protected in varying degrees by prohibiting and/or restricting activities or development within the areas. Protected areas are discussed in detail in chapter 1 and will not be discussed further.

The Act also provides for offences, penalties and forfeiture (ss 29, 30, 31A) *inter alia*, where a person is found guilty of damaging flora and/or harming fauna. These penalties include fines and imprisonment and will be discussed in chapter 3.

### 1.3.3 National Parks Act 57 of 1976

In South Africa, national parks<sup>108</sup> are established on state land in terms of the National Parks Act 57 of 1976. The Act consolidates the laws relating to national parks in South Africa and regulates the conservation of fauna and flora within national parks.<sup>109</sup> According to section 4, the aim of a park is “the establishment, preservation and study therein of wild animals, marine and plant life... in such a manner that the area which constitutes the park shall, as far as may be and for the benefit and enjoyment of visitors, be retained in its natural state”.

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offer the ultimate protection to fauna and flora.

<sup>108</sup> Examples of national parks are the Kruger National Park and the Bontebok National Park. For all the national parks in South Africa, see Schedule 1 of the National Parks Act 57 of 1976.

<sup>109</sup> The definition of a national park, agreed to by the IUCN at the Delhi conference of 1969, states as follows: “A national park is a fairly large territory:

- a) where one or more ecosystems are not materially altered by human exploitation and occupation, where the vegetation and animal species, geomorphologic sites and habitats are of scientific, educational and recreational interest or where there are natural landscapes of great aesthetic value;
- b) where the highest official authority in the country has taken measures to prevent, or eliminate as soon as possible, exploitation or occupation in the whole area, and to make sure that the ecological, geomorphologic or aesthetic features which justified its creation are respected; and
- c) where visiting is authorised under certain conditions, for inspirational, re-creative, educational and cultural purposes.”

This definition was modified in 1972 to allow the inclusion of parks that may have zones where the protection of cultural heritage is the most important objective. One of the central concepts that were adopted by the IUCN, until it was later modified, was the exclusion of human occupation within its boundaries. This was the “wilderness” model of the national park. Jefferey, M “National Parks and Protected Areas: Approaching the new Millennium” (1999) *Acta Juridica* 176.

Section 12(1) states that the National Parks Board (known as the South African National Parks as from 1997) shall control, manage and maintain the parks for the objects described in section 4 and shall utilise its revenues for that purpose. The South African National Parks have the power to *inter alia*, take “such steps as will ensure the security of visitors, the animal and plant life in the park, and the preservation of the park and the animals and vegetation therein in a natural state” (s12(2)(b)(ii)) and “reserve areas as breeding places for animals or as nurseries for trees, shrubs, plants and flowers” (s12(2)(b)(iii)).

Section 12(3) gives this body the authority to *inter alia* sell, or exchange or donate specimens of the animals and plants of a park... provided they shall not introduce into a park any animal or plant which is not of a species indigenous to that park.

Section 21(1) restricts entry into or residence in a park, and prohibits certain acts therein. Any person who contravenes the provisions of section 21(1)(c)-(h)<sup>110</sup> will be punished, according to the section-24 penalties, by fines and/or imprisonment and/or forfeiture of items (weapons, traps, vehicles and vessels) used in committing the offence. Section 24 provides for two sets of penalties: those with regard to offences relating to wild animals and those related to plants.<sup>111</sup> Section 27 gives powers of arrest and detention to a peace officer within a park or at any place within 10 kilometres from the boundary of a park without a warrant if, on reasonable grounds, a person is suspected of having committed an offence under the Act.

The three most important national Acts with regard to the conservation of fauna and flora have now been discussed.

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<sup>110</sup> The provisions include the hunting, killing, injuring and disturbance of any animal in the park.

<sup>111</sup> The penalties will be discussed in chapter 3.

#### 1.4 Provincial legislation (Acts and Ordinances)

The responsibility for the administration of nature conservation before 1994 vested with the four provinces rather than the national government.<sup>112</sup> Provincial legislation concerning conservation of wildlife (both wild animals and plants) was thus very fragmented as each of the four provinces had an ordinance dealing with nature conservation. In addition, each of the so-called TBVC states and self-governing territories had its own nature conservation legislation. In total there were thirteen enactments in the country dealing with wildlife.

These provincial laws were primarily concerned with the conservation and exploitation of wild animals, indigenous plants and freshwater fish, and by and large adopted a species based approach listing categories of plants and animals and providing different degrees of legal protection to each category. Fauna and flora were conserved in various protected areas<sup>113</sup> established in terms of these nature conservation ordinances and/or Acts.

With the adoption of a new Constitution in 1994, the four provinces became nine, and simultaneously reincorporated the erstwhile TBVC states and self-governing territories into the Republic of South Africa.<sup>114</sup> As a result, each of the nine provinces now has, at least in theory, its own individual nature conservation law which subsumes any previous homeland legislation in its area and which governs nature conservation in that entire province.<sup>115</sup> However, the nature conservation ordinances which applied in the

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<sup>112</sup> The national government focused on establishing and managing forests and national parks (as mentioned in chapter 1). See Glazewski (2000) op cit 415 & 425.

<sup>113</sup> These areas are discussed in chapter 1.

<sup>114</sup> Also known as the homelands.

<sup>115</sup> As already mentioned, in terms of the current constitutional dispensation, nature conservation is a functional area of concurrent national and provincial competence. The provinces now have to rationalise the relevant legislation since more than one existing enactment is currently applicable in some provinces and these laws must be in line with national legislation. As already discussed, chapter 3 of NEMA sets out the procedures for co-operative governance. The Constitution (s146) makes provision for measures should conflict arise between national and provincial legislation. For example, section 146(2) provides that if national legislation applies

former four provinces are still applicable<sup>116</sup> because some of the new provinces<sup>117</sup> have not yet adopted their own nature conservation laws. In some provinces the “old” nature conservation ordinances as well as the relevant homeland nature conservation laws apply.<sup>118</sup>

Currently, environmental legislation in the provinces, including the nature conservation ordinances, is at different stages of reform. In the Eastern Cape, the Nature and Environmental Conservation Ordinance 19 of 1974, the Ciskei Nature Conservation Act 10 of 1987 (only applies in that part of the province which constituted the former Ciskei) and the Transkei Environmental Decree 9 of 1992 (the latter only applies in that part of the province which constituted the former Transkei) operate.<sup>119</sup> An Eastern Cape Nature Conservation Act will eventually consolidate the nature conservation laws of the former Transkei, Ciskei and the Nature and Environmental Conservation Ordinance 19 of 1974 into one comprehensive Act.

The Free State still operates under the Nature Conservation Ordinance 8 of 1969, and Gauteng under the Nature Conservation Ordinance 12 of 1983. KwaZulu-Natal still applies the Nature Conservation Ordinance 15 of 1974, but also the KwaZulu-Natal Nature Conservation Management Act 9 of 1997. Mpumalanga operates under the Mpumalanga Nature Conservation Act 10 of 1998, as well as the Mpumalanga Parks Board Act 9 of 1998. The Northern Cape and Western Cape still operate under the Nature and Environmental Conservation Ordinance 19 of 1974. In the Western Cape the Nature Conservation Board Act 15 of 1998 is also in operation. In the North West

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uniformly with regard to the country as a whole, it prevails over provincial legislation if certain conditions are met. One of these conditions that must be met is that the national legislation must be necessary for, *inter alia*, “the protection of the environment” (s146(2) (c) (vi)).

<sup>116</sup> These ordinances of the former four provinces are, the Nature and Environmental Conservation Ordinance 19 of 1974 (Cape), the Nature Conservation Ordinance 12 of 1983 (Transvaal), the Nature Conservation Ordinance 8 of 1969 (Orange Free State) and the Nature Conservation Ordinance 15 of 1974 (Natal).

<sup>117</sup> For example the Free State, Gauteng and Northern Cape.

<sup>118</sup> Glazewski (2000) op cit 415.

<sup>119</sup> The status of the nature conservation legislation in the Eastern Cape was telephonically confirmed by the relevant provincial department on 18 August 2001.

Province four pieces of legislation regulate nature conservation. They are the North West Parks and Tourism Board Act 3 of 1997, the Nature and Environmental Conservation Ordinance 19 of 1974, the Nature Conservation Ordinance 12 of 1983 and the Bophuthatswana Nature Conservation Act 3 of 1973. In the Limpopo the Nature Conservation Ordinance 12 of 1983 is in operation. The latter province still has to consolidate all the conservation legislation of four previous homelands that existed in its area, namely Lebowa, Venda, Gazankulu and KaNgwane.<sup>120</sup> Thus the conservation legislation of the latter homelands are still applicable.<sup>121</sup>

The various ordinances and Acts will not be discussed individually as they all generally follow a similar pattern in conserving wild animals and plants outside protected areas. Other Acts, for example the Environment Conservation Act 73 of 1989 and the National Parks Act 57 of 1976 protect fauna and flora within protected areas.

The protection of fauna (against hunting, capture and disturbance) and flora (against picking or damaging) by provincial legislation is primarily regulated by a permit and licence system. The ordinances/Acts all provide for the protection of different classes of wild animals and plants and the measure of protection that is given to a species depends on its classification.<sup>122</sup> An advantage of this “class” system is that it takes into account different regional eco-types. The system is, accordingly, easily adaptable to local needs and ecological circumstances.<sup>123</sup> Provinces therefore also have provisions relating to environmental features unique to their specific area.<sup>124</sup>

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<sup>120</sup> The status of the nature conservation legislation in these provinces was telephonically confirmed by the relevant provincial departments on 18 August 2001.

<sup>121</sup> Glazewski (2000) op cit 435-439; Van Wyk (1999) op cit 71. Former homeland legislation still in force include, the KaNgwane Nature Conservation Act 3 of 1981; the QwaQwa Nature Conservation Act 5 of 1976; the Lebowa Nature Conservation Act 10 of 1973 and the Gazankulu Nature Conservation Act 5 of 1975.

<sup>122</sup> This classification system is discussed in chapter 1.

<sup>123</sup> Glazewski (2000) op cit 432.

<sup>124</sup> For more detail on the legislation of provinces, see the various nature conservation ordinances and/or Acts.

Given its focus on species, the various nature conservation ordinances/Acts could also be described as “wildlife law”, which is seen to cover indigenous plants, trees, wild animals and ultimately all living organisms. “Wildlife law” is a convenient descriptive title for encompassing all those legal rules that directly or indirectly have the effect of protecting wildlife. Glavovic<sup>125</sup> points out that this term is difficult to define precisely in legal terms,<sup>126</sup> but that relevant statutes and ordinances generally contain adequate definitions of what “wildlife” means in the context of a particular document. However, in South Africa wildlife law is not yet recognised as a distinct branch of the law.<sup>127</sup>

Legislation in itself does not provide a solution to environmental problems. Ultimate success is decisively determined by the effective implementation and enforcement of the legislation concerned. The state of South Africa’s environment will continue to be dependent, to a decisive degree, upon the willingness and ability of administrative bodies to fulfil their role as trustees of the public interest with regard to the conservation of the environment in general and fauna and flora in particular.<sup>128</sup>

### 1.5 Environmental policy

There are different definitions of “policy”. One of these is “a course of action adopted and pursued by a government, party or ruler...”<sup>129</sup>

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<sup>125</sup> Glavovic, PD “An Introduction to Wildlife Law” (1988) 3 *SAJL* 519-521.

<sup>126</sup> Matters that should be included into wildlife law are, trade in wildlife, zoos and soil conservation. For other matters see Glavovic (1988) 3 *SAJL* op cit 527-530. According to Spellerberg, IF *Evaluation and Assessment for Conservation* (1995) Chapman & Hall London 24 and 84, international conventions, for example CITES, are seen as part of wildlife law. He is also of the opinion that the incentives to establish wildlife law varies from the protection of game species to an economic argument. For more information on international wildlife law, see Lyster, S “*International Wildlife Law*” (1993) Grotius Publications Cambridge University Press 239-276.

<sup>127</sup> In the USA wildlife law has achieved recognition as a distinct body of law. Despite this, it is accepted that it is difficult to state precisely what constitutes wildlife law because it is a body of law that is still evolving and expanding in the USA. It includes laws that have the conservation of wildlife as a specific purpose and many other laws that affect wildlife indirectly, for example those relating to land use and pollution control. The potential scope of coverage is so wide as to make inclusion of all relevant laws impractical. For more information, see Glavovic (1988) 3 *SALJ* op cit 521.

<sup>128</sup> Rabie, A (1990) 53 *THRHR* op cit 27; Rabie, A (1994) 1 *SAJELP* op cit 121 & 125.

<sup>129</sup> Hill, M *The policy process in the modern state* (1997) (3<sup>rd</sup>ed) Prentice Hall London 6-7. Also see Anderson, JE *Public Policymaking* (2000)(4<sup>th</sup> ed) Houghton Mifflin Co Boston 2-5. For key rules on

In addition to a constitutional recognition of an environmental right, the best strategy to ensure a sound environmental base upon which development may proceed is an environmental policy with which all administrative bodies should comply.<sup>130</sup> Several policy and reform processes have been initiated since 1994. These processes reflect the most fundamental and comprehensive re-assessment of environmental policies in South Africa's history. The processes are mostly driven jointly by the government department involved and by relevant non-governmental organisations, stakeholders and other interest groups. These processes aim at being inclusive and transparent and offer unprecedented opportunities for public participation.<sup>131</sup>

A process of policymaking usually involves discussion documents, consultation with all the stakeholders, the drafting of a Green Paper and finally a White paper in which the government's policy on a specific subject is published. Policy reviews are being conducted mainly at national government level.<sup>132</sup>

In South African law there is uncertainty on the juridical nature of policy rules as it is often referred to as pseudo-legislation or subordinate legislation. If it is not regarded as legislation, it cannot be implemented as fixed legal rules but should rather be seen as guidelines.<sup>133</sup> The environmental policy has, however, been enforced by a court of law in *Van Huyssteen v Minister of Environmental Affairs and Tourism* 1996 1 SA 283 (K)

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good policy-making, see Bernstein, *A Policy-making in a new Democracy* (1999) The Centre for Development and Enterprise Johannesburg 22-23.

<sup>130</sup> It has been suggested that "other measures" mentioned in section 24(b) of the Constitution, also refer to policy rules. These rules play an important role in environmental law and can be seen as a condition for any system of environmental control. See Ferreira (1999) 1 *TSAR* op cit 90-91&104.

<sup>131</sup> Rabie (1999) 6 *SAJELP* op cit 121; Peart & Wilson (1998) 5 *SAJELP* op cit 237.

<sup>132</sup> Rabie (1999) 6 *SAJELP* op cit 122; Peart & Wilson (1998) 5 *SAJELP* op cit 237. For a detail discussion on the process of policy-making, see Peart & Wilson (1998) 5 *SAJELP* op cit 249-261. According to Peart & Wilson effective monitoring is essential to determine the success of environmental policy reforms, but monitoring and evaluation of environmental policy has rarely been carried out in South Africa (261).

<sup>133</sup> In terms of s 51 of NEMA, the general 1994 environmental policy is still valid. According to Barnard (1999) op cit 211-212, the repeal of section 3 of the Environment Conservation Act 73 of 1989 in effect removed the basis on which the general environment policy status as secondary legislation previously depended. He argued that this policy must consequently be used as a guideline with a status similar to that of a White Paper.

303C-F.<sup>134</sup> The possibility that an environmental policy will not merely be seen as providing guidelines, but will also be enforced, will contribute to the conservation of fauna and flora. Although South African courts are reluctant to interfere with policy judgments, it seems that they will, in future, be more prepared to enforce policy issues following the judgment of the Constitutional Court that socio-economic rights will be enforceable in a court of law.<sup>135</sup> The courts will probably also be prepared to enforce policy issues to be in line with the contextual approach and in promoting the constitutional democratic values and norms that underlie an open and democratic society.

Many of the policies formulated since 1994<sup>136</sup> are either concerned with natural resource and environmental management issues, or indirectly likely to have significant impacts on the natural environment.<sup>137</sup> The most important policies relevant to this study include those described in the two paragraphs that follow.

- a) A White Paper on environmental management policy for South Africa was published in May 1998<sup>138</sup>. This policy is the national government's overarching framework policy and sets out the vision, principles, strategic goals and objectives and regulatory approaches that government will use for environmental management in South Africa. The overarching goal that underpins the White Paper is that of environmentally sustainable development and the DEAT has the responsibility of

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<sup>134</sup> Ferreira (1999) 1 *TSAR* op cit 104-106. The court held that s3 of the Environment Conservation Act of 1989 obliged persons, charged with the duty of deciding on rezoning applications under the Land Use Planning Ordinance 15 of 1985 (C), to exercise their powers in accordance with the policy determined under s2 of the Environment Conservation Act of 1989. For further discussion on the court's willingness to enforce policy issues and possible conditions thereof, see Ferreira (1999) 1 *TSAR* op cit 107-109.

<sup>135</sup> Ferreira (1999) 1 *TSAR* op cit 107.

<sup>136</sup> Although many environmental policies were formulated since 1994, only few have been implemented by 1998. See Peart & Wilson (1998) 5 *SAJELP* op cit 21 & 237, 241.

<sup>137</sup> Examples of these policies include, White Papers on marine fisheries (1997), agriculture (1995), forestry (1996), water (1997), land (1997) and minerals and mining (1998). For a detailed discussion on these White Papers and others, see Rabie, MA "Governmental Policy reviews and reforms relating to the Environment" (1999) 6 *SAJELP* 127-147.

<sup>138</sup> GN 749 of 15 May 1998. Also see, Rabie (1999) 6 *SAJELP* op cit 124.

giving effect to the achievement of integrated and co-ordinated environmental management. Such a national environmental policy is essential in view of the wide-ranging, fragmented and diffuse nature and treatment of environmental issues in South Africa.<sup>139</sup> The implementation of this policy is through NEMA.<sup>140</sup>

- b) A White Paper on the Conservation and Sustainable use of South Africa's Biological diversity<sup>141</sup> was published in July 1997.<sup>142</sup>

Effective legislation and adequate policies are fundamental to the success of environmental management; effective monitoring is also essential to determine the success of any policy reforms. However, it seems that monitoring and evaluation of environmental policy have rarely been carried out in South Africa. It must be pointed out that policy statements forbidding environmentally harmful actions, such as the destruction of rare species, will only be effective if the law provides adequate means for their enforcement.<sup>143</sup>

## 2. AUSTRALIA

### 2.1 General

In Australia, the traditional focus of government policy-making has been economic with the result that little weight has been given to environmental considerations.<sup>144</sup> However, in the early 1970s, the Commonwealth, the six State Governments and the

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<sup>139</sup> Knoetze (1996) *Obiter* op cit 302.

<sup>140</sup> It has been suggested that the possibility to use environmental agreements to implement policy rules, should be considered. See Ferreira (1999) 1 *TSAR* op cit 113.

<sup>141</sup> According to Dr G Willems (telephonic conversation on 28 September 2001) the DEAT is in the final stages of preparing a Bill on Biological Diversity to be tabled early in 2002.

<sup>142</sup> GN 1095 of 28 July 1997. See Rabie (1999) 6 *SAJELP* op cit 126. Fauna and flora are components of biodiversity and their conservation are thus promoted by this White Paper. See the discussion on biodiversity in chapter 1.

<sup>143</sup> Newson, M & Barnes, J et al *Managing the human impact on the natural environment: patterns and processes* (1992) Belhaven Press London 73.

<sup>144</sup> Cook, G *The Greening of Australia: Environmental Policy Towards 2000* (1990) Robert Menzies Centre for Australian Studies London 2.

two Territories, all with legislative powers, responded to environmental issues by promulgating and implementing environment-protection legislation.<sup>145</sup> This independent response<sup>146</sup> of the Commonwealth, States and Territories to environmental matters led to the fragmentation of environmental legislation in Australia.<sup>147</sup>

Before discussing the co-operation arrangements between the Commonwealth, States and Territories to manage the possible consequences of this fragmentation, the Commonwealth Constitution and legislation of the States and Territories applicable to the conservation of fauna and flora will be discussed.<sup>148</sup>

## 2.2 Commonwealth Constitution Act 1900

The Constitution of the Commonwealth of Australia came into force on 1 January 1901. The Constitution has no Bill of Rights and no reference to the environment as such.<sup>149</sup> The reason given is that environmental conservation was not an issue of concern at the turn of the century when the Constitution was passed. Thus the Commonwealth (federal government) has no direct legislative powers in relation to the

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<sup>145</sup> Bates, *GM Environmental Law in Australia* (1987) (2<sup>nd</sup> ed) Butterworths Sydney 7. The six States governments are that of Victoria, New South Wales, Queensland, Western Australia, South Australia and Tasmania. The two Territories are the Northern Territory and the Australian Capital Territory.

<sup>146</sup> A compilation in 1993 of legislation concerned with environmental protection and related issues of the Federal, State and Territory Governments of Australia reveals that there are approximately 1500 such statutes. See Norberry, J "Australia" in Del Frate, AA & Norberry, J *Environmental Crime, Sanctioning Strategies and Sustainable Development* (1993) Australian Institute of Criminology Publication no 50 Canberra (1993) 7, 28.

<sup>147</sup> There is movement towards achieving integrated environmental management in Australia, as in the case of New Zealand where it is "achieved" through the promulgation of the Resource Management Act of 1991 (RMA). See Rabie, A *Environmental Law in Australia* (1995) 1 *SAJELP* 104-105. New Zealand's legislation will be discussed later in chapter 2.

<sup>148</sup> The legislation of the States and Territories will be discussed together. State(s) will also include Territories unless explicitly indicated otherwise.

<sup>149</sup> According to Crawford, section 100 is an exception and the only provision of the Constitution that confers a right in respect of the environment. This "environmental" provision refers to "reasonable use of water of rivers for conservation and irrigation" and only applies with respect to federal activity. This one "environmental" provision has caused more difficulty than any of the environmental issues the Constitution does not regulate. See Crawford, J "The Constitution" in Bonyhady, T *Environmental Protection and Legal Change* (1992) The Federation Press Sydney 2, 17, 21; Lipman, Z "Environmental Management in a multi-jurisdictional System: An Australian Perspective" (1996) 3 *SAJELP* 105.

environment and environmental management is primarily the responsibility of State and Territory governments.<sup>150</sup>

According to Crawford,<sup>151</sup> the Constitution is primarily about powers rather than rights.<sup>152</sup> In spite of the absence in the Constitution of any direct reference to federal legislative power over environmental matters, the Federal Government has specific “powers”<sup>153</sup> with regard to environmental matters in terms of section 51 of the Constitution. On the basis of these powers, the Federal Government has passed several Acts relating to the environment. An example is the National Parks and Wildlife Conservation Act 1975 (Cth), which relies on the “trade and commerce” power<sup>154</sup> as well as on the implied “nationhood” power.<sup>155</sup>

Based on the wide interpretation of the High Court on the Federal Government’s powers in terms of section 51 of the Constitution, the Federal Government has, on occasion, also intervened on environmental grounds to override State government’s

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<sup>150</sup> Bates (1987) op cit 37; Bates, *GM Environmental Law in Australia* (1995) (4<sup>th</sup> ed) Butterworths Sydney 76; Saunders, C “Making and changing the Australian Constitution” (1996) 11 *SAPR/PL* 47; Rabie (1995) 1 *SAJELP* op cit 106.

<sup>151</sup> Crawford (1992) op cit 7.

<sup>152</sup> “Powers” are used to *indirectly* enforce legislation or measures because there is no right to do so. In this case, the federal government uses powers given in terms of the Constitution to indirectly “force” the States to comply with, for example, their environmental legislation.

<sup>153</sup> These powers include the external affairs, the corporations, the trade and commerce and the financial powers. For a detail discussion on these powers, see Bates (1995) op cit 78-93 and Lipman (1996) 3 *SAJELP* op cit 109-112; Cook (1990) op cit 2; Boer, B & Fowler, R & Gunningham, N *Environmental Outlook* (1994) The Federation Press Sydney 3-5; Rabie (1995) 1 *SAJELP* 106-107.

<sup>154</sup> This power enables the Commonwealth to require that export and import approvals be obtained for goods leaving and entering Australia and enable the Commonwealth to issue approvals conditional on environmental factors or refuse approvals for environmental reasons. See Bates (1995) op cit 86-87.

<sup>155</sup> The basis of the nationhood power appears to be that the Constitution, by creating the Commonwealth of Australia as a nation, must necessarily imply a grant of power to the Commonwealth to do such things and enact such legislation as is necessary for the Commonwealth to exercise its functions as a national government. The ambit of this power is still uncertain but it was upheld in *Commonwealth v Tasmania* (1983) 46 ALR 625 (The so called Tasmanian Dam case). For examples of other legislation that rely on section 51 powers, see Bates (1995) op cit 79.

decisions.<sup>156</sup> These powers can also be used to indirectly influence the decisions or activities of states with regard to environmental issues. For example, the financial power can be used to tax environmentally harmful practices or allow deductions for sound environmental activities. Grants can also be made to States to further environmental objectives or to finance environmental projects within the States.<sup>157</sup> However, in exercising these powers, the Commonwealth is entitled to act only for environmental reasons.<sup>158</sup>

Thus even though the Australian Constitution has no environmental right, the range of existing Commonwealth powers in the Constitution and the broad interpretation of certain powers by the High Court makes this lack of a specific power in relation to the environment of little practical significance. The Commonwealth thus has the power to act to protect the environment in all significant areas.<sup>159</sup>

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<sup>156</sup> Rabie (1995) 1 *SAJELP* op cit 107 & 108.

<sup>157</sup> Lipman (1996) 3 *SAJELP* op cit 112; Rabie (1995) 1 *SAJELP* op cit 106-107; Cook (1990) op cit 2.

<sup>158</sup> Bates (1987) op cit 38. There seems to be disagreement on the interpretation of the Constitution. Bradsen, J is of the opinion that the Constitution is misunderstood. According to him, the view that the Constitution vests power with respect to land management, and issues such as biodiversity, in the States and not in the Commonwealth, is a fundamental constitutional error. He points out that the Constitution does not vest any specific legislative power in the States, only general power — that is power to legislate or regulate within a State. He is further of the opinion that there is no guarantee that specific issues or areas of power are vested in or reserved to the States: See Bradsen, J “The Green Issues: Biodiversity Conservation in Australia” in Boer, B & Fowler, R & Gunningham, N *Environmental Outlook* (1994) The Federation Press Sydney (1994) 195-196. (The latter view is supported by Lipman (1996) 3 *SAJELP* op cit 114.) Where the Constitution confers specific powers upon the Commonwealth, such as the power with respect to taxation, it does so concurrently. That is, either Commonwealth or the States may legislate. This means that any Commonwealth legislation will apply to issues that may also be the subject of State legislation. Unlike South Africa, local government is not recognised in the Australian Constitution.

<sup>159</sup> Lipman (1996) 3 *SAJELP* op cit 113; Rabie (1995) 1 *SAJELP* op cit 108. This means that it is not essential for the Constitution to be amended in order for the Commonwealth to provide protection to the environment. According to Crawford, to change the Constitution to include the protection of the environment requires the “demonstration of inadequacy” ((1992) op cit 5 & 9). In other words, can it be said that the present text of the Constitution is inadequate to protect environmental values in order to sustain the future? Crawford points out that the only “environmental” provision in the Constitution, section 100, has caused more difficulty than any of the environmental issues the Constitution does not regulate. He is further of the opinion that the environment is an inter-generational concern, and its regulation depends on a continually changing state of knowledge, technology and awareness (op cit 21-22). Saunders (1996) 11 *SAPR/PL* op cit 55 is of the opinion that a Constitution can be significantly affected by means other than by amending the relevant Act. She points out that any constitution has built-in flexibility that may be manifested through judicial interpretation or political action. One illustration of the effect of judicial interpretation, is the 1988

According to Rabie,<sup>160</sup> “the reluctance of the Australian Federal Government to act decisively in the national interest in protecting the environment is probably the single most controversial aspect of environmental management in Australia”.

The Commonwealth, and every State and Territory, has legislation that prohibits or controls the taking of native fauna and flora species on all Crown and privately owned land throughout Australia. The relevant legislation will now be discussed.

## 2.3 Commonwealth legislation

### 2.3.1 General

The administration of environmental affairs at federal level is the responsibility of the Minister and the Department of Environment, Sport & Territories, more particularly through the Commonwealth Environment Protection Agency and the Environment Strategies Directorate. Certain statutory bodies are also associated with the Department, such as the Australian Nature Conservation Agency. Almost every department<sup>161</sup> is involved in some aspect of environmental administration. There is also an Environment and Natural Resources Branch attached to the Department of the Prime Minister and the Cabinet.<sup>162</sup>

### 2.3.2 Environment Protection (Impact of Proposals) Act 1974

Where a Commonwealth decision is necessary for the approval of a major project, the application of the Environment Protection (Impact of Proposals) Act 1974 (Cth) is proactive as it protects the fauna and flora by requiring the proponents of the project to undertake an environmental impact study. However, the effectiveness of this Act is in

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judgment of the High Court in *Cole v Whitfield* (165 CLR 360) overturning more than 140 previous decisions on the meaning of the “guarantee of interstate free trade” in section 92 of the Constitution.

For methods of formal change and other influences, see Saunders (1996) 11 *SAPR/PL* op cit 56.

<sup>160</sup> Rabie (1995) 1 *SAJELP* op cit 113.

<sup>161</sup> For example the Departments of Transport, Industry and Science and Technology.

<sup>162</sup> Rabie (1995) 1 *SAJELP* op cit 111.

question. One commentator remarked that “the Commonwealth Impact Act ‘is a virtually useless piece of window-dressing significant only for its demonstration of the reluctance of Australian Federal Governments to give a meaningfully higher priority in their programmes to environmental issues’.”<sup>163</sup>

### 2.3.3 Wildlife Protection (Regulation of Exports and Imports) Act 1982

This Act applies throughout Australia, and introduced comprehensive legal and administrative protection for native and endangered wildlife. The Act protects fauna and flora by regulating export and import of all wildlife or specimens thereof, which are endangered or threatened with extinction, whether from Australia or overseas. The export and import are regulated by means of a permit and licence system. The Act constitutes a Designated Authority (DA), which is the Director of National Parks and Wildlife, or another person, with specific functions such as the granting of permits for the import or export of wildlife or specimens.<sup>164</sup>

The possession of illegally imported wildlife, “without reasonable excuse or knowledge,” is an offence and proof of such defence lies with the person seeking its protection. This offence may result in a fine of up to \$100000<sup>165</sup> (\$200000 for corporations) or imprisonment of five years.<sup>166</sup>

Inspectors appointed under the Act as well as customs and police officers have wide-ranging powers to question and arrest suspects, search baggage and seize and forfeit specimens and goods. However, as regards the smuggling of native fauna out of Australia, the House of Representatives Standing Committee (HRSC) on Environment and Conservation of 1976 pointed out the enormous problems facing customs officials.

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<sup>163</sup> Bates (1987) op cit 188; Bates (1995) op cit 170.

<sup>164</sup> Bates (1987) op cit 188-189. For other functions, see Bates (1987) op cit 189; Bates (1995) op cit 310-311; Fisher, *DE Environmental law* (1993) The Law Book Company 489.

<sup>165</sup> It is approximately R560,000.

<sup>166</sup> Bates (1987) op cit 189-190. Penalties will be discussed in chapter 3.

These problems include the surveillance at international ports and airports, and patrolling of remote stretches of coastline, particularly in the sparsely populated northern areas of Australia where light aircraft and ships are used by highly organised syndicates to remove consignments of fauna to convenient points abroad.<sup>167</sup>

The Australian government implemented the Wildlife Protection (Regulation of Exports and Imports) Act 1982 (Cth) to supplement the existing Customs Act 1901(Cth) or any future enactments.<sup>168</sup>

#### 2.3.4 Endangered Species Act 1992 (Cth)

This Act protects the habitat of fauna and flora by identifying native species and ecological communities to which controls will apply as well as by identifying key threatening processes<sup>169</sup> that need to be regulated.

Conservation instruments in terms of this Act include recovery plans for each listed species and community, abatement plans, enforcement orders and conservation agreements with any person who has an interest in a Commonwealth area for the purpose of the conservation and management of listed species and communities and their habitats.<sup>170</sup>

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<sup>167</sup> Bates (1995) op cit 309.

<sup>168</sup> For detail on these Acts, see Bates (1995) op cit 309-312; Fisher (1993) op cit 489. Other legislation applicable to wildlife, but not in the scope of this study, include the Antarctic Treaty (Environment Protection) Act of 1980 and the Whale Protection Act of 1980. For detail on them, see Bates (1987) op cit 190-190.

<sup>169</sup> A threatening process is one that threatens or may threaten the survival, abundance or evolutionary development of a native species or ecological community. For more information, see Bates (1995) op cit 303.

<sup>170</sup> For detail on this and other conservation instruments, see Bates (1995) op cit 304-305; Bradsen (1994) op cit 207-209.

### 2.3.5 National Parks and Wildlife Conservation Act 1975 (Cth)

This Act provides for the establishment and management of parks and reserves in the Territories and Australian coastal waters for the purpose of conserving wildlife. The Commonwealth may also establish parks in the States in terms of section 51 of the Constitution. The Director of National Parks and Wildlife, as chief executive officer of the Australian Nature Conservation Agency, administers this Act. One of the functions of the director is the management of wildlife in parks, reserves and conservation zones.<sup>171</sup>

## 2.4 States and Territory legislation

### 2.4.1 General

In Australia the States enjoy residual power over matters not specifically enshrined in the Constitution. As already mentioned, the Constitution does not specifically mention the environment<sup>172</sup> and, therefore, environmental matters and the responsibility for the conservation of fauna and flora rest with separate authorities in all the States and Territories. This increases the tendency towards fragmented administration at State, Territory and local government levels. However in some States there is a tendency to consolidate a number of environmental functions; for example, the South Australian Environment Protection Authority administers the Consolidated Environmental Protection Act 1993.<sup>173</sup>

Every State and Territory has legislation that prohibits or controls the taking of most species of native Australian fauna and flora on all Crown and privately owned land throughout Australia. The relevant legislation is:

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<sup>171</sup> For other functions of the Director, see Bates (1995) op cit 255. For more information on this Act, see Bates (1995) op cit 253-255; Fisher (1993) op cit 486.

<sup>172</sup> Norberry (1993) op cit 7.

<sup>173</sup> Rabie (1995) 1 *SAJELP* op cit 111 & 112.

New South Wales	: National Parks and Wildlife Act 1974
Victoria	: Wildlife Act 1975
	: Flora and Fauna Guarantee Act 1988
Queensland	: Nature Conservation Act 1992
South Australia	: National Parks and Wildlife Act 1972
Western Australia	: Wildlife Conservation Act 1950
Tasmania	: National Parks and Wildlife Act 1970
Australian Capital Territory	: Nature Conservation Act 1980
Northern Territory	: Territory Parks and Wildlife Conservation Act 1976. <sup>174</sup>

The regulations in terms of the various State and Territory legislation regarding the protection of the native fauna and flora are, as in the case of the provincial nature conservation ordinances and Acts in South Africa, generally the same. Thus, rather than discussing the relevant legislation (as indicated above) in each State and the Territories separately, the relevant aspects contained in these Acts will be discussed in general under the headings “protection of fauna” and “protection of flora”.<sup>175</sup>

#### 2.4.2 Protection of fauna

The general scheme of all the State and Territory legislation is to protect virtually all forms of native wildlife, except certain “noxious” species<sup>176</sup> found in national parks or other major reserves. This is done by regulating the circumstances in which they may be taken, killed, hunted, possessed, sold, released and otherwise dealt with by way of a licence system.<sup>177</sup>

<sup>174</sup> Bates (1995) op cit 315. For detailed comments on these Acts, see Fisher (1993) op cit 481-522.

<sup>175</sup> Also see the discussion on fauna and flora in chapter 1.

<sup>176</sup> Examples of noxious species are, rabbits and dingo in NSW and dingo, fox, wolf and mink in Tasmania.

<sup>177</sup> Bates (1987) op cit 192, 194; Bates (1995) op cit 315. For detail on different types of licences and licence provisions in the various states, see Bates (1987) op cit 199-204; see Bates (1995) op cit 326-332.

The wildlife can be protected wholly (for example, rare or endangered species) or conditionally (for example, subject to culling requirements) or seasonally (for example, no hunting of game is permitted during the close season). Common species may be declared locally protected in certain areas of a State, or they may be killed at a certain time of the year. In general, wildlife, especially unprotected species, enjoys a greater measure of protection inside a national park or reserve where the taking of even common species is usually totally prohibited, except for game species during “open” season.

The legislation also regulates the methods by which wildlife may be taken, killed or hunted. For example in New South Wales (NSW), the types of firearms permitted are limited to those that do not require support to be fired, while in the Northern Territory the mere possession of a firearm in a sanctuary without authorisation is an offence. Legislation also prohibits and/or restricts the use of certain substances to kill an animal. For example in Tasmania, the Northern Territory and Victoria no poisonous substances may be used as bait. In NSW, only prescribed substances may be used and only if authorised by the Director of National Parks. Legislation also regulates the use of hunting equipment. For example, in the Northern Territory and Victoria the use of traps, nets and tags is prohibited.<sup>178</sup>

Enforcement is the responsibility of the wildlife services and their rangers who enjoy wide powers of search, investigation, arrest and seizure as do their national park counterparts.<sup>179</sup> For example, section 57(2)(d) of the Flora and Fauna Guarantee Act

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<sup>178</sup> See the discussion in chapter 1. Also see, Bates (1987) op cit 195 & 198; Bates (1995) op cit 321 & 325. For detailed information on the protection of fauna in the different States, see Bates (1995) op cit 318-326; Fisher (1993) op cit 493-516.

<sup>179</sup> It is necessary to briefly refer to *locus standi*. In the absence of clear statutory guidance, in order to establish standing, an applicant must pass the common law test by establishing a special interest, over and above other members of the public, in enforcing a public duty. The potential for litigation is substantially increased by *inter alia*, the establishment of the Environmental Defender’s Office operating in NSW, Victoria and Queensland and the creation of specialised environmental tribunals and courts. See Bates (1995) op cit 471. Van Reenen (1995) 2 *SAJELP* op cit 138; Rabie (1995) 1 *SAJELP* op cit 109-110. NSW also has a Land and Environment Court that enforces planning and environmental laws and which allows *any* person to bring proceedings before the Court, to remedy or

1988 (Vic) confers upon authorised officers the authority to “inspect equipment, machinery, implements, plants, animals, enclosures or other goods”.<sup>180</sup>

Although wildlife protection is left to the States and Territories to implement, the Commonwealth does have an interest in assisting all States and Territories to enact suitable legislation to enforce appropriate restrictions and develop management programmes to protect Australia’s native wildlife. Co-operation with State authorities is also very important in the enforcement of Commonwealth legislation, as well as in the control of imports and exports of wildlife products. Section 19 of the Commonwealth National Parks and Wildlife Conservation Act 1975 empowers the Director to co-operate with the States and Territories in, for example, the formulation of wildlife conservation programmes.<sup>181</sup>

Aspects of the identification and classification of fauna contained in the legislation of the different States and Territories have already been discussed in chapter 1.

#### 2.4.3 Protection of flora

As in the case of fauna, the provisions contained in the relevant legislation of all States and Territories with regard to the conservation of native flora are generally the same. Depending on the conservation status of the native plants, that is if they are a protected species or not, and if they are located in or outside a protected area, the relevant legislation regulates the picking, possessing, removal, destruction, import and export of and the injury to and interference with the sale of the flora by means of a licence

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restrain a breach of environmental law. Experience showed that this open standing has not been abused and that the success of the court is to be judged not only in terms of efficiency and effectiveness, but also in terms of access. See, Stein, P “Specialist Environmental Court: An Australian experience” in Robinson, D & Dunkley, J *Public Interest Perspectives in Environmental Law* (1995) (ed) Wiley Chancery London 271. Also see Van Reenen (1995) 2 *SAJELP* op cit 139.

There will be more discussion on the Environment Court in chapter 3.

<sup>180</sup> Bates (1995) op cit 315; Fisher (1993) op cit 609-610.

<sup>181</sup> Bates (1995) op cit 315 & 316. The co-operation arrangements between the Commonwealth and the States and Territories will follow.

system. Generally the native flora in a particular State or Territory is protected and regulated in terms of the same legislation applicable to fauna. For example the Nature Conservation Act 1992 (Qld) provides for the conservation of fauna *and* flora.<sup>182</sup>

As previously mentioned, one of the difficulties that might arise from the fragmentation of environmental legislation is the lack of co-operation and co-ordination between the Commonwealth,<sup>183</sup> State and Northern Territory governments. Therefore, it is necessary to discuss briefly the legislative jurisdictions of the respective governments and their co-operative arrangements in terms of the environment, including fauna and flora.

## 2.5 Commonwealth/State co-operation

The Commonwealth (Federal Government) has exclusive legislative jurisdiction over the Australian Capital Territory (ACT) (public service) and land in the States owned by the Commonwealth (as listed in section 52 of the Constitution). In general, then, the States can legislate on all matters not specifically reserved for the Commonwealth by the Constitution.<sup>184</sup> Other matters, including the environment, on which the Commonwealth is empowered to legislate, though not exclusively, are in terms of “powers” listed in section 51 of the Constitution.<sup>185</sup>

The legislative responsibility for environmental protection lies mainly within the States and the government of the Northern Territory, but in practice there are two sources of legislative power in each State, that of the State and that of the Commonwealth.<sup>186</sup> If the Commonwealth legislation conflicts with existing or future State legislation, the

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<sup>182</sup> For specific detail on the protection of flora in every State, see Bates (1987) op cit 204-207; Bates (1995) op cit 332-335; Fisher (1993) op cit 493-516.

<sup>183</sup> The Commonwealth government has jurisdiction over the Australian Capital Territory (ACT).

<sup>184</sup> Bates (1987) op cit 37.

<sup>185</sup> These powers will be discussed later in this section.

<sup>186</sup> Bates (1987) op cit 38.

Commonwealth legislation will prevail. The Tasmanian Dam case<sup>187</sup> is an example where the High Court of Australia upheld the validity of the Commonwealth Act, and the Tasmanian Act ceased to have any effect.<sup>188</sup> Usually the Commonwealth and States operate without conflict.

Since the Commonwealth government has little direct responsibility in the States for the administration and implementation of environmental management policies, the Federal Department of Arts, Heritage and the Environment largely exercises a policy co-ordinating role. That is, it consults with State governments and authorities in order to establish and develop national environmental policy objectives. This consultative process is formalised through ministerial councils,<sup>189</sup> standing committees of senior officials<sup>190</sup> and specialist and *ad hoc* committees of various kinds.

Despite a broad mandate that the High Court has conferred on the Commonwealth to control land-use decisions in the States, the overwhelming preference has been for consensus-based arrangements.<sup>191</sup> In Australia, a number of initiatives have been taken to improve intergovernmental co-operation on environmental matters. According to

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<sup>187</sup> *The Commonwealth v Tasmania* (1983) 46 ALR 625

<sup>188</sup> Bates (1987) op cit 37.

<sup>189</sup> The ministerial council is a body comprised of State and Federal ministers. The two most important ministerial councils in relation to environmental policy are the Australian Environment Council (AEC) and the Council of Nature Conservation Ministers (CONCOM). The AEC has been functioning since 1972 and was created to co-ordinate Commonwealth and State activities relating to environmental matters. It has proved to be a valuable forum for the exchange of information and advice and for the development of standards and guidelines. The CONCOM was established in 1974, and deals specifically with matters relating to nature conservation and wildlife protection. The AEC was succeeded in 1991 by the Australian and New Zealand Environment and Conservation Council (ANZECC). The latter simultaneously amalgamated and absorbed the former Australian and New Zealand Environment Council (ANZEC), which was established in 1972 and the former Council of Nature Conservation Ministers (CONCOM), which was established in 1974. The ANZECC is supported by two permanent standing committees, specialist working groups and task forces. Bates (1987) op cit 7&43; Bates (1995) op cit 95-96; Fowler, R "New National directions in Environmental Protection and Conservation" in Boer, B & Fowler, R et al *Environmental Outlook* (1994) The Federation Press Sydney (1994) 116; Rabie (1995) 1 *SAJELP* op cit 112.

<sup>190</sup> The Australian Advisory Committee on the environment advises the Minister for the Environment on important environmental issues. See Bates (1987) op cit 7.

<sup>191</sup> Lipman (1996) 3 *SAJELP* op cit 113.

Fowler<sup>192</sup> these arrangements fall into four categories,<sup>193</sup> of which the Intergovernmental Agreement on the Environment (IGAE), concluded in May 1992 between the Commonwealth, States and Territories and the Australian Local Government Association, is regarded as the most important. The States strongly supported it as it regarded the IGAE as a means of restricting Commonwealth intervention in land-use planning in the States. This Agreement is divided into 5 sections and 9 schedules. Of the schedules, only schedule 4 has a significant impact on environment protection. The document provides detailed definitions of the roles and responsibilities of all levels of government. It also provides for “accreditation” that is to be employed in cases of jurisdictional overlap.<sup>194</sup>

Because of pressure from industry, conservationists and the community for national action to protect the environment, a Commonwealth Environment Agency (EPA) was established in 1992. The EPA is responsible for administering federal environmental legislation, but has only an advisory role and no authority over the State EPAs. Consequently, the Commonwealth EPA has no national role. Its functions include the preparation of guidelines in relation to environmental protection.

To meet the need for a national agency, the IGAE also serves as a formalised mechanism that formulates a co-operative national approach to the environment. It also makes provision for setting up a ministerial council, the Intergovernmental Agreement on the Environment (IGAE) and to provide mechanisms for their application in the

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<sup>192</sup> Fowler (1994) op cit 113-114. Also see Lipman (1996) 3 *SAJELP* op cit 113.

<sup>193</sup> These categories are:

- a) Broad strategic agreements which attempt to delineate areas of jurisdiction and responsibility such as the Intergovernmental Agreement on the Environment (IGAE) 1992;
- b) National strategies which address specific areas such as the National Waste Minimisation Strategy;
- c) Agreements establishing jurisdictions for environmental management such as joint arrangements for the management of the world heritage sites in Queensland and Tasmania; and
- d) Agreements for adoption of national standards and guidelines in specific areas, for example the national guidelines formulated by ANZECC in relation to areas such as air, noise, water and waste.

<sup>194</sup> Fowler (1994) op cit 114; Lipman (1996) 3 *SAJELP* op cit 114. For more objectives of the IGAE, see Rabie (1995) 1 *SAJELP* op cit 113.

States. This new body is intended to play a co-operative rather than supra-national role.<sup>195</sup>

The IGAE also outlines an undertaking by all levels of government to be guided by certain environmental considerations. The parties recognise the need to adopt sound environmental practices and procedures as a basis for ecologically sustainable development.<sup>196</sup> Although the latter is not defined in the Agreement, its usage is consistent with international usage, namely, “development that meets the needs of the present without compromising the ability of future generations to meet their own needs”.<sup>197</sup>

The National Environment Protection Council Act 1944 was passed to facilitate the establishment of the National Environment Protection Council in keeping with the Commonwealth’s obligations under the Intergovernmental Agreement. This Act is designed to ensure that equivalent environment protection is enjoyed throughout Australia.<sup>198</sup>

The National Environment Protection Council<sup>199</sup> is responsible for formulating national environment protection measures, which may take the form of standards (which are mandatory), goals, guidelines (compulsory) or protocols. States have the right to maintain existing more stringent standards that were in operation at the date when the Council was established.<sup>200</sup>

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<sup>195</sup> Fowler (1994) op cit 113&114, 120, 135-138; 149-151; Rabie (1995) 1 *SAJELP* op cit 112.

<sup>196</sup> Ecological sustainable development is to be achieved by the effective integration of economic and environmental considerations in decision making processes. As already mention in chapter 1, the IGAE states that ecologically sustainable development can be achieved by the implementation of four Principles, for example to make use of the precautionary principle. See Lipman (1996) 3 *SAJELP* op cit 118.

<sup>197</sup> Fowler (1994) op cit 118. Approaches to co-ordinate and harmonise Federal-State responsibilities in relation to the environment, include the IGAE and several legislative initiatives/measures. For a detailed discussion on these approaches, see Fowler (1994) op cit 113-140.

<sup>198</sup> Fowler (1994) op cit 120.

<sup>199</sup> For the structure and other functions of the Council, see Fowler (1994) op cit 120-121.

<sup>200</sup> Fowler (1994) op cit 121-122.

One of the difficulties that might arise from the fragmentation of legislation in a federation such as Australia, is the absence of co-operation and co-ordination between the States and Territories. This then may result in different environmental standards, offences and penalties amongst the States and between the States and Territories, with consequent potential for the creation of “pollution havens”.<sup>201</sup> However, Australian States and Territories deal with this potential problem by entering into co-operation agreements such as the IGAE already discussed.

The federal legislation has no mechanism to ensure that the States co-operate and comply with measures that have been adopted. The only mechanism available is a duty on the States and Territories to submit an annual report to the Council on the “implementation and effectiveness of national environment protection measures”.<sup>202</sup> These reports, together with a similar report from the Council, is required to be tabled in the Commonwealth Parliament. Other than the reporting requirements, no sanctions are imposed for non-compliance.

It is unfortunate that the IGAE and the enabling legislation do not give the Federal Council the right to take over State functions where States are unwilling to carry out their obligations. Funding by the Commonwealth could be an incentive to persuade unwilling State Governments to co-operate. It could use its financial powers with respect to special purpose grants, taxation and other expenditure to encourage the participation of the States.<sup>203</sup>

The IGAE also provides for a uniform hierarchy of offences and a penalty structure to be established and implemented by the Commonwealth and States. This requirement is crucial to prevent industry relocating to States that have less rigorous environmental protection requirements. This requirement will also achieve equal protection for human

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<sup>201</sup> Norberry (1993) op cit 7. Pollution havens are created when certain states have less rigorous environmental protection requirements than others.

<sup>202</sup> Fowler (1994) op cit 124.

<sup>203</sup> Fowler (1994) op cit 125.

beings and the environment in all areas of Australia. The States will have the sole responsibility for the enforcement of the national environment protection measures.<sup>204</sup>

## 2. NEW ZEALAND

### 3.1 General

#### 3.1.1 Background

The government system of New Zealand consists of a central government and a local government. The local government comprises the regional government<sup>205</sup> and the territorial authorities<sup>206</sup> and their powers are primarily established under the Local Government Act of 1974, although many statutes individually empower the local authorities.<sup>207</sup>

As previously mentioned New Zealand's environmental law came about, as was the case in South Africa, in an unco-ordinated and reactionary manner to deal with particular problems as they arose. Numerous ministries and government departments have traditionally been mandated to administer a variety of aspects relating to the environment. This resulted in fragmented environmental legislation with numerous overlapping statutes and no single agency to promote conservation. Furthermore, effective implementation of environmental law was specifically hampered by aspects such as the absence of a well-defined national environmental policy, the lack of co-ordination among agencies responsible for environmental administration and the poor monitoring and enforcement of the environmental legislation.<sup>208</sup>

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<sup>204</sup> Fowler (1994) op cit 122-123.

<sup>205</sup> The regional government is the middle government comprising 12 regional councils that constitute the primary administrative bodies under the RMA. Grinlinton "Access to environmental justice in New Zealand" (1999) *Acta Juridica* 82; Rabie (1998) 5 *SAJELP* op cit 377.

<sup>206</sup> Territorial authorities are the lowest level of government comprising 74 city and district councils. Grinlinton (1999) *Acta Juridica* op cit 82.

<sup>207</sup> Milne, *CDA Handbook of Environmental Law* (1992) Royal Forest and Bird Society of New Zealand Inc Wellington 274.

<sup>208</sup> Peart, R. "A new generation of environmental law. The New Zealand Reform and lessons for South Africa" (1996) 3 *SAJELP* 127; Rabie, A "Environmental Law in New Zealand" (1998) 5 *SAJELP* 365; Rabie, A "Integrated resource management: the New Zealand model and some lessons for South Africa" (1998) 13 *SAPR/PL* 330.

These shortcomings and influences, such as international environmental conventions, prompted New Zealand to embark on a programme of law reform. The reform process commenced in 1988 and was concluded on 22 July 1991 with the promulgation of the Resource Management Act 1991 (RMA) that provides for the management of natural and physical resources in an integrated and sustainable manner. With the passing of the RMA, New Zealand became a leader in environmental law reform. The RMA did away with the fragmented system of environmental law as it repealed 78 statutes and regulations and amended numerous others, to provide for a single piece of legislation for the management of land, water, soil and air throughout the whole of the country.<sup>209</sup>

New Zealand had almost no practical guidance in establishing the RMA. No comparable legislation existed in any other country and whatever guidance could be derived from the international experience was limited. Probably the most important international guide was provided by the Experts Group on Environment Law of the World Commission on Environment and Development,<sup>210</sup> which formulated 22 articles on establishing legislation.<sup>211</sup>

Before discussing the relevant legislation individually, aspects of the institutional and environmental law reform will be discussed.

### 3.1.2 Institutional reform

A major factor that contributes to New Zealand's favourable position to succeed with the implementation of resource-management legislation, is that fundamental institutional reform accompanied the Resource Management Law Reform (RMLR) process.<sup>212</sup> The most important institutional reforms in environmental management at

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<sup>209</sup> Peart (1996) 3 *SAJELP* op cit 127. The RMA will be discussed in detail further on in this chapter.

<sup>210</sup> However this group did not provide guidance on how to incorporate the concept of sustainability into legislation or how the integration of resource management legislation could be accomplished.

<sup>211</sup> Rabie (1998) 13 *SAPR/PL* op cit 339.

<sup>212</sup> The RMLP was underpinned by extensive and far-reaching economic and institutional restructuring and reforms. Peart (1996) 3 *SAJELP* op cit 127; Rabie (1998) 5 *SAJELP* op cit 377; Rabie (1998) 13

central government are the establishment of the Ministry for the Environment (MfE)<sup>213</sup> and the Parliamentary Commissioner for the Environment (PCE),<sup>214</sup> in terms of the Environment Act of 1986. Other important institutional reforms are the Department of Conservation (DoC),<sup>215</sup> by virtue of the Conservation Act 1987 and the establishment of an Environment Court.<sup>216</sup> In addition to the above institutions, many other government departments are involved in administering the considerable body of environmental legislation. Among these are the Ministry of Fisheries, the Ministry of Transport and the Ministry of Agriculture and Forestry.<sup>217</sup>

Institutional reform also took place in the local government.<sup>218</sup> The most significant impact on environmental policy of the local government reform process was the establishment of structures, organisations and processes that could be utilised by the RMA to assign functions to local government.

The RMA has reduced the role of central government in the management of natural and physical resources and correspondingly increased the autonomy of regional councils to decide policy within their own regions. Although the RMA empowers local authorities as the bodies primarily responsible for the day-to-day resource management, the central government retains certain overriding powers and a

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*SAPR/PL* op cit 335, 340.

<sup>213</sup> For detail on the MfE, see the Environment Act of 1986 further on in this chapter.

<sup>214</sup> For detail on the PCE, see the Environment Act of 1986 further on in this chapter.

<sup>215</sup> For detail on the DoC, see the Conservation Act of 1987 further on in this chapter.

<sup>216</sup> The Environmental Court is entrusted with the responsibility to investigate and rule on resource management disputes arising by virtue of the RMA. To strengthen its role, the Act provides for a range of strong enforcement mechanisms including issuance of injunctions and orders, and stiff financial penalties and even imprisonment for breach of regulations. Further discussion on this court will follow in chapter 3. Also see, Rabie (1998) 5 *SAJELP* op cit 376; Williams, *DAR Environmental & Resource Management Law in New Zealand* (1997) (2<sup>nd</sup> ed) Butterworths Wellington 32-33.

<sup>217</sup> Rabie (1998) 13 *SAPR/PL* op cit 343; Rabie (1998) 5 *SAJELP* op cit 378.

<sup>218</sup> This reform led to the creation of 12 regional councils and 74 territorial authorities (district and city councils) of which 4 are unitary authorities, meaning that they also perform regional functions. These bodies all have major responsibilities under the RMA. See Grinlinton (1999) *Acta Juridica* op cit 82; Rabie (1998) 5 *SAJELP* op cit 377.

measure of control over the management of resources by way of national policy statements.<sup>219</sup>

The primary function of regional councils is the management of natural and physical resources. Other functions include the formation of regional policy statements, regional plans and rules, and coastal management (the latter in conjunction with the Minister of Conservation).<sup>220</sup> The territorial authority's primary responsibilities are the control of land use, subdivision of land and noise control. Other functions include the formulation of district plans and rules.<sup>221</sup> The division of functions between regional government and territorial authorities is designed to simplify and streamline procedures and to enable the integrated management of resources. The RMA thus streamlined the development approval process by establishing a "one-stop-shop" system for obtaining all necessary consents. However, some degree of overlapping of functions remain.<sup>222</sup>

In summary, it can be said that the responsibility to protect the environment and conserve fauna and flora is divided between the central government, regional councils and, to a lesser extent, the territorial authorities.

There has also been a deliberate effort to achieve institutional integration in terms of the RMA, both vertically between different levels of government and horizontally, between the same levels of government. Integration is achieved vertically through the hierarchy of "green plans".<sup>223</sup> The RMA also promotes horizontal integration by giving local authorities responsibility "to achieve integrated management" of natural and physical

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<sup>219</sup> Williams (1997) op cit 103; Rabie (1998) 5 *SAJELP* op cit 377; Peart (1996) 3 *SAJELP* op cit 138; Rabie, A "Integrated resource management: the New Zealand model and some lessons for South Africa" (1999) 14 *SAPR/PL* 142.

<sup>220</sup> For more functions, see Grinlinton (1999) *Acta Juridica* op cit 82; Williams (1997) op cit 109-110; Milne (1992) op cit 41; Rabie (1999) 14 *SAPR/PL* op cit 142.

<sup>221</sup> For other functions, see Grinlinton (1999) *Acta Juridica* op cit 82; Williams (1997) op cit 114; Milne (1992) op cit 41; Peart (1996) 3 *SAJELP* op cit 139.

<sup>222</sup> Williams (1997) op cit 103-104; Richardson, BJ "Economic instruments and sustainable management in New Zealand" (1998) 10 *JEnvL* 21.

<sup>223</sup> For example national and regional policy statements and plans. See Peart (1996) 3 *SAJELP* op cit 135.

resources of the region. Although horizontal integration at local level is regarded as satisfactory, it is not the position at the central level. This is because the MfE, DoC, PCE and various other government departments are all involved in the management of the environment at central level.<sup>224</sup> The degree of integration is important as it will ultimately indicate the effectiveness of the RMA that is if it meets its goal of promoting sustainable management.<sup>225</sup>

### 3.1.3 Environmental law reform

As far as the reform of environmental legislation and its administration is concerned, three phases<sup>226</sup> may be identified. The third phase was the reform of resource-management legislation that resulted in the promulgation of a comprehensive and integrated resource management statute, the RMA.<sup>227</sup>

Despite the promulgation of the RMA in 1991, a report in 1997 indicated that there were still 90 other environmentally relevant statutes at national level. These include the Wildlife Act 1953, Environment Act 1986 and the Conservation Act 1987. There are also 80-odd environmentally relevant statutes, such as the Animals Act 1967, the Wildlife Animal Control Act 1977 and the Trade in Endangered Species Act 1989.<sup>228</sup>

Integration of environmental legislation is thus only partially achieved by the RMA. In defence of this “fragmentation” of environmental legislation, it was stated that the creation of a substantive environmental policy was not the primary purpose of the RMLR process, nor was the process driven primarily by environmental values or

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<sup>224</sup> For further detail on the integration process, see Rabie (1998) 5 *SAJELP* op cit 377-378.

<sup>225</sup> Peart (1996) 3 *SAJELP* op cit 135, 137.

<sup>226</sup> The first phase commenced with the restructuring of the national environmental administration between 1986 to 1988. The second phase (1987-1989) concerned the restructuring of local and regional government. Rabie (1998) 13 *SAPR/PL* op cit 332. Also see Rabie, A “The New Zealand Parliamentary Commissioner for the Environment: a comparative perspective” (1999) *Acta Juridica* 98. See Rabie (1998) 13 *SAPR/PL* op cit 333-334 for more detail on the RMLR process.

<sup>227</sup> Rabie (1998) 5 *SAJELP* op cit 366 & 367. It appears that a fourth phase is the review of the implementation of the RMA.

<sup>228</sup> Rabie (1998) 5 *SAJELP* op cit 370-371.

principles. It was further stated that: “The reforms were supported for a variety of reasons, including a general commitment to ‘better decision making’; for the most part substantive environmental policy goals emerged as products of the reform process”.<sup>229</sup>

According to Rabie,<sup>230</sup> Milligan also suggested that the RMA does not seem to support the notion that its fundamental direction is environmental protection. The RMA should rather be viewed as a streamlining of planning legislation, but with the important qualification that it is now designed to integrate planning with the sustainable management of almost all natural resources.

Rabie<sup>231</sup> points out that although the RMA does not cover all natural resources, even those resources that fall outside its direct ambit are nevertheless subject to the same management philosophy or are, at least, partially subject to the provisions of the RMA. According to him, environmental law reform should be an on-going process, with periodic monitoring and review of the performance and effectiveness of environmental statutes and institutions.

## 3.2 Legislation

### 3.2.1 General

Neither the Constitution Act 1986 nor the Bill of Rights Act 1990 refers to the environment. Environmental legislation in New Zealand can be divided into four functional groupings.<sup>232</sup> The two groupings that have relevance to this study are the conservation of natural and cultural resources grouping as well as the environmental planning and natural resource management grouping.<sup>233</sup> The relevant legislation that falls within these two groupings will be discussed.

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<sup>229</sup> Rabie (1998) 13 *SAPR/PL* op cit 341.

<sup>230</sup> Rabie (1998) 13 *SAPR/PL* op cit 341. It is significant that the encyclopaedic compilation of New Zealand law, *The laws of New Zealand*, distinguishes separate titles for environmental law and for resource management.

<sup>231</sup> Rabie (1998) 5 *SAJELP* op cit 371, 372 & 382.

<sup>232</sup> Williams (1997) op cit 21.

<sup>233</sup> The other two groupings are, the pollution, waste disposal and hazardous substances control grouping

The Reserves Act 1977, the Conservation Act 1987 and the Resource Management Act 1991 are the three principal Acts that can be used to protect public and private land, and thus indirectly conserve the fauna and flora on this land. However the principal Act for the conservation of plants and animals is the Wildlife Act 1953. Other Acts that are also relevant to fauna and flora are the Environment Act 1986 and the National Parks Act 1980.

### 3.2.2 Resource Management Act 1991(RMA)

#### 3.2.2.1 General

The RMA is the dominant and most important piece of environmental legislation in New Zealand and came into force on 1 October 1991. Together with the Crown Minerals Act 1991, it became the governing legislation for nearly all resource use in New Zealand. This reform<sup>234</sup> represents the most comprehensive and far-reaching law reform process ever accomplished in New Zealand. The resulting legislation represents an amalgam of market and regulatory processes and conservationist and development perspectives.<sup>235</sup>

The Act represents a paradigm shift, involving the establishment of a unified and omnibus system of resource management. In terms of this system, most natural and physical resources (defined as to include land, water, air, soil, minerals and energy), all forms of plants and animals (whether native to New Zealand or introduced) and all structures are brought under the umbrella of one statute, with a single overriding purpose of promoting the “sustainable management” of the above resources.<sup>236</sup>

The RMA was designed to redress the unsatisfactory fragmentation of legislation governing the management of natural resources by integrating a plethora of statutes into

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and the resource allocation and development grouping.

<sup>234</sup> For information on the reform process (RMLP) *per se*, see Rabie (1998) 13 *SAPR/PL* op cit 334.

<sup>235</sup> Milne (1992) op cit 34; Rabie (1998) 5 *SAJELP* op cit 367; Rabie (1998) 13 *SAPR/PL* op cit 334.

<sup>236</sup> Grinlinton (1999) *Acta Juridica* op cit 80; Rabie (1998) 5 *SAJELP* op cit 368.

a coherent whole and thus reforming the law relating to the use of land, air and water. It repealed 12 primary statutes (together with amendments), amended 53 other Acts and revoked or amended 21 regulations and orders.<sup>237</sup>

The RMA has been largely successful in providing for the integrated management of land, air and water resources. However, not all natural resources have been brought within the ambit of the Act and, therefore, it can not be regarded as a comprehensive codification of all environmental law. In particular, the RMA did not significantly affect the existing set of laws governing nature conservation and management of biological diversity.<sup>238</sup>

### 3.2.2.2 Principal features of the RMA

The RMA includes a number of new policy principles and approaches to environmental management. Foremost among these principles is the overriding concept of “sustainable management”.<sup>239</sup> A second important conceptual feature of this Act is its “effects-based” approach to environmental management. With this approach, the focus is placed upon the *effects* of activities, rather than upon the activities themselves, in determining whether a resource consent<sup>240</sup> will be granted or not.<sup>241</sup> Section 3 of the RMA defines “effect” so widely<sup>242</sup> in relation to the use, development, or protection of natural and physical resources, or in relation to the environment that

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<sup>237</sup> Grinlinton (1999) *Acta Juridica* op cit 80; Rabie (1998) 5 *SAJELP* op cit 368; Milne (1992) op cit 34.

<sup>238</sup> Rabie (1998) 5 *SAJELP* op cit 369.

<sup>239</sup> For a definition of this concept and a discussion thereof, see chapter 1.

<sup>240</sup> A resource consent is in effect a licence or permit. See Rabie (1998) 13 *SAPR/PL* op cit 366. A consent can be defined as “a permission to do something that would otherwise be prohibited”. Depending on the circumstances, it may be granted by a regional, district or city council. Policies and plans gain their practical expression through the consent granting process. Most uses of land, air and water are prohibited unless they are permitted through a resource consent or a rule in a plan. See Milne (1992) op cit 69. The consent applied for will vary with the type of activity. The effect of an activity on the environment determines largely what consent-issuing procedure is applied. There are four agencies that may issue consents and they are generically called “consent authorities”. For more detail on resource consents or consent authorities, see Milne (1992) op cit 72-88.

<sup>241</sup> Milne (1992) op cit 34; Rabie (1998) 5 *SAJELP* op cit 370.

<sup>242</sup> “Effect” includes, any positive or adverse effect; any temporary or permanent effect; any past,

almost any kind of impact on the “environment” falls within the meaning of “effect”, with the exception of potential effects of only low probability and low potential impact.<sup>243</sup> It must be noted that the assessment of environmental effects (AEE)<sup>244</sup> differs from an environmental impact assessment (EIA).<sup>245</sup> “Impacts” are usually associated with the actual negative impacts of an activity. By contrast, the concept of “effects” as defined in the RMA is much broader in scope. In short, not all effects are impacts.<sup>246</sup>

### 3.2.2.3 Control over resource use

The RMA controls and administers the use of land (in which fauna and flora are included), air and water. The controls are based on a hierarchy of policies, plans and consents. Each set of controls is binding on those in a lower hierarchy to the extent that the latter must not be inconsistent with them.<sup>247</sup>

#### a) Control at central level

The RMA provides for certain functions of central government departments. For example, sections 24-27 sets out functions of the Ministry of Environment, while section 28 sets out the functions of the Ministry of Conservation.<sup>248</sup> Government policy

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present, or future effect and any potential effect of high priority.

<sup>243</sup> Milne (1992) op cit 35; Rabie (1998) 13 *SAPR/PL* op cit 370.

<sup>244</sup> An AEE is an action to inform potentially affected parties so they can effectively participate in the consent process, and to provide environmental effects information to the consent authority so that the authority can ensure its consent decisions are consistent with sustainable resource management. See Williams (1997) op cit 504.

<sup>245</sup> An EIA can be defined as a technique and a process of gathering information on the likely environmental effects of a proposed development or activity. It should be carried out while the project is still at the design stage, so that any adverse effects can be addressed and, where practicable, minimised in the plans. See Williams (1997) op cit 503.

<sup>246</sup> Milne (1992) op cit 71.

<sup>247</sup> Milne (1992) op cit 42; Rabie (1998) 13 *SAPR/PL* op cit 363.

<sup>248</sup> See discussion further on in this chapter under the different Acts. For the functions set out by sections 24-28, see Williams (1997) op cit 104; Milne (1992) op cit 40.

may also be made through national policy statements and national environmental standards (regulations) that are both binding on all regional and district controls.<sup>249</sup>

#### b) Control at the regional level

There are three types of regional control provided for under the RMA. They are, regional policy statements, regional plans (including regional coastal plans that relates only to the coastal environment) and regional rules.<sup>250</sup>

#### c) Control at territory level

There are two types of territorial controls provided for under the RMA, namely district plans and district rules. Preparation of district plans is mandatory and they may not be inconsistent with any central or regional plans or policy.<sup>251</sup>

### 3.2.2.4 Assessment of the RMA

#### a) General

A lengthy period, up to a decade or more, of adjustment is necessary before an appropriate assessment as to the success or failure of this Act can be made. The reasons for this are both the drastic and far-reaching changes introduced by the RMA and the

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<sup>249</sup> These statements and standards are not discussed further as they are beyond the scope of this study. For information on them, see Rabie (1998) 13 *SAPR/PL* op cit 361-363. For detail on the procedures involved, see Milne (1992) op cit 46-49.

<sup>250</sup> These statements, plans and rules have already been referred to under local government reform above. They will not be discussed further as they are beyond the scope of this study. Functions of regional councils are set out in section 30 of the RMA. For detail on functions and procedures, see Milne (1992) op cit 41, 49-53.

<sup>251</sup> These plans and rules have already been referred to under local government reform above. They will not be discussed further as they are beyond the scope of this study. Functions of district and city councils are set out in section 31 of the RMA. For more detail, see Milne (1992) op cit 41, 53-54.

lack of a comprehensive benchmark against which government performance could have been measured<sup>252</sup> before 1997.<sup>253</sup>

The Ministry for the Environment (MfE) released the Environment 2010 strategy in September 1995. This strategy sets out a suite of environmental goals to be achieved at central level by 2010. The MfE is currently coordinating the development of a set of environmental performance indicators that will monitor progress made towards the achievement of the above goals.

#### b) Support for the RMA

The RMA was passed with the blessing of all major groups in New Zealand's society, involving environmentalists, the business community, the Maori and the general public. There remains widespread agreement by all sectors with the philosophy of integrated and sustainable management of natural resources that forms the basis and purpose of the RMA. An overwhelming 87 percent of senior executives who participated in a survey in 1998, supported legislation similar to the RMA. However, 47 percent of respondents regarded the Act as ineffective, while only 24 percent thought it effective, with the rest remaining neutral.<sup>254</sup>

Although the environmental groups supported the philosophy of integrated and sustainable management of natural resources, they have been dissatisfied with the RMA

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<sup>252</sup> Rabie (1999) 14 *SAPR/PL* op cit 145.

<sup>253</sup> This was when the Minister for the Environment published *The state of New Zealand's environment*.

<sup>254</sup> Rabie (1999) 14 *SAPR/PL* op cit 147. A document entitled *Land use control under the Resource Management Act: Analysis of submissions*, was published by the MfE in September 1998. This document evidenced widespread support for the retention of the RMA and for improvements to be effected through better administration, rather than through costly amendments to the legislation. It was also concluded that greater use should be made of national guidance in the form of policy statements, standards and guidelines. A separate report, *Resource Management Act 1991: Report of the Minister for the Environment's reference group* was published in September 1998. After both documents were considered, the MfE released proposals for reform of the RMA in November 1998 as a basis for final public discussion before an Amendment Bill would be introduced. Thus, despite several amendments to the Act since 1994, no one has contended that the RMA should be repealed, nor have there been serious demands for major amendments. See Rabie (1998) 5 *SAJELP* op cit 379.

primarily because they perceive insufficient opportunities to participate in decision-making processes or to effectively challenge inappropriate development approvals.<sup>255</sup> The fact is that the RMA does provide for public participation at nearly every level. The whole thrust of the Act favours interested parties having an input in the decision-making process and *anyone* can initiate a prosecution when an offence is committed under the Act, irrespective of whether a consent authority is pursuing the matter.

One of the ways in which the RMA provides for wider participation, is by relaxation of *locus standi* restrictions.<sup>256</sup> The Act has simplified and improved the issue of standing. While the “open access” provisions seem generous it is increasingly apparent that there are significant practical and procedural barriers to participation inherent in the new regime. One of these barriers is access to information.<sup>257</sup> The information should be accurate and should provide reasonable detailed background information on *inter alia* the state of the environment, how the resource management system works and on the effects of specific activities and developments.<sup>258</sup> However, the RMA seeks to ensure that decision-makers have sufficient and relevant information on which to base their decisions by, *inter alia*, requiring the local authorities to gather their own information, conduct research, monitor the state of the environment, monitor the effectiveness of their actions and keep records.<sup>259</sup>

Another barrier to participation is costs. Considerable costs can be incurred through consultants and legal fees at council hearings and in appeals. In addition, unsuccessful appellants in the Environmental Court and higher courts may have

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<sup>255</sup> The perception is probably because of the absence of legal aid for public interest litigation and the tendency of courts to award significant costs against plaintiff environmental groups. See Rabie (1998) 5 *SAJELP* op cit 379.

<sup>256</sup> For more detail on standing, see Williams (1997) op cit 578.

<sup>257</sup> Other examples relate to the issuing of certificates of compliance and to the non-notification discretion of consent authorities.

<sup>258</sup> For more detail on this, see Grinlinton (1999) *Acta Juridica* op cit 84-92.

<sup>259</sup> Peart (1996) 3 *SAJELP* op cit 141.

substantial costs awarded against them. Furthermore, section 278(1) of the RMA provides for the Environmental Court to make orders for security for costs.<sup>260</sup>

Because of the costs factor, the class action appears to have considerable appeal in environmental litigation. It furnishes a way of overcoming the high costs of litigation by providing a means through which a number of persons, each injured too little to justify the expense of an individual claim, can conveniently pool their resources. Although the class action in New Zealand is by no means a straight-forward procedure,<sup>261</sup> the courts have adopted a reasonably liberal approach to class actions under the High Court Rules, R78. Thus from an environmental perspective, the class action may become increasingly important as it appears that the courts are willing to accept such applications.<sup>262</sup>

Another characteristic of the RMA, apart from the relaxation of the standing restrictions, which attracted much support, is that the management of all natural and physical resources was brought under a single statute,<sup>263</sup> thus establishing a common purpose for the management of natural and physical resources.<sup>264</sup> This is an approach away from a fragmented and poorly co-ordinated system that was cumbersome and did not enable a uniform and integrated approach to the management of resources.<sup>265</sup>

The RMA is also supported because it provides for a range of enforcement techniques (administrative and judicial) including, declarations, enforcement orders and abatement

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<sup>260</sup> For more detail on this, see Grinlinton (1999) *Acta Juridica* op cit 92-96.

<sup>261</sup> Williams (1997) op cit 587.

<sup>262</sup> Williams (1997) op cit 593. For more detail on class actions in New Zealand, see Williams (1997) op cit 589-594.

<sup>263</sup> However, Rabie (1998) 5 *SAJELP* op cit 369-371, pointed out that the RMA cannot be regarded as a codification of all environmental law as there still exists numerous environmentally related statutes that were not repealed by the RMA.

<sup>264</sup> Williams (1997) op cit 68.

<sup>265</sup> Other characteristics that led to the wide-spread support for the RMA include, the explicit stating of the Act's goals (to promote the sustainable management of natural and physical resources) and that it encourages a pro-active approach to environmental management by requiring that the whole country is covered by regional policy statements, regional coastal plans and district plans. See, Peart (1996) 3 *SAJELP* op cit 129, 137-138; Williams (1997) op cit 68.

notices, which may be utilised by local authorities and other parties to ensure that the Act is not just a “paper tiger” but is enforced effectively.<sup>266</sup>

### c) Criticism against the RMA

A criticism of the RMA is that it is not effective in its quest to integrate environmental legislation, especially at central level. Peart<sup>267</sup> points out that environmental considerations are not integrated into central government policymaking in important areas such as the economy, agriculture, transport, tourism, energy or social welfare. There are also some significant gaps in the coverage of the RMA, including the management of fisheries and national parks that are covered by other legislation. As previously stated, the RMA did not affect the existing set of laws governing nature conservation and the management of biodiversity.<sup>268</sup> Integration of environmental legislation is thus only partially achieved by the RMA. As already mentioned, in defence of this “fragmentation” of environmental legislation, it was stated that the creation of a substantive environmental policy was not the primary purpose of the RMLR process but a product thereof.<sup>269</sup>

Criticism relating to the implementation of the RMA is also made. At central government level, complaints target the performance of the Ministry of Environment as well as against the Department of Conservation and the Parliamentary Commissioner for the Environment. The complaint against the MfE, for example, is that it has failed to provide national policy statements or national environmental standards, thus leaving the local authorities with little guidance as to how they should perform their functions under the Act.<sup>270</sup>

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<sup>266</sup> Enforcement issues will be discussed in chapter 3. For further detail on these techniques, see Peart (1996) 3 *SAJELP* op cit 142.

<sup>267</sup> Peart (1996) 3 *SAJELP* op cit 137.

<sup>268</sup> Rabie (1998) 5 *SAJELP* op cit 369.

<sup>269</sup> Rabie (1998) 13 *SAPR/PL* op cit 341.

<sup>270</sup> For more detail on the complaints against the MfE, DoC and PCE, see Rabie (1999) 14 *SAPR/PL* op

This lack of proper guidance is probably why there are complaints relating to the performance of the local authorities. As the primary responsibility for environmental management is placed at the level of the local authorities, the RMA's successful implementation depends decisively on them. The most severe criticism has come from the business sector. According to an environmental performance survey in 1996, only 14% of respondents preferred local government to administer the RMA, while 21% favoured central government and 50% a privatised agency.<sup>271</sup>

Other complaints regarding the RMA are that the Act is too prescriptive so that people's ability to develop their land has often been unduly impeded by cumbersome and inefficient bureaucratic local administration and that it has failed to define pivotal concepts such as "environment".<sup>272</sup>

As previously stated, the RMA did not repeal the existing set of laws (for example, the Environment Act 1986, the Conservation Act 1987, the Reserves Act 1977, the Wildlife Act 1953 or the National Parks Act (1980)) governing nature conservation in protected areas and the management of biodiversity. These Acts have their own provisions regarding the conservation of fauna and flora, as well as functions in terms of the RMA. The functions under the RMA are divided between central and local government. The former government's functions with regard to the management of natural and physical resources is the responsibility of the Ministers of Environment (established in terms of the Environment Act 1986) and Conservation (established in terms of the Conservation Act 1987).<sup>273</sup> A discussion of these Acts will now follow.

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cit 150-152.

<sup>271</sup> It is beyond the scope of this study to discuss the criticisms in further. For a very detailed discussion of the criticism against the performance of the local authorities, see Rabie (1999) 14 *SAPR/PL* op cit 153-162.

<sup>272</sup> Rabie (1998) 5 *SAJELP* op cit 381; Rabie (1999) 14 *SAPR/PL* op cit 149. For more critique, see Rabie (1999) 14 *SAPR/PL* op cit 148-149; Peart (1996) 3 *SAJELP* op cit 131.

<sup>273</sup> Williams (1997) op cit 70-71.

### 3.2.3 Environment Act 1986

This Act conserves fauna and flora indirectly mainly through the functions of both the Ministry for the Environment (MfE)<sup>274</sup> and the Parliamentary Commissioner for the Environment (PCE)<sup>275</sup> that was established by the Act.

#### 3.2.3.1 The Ministry for the Environment

It is the central body that provides advice to the Minister for the Environment on environmental policies, procedures and controls and oversees the implementation of *inter alia* the RMA and the Environment Act 1986.<sup>276</sup> One of the objectives of the MfE is that, in management of natural and physical resources, full and balanced account is taken of all intrinsic values of ecosystems.<sup>277</sup>

The MfE began with monitoring the RMA in its first Findings of the Annual Survey of Local Authorities, released in December 1996. To give further policy direction to environmental managers, the MfE released in September 1995 the Environment 2010 Strategy, which sets out a suite of environmental goals to be achieved by 2010 at national level. This Strategy is the first comprehensive statement of environmental priorities and strategies ever developed by a New Zealand government. It is an overarching umbrella for resource management and proposes to guide the development of environmental policies and priorities of central government, local authorities, resource users and community groups up to the year 2010. The MfE is currently co-ordinating the

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<sup>274</sup> It is a small neutral body that acts as an arbiter in decisions over allocation of resources. It has accordingly been referred to as the “ministry in the middle” and focuses mainly on policy formulation.

<sup>275</sup> See discussion below.

<sup>276</sup> For other functions of the Minister for the Environment under the Environment Act of 1986, see Milne (1992) op cit 270; Williams (1997) op cit 48-49; Grinlinton (1999) *Acta Juridica* op cit 81. For other functions of the Minister for the Environment under the RMA of 1991, see Milne (1992) op cit 41; Williams (1997) op cit 50 & 104; Sheate, W *Environmental Impact Assessment: Law & Policy* (1996) Cameron May London 106.

<sup>277</sup> Williams (1997) op cit 49; Milne (1992) op cit 270; Peart (1996) 3 *SAJELP* op cit 138; Rabie (1998) 5 *SAJELP* op cit 375; Rabie (1998) 13 *SAPR/PL* op cit 343.

development of a set of environmental performance indicators that will monitor progress towards the achievement of the above goals.<sup>278</sup>

### 3.2.3.2 The Parliamentary Commissioner for the Environment (PCE)

The PCE is an officer of Parliament and was the first office of its kind in the world and even today is shared by only a handful of countries and institutions, for example Australia (in ACT) and Germany.<sup>279</sup> The PCE is appointed by the Governor General, on recommendation of the House of Representatives and its independence is guaranteed.<sup>280</sup>

The PCE provides an independent check on the operation of New Zealand's environmental management system, including the actions of public authorities. The main function of the PCE has been described as a "system guardian", to *inter alia* review the system of agencies and processes established by the government to manage the allocation, use and preservation of natural and physical resources. The PCE also acts as environmental auditor and as environmental ombudsman<sup>281</sup> and has extensive powers of investigation and recommendation relating to environmental matters.<sup>282</sup> Further functions include the maintenance and restoration of ecosystems protecting areas of cultural and scientific value.<sup>283</sup> There are thus four different roles identified for the PCE, namely those of an environmental ombudsman, an environmental auditor, an environmental guardian and a system guardian.<sup>284</sup>

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<sup>278</sup> Rabie (1998) 5 *SAJELP* op cit 381; Rabie (1999) 14 *SAPR/PL* op cit 146.

<sup>279</sup> Rabie (1999) *Acta Juridica* op cit 100. For a detailed discussion on the PCE, see Rabie (1999) *Acta Juridica* op cit 97-115.

<sup>280</sup> For further detail on the PCE, see Rabie (1999) *Acta Juridica* op cit 109.

<sup>281</sup> The ombudsman may intervene and participate in any appeal proceedings arising out of planning and environmental consents; summon and examine persons under oath; investigate administrative structures and their effectiveness; and investigate "any matter" adverse to the environment. See Bates (1995) op cit 469. The role as an environmental ombudsman will be discussed further in chapter 3.

<sup>282</sup> Williams (1997) op cit 48; Milne (1992) op cit 271; Peart (1996) 3 *SAJELP* op cit 138; Rabie (1998) 5 *SAJELP* op cit 376; Rabie (1998) 13 *SAPR/PL* op cit 343; Rabie (1999) *Acta Juridica* op cit 100.

<sup>283</sup> For more functions of PCE, see Williams (1997) op cit 48-49; Rabie (1999) *Acta Juridica* op cit 100-102.

<sup>284</sup> For information on the different interpretations of the four roles, see Rabie (1999) *Acta Juridica* op cit 102-105.

### 3.2.4 Conservation Act 1987

This Act aims to promote the conservation of natural resources (including fauna and flora) generally by providing for their protection on private and public land and for the declaration of protected areas.<sup>285</sup> The provisions of this Act are implemented through the responsibilities of the Department of Conservation that was established under the Act, the New Zealand Conservation Authority and conservation boards.

#### 3.2.4.1 The Department of Conservation (DoC)

The DoC administers almost a third of New Zealand's land area including all national parks, forests, conservation parks, maritime parks and nearly 4000 reserves. The department is the central government's principle conservation agency with an explicit mandate to act as an advocate for the conservation of natural<sup>286</sup> and physical resources.<sup>287</sup> This advocacy role is particularly significant because it has the financial, technical and scientific resources to protect conservation values. Given the lack of legal aid for environmental groups, the DoC's role is vital for the conservation of fauna and flora.<sup>288</sup>

This department is also entrusted with the implementation of approximately 20 different conservation statutes,<sup>289</sup> administers the state's land-based natural conservation estate (about 30 percent of New Zealand) including the protected species

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<sup>285</sup> These areas include ecological, sanctuary or wilderness areas and conservation parks. For a description of these areas, see "protected areas" (1.2.4.4) in chapter 1.

<sup>286</sup> "Natural resources" are defined in section 2 and the meaning includes "plants and animals of all kinds" and "systems of interacting living organisms and their environment".

<sup>287</sup> For other functions of the Minister of Conservation under the Conservation Act of 1987 section 6, see Williams (1997) op cit 50-51; Grinlinton (1999) *Acta Juridica* op cit 81. For functions of the Minister of Conservation under the RMA section 28, see Williams (1997) op cit 51, 104-105 and Milne (1992) op cit 40. The latter functions are mainly with regard to coastal issues, for example coastal policy statements, plans and permits.

<sup>288</sup> Milne (1992) op cit 267; Williams (1997) op cit 180; Rabie (1998) 5 *SAJELP* 374; Rabie (1998) 13 *SAPR/PL* op cit 343.

<sup>289</sup> These statutes include, the Reserves Act 1977, the National Parks Act 1980 and the Wildlife Act 1953.

and land and is primarily responsible for the protection of the coastal area.<sup>290</sup> Under the Conservation Act 1987, the department also administers a number of funds, such as the Forest Heritage Fund.<sup>291</sup>

As already discussed in chapter 1, the Conservation Act 1987 provides for the conservation of fauna and flora on public land<sup>292</sup> as well as on private land.<sup>293</sup> Since 1987 the Department of Conservation has pursued the Protected Natural Areas Program (PNA) that was initiated in the early 1980s through the former New Zealand National Parks and Reserves Authority. The PNA provides for the identification and protection of New Zealand's best representative natural areas. The programme is being reviewed to serve, not only as protection of the natural areas, but also for the management and restoration of ecosystems.<sup>294</sup>

#### 3.2.4.2 The New Zealand Conservation Authority

This body was established in 1990 and replaced both the National Parks and Reserves Authority and the Nature Conservation Council. It has responsibility, under the Conservation Act 1987, for advising the Minister of Conservation on a wide range of conservation matters. These include matters affecting the land, animals and plants managed by the Department and a wide discretion to "investigate any nature conservation..." matters the Authority considers to be of national importance.<sup>295</sup> The Authority also provides for public input into the management of New Zealand's natural

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<sup>290</sup> Under the RMA, the Minister of Conservation has the ultimate responsibility for managing the 13000 km of New Zealand's coastline in association with regional councils. See Peart (1996) 3 *SAJELP* op cit 138.

<sup>291</sup> Milne (1992) op cit 267; Williams (1997) op cit 180; Rabie (1998) 5 *SAJELP* 374; Rabie (1998) 13 *SAPR/PL* op cit 343.

<sup>292</sup> There are three categories of publicly owned conservation areas, specially protected areas (ss 18-22), marginal strips and stewardship land. Specially protected areas are poorly defined in the Act but in practice they represent a range of protected areas similar to the Reserves Act 1977. These areas include conservation parks, wilderness areas and ecological areas. For further detail see, Milne (1992) op cit 221.

<sup>293</sup> Protection on private land is through conservation covenants and management agreements. For further detail, see Milne (1992) op cit 209.

<sup>294</sup> Milne (1992) op cit 268.

<sup>295</sup> Milne (1992) op cit 269.

heritage and it reports directly to the Minister. The Authority also has an important role in approving conservation management strategies and conservation management plans referred to it by conservation boards.<sup>296</sup>

#### 3.2.4.3 Conservation Boards

Seventeen conservation boards were established in 1990 under the Conservation Act. Their functions include recommending and advising the New Zealand Conservation Authority and the DoC on conservation management strategies and plans affecting, for example, national parks and reserves. The conservation boards can also independently investigate issues of conservation significance.<sup>297</sup>

#### 3.2.5 Reserves Act 1977

This Act is administered by the DoC. The purpose of this Act includes the preservation and survival of indigenous flora and fauna in its natural habitat and the preservation of samples of natural ecosystems.<sup>298</sup> As previously mentioned, the Act can be used to protect fauna and flora on public as well as private land. It provides, however, primarily for the protection and management of land held in public ownership for reserve purposes. The basis of management of public land under the Act is the classification of reserves and the preparation of their management plans.

There are various types of reserves, *inter alia*, recreation reserves, historic reserves and national reserves.<sup>299</sup> Of specific relevance are the scenic, scientific and nature reserves, as all plants, animals and landscape are protected in their borders.<sup>300</sup>

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<sup>296</sup> Milne (1992) op cit 269.

<sup>297</sup> For further detail, see Milne (1992) op cit 269.

<sup>298</sup> Williams (1997) op cit 24.

<sup>299</sup> For examples of other reserves and a description of each, see Milne (1992) op cit 218-220.

<sup>300</sup> For a description of these reserves, see "protected areas" (1.2.4.4) in chapter 1. Also see Milne (1992) op cit 219.

The protection of private land depends on the willingness of the landowner. The types of protection are ranked in order of the degree of protection they confer. The soundest approach to protection is through protected private land agreements<sup>301</sup> and conservation covenants<sup>302</sup> as they are subject to the enforcement provisions of the Reserves Act 1977. Private land can also be protected by management agreements,<sup>303</sup> but they do not bind future landowners as do the former two agreements.

### 3.2.6 Wildlife Act 1953

As previously mentioned, this Act is the principal Act for the protection of wildlife<sup>304</sup> on land and in the territorial sea and is administered by the DoC. The Wildlife Act 1953 establishes a protection system for wildlife (and their habitat) through various types of protected areas, including wildlife refuges, sanctuaries and management reserves<sup>305</sup> in which some species are absolutely protected (for example in wildlife sanctuaries) and some are partially protected (for example in wildlife refuges).<sup>306</sup> The schedules in the Act define what level of protection is given to each species. The Act also controls a number of related activities, including game shooting and wildlife damage to crops.

### 3.2.7 National Parks Act 1980

This Act protects areas that contain *inter alia*, distinctive ecological systems or natural features so beautiful, unique or scientifically important that their preservation is in the

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<sup>301</sup> For a description of this agreement, see “protected areas” (1.2.4.4) in chapter 1 and also Milne (1992) op cit 209.

<sup>302</sup> For a description of conservation covenant, see “protected areas” (1.2.4.4) in chapter 1 and also Milne (1992) op cit 209.

<sup>303</sup> With this agreement, the owner requests the Minister of Conservation to manage land for any of the purposes of the Reserves Act of 1977.

<sup>304</sup> “Wildlife” is defined in the Act as any “animal” that is living in a wild state. See 1.2.4.3 of chapter 1 and Milne (1992) op cit 230-231.

<sup>305</sup> These “areas” are already described in 1.2.4.4 of chapter 1. Also see Milne (1992) op cit 210 and Williams (1997) op cit 23.

<sup>306</sup> For examples of species listed in the various schedules according to the protection they are given, see Milne (1992) op cit 231-232. Also see 1.2.4.3 of chapter 1.

national interest. These national parks and all the fauna and flora in them, are protected for their intrinsic worth and for the benefit, use and enjoyment of the public.<sup>307</sup>

#### 4. INTERNATIONAL TREATY (CITES)

A discussion of public international law<sup>308</sup> is beyond the scope of this study.<sup>309</sup> However, having said that, one treaty<sup>310</sup> that is especially relevant to this study on the protection of fauna and flora, is the Convention on International Trade in Endangered Species of 1973 (CITES).<sup>311</sup> For the sake of completeness, this treaty will be discussed briefly.

##### 4.1 General

As of 1999, one hundred and forty five (145) countries, including South Africa, Australia and New Zealand, have become members of CITES. This makes it one of the most widely accepted treaties in the world. Under this Convention, all member nations are prohibited from trading in specimens of species that are included in Appendices I-III, except in accordance with the provisions of the Convention.<sup>312</sup>

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<sup>307</sup> Williams (1997) op cit 24; Milne (1992) op cit 222.

<sup>308</sup> Public international law (the "law of nations") governs relations between international legal subjects and is also referred to as interstate law since it is primarily concerned with the rights and obligations of states.

<sup>309</sup> For information on international environmental law and the treaties to which South Africa is a party, see Kidd (1997) op cit 64-82.

<sup>310</sup> Treaties (also referred to as conventions, accords, agreements and protocols) are the primary source of international law. A treaty can be adopted bilaterally, regionally or globally, and is defined by the 1969 Vienna Convention on the Law of Treaties as "an international agreement concluded between states in writing form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation". The parties to a treaty are legally bound by the provisions of a treaty. For further information on treaties, see Sands, P *Principles of International Environmental Law* (1995) Manchester University Press 103-122.

<sup>311</sup> A Conference of parties meets periodically to assess *inter alia*, trade issues and are funded by the CITES parties. The 11th Conference was held in Nairobi in April 2000.

<sup>312</sup> Berry, JF & Dennison, MS *The Environmental Law and Compliance Handbook* (2000) McGraw Hill New York 695.

The Convention's objective is to protect all endangered animal and plant species in the world by regulating trade in live species and wildlife products such as hides, ivory and timber. A system of three appendices differentiates between species of differing status with regard to trade in them. Appendix I lists those species in present danger of extinction and, subject to a few exceptions, totally prohibits commercial trade in them. Appendix II permits trade in listed species that are not yet threatened but may become so. Appendix III provides a mechanism whereby a party to the treaty that provides protection in its domestic legislation of species that are not listed in Appendix I or II can enlist the support of other parties in enforcing its own legislation.<sup>313</sup> Trade in the listed specimens is regulated through a system of export and import permits, certificates and reports.

CITES is seen as the Endangered Species Act (ESA) in the international arena. However, it has a number of weaknesses. One of the weaknesses is that CITES focuses on species protection and not the usual underlying problem of habitat destruction. Another shortcoming is that despite its protective measures, a substantial amount of international trade in species is believed to take place illegally.<sup>314</sup> The effectiveness of CITES is thus questioned.<sup>315</sup> Statistics show that of the 711 species listed as of 1992, only 69 (9,7%) are recovering. Furthermore, 14 species listed (2%) are probably extinct and 232 species (32,6%) are declining.<sup>316</sup> According to a report prepared for the secretariat of CITES, at least 45 percent of international trade in CITES-listed animals and 79 percent of trade involving plants, are unreported.<sup>317</sup>

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<sup>313</sup> Fuggle, RF & Rabie, MA *Environmental Management in South Africa* (1998) Juta Cape Town 175; Kidd (1997) op cit 79; Spellerberg (1995) op cit 84; Glazewski (2000) op cit 59; Berry et al (2000) op cit 696; Ramsay, R & Rowe, GC *Environmental Law and Policy in Australia* (1995) Butterworths Sydney 620.

<sup>314</sup> For other weaknesses, see Ramsay et al (1995) op cit 621.

<sup>315</sup> Although some critics view CITES as protecting a resource that seems to have only sentimental value, this is far from the truth. Forty percent of the prescription drugs come from plants, animals or micro-organisms and most of these chemical compounds cannot be duplicated in the laboratory. Furthermore, humans make use of the disease resistant strains to protect crops and to manufacture antibiotics. See Berry et al (2000) op cit 698 for more advantages of conserving fauna and flora.

<sup>316</sup> Berry et al (2000) op cit 696.

<sup>317</sup> Ramsay et al (1995) op cit 621.

From an economic perspective, wildlife-related recreation is a \$50 billion industry annually in the USA and the fishing industry alone provides for over 100,000 jobs. According to Berry et al,<sup>318</sup> Eichenberg once said “destroying wildlife and habitats is as close as one can get to killing the goose that lays the golden egg”.

#### 4.2 South Africa

At a Conference in 1997,<sup>319</sup> on the Regulation of Trade in Endangered Species, it was indicated that South Africa is one of the countries that fell short of its obligations under CITES in respect of the enforcement of legislation. This was mainly because of the plethora of laws with regard to wildlife and the inconsistencies between the different provincial departments with regard to nature conservation legislation. Other problems cited include severe shortage of nature conservation law officers, intimidation and bribery of staff and under-paid staff. As prices of wildlife products increase, more game guards and rangers get involved in poaching activities to supplement their modest income.<sup>320</sup>

This treaty is specifically important to South Africa as illegal trade in wildlife is a serious problem that has increased because of the country's good infra-structure that is being used as an exit route by international smugglers to transport their wares to their markets. This problem has continued with little control for many years. Through the establishment of a local branch of the Wildlife Foundation and the international

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<sup>318</sup> Berry et al (2000) op cit 698.

<sup>319</sup> Nottingham, 12-13 May 1997.

<sup>320</sup> Kidd (1997) 4 *SAJELP* op cit 334-5; Jones, G “Black Rhino Poaching” (1996) 3 *SAJELP* 178. Kohm is of the opinion that CITES has become almost impossible to enforce and that it is generally believed that wildlife smuggling are low-risk endeavours, reportedly leading some drug traffickers to switch jobs and become wildlife smugglers. Enforcement of CITES within the USA is also not serving a significant deterrent function. In the vast majority of cases, the only penalty imposed on a violator is confiscation of merchandise. It also seems that enforcement efforts are not focusing on those portions of the trade potentially most detrimental to CITES species. Instead, most reported violations involve tourist souvenirs or other personal, rather than commercial, transactions. For further comments, see Kohm, KA “*Balancing on the Brink of Extinction*” (1991) Island Press Washington DC 124.

organisation, Trade Records of Flora and Fauna in Commerce (TRAFFIC),<sup>321</sup> a network was established by the three leading private conservation organisations in South Africa to crack down on the illegal trade in wildlife. These three organisations are the South African Nature Foundation, the Trust for Endangered Wildlife and the Wildlife Society.<sup>322</sup>

In September 1988 a Rhino Conservation Workshop was held in Skukuza and recommended to the Commissioner of the South African Police and conservation authorities that:

- (a) a central bureau be established within the South African Police Service (SAP) to deal specifically with the illicit traffic in rhino horn and ivory; and
- (b) that this unit should, if possible, include investigating officers experienced in wildlife law enforcement.

This workshop led to the establishment of a special unit in the SAP in 1989, namely the Endangered Species Protection Unit (ESPU). This unit is tasked to combat illegal trafficking in wildlife species with the overall vision to ensure South Africa's natural heritage is preserved.<sup>323</sup>

Other specialised functions of the ESPU include:

- the identification of the international routes used by poaching syndicates and the destruction of the organisations behind these schemes.
- redressing South Africa's unwarranted and unjust reputation as an accessory to the illegal trade and indiscriminate extermination of the endangered species.

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<sup>321</sup> The world's largest agency to monitor trade in game.

<sup>322</sup> Hugo, ML & Viljoen, AT & Meeuwis, JM *The Ecology of Natural Resource Management* (1997) Kagiso Publishers Pretoria 128; Krott, R "Catching the ivory poachers" (1998) *New African* 1.

<sup>323</sup> Jones (1996) 3 *SAJELP* op cit 179.

- curtailing the international trade in endangered species by investigating and preventing any criminal conduct such as illegal hunting, buying, selling and
- smuggling of products (for example rhino horn and elephant ivory) of these species.<sup>324</sup>

With millions of dollars<sup>325</sup> at stake in illegal trading, protecting endangered species is a demanding and dangerous job for any law-enforcement agency. The ESPU turned the tide in South Africa's war against poachers by making great strides in eliminating entire poaching networks. Since 1989 the ESPU has conducted over 1000 investigations into wildlife crime, seizing smuggled ivory, rhino horn, fish, rare plants, endangered prehistoric plants (cycads) and endangered birds worth tens of millions of dollars. This is why this unit is seen as one of the world's top wildlife law-enforcement agencies.<sup>326</sup>

The commitment of the ESPU is reflected in the words of Superintendent Lategan, the then head of the ESPU.<sup>327</sup> He said, "If we fail to effectively control the illegal trade, an offence is committed against every tax-paying citizen by way of loss of tourist revenue and the destruction of our natural heritage".<sup>328</sup>

Despite the ESPU's efforts and successes, a Commission of Inquiry<sup>329</sup> into the illegal trade in rhino horn in 1996 reached, *inter alia*, the following recommendations and conclusions:

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<sup>324</sup> Jones (1996) 3 *SAJELP* op cit 179; Krott (1998) *New African* op cit 2.

<sup>325</sup> International commercial trade in wildlife has been estimated to amount to between US \$5 and 50 billion annually. The lucrative ivory market resulted in 700 000 to 800 000 elephant being slaughtered in Africa between 1979 and 1988. Glazewski (2000) op cit 59.

<sup>326</sup> Krott (1998) *New African* op cit 1-4.

<sup>327</sup> Acting Superintendent B Benson is currently (Feb 2002) in charge of the ESPU.

<sup>328</sup> Krott (1998) *New African* op cit 3.

<sup>329</sup> The Commission of Inquiry was appointed in 1994. Recommendations and conclusion were published in the Report of the Commission of Inquiry into the Alleged Smuggling of Illegal Trade In ivory and Rhinoceros horn in South Africa in 1996. For more information, see Jones (1996) 3 *SAJELP* op cit 188.

- a) that the ESPU is understaffed and ought to be extended by having a permanent presence of ESPU staff in other parts of the Republic, and not only in Pretoria;
- b) that the customs control in South Africa as conducted then, is seriously flawed in many respects with the result that ivory and rhino horn can enter and leave this country with very little risk of detection; and
- c) that the need for communities adjacent to protected areas to benefit from these areas and to participate in the protection of wildlife in such areas, is recognised.<sup>330</sup>

The inconsistencies in the different provincial statutes relating to control over trade in endangered species came under discussion again. It prompted a request to the Select Committee on Agriculture, Land and Environmental Affairs for the approval of the CITES agreement in terms of section 231 of the Constitution. This would authorise DEAT to make regulations on CITES implementation. The ESPU has prepared a draft

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<sup>330</sup> Jones (1996) 3 *SAJELP* op cit 186. Jones points out that the CITES ban is not achieving its objective in Southern Africa with regard to the black rhino as its numbers has drastically diminished in spite of it. The mere promulgation of environmental legislation is not enough. Poachers are not deterred by legislation and the rhinos are not safe in vast areas of limited patrols, neither in heavily guarded sanctuaries such as the Kruger National Park. There can be no realistic expectation of success without adequate implementation of applicable legislation. He suggests that alternative solutions must be found before it is too late. Various methods have been employed in other African countries in an attempt to save one of the ten most endangered mammals on earth, the black rhino, for example:

- military campaign (any person caught poaching is shot dead on sight).
- animals are kept in heavily guarded enclosures (Kenya).
- dehorning (Namibia).

Jones points out that these “solutions” may not be effective in South African reserves due to the dense vegetation that would prevent a poacher from checking if a rhino in fact has a horn before shooting it. What South Africa needs is a combination of dehorning, concentration into sanctuaries, increased anti-poaching and law enforcement efforts in the field, supported by a concerted strategy to understand and impact the rhino horn supply and price factors. Other “solutions” put forward to save the rhino from extinction include, the market mechanism (the market mechanism as an alternative will be discussed further in chapter 4), increased fines and prison sentences to have an effective deterrent effect, (this issue will be discussed in chapter 3) and support of the local population through education. It must be beneficial for the local people to protect their own heritage. The needs of the rural people must be established clearly and be incorporated into the conservation program in the future (this issue will be discussed in chapter 4). For comments on possible solutions on the protection of the black rhino specifically, see Jones (1996) 3 *SAJELP* op cit 181-187.

Endangered Species Act, which is intended to deal with many inadequacies in the South African legislation, in so far as its obligations under CITES are concerned.<sup>331</sup>

Jones<sup>332</sup> once stated, “While there is still sand in our glass, we owe it to posterity to protect South Africa’s unique ecosystems so that those who may follow us also experience and cherish the wonders of nature”. It seems as if South Africa is striving to do just that.

However, a new danger is facing South Africa’s (and the world’s) wildlife and that is an increase in internet trade of endangered species. According to Mr D Newton, a representative of TRAFFIC, it is impossible to determine the precise volume of e-trade in endangered and protected species, but that it is increasing is a fact.<sup>333</sup> This will mean that the members of the ESPU will have to be trained in internet and e-trade or appoint experts in this field to enable them to combat the exploitation of South Africa’s endangered species by means of electronic technology.

#### 4.3 Australia

The uniqueness of Australia’s wildlife has encouraged a highly lucrative, and often illegal, export trade in many species of native animals. Therefore, it is not surprising that Australia became a member of CITES in 1976.<sup>334</sup>

The Commonwealth has legislative power to give effect to the Convention throughout Australia and this has led to the enactment of a number of provisions designed to preserve native or other wildlife. The Commonwealth has authority under section 51 of the Constitution to regulate trade between Australia and other countries. It has sought to implement the terms and spirit of CITES through the provisions of the Wildlife

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<sup>331</sup> Kidd (1999) 6 *SAJELP* op cit 130; Glazewski (2000) op cit 60.

<sup>332</sup> Jones (1996) 3 *SAJELP* op cit 187.

<sup>333</sup> Van Wyk, A “Keer dringend die sluikehandel in diere op internet” *Rapport* of 18 February 2001.

<sup>334</sup> There are over 70 Australian species that are listed in Appendix I of the Convention. Bates (1987) op

Protection (Regulation of Exports and Imports) Act 1982 (Cth) and the Endangered Species Act 1992.<sup>335</sup> The former Act is intended to add to and not substitute existing Acts, such as the Customs Act 1901, or future enactments.

The Commonwealth has further legislated the protection of endangered species of fauna and flora through Endangered Species Ordinances that were all passed in 1980 and that regulate trade in certain species. These ordinances relate to the export and import of specimens of endangered species from or into Australian External Territories. The imports and exports of endangered species are only permitted in accordance with a valid permit granted by the Minister of Environment. However, the Minister will only grant a permit in relation to species listed in Appendix I and II if certain conditions<sup>336</sup> are met.<sup>337</sup>

As previously mentioned, enormous problems face the customs officials with regard to the control of the movement of endangered species into and out of Australia. These problems include the surveillance at international ports and airports and the patrolling of remote stretches of coastline, particularly in the sparsely populated northern areas of Australia.<sup>338</sup>

Control over the movement of fauna interstate is also difficult and is made more difficult by the lack of uniform laws in the States and Territories as well as the inadequacy of penalties to serve as an effective deterrent.<sup>339</sup>

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cit 186; Bates (1995) op cit 308.

<sup>335</sup> These Acts have already been discussed. For other Acts implemented by the Commonwealth to meet Australia's obligations under other treaties, see Ramsay et al (1995) op cit 630.

<sup>336</sup> An example is that the Minister must be satisfied that the animal will be suitably housed and cared for. For other conditions, see Bates (1987) op cit 187-188.

<sup>337</sup> Bates (1987) op cit 185 & 187; Bates (1995) op cit 309.

<sup>338</sup> Bates (1995) op cit 309.

<sup>339</sup> Bates (1995) op cit 309.

#### 4.4 New Zealand

New Zealand is party to two international treaties that have relevance to this study. The first treaty is CITES. The Trade in Endangered Species Act 1989, together with the Wildlife Act of 1953, controls the import and export of protected species through a permit system. The former Act provides for the implementation of New Zealand's obligations under CITES.<sup>340</sup> New Zealand species that are listed under CITES include the brown teal, kakapo, falcon, black coral, *Cyathea* and *Dicksonia* tree ferns and all orchids.<sup>341</sup>

The second treaty is the Plant Protection Agreement for the South-East Asia and Pacific Region (Rome 1956). This treaty establishes a Plant Protection Commission for the Asia and Pacific region, and seeks to regulate trade in plant and plant products by certification, prohibition, inspection, quarantine, and destruction as necessary. There is no specific national legislation to implement the provisions of this treaty.<sup>342</sup>

### 5. CONCLUSION

#### 5.1 General

In comparing the legislation in the three countries, it seems as if there are many more similarities than differences. The differences are due mainly to the difference in government structures. The following are the most important areas where interesting comparisons between legislation and related matters with regard to the conservation of fauna and flora of the three countries can be drawn.

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<sup>340</sup> Milne (1992) op cit 234 & 283.

<sup>341</sup> For more examples, see Milne (1992) op cit 234.

<sup>342</sup> Milne (1992) op cit 283.

## 5.2 The Constitution

In South Africa, an environmental right is enshrined in the Bill of Rights. The Australian Constitution provides no environmental guarantees and has no Bill of Rights according to which the environment is protected. Also New Zealand's Constitution and its Bill of Rights Act 1990 make no reference to the environment. However, the Commonwealth of Australia has specific "powers" in terms of section 51 of their Constitution to pass legislation relating to the environment.

By including an environmental right in a Bill of Rights, South Africa has the potential to develop a more comprehensive system of environment protection than exists in Australia and New Zealand. The efficacy of the system, however, will depend on how it is implemented through policy and legislation.

## 5.3 Integrated environmental management

In South Africa, Australia and New Zealand there are substantive statutes that provide for the conservation of the natural environment. However, in all three countries the environmental legislation came about in an unco-ordinated manner and was administered by a fragmented institutional structure. Fortunately, all three countries recognised that the only way to achieve sustainable development (sustainable management in the case of New Zealand) is through an integrated environmental management system.<sup>343</sup> In South Africa the attempt to achieve an integrated environmental management system began with the promulgation of the Constitution in which the environment was designated as a functional area of both the national and provincial governments. However, the consequence of this is that not only is the administration of environmental matters fragmented but also the power to promulgate environmental legislation. This situation made co-operative governance essential to

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<sup>343</sup> Van Wyk (1999) op cit 249, defines "integrated environmental management" as the "... co-ordinated planning and management of all human activities in a defined environmental system, to achieve and

ensure the effective management of environmental matters and success in achieving sustainable development.

The Constitution sets out principles of co-operative government and intergovernmental relations (section 41) to assist the three spheres of government (national, provincial and local spheres) in co-operating with each other, and also provide the necessary mechanisms for conflict management (s146-150), should it arise.

The constitutional democracy has changed one's attitude and disposition towards the environment. NEMA illustrates this paradigm shift in environmental-law reform and brings environmental management in South Africa in synchronisation with broader socio-economic development and international trends. Rabie<sup>344</sup> is of the opinion that notwithstanding the poor implementation of environmental legislation that has traditionally characterised South African environmental management, a new commitment to environmental values has become evident by the development of the many government policy initiatives. According to him, NEMA reflects this new commitment.

NEMA also facilitates an integrated environmental management approach in South Africa by addressing the legislative and administrative fragmentation of environmental matters primarily through co-operative governance.<sup>345</sup> This is to be achieved by *inter alia* the compilation of environmental implementation plans and environmental management plans by certain national and provincial departments. However, there are numerous pieces of other environment-related legislation in force so that the management of most natural resources still remains subject to their own resource-specific or media-orientated legislation.<sup>346</sup> It can thus not be said that South Africa has

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balance the broadest possible range of short-and long term environmental objectives”.

<sup>344</sup> Rabie (1999) 14 *SAPR/PL* op cit 176.

<sup>345</sup> Through the promulgation of the Constitution and NEMA the approach to environmental management in South Africa changed as part of the transformation of the country as a whole.

<sup>346</sup> Bray (1999) 6 *SAJELP* op cit 12 is also of the opinion that there are many indications that development and environmental policies and legislation are still tackled separately.

a "one stop shop" for comprehensive and uniform resource use as New Zealand claims to have through their Resource Management Act 1991 (RMA). This has serious implications for the integration and co-ordination of development and environment and, ultimately, the achievement of sustainable development in South Africa.

In Australia, the responsibility for the conservation of natural resources and other environmental matters rests primarily with all the States and the Northern Territory. The Federal government has responsibility for the environment in the Australian Capital Territory and, as already mentioned, the Federal Government has legislative "powers" in terms of section 51 of the Constitution relating to the environment that might have an effect on State legislation. Provisions are provided to deal with conflict between Federal and State legislation. Thus Australia also has administrative and legislative fragmentation with regard to environmental matters.

However, some States in Australia are now also moving towards achieving integrated environmental management through the consolidation of a number of environmental functions. Furthermore, there are a number of initiatives to improve the intergovernmental co-operation on environmental matters, of which the Intergovernmental Agreement on the Environment (IGAE) is regarded as the most important.

New Zealand seems to be much further on the road than South Africa and Australia to an integrated environmental management system. New Zealand's RMA is seen as one of the world's most progressive environmental statutes, providing a benchmark for environmental law reform, particularly with regard to integrated resource management. This Act is said to comprehensively and uniformly address the management of natural resources in New Zealand.

However, although it seems as if the RMA has integrated all the environmental legislation into one single Act and has created an “one stop shop” for resource management, it is not really the case. The RMA is not effective in its quest to integrate environmental legislation, especially at central level. Neither does it cover all natural resources. There are also other significant gaps in the coverage of the RMA, such as the management of fisheries and national parks that are still covered by other legislation. Thus it seems as if New Zealand is not much further on the road to integrated environmental management than South Africa.

It is concluded that all three countries still “battle” with the fragmentation of environmental matters but that they all have different mechanisms in place to deal with the situation.

#### 5.4 Sustainable development/management

The successful achievement of the ultimate goal of integrated environmental management, which is sustainable development, should result in the protection of the environment in general and in the conservation of fauna and flora specifically. This in turn will result in humankind fulfilling its stewardship role in holding the environment in public trust for future generations. It is also clear that the objective of achieving sustainable development/management as a way to create a balance between environmental and economic matters has triggered the “movement” to work towards integrated environmental management.

All three countries have legislation and policies in place to support sustainability. In South Africa, sustainable development is referred to in the Constitution (s 24(b)) and it is one of the core principles of NEMA. NEMA’s definition of this concept includes social, economic and environmental factors, thus ruling out any notion of an environmental bottom line.

In Australia sustainable development is supported by the National Strategy for Ecologically Sustainable Development that was endorsed by the Council of Australian Governments in 1992. Also the Intergovernmental Agreement on the Environment (IGAE) states how sustainable development can be achieved.

New Zealand is regarded as having pioneered the institutionalisation of sustainability in its resource management legislation. The RMA elevates sustainability to a position of pre-eminence as constituting the Act's sole and overarching purpose. Sustainability thus governs all functions performed by virtue of the RMA. This is seen as unprecedented in resource management legislation.

Furthermore, the New Zealand legislature opted for the concept of sustainable *management* rather than sustainable *development*. This was done because the latter concept was regarded as too comprehensive as it also embraces social and other goals. The RMA also concerns the sustainable management of *natural and physical* resources rather than the *environment*, which is a much broader concept. However, the definition of sustainable management also relates to social, economic and cultural well-being as well as the environment. Even the definition of natural and physical resources does not relate purely to the bio-physical environment since it includes all structures. These factors gave rise to an extensive debate as to whether the "ecological function" identified in the definition of sustainable management involves the establishment of non-negotiable environmental bottom lines, which serve as constraints on the "management function" of the definition.

In the light of the problem of defining "sustainable management", it seems that there is really no difference between the three countries with regard to the concept of sustainability.

## 5.5 Public participation

One of the ways to succeed in achieving sustainable development/management is to promote and assist in the active participation of the public in all decision making regarding the environment. By promoting this, the interests of all people in the environment, including the indigenous people, are acknowledged. All three countries under discussion have legislation that promotes public participation and acknowledges the interests of indigenous people. In South Africa public participation is promoted explicitly and by implication throughout the Constitution and by NEMA (s2(4)(f)) while the interests of indigenous people are acknowledged in section 39 of the Constitution and sections 2(2) and 2(4)(b), 2(4)(d) 2(4)(g) of NEMA.

For active and meaningful participation to take place, the public must have access to relevant information and to the courts. South Africa (s32 of the Constitution and s31 and s2(4)(k) of NEMA), Australia and New Zealand have legislation that provide for access to information to ensure that the public is able to participate effectively in decision-making processes regarding the environment.

All three countries had the same problems with the common law requirements regarding legal standing. In South Africa the Constitution (s38) and NEMA (s32) have expanded and liberated the *locus standi* requirements. This made the courts more accessible to environmental groups and environmental organisations. In Australia standing is expanded by some statutes and especially by the Environment Planning and Assessment Act 1979 (NSW) while the RMA simplified and improved the issue of standing in New Zealand.

In conclusion, with regard to promoting and assisting active public participation in decision-making processes regarding the environment, all three countries have adequate legislation to support it. However, it is submitted that the South African public is in a

better position in this regard as accessibility to relevant information and the judiciary are enshrined in the Bill of Rights.<sup>347</sup>

## 5.6 Institutional structures

Integrated environmental management will be effective only if it is supported by well-defined institutional and administrative structures that function properly. In New Zealand institutional reform preceded and, to some extent, coincided with law reform in order to lay a foundation for the Resource Management Law Reform (RMLR) process. Although the South African public administration has undergone extensive transformation, it was mainly due to the new democratic and constitutional dispensation introduced in 1994, rather than to a deliberate effort to reform appropriate institutional arrangements for environmental management.

In the central government in New Zealand, a single agency, the Department of Conservation (DoC), was established to act as the national government's advocate for conservation. The South African Department of Environmental Affairs and Tourism (DEAT) is not a true conservation agency like the DoC, but neither can its role as lead agent in environmental management be characterised as neutral.

In Australia the administration of environmental matters is the responsibility of several authorities in the Federal and State Governments respectively. In some States there are signs of "reform", as consolidation of environmental legislation is taking place. It seems that this consolidation process might lead to the establishment of a single agency for the conservation of natural resources in a particular State.

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<sup>347</sup> The role of the public in the enforcement of environmental legislation will be discussed in chapter 4.

## 5.7 Ombudsman

The position in New Zealand is that under the Environment Act 1986 the Parliamentary Commissioner for the Environment (PCE) also acts as an environmental ombudsman. The PCE may intervene and participate in any appeal proceedings arising out of planning and environmental consents; summon and examine persons under oath; investigate administrative structures and their effectiveness; and investigate “any matter” adverse to the environment.

Australia (in ACT) also makes use of a PCE, while South Africa does not have such an officer of parliament. However, South Africa does have an ombudsman in the form of the Public Protector. Although this office has been involved in the investigation of some environmentally related complaints, there is no specialised agency at national government to deal with such complaints. The Western Cape provincial legislature, however, has taken the lead through providing for a Commissioner for the Environment in its Constitution, although no legislation has been promulgated to further regulate this institution and no Commissioner has yet been appointed.<sup>348</sup>

Finally, it would be worthwhile for South Africa to establish an office for an environmental ombudsman. Such a specialised position can assist the public and environmental groups on complicated environmental issues. Some lessons to take note of from the New Zealand experience are, *inter alia*, that there must be clarity on exactly which functions an environmental ombudsman should perform and that the ombudsman’s office must be adequately resourced.<sup>349</sup>

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<sup>348</sup> Rabie (1999) *Acta Juridica* op cit 115.

<sup>349</sup> For further comments on aspects to consider, see Rabie (1999) *Acta Juridica* op cit 115-120.

## 5.8 International treaty (CITES)

All three countries are members of this international treaty and it seems as if they are doing their utmost to comply with their obligations under the treaty.

Despite all the legislation in South Africa, Australia and New Zealand with regard to the conservation of fauna and flora, it seems as if the degradation of resources continues. Therefore, in the following chapter the enforcement methods and the effectiveness of applicable environmental laws will be discussed.

## CHAPTER 3

### ENFORCEMENT OF APPLICABLE ENVIRONMENTAL LAWS

#### INTRODUCTION

In chapter 2 provisions of the Constitution and environmental legislation relevant to the protection of the environment in general and conservation of fauna and flora in particular were discussed. In terms of the Constitution and NEMA, South Africa may have one of the world's best bodies of laws for the protection of the environment. Despite the protection fauna and flora in South Africa enjoy, it seems as if conservation efforts are not as successful as they should be because an increasing number of fauna and flora species are endangered. This illustrates that the mere existence of an excellent body of environmental law,<sup>1</sup> though essential in establishing a basis for action, does not in itself ensure the protection of the environment or the conservation of fauna and flora. For conservation efforts to be successful, effective *enforcement* of environmental laws has to take place.

There is, however, a widely held dissatisfaction with the enforcement of environmental law in South Africa.<sup>2</sup> Many reasons for the poor enforcement had been raised, including excessive fragmentation of environmental legislation, uncertainty regarding the meaning of the concept "environment", insufficient disclosure of environmental information and the strict *locus standi* requirements.<sup>3</sup> These reasons should however no longer hamper enforcement as most of these aspects have been addressed by relevant provisions of the Constitution and NEMA.<sup>4</sup>

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<sup>1</sup> A lack of sufficient and adequate environmental laws can thus not be the reason for the "failure" of conservation efforts.

<sup>2</sup> Kidd, M "Environmental Crime — time for a rethink in South Africa?" (1998) 5 *SAJELP* 181; Bray, E "Fragmentation of the environment: another opportunity lost for a nationally co-ordinated approach?" (1995) 10 *SAPR/PL* 173.

<sup>3</sup> See, Bray (1995) 10 *SAPR/PL* op cit 173, 174,178; Hanks, J "Achieving industrial sustainable development in South Africa: What role for 'self-regulatory' and 'co-regulatory' instruments?" (1998) 5 *SAJELP* 313. For other reasons of poor enforcement more applicable to pollution issues, see Hanks (1998) 5 *SAJELP* op cit 313-320.

<sup>4</sup> These aspects have been discussed in detail in chapter 1 and chapter 2.

Another reason raised for the poor enforcement of environmental laws, and one that might still be relevant, is that government views environmental matters of a much lower priority than socio-economic demands.<sup>5</sup> Although the priority of environmental issues has increased somewhat since 1996, it will for the foreseeable future still occupy a low position on the government's priority list, especially with regard to financial resources. This is understandable because South Africa is a developing country with a huge social responsibility. The priority given to social and economic upliftment of previously disadvantaged South Africans has inevitably led to the allocation of a low budget to the Department of Environmental Affairs and Tourism (DEAT),<sup>6</sup> which, in turn, has had a negative effect on efforts to conserve fauna and flora. Financial constraints, together with government transformation and equity policies, have led to a shortage of qualified, experienced and committed inspectors,<sup>7</sup> government lawyers and administrators in the national and provincial spheres. The consequences of financial constraints have had a negative impact on the effectiveness of judicial as well as administrative procedures in the fight against environmental crime.<sup>8</sup> Thus, although the government views the environment as important and is committed to conserve South Africa's richness in biodiversity, it will for some time to come still be constrained in its conservation efforts by a low budget.

It should be seen as a challenge to both the applicable national and provincial spheres to manage their allocated financial resources in such a way that the conservation of fauna and flora is not neglected. These spheres of government should also explore innovative

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<sup>5</sup> The fact that the government views environment important but low on their priority is illustrated by a recommendation by President Mbeki in the *Rapport* of 24 February 2002. He recommended that each month of the year (except December) should have a theme and that volunteers must deliver a service associated with that theme during that particular month. It was recommended for example, that January was allocated to education, February to safety and security, August to freedom of women, October to the rights of children and lastly November to the environment.

<sup>6</sup> Tourism should be a separate department from that of environment. This separation would be to the advantage of both the environment and tourism as the allocation of resources will be more focused.

<sup>7</sup> Even though penalties are harsh in some instances, Kidd rightly points out that it will be pointless if offenders can avoid being caught. He states that "successful deterrence depends not only upon severity of punishment but also a perceived high risk of detection" ((1998) 5 *SAJELP* op cit 186). Also see Visser, F "Nature Area legislation in South Africa" (1988) *SAJL* 267. For more discussion on the shortage of human resources, see Loots, C "Making Environmental Law Effective" (1994) 1 *SAJELP* 17; Kidd (1998) 5 *SAJELP* op cit 190.

<sup>8</sup> The effect of a shortage of competent human resources on enforcement of environmental law will be discussed further on in chapter 3.

ways to raise funds to increase their budgets. They should, for example, identify specific conservation projects and then obtain foreign investors<sup>9</sup> to finance them.

A further and possible valid reason raised for the poor enforcement of environmental laws is the use of criminal sanctions and, specifically, the inadequacy of criminal penalties as a deterrent to environmental crimes.<sup>10</sup> The role of criminal sanctions in the enforcement of environmental legislation will be discussed later in this chapter.

The objective of chapter 3 is thus to investigate the enforcement of environmental laws in South Africa to determine if ineffective enforcement of these laws is the reason why the conservation of fauna and flora in South Africa is not as successful as can be expected, given the protection that existing environmental laws would seem to provide. I wish to point out that in this study the term “enforcement” will have a wide meaning to include enforcement (and compliance) between government spheres, enforcement mechanisms (criminal sanctions, administrative controls, civil actions and alternative dispute resolutions), preventative enforcement and compliance strategies (for example environmental education and community awareness) and commercial pressures (for example commercial NGOs and economic instruments).<sup>11</sup>

Furthermore, enforcement of environmental laws in Australia and New Zealand will also be investigated to identify possible reasons why these two countries seem to be more successful in their conservation of fauna and flora and to determine if any of their enforcement strategies may be successfully implemented in South Africa.

To achieve this objective, the enforcement and compliance with environmental laws between different spheres of government and between relevant national departments will

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<sup>9</sup> It seems that the South African public and businesses in South Africa are so overwhelmed by requests for sponsorships, investments and funds that the government might be more successful in obtaining funds from a foreign investor.

<sup>10</sup> It is submitted that “insufficient” is a relative concept and that what is perceived as “insufficient” depends on the individual. The lack of insufficient deterrent sanctions as a reason for the inadequate enforcement of environmental law will be discussed later in chapter 3.

<sup>11</sup> Alternative dispute resolutions (ADR), preventative enforcement strategies and commercial pressures will be discussed in chapter 4.

be investigated, as well as enforcement between the organs of state and the public (civil society). As the government should lead by example, enforcement and compliance between the spheres and between the relevant departments in a sphere will be discussed with reference to the concept of co-operative government as introduced by the Constitution and given effect to by NEMA. Enforcement of environmental laws between the organs of state and the public will focus on the enforcement mechanisms currently employed in South Africa.

## 1. THE IMPACT OF THE CONSTITUTION ON ENFORCEMENT OF ENVIRONMENTAL LAWS

### 1.1 Introduction

It is evident from the discussion in chapter 2 that the Constitution has a significant positive impact on the enforcement of environmental laws and, thus, on the protection of the environment, including the conservation of South African's biodiversity.<sup>12</sup> The Constitution not only enshrines an environmental right (s24) in the Bill of Rights, but also contains supporting rights that aid in the enforcement of environmental laws.<sup>13</sup> The Constitution also has a major positive impact on the protection of the environment by introducing the concept of co-operative government.<sup>14</sup> The relevance of this concept to the enforcement of environmental laws will now be discussed in more detail.

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<sup>12</sup> The Constitution not only provides an enforceable right in terms of s24(b) to have the environment protected for the survival of humankind, but also to have an environment that is not harmful to the health or well-being of humans (24(a)). Because nature in general and fauna and flora in particular have a positive effect on the *psychological* component of humans, damage to the environment is also regarded as harm to the well-being of humans. The effect that nature has on the well-being of humans falls beyond the scope of this study and will not be discussed further.

<sup>13</sup> The environmental right has been discussed in chapter 2. Supporting rights that assist in the enforcement of the environmental right and other environmental laws include, *locus standi* requirements (s 38) and access to information (s32). These have also been discussed in chapter 2.

<sup>14</sup> It is interesting to note that "corporate" governance has been recommended by the King Report in 1994. One of the recommendations in The Code of Corporate Practices and Conduct, is that companies should be accountable regarding the environment and that Directors should report on environmental issues involving their companies and businesses. The King Report will be referred to again in chapter 4. For further detail, see Armstrong, P "The King Report on Corporate Governance" (1995) 1 *Boardroom* 16-

## 1.2 Co-operative government and enforcement of environmental laws

In South Africa, the government is constituted as national, provincial and local spheres that are distinctive, interdependent and interrelated.<sup>15</sup> The Constitution provides that there must be co-operative governance between these three spheres<sup>16</sup> and sets out principles of co-operative government and intergovernmental relations in section 41.<sup>17</sup> Although section 41(1)(g) provides that the spheres must “exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere”,<sup>18</sup> section 41(1)(h) provides that the spheres should co-operate with each other in mutual trust and good faith. This should be done by, *inter alia*, assisting and supporting one another, informing one another of, and consulting one another on, matters of common interest, co-ordinating their actions and legislation with one another, and avoiding legal proceedings against one another.

Matters of common interest on which the national and provincial spheres must inform and consult with each other and co-ordinate their actions and legislation, include the environment and nature conservation which are functional areas of concurrent competence. Thus the legislative and administrative<sup>19</sup> responsibility for the environment and nature conservation (which includes fauna and flora) must be shared by the national and provincial spheres. Effective co-operative governance is thus essential to the protection of the environment and the conservation of fauna and flora. Adherence to the principles set out in, especially, section 41(h) of the Constitution would not only ensure effective co-operation between the national and provincial spheres, but it should also

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<sup>15</sup> The Constitution, section 40.

<sup>16</sup> See chapter 3 of the Constitution. NEMA gives effect to the notion of co-operative government and will be discussed later in chapter 3.

<sup>17</sup> Also see, De Waal, J & Currie, I & Erasmus, G *The Bill of Rights handbook* (2000) (3<sup>rd</sup> ed) Juta & Co Kenwyn 19-20; Burns, Y *Administrative law under the 1996 Constitution* (1998) Butterworths Durban 35.

<sup>18</sup> For other principles, see section 41 of the Constitution. For an interpretation of s41(1) (g), see Currie, I & De Waal, J *The New Constitutional and Administrative Law* (2001) Juta Law Lansdowne 124.

<sup>19</sup> The fragmentation of the administrative functions involving the environment has been discussed in chapter 1.

counter the negative consequences that fragmentation of environmental matters may have on the conservation of fauna and flora.

Furthermore, the spheres must assist one another (s 41(h)(ii)) in fulfilling their constitutional obligations regarding the environment and nature conservation. In this regard, the national sphere, especially, has a responsibility to assist in developing the capacity of the traditionally “weaker” provincial and local spheres. Failure to fulfil this responsibility will result in the latter two spheres being dependent on the strongest sphere (national sphere) with its usually adequate financial and human resources. This dependence on the national sphere will inevitably lead to a situation where the provincial sphere does not negotiate as an “equal” partner in the co-operative relationship.

Section 154(1) of the Constitution also states that “the national government and provincial governments, by legislative and other measures, must support and strengthen the capacity of municipalities (local sphere) to manage their own affairs, to exercise their powers and to perform their functions. For the successful protection of the environment as a whole and conservation of fauna and flora in particular, all the spheres should have the capacity to fulfil their environmental obligations adequately.

Section 41(2) of the Constitution requires that an Act of Parliament must establish or provide for structures and institutions to promote and facilitate intergovernmental relations and for mechanisms to facilitate settlement of intergovernmental disputes. NEMA was promulgated in 1998 to give effect to this constitutional provision. The impact of NEMA on the protection of the environment and enforcement of environmental laws will be discussed in the following section.

To further assist in co-operative governance, the Constitution (ss146-150) makes provision for conflict management should it arise between national and provincial legislation falling within a functional area listed in Schedule 4.<sup>20</sup> Normally, national legislation prevails over provincial legislation if certain conditions, as set out in section

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<sup>20</sup> Environment and nature conservation are listed in Schedule 4.

146 (2) and (3), apply. One of these conditions is the need for national legislation for the protection of the environment.<sup>21</sup>

Intergovernmental disputes, with regard to environmental matters for example, must be settled by means of mechanisms and procedures provided for that purpose, and all other remedies should be exhausted before a court may be approached to resolve the dispute.<sup>22</sup>

The Constitution (s195) also provides that the public administration must be governed by the democratic values and principles enshrined in the Constitution, and principles such as a high standard of professional ethics, accountability, transparency and the encouragement of public participation in policy-making.<sup>23</sup>

It is thus evident that successful co-operation between the relevant spheres with regard to the environment and nature conservation, as well as adherence of the public administration (entrusted with environmental matters) to basic values and principles, will have a positive influence on the effectiveness of enforcement of environmental laws in South Africa.

In Australia co-operative governance seems to be effective and has resulted in the successful conservation of native fauna and flora. Although the Australian Constitution makes no reference to the environment as such, the Federal government has the power to promulgate and enforce environmental legislation<sup>24</sup> through powers conferred on it in terms of section 51 of the Constitution.<sup>25</sup> However, the States and Territories have residual powers over matters not specifically enshrined in the Constitution. One of these is environmental matters. Therefore, the responsibility for the conservation of fauna and flora rests mainly with the States and Territories. Thus, since the Federal government, States and Territories all have responsibilities regarding the protection of the

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<sup>21</sup> See section 146(2)(c) (vi) of the Constitution. For other conditions, see s 146 (2)-(3).

<sup>22</sup> See section 41(3) of the Constitution.

<sup>23</sup> For other principles, see s195 (1) of the Constitution.

<sup>24</sup> The Endangered Species Act 1992 (Cth) is an example of environmental legislation promulgated in terms of the section-51 powers.

<sup>25</sup> For more detail, see the discussion of the Australian Constitution in chapter 2.

environment, a need for co-operation was identified. Together with the Australian Local Government Association, the Federal government, States and Territories embarked on a number of initiatives to improve intergovernmental co-operation on environmental matters. The Intergovernmental Agreement on the Environment (IGAE) was concluded in 1992, and is regarded as the most important co-operative initiative. In terms of the IGAE, Commonwealth-State-Territory co-operation initiatives should operate through the Australian and New Zealand Environment and Conservation Council (ANZECC) that consists of Commonwealth, State and Territory Ministers with responsibility for the environment.<sup>26</sup>

Schedule 4 of the IGAE is specifically important to the conservation of fauna and flora as it provides for the establishment of statutory Environment Protection Agencies (EPAs) through which environmental legislation<sup>27</sup> is enforced and administered in the Commonwealth, the States and Territories.<sup>28</sup>

Unlike South Africa, New Zealand also has no environmental right enshrined in a Bill of Rights and has to rely on the environmental legislation, especially the Resource Management Act 1991 (RMA), to provide adequate measures for the protection of the environment and the conservation of fauna and flora.

New Zealand is a small country consisting of a North and South Island (Stewart Island part of South Island) and is not like South Africa divided into provinces (or into States and Territories as in Australia). The country is governed by a central government and local governments.<sup>29</sup> Since the local government has no legislative powers, co-operative governance and agreements relating to the environment (or any other issue) do not apply. Although the central government, through the RMA, has increased the autonomy of regional councils with regard to the management of the environment, the central government retains certain overriding powers and a measure of control over the

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<sup>26</sup> See Norberry, J "Australia" in Del Frate, A & Norberry, J *Environmental crime, Sanctioning strategies and sustainable Development* (1993) Australian Institute of Criminology Publication no 50 Canberra 38.

<sup>27</sup> See chapter 2 for a discussion of the environmental legislation.

<sup>28</sup> Schedule 4 also provides detailed definitions of the roles and responsibilities of all levels of government.

<sup>29</sup> The local government operates through regional councils and territory authorities. The latter functions

management of resources by way of national policy statements. National legislation, policy statements, environmental standards and plans bind local governments. The national government thus holds such a dominant and controlling position over local governments that it seems as if co-operative governance, such as required in South Africa, is not a necessity to ensure effective enforcement of environmental laws. New Zealand is, therefore, not a suitable country for the comparison of the functioning of co-operative environmental governance.

## 2. ENFORCEMENT OF SPECIFIC ENVIRONMENTAL LEGISLATION

### 2.1 National Environment Management Act 107 of 1998 (NEMA)

NEMA is an excellent and important piece of environmental legislation. It not only gives effect to, and reinforces, sections in the Constitution regarding the environment and related matters,<sup>30</sup> but also serves as framework legislation for a national environmental management system by providing for national environmental management principles.<sup>31</sup> These principles apply throughout South Africa to the actions of all organs of state that may significantly affect the environment. The principles serve to guide the interpretation, administration and implementation of any law concerned with the protection or management of the environment,<sup>32</sup> and also serve as a general framework against which environmental implementation plans and environmental management plans, as set out in NEMA, must be formulated.<sup>33</sup>

An aspect essential to the conservation of fauna and flora, which is also a national environmental management principle (s2(4)(l)), is the requirement of intergovernmental co-ordination and harmonisation of policies, legislation and actions relating to the

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through district and city councils. See the discussion in chapter 2 for more detail.

<sup>30</sup> These sections include ss 24, 32, 34, 38 and 41.

<sup>31</sup> See s2 for the national environmental management principles.

<sup>32</sup> This include the interpretation of the Environment Conservation Act 73 of 1989 and the National Parks Act 57 of 1976.

<sup>33</sup> Ferreira, GM & Du Plessis, W, et al "A licence to mine, *audi alteram partem* and NEMA" (1997) 4 *SAJELP* 256. Van Wyk, *J Planning Law* (1999) Juta & Co Kenwyn 244.

environment. NEMA thus reinforces the constitutional basis of co-operative governance (s40-41 of the Constitution) in the field of environmental management. Chapter 3 of NEMA provides for structures and institutions to promote and facilitate co-operative government and thereby specifically gives effect to section 41(2) of the Constitution.<sup>34</sup>

These structures entail the preparation of environmental implementation plans by national departments listed in Schedule 1<sup>35</sup> of NEMA and by every provincial department within one year of the promulgation of NEMA, and at least every four years thereafter. Preparation of environmental management plans by national departments listed in Schedule 2<sup>36</sup> within one year of the promulgation of NEMA and at least every four years thereafter is also provided for. In the compilation of these plans, every other implementation and management plan<sup>37</sup> already adopted must be taken into consideration so that consistency among such plans can be achieved. These plans thus serve to co-ordinate and harmonise plans, policies, programmes and decisions of the relevant national departments and provinces, and in this way minimise duplication of procedures and functions, and promote consistency in the exercising of functions that may affect the environment. These plans thus aim to secure the protection of the environment across the country by means of effective co-operation among the relevant national departments, and between them and the relevant provincial departments.

Section 7 of NEMA provides for the establishment of a Committee for Environmental Coordination. One of the functions of the Committee is to scrutinise, report and make recommendations on the prepared environmental implementation and environmental

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<sup>34</sup> Section 41(2) of the Constitution provides that an Act of Parliament must provide for structures and institutions to promote and facilitate intergovernmental relations.

<sup>35</sup> The national departments included in Schedule 1 of NEMA are, Department of Environmental Affairs and Tourism, Department of Land Affairs, Department of Agriculture, Department of Housing and the Department of Water Affairs and Forestry. These departments exercise functions which may affect the environment and thus also fauna and flora.

<sup>36</sup> National departments included in Schedule 2 of NEMA are, Department of Environmental Affairs and Tourism, Department of Land Affairs, Department of Water Affairs and Forestry and Department of Minerals and Energy. These departments exercise functions that involve the management of the Environment, including fauna and flora.

<sup>37</sup> For information on the content of the environmental implementation and management plans, see NEMA sections 13 and 14.

management plans.<sup>38</sup> The objective of the Committee is thus to promote the integration and co-ordination of environmental functions by the relevant organs of state and to promote the achievement of the objectives of the environmental implementation and environmental management plans.

To ensure that consistency in environmental management occurs in all three spheres, section 16(4) of NEMA provides that each provincial government must ensure that the relevant provincial environmental implementation plans are complied with by each of its municipalities, and that the municipalities adhere to the environmental implementation and environmental management plans of the relevant national departments. Co-operative governance should promote a more focused approach to conservation efforts which, in turn, will lead to the optimum utilisation of financial and human resources. This should result in the successful conservation of fauna and flora.

NEMA's importance to the enforcement of environmental laws is evident from the preamble where there is reference to, among other aspects, the "desirability that the law should be enforced by the state and that the law should facilitate the enforcement of environmental laws by civil society. Its promulgation also fulfils the duty placed on the state in terms of section 24(b) to protect the environment through "reasonable legislative and other measures".

NEMA promotes co-operative governance and facilitates enforcement between the spheres of government by providing for conflict management<sup>39</sup> through conflict resolution procedures such as conciliation, mediation and arbitration. Section 17(1), for example, provides that a Minister, MEC or Municipal Council must refer any difference or disagreement that arises, concerning any function that may significantly affect the environment, for conciliation. The conciliation or mediation process must also be utilised

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<sup>38</sup> In terms of section 15 of NEMA the environmental implementation and management plans must be submitted to the Committee.

<sup>39</sup> By providing for conflict management, NEMA gives effect to section 41(2)(b) of the Constitution. Section 41(2)(b) of the Constitution states that an Act of Parliament must provide for appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes. A national environmental principle in NEMA, s2(4)(m), also states that actual or potential conflicts of interest

if it is provided for under any other relevant law administered by such Minister, MEC or Municipal Council. Section 18(6) provides that if conciliation fails, the matter may be referred for arbitration, while section 19 provides that a difference or disagreement regarding the protection of the environment may be referred to arbitration in terms of the Arbitration Act 42 of 1965. These enforcement “strategies” are usually seen as alternatives to judicial proceedings and will be discussed in detail in chapter 4.

NEMA also reinforces other constitutional provisions that are important to assist in the effective enforcement of environmental laws. These include the promotion of public participation in administrative and legislative decision-making (s2(4)(f)) and the right of access to information (s 2(4)(k)).<sup>40</sup> Public participation in decision-making processes involving the environment or fauna and flora, is a very important proactive way in which to prevent the implementation of decisions that might be detrimental to the environment, rather than challenging it *ex post facto*, through judicial review, for example.<sup>41</sup>

Access to relevant information is vital to promote transparency and enable the public and civil society (communities, NGOs, and private organisations) to have meaningful and effective participation in decision-making that might have an affect on the environment and nature conservation. There is also a set of innovative provisions in NEMA that applies in some circumstances and is aimed at protecting whistle-blowers who disclose environmental information.<sup>42</sup>

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between organs of state should be resolved through conflict resolution procedures.

<sup>40</sup> Both section 2(4) (f) and (k) have been discussed in chapter 2.

<sup>41</sup> Kidd (1999) 6 *SAJELP* op cit 29, 31 is of the opinion that although NEMA breaks new ground, it could have been significantly better if more time had been given to the public to scrutinise the National Environmental Management Bill. He points out that actions for damages for environmentally detrimental behaviour, are poorly provided for by current law and that this is an aspect that NEMA could have addressed in order to facilitate the public’s access to environmental remedies. He sees this as a “case of missed opportunities”.

<sup>42</sup> Kidd, M “The National Environmental Management Act and Public Participation” (1999) 6 *SAJELP* 22, 26; Glazewski, J “Environmental Justice and the new South African democratic legal order” (1999) *Acta Juridica* 17; Bray, E “Co-operative Governance in the context of the National Environmental Management Act 107 of 1998” (1999) 6 *SAJELP* 9, 11.

Section 32 of NEMA further expands the standing requirements and, together with section 33, (private prosecution) also recognises the rights conferred on individuals by section 38 of the Constitution, namely the option of a “class action”.<sup>43</sup>

In terms of section 32(2), NEMA has an impact on the enforcement of environmental laws. It encourages litigation in environmental matters, in that it suggests that courts do not award costs against an unsuccessful, but reasonable, litigant. This is an important provision for private individuals and environmental NGOs wishing to resort to judicial proceedings in order to protect the environment, as it aims to address a big disincentive, namely: the costs of litigation. The court, however, still has a discretion in this regard and costs may thus still be a worry for prospective litigants.<sup>44</sup>

Section 34 of NEMA makes provision for criminal proceedings. It provides *inter alia*, that if any person is convicted of an offence under any provision in Schedule 3 of the Act<sup>45</sup> and loss or damage was caused to the environment, the court may inquire into the amount of the loss or damage so caused. The court may also enquire into and assess the monetary value of any advantage gained by the offence and then impose punishment in addition to any other punishment imposed in respect of the offence.

Thus a striking feature of this Act is the manner in which it seeks to invoke traditional doctrines or procedures of criminal law to advance its goals of improving the management of the environment. As the criminal sanction has not proved to be particularly effective as an environmental guard-dog, Milton<sup>46</sup> points out that the provisions of NEMA must be welcomed for the way in which it has at least “sharpened the dog’s teeth”.

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<sup>43</sup> The impact of NEMA on *locus standi* has been discussed in chapter 2.

<sup>44</sup> Couzens, E “NEMA—A step closer to coherence?” (1999) 6 *SAJELP* 18; Kidd (1999) 6 *SAJELP* op cit 27; Glazewski (1999) *Acta Juridica* op cit 20.

<sup>45</sup> Section 34 of the NEMA is important to the protection of fauna and flora as section 24 (1)(b) of the National Parks Act 57 of 1976 and sections 29 (2)(a) and (4) of the Environment Conservation Act 73 of 1989 are included in Schedule 3. See discussion later in chapter 3.

<sup>46</sup> Milton, J “Sharpening the dog’s teeth: of NEMA and criminal proceedings” (1999) 6 *SAJELP* 53-56 & 60.

NEMA also has an impact on the enforcement of other environmental laws. Section 34 makes provision for criminal proceedings in certain circumstances<sup>47</sup> against any person convicted of an offence under any provision listed in Schedule 3. Section 34 is important to the protection of fauna and flora, as section 24 (1)(b) of the National Parks Act 57 of 1976 and sections 29 (2)(a) and (4) of the Environment Conservation Act 73 of 1989<sup>48</sup> are provisions included in Schedule 3. Various provisions of some pieces of provincial environmental legislation (Acts and Ordinances) are also included in Schedule 3.<sup>49</sup> In these instances, the court may inquire into the amount of the loss or damage caused. The court may also inquire into and assess the monetary value of any advantage gained by the offence and then impose a fine in addition to any other punishment imposed in respect of the offence.<sup>50</sup>

## 2.2 Environment Conservation Act 73 of 1989

As discussed in chapter 2, this Act intends “to provide for the effective protection and controlled utilisation of the environment and for matters incidental thereto” and is viewed, together with NEMA, as South Africa’s most important piece of environmental legislation regarding indigenous terrestrial wild fauna and flora. Although NEMA has repealed most of the Act’s provisions the remaining sections that aim to conserve fauna and flora by declaring nature areas, are very important<sup>51</sup> and must be properly enforced if conservation efforts are to be successful.

The Environment Conservation Act 73 of 1989 provides for the enforcement of its provisions, mainly through primary criminal sanctions<sup>52</sup> by imposing a fine and/or

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<sup>47</sup> Section 34 applies if it appears that an offence was committed of a Schedule 3 provision and has caused loss or damage to any organ of the state or other person, including the cost incurred by an organ of the state in rehabilitating the environment or prevent damage to the environment.

<sup>48</sup> As discussed in chapter 2, NEMA has a significant impact on the Environment Conservation Act 73 of 1989 in that it repealed most of the sections of this Act. The remaining sections aim to conserve fauna and flora by declaring nature areas.

<sup>49</sup> Examples of provisions of provincial environmental legislation included in Schedule 3 are, s40 (1)(a) of the Orange Free State Conservation Ordinance 8 of 1969 and s 16A of the Transvaal Nature Conservation Ordinance 12 of 1983. For other examples, see Schedule 3 Part (b) of NEMA.

<sup>50</sup> See discussion later in this chapter.

<sup>51</sup> Protected areas are discussed in detail in chapter 1 and will not be discussed further.

<sup>52</sup> The criminal sanction may be imposed either as a primary (independent) sanction or as a subsidiary

imprisonment upon conviction of an offence (s29), such as the damaging of flora and/or harming of fauna in a protected area. Administrative officials are also empowered to forfeit items used in committing an offence (s30).

An example of a penalty in terms of this Act is section 29(2)(b). This section provides that any person who contravenes a provision of section 18(6), which prohibits the entering of a special nature reserve or the performing of any activity in or on such a reserve, or a condition of an exemption in terms of section 18(7),<sup>53</sup> shall be guilty of an offence and liable on conviction of a fine not exceeding R8000 or imprisonment for a period not exceeding two years or both. In terms of section 29(7), the court may also order the convicted person to repair any damage to the environment resulting from the offence and the court may declare any vehicle or item used in committing the offence to be forfeited to the state (s30).<sup>54</sup>

### 2.3 National Parks Act 57 of 1976

As discussed in chapter 2, this Act consolidates the laws relating to national parks in South Africa and regulates the conservation of fauna and flora within national parks. Enforcement of the provisions of this Act is also mainly through imposing criminal sanctions. Section 21(1) restricts entry into or residence in a park, and prohibits certain acts therein. Any person who contravenes the provisions of section 21(1)(c-h)<sup>55</sup> will be punished, according to the section-24 penalties, by fines and/or imprisonment and/or forfeiture of items (weapons, traps, vehicles and vessels) used in committing the offence. Section 24 provides for two sets of penalties: those with regard to offences relating to wild animals and those related to plants. An example of the former is in terms of section

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(supporting) sanction. The difference between primary and subsidiary criminal sanctions and the role of the criminal sanction in the protection of fauna and flora will be discussed later in chapter 3. For further information, see Kidd, M *Environmental Law. A South African Guide* (1997) Juta & Co Ltd Cape Town 21; Fuggle, RF & Rabie, MA *Environmental Management in South Africa* (1998) Juta & Co Ltd Cape Town 128; Loots (1994) 1 *SAJELP* op cit 17.

<sup>53</sup> An example of a condition that is exempted from s18(6) is, *inter alia*, that the person gaining access to the area must be a scientist occupied with any specific project.

<sup>54</sup> For more detail on penalties and forfeiture provisions, see sections 29-30 of the Environment Conservation Act 73 of 1989.

<sup>55</sup> The provisions include the hunting, killing, injuring and disturbance of any animal in the park.

21(1) (c)-(h) which refers to any animal listed in Schedule 2 (except an elephant, black rhinoceros and white rhinoceros), the brown hyena, lion and cheetah. Upon conviction a fine of between R4000 to R8000 is imposed or, if in default of payment of such a fine, a period of imprisonment of one to two years.<sup>56</sup> Section 27 confers powers of arrest, search and seizure to a peace officer within a park or at any place within 10 kilometers from the boundary of a park without a warrant if, on reasonable grounds, a person is suspected of having committed an offence under the Act.

## 2.4 Provincial legislation

The environmental legislation of the provinces (Acts and Ordinances) provides for enforcement of environmental legislation through criminal sanctions and administrative controls such as the permit and licence systems.<sup>57</sup> Enforcement is predominantly through administrative controls and only if these controls fail, are criminal sanctions (fines and/or imprisonment) imposed.<sup>58</sup> In the latter circumstances criminal sanctions are thus used in a subsidiary way.

Environmental legislation of the provinces, as well as relevant national legislation (for example the Environment Conservation Act 73 of 1989), is enforced by legal divisions within the relevant provincial departments. The titles of the relevant departments differ from province to province because, in each province, different portfolios are grouped together with those of the environment. For example, in Mpumalanga and the Free State, the Department of Environmental Affairs and Tourism is responsible for enforcing provincial environmental legislation; in Limpopo Province it is the Department of Agriculture, Land and Environmental Affairs; while in the Northern Cape it is the Department of Environmental Affairs, Health and Welfare.<sup>59</sup>

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<sup>56</sup> See section 24 of this Act for more detail on penalties.

<sup>57</sup> Enforcement of environmental legislation through administrative controls will be discussed later in chapter 3.

<sup>58</sup> I wish to point out that I made several attempts during the last two years to gain access to any cases involving fauna and flora (excluding endangered fauna and flora) from the relevant provincial departments. In most instances "no one" had knowledge of such records. In other instances "the files were somewhere" but not organised or recorded in such a way that I could utilise them. This situation is unacceptable.

<sup>59</sup> In the other provinces they are: Gauteng, the Department of Agriculture, Conservation and

## 2.5 Conclusion

In Australia, the EPAs that have been established in terms of the IGAE, have centralised most of the administration and regulation of environmental protection in the States and Territories into one organisation. However, in Queensland and South Australia the responsibility for environmental matters is shared by a number of government agencies.<sup>60</sup> These agencies may be specialised (for example, environmental protection may be the core function of the organisation) or non-specialised (for example, environmental protection is merely an incidental responsibility).<sup>61</sup> The Commonwealth EPA is responsible for administering environmental legislation of the Federal government and has an advisory function with regard to the EPAs in the States and Territories, but no authority over the latter.

It seems that the establishment of specialised national and provincial EPAs in South Africa, similar to those in Australia, will contribute significantly to the effectiveness of enforcement of environmental legislation and, thus, to the successful conservation of fauna in flora. The advantages of having the enforcement of environmental laws centralised in one organisation are numerous. One of the advantages is that the allocation of human and financial resources is focused at achieving a specific outcome, namely the effective enforcement of environmental laws to protect and conserve the environment (including fauna and flora) for present and future generations. Because an EPA has a focused mission, experts in the environmental field, both in natural sciences and environmental law, can be employed to increase the possibility of effective enforcement of environmental laws.

Finally it is submitted that conservation efforts in South Africa will be more successful if

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Environmental Affairs; KwaZulu-Natal, the Department of Traditional and Environmental Affairs; Eastern Cape, the Department of Economic Affairs, Environment and Tourism; North West Province the Department of Tourism and Environmental Conservation and in the Western Province it is the Western Cape Nature Conservation.

<sup>60</sup> For bodies administering environmental protection in the different States and Territories, see Norberry (1993) op cit 35, 38, 42.

<sup>61</sup> Norberry (1993) op cit 8. The Commonwealth-State-Territory co-operation and the IGAE has been discussed in chapter 2.

the responsibility for environmental matters is centred separately in one organisation, such as an EPA. The fact that environmental matters are only part of the responsibility of a provincial department does not contribute to better administration, enforcement and conservation of fauna and flora. Where the environmental affairs portfolios are shared with agriculture or land or economics or welfare, as is currently the case in some of the provinces, it is possible that one of the portfolios will be neglected specifically with regard to financial resources. It is more than likely that the environmental affairs portfolio will be neglected because the other portfolios (for example economic affairs, agriculture and tourism) are currently of a higher priority to the government.

### 3. ENFORCEMENT MECHANISMS

As mentioned above, it is mainly criminal sanctions that enforce compliance with environmental legislation. Therefore the shortcomings of the criminal sanctions in the protection of the environment and conservation of fauna and flora are generally raised as contributing to the poor enforcement of environmental laws in South Africa. The role of criminal sanctions as a “punishment” tool<sup>62</sup> and a deterrent<sup>63</sup> for environmental offences, as well as other enforcement mechanisms provided for in environmental laws, will now be evaluated.

In South Africa, Australia and New Zealand, three mechanisms of enforcement are used to secure compliance with the law, namely: criminal sanctions, administrative control, and civil action. According to Loots,<sup>64</sup> these mechanisms must be utilised collectively

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<sup>62</sup> According to Terblanche, SS *The Guide to Sentencing in South Africa* (1999) Butterworths Durban 178-190, punishment is seen as a deterrence, preventative, retribution and rehabilitation tool. According to Kidd (1998) 5 *SAJELP* op cit 183, the retribution element distinguishes the criminal sanctions from other sanctions. Also see Terblanche (1999) op cit 4.

<sup>63</sup> Terblanche (1999) op cit 178 describes the meaning of deterrence as follows, “the idea is that man, being a rational creature, would refrain from the commission of crimes if he should know that the unpleasant consequences of punishment will follow the commission of certain acts. It is thus the inhibiting effect of the threat of punishment, or the imposition of punishment on others, which should cause a person to think twice before he would commit a crime.”

<sup>64</sup> Loots (1994) 1 *SAJELP* op cit 17.

for enforcement to be an effective tool in the protection of fauna and flora. These mechanisms will now be discussed.<sup>65</sup>

### 3.1 Criminal sanctions

#### 3.1.1 General

There are essentially two regulatory mechanisms under criminal sanctions by which the state can ensure that everyone (for example individuals, environmental groups and corporations) complies with legislative control provisions. They are the “command and control” (direct regulation) mechanism and the “self-regulation”<sup>66</sup> mechanism. The former refers to a system where there is strict monitoring by the authorities to determine whether the law is complied with and where offenders are prosecuted by criminal law.<sup>67</sup>

According to Gunningham and Sinclair,<sup>68</sup> the major strength of command and control regulation is its dependability (provided there is adequate monitoring and enforcement) and its relative success as a deterrent, especially when coupled with strong community support. The authors also point out the weaknesses of the command and control regulation. Of these weaknesses include the ineffectiveness to address environmental problems (for example, deforestation and loss of biological diversity) and vulnerability to political manipulation. Political manipulation refers to a situation where the interests of

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<sup>65</sup> The discussions and comments in the South African section of chapter 3 with regard to the use of the criminal sanction (primary and subsidiary) as well as the advantages and disadvantages of the criminal sanction as an enforcement mechanism, are also applicable to Australia and New Zealand. Therefore, only aspects that are important for comparative purposes will be emphasised and discussed.

<sup>66</sup> Self regulation would typically involve a situation where individuals or corporations monitored their own operations and submitted to the authorities periodic audit results in which their environmental performance was set out. This mechanism is more applicable to pollution control than to the conservation of fauna and flora and will not be discussed further. See Kidd (1997) op cit 21.

<sup>67</sup> Kidd (1997) op cit 21. Direct regulation has mainly been applied with regard to “brown” issues, such as pollution, to prohibit or restrict environmentally harmful activities. See Gunningham, N & Sinclair, D “Instruments For Environmental Protection” in Gunningham, N & Grabosky, P *Smart Regulation* (1998) Clarendon Press Oxford 38. Also see Pardy, B *Environmental Law A guide to Concepts* (1996) Butterworths Toronto 33.

<sup>68</sup> Gunningham & Sinclair (1998) op cit 45. By dependability is meant that the behaviour expected of regulators can be specified with considerable clarity, making it easy to identify breaches of legal standard and to enforce law. However, the cost and difficulty of enforcement have a negative impact on its dependability and as such it failed to pose a credible deterrent threat. For further strengths and weaknesses, see Gunningham & Sinclair (1998) op cit 45, 46.

individuals or groups with political weight are served at the expense of good environmental policy.

In South Africa the “command and control” mechanism is extensively used to enforce environmental law<sup>69</sup> and, thus, to punish failure to comply with the provisions by imposing criminal sanctions (fines and imprisonment). This is also illustrated in the above discussion of relevant environmental legislation (2.2 - 2.4) where mainly fines and/or imprisonment are prescribed upon conviction of an offence. Despite this extensive provision for criminal sanctions in South African environmental legislation, there have not been many successful prosecutions in the environmental sphere, probably because the offenders and the officials came to out-of-court settlements.<sup>70</sup>

Although criminal sanctions are by far the most widely prescribed sanctions for contraventions of legal and administrative provisions, they will, more often than not, only be used as a last resort.<sup>71</sup> It must be pointed out that using criminal sanctions will not restore damage that has already been done to the environment.

Visser<sup>72</sup> is of the opinion that with regard to the protected-area concept, criminal sanctions should definitely be used only as a last resort as they will not induce the landowner to respect and promote the conservation measures introduced by the legislature. However, he submits that where damage can be done to parts of the environment, such as the destroying of endangered species of fauna and flora, stringent penalties will be inevitable and criminal sanctions will not be used only as a last resort.

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<sup>69</sup> Barnard, *D Environmental Law for All* (1999) Impact Books Pretoria 165 is of the opinion that the enforcement of environmental law has undergone a major change by focusing away from the command-and-control structures designed to “punish” offenders, by developing and implementing environmental management programmes.

<sup>70</sup> My research during the last three years up until 28/2/02, revealed only a few South African court cases where fauna and/or flora were involved. The few cases that did involve harmful activities to the environment, dealt with pollution or health issues. Also see Fuggle & Rabie (1998) op cit 130.

<sup>71</sup> Fuggle & Rabie (1998) op cit 128; Kidd (1997) op cit 21; Kidd (1998) 5 *SAJELP* op cit 181.

<sup>72</sup> Visser (1988) *SALJ* op cit 252 & 268.

According to Kidd,<sup>73</sup> criminal sanctions should be the law's ultimate threat to enforce compliance with legislation and should be reserved for the most serious environmental violations and thus for: "what really matters". According to Kidd, "what really matters" in the context of environmental crime, are offences involving deliberate conduct (intention-based offences), repeated violations of the law, and violations resulting in severe harm and damage to the environment and/or human health.

Visser<sup>74</sup> is also of the opinion that for criminal sanctions to be effective, the offence must be easily detectable, enforcement must be regular and efficient, and the penalty must be stringent enough to "overcome the motive of economic gain". Moreover, there must be a realistic chance of detection, prosecution and conviction.

### 3.1.2 Criminal sanctions as a primary sanction

According to Milton, criminal sanctions as a primary sanction have not proved to be particularly effective as an environmental guard-dog.<sup>75</sup> Kidd<sup>76</sup> agrees and argues that viewing criminal sanctions as a solution to environmental problems is misguided as they have a number of shortcomings when applied to environmental offences. Shortcomings that influence the effectiveness of criminal sanctions in the enforcement of environmental legislation will now be discussed.

#### 3.1.2.1 The shortcomings of the primary sanction

##### a) Reactive nature

A serious shortcoming of the primary sanction is that it is reactive in nature. This means that damage to fauna and flora must already have occurred or be in the process of

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<sup>73</sup> Kidd (1998) 5 *SAJELP* op cit 197.

<sup>74</sup> Visser (1988) *SALJ* op cit 267.

<sup>75</sup> Milton (1999) 6 *SAJELP* op cit 60.

<sup>76</sup> Kidd (1998) 5 *SAJELP* op cit 181, 189-191.

occurring before it can be employed. This is unfortunate as harm to fauna and flora is mostly irreversible and restoration of their habitat, if at all possible, can take many years.

b) Inadequacy of penalties

(i) South Africa

If criminal sanctions are to be used to deter people from committing environmental offences, there must be a sufficient threat for the deterrence to be effective. For a threat to be a sufficient deterrent, the penalties provided for in legislation must be adequate to deter any environmentally harmful activities and, failing prevention, they must punish the offender in such a way that future harmful behaviour of the offender and potential offenders are prevented.

With regard to penalties in general, most legislation provides for fines, and only if the offender does not pay the fine, does imprisonment follow. Thus, in practice most offenders who are convicted receive only fines. However, sections 24(1)(b)(ii) and 24(5) of the National Parks Act 57 of 1976 provide that an offender who has a similar previous conviction, may be imprisoned upon conviction without an option of a fine.

According to Kidd,<sup>77</sup> the penalties provided for in environmental legislation are not adequate and the fines are far too low to have any deterrent effect, especially to a corporate offender who tends to view fines as a kind of indirect tax (a cost of doing business) rather than as a punishment. An example of an inadequate penalty that, in my opinion, has no deterrent effect was imposed in *S v Sibiya*.<sup>78</sup> In this case, the accused was found guilty of the unlawful possession of game (bush buck) in contravention of sections 18 and 27 of the Mpumalanga Nature Conservation Act 10 of 1998. However, the accused was sentenced to only 18 months imprisonment *suspended* for five years for contravention of section 27.<sup>79</sup>

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<sup>77</sup> Kidd (1998) 5 *SAJELP* op cit 185-186. Also see, Kidd (1997) op cit 23; Fuggle & Rabie (1998) op cit 130; Milton (1999) 6 *SAJELP* op cit 55.

<sup>78</sup> *S v Sibiya* 2001 (1) SACR 630 (T).

<sup>79</sup> Although the accused had a previous conviction for the contravention of section 18, he was not

Even where the legislation provides for high fines and long-term imprisonment,<sup>80</sup> there are only a few cases involving fauna and flora, and it seems as if no one is ever prosecuted, sentenced or imprisoned for contravening provisions protecting fauna and flora. It is possible that the courts do not impose harsh penalties because the majority of the South African society does not regard environmental offences as a crime. It is also a probability that the overcrowded prisons may influence the imposition of a prison sentence for the commission of an environmental crime. The fact that there are few reported cases is also an indication that parties settle out of court.

According to Kidd<sup>81</sup> most of the criticism in South Africa against the effectiveness of criminal sanctions in environmental offences is levelled at the inadequacy of the penalties provided for by legislation. Some of these penalties in the relevant legislation will now be examined briefly.

Sections 29 and 30 of the Environment Conservation Act 73 of 1989 provide for penalties applicable when, *inter alia*, section 22(1)<sup>82</sup> of the Act is contravened. Section 29(4) provides for a fine not exceeding R100000 or imprisonment for a period not exceeding ten years or both, and a fine not exceeding three times the commercial value of any thing in respect of which the offence was committed. Section 29(5) states that any person convicted of an offence in terms of this Act for which no penalty is expressly provided, shall be liable for a fine not exceeding R2000 or imprisonment for a period not exceeding six months or both. If any person, after conviction for an offence in terms of the Environment Conservation Act 73 of 1989, persists in the act a fine (R250) and/or imprisonment (20days) may be imposed in respect of every day on which the act persists (s 29(6)). An order that any damage to the environment resulting from an offence be repaired by the convicted person to the satisfaction of the official in question (s 29(7))

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convicted in terms of section 18 because of an inadmissible confession.

<sup>80</sup> The threat of imprisonment is much more of a deterrent to offenders and in other countries it is frequently imposed on environmental offenders.

<sup>81</sup> Kidd (1998) 5 *SAJELP* op cit 186.

<sup>82</sup> Section 22(1) states that no one shall undertake without authority any activity identified by the Minister in terms of section 21(1). One of these activities (s21(2) (c)) identified and prohibited in protected natural environment, special nature reserve and limited development area is the removal of natural living resources (which include fauna and flora).

may also be made. Failure to comply with such an order entitles the official to take the necessary steps to repair the damage and recover the cost from the convicted person (s 29(8)).<sup>83</sup> Furthermore, section 30 provides for forfeiture to the State of any vehicle or other thing by means of which the offence in question was committed.

The National Parks Act 57 of 1976 prohibits certain acts in national parks (s21). Contraventions of the provisions of section 21 results in the application of the penalties referred to in section 24. The Act provides for two sets of penalties, those with regard to offences relating to wild animals<sup>84</sup> and those related to plants.<sup>85</sup> Contraventions of sections 21(1)(c)<sup>86</sup> or 21(h),<sup>87</sup> with regard to wild animals listed in Schedule 2 (except the elephant and black and white rhinoceros), may lead to the imposition of a fine of between R4000 and R8000, or imprisonment of between one year and two years if the fine is not paid. In respect of offences committed against the elephant and black or white rhinoceros, the penalties are much stiffer, namely a fine of not less than R30000 and not more than R100000 or, in default of payment of such a fine, imprisonment for a period of not less than three years and not more than ten years (s24(1)(b)(i). If a person had previous convictions, imprisonment may be given without an option of a fine and on a first or subsequent conviction, an additional fine of three times the commercial value of the animal in respect of which the offence was committed, is applicable.<sup>88</sup>

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<sup>83</sup> Sections 31A(1) and 31A (2) provide for similar penalties than sections 29(7) and 29(8). However, Soltau points out that the practical usefulness of section 31A is likely to be limited for a number of reasons ((1999) 6 *SAJELP* op cit 41-42). One reason is that it does not operate retrospectively, thus it will not be useful for the rehabilitation of areas that had been damaged before the section came into force. The advantage of this section is however, that it is available not only to the Minister, but also to the local government and "competent authorities".

<sup>84</sup> Schedule 2 of the Act lists about 200 animal species.

<sup>85</sup> Schedule 3 of the Act lists about 200 plant species.

<sup>86</sup> Section 21(1) (c) prohibits the hunting or otherwise wilful and negligent killing or injuring of any animal in the park. The definition of hunt covers a wide variety of actions that may not qualify as attempted killing. For example, in *S v Hellerle and Others* 1969 (1) SA 420 (N) it was held that the wilful disturbance of moulting water fowl (Yellowbill ducks) fell within the definition of "hunt". In this case the accused tried to run down the water fowl with a high-speed boat. In this case the acquittal of the accused by the magistrate was set aside and the case referred back to the magistrate's court for further hearing.

<sup>87</sup> Section 21(1) (h) prohibits the possession in the park of any animal, alive or dead or any part of an animal.

<sup>88</sup> See s24(1)(b)(ii) and s24(1)(b)(ii)(aa) of the Act. Penalties are also provided for violations of s 21(1)(c) involving animals not specified in Schedule 2 and for the contravention of s 21(1)(d) with regard to *inter alia* lion and buffalo. See s 24(2)-(4).

In the case of plants, the penalty for a contravention of section 21(1)(i),<sup>89</sup> in respect of trees or other plants listed in Schedule 3, is a fine of between R1000 and R6000 or imprisonment of between three months, and 18 months if the fine is not paid. In the case of plants and trees not listed in Schedule 3, the fine varies between R300 and R1500 or imprisonment of one month up to four months if the fine is not paid. A previous conviction under the same subsection will result in imprisonment without an option of a fine (s24(6)).

As already mentioned, section 34 of NEMA also provides for *additional* penalties for the contravention of certain provisions of national and provincial Acts listed in Schedule 3 of the Act. For example, additional fines will apply for the contravention of section 24(1)(b) of the National Parks Act 57 of 1976, section 29(2)(a) and (4) of the Environment Conservation Act 73 of 1989 and, *inter alia*, section 67 of the KwaZulu Nature Conservation Act 29 of 1992. The additional fines involve the costs incurred or likely to be incurred by an organ of state in the rehabilitation of the environment or the prevention of damage to the environment (s34(1)), a fine equal to the monetary value of the advantage gained or likely to be gained by the offender (s34(3)), and reasonable costs incurred by the public prosecutor and the organ of state concerned in the investigation and prosecution of the offence (s34(4)).

Apart from the available penalties in national legislation mentioned above, provincial legislation also contains penalties to be imposed when a person is convicted of an offence in terms of its provisions. The provincial legislation contains provisions aiming at protecting, *inter alia*, specially protected game, protected game, ordinary game, protected wild animals, endangered and rare species of fauna and flora, specially protected indigenous plants and protected indigenous plants.<sup>90</sup>

Provincial Acts and Ordinances are administered by the relevant Parks Board; for example the Mpumalanga Nature Conservation Act 10 of 1998 is administered by the

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<sup>89</sup> Section 21(1)(i) prohibits the cut, damage, removal or destruction of *inter alia* any tree (or any part thereof), firewood, grass or other plant in a park.

<sup>90</sup> For more detail on the relevant provisions, see the Mpumalanga Nature Conservation Act 10 of 1998.

Eastern Transvaal Parks Board. In each province fauna and flora are protected and conserved through a permit, licence or exemption system. The relevant Board will issue, upon application and payment of prescribed fees, a permit, licence or exemption subject to conditions prescribed in the applicable legislation. Thus, compliance with provincial legislation is enforced by controlling human interaction with fauna and flora through the issuing of permits, licences or exemptions. If a holder of a permit, licence or exemption, *inter alia*, contravenes or fails to comply with a condition to which the permit, licence or exemption is subject, the Board may cancel or suspend the licence/permit. Only if the contravention caused severe damage to the fauna or flora, will the criminal sanctions (fines and imprisonment) provided for in the legislation come into play. Criminal sanctions are thus, used by the provincial administration only as a subsidiary sanction.

To illustrate the provision of criminal penalties in provincial legislation, the Mpumalanga Nature Conservation Act 10 of 1998 will be used as an example. Section 5(3)(a) of this Act provides for a fine or imprisonment of up to 10 years, or both, if any person is found guilty of not reporting, within 24 hours, to the police or the nearest office of a nature conservator that he/she has wounded an elephant or rhinoceros. An additional fine not exceeding three times the commercial value of the wounded animal may be imposed. Similar criminal penalties are provided for in the legislation of the other provinces.

The penalties mentioned above that are additional to the usual criminal penalties (fines and imprisonment) are only available once the offender has been convicted of an offence. Kidd<sup>91</sup> points out that these additional penalties are, therefore, not alternatives to criminal sanctions but complementary to them. These provisions can enhance the deterrent effect and, in some cases, contribute to remedy damage to the environment. Examples of these additional penalties (already mentioned above) include the following: payment of compensation for any damage caused in the commission of the offence;<sup>92</sup> forfeiture of any advantage gained from the offence;<sup>93</sup> an additional fine equivalent to the monetary

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<sup>91</sup> Kidd (1998) 5 *SAJELP* op cit 192.

<sup>92</sup> Environment Conservation Act 73 of 1989 (s 29(7)); section 34 of NEMA.

<sup>93</sup> Section 34 of NEMA. In *S v Frost and S v Noah* 1974 (3) SA 466 (CPD) the appellants were convicted and fined by the magistrates' court of illegally catching snoek in the "closed season". The magistrates'

advantage gained from the offence;<sup>94</sup> forfeiture of any object used in the commission of the offence;<sup>95</sup> the forfeiture of authorisation (cancellation of permits or licences) that was enjoyed by the offender before the commission of the offence, and orders of reparation. Failure to comply with the latter orders entitles the authority to take the necessary steps and to recover the cost from the offender.<sup>96</sup> Kidd<sup>97</sup> suggests that alternative penalties should include community service, adverse publicity orders (particularly for corporate offenders), and disqualification from government contracts.

## (ii) Australia

In Australia, environmental legislation of the Federal government, the States and Territories all provide for criminal sanctions to serve as a deterrent or to be imposed upon conviction.<sup>98</sup> Inadequacy of penalties<sup>99</sup> is also raised as a shortcoming of the criminal sanction to punish environmental offenders.

The penalties imposed differ from State to State/Territory and depend on whether the species involved is a protected species or an endangered species. For example, in terms of section 98(2) of the National Parks and Wildlife Act 1974 (NSW), the unauthorised taking or killing of any *protected* fauna may lead to a fine of AUD \$2000<sup>100</sup> or six months imprisonment or both. In terms of the same Act (s 99(1)) the unauthorised taking or killing of any *endangered* fauna species may lead to a fine of AUD \$100000 (for

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court also ordered a large quantity of snoek to be confiscated to the State. The appeals were noted against the confiscation orders as the appellants were not the owners of the snoek caught but the owner of the vessel. The court held that someone who unlawfully acquires a wild animal that is a *res nullius*, nevertheless acquires ownership. Also see discussion in chapter 1.

<sup>94</sup> NEMA s34(3)

<sup>95</sup> Such provisions are included in all the provincial nature conservation ordinances and Acts.

<sup>96</sup> Fuggle & Rabie (1998) op cit 130-131; Kidd (1998) 5 *SAJELP* op cit 189-192; Milton (1999) 6 *SAJELP* op cit 55.

<sup>97</sup> Kidd (1998) 5 *SAJELP* op cit 198.

<sup>98</sup> Norberry (1993) op cit 10.

<sup>99</sup> According to Gunningham, N "Beyond Compliance: Management of Environmental Risk" in Boer, B & Fowler, R & Gunningham, N *Environmental Outlook* (1994) The Federation Press Sydney 256, penalties are rarely enforced and compliance is normally "negotiated" in a manner which pay high regard to the economic interests of business.

<sup>100</sup> Currently (2002) approximately R5,60 = 1 AUD \$.

threatened species) or AUD \$20000 (for vulnerable and rare species) or two years imprisonment or both.

In Victoria the unauthorised taking or killing of endangered wildlife differs from that in New South Wales. In terms of section 41 of the Wildlife Act 1975 (Vic), the above mentioned offence may lead to a fine of not more than AUD \$5000 and an additional penalty of not more than AUD \$500 for every head of such wildlife taken or killed. If protected wildlife was taken or killed (s43), the fine is not more than AUD \$500 and an additional penalty of not more than AUD \$50 for every head of such wildlife taken or killed.

With regard to penalties applicable to flora, a South Australian court<sup>101</sup> imposed a heavy fine of AUD \$40 000 in terms of the National Parks and Wildlife Act 1972 for the illegal clearance of vegetation.

In terms of the Wildlife Protection (Regulation of Exports and Imports) Act 1982 (Cth), the possession of illegally imported wildlife is an offence that may result in a fine of up to \$100000 (\$200000 for corporations) or imprisonment of five years.<sup>102</sup> Offences and penalties, particularly with regard to conduct in reserved areas and the protection of natural features and wildlife from harmful activities, are prescribed by legislation or are the subject of regulations passed under the authority of the relevant Act.<sup>103</sup> Australia has separate legislation imposing high penalties and imprisonment for serious environmental offences.<sup>104</sup> For example, the NSW Environmental Offences and Penalties Act 1989 introduces a tiered system of environmental offences. Tier one is designed for serious environmental offences, while tiers two and three concern less serious offences. This

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<sup>101</sup> *Rentiers v Native Vegetation Authority* (1990) Unreported SC (SA). See Bradsen, J “The Green issues: Biodiversity Conservation in Australia” in Boer, B & Fowler, R & Gunningham, N *Environmental Outlook* (1994) The Federation Press Sydney (1994) 207.

<sup>102</sup> Bates, GM *Environmental Law in Australia* (1987) (2<sup>nd</sup> ed) Butterworths Sydney 189-190.

<sup>103</sup> Bates (1987) op cit 158.

<sup>104</sup> Penalties in relation to offences involving endangered species are often potentially heavier because of the more serious effects on such a species. Also, according to De Klemm, C & Shine, C *Biological Diversity Conservation and the Law* IUCN — The World Conservation Union (1993) 122 the maximum fine that may be imposed on legal persons committing an offence under species conservation legislation is double that which may be imposed on natural persons.

hierarchical approach to environmental offences has been adopted in most Australian jurisdictions.<sup>105</sup>

Legislation frequently empowers the applicable Environment Court<sup>106</sup> to impose additional maximum fines in respect of each animal involved in the offence. This is frequently imposed in cases involving the illegal taking of fish and shellfish.<sup>107</sup> In addition to any penalty imposed, a person convicted of an offence may also be required to pay compensation for any damage caused.<sup>108</sup>

According to Gunningham<sup>109</sup> there is an increasing willingness in Australia to prosecute for breaches of environmental law, coupled with the threat of higher penalties. This willingness was demonstrated in Queensland during 2001, the year that is regarded as a watershed year for green justice in Queensland. Before June 2001 penalties imposed in Queensland for environmental vandalism were limited to fines and suspended jail sentences. However, since June 2001, three offenders had been to jail in Queensland for committing environmental vandalism. The third case<sup>110</sup> is relevant to this thesis as the offender's crime was the illegal felling of 23 trees in a world-heritage-listed rainforest.<sup>111</sup> The offender was convicted in terms of Queensland's Wet Tropics World Heritage Protection and Management Act of 1993.

Apart from imposing hefty jail sentences, the fines imposed by courts in Queensland have also increased dramatically since 2001. For example, a \$400000 (AUD\$) fine, the largest under the State's environmental protection laws, was imposed on the Malaysian owners of a ship that ran aground on the Great Barrier Reef and caused severe damage to the

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<sup>105</sup> Lipman, Z "Corporations, Crime and the Environment" (1997) 4 *SAJELP* 71-72.

<sup>106</sup> An Environmental Court will be discussed later in this chapter.

<sup>107</sup> In an Australian case, *Stephenson v Brine* (1983) SASR 161, a general fine of \$1000 was imposed on the convicted person and an additional fine of \$150 for each animal illegally taken. Bates (1987) op cit 208.

<sup>108</sup> Bates (1987) op cit 158.

<sup>109</sup> Gunningham (1994) op cit 256.

<sup>110</sup> The other two cases involved illegal dumping of toxic material into the Brisbane river and the deliberate release of hundreds of thousands of litres of raw sewage into waterways. See Ryan, S "Green justice jails lawbreakers" *The Courier-Mail* of 15 December 2001 (Brisbane) 16.

<sup>111</sup> A jail sentence was justified in this case as most of the trees logged were over a century old and one over 300 years old.

coral reefs. There is also an increase in the prosecutions regarding environmental crime. The Minister for the Environment, Dean Wells, claims that a new legal compliance unit within the EPA has made all the difference, with 15 to 20 prosecutions on its books.<sup>112</sup>

### (iii) New Zealand

In New Zealand there are also concerns regarding the adequacy of penalties and the effectiveness of them as deterrents for environmental crime. Since the most important and dominant environmental legislation is the Resource Management Act 1991 (RMA), it will be used as an example to illustrate the adequacy of penalties. The RMA provides for a hierarchical structure of offences, reflecting differing degrees of severity of contraventions. The most serious offences, “Grade I” offences, are set out in section 338(1) and comprise breaches of duties imposed under Part III of the Act (ss 9-15)<sup>113</sup> and contravention, of *inter alia*, an enforcement order and an abatement notice. Such offences can attract fines of NZ\$ 125 000 and NZ\$ 6250<sup>114</sup> a day for continuing offences, as well as imprisonment for a maximum period of two years. “Grade II” (contravention of, *inter alia*, ss 22 and 42 of RMA) and “Grade III” offences constitute less severe contraventions<sup>115</sup> and attract only financial penalties. A maximum fine of NZ\$ 6250 and NZ\$ 69 a day for a continuing offence is prescribed for “Grade II” offences, while a maximum fine of NZ\$ 938 is provided for “Grade III” offences. These increased sanctions are an indication that environmental crimes are no longer to be considered simply as misdemeanours, but recognised as real crimes.<sup>116</sup>

Apart from the traditional criminal sanctions of fines and imprisonment, a sentence of community service (s339(4)) is also an option in the case of any offence, and

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<sup>112</sup> Ryan (2001) *The Courier-Mail* op cit 16.

The Department of Natural Resources and Mines also has about 200 investigations under way into illegal tree-clearing, including 20 prosecutions since July 2000.

<sup>113</sup> For information on these sections, see Williams, *DAR Environmental & Resource Management Law in New Zealand* (1997) (2<sup>nd</sup> ed) Butterworths Wellington (1997) op cit 92-97.

<sup>114</sup> A NZ \$ is worth approximately R4,80.

<sup>115</sup> Less severe or “minor” offences or Grade II offences include the obstruction of people exercising powers conferred by RMA. For other examples, see Williams (1997) op cit 645.

<sup>116</sup> Rabie, A “Integrated resource management: the New Zealand model and some lessons for South Africa” (1998) 13 *SAPR/PL* 383-384.

enforcement orders may be made instead of, or in addition to, the imposition of a fine or imprisonment. Section 339B provides for an additional penalty of an amount not exceeding three times the value of any commercial gain resulting from committing certain offences if the court is satisfied that the offence was committed in the course of producing commercial gain.<sup>117</sup>

Dissatisfaction was expressed with the more recent sentencing trends,<sup>118</sup> especially with fines that represent a mere fraction of the maximum penalty. Peart<sup>119</sup> also points out that the penalties prescribed for environmental offences are high, with the RMA providing a maximum imprisonment of two years, or a fine not exceeding NZ\$200 000 plus NZ\$10 000 a day for continuing offences. According to Rabie<sup>120</sup> the average penalty is less than 2% of the available maximum, while fines equivalent to NZ\$ 31250, which represents 25% of the maximum penalty, have been imposed only three times.

There has thus been reluctance by the courts to impose fines of this magnitude. One of the main reasons for the imposition of such small fines is the courts' attempt to tailor the fines to suit the offender's ability to pay, rather than reflect the gravity of the offence. Such sentences have a modest degree of individual deterrence.<sup>121</sup>

#### (iv) Conclusion

The fines and imprisonment periods provided for in the South African environmental legislation are not too low and are, in fact, adequate to serve as a deterrent for the majority of the public and small businesses. Even a fine of R1000 is a huge amount of

<sup>117</sup> Rabie (1998) 13 *SAPR/PL* 383-384; Williams (1997) op cit 645-651.

<sup>118</sup> The leading case as far as sentencing principles are concerned is the High Court decision of *Machinery Movers Ltd v Auckland Regional Council* ((1993) 2 NZRMA 661; (1994) 1 NZLR 492). The case laid the foundation for the establishment of a significant body of sentencing jurisprudence in environmental cases. See Rabie, A "Integrated resource management: the New Zealand model and some lessons for South Africa" (1999) 14 *SAPR/PL* 165.

<sup>119</sup> Peart, R "A New Generation of Environmental Law. The New Zealand reform and lessons for South Africa" (1996) 3 *SAJELP* 143.

<sup>120</sup> Rabie (1999) 14 *SAPR/PL* op cit 165-166.

<sup>121</sup> In South Africa, such an approach to sentencing will have no deterrent effect and almost no fines will be imposed because of the high level of unemployment and severe poverty in South Africa.

money to the majority of people in a poverty-stricken South Africa. Furthermore, the existing penalties are adequate to protect the fauna and flora if the courts are willing to impose the stiff fines or imprisonment available to them rather than only the minimum or suspended sentences. It is hoped that the South African courts will follow the Queensland courts and impose heavy fines and imprisonment on offenders convicted of a crime against the environment in general (for example environmental vandalism), and against fauna and flora in particular. These heavy penalties must not be imposed only when protected or endangered species are involved, but also when harm or damage to any other species is done. If crimes against “unimportant” or “unprotected” fauna and flora species are also punished, it will serve as a deterrent and most probably prevent potential offenders to direct their criminal activities to the protected and endangered species. It will also create a general awareness of the obligations one has as steward or trustee of fauna and flora.

c) Lack of expertise

The lack of expertise exaggerates the negative effect that the shortage of human resources has on the enforcement of criminal sanctions. This problem influences the effectiveness of investigators and prosecutors. The officials of specialised departments normally have the scientific knowledge to investigate a case involving environmental degradation, but lack the specific legal knowledge with regard to the law of evidence and criminal procedure. This makes it difficult to gather evidence that will stand the scrutiny of a court, and also causes much of their valuable investigative work to be rendered nugatory. The consequence of a lack of expertise is illustrated in *S v Sibiyi*,<sup>122</sup> referred to above. In this case, the accused was found guilty of the unlawful possession of game (bush buck) in contravention of sections 18 and 27 of the Mpumalanga Nature Conservation Act 10 of 1998. However, the accused was only sentenced with regard to section 27 and not section 18, although he had a previous conviction in terms of section 18. This happened because

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<sup>122</sup> *S v Sibiyi* 2001 (1) SACR 630 (T).

of an inadmissible confession made by the accused. The accused thus “got away” as a direct consequence of the official's lack of knowledge (expertise) in the law of evidence.

Conversely, prosecutors have the legal knowledge but are not familiar with environmental crimes and may have difficulty in dealing with cases that rely mainly on technical evidence. To overcome this lack of relevant legal knowledge of department officials and the inexperience of prosecutors in environmental issues, more focus should be placed on all aspects of environmental law during training. Department officials should, for example, receive training in relevant legal aspects or appoint their own prosecutors who could then specialise in the field of criminal environmental law. The Department of Justice should also include an environmental component in the training programme of prosecutors and magistrates, and then allocate selected prosecutors and magistrates to environment-related cases.<sup>123</sup> It is also proposed that all tertiary educational institutions that offer law degrees (and nature conservation degrees) should include an environmental law component in their pre- and post-graduate courses.

With regard to the shortage of competent human resources, Kidd<sup>124</sup> rightly points out that environmental legislation will be pointless if offenders can avoid being caught. He states that “successful deterrence depends not only on severity of punishment but also on a perceived high risk of detection”.<sup>125</sup>

It is worth noting that Australia considers training of their environmental officers of the utmost importance for the effective implementation and enforcement of environmental legislation. Norberry<sup>126</sup> points out that the effectiveness of legislation will depend to a large extent on consistency in enforcement, the development of enforcement guidelines, and the training of field staff in investigative techniques. A particular point raised by

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<sup>123</sup> Also see Kidd (1997) op cit 23; Fuggle & Rabie (1998) op cit 129; Kidd (1998) 5 *SAJELP* op cit 197; De Klemm & Shine (1993) op cit 121.

<sup>124</sup> Kidd (1998) 5 *SAJELP* op cit 186.

<sup>125</sup> For more discussion on the shortage of human resources, see Loots (1994) 1 *SAJELP* op cit 17; Kidd (1998) 5 *SAJELP* op cit 190. The lack of *insufficient deterrent sanctions* as a reason for the inadequate enforcement of environmental legislation may also still be valid. However, “insufficient” is a relative concept and what is perceived as “insufficient” depends on the individual.

<sup>126</sup> Norberry (1993) op cit 93.

New South Wales officers and echoed elsewhere in Australia, was the need for adequate and continuous training in criminal investigation, courtroom procedure, and developments in environmental law. Fortunately, Australia as a first-world country is able to respond positively to these training needs and does not, as South Africa, have the huge social responsibilities that burden its annual budget.

In short, the shortage of human power and the lack of expertise regarding the enforcement of environmental legislation, influence the effective conservation of fauna and flora in South Africa. Fortunately, this problem has been identified and acknowledged by government and the annual budget allocated to DEAT and provincial government departments responsible for the conservation of fauna and flora will hopefully reflect this concern in the near future.

#### d) Problems of proof

The standard of proof<sup>127</sup> required in criminal actions, namely “beyond reasonable doubt”,<sup>128</sup> makes it difficult to succeed in environmental cases.<sup>129</sup> However, this shortcoming can be overcome to a significant extent by using criminal sanctions as a *subsidiary* sanction.<sup>130</sup>

Before the Constitution came into operation, the issue of proof was made easier for prosecutors by legislation that provided for certain presumptions (reverse-onus provisions). An example of such a presumption is included in the Nature Conservation Ordinance 12 of 1983 (Transvaal) in section 110(1)(m). It states “... if it is proved any person was in possession or in control of an endangered species or rare species, such person will be deemed to have imported such species into the province, until the contrary is proved.” This means that the onus was on the *accused* to prove that he/she did not

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<sup>127</sup> Proof is the process of establishing with evidence the existence of a fact to the satisfaction of the court. The standard of proof is the degree of certainty that must be achieved in the mind of the judge. See Pardy (1996) op cit 15.

<sup>128</sup> This standard of proof is considerably more difficult than the balance of probabilities required by civil actions. Also see Pardy (1996) op cit 15.

<sup>129</sup> Kidd (1998) 5 *SAJELP* op cit 198-200.

<sup>130</sup> The criminal sanction as a subsidiary sanction will be discussed later in this chapter.

import such species, thus that he/she was innocent. The position after 1996 is that these presumptions may all be challenged as unconstitutional on the basis that they contravene the right to a fair trial.<sup>131</sup>

In *S v Mumba* (1997) (1) SA 854 (W) the appellant had been convicted of contravention of section 98(1) of the Nature Conservation Ordinance 12 of 1983 (Transvaal) solely on the basis of the presumption contained in section 110(1)(m). The court held that a presumption that the possession of ivory deems that the accused has imported it, is against the presumption of innocence enshrined in section 25(3)(c) of the Constitution of the Republic of South Africa Act 200 of 1993 (the Interim Constitution). It is also not justified under section 33 (administrative justice) of the Constitution. Reverse-onus provisions are thus unconstitutional.<sup>132</sup>

#### e) Cost of prosecution

A huge stumbling block for concerned individuals and environmental groups who wish to access the court is the cost of prosecution, which is often inordinately high as a result of all the technical evidence that has to be led by expert witnesses.<sup>133</sup> The frequent postponement of cases further adds to the costs of prosecution. However, as already discussed in chapter 2, legislative changes (NEMA, s 32(2)) are making the cost factor less fearsome for potential litigants wishing to resort to judicial proceedings in order to protect the environment. Section 32(2) of NEMA aims at addressing this disincentive by

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<sup>131</sup> Kidd (1998) 5 *SAJELP* op cit 189; Kidd, M “Presumption as to illegal importation of ivory set aside” (1997) 4 *SAJELP* 331; De Klemm & Shine (1993) op cit 121.

<sup>132</sup> This court was of the view that there was an alternative manner of dealing with the difficulty of proving contravention of the ordinance which would be less damaging to the presumption of innocence. This could be done by imposing an evidential burden on an accused by providing that possession would constitute *prima facie* evidence of importation. It was stated that such a provision has a better chance of passing the constitutionality test (at 860E-F). It was also submitted that the ordinance be redrafted to create a different offence which is easier to prove and which would not infringe the constitutional rights of the accused. The suggestion is that possession of an endangered or rare species without a permit constitutes an offence. It would then be easy to prove that someone was not in possession of the required permit. This provision would satisfy CITES since the relevant article in the Convention requires “measures to penalise trade in, or possession of, such specimens” (own emphasis). Also see Kidd (1997) 4 *SAJELP* op cit 334.

<sup>133</sup> Kidd (1997) op cit 23; Barnard (1999) op cit 170-171.

suggesting that courts do not award costs against an unsuccessful, but reasonable, litigant. However, because the court still has the discretion with regard to costs, it may still be a matter of concern to prospective litigants.

f) Time delay

The high crime rate<sup>134</sup> in South Africa resulted in the courts being overloaded, and this has created a shortage of human resources that, in turn, has led to a huge backlog in the finalisation of the court proceedings. Consequently there is a considerable delay between the time that an offender is charged and the court date. Furthermore, as mentioned in (d) above, the postponement of trials, often more than once, adds to the delay. Because this “time” problem can not easily be remedied, it is a factor that leads authorities to consider alternatives to criminal sanctions.<sup>135</sup>

In conclusion, the problems regarding the shortage of human resources, the lack of expertise and the costs of prosecution (increased by the time delays) in South Africa will significantly be reduced, if not resolved, by the establishment of Environment Courts and Tribunals<sup>136</sup> similar to those in Australia and New Zealand.

### 3.1.2.2 The advantages of the primary criminal sanction

Even though the primary criminal sanction as a “punishment” for environmental offences might have many drawbacks, this sanction does have important advantages. One of these advantages is the fact that it is only through the criminal process that fines and imprisonment (severe penalties) may be imposed on offenders, and that the deterrent effect on individuals and on small businesses can be set up. Also, the stigma of a criminal record attached to an individual or a business is a huge deterrent, especially where the business is listed on the stock exchange.

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<sup>134</sup> See the table of crimes and their ratio in Terblanche (1999) op cit 30-31.

<sup>135</sup> Kidd (1997) op cit 24.

<sup>136</sup> These specialist courts/tribunals will be discussed later in this chapter.

Another advantage of the primary sanction is that it can also be used to contribute to the fashioning of norms, shaping of preferences and education of the public (and potential violators) regarding the moral consequences of their actions. It also creates uniformity in public attitudes towards environmental crimes and serves as a tool to shape public opinion.<sup>137</sup> Thus, in making judgments, and assuming that maximum publicity is given, the courts do impact on the general public's legal mentality and consciousness. The pursuit of environmental rights litigation should have more aims and goals than that of securing favourable judgments. According to Gutto,<sup>138</sup> the case for environment can be "won" whether or not the actual case before the courts is "lost".

Loon<sup>139</sup> agrees with Gutto and submits that in environmental litigation many "failure" cases are actually victories, since part of the objective is to raise public consciousness, as well as to create possibilities of using other non-litigation channels to fight for environmental protection.

The criminal sanction also has an indirect "advantage". This is where alternative approaches to the law,<sup>140</sup> and not criminal law *per se*, such as mediation, has been used in the first instance to address environmental issues. The threat of imposing criminal penalties, should mediation fail, gives the environmental officials a competitive advantage during negotiations. This use of criminal law has been referred to as a "long stop".<sup>141</sup>

Although criminal sanctions will always remain important devices for securing compliance with the law, the problems outlined above will have to be resolved for them to be fully effective. Problems relating to the use of criminal sanctions in the enforcement of environmental law were also experienced by the USA. This country demonstrated that

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<sup>137</sup> Kidd (1998) 5 *SAJELP* op cit 187.

<sup>138</sup> Gutto, SBO "Environmental rights litigation, human rights and the role of non — governmental and people's organisations in Africa" (1995) 1 *SAJELP* 8.

<sup>139</sup> Loon, R "The effectiveness of the law in the conservation of birds of prey in South Africa" (1995) 2 *SAJELP* 183.

<sup>140</sup> Litigation in courts of law is just one of the means of promoting and seeking the protection of guaranteed fundamental rights. Alternative enforcement mechanisms will be discussed in chapter 4.

<sup>141</sup> Kidd (1998) 5 *SAJELP* op cit 196.

these problems are not insurmountable and that with improved legislation and the commitment of resources they can be overcome to make criminal sanctions effective. The USA overcame these problems by imposing severe penalties,<sup>142</sup> by the inclusion of environmental crimes in the Federal Sentencing Guidelines Manual,<sup>143</sup> and by establishing Environmental Crime Units.<sup>144</sup> Most environmental violations are viewed as serious white-collar crimes. All the above-mentioned efforts and the general ill effects of incarceration combine to make the threat of criminal prosecution a major tool in preventing environmental violations.<sup>145</sup>

### 3.1.3 Specialist Courts/Tribunals

Usually, legal challenges to administrative decisions are based on the principles of judicial review. However, with regard to environmental issues, aggrieved persons in Australia and New Zealand may lodge a complaint with the Ombudsman<sup>146</sup> or appeal to specialist courts and/or tribunals.<sup>147</sup> All the Australian States and the Australian Capital Territory (ACT)<sup>148</sup> have established specialist courts or tribunals<sup>149</sup> in order to facilitate the adjudication of environmental issues. Rabie<sup>150</sup> is of the opinion that Australia has

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<sup>142</sup> Penalties that are imposed are up to \$25 000 (approximately R9,95 = 1 US \$) per day per violation or imprisonment of one year or both, for negligent violations of the Clean Air Act of 1977.

<sup>143</sup> These guidelines eliminate much of the judicial discretion involved in sentencing, abolition of parole and also restrict suspended sentences to the least serious offences. After the inclusion of environmental crimes in the guidelines, defendants are routinely sent to prison.

<sup>144</sup> These units are staffed by lawyers with both criminal and environmental law experience. The results of these units have been successful with a conviction rate in 1990 of 95%. Nearly 30 states have formal criminal environmental-crime units at the state level. The units pull together all participants necessary for successful investigation and prosecution of environmental offenders.

<sup>145</sup> Loots (1994) 1 *SAJELP* op cit 18-20; McGregor, GI *Environmental Law and Enforcement* (1994) Lewis Publishers London 113, 114, 120, 124.

<sup>146</sup> The Ombudsman will be discussed later in chapter 3.

<sup>147</sup> For more information, see Bates, GM *Environmental Law in Australia* (1995) (4<sup>th</sup> ed) Butterworths Sydney (1995) 493; Devenish, GE & Govender, K & Hulme, D *Administrative Law and Justice in South Africa* (2001) Butterworths Durban 448.

<sup>148</sup> The ACT has a Land and Planning Appeal Board where administrative decisions may be challenged. This Appeal Board was established in 1993. For more detail, see Stein, PA "Specialist Environmental Court: An Australian experience" in Robinson, D & Dunkley, J (ed) *Public Interest Perspectives in Environmental Law* (1995) Wiley Chancery London 270.

<sup>149</sup> In Victoria, Western Australia and Tasmania environmental appeals are adjudicated by administrative appeals tribunals for example, the Planning Division of the Victorian Administrative Appeals Tribunal. Environmental issues are also adjudicated by the Commonwealth Administrative Appeals Tribunals. See Rabie, A "Environmental Law in Australia" (1995) 1 *SAJELP* 110.

<sup>150</sup> Rabie (1995) 1 *SAJELP* op cit 119.

been playing a pioneering role as far as administrative appeals tribunals generally are concerned. Examples of these courts and tribunals include: a Land and Environment Court (NSW);<sup>151</sup> a Planning and Environment Court (Qld.);<sup>152</sup> a Resource Management and Planning Appeal Tribunal (Tasmania); and an Environment Resources and Development Court (South Australia).<sup>153</sup> As an example of an Environment Court, the Land and Environment Court of NSW will be discussed.

This court was established in 1980. Stein<sup>154</sup> is of the opinion that the Land and Environment Court (NSW) achieves each of the objectives of a legal system namely, effectiveness, efficiency, timeliness and justice. Some noteworthy aspects regarding this Court needs to be pointed out. Firstly, it was created as an integrated superior court of record of equal status to the State Supreme Court, with exclusive jurisdiction to determine disputes arising under more than 20 separate environmental laws. These statutes make provision for the protection of the environment and include, *inter alia*, planning and national parks and wildlife protection. Secondly, under the Land and Environment Court Act 1979 (NSW) various fragmented jurisdictions were consolidated.

Jurisdiction was no longer to be split between numerous different courts, boards, tribunals and authorities because the court is seen as a “one-stop shop”. Thirdly, the court was given a very broad jurisdiction to hear all civil and criminal (summary) enforcement matters, judicial review and merit appeals relating to land and environment matters.

These appeal bodies are normally composed of a legally qualified chairperson and “assessors”, who are qualified in disciplines that include environmental planning and management, and nature conservation. The composition of the specialist appeal bodies reflects the fact that they may be required to determine both the merits and the legality of an administrative decision.<sup>155</sup> The officers thus have the necessary knowledge and

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<sup>151</sup> For a detailed discussion on this court and its advantages, see Stein (1995) op cit 258-266.

<sup>152</sup> This court was established in 1990. For more detail on this court, see Stein (1995) op cit 269.

<sup>153</sup> This court was established in 1993. For more detail on this court, see Stein (1995) op cit 270.

<sup>154</sup> Stein (1995) op cit 272.

<sup>155</sup> Bates (1995) op cit 463; Stein (1995) op cit 258.

experience to successfully prosecute offenders. However, in New South Wales non-judicial members have also been included as assessors for the first time. These assessors are not required to have legal qualifications, but must be qualified in fields such as planning, environmental sciences and natural resources.<sup>156</sup> An advantage of these specialist courts and tribunals is, therefore, that the officials have the necessary expertise to successfully prosecute offenders.

Another advantage of these specialist courts and tribunals is that environmental issues are dealt with speedily. This is because they operate more informally than courts of law. They are generally not bound by legal formalities and procedures, though procedural rules may be enforced to ensure a fair hearing.<sup>157</sup> These court and tribunals exercise all the powers of the administrative bodies, and may rely upon new evidence. They exercise appeal functions<sup>158</sup> and are the final arbiters<sup>159</sup> of the merits of a proposal.<sup>160</sup> A noteworthy aspect is that in addition to the final determination of matters by judges and assessors, alternative dispute resolution options of mediation and conciliation are also available to litigants.<sup>161</sup>

However, despite the innovative aspects and advantages<sup>162</sup> of such specialist courts or tribunals, there are also criticisms. One of the criticisms of the court is with regard to the appropriateness of an integrated, specialist jurisdiction. It is argued by some that there is nothing distinctive about environmental law to justify separate or specialist treatment, such as that provided by a specialist court. However, one must agree with Stein<sup>163</sup> that

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<sup>156</sup> Stein (1995) op cit 258.

<sup>157</sup> Bates (1995) op cit 464; Stein (1995) op cit 259.

<sup>158</sup> This means that they have the power to review administrative decision-making on its merits and substitute their decisions for those of the administrative bodies in question.

<sup>159</sup> No further appeal on the merits is possible from the decisions of these specialist bodies because the superior courts of law are not empowered to determine the merits of administrative decision-making, only its legality.

<sup>160</sup> Bates (1995) op cit 463; Rabie (1995) 1 *SAJELP* op cit 110.

<sup>161</sup> Stein (1995) op cit 259, 260, 262. For examples of other innovations, see Stein (1995) op cit 260-262.

<sup>162</sup> An advantage is for example that it decreases multiple proceedings arising out of the same environmental dispute. For other advantages, see Stein (1995) op cit 260-262.

<sup>163</sup> Stein (1995) op cit 264.

environmental matters do require specialist knowledge, and acknowledge that they have generated specialisation in various fields, including the law.<sup>164</sup>

In New Zealand, the existence of an Environment Court (previously the Planning Tribunal) plays a very important role in the criminal system as it is a crucial part in environmental decision making. The jurisprudence of the Court is an increasingly important source of law. In more than 40 years of hearing and deciding appeals, the Court has established a practice of open hearings, and reasoned decisions that have normative value for professional decision makers and professional advisers. It travels to all parts of the country, reviews schemes, hears evidence in the locality, and gives comprehensive decisions. That the Court has been entrusted with increased jurisdiction and judicial powers<sup>165</sup> under the RMA demonstrates the acceptance in this country of a multi-disciplinary specialist Court to review planning and resource management decisions on their merits.<sup>166</sup> Functions of this Court include determining appeals in respect of policy statements and plans and in respect of resource consent applications. It also has declaratory powers and wide authority to make enforcement orders.<sup>167</sup>

In South Africa, section 6(1) of the Promotion of Administrative Justice Act 3 of 2000 provides for any person to institute proceedings in a court of law or a tribunal<sup>168</sup> for the judicial review of an administrative action.<sup>169</sup> As a rule, judicial administrative bodies are not bound by the strict rules of procedure and evidence that apply to ordinary courts.<sup>170</sup>

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<sup>164</sup> Examples of these fields of law are planning law and marine law. For a discussion on other criticisms, see Stein (1995) op cit 266-268.

<sup>165</sup> The Court is a judicial body under XI of the RMA. The RMA extended the powers of the Court in enforcement proceedings, notably declarations, enforcement orders and appeals against abatement notices. See Williams (1997) op cit 71, 30, 33.

<sup>166</sup> The increased jurisdiction and judicial powers of the Court under the RMA, indicate that the role of the Environment Court is more important under the RMA than under previous legislation. See, Williams (1997) op cit 32-33.

<sup>167</sup> For more functions, see Williams (1997) op cit 71.

<sup>168</sup> A tribunal is defined by this Act as meaning, "any independent and impartial tribunal established by national legislation for the purpose of judicially reviewing an administrative action in terms of this Act". This tribunal has not yet been established.

<sup>169</sup> The Promotion of Administrative Justice Act defines "administrative action" as, *inter alia* "any decision taken, or any failure to take a decision, by- (a) an organ of state, when- (i) exercising a power in terms of the Constitution or a provincial constitution; or (ii) exercising a public power or performing a public function in terms of any legislation".

<sup>170</sup> For more information on aspects relevant to tribunals, see Burns (1998) op cit 228--232.

Fuggle and Rabie<sup>171</sup> are of the opinion that an independent body<sup>172</sup> to control administrative actions that affect the environment is necessary and that the establishment of an environmental appeal tribunal<sup>173</sup> in South Africa should be investigated. This is especially important to avoid the abuse of administrative power that could result in damage to the environment. A discussion on administrative enforcement will follow.

### 3.2 Administrative enforcement

The Environment Conservation Act 73 of 1989 and the National Parks Act 57 of 1976 respectively conserve fauna and flora in declared protected areas and national parks. The conservation of fauna and flora species living outside these areas is through provincial legislation (Acts and Ordinances). As already mentioned, the enforcement of provincial legislation is almost exclusively non-judicial through administrative actions.<sup>174</sup> Only if the non-judicial methods fail to ensure compliance with the relevant legislation, are criminal sanctions imposed.<sup>175</sup>

This “secondary” way of using criminal sanctions is referred to as the subsidiary criminal sanction. It is a proactive and preventative approach to environmental damage. It stops environmentally detrimental conduct before it materialises and the advantages it presents to the conservation of fauna and flora can hardly be overemphasised. This is in contrast to the reactive nature of the primary criminal sanction. According to Fuggle and Rabie<sup>176</sup> the subsidiary sanction is also preferable to the primary criminal sanction because it is easier to prove the elements of crime.<sup>177</sup>

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<sup>171</sup> Fuggle & Rabie (1998) op cit 140.

<sup>172</sup> For issues that have to be addressed, see Fuggle & Rabie (1998) op cit 140.

<sup>173</sup> This body may substitute its own decision for that of the administrative body in question. An appeal to an administrative tribunal is available only if the legislature has established such a tribunal and has granted a right to appeal. See Fuggle & Rabie (1998) op cit 138.

<sup>174</sup> An example of an administrative action is the suspension of a hunting permit or licence. These actions will be discussed later in this chapter.

<sup>175</sup> Loots (1994) 1 *SAJELP* op cit 17; McGregor (1994) op cit 99.

<sup>176</sup> Fuggle & Rabie (1998) op cit 128.

<sup>177</sup> It is easier to prove that a person did not have the required licence, or did not comply with the conditions of a licence, than to prove beyond reasonable doubt that the accused has committed a certain kind of environmentally detrimental activity.

However, the subsidiary sanction also has shortcomings. One of these shortcomings is that its effectiveness depends on the efficiency of administrative officials and the mechanisms of administrative control. If, for example, the conditions upon which permits or licences are issued are not monitored and controlled adequately, the subsidiary sanctions will be ineffective.<sup>178</sup>

In this section general aspects regarding administrative actions will be discussed, followed by a discussion of non-judicial and judicial enforcement mechanisms (excluding the criminal sanction that has already been discussed) employed by the public administration. Remedies available to aggrieved public members (individual or environmental interest groups) will also form part of this section.

### 3.2.1 General

Administrative actions are governed by administrative law<sup>179</sup> and form part of public law.<sup>180</sup> Therefore, since administrative actions affecting the environment are undertaken by those vested with “public functions”,<sup>181</sup> it is essential for the protection of the environment and for the conservation of fauna and flora that public administration be governed by democratic values and principles enshrined in the Constitution ((s195)). According to section 195 of the Constitution, other principles that should be applicable to the public administration include, the impartial, fair and equitable delivery of services; accountability and transparency; and timely access to accurate information. NEMA also states, as one of its national environmental management principles, that decisions must be

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<sup>178</sup> Kidd (1997) op cit 24. For other shortcomings of the subsidiary sanction, see Fuggle & Rabie (1998) op cit 129.

<sup>179</sup> Administrative law is being described as “that section of public law which governs the organisation, powers and actions of the state administration”. See Wiechers, M *Administrative Law* (1985) Butterworths Durban 1-2 and Burns (1998) op cit 41. According to Devenish et al (2001) op cit 10, the term “state” is not employed with consistency in relevant legal literature. It may refer to the public assets and liabilities of the RSA, or be used as a collective noun for the central institutions of public administration. It depends on the context in which it is used. It can thus be a much wider concept than “state” administration. For other definitions of “administrative law”, see Devenish et al (2001) op cit 7.

<sup>180</sup> For a discussion on the distinction between public and private law, see Burns (1998) op cit 41, 42. Also see Beukes, M & Burns, Y & Viljoen, H *Workbook for Administrative Law* (1999) Butterworths Durban 9-10.

<sup>181</sup> See s1(i) (a) (ii) and s(1) (i) (b) of the Promotion of Administrative Justice Act.

taken in an open and transparent manner and that access to information must be provided in accordance with the law ((s2(4)(k)).

One of the rights<sup>182</sup> relevant to the environment, and that must be given effect to in accordance with democratic values and principles, is the right to a just administrative action provided for in section 33 of the Constitution. Section 33(1) states that everyone has the right to administrative action that is lawful, reasonable and procedurally fair,<sup>183</sup> and section 33(2) provides that everyone whose rights have been adversely affected by administrative action has the right to be given written reasons. Section 33(3) states that national legislation must be enacted to provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal (33(3)(a)); that a duty must be imposed on the state to give effect to the rights in subsections (1) and (2); and that an efficient administration must be promoted (33(3)(b)).

The Promotion of Administrative Justice Act 3 of 2000 was enacted to give effect to section 33 of the Constitution. This Act provides for procedurally fair administrative action<sup>184</sup> affecting any person (s3); administrative action affecting the public (s4); and states that reasons must be given for an administrative action (s5). Section 6 of this Act also provides for judicial review of administrative actions under certain conditions by a

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<sup>182</sup> Another relevant right is that of access to information provided for in section 32 of the Constitution. It is required (s32 (2)) that national legislation must also be enacted give effect to this right. Section 32 gives anyone the right of access to any information held by the state or another person that is required for the exercise or protection of any rights. This right is essential if the public is to participate actively in decision making processes regarding the environment and conservation of fauna and flora. Section 31 of NEMA also refers to access to environmental information. This constitutional right and NEMA were discussed in chapter 2.

<sup>183</sup> In *Van Huyssteen and Others NNO v Minister of Environmental Affairs and Tourism and Others* 1996 (1) SA 283 (K), the Court held that (in terms of the Interim Constitution) it would be an infringement of the applicant's rights to procedural fairness if the provincial administration's functionaries decided on a rezoning application before the enquiry of the Board of Investigation referred to in the relevant legislation had been completed. In *Director: Mineral Development, Gauteng region and Another v Save the Vaal Environment and Others* 1999 (2) SA 709 (SCA) the Director designated to grant or refuse a mining licence refused SAVE, an unincorporated association, the opportunity to be heard. The Court held that it would constitute an unfair procedure if the *audi alteram partem* rule does not apply.

<sup>184</sup> In terms of the Act, "administrative action" means any decision taken, or any failure to take a decision, by an organ of state, when exercising a power in terms of the Constitution or provincial constitution (s1(i)(a)(i); or exercising a public power or performing a public function in terms of any legislation (s1(i)(a)(ii) and by a natural or juristic person (s1(i)(b)).

court or a tribunal.<sup>185</sup> Compliance with the Promotion of Administrative Justice Act will thus ensure that administrative actions with regard to the environment (and fauna and flora in particular) are in accordance with democratic values and principles that include open, transparent and accountable administration.<sup>186</sup> This, in turn, will lead to more effective enforcement of environmental legislation by the administration involved.

### 3.2.2 Non-judicial enforcement of administrative actions

Non-judicial enforcement of environmental laws are generally more expedient and cost effective than judicial enforcement.<sup>187</sup> There are various non-judicial ways in which the public administration may enforce applicable environmental laws. One of the ways is to serve an abatement notice<sup>188</sup> on a person who is causing environmental destruction, calling for the cessation of the harmful activity or to take precautionary measures to prevent or minimise the harm.<sup>189</sup> The offender may also be ordered to rehabilitate any damage caused to the environment. If he/she fails to comply, the administrative body may perform the required action and then recover the costs from the offender.<sup>190</sup> This is an important enforcement method since the abatement notice procedure is a proactive approach that allows for damage to be stopped before it becomes too severe or

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<sup>185</sup> In terms of the Act, “tribunal” means any independent and impartial tribunal established by national legislation for the purpose of judicially reviewing an administrative action in terms of this Act (s1 (xiii)).

<sup>186</sup> Remedies available to aggrieved persons will be discussed later in chapter 3.

<sup>187</sup> Kidd (1998) 5 *SAJELP* op cit 201; Fuggle & Rabie (1998) op cit 127; Norberry (1993) op cit 16.

<sup>188</sup> In terms of s31A of the Environment Conservation Act 73 of 1989, certain administrative bodies are authorised to serve abatement notices. According to Williams (1997) op cit 629 an abatement notice is described as a “first aid” measure to enforce compliance with legislation in New Zealand.

<sup>189</sup> An example where an abatement notice may be issued is where a person is ordered to clean up drums of hazardous waste that has or is likely to have an adverse effect on fauna and flora and to prevent any leaching of toxic waste into the ground water.

<sup>190</sup> Fuggle & Rabie (1998) op cit 126; Kidd (1998) 5 *SAJELP* op cit 201; Kidd (1997) op cit 25; Loots (1994) 1 *SAJELP* op cit 22.

irreparable.<sup>191</sup> Non-compliance with the abatement notice is a criminal offence punishable with a fine and/or imprisonment.<sup>192</sup>

Another non-judicial way of enforcing environmental laws is through the suspension or cancellation of permits and licences. Activities that are a potential threat to the environment are usually controlled by the issuing of permits or licences that are subject to specific conditions. Relevant activities controlled by a permit or licence system include those that cause depletion of natural resources, such as hunting and fishing<sup>193</sup> as well as possession of certain plant and animal species.<sup>194</sup> If the holder of a licence or permit does not comply with the conditions set out in the licence or permit, it can be revoked. In addition, costs can be imposed on the offender to take remedial steps before the licence will be reinstated.<sup>195</sup> However, if any person is caught indulging in the controlled activity without having the required permit or licence, a fine and/or imprisonment (primary criminal sanction) will be imposed upon conviction. The withdrawal of a licence or permit can be very effective in enforcing environmental legislation, particularly when dealing with the corporate world as the threat of not being able to do business (without a licence/permit) usually promotes compliance with the statute.<sup>196</sup> For example, in the following cases the withdrawal of a licence would be detrimental to the business concerned: a company trading in certain plants (for example cycads or flowers), certain animal hides (for example springbok), in exotic birds and animals or supplies fish to food markets.

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<sup>191</sup> It should be noted that although the purpose of the abatement notice resembles that of an interdict, it does not entail such cumbersome procedures as the interdict because it is issued by the relevant administrative department and not the court. Therefore serving an abatement notice should be less expensive and less time consuming than serving an interdict or using the criminal sanction. For more information, see Kidd (1998) 5 *SAJELP* op cit 194, 201; Kidd (1997) op cit 25, 59; Rabie, A “The Environment Conservation Act and its implementation” (1994) 1 *SAJELP* 120.

<sup>192</sup> This also illustrates the operation of the subsidiary criminal sanction.

<sup>193</sup> Loots (1994) 1 *SAJELP* op cit 22. Also see *S v Frost and S v Noah* 1974 (3) SA 466 (CPD) discussed above.

<sup>194</sup> For conditions applicable to hunting and fishing permits and licences, see the applicable provincial legislation.

<sup>195</sup> Kidd (1998) 5 *SAJELP* op cit 201; Kidd (1997) op cit 26; Loots (1994) 1 *SAJELP* op cit 22; De Klemm & Shine (1993) op cit 122.

<sup>196</sup> Loots (1994) 1 *SAJELP* op cit 22.

A third non-judicial way of attempting to achieve compliance with environmental laws is by informing and assisting the public.<sup>197</sup> It is an important duty of the public administration to inform and educate the public<sup>198</sup> about their rights and obligations in terms of legislation applicable to them. In terms of a national environmental principle (s2(4)(h) of NEMA), the well being and empowerment of the community must be promoted through environmental education, the raising of environmental awareness, the sharing of knowledge and experience and other appropriate means.<sup>199</sup> This duty is important in view of the relative inaccessibility of legislation, especially subordinate legislation, which constitutes a considerable proportion of environmental law.<sup>200</sup> Knowledge of their rights and obligations should assist the public in determining which activities are offences in terms of the law and, thus, deter them from committing an offence.<sup>201</sup> The provision of relevant information will also give the public an opportunity to participate in decision-making processes regarding the environment.

Compliance with this duty will also make the public, especially the previously disadvantaged, more aware of environmental issues and assist in changing their attitude towards the environment in general and perceptions regarding nature conservation in particular. To be effective in changing attitudes, it is preferable to inform and to explain rather than to embark upon criminal proceedings and imposition of fines. In this way the public administration gives effect to the right to access of information (s32 of the Constitution) and to the principle in NEMA of promoting empowerment of the community through, *inter alia*, environmental education and the raising of environmental

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<sup>197</sup> Education is a fundamental right (s29) in the South African Constitution. Empowering the public with relevant knowledge is actually not “enforcement” in the true sense of the word. It is rather a method of securing compliance with and awareness of environmental laws without the need to employ the criminal or any punitive sanction. This role of education will be discussed in chapter 4.

<sup>198</sup> School children can be taught about the conservation of fauna and flora and particularly of protected species. The public at large can be “educated” by making use of posters and pamphlets.

<sup>199</sup> Section 26 (2) of NEMA requires from the Minister to initiate an Annual Performance report on Sustainable Development to meet the government's commitment to Agenda 21. The purpose of the report is *inter alia*, to review progress on a public educational program to support the objectives of Agenda 21.

<sup>200</sup> Fuggle & Rabie (1998) op cit 126.

<sup>201</sup> Hugo and Viljoen et al point out that more harm is done to the environment through ignorance than malice (*The Ecology of Natural Resource Management* (1997) Kagiso Publishers Pretoria 186).

awareness (s2(4)(h)). Thus, by empowering the public with relevant knowledge, prevention of damage to the environment is possible.<sup>202</sup>

To assist in this information campaign and simultaneously elevate the shortage in human resources, honorary or voluntary wardens<sup>203</sup> may be appointed on the basis of their competence and interest in nature conservation.<sup>204</sup> These wardens can also be appointed as auxiliary police officers, although they are not usually authorised to make arrests, only to provide information and give warnings. They can be authorised to enter premises, undertake investigations and seizure, or hold in detention objects that are used in environmentally harmful activities pending the payment of costs for which their holders are liable.

A noteworthy non-judicial enforcement mechanism not available in South Africa, but used widely in Australia and New Zealand, is the infringement notice. An infringement notice carries a prescribed infringement fee and is normally served “on the spot” by an enforcement officer when a minor offence (infringement offence) has been committed. It thus allows for minor offences to be dealt with speedily and so forestall major difficulties.<sup>205</sup>

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<sup>202</sup> To illustrate how relevant knowledge may cause a community to conserve fauna or flora, the following example. It is most probable that if a community is aware that the uncontrolled killing of an animal or indiscriminate damaging of plants may cause their extinction, never to be seen, utilised or enjoyed by their future generations, it will change their attitude and inspire them to conserve fauna and flora.

<sup>203</sup> Examples of such honorary game wardens are found in South Africa (Kruger National Park) as well as some States of Australia.

<sup>204</sup> Such appointments are often made from amongst the members of naturalist societies or conservation NGOs.

<sup>205</sup> Del Frate, AA & Norberry, *J Environmental Crime, Sanctioning Strategies and Sustainable Development* (1993) Australian Institute of Criminology Publication no 50 Canberra 55, 93. The author could not gather from the literature what is regarded as a minor offence or a “major difficulty”. A minor offence is probably giving false information to an environmental officer or not being able to present a licence/permit on request or a minor contravention of a licence condition. For more detail on

### 3.2.3 Judicial enforcement of administrative actions

A judicial enforcement method available to the public administration<sup>206</sup> is the common law remedy, the interdict. Fuggle and Rabie<sup>207</sup> pointed out that an administrative body must be authorised by legislation to apply for an interdict because it is not automatically available to them. The reason for this is that legislation usually provides methods such as criminal sanctions for securing compliance with the law, and rules out an interdict that is only permitted when there are no other suitable remedies available to the applicant. However, in *Minister of Health and Welfare v Woodcarb (Pty) Ltd and Another* (1996 (3) SA 155 (N)) and in *Corium (Pty) Ltd & Others v Myburgh Park Langebaan (Pty) Ltd & Others* 1993 (1) SA 853 (C), the court stressed that a statutory (criminal) sanction provided for in legislation does not automatically exclude the common-law remedy of the interdict<sup>208</sup> if the latter proves to be the most appropriate legal sanction in the circumstances.<sup>209</sup>

Interdicts may be interim or final.<sup>210</sup> A final interdict will be awarded if the court is convinced that:

- a) the applicant has a clear legal interest;
- b) the applicant's right has been infringed or there is a reasonable possibility that the right may be infringed;
- c) there is no other appropriate legal remedy available; and
- d) the applicant will suffer irreparable harm if the interdict is refused.<sup>211</sup>

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infringement offences, see Williams (1997) op cit 633.

<sup>206</sup> An interdict is also available to the public (individuals) to prevent an unlawful administrative action or threatened unlawful administrative action, including an environmentally harmful activity.

<sup>207</sup> Fuggle & Rabie (1998) op cit 128.

<sup>208</sup> This rule originated from *Madrassa Anjuman Islamia v Johannesburg Municipality* (1917 AD 718). It states that where a specific remedy, such as a criminal sanction or administrative remedy, is provided for by legislation, the legislature is presumed to have intended to exclude all other remedies, except an interdict.

<sup>209</sup> Also see Bray, E “‘Clearing the Air-Industrial Polluters, Beware’ *Minister of Health and Welfare v Woodcarb (Pty) Ltd and Another*” (1996) 3 *SAJELP* 217.

<sup>210</sup> An interim interdict is a preliminary decision regarding the rights of the parties while the legal process is pending. A final interdict may only be amended on appeal. See Burns (1998) op cit 218; Beukes & Burns et al (1992) op cit 71.

<sup>211</sup> See Burns (1998) op cit 219; Beukes & Burns et al (1992) op cit 71.

One of the important advantages of the interdict in the environmental field is that it is a proactive mechanism and has been used effectively to prevent or stop harmful activities to the environment. This is illustrated in the *Woodcarb* case. In this case the Minister of Health and Welfare applied for an interdict to restrain conduct which is unlawful (in this case, the generation of smoke-producing noxious or offensive gases at the respondents' sawmill) in terms of section 9 of the Atmospheric Pollution Prevention Act 45 of 1965.<sup>212</sup> This case confirms the Minister's ability to take proactive steps rather than relying on the cumbersome, reactive procedure of criminal prosecution.

In the *Corium* case the development of a township in the Langebaan protected natural environment was interdicted in the interests of nature conservation. The judgment is of particular significance because the court recognised nature parks as a "national asset of immense value, perhaps the most valuable natural resource we have".<sup>213</sup> This view of regarding nature parks, and thus the fauna and flora living within their boundaries, as a national asset might trigger an awareness amongst the legal profession that all South African fauna and flora (also those outside nature parks) should be regarded as a national asset. The judgment in the *Corium* case might "influence" courts in future to view any unauthorised damage to fauna and flora as an environmental crime (including an infringement of an individual's constitutional right to an environment that is not harmful to the well-being (s24(a)) and encourage them to impose harsh penalties.

An interdict may also be sought against the public administration (civil action) where an applicant (individual or environmental interest group) can prove that an action or proposed action will be to his/her detriment or that of the environment and will encroach upon his/her rights (including environmental right). An example where an interdict was granted to members of the public is illustrated in *Van Huyssteen and Others NNO v Minister of Environmental Affairs and Tourism and Others* 1996 (1) SA 283 (K). In this

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<sup>212</sup> The generation of smoke producing noxious or offensive gases at the respondents' sawmill by means of a scheduled process was also an infringement of the rights of the respondents' neighbours to "an environment which is not detrimental to their health and well-being", as enshrined in section 29 of the Interim Constitution.

<sup>213</sup> At 858 G-H. Also see Loots, C "Environmental Law: Case Law" (1993) *Annual Survey of South African Law* 377; Lyster, R "Protected natural environments: Difficulties with environmental land use regulation

case (mentioned above) an interdict was granted to trustees of a trust property which was situated near land proposed for the erection of a steel mill. The interdict was to stop a rezoning process for the purpose of erecting the steel mill, before an appointed Board of Investigation had completed its enquiry.

Despite the advantage of the interdict as a proactive enforcement mechanism, Loots<sup>214</sup> points out that an application for an interdict is probably just as cumbersome a procedure as a criminal prosecution and could even be more expensive. However, there are advantages of an interdict over a criminal sanction. Firstly, to obtain an interdict is less time consuming. An urgent application can be lodged and an interdict can be obtained within days or, if it is very urgent, within hours. Secondly, the standard of proof is much lower than in criminal trials. The applicant must prove his case on a balance of probabilities and not “beyond all reasonable doubt”.<sup>215</sup>

Another judicial method of enforcement available to the public<sup>216</sup> and the public administration, is the mandamus. The aim of a mandamus is to compel an individual to perform a specific action or an administrative organ (in a civil action) to perform a statutory duty. According to Burns,<sup>217</sup> this remedy is not effective in a civil action because the administration cannot be compelled to do anything it is not obliged to do (or has a discretion to do) under the enabling Act.<sup>218</sup> In *Wildlife Society of Southern Africa & Others v Minister of Environmental Affairs & Tourism of the Republic of South Africa & Others* 1996 (3) SA 1095 (Tk) referred to above, a mandamus was awarded to compel the Minister and provincial authorities to fulfil their statutory responsibility towards the environment.<sup>219</sup>

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and some thoughts on the property clause” (1994) *De Jure* 138.

<sup>214</sup> Loots (1994) 1 *SAJELP* op cit 28.

<sup>215</sup> For more advantages, see Loots (1994) 1 *SAJELP* op cit 28.

<sup>216</sup> Other civil remedies include compensation and restoration. See Norberry (1993) op cit 14, 95. Also see Williams (1997) op cit 29, 30.

<sup>217</sup> Burns (1998) op cit 219.

<sup>218</sup> The difference between a mandamus and an interdict is that the former compels the administrative body to comply with its duty, whereas the latter prohibits unauthorised action. See Burns (1998) op cit 219; Wiechers (1985) op cit 268.

<sup>219</sup> For a discussion on the case, see Van Wyk (1999) op cit 62.

A judicial enforcement mechanism that is available to the public administration in New Zealand is the enforcement order.<sup>220</sup> A local authority may apply to the Environment Court for such an order to compel a person to cease a certain activity<sup>221</sup> or to prohibit the person from commencing that activity,<sup>222</sup> or even to require a positive action from a person.<sup>223</sup> It is thus similar to an injunction.<sup>224</sup> The enforcement order may be made by the court on whatever terms it thinks fit and may include restoration of any natural resource to the state it was before the adverse effect occurred. This includes the replanting of a tree or other vegetation.<sup>225</sup> The enforcement order may also be made instead of, or in addition to, the imposition of a fine or imprisonment. Any person directly affected by an enforcement order may apply to the Environment Court to change or cancel the order.<sup>226</sup> As is the case in South Africa, the interdict and mandamus are also available to the Australian and New Zealand public to “force” the administration to fulfil their duty towards the environment.

### 3.2.4 Control of administrative actions

Both judicial and non-judicial administrative actions may significantly influence the rights of an individual, an environmental group, or the general public. Fortunately the public administration has generally a well-developed internal structure and organisation

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<sup>220</sup> An enforcement order may also be part of civil proceedings in Australia and New Zealand. This is where an individual applies for such an order to the Environment Court to compel the public administration to cease a certain activity or to prohibit it from commencing that activity, or even to require a positive action from the administration. An example is where an application is made for an order to prohibit or cease town development in a specific area.

<sup>221</sup> An example of where a person may be issued an enforcement order to cease a certain activity is where he/she dumps toxic waste into a river or wetland.

<sup>222</sup> It can even be used to prevent someone doing something that is allowed by a consent or plan (s 319(2)(c) of the RMA). There are many circumstances in which an order may be sought (s314 of RMA). For these circumstances, see Milne, *CDA Handbook of Environmental Law* (1992) Royal Forest and Bird Society of New Zealand Inc Wellington 89 and Williams (1997) op cit 634, 645.

<sup>223</sup> An example of a positive action may be to take the necessary action to avoid, remedy or mitigate any adverse effect on fauna and flora. This action may include the replanting of trees, the rehabilitation of vegetation or the disposal of drums containing hazardous waste.

<sup>224</sup> Williams (1997) op cit 30. Also see Milne (1992) op cit 88. According to Rabie, enforcement orders are superior to both interdicts (injunction) and abatement notices because they are more flexible and have a wider scope ((1999) 14 *SAPR/PL* op cit 173).

<sup>225</sup> Milne (1992) op cit 88-89.

<sup>226</sup> Williams (1997) op cit 643. For more information on enforcement orders, see Williams (1997) op cit 634-645. Rabie (1998) 13 *SAPR/PL* op cit 381-383.

and is in the best position to remedy its mistakes. The internal control structures<sup>227</sup> make provision for a re-hearing and a re-evaluation of administrative decisions by a higher body in the same administrative hierarchy. As a general rule, internal remedies should be exhausted unless, *inter alia*, the organ reviewing the matter has prejudiced the matter in some way.

However, the Constitution,<sup>228</sup> as well as the Promotion of Administrative Justice Act, also provides for several “safeguards” to ensure that the public administration does not use its superior position to infringe the rights of individuals and the public at large. Also, remedies are available to aggrieved individuals and environmental groups if they are of the opinion that an administrative action has unfairly affected their rights. These remedies include non-judicial remedies such as recourse to the office of the Public Protector,<sup>229</sup> and judicial remedies such as review<sup>230</sup> and appeal.<sup>231</sup>

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<sup>227</sup> For further discussion on internal structures and exceptions on the general rule, see Burns (1998) op cit 222; Wiechers (1985) op cit 259, 281; Fuggle & Rabie (1998) op cit 138.

<sup>228</sup> Section 33 (just administrative action) together with section 32 (access to information), section 34 (access to courts) and section 38 (legal standing).

<sup>229</sup> According to Devenish, GE *A Commentary on the South African Constitution* (1998) Butterworths Durban 245, the term “ombudsman” was unacceptable to the drafters of the Interim Constitution because it was perceived to be sexist. The Public Protector was established in terms of section 181 of the Constitution. It is an important and independent official, who is in essence an ombudsman and is appointed for a non-renewable period of seven years. The Public Protector (Mr Selby Baqwa) was appointed the first Public Protector in June (1995) and fulfils a pivotal and indispensable role in relation to public administration, transparent government and accountability in regard to the institutions and officials of the state. For other functions and information on the Public Protector, see the Constitution (s182); Devenish (1998) op cit 245—246; Burns (1998) op cit 234; Van Reenen, TP “Constitutional protection of the Environment: Fundamental (Human) right or principle of State Policy?” (1997) 4 *SAJELP* 289.

<sup>230</sup> Section 3(1)(d) of the Promotion of Administrative Justice Act provides for judicial review of an administrative action to a court of law or tribunal as part of a fair procedure should the rights or legitimate expectations of any person be materially or adversely affected. Section 6 of this Act sets out various circumstances in which a court or tribunal has the power to judicially review a administrative action. In summary, review may be done when an administrative action is procedurally and substantively unfair. Also see s33 (just administrative action clause) of the South African Constitution. For more information on judicial review, see Fuggle & Rabie (1998) op cit 138; Burns (1998) op cit 217; Wiechers (1985) op cit 265, 266.

<sup>231</sup> An appeal may be lodged to the judiciary only against a final decision or a final order. During an appeal the appellate body will examine the merits of the matter to determine whether the decision was right or wrong. Section 3(1)(d) of the Promotion of Administrative Justice Act provides for an appeal of an administrative action as part of a fair procedure should the right or legitimate expectations of any person be materially or adversely affected. For more information on judicial appeal, see Burns (1998) op cit 218; Wiechers (1985) op cit 263.

The office of the Public Protector furnishes inexpensive and practical remedies to redress grievances experienced by members of the public,<sup>232</sup> as well as investigate complaints from individuals and environmental interest groups that maintain that the public interest in nature conservation is being prejudiced by maladministration. The Public Protector has the power, as regulated by national legislation, to, *inter alia*, investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged to be improper. However, the Public Protector may not investigate court decisions. Although the administrative officials are not legally obliged to comply with the Public Protector's recommendations, they will under normal circumstances do so. This office is thus a very important mechanism for controlling the public administration, since it fulfils a watchdog role over maladministration in the affairs of state or the public administration.

The establishment of a specialised “ombudsman” for environmental affairs in South Africa could be valuable for the conservation of fauna and flora. Not only would the ambit of investigations be contained and focused on environmental matters, but it would also require an ombudsman who is knowledgeable of environmental affairs. This focused approach and expertise would significantly contribute to speedy and effective address of complaints. Unfortunately, no provision is made in the Public Protector Act 23 of 1994 for the specialised treatment of environment-related complaints.<sup>233</sup>

Although South Africa has no national Environment Public Protector, the Western Cape has a Commissioner for the Environment.<sup>234</sup> The Constitution of the Western Cape 1 of 1998 (s71(1)) makes provision for the establishment of a Commissioner for the Environment. The Commissioner’s functions are to monitor urban and rural development which may impact on the environment; investigate complaints in respect of environmental administration; and to recommend a course of conduct to any provincial organ of the state or municipality whose activities have been investigated (s72 (1)).

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<sup>232</sup> Devenish (1998) op cit 245 & 247.

<sup>233</sup> Fuggle & Rabie (1998) op cit 141.

<sup>234</sup> The Interim Constitution (s114) made provision for the appointment of a provincial Public Protector. Burns (1998) op cit 234, is of the opinion that although there is no reference to a provincial Public Protector in the Constitution, there is no doubt that the legislative powers of the provinces include the power to appoint such a body. The Public Protector Act 23 of 1994 provides guidelines for the

According to Kidd,<sup>235</sup> no legislation has yet been promulgated to further regulate this institution and no commissioner has yet been appointed.

The Parliamentary Commissioner for the Environment (PCE) in New Zealand was the first office of its kind in the world and was created in terms of the Environment Act 1986.<sup>236</sup> As discussed in chapter 2, the PCE occupies four different roles to do with the protection of the environment in general and, thus, the conservation of fauna and flora. One of these roles is that of an Environmental Ombudsman.<sup>237</sup> Although the PCE has many functions and powers, it is not directly involved in the enforcement of environmental laws. The PCE may: intervene and participate in any appeal proceedings arising out of planning and environmental consents; summon and examine persons under oath; investigate administrative structures and their effectiveness; and investigate “any matter” adverse to the environment.<sup>238</sup>

In Australia,<sup>239</sup> suggestions for the establishment of a Parliamentary Commissioner for the Environment, an Environmental Ombudsman, flow from the creation of such a position in New Zealand. As in New Zealand, the role of the Ombudsman is mainly to tender advice and recommendations rather than initiate legal action.<sup>240</sup> However, investigation undertaken by and recommendations made by the Ombudsman may lead to legal action being taken by the EPAs.

Finally, the public administration of Australia and New Zealand employs similar non-judicial (suspension or cancellation of permits and licences; abatement notices; the ombudsman) and judicial methods (interdict (injunction), judicial review and appeal to a

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provincial public protectors. For further information, see Devenish (1998) op cit 246.

<sup>235</sup> Kidd, M “Vaal Environment Saved?” (1999) 6 *SAJELP* 145.

<sup>236</sup> For detailed information of the PCE, see Rabie, A “The Zealand Commissioner for the Environment: a comparative perspective” (1999) *Acta Juridica* 97-115.

<sup>237</sup> For a discussion on the different interpretations of the four different roles that are identified for the PCE, see Rabie (1999) *Acta Juridica* op cit 102-105.

<sup>238</sup> The PCE has powers of review, investigation, recommendation, encouragement and reporting relating to the environment. For functions of the PCE, see Rabie (1999) *Acta Juridica* op cit 100-102. Also see Bates (1995) op cit 469.

<sup>239</sup> A PCE operates in the Australian Capital Territory.

<sup>240</sup> Bates (1995) op cit 468.

court of law) to those used in South Africa to enforce compliance with environmental legislation. As in the case with the enforcement of provincial Acts and Ordinances in South Africa, environmental officials in Australia and New Zealand, such as national park rangers, wardens, and wildlife officers, generally have wide powers to search, question, arrest, detain and seize goods, equipment and vehicles.<sup>241</sup> These actions will thus not be discussed further.

#### 4. CONCLUSION

The enforcement of environmental laws in South Africa, Australia and New Zealand is carried out through criminal sanctions (primary and subsidiary), administrative actions (judicial and non-judicial) and civil actions (judicial and non-judicial).<sup>242</sup> The main difference between South Africa, Australia and New Zealand in achieving compliance with environmental laws seems to be associated with the *effectiveness* of the implementation of these enforcement mechanisms. In all three countries there is dissatisfaction with the appropriateness of (primary) criminal sanctions in solving environmental disputes. Apart from aspects such as the burden of proof, cost of litigation and time delays, the main criticism against the use of criminal sanctions in environmental cases is directed at the effectiveness of the penalties to curb environmental crime. The focus is therefore on criminal sanctions and related issues in the conclusion of this chapter.

As mentioned, the enforcement of criminal sanctions has inherent difficulties, especially when used as a primary sanction. The majority of obstacles<sup>243</sup> encountered with the use of the criminal sanction have been addressed adequately by legislation and by the use of the criminal sanction as a subsidiary sanction.<sup>244</sup> However, it seems as if the shortage of

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<sup>241</sup> See Bates (1987) op cit 158; Milne (1992) op cit 90; Williams (1997) op cit 623, 629.

<sup>242</sup> There are some additional enforcement mechanisms available in Australia and New Zealand. For example infringement notices and enforcement orders. However, the author could not ascertain from the literature what the success of these mechanisms is in ensuring compliance with environmental laws.

<sup>243</sup> Examples of these obstacles are the standing requirements and access to relevant information.

<sup>244</sup> The difficulties associated with the criminal sanction can in the majority of cases also be "by-passed" by only using it as a last resort and only in cases of serious damage to the environment.

human resources, the lack of expertise (particularly in South Africa), and the inadequacy of penalties are still obstacles to overcome.

In conclusion, the shortage of human resources and the lack of relevant expertise of South African government officials in environmental matters may be attributed to a combination of the government's transformation process and the lack of adequate financial resources. This social burden causes environmental issues to be low on the priority list of the government, and has, in turn, led to inadequate funding of the training needs of newly employed conservation officers and legal personnel. This situation negatively influences the effective enforcement of environmental laws and thus the conservation of fauna and flora.<sup>245</sup> It is apparent that adequate funds for nature conservation purposes in South Africa will remain an obstacle in the foreseeable future and that other ways should be explored to address the shortage of skilled personnel involved in environmental matters.<sup>246</sup>

In Australia and New Zealand there seems to be no shortage of either human resources or expertise in environmental matters.<sup>247</sup> Contrary to the situation in South Africa, the environment occupies a high position on the priority list of the Australian Commonwealth, State and Territory governments as well as of the New Zealand government. As developed countries, Australia and New Zealand have much more funding available to allocate to environmental matters in general, and for training purposes. Thus, regarding the issue of competent and adequate human resources, the author is of the opinion that the difference between South Africa, Australia and New Zealand is that the latter two countries have adequate funds at their disposal.

Furthermore, the enforcement of environmental legislation in Australia is the responsibility of EPAs and the prosecution of offenders takes place in Environmental

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<sup>245</sup> For example the officers might not have the necessary skills to gather enough evidence to successfully prosecute an offender. Thus an environmental crime can eventually go unpunished because the enforcement officers did not have adequate training in the law of evidence and related issues as happened in the *S v Sibiya* case (already discussed).

<sup>246</sup> Recommendations in this regard in chapter 5.

<sup>247</sup> Although the NSW environmental officers requested continuous training, this lack of training is not

Courts or Tribunals (an Environmental Court is also operational in New Zealand). An important characteristic of such an Environment Court or Tribunal is that it solely focuses on environmental issues. Therefore, it can be assumed that the officials associated with these specialised bodies have the knowledge, training and experience to successfully prosecute environmental offenders. The concentration of expertise in EPAs and the Environmental Courts/Tribunals seems to be the way in which Australia and New Zealand address any lack of expertise in the environmental field. The investigative functions of the Environmental Ombudsman in Australia and New Zealand assist in alleviating possible shortages in human resources.

The other major factor that influences the effectiveness of enforcement of environmental laws in South Africa is inadequate penalties. In all three countries under discussion dissatisfaction with the low penalties<sup>248</sup> provided for in environmental legislation and/or imposed by courts was expressed. In this regard, it must be pointed out that “what an adequate fine or deterrent entails” is a relative concept that depends on the perception of a particular individual, influenced by the circumstances in which the individual finds himself/herself.<sup>249</sup>

After examining the relevant legislation of all three countries, the author is of the opinion that the penalties (fines and prison sentences, as well as additional penalties) provided for by legislation with regard to offences against protected fauna and flora are quite adequate to deter individuals and most corporations.<sup>250</sup> However, the deterrent factor of penalties will improve if the courts would more readily impose the *maximum* prescribed fine and/or imprisonment. As already mentioned, drastically increased fines and also imprisonment are currently being imposed by courts in the Australian State of

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related to inadequate funds but rather to creating more opportunities for training.

<sup>248</sup> Penalties vary considerably from one country to another, which may be considered as a reflection of the way in which different societies judge the seriousness of offences committed against fauna and flora species.

<sup>249</sup> It is suggested that if reference is made to inadequate penalties, it should be indicated if the penalty is inadequate to impose on individuals or corporations.

<sup>250</sup> The term “corporations” is used in this study to include companies and businesses.

Queensland.

Although the imposition of a prison sentence would be a major deterrent to the commission of environmental offences, such a sentence for environmental offences in South Africa would not have the desired effect. The reality in South Africa is that the prisons are overcrowded because of the high crime rate<sup>251</sup> and that this situation makes imprisonment an impractical punishment and/or rehabilitation tool to impose upon an offender. In the light of this, it is suggested that the imposition of relevant community service programmes for individuals is a more appropriate “punishment” and rehabilitation tool than imprisonment. Relevant community service programmes include working in zoos, national parks, nature reserves, botanical gardens and even natural science museums. Community service as a “punishment” is not a new method in South Africa. In cases where the SPCA (Society for the Prevention of Cruelty of Animals) is the applicant, community service is often imposed on the convicted. For example in *SPCA v Hodgkiss and Mulder*, (1995)<sup>252</sup> Mr Mulder was sentenced to two years correctional supervision and 786 hours community service for his involvement in placing a firecracker into a dog's anus and lighting it.

Community service in the case of environmental crimes, especially involving fauna and flora, will also serve as a valuable method in educating the offender on the importance of conservation. Community service in this regard may also serve to alleviate the shortage of human resources on the ground<sup>253</sup> without finances (salaries) having to be paid.

In the case of corporations, offences should be publicised widely in local and national newspapers as well as in popular magazines. Corporations should also be obliged to publish their “environmental crimes” in their annual reports and indicate how they would rectify, or are planning to rectify, the damage caused. If a corporation fails to rectify the damage or continues to harm the environment it should be “blacklisted”. The

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<sup>251</sup> See Terblanche (1999) op cit 29-31 for tables illustrating the increase in crime rate in South Africa.

<sup>252</sup> Bloemfontein Magistrate's Court case no 522/11/95, Unreported.

<sup>253</sup> By “ground” level, the author means non-managerial positions, such as the cleaning of cages, feeding of animals and the planting and watering of plants.

corporation's environment management plans must also be freely accessible to the public. The risk of bad publicity will have a huge deterrent effect on corporations because of the influence it will have on the views and, hopefully, the behaviour of the public towards the corporation and its products or services. Jeffrey Bates<sup>254</sup> once commented with regard to the effect of bad publicity on companies as follows, "...one of the more powerful incentives has little to do with the size of the criminal penalty and more with the size of the article in the New York Times that results from it". As the South African public becomes more aware of and involved in environmental matters, its behaviour and attitude towards the corporations may be influenced, which in turn may have a negative or positive effect on the shares of those corporations that are listed on the stock exchange.<sup>255</sup> It will thus be in a corporation's best interests to be viewed by the public as a "green" or environmentally friendly corporation.

In addition to bad publicity, corporations must also be "punished" for their environmental crimes by imposing a substantial fine to be paid into a conservation trust fund. This fund may then be used for conservation projects, training of personnel, and the alleviation of the shortage of competent enforcement officers. It is suggested that this fund be administered by an independent non-governmental environmental organisation and not an organ of the government to ensure that it will be used only for environmental matters.

As mentioned, in Australia and New Zealand there is dissatisfaction with the low penalties (fines and imprisonment) imposed by the courts. However, it seems that the penalties in these two countries would be adequate if the courts imposed the maximum penalty available and not the minimum, or that which the offender can afford. Fortunately, since 2001 the Queensland courts have been bold enough to impose severe fines and imprisonment on offenders who damaged the environment.

To summarise, the two major factors influencing the enforcement of environmental laws in South Africa, namely the shortage of skilled environmental officers and the

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<sup>254</sup> Urbani, EJ & Rubin, CP *Transnational Environmental Law and its impact on corporate behaviour* (1994) Transnational Juris Publications Inc Irvington-on-Hudson NY 128.

<sup>255</sup> The public's role in "forcing" or encouraging compliance with relevant laws will be discussed in chapter 4.

inadequacy of criminal penalties, may be addressed by employing innovative management strategies and other alternative/additional enforcement mechanisms which are used in Australia and/or New Zealand. These strategies will be discussed in chapter 4. It should be pointed out that traditionally, crime control relied on the punitive strategies of law enforcement by the state/government. Responses to crime, however, are shifting and civil society is no longer taking a back seat in preventing and combating crime. The promulgation of the South African Constitution, the widely published provisions of the Bill of Rights, and the establishment of commissions such as the South African Human Rights Commission have made members of the public aware of their rights, including their environmental right. Provisions in the Constitution and NEMA, such as co-operative governance, access to information, just administrative action and *locus standi*, also facilitate public participation in decision-making processes and in litigation.

Through civil action (judicial and non-judicial) individuals (and environmentalists) can now play an important role in forcing administrative officials to implement environmental legislation and comply with their statutory duties regarding the environment.<sup>256</sup> Traditionally few remedies existed by which individuals, particularly conservationists, could ensure that the public interest in conservation has been furthered by the administrative body concerned.<sup>257</sup> As already discussed above, the Constitution and NEMA have drastically changed and liberalised the position regarding legal standing.

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<sup>256</sup>The impact of a civil action between two private individuals (private law) on the conservation of fauna and flora are presently insignificant. It will therefore not be discussed in this thesis. However, it should be pointed out that such actions might become important in the future when individuals become more aware of environmental matters and their moral obligation (as stewards of the environment) to conserve fauna and flora for future generations.

<sup>257</sup>Fuggle & Rabie (1998) op cit 132.

## CHAPTER 4

### ADDITIONAL/ALTERNATIVE STRATEGIES TO IMPROVE COMPLIANCE WITH ENVIRONMENTAL LAWS

#### INTRODUCTION

In chapter 3 it was concluded that the ineffectiveness of criminal sanctions to deter potential offenders from damaging flora and harming fauna can mainly be attributed to the shortage of human resources, the lack of expertise and the inadequacy of penalties imposed on convicted offenders. Although possible ways to overcome the effect of these obstacles were pointed out, other characteristics of criminal sanctions such as the burden of proof, the high cost of litigation, and time delays may still render the use of criminal sanctions in environmental disputes ineffective. Therefore, there should not only be a constant search to find alternative environmental remedies that are less cumbersome, expensive, oppressive and time-consuming than criminal sanctions, but additional ways other than enforcing legislation to protect fauna and flora should also be explored.<sup>1</sup>

The purpose of this chapter is thus to identify and explore ways, other than the regulatory mechanisms discussed in chapter 3, to improve compliance with environmental laws and thus avoid the necessity of prosecution and criminal sanctions. In other words, other strategies in the achievement of optimum protection of fauna and flora are investigated.

Alternative and/or additional strategies that may improve compliance with environmental laws and thus contribute to the conservation of fauna and flora are alternative dispute resolution (mediation and arbitration), environmental education, involvement of environmental interest groups and other non-governmental

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<sup>1</sup> Also see Glavovic, PD "An Introduction to Wildlife" (1988) 3 *SALJ* 527 & 528, Raney, S "Green Taxes" (1994) 1 *Stell LR* 74, Hanks, J "Achieving industrial sustainable development in South Africa: What role for 'self-regulatory' and 'co-regulatory' instruments?" (1998) 5 *SAJELP* 339, Gunningham, N "Introduction" in Gunningham, N & Grabosky, P *Smart Regulation* (1998) Clarendon Press Oxford 1&7.

organisations, economic instruments, market mechanisms and voluntary measures.<sup>2</sup> These strategies will now be discussed.

## 1. ALTERNATIVE DISPUTE RESOLUTION (ADR)

### 1.1 General

The failure of traditional adversarial mechanisms<sup>3</sup> to resolve environmental disputes in an efficient, equitable, and sustainable manner has prompted the search for solutions through other mechanisms. A need was thus identified to move away from approaches that promote adversarial, or “win-lose” outcomes and towards consensus-based processes that foster co-operative efforts or “win-win” outcomes.<sup>4</sup>

An alternative mechanism to traditional regulatory mechanisms (criminal, administrative and civil) was identified and is known as “alternative dispute resolution” (ADR). Prady<sup>5</sup> defines “alternative dispute resolution” as the resolution of conflicts using processes and forums other than the judicial system. ADR thus encompasses a collection of processes to which disputing parties might have recourse as an alternative to litigation. The objective of ADR is to attempt to resolve a dispute through conciliation.<sup>6</sup> The most common types<sup>7</sup> of ADR are negotiation,<sup>8</sup> mediation<sup>9</sup>

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<sup>2</sup> According to De Klemm, C & Shine, C *Biological Diversity Conservation and the Law* (1993) IUCN — The World Conservation Union 239, voluntary measures are an essential complement to the direct conservation role of the government.

<sup>3</sup> Glavovic and Dukes are of the opinion that the failure of the traditional adversarial mechanisms (criminal and administrative) to resolve environmental disputes may be attributed to poor structures. For example these mechanisms have a narrow focus and are preoccupied with matters of procedure rather than substance (“Co-ordinating integrated environmental management studies: lessons from the theory and practice of negotiation” (1997) 4 *SAJELP* 49). For other reasons, see Glavovic & Dukes (1997) 4 *SAJELP* op cit 49.

<sup>4</sup> Glavovic & Dukes (1997) 4 *SAJELP* op cit 46.

<sup>5</sup> Pardy, B *Environmental Law A guide to Concepts* (1996) Butterworths Toronto 3.

<sup>6</sup> In terms of the Labour Relations Act 66 of 1995, conciliation is a process by which a conciliator helps the parties to a dispute to reach a settlement. This can be done by any consensus-building process including mediation and arbitration. See Basson, A & Christianson, M & Garbers, C et al *Essential Labour Law* (2000) (2<sup>nd</sup> ed) Labour Law Publications Groenkloof 184.

<sup>7</sup> Other types of ADR used in the USA are mini-trials and non-binding fact-finding. See Fuggle, RF & Rabie, MA *Environmental Management in South Africa* (1998) Juta Cape Town 147.

<sup>8</sup> Negotiation involves the parties in dispute hammering out their own differences without any involvement of third parties. See Bates, GM *Environmental Law in Australia* (1995) (4<sup>th</sup> ed) Butterworths Sydney 467.

<sup>9</sup> Mediation is a more structured form of negotiation, involving an independent mediator who can assist the parties to identify and focus upon the real issues in dispute, and offer solutions. That is to assist parties to achieve their own resolution. See Bates (1995) op cit 467; Van den Berg, JP “Africa-Towards Sustainable Development” (1998) 5 *SAJELP* 81. Mediation will be discussed in detail further on in chapter 4.

and arbitration.<sup>10</sup> Normally the first step in the ADR process is to obtain consensus between the parties through negotiation. If this attempt fails, mediation usually follows. If mediation fails to obtain consensus between the parties, the dispute may be referred for arbitration, if the applicable Act prescribes such a procedure, or for litigation.

Indications are that consensus-based approaches (ADR) offer distinct advantages over traditional adversarial responses to environmental disputes. According to Bates,<sup>11</sup> these non-judicial approaches (negotiation, mediation and arbitration)<sup>12</sup> to dispute resolution have, to a greater or lesser degree, the following advantages: informality, accessibility, fewer delays and lower costs.<sup>13</sup>

Modern dispute resolution is about what is most appropriate to resolve the particular dispute rather than about what is right and wrong. The decision about which process is most appropriate is taken according to certain criteria. It is important that the criteria used in dispute resolution be adapted to the environmental field<sup>14</sup> and that they serve the ultimate environmental object of sustainable development. Criteria such as the cost and speediness<sup>15</sup> of the process, the effect of the process on the public image of the parties and on the relationship between the parties, the effect on human resources, the number of possible outcomes and the finality of the result are all factors to consider when opting for an environmental dispute resolution (EDR) process.

Generally, mediation is the most commonly used form of ADR. As already mentioned, it is a structured form of negotiation in which the assistance of a skilled third party is used. It is normally characterised by a constructive process that requires

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<sup>10</sup> Arbitration involves a formalised procedure of hearings before an arbitrator appointed by the parties. The arbitrator sets the parameters for the issues to be arbitrated and the parties are bound by the rulings made. See Bates (1995) op cit 467. Also see Basson et al (2000) op cit 187.

<sup>11</sup> Bates (1995) op cit 467.

<sup>12</sup> Of the three, arbitration is likely to be the least favoured because the final decision is made by a third party.

<sup>13</sup> For other advantages, see Bates (1995) op cit 467.

<sup>14</sup> Van den Berg (1998) 5 *SAJELP* op cit 71-72 & 78.

<sup>15</sup> It is important that in the environmental sphere, the dispute must be resolved as quickly as possible because a lengthy process is expensive and consumes precious human resources. Furthermore, the environment is not static and as time passes the facts of a dispute can change rendering the resolution of the dispute obsolete and academic: Van den Berg (1998) 5 *SAJELP* op cit 74-75. For example, in the case of litigation, it might not be possible to rehabilitate the damaged environment as initially proposed or envisaged. Or in the case of mediation, options explored and agreed upon might not be

collaborative problem-centred negotiations between the parties, open and honest communication, information sharing, recognition of the synergy of beliefs and values, acceptance of the legitimacy of parties and mutual trust.<sup>16</sup> Because mediation is all about creating as many options for settlement as possible, it normally yields outcomes that are perceived by the parties to be fair, efficient, wise and enduring.<sup>17</sup> It is also important that there is finality to the outcome of the dispute to avoid incurring further costs on the same dispute in future.<sup>18</sup> Glavovic et al,<sup>19</sup> therefore, rightly point out that the role, responsibilities and qualities of the environmental mediator are important factors in the successful and sustainable outcome of a mediation process.

Mediation creates as many options for settlement as possible and, therefore, makes it most successful for dealing with environmental matters.<sup>20</sup> Mediation, as a consensus-based approach, also offers particular promise in the environmental arena because it promotes better understanding of, and accommodates, all the parties' individual and collective interests.<sup>21</sup> For mediation to succeed, it is very important that the parties to the dispute (for example a developer and an environmental interest group) are reasonable and transparent in their behaviour. Failure in this regard could lead to a loss of goodwill in the case of a developer or the loss of public support (moral and/or financial) in the case of the environmental interest group. If a solution is reached, it will normally mean that all the interests of the parties<sup>22</sup> were aired, discussed and

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possible anymore or not be the best option to resolve a particular dispute.

<sup>16</sup> This is in contrast with traditional conflict resolution mechanisms that typically generate the characteristics and consequences of competitive interaction, including poor communication, coercion, suspicion, exaggeration of basic value differences, an emphasis on power differences, and denial of the legitimacy of other parties.

<sup>17</sup> Fuggle and Rabie acknowledge that a successfully negotiated agreement, which satisfies the parties' interest, is more likely to endure than the "win-lose" scenario of an adversarial process which normally leads to irreparably damaged relationships ((1998) op cit 146).

<sup>18</sup> Van den Berg (1998) 5 *SAJELP* op cit 75.

<sup>19</sup> Other qualities that a mediator must have include being a process expert, having significant life experience, be committed, have integrity, be trustworthy, have the ability to adopt different dispute resolution styles and behaviours and have superb planning and organisational capacity. For further detail on these qualities, see Glavovic & Dukes (1997) 4 *SAJELP* op cit 50-55.

<sup>20</sup> Van den Berg (1998) 5 *SAJELP* op cit 81. It is very important to create as many outcomes as possible in environmental disputes in order to arrive at a solution tailor-made for the problem.

<sup>21</sup> Other characteristics of mediation include, fostering a mutual learning process through which parties can advance their understanding of the issues stemming from the complex interconnections between natural and human systems and seeking to engage all interested and affected parties. See Glavovic & Dukes (1997) 4 *SAJELP* op cit 49.

<sup>22</sup> A distinguishing characteristic of environmental disputes is that it often involves many parties with divergent views, different levels of experience and different resources. See Fuggle & Rabie (1998) op cit 146; Pardy (1996) op cit 3. For other characteristics, see Glavovic & Dukes (1997) 4 *SAJELP* op cit 47.

weighed and that the optimal and most sustainable result possible has been achieved in the circumstances. A mediated agreement will thus often reflect the best balance between conservation and development possible in the circumstances of the particular case.<sup>23</sup> Furthermore, the outcome of the environmental dispute will normally require the involved parties to co-operate and co-exist in future. For this reason mutual trust, respect and understanding are necessary to make the relationship work.<sup>24</sup>

From the above discussion it is evident that mediation has important advantages over litigation in the environmental field. Table 1 below compares the characteristics of litigation and mediation to illustrate some of the advantages of mediation.

TABLE 1: COMPARATIVE OVERVIEW OF LITIGATION AND MEDIATION AS ENVIRONMENTAL DISPUTE RESOLUTION PROCESSES

	LITIGATION	MEDIATION
PUBLIC IMAGE	Can have adverse effect even if result is positive ('win')	Transparency & reasonableness can have positive effect even if party compromises ('win-win')
SPEED	Generally slow	Generally faster than litigation
COST	Generally high	Generally lower than litigation
FINALITY	Final, subject to review or appeal	Final if successful
SUSTAINABILITY	Questionable. Normally low	High if all stakeholders involved
SUPPLENESS	Very rigid	Totally flexible
RELATIONSHIP BETWEEN PARTIES	Destructive	Constructive
HUMAN RESOURCES	Negative: traumatic	Still traumatic but often therapeutic

SOURCE: Van den Berg (1998) 5 *SAJELP* op cit 79.

<sup>23</sup> Van den Berg (1998) 5 *SAJELP* op cit 82, 83, 86.

<sup>24</sup> Van den Berg (1998) 5 *SAJELP* op cit 75.

As appears from Table 1, litigation is normally expensive, slow,<sup>25</sup> often binary (only two outcomes exist), generally destructive of the relationship between the parties, traumatic to litigants and witnesses, and conducive to damage to the public image of, especially, developers. The limited number of options available to achieve a specific objective is incompatible with the extreme sophistication and complexity of natural processes.<sup>26</sup>

Contrary to litigation, mediation has the opposite characteristics in all aspects.<sup>27</sup> According to Van den Berg,<sup>28</sup> mediation should be used as the dispute resolution process of the first instance in all appropriate cases where environmental conflict arises. In this way the parties' interests, rather than rights, are discovered as well as a wealth of information about the dispute. This increases the chance of common ground being found. This process is totally opposite to litigation where information is ultimately narrowed down to a few legal questions at the end.

Despite all the advantages mediation has over litigation, not all commentators agree that it is a more effective enforcement mechanism. Pardy<sup>29</sup> points out that there is more literature on environmental mediation than there are examples of its successful application in practice. According to him there are doubts about its suitability to environmental matters. This is because some environmental conflicts arise because of incompatible visions of society, economics and the human relationship, and mediations are unlikely to bridge the gap between conflicting value structures. Pardy<sup>30</sup> is of the opinion that mediation is not ideal in situations where one or more parties have no substantive rights with which to bargain, such as in an environmental assessment proceeding where objecting parties have only procedural rights to make submissions. However, he points out that mediation can assist in identifying points in dispute, and thereby assist the formal legal process.

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<sup>25</sup> Fuggle & Rabie (1998) op cit 146 points out that there is little empirical evidence to suggest that ADR is cheaper or faster than litigation. The average duration for resolution of an environmental dispute is between 5 and 6 months, while 10% of the cases endure for 18 months.

<sup>26</sup> Van den Berg (1998) 5 *SAJELP* op cit 79.

<sup>27</sup> Arbitration has advantages, similar to that of mediation, over litigation. Therefore, these advantages will not be discussed separately.

<sup>28</sup> Van den Berg (1998) 5 *SAJELP* op cit 82; Gutto, SBO "Environmental rights litigation, human rights and the role of non-Governmental and peoples organisations in Africa" (1995) 1 *SAJELP* 7.

<sup>29</sup> Pardy (1996) op cit 3.

<sup>30</sup> Pardy (1996) op cit 3.

According to Bates,<sup>31</sup> mediation will only work effectively where both parties are in an equal bargaining position, and that may be difficult where the proponent of the project controls the information flow. Mediation may also fail to reflect the wider public interest, and the process of resolution and the conclusion may not be subject to public scrutiny. He further points out that, contrary to mediation, adversarial court proceedings have the following advantages:

- a) they may have better prospects of bringing out all the facts;
- b) they deal more satisfactorily with complicated technical and scientific issues;
- c) they serve the public interest by reaching a considered conclusion provided by an independent “umpire”.

If mediation fails, the outcome of the dispute may be determined by an independent third party (arbitrator) if the applicable Act prescribes for such a procedure. Because all the interests of the parties were aired, discussed and weighed during mediation, the arbitrator has enough detailed information on the various aspects of the dispute to make a well-informed decision. The ruling of the arbitrator is final and the parties are bound by it.

Glavovic et al<sup>32</sup> are of the opinion that consensus-based approaches, such as mediation and arbitration, do not provide a panacea for environmental conflict, and frequently supplement, rather than replace, traditional enforcement mechanisms. Fuggle and Rabie<sup>33</sup> point out that while alternative processes are invaluable in an environmental framework, the courtroom remains a necessary and desirable forum both for the settlement of environmental disputes and for enforcement purposes. One of the reasons they mention is that disputes may never reach negotiation unless litigation reveals that, without the resolution of the problem by negotiation, a disinterested third party will determine the outcome.<sup>34</sup>

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<sup>31</sup> Bates (1995) op cit 467.

<sup>32</sup> Glavovic & Dukes (1997) 4 *SAJELP* op cit 50.

<sup>33</sup> Fuggle & Rabie (1998) op cit 146.

<sup>34</sup> For other reasons why the courtroom remains a necessary forum, see Fuggle & Rabie (1998) op cit 146.

In the light of the above discussion on general points relating to ADR and specifically mediation, one may argue that consensus-based approaches such as mediation may successfully be applied to environmental dispute resolution. A discussion on EDR in South Africa, Australia and New Zealand will now follow.

## 1.2 South Africa

The dynamic balance between different and sometimes opposing interests<sup>35</sup> prevalent in environmental law, should be sought in the consensus-based resolution of environmental disputes and not in litigation. Unfortunately, mediation as a dispute resolution process in environmental disputes is not yet used as extensively in South Africa as it is in the United States<sup>36</sup> or even Australia and New Zealand. However, Fuggle and Rabie<sup>37</sup> are of the opinion that the development and growth of the South African ADR movement and the emergence of an environmental ethic make EDR in South Africa a real possibility. Van den Berg<sup>38</sup> is of the view that facilitation and encouragement of environmental mediation are needed from the legislature and the executive.<sup>39</sup> Of the environmental legislation relevant to this study, NEMA refers to conciliation, mediation (ss17 and 18)<sup>40</sup> and arbitration.<sup>41</sup>

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<sup>35</sup> An example of such opposing interests is the apparently conflicting interests between economic growth and nature conservation which is found in the South African Constitution where section 24(b) (ii) refers to "conservation" and section 24(b)(iii) refers to "development and use of natural resources". Also see Van den Berg (1998) 5 *SAJELP* op cit 72.

<sup>36</sup> In the USA environmental dispute resolution has become a well-established discipline and the practice has become professionalised and institutionalised. EDR has a success rate of almost 80% in the USA. See Fuggle & Rabie (1998) op cit 146, Van den Berg (1998) 5 *SAJELP* op cit 81.

<sup>37</sup> Fuggle & Rabie (1998) op cit 147. Van den Berg (1998) 5 *SAJELP* op cit 81 agrees with Fuggle & Rabie and is of the opinion that the expanding world population living off limited resources will produce a rapid increase in the number of environmental disputes that may necessitate the use of mediation in resolving the disputes.

<sup>38</sup> Van den Berg (1998) 5 *SAJELP* op cit 84.

<sup>39</sup> Theoretically the Minister can encourage mediation by providing resources and by threatening to impose a solution if the parties do not settle, or by a combination of the above. Experience in mediation has shown that parties are more likely to agree if there is a threat that a third party will impose a solution if they fail to reach an agreement. With regard to resources, the legislature can make a contribution to environmental dispute resolution if it were to provide for legislation (law reform) which authorises the funding of environmental mediation in appropriate cases. Funding for a limited period would ensure that parties negotiate in good faith and with the necessary urgency. See Van den Berg (1998) 5 *SAJELP* op cit 85.

<sup>40</sup> Section 17(1) (b) provides that "Any Minister, MEC or Municipal Council before whom an appeal arising from a difference or disagreement regarding the protection of the environment is brought under any law, may, before reaching a decision, consider the desirability of first referring the matter to conciliation...." Section 17(1)(b)(i)(cc) provides that the Minister may also refer the matter for conciliation or mediation provided for under another relevant Act. Section 2(4)(m) of NEMA refers to conflict resolution procedures involving conflicts of interest between organs of state.

<sup>41</sup> Section 19 of NEMA provides that "A difference or disagreement regarding the protection of the

Fuggle and Rabie<sup>42</sup> point out that one of the primary areas in which EDR has been used in the USA is in environmental law enforcement. According to these authors, environmental dispute resolution is relevant to environmental law enforcement in three respects. These are in the case of civil enforcement cases, where the pollution control officer negotiates with the polluter to secure compliance and where judicial enforcement has failed.

It is believed that because of the established practice in South Africa of using ADR processes for the resolution of disputes in the field of labour law, there is no reason why EDR will not be used in the settlement of civil claims against polluters.<sup>43</sup> In fact, it may also be used in civil claims involving the damage of flora or harming of fauna.

The fact that prosecution in environmental offences in general, and especially in offences involving fauna and flora, is such a rarity in South Africa might be because enforcement officers use informal dispute resolution techniques to resolve disputes with offenders.<sup>44</sup> If this is indeed the case, it should continue if it leads to compliance with environmental laws.

*S v Nyele*<sup>45</sup> serves as an illustration that EDR may be used successfully if judicial enforcement has failed. In this case, seven men were convicted of contravening the Prevention of Illegal Squatting Act 52 of 1951 and given suspended fines of R1000 each. They, together with 2000 to 3500 squatters, had destroyed about 25 percent of the Dukuduku state forest near Mtubatuba in KwaZulu Natal. One of the conditions of the suspension was that they leave the forest with their families. None of them left the forest and the judicial enforcement thus failed to secure compliance with the applicable Act. The Wildlife Society of Southern Africa then acted as mediator between the squatters and the then Natal Provincial Administration in an effort to resolve the dispute. The squatters indicated that they would consider the occupation of

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environment may be referred to arbitration in terms of the Arbitration Act 42 of 1965.

<sup>42</sup> Other areas include land-use and the allocation of natural resources. See Fuggle & Rabie (1998) op cit 147, 149.

<sup>43</sup> See Fuggle & Rabie (1998) op cit 149.

<sup>44</sup> As the criminal sanction is normally used as a last resort, statistics tend to conceal the considerable persuasive force of the negotiation process which precedes the criminal proceedings. See Fuggle & Rabie (1998) op cit 130, 150.

<sup>45</sup> *S v Nyele* (Mtubatuba Magistrate's Court case no 2288/89, unreported).

another suitable site and showed an intention to abide by the spirit of the negotiations by not destroying any of the large trees in the forest.<sup>46</sup>

Dispute resolution by means of conciliation, mediation and arbitration is extensively used in the field of labour relations in South Africa. In terms of the Labour Relations Act 66 of 1995,<sup>47</sup> it is compulsory that all labour-related disputes first be referred to the Commission for Conciliation, Mediation and Arbitration (CCMA)<sup>48</sup> in an attempt to resolve the dispute through conciliation. Only if conciliation fails may the dispute be referred for arbitration<sup>49</sup> or to the Labour Court,<sup>50</sup> depending on what procedure the Act prescribes. The final court of appeal in respect of all judgments and orders made by the Labour Court is the Labour Appeal Court.<sup>51</sup> The Labour Relations Act 66 of 1995 prescribes a timeframe within which the appointed Commissioner must attempt to resolve the dispute.<sup>52</sup>

It is suggested that environmental legislation in South Africa should provide for a compulsory conciliation process whereby any environmental dispute is first referred for mediation and/or arbitration before it is taken to a court. This is the case in Australia and New Zealand. Such ADR provisions should be included in NEMA, as it is the most important environmental legislation in South Africa. The Labour Relations Act 66 of 1995 and its provisions on dispute resolution seem to be an excellent model to use. Furthermore, a specialist court, an Environment Court, similar to that in Australia and New Zealand (and to the Labour Court of South Africa), as well as an Environment Appeal Court, should simultaneously be established in an amended NEMA. The advantages of such a specialist court have been discussed in chapter 3. Such a court is especially necessary in South Africa because the high crime

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<sup>46</sup> For more information, also see Fuggle & Rabie (1998) op cit 150.

<sup>47</sup> See section 115(1)(a) of the Labour Relations Act 66 of 1995.

<sup>48</sup> The CCMA is established as a juristic person in terms of the Labour Relations Act 66 of 1995. For more information on the CCMA, see Basson et al (2000) op cit 180, 181.

<sup>49</sup> In terms of s 143 of the Labour Relations Act 66 of 1995, an arbitration award issued by a commissioner is final and binding and may be made an order of the Labour Court in terms of section 158 (1)(c).

<sup>50</sup> The Labour Court is a superior court (s151(2)) that has the authority, inherent powers and standing to resolve matters under its jurisdiction, equal to that which a court of a provincial division of the Supreme Court has in relation to the matters under its jurisdiction. For more information on the Labour Court, see Basson et al (2000) op cit 182.

<sup>51</sup> The Labour Appeal Court was established in terms of section 167 of the Labour Relations Act 66 of 1995. For more information on the Labour Appeal Court, see Basson et al (2000) op cit 183.

<sup>52</sup> The prescribed timeframe for example for conciliation is 30 days from the date of receiving the

rate has resulted in a too heavy workload for the insufficient number of legal personnel. Because there is no specialist court in South Africa for the litigation of environmental issues, these cases have “to wait in line” together with cases of another nature. As the environment is a dynamic entity, and irreparable damage can be done in a short time, especially to fauna and flora, time is of the essence in the conservation of fauna and flora and the settlement of such disputes.

### 1.3 Australia

In Australia the procedural and cost hurdles of a tribunal or court action have similarly led to more attention being given to alternative ways of resolving environmental disputes, namely negotiation, mediation and arbitration.<sup>53</sup> Conciliation (in conjunction with education) is a strategy employed in Queensland, South Australia and Western Australia to improve compliance with relevant legislation.<sup>54</sup>

However, Bates<sup>55</sup> is of the view that alternative dispute-resolution mechanisms are unlikely to replace traditional adversarial hearings, but that they will be used increasingly at the pre-hearing or pre-decision stage of environmental litigation in an attempt to delineate the issues in dispute, and offer the possibility of reaching consensus in the process. In some cases environmental legislation empowers specialist courts and tribunals to call conferences of parties involved in an appeal to try to at least delineate the issues of concern, strike a compromise, or reach a settlement. A court may accept a mediated settlement as a final resolution or may make further inquiries to satisfy itself about the details of any possible compromise. This means that the court or tribunal is not necessarily bound by a settlement reached at a pre-hearing conference.<sup>56</sup>

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referral (s135). See section 136 of the Act for the timeframe applicable to arbitration.

<sup>53</sup> Bates (1995) op cit 46. These ADR methods have been discussed above and will not be discussed further.

<sup>54</sup> Norberry, J “Australia” in Del Frate, AA & Norberry, J *Environmental crime, Sanctioning Strategies and Sustainable Development* (1993) Australian Institute of Criminology Publication no 50 Canberra 16 & 17.

<sup>55</sup> Bates (1995) op cit 467.

<sup>56</sup> Bates (1995) op cit 468.

In Queensland, the Environmental Protection Authority may also, in terms of section 64 of the Environmental Protection Act 1993 (Qld), call a conference of the parties to try to resolve disputes regarding licences.<sup>57</sup>

New South Wales, (Land and Environment Court Act 1979 s 61B) has introduced a mediation and neutral evaluation process. The latter process seems to be another form of ADR. Neutral evaluation is when an evaluator attempts to identify and reduce the issues of fact and law in dispute and, by assessing the strengths and weaknesses of the parties' case, offer an *opinion on the likely outcome* of the proceedings, including findings of liability and any award of damages.<sup>58</sup>

#### 1.4 New Zealand

The most important and dominant environmental legislation in New Zealand, the Resource Management Act of 1991 (RMA), specifically provides for ADR in section 268 under the heading, "Additional Dispute Resolution".<sup>59</sup> Section 268(1) of RMA states that: "At any time after lodgement of any proceedings, for the purpose of encouraging settlement, the Planning Tribunal, with consent of the parties and of its own motion or upon request, may ask one of its members or another person to conduct mediation, conciliation, or other procedures designed to facilitate the resolution of any matter before or at any time during the course of a hearing".

This is a significant step towards ADR, as there was no equivalent to this provision in earlier environmental legislation. Williams<sup>60</sup> is of the opinion, that the growing significance of alternative dispute resolution in environmental cases should not be underestimated and the possible use of ADR should be considered before litigation is embarked upon.

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<sup>57</sup> Bates (1995) op cit 468.

<sup>58</sup> Bates (1995) op cit 468. (own emphasis).

<sup>59</sup> It seems as if the relevant literature, for example Williams, *DAR Environmental and Resource Management Law in New Zealand* (1997) (2<sup>nd</sup> ed) Butterworths Wellington 169 and 559, use "alternative" and "additional" with regard to dispute resolution as synonyms. It could not be determined from relevant literature why the RMA grouped consensus-based approaches under the heading of "additional" dispute resolution and not "alternative" dispute resolution.

<sup>60</sup> Williams (1997) op cit 559.

According to Williams<sup>61</sup> many resource-management disputes might be better resolved by agreement, not only because of the potential savings in cost and time through an avoidance of litigation, but also because the responsibility for sustainable management of scarce natural and physical resources are shared by the parties involved. The Environment Court is well aware of the important role ADR can play in resolving disputes. Thus, as a general practice, the Environment Court inquires into the prospects of settlement in any case before it, and offers assistance wherever the parties consider mediation. The Environment Court also has the power to initiate alternative dispute resolution of its own motion or upon request, but can only proceed with the consent of the parties.<sup>62</sup> The Planning Commissioners are often asked to sit as mediators, to ascertain whether or not an appeal can be resolved without a full hearing or whether certain issues can be narrowed in order to reduce the time needed for a hearing.<sup>63</sup>

Section 356 of RMA provides that if interested parties agree, the Environment Court may order matters in dispute to be determined by arbitration. Once an arbitrator has been appointed no steps may be taken in the appeal without the leave of the Environment Court.<sup>64</sup>

According to the above, it seems that in New Zealand, ADR will be employed before a dispute will be litigated.

## 1.5 Conclusion

It seems as if Australia and New Zealand have advanced much further than South Africa on the road to employing alternative dispute resolutions in environmental disputes. Unlike South Africa, both these countries are bound by statute to employ various forms of ADR to resolve environmental disputes. The Environment Courts in operation in both Australia and New Zealand (and some EPAs in Australia) have the power to call upon disputing parties to first try and reach an out of court settlement

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<sup>61</sup> Williams (1997) op cit 559.

<sup>62</sup> Williams (1997) op cit 169, 559. Also see Rabie, A "Integrated resource management: the New Zealand model and some lessons for South Africa" (1998) 13 *SAPR/PL* 379.

<sup>63</sup> Williams (1997) op cit 169, 559.

<sup>64</sup> Williams (1997) op cit 169, 559.

before resorting to these courts. As discussed above, the author is of the opinion that inclusion of compulsory use of consensus-based approaches in environmental disputes in environmental legislation, particularly NEMA, will not only result in a speedier outcome but will possibly also improve compliance with relevant laws. If the consensus-based approaches fail, an Environment Court (and Environment Appeal Court) must be in place to deal with the matter speedily. It is suggested that these proposed amendments to NEMA must be investigated by all relevant stakeholders as a matter of urgency.

## 2. ENVIRONMENTAL EDUCATION

### 2.1 General

Another powerful strategy to encourage compliance with environmental laws and to promote conservation of fauna and flora is securing the co-operation of the public. Co-operation may be attained by creating a society that is aware and conscious of the environment and how human conduct might affect it. The public should be aware of the negative impact of excessive population growth, excessive economic development, and over-exploitation or pollution of natural resources.<sup>65</sup> Awareness may be raised through environmental education. Environmental education may be formal, through primary, secondary or tertiary educational institutions, or informal through, for example, the media. To be effective, environmental education should target individuals and communities, especially those living in rural areas.<sup>66</sup>

The objective of environmental education should be to replace apathy with a heightened awareness of the natural resource base<sup>67</sup> and the development of an environmental ethic. This awareness is created by informing and empowering the

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<sup>65</sup> Loots, C "Environmental Law: Legislation" (1993) *Annual Survey of South African Law* 350.

<sup>66</sup> Although it is important to "educate" and provide knowledge on the environment in a formal way through schools and tertiary educational institutions, the role of environmental education in the context of this study is to create an awareness of environmental matters in the South African public at large, especially in the previously disadvantaged people, through informal methods. It is for this reason that the focus is on issues regarding awareness, attitude, perceptions and behaviour of the public towards environmental matters and not on formal environmental education. For more information on formal environmental education, see Ferreira, JG "Distance teaching and environmental education in South Africa" in Filho, WL & Tahir, F *Distance Education and Environmental Education* (1998) Peter Lang GmbH 90-91.

<sup>67</sup> Hanks (1998) 5 *SAJELP* op cit 309 is of the view that other information-based instruments, such as advertising and eco-labelling, can also be used to enhance awareness of environmental issues.

public with relevant knowledge, thereby influencing their perceptions and attitudes towards the environment, conservation and people (respecting other persons' rights in terms of section 24 of the Constitution, for example) in such a way that it will reflect an environmentally friendly behaviour. Environmental education is a proactive strategy to promote conservation of fauna and flora without having to resort to judicial mechanisms to enforce relevant environmental laws. The ultimate goal of environmental education should be to understand, promote and practise sustainable development.

A positive attitude and positive behaviour towards conservation of fauna and flora should not only encourage the public to willingly comply with environmental laws, but also to regard degradation of the environment as a punishable crime. I believe that such a positive attitude will bring the public to a realisation that environmental offences are not only a crime against the environment, but against humankind and civilisation. This realisation should reflect a decrease in environmental crime, an increase in public participation in environmental decision making, and an increase in the membership of environmental interest groups and "green" consumers. Furthermore, the public would regard fauna and flora as priceless national assets and become committed to fulfil their watchdog and stewardship role regarding the environment. All citizens should have a social/moral responsibility to protect and conserve fauna and flora for present and future generations.

According to Kidd,<sup>68</sup> the attitude of the public towards environmental offences is important for two reasons. Firstly, if members of the public witness other persons committing offences, they may well report these offences or assist in other ways in the policing of environmental crimes. Secondly, the extent to which people generally regard activities as morally wrong will influence the way in which offenders are sentenced upon conviction. Thus, there appears to be a link between public awareness and public moral attitudes. Therefore, public involvement would probably not extend to offences that the public regards as morally colourless. Unfortunately, in South Africa the "environmental ethos" of the general public has not yet developed to the extent where environmental offences are seen as a punishable crime. This is

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<sup>68</sup> Kidd, M *Environmental Law. A South African Guide* (1997) Juta & Co Ltd Cape Town 24.

understandable as the South African public is confronted with hosts of other life-threatening crimes such as rape and murder, on a daily basis.<sup>69</sup>

Van Reenen<sup>70</sup> is of the opinion that environmental protection should be established as an educational goal. He further submits that mandatory environmental education will foster a public environmental consciousness and facilitate the establishment of a framework of social norms that respect the environment. It is believed that an informed public will promote good citizenship as they will be aware of their duty of care towards the environment (in terms of section 28 off NEMA) and will be committed to fulfil their responsibility as “stewards” or “trustees” of the environment.

To secure co-operation, it is essential that:

- (a) communities participate in decision-making processes (see NEMA s2(4)(f));
- (b) a community's perception and understanding of nature conservation are taken into account in decision-making processes; and
- (c) the real benefits of nature conservation to the community are explained to them.

## 2.2 South Africa

### 2.2.1 General

As a result of environmental injustice,<sup>71</sup> many South Africans view the promotion of “green” issues and conservation efforts as elitist “white” privileges that often led to

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<sup>69</sup> Loots, C “Making Environmental Law Effective” (1994) 1 *SAJELP* 18; Kidd, M “Environmental Crime — time for a rethink in South Africa?” (1998) 5 *SAJELP* 184 & 190.

<sup>70</sup> Van Reenen, TP “Constitutional Protection of the environment: fundamental (Human) right or principle of State Policy?” (1997) 4 *SAJELP* 289.

<sup>71</sup> For a definition and general information on environmental injustice, see Kidd, M “Environmental justice: a South African Perspective” (1999) *Acta Juridica* 148-154. According to Cowen, the phrase “environmental justice” is difficult to give a clear and intelligible meaning to (“The new South African Constitution and opportunities for environmental justice in a democratic South Africa” in Glazewski, J & Bradfield, G *Environmental Justice and the Legal Process* (1999) Juta & Co Ltd Cape Town 135). For legal mechanisms to address and redress existing environmental injustice see Kidd (1999) *Acta Juridica* op cit 155-160. Environmental injustice is also referred to as environmental racism or environmental discrimination. The notion of environmental justice has its origin in 1991 in the USA where the First National People of Colour Leadership Summit adopted a seventeen-point declaration of the principles of Environmental Justice. Glazewski, J “Environmental Justice and the new South African democratic legal order” (1999) *Acta Juridica* 3. For detail on these principles, see Glazewski (1999) *Acta Juridica* op cit 31-32. Also see Stacy, H “Environmental justice and transformative law in South Africa and some cross-jurisdictional notes about Australia, the United States and Canada” (1999) *Acta Juridica* 36-70; Glazewski (1999) *Acta Juridica* op cit 4,

racial inequity in the past. It seems that the meaning of the concept “environmental justice” in the South African context is as follows: “Environmental justice is about social transformation directed toward meeting human needs and enhancing the quality of life — economic equality, health care, shelter, human rights, species preservation, and democracy — using resources sustainably.”<sup>72</sup> According to Peart and Wilson,<sup>73</sup> forced removals<sup>74</sup> of Africans in the apartheid era to set aside reserves for wildlife, and the management of game reserves for the enjoyment of the white elite and international tourists contributed to the unfavourable reception of environmental protection policies by the black majority population.

However, part of the political transformation in South Africa also takes place in the environmental field. In 1994 the African National Congress (ANC) suggested that the problem of environmental degradation could be addressed by *inter alia*, participation of communities in management and decision-making regarding wildlife conservation, increasing consciousness amongst the youth, co-ordinating of environmental education policy at all levels and empowering communities to act on environmental issues.<sup>75</sup> Section 24 of the Constitution addresses environmental injustice by stating that “*everyone* has a right to an environment that is not harmful to their health or well-being; ....”<sup>76</sup> Section 2(4)(c) of NEMA specifically states that environmental justice must be pursued. One way of addressing environmental injustice is by providing equitable access to environmental resources, benefits and services to meet basic human needs and ensure human wellbeing (s2(4)(d) of NEMA). In addressing environmental injustice, co-operation of the affected communities to conserve fauna and flora will ensue.<sup>77</sup> The government is committed to raising public awareness of

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<sup>72</sup> Kidd (1999) *Acta Juridica* op cit 154.

<sup>73</sup> Peart, R & Wilson, J “Environmental Policy-making in the New South Africa” (1998) 5 *SAJELP* 238.

<sup>74</sup> According to De Villiers there have been 63455 claims to land in South Africa. Australia also has to contend with land claims but, contrary to South Africa, only a *minority* demands restoration of land. De Villiers, B “Africa 2000 — the progress with land claims and reflections on the Australian process” (2000) 15 *SAPR/PL* 431-433.

<sup>75</sup> Ferreira (1998) op cit 91.

<sup>76</sup> Although environmental injustice was mainly associated with pollution and health issues, people were also denied access to fauna and flora that they previously utilised.

<sup>77</sup> The environmental justice movement is one of the fastest growing movements in South Africa and includes the Environmental Justice Networking Forum (EJNF). For further detail on environmental justice in South Africa, see Stacy (1999) *Acta Juridica* op cit 36-70.

environmental matters through environmental education.<sup>78</sup> A national environmental management principle in NEMA (s(2)(4)(h)) promotes environmental education and states: “Community wellbeing and empowerment must be promoted through environmental education, the raising of environmental awareness, the sharing of knowledge and experience and other appropriate means”.

Activities and attitudes of black rural communities often cause degradation of the environment.<sup>79</sup> It is thus of the utmost importance for the successful conservation of fauna and flora to gain the support and acceptance<sup>80</sup> of these communities by informing them and making them aware of the threats to the environment and nature conservation. Hugo<sup>81</sup> is of the opinion that local authorities closest to the people should play a vital role in educating and mobilising the public/community on the issues of sustainable development. Such awareness campaigns should predominantly be carried out through the radio. However, to reach rural communities, “field workers” are necessary and the government should, therefore, allocate money for members of the communities to be trained as “environmental field workers” or “rangers”. These trained people can then be sent back to their communities to educate and inform their people about conservation and environmentally friendly activities and practices.

It is essential for the success of any environmental education programme that the relationship of South African communities to their environment and their perception

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<sup>78</sup> For information on the history of environmental education in South Africa, see Ferreira (1998) op cit 91-94. Education *per se* is beyond the scope of this study and will not be discussed further.

<sup>79</sup> Loon is of the opinion that a growing human population is the ultimate threat to all biodiversity (“The effectiveness of the law in the conservation of birds of prey in South Africa” (1995) 2 *SAJELP* 170). Labuschagne and Boonzaaier remark that a growing population is not the major cause for deterioration of the environment (“African perceptions and legal rules concerning Nature conservation” (1998) 5 *SAJELP* 53). According to Kidd, joblessness and poverty lead to environmental degradation. He also points out that apart from climatic changes, the general worldview and philosophy of the various cultural groups in South Africa should be regarded as an important factor that has contributed to the deterioration of plant and animal life. (“Environmental justice: a South African Perspective” (1999) *Acta Juridica* op cit 160).

<sup>80</sup> According to Dias, when dealing with the indigenous people, several conflict-avoidance mechanisms are available. These include, environmental impact assessments, requirements of dialogue and disclosure and participation of the community. (“International standard-setting on the Rights of indigenous peoples: Implications for mineral development in Africa” (1999) 6 *SAJELP* 88-89).

<sup>81</sup> Hugo, ML & Viljoen, AT & Meeuwis, JM *The Ecology of Natural resource Management* (1997) Kagiso Publishers Pretoria 189.

of nature conservation are understood. These relationships and perceptions are now discussed.

### 2.2.2 Communities and nature conservation

Some Africans (Tsonga, North-Sotho, Tswana and Xhosa) see humans as part of nature and dependent on it for their survival. All natural resources are viewed as having been provided by the Creator in order to meet the needs of man. All products of nature are regarded as gifts<sup>82</sup> from the Supreme Being and nature conservation is seen as the responsibility of the government and personnel of nature conservation authorities. Humans then have a right to dominate and change their environment as they wish. The perception is also that human beings are unable to destroy the natural resources by utilisation. However, interviews with learners indicate a shift from the views of older spokespersons in that learners were of the opinion that humans should conserve nature, *inter alia* by preventing veld fires and the felling of trees.<sup>83</sup>

Because of their close contact with, and cultural and subsistence dependence on, the environment, indigenous people have over years developed a rich traditional conservation wisdom and understanding of natural processes. These people's perceptions of nature are closely related to the philosophical foundations of their cultures, namely a holistic, magical and anthropocentric world-view, a group-oriented approach to life and a cyclic perception of time.<sup>84</sup> Much of indigenous culture is expressed in terms of human interaction with the biology of the natural world. Hence, there is an inescapably strong relationship between conservation of biodiversity and the culture of indigenous peoples.<sup>85</sup> Their intuitive sense of conservation is embodied in the ancient wisdom of their cultures. As their cultures change under the impact of Western technology and values, this sense and practice of conservation may follow suit.<sup>86</sup> This harmonious relationship with nature has changed as the younger

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<sup>82</sup> Trees in the veld are described as beautiful, not for their aesthetic value, but for their pragmatic value (their use to man). Animals are only regarded as "beautiful" because of the quantity of meat they represent.

<sup>83</sup> Labuschagne & Boonzaaier (1998) 5 *SAJELP* op cit 60-64.

<sup>84</sup> Labuschagne & Boonzaaier (1998) 5 *SAJELP* op cit 64 & 66.

<sup>85</sup> Indigenous people pointed out that they have been the "traditional custodians of biodiversity" and that they are not the primary agents of environmental degradation. For a description of who indigenous people are, see Dias (1999) 6 *SAJELP* op cit 69-73, 89, 92, 96.

<sup>86</sup> Bradsen, J "The Green Issues: Biodiversity Conservation in Australia" in Boer, B & Fowler, R &

generation of these communities has been influenced by Western cultures. In South Africa their attitude towards conservation changed during the apartheid era because of environmental injustice. This led to the situation where even “poachers” were regarded by some communities as hunters, and not thieves, who then enjoyed a relatively high degree of esteem in their communities. Generally a negative attitude existed towards nature conservationists, who were regarded as people who protect wild animals against communities.

Certain situations were difficult for these communities to understand. Firstly, community members were not allowed to kill or capture wild animals that caused damage to their crops and livestock because it was regarded as theft; yet they were not compensated for the damage caused. This was because nature conservation authorities denied ownership of wild animals when these animals killed livestock. However, when the predators were caught in snares, these animals were regarded as the property of the relevant nature conservation authority. Another confusing situation arose when people were not prosecuted when they killed wild animals with firearms, only when these animals were caught in snares.<sup>87</sup> Furthermore, communities living adjacent to nature reserves are not satisfied with the concept of nature conservation as the enclosure of nature reserves prevents them from hunting. Therefore, game rangers are viewed as people caring more about animals than people.<sup>88</sup> According to Glavovic,<sup>89</sup> “for people to value conservation they must receive some tangible benefit from it”. This means that there must be a bottom-line profit for the local community to make it beneficial for them to protect their own heritage.

The colonial approach to conservation in Africa over the past century, centred round the notion that the exclusion of rural people from protected areas would lead to the ultimate protection of wild animals and their habitats. This was essentially a protectionist approach that entailed the creation of wildlife sanctuaries, predominantly in the form of national parks and game reserves, to the exclusion of the local

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Gunningham, N (ed) *Environmental Outlook* (1994) The Federation Press Sydney 212- 213.

<sup>87</sup> Labuschagne & Boonzaaier (1998) 5 *SAJELP* op cit 60.

<sup>88</sup> Labuschagne & Boonzaaier (1998) 5 *SAJELP* op cit 60.

<sup>89</sup> Glavovic, PD “Environmental ‘Group’ Rights for Indigenous South Africans” (1991) *SAJL* 79.

communities.<sup>90</sup> Summers<sup>91</sup> points out that people prevented from using fauna and flora legally will tend to ignore the relevant laws and use it illegally, to the disadvantage of these natural resources. Thus conservation policies that treat rural communities as the enemy of fauna and flora and deny them access to these resources are doomed to failure. Summers is of the opinion that policies aimed at the total preservation of wildlife sanctuaries as some kind of glorified zoo are thus outdated and unrealistic.

There is growing acceptance of the view that the best means of conserving habitats and species is the realisation that the success of any modern natural resource management project entails providing benefits to and securing the co-operation of rural communities. Conservation is a positive concept embracing preservation, maintenance, sustainable utilisation, restoration and enhancement of the natural environment. It is apparent, therefore, that the existence of large protected areas can no longer be justified in the face of dire poverty of rural people. Ultimately, it is the rural people who will determine the fate of fauna and flora in South Africa.<sup>92</sup>

The evidence is that communities can become effective institutions for sustainable resource management, but only if they are granted genuine proprietorship (that is the right to use natural resources (including fauna and flora), determine the mode of usage, benefit fully from their use, determine the distribution of such benefits and determine rules of access). Any policy that excludes these components will frustrate the goal of making communities effective institutions for sustainable resource management.<sup>93</sup>

The modern concept of conservation stresses the need for communities to manage and maintain fauna and flora responsibly and for their own benefit.<sup>94</sup> The emphasis is, therefore, on a people-orientated management approach to nature conservation that acknowledges that the conservation of fauna and flora is intimately connected with

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<sup>90</sup> Summers, R. "Legal and institutional aspects of community-based wildlife conservation in South Africa, Zimbabwe and Namibia" (1999) *Acta Juridica* 188.

<sup>91</sup> Summers (1999) *Acta Juridica* op cit 188-189.

<sup>92</sup> Summers (1999) *Acta Juridica* op cit 189.

<sup>93</sup> Summers (1999) *Acta Juridica* op cit 190.

<sup>94</sup> The traditional African communities utilise a wide variety of indigenous flora for firewood, building materials (thatching) and foodstuffs. Fauna is mainly used for medicine and meat. According to Labuschagne and Boonzaaier, domestic animals have become the main source of animal protein for some communities ((1998) 5 *SAJELP* op cit 59).

the sustainable utilisation of them. The most important of these being the return of control over resources to those who depend on them, and what this requires is a decentralisation of power. This is arguably the most fundamental process at the centre of community-based conservation.<sup>95</sup>

It has been argued that a modern approach to the conservation of fauna and flora has to extend itself beyond the confines of an approach based solely on protected areas. This entails a recognition of the vital role rural communities have to play in the future of fauna and flora conservation in South Africa. Accordingly, they must be legally empowered to do so.<sup>96</sup> They should, therefore, be involved in the control and planning of the use of those resources. Harmonising local needs and local knowledge with conservation constitutes sound environmental and socio-economic planning.<sup>97</sup>

Although government accepts the value of conservation, it is unlikely that the implementation of any environmental conservation programme will be successful unless it also gains the acceptance, active participation and the involvement and co-operation of the rural people whose lives will invariably be affected in the process. This is essential, particularly in those areas where the traditional way of life is dependent upon access to flora and fauna for food, fuel, medicine and building materials.<sup>98</sup> Development of reserves and resorts should not unduly disrupt traditional land use and should provide direct benefits for local inhabitants that could be used to provide community facilities and cater for other needs.<sup>99</sup>

Although Western influences and prescriptions have disrupted traditional cultures and values,<sup>100</sup> tribal cultures require special legal treatment to ensure their continued existence, at least for so long as the people themselves wish to retain their traditional way of life. Because of their close contact with and dependence on their natural environment, indigenous people have over a long period of time developed a unique and rich knowledge of conservation and understanding of natural processes. They should, therefore, be involved in the control and planning of the use of the resources

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<sup>95</sup> Summers (1999) *Acta Juridica* op cit 191.

<sup>96</sup> Summers (1999) *Acta Juridica* op cit 209.

<sup>97</sup> Fuggle & Rabie (1998) op cit 258.

<sup>98</sup> Fuggle & Rabie (1998) op cit 258.

<sup>99</sup> Fuggle & Rabie (1998) op cit 224.

<sup>100</sup> Glavovic (1991) *SAJL* op cit 80.

involved. Allowing local communities to participate in environmental management, and to continue their customary harvesting practices on a controlled and sustained yield basis, is not merely a type of “group” privilege. It is sound environmental and socio-economic planning, and the harmonising of local needs with the conservation of natural resources and the interests of greater society.<sup>101</sup>

South Africa's environmental laws should in some way accommodate the apparent dilemma of conserving the country's natural resources while at the same time, recognising the subsistence needs of indigenous people. Sections 2(4)(d) and (g) of NEMA have in some way tried to address this “dilemma”. It is essential that the last remnants of our fauna and flora and its habitat be legally protected, but the laws must be so formulated and applied to permit the controlled taking on a sustained yield basis, particularly in those areas where the traditional way of life is dependent upon access to flora and fauna for food, fuel, medicine and building materials.<sup>102</sup>

Environmental education has a vital role to play in the conservation of fauna and flora and in gaining the co-operation and acceptance of the local communities.

### 2.3 Australia

The Australian public seems to be more aware of environmental issues than South Africans are. One reason for this is because Australia regards environmental education as an important mechanism to inform and alert the public on environmental matters. Environmental education is not only utilised to inform the public but is seen as a mechanism to improve compliance with relevant environmental laws and thus promote conservation of fauna and flora without having to resort to criminal sanctions.

The governments of the Australian States have recognised that they need the support and co-operation of the indigenous people (Aborigines) if they want to be successful in the conservation of fauna and flora.<sup>103</sup> However, these governments also recognise

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<sup>101</sup> Glavovic (1991) *SAJL* op cit 68.

<sup>102</sup> Glavovic (1988) 3 *SALJ* op cit 527.

<sup>103</sup> Bradsen (1994) op cit 190.

that the needs of the Aborigines in terms of natural resources, such as fauna and flora, should be accommodated and that they should participate in decision-making and the management of fauna and flora. To accommodate (and control) these needs, special legislative provisions are made in all States and the Commonwealth to allow Aboriginal inhabitants the right to continue to take and kill otherwise protected wildlife in the furtherance of native customs relating to the hunting and gathering of traditional food sources.<sup>104</sup> An example of such legislative provisions is seen in New South Wales (NSW). In this State special provision for Aborigines to enter onto private land in order to hunt for fish or gather traditional foods for domestic purposes is made under sections 47 and 48 of the Aboriginal Land Rights Act 1983. Such rights are subject to the provisions of the National Parks and Wildlife Act 1974 in so far as protected fauna is concerned, though presumably an access permit granted under section 48 will obviate the need to obtain any permit under the National Parks and Wildlife Act 1974.<sup>105</sup> In the Northern Territory the Aborigines may also continue their traditional uses of land and water for hunting for food (not for sale) and for ceremonial and religious purposes unless these activities are restricted by regulations made for the purpose of conserving wildlife in the area.<sup>106</sup>

To secure the co-operation of the Aborigines, they are encouraged to participate in decision making involving nature conservation and in the management of national parks. In the Australian States, for example, the governing authorities of national parks are often in the form of national or State trusts, and are administered as trusteeships. In many cases indigenous peoples are taking an increasingly active role in the establishment and management of the national parks. A noteworthy example is the Kakadu National Park in the Northern Territory where the Kakadu Aboriginal Land Trust (on behalf of the Aboriginal land owners) in 1978 leased the land that forms the bulk of the Park to the Commonwealth Director of National Parks and Wildlife to be managed as a national park for 100 years. Aborigines share in aspects

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<sup>104</sup> Bates (1995) op cit 336-338.

<sup>105</sup> Bates, *Environmental Law in Australia* (1987) (2<sup>nd</sup> ed) Butterworths Sydney 207-208; Bates (1995) op cit 336.

<sup>106</sup> Bates (1987) op cit 208; Bates (1995) op cit 336. For provisions in other States, see Bates (1995) op cit 336-339.

of management and retain title to their lands. Other examples in Australia are the Gurig National Park and the Uluru National Park.<sup>107</sup>

## 2.4 New Zealand

### 2.4.1 General

The rights of the country's indigenous people (Maori) to natural resources has long been a vexed question in New Zealand. The legal problems date back to the Treaty of Waitangi of 1840. In terms of this document the Maori people ceded sovereignty to the British Crown in return for protection of their land and resources and rights of British citizenship. However, the legal status of the treaty is controversial. The major reason for this uncertainty is the fact that the treaty has conflicting English and Maori texts leading to different conclusions as to what degree of sovereignty was in fact ceded by the Maori to the Crown.<sup>108</sup>

However, recent conservation statutes, such as the Environment Act 1986 and the Conservation Act 1987 (ss3&4), incorporate references to the treaty. The RMA also incorporates a reference to the treaty in section 8 and other provisions seek to further the position of the Maori.<sup>109</sup>

The resource management system in New Zealand is fundamentally reliant upon wide public participation, both to enable fully informed decision making, and to provide checks and balances on environmental assessments and the exercise of statutory discretions. However, informational barriers, procedural barriers to participation and the threat of large awards of costs seriously undermine access to environmental justice in New Zealand.<sup>110</sup>

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<sup>107</sup> Jefferey, M "National Parks and Protected Areas: Approaching the new Millennium" (1999) *Acta Juridica* 180. Also see De Villiers, B "Democratisation of conservation: involvement in the management of national parks" (2000) 15 *SAPR/PL* 184-187.

<sup>108</sup> Rabie (1998) 13 *SAPR/PL* op cit 377.

<sup>109</sup> Sections 6 (e), 7 (a), 61(2)(a)(ii), 66(2)(c)(ii), 74(2)(b)(ii), and clause 3(1)(d). Also see Rabie (1998) 13 *SAPR/PL* op cit 378, 379.

<sup>110</sup> Grinlinton, D "Access to environmental justice in New Zealand" (1999) *Acta Juridica* 96.

### 3. ENVIRONMENTAL INTEREST GROUPS

#### 3.1 General

The participation in and/or membership of individuals in environmental non-governmental interest groups depends to a large degree on how informed and aware they are regarding environmental and conservation issues. Especially in developed countries the public seems to be well aware of the importance of protecting the environment and, therefore, a broad spectrum of national and transnational environmental NGOs<sup>111</sup> have been actively involved in the conservation of biodiversity since the 1950s. They have mainly focused their efforts on the protection of ecosystems, but since the 1980s their focus has broadened and more attention has been given to the issue of genetic diversity and to the relationship between poverty and the destruction of ecosystems.<sup>112</sup>

The two decades following the 1972 Stockholm Conference have seen the rapid growth of environmental non-governmental organisations (NGOs). Since 1987, several environmental NGOs have begun to invest in conservation in developing countries, such as South Africa.<sup>113</sup> Some of them, for example the World Wide Fund for Nature (WWF), have used debt-for-nature swaps to encourage conservation in developing countries. Debt-for-nature swaps entail that creditor banks sell some of the debts of developing countries at a discount to NGOs who then write them off in exchange for the debtor country putting local currency and effort into conservation.<sup>114</sup>

In South Africa the NGOs that are involved in the environmental arena have had only a small impact on the development of environmental policy until recently.<sup>115</sup>

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<sup>111</sup> Of the most active transnational NGOs include, Friends of the Earth, WWF, Endangered Wildlife Trust (EWT) and Greenpeace. Also see Le Quesne, T "The divorce of Environmental and Economic policy under the first ANC Government, 1994-1999" (2000) 7 *SAJELP* 3. Although not applicable to this study, a very active organisation which is involved in the protection of marine resources, is Seawatch. The objectives of this organisation include educating the people and getting the community involved. For further detail on this community-based organisation, see Hauck, M "Seawatch: Civil Society's role in combating environmental crime" (1999) 6 *SAJELP* 101--119.

<sup>112</sup> Miller, MAL *The Third World in Global Environmental Politics* (1995) Lynne Rienner Publishers London 121.

<sup>113</sup> Miller describes South Africa as a third-world country with first-world elements ((1995) op cit 131).

<sup>114</sup> Miller (1995) op cit 40, 121.

<sup>115</sup> An exception to this is probably the impact of well resourced national organisations such as the Wildlife and Environmental Society of South Africa.

However, since 1994, lobbying and publishing of issues by environmental NGOs<sup>116</sup> were the driving forces causing environmental issues to reach the South African political agenda. The activities of the Environmental Justice Networking Forum (EJNF), which was established in late 1994, have significantly increased the lobbying power of a large number of small and disparate organisations. The EJNF has grown into a network of 450 civil organisations and, together with the Group for Environmental Monitoring (GEM), it was involved in the process that led to the White Paper on Environmental Management.<sup>117</sup>

In most developed countries, such as Australia and New Zealand, it seems as if the public is generally well informed on environmental issues and, therefore, public interest groups have normally become influential participants in the regulatory process and may have significant influence in the political arena.

### 3.2 The role of environmental NGOs

Irrespective of the country in which they operate, environmental interest groups normally have the same objectives, perform the same functions and play similar roles in the protection of the environment in general and the conservation of fauna and flora in particular.<sup>118</sup>

Environmental NGOs play a very important role in the protection of the environment in general and the conservation of the biodiversity in particular. Although most of their objectives are aimed at ensuring that the industry and business sectors comply

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<sup>116</sup> An example is the active, highly organised, voluntary environmental NGO, CROWA SA (The Criminological Research Centre for Wildlife and Ecological Crime in Southern Africa). It is a product-driven organisation aiming at providing a practical and academic research facility pertaining to specific universal issues of ecological (and cultural historic) crime. The organisation's mission is to facilitate the understanding, explanation, control, combating and prevention of ecological crime, contributing to the preservation of genetic species and ecosystem diversity for the benefit of all life on earth. Although CROWA SA has been conducting research on wildlife crime since 1991, it formally came into existence in 1996 and was officially registered in 1998. Pamphlet "Towards 2000: an African Renaissance taking Eco-responsible human behaviour" (1998).

<sup>117</sup> Peart & Wilson (1998) 5 *SAJELP* 249, 253.

<sup>118</sup> Although the number of different environmental NGOs may differ from country to country, they are usually all very enthusiastic in their campaigns to protect the environment. However, the degree of visual activeness depends on how many NGOs there are, their financial resources and the degree of collaboration between them. Because of this "universal" mode of operation, the role of environmental NGOs in general will be discussed and reference made to examples or, if applicable, differences in the three countries under discussion.

with environmental laws (especially in relation to pollution control), some objectives are also applicable to individuals and the conservation of fauna and flora. Some of these ways in which environmental NGOs may enforce environmental laws (directly and indirectly) and/or positively influence compliance with environmental laws will be discussed briefly.

### 3.2.1 The indirect role of environmental NGOs in the conservation of fauna and flora

Environmental NGOs have been instrumental in placing environmental issues high on the public agenda, and in keeping them there.<sup>119</sup> In this way they raise public awareness on environmental issues and “educate” the public about the environment and nature conservation. In so doing they contribute significantly to a more informed community. They are thus able to call upon a strong core of public support as they attempt to affect national and global environmental politics.<sup>120</sup> They (and Community Based Organisations (CBOs)) thus play a crucial role in mobilising communities<sup>121</sup> for campaigns involving the protection of the environment and for the promotion of nature conservation.

Environmental NGOs have made a significant contribution to fostering human responsibility for the earth. An illustration of this is the worldwide initiative Caring for the earth, A strategy for sustainable living launched in partnership by the World Conservation Union, the United Nations Environment Program, and the World Wide Fund for Nature.<sup>122</sup> Nine principles for building a sustainable society have been proposed. These principles include conservation of the earth’s vitality and

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<sup>119</sup> They contribute to agenda setting, raising an issue and enhancing its priority. For example the WWF has made endangered species an issue of international concern. They strengthen the effectiveness of environmental policy instruments and are a force of informal social control in their own right. Grabosky, P & Gunningham, N & Sinclair, D “Parties, roles and interactions” in Gunningham, N & P Grabosky “Smart Regulation” (1998) Clarendon Press Oxford 93 -95.

<sup>120</sup> An example is the consumer boycott of Norwegian fish products organised in 1993 by Greenpeace in protest against that nation’s resumption of whaling. See Grabosky & Gunningham et al (1998) op cit 108.

<sup>121</sup> Gutto (1995) 1 *SAJELP* op cit 11. Reports in the press indicate growing realisation that environmental problems may only be addressed meaningfully and effectively by mobilising the communities on the ground.

<sup>122</sup> Fuggle & Rabie (1998) op cit 2.

biodiversity,<sup>123</sup> changing of personal attitudes and practices,<sup>124</sup> and enabling communities to care for their own environments.<sup>125</sup>

Environmental NGOs provide information to regulators and regulatees. They are a source of information for government authorities and, in the regulatory process, ensure that not only an industry view but also an environmental standpoint will be presented.<sup>126</sup> They are not only a source of information but fulfil an essential watchdog role. Firstly, they identify any shortcomings in the development and implementation of government policy<sup>127</sup> and secondly, they play an important role in monitoring the performance of both regulatory agencies (pressure them to “get tough” on recalcitrant industry) and of industry itself (via the media and political leverage).<sup>128</sup> Thus in the environmental arena, where firms are often unwilling to implement regulation voluntarily and where regulatory agencies are frequently under-staffed and relatively ineffective, the environmental interest groups play an important role.<sup>129</sup>

A very important role of environmental NGOs stems from their ability to act as private enforcers. In addition to pressuring regulators to take appropriate action, environmental interest groups may initiate legal proceedings (civil action)<sup>130</sup> against government<sup>131</sup> (or even against a country they perceive not to be in compliance with

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<sup>123</sup> This principle entails that the variety of plants and animals and other organisms as well as the different ways these are assembled in communities must be preserved, and human use of living resources must be within the resource's capacity for renewal.

<sup>124</sup> This principle entails that through educational programs and the dissemination of information individuals must be encouraged to re-examine their values and to alter their behaviour to accord with the ethic of living sustainably.

<sup>125</sup> This principle entails that communities must be empowered to contribute to and enforce decisions that effect their environment. Care for the environment is the responsibility of all communities; it must not be made to appear the predominant responsibility of government or conservation agencies. For other principles, see Fuggle & Rabie (1998) op cit 2-3.

<sup>126</sup> Grabosky et al (1998) op cit 95.

<sup>127</sup> Grabosky et al (1998) op cit 96. According to Miller they also influence policy through research and publication and through collaboration with UN agencies and the World Bank. However, Miller points out that the NGOs have limited success in their campaign for structural and policy changes at the World Bank ((1995) op cit 38-39, 121).

<sup>128</sup> Gunningham, N “Beyond Compliance: Management of Environmental Risk” in Boer, B & Fowler, R & Gunningham, N (ed) *Environmental Outlook* (1994) The Federation Press Sydney 260.

<sup>129</sup> Gunningham, N “Beyond regulation: Proactive environmental management” (1995) 1 *SAJELP* 81.

<sup>130</sup> As already discussed in chapter 2 (and 3), the expansion of the *locus standi* requirement in South Africa, Australia and New Zealand greatly assists the environmentalists in engaging in a civil action to ensure protection to the environment.

<sup>131</sup> An example of such legal action is *Director, Mineral development, Gauteng Region and Another v Save the Vaal Environment and Others* 1999 (2) SA 709 (SCA). In this case the Supreme Court of Appeal ruled in favour of an environment NGO, Save the Vaal Environment (SAVE), against Sasol Mining and the Gauteng Director of Mineral Development concerning a proposed open-cast coal

international environmental treaties).<sup>132</sup> Through litigation they usually seek compensation<sup>133</sup> for damage to the environment, or to prevent impending harm. Another recent example of such an action by an NGO is *Silvermine Valley Coalition v Sybrand van der Spuy Boerderye and Others* 2002 (1) SA 478 (C). In this case the a vineyard was establishment in a declared nature area of the South Cape Peninsula without conducting an environmental impact assessment as requested by an environmental NGO. In this case, Judge Davies acknowledged the important role of NGOs in the protection of the environment by the following statement: "...it seems to me that NGOs should not have unnecessary obstacles placed in their way when they act in a manner designed to hold the State and indeed the private community accountable to the constitutional commitments of our new society, which includes the protection of the environment".

Legal action serves as a means of mobilising public support and as a rallying point, to generate or to maintain public momentum for a cause. Legal action also serves to "reform the law" as litigants may seek to set precedents, develop doctrine, or to contribute to the evolution of rules that may bear upon citizen access to law generally.<sup>134</sup>

### 3.2.2 The direct role of environmental NGOs in the conservation of fauna and flora

In addition to the indirect way of influencing environmental performance and behaviour, environmental interest groups may also *directly* pressurise industries. However, the relationship between these groups and industry is not necessarily adversarial, as they can be involved in industry-environmentalist partnerships, relationships that are referred to as "constructive engagement".<sup>135</sup>

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mine on the Vaal river. *SAVE inter alia* indicated to the Court that such a mine would threaten the habitat of numerous bird, reptile, amphibian and mammal species.

<sup>132</sup> Grabosky et al (1998) op cit 95.

<sup>133</sup> Compensation may entail redemption of damage, or payment of monetary compensation. Grabosky et al (1998) op cit 97.

<sup>134</sup> Grabosky et al (1998) op cit 98.

<sup>135</sup> Grabosky et al (1998) op cit 99.

One way in which environmental interest groups may directly engage industry is through the provision of “green” endorsements. The blessing of environmentalists may be a boom to marketing. They may directly influence the behaviour of industry through the provision of awards. For example, the Banksia Environmental Foundation in Australia presents the Banksia Awards each year, which recognise individuals and corporations for their environmental achievements in such categories as land management and resource conservation.<sup>136</sup> Award schemes have considerable publicity potential and can thus contribute to the education and information strategies of a regulatory regime. This publicity can also raise public awareness about surrounding circumstances, and focus attention on critical issues.<sup>137</sup>

Another direct way of “forcing” compliance with environmental legislation is by influencing public consumer behaviour through certifying “green” products or organising boycotts. “Green” consumers support boycotts organised by environmental interest groups and tend to buy only products that are certified by the environmental interest groups as “green” products.<sup>138</sup>

### 3.2.3 Shortcomings of environmental NGOs

Grabosky<sup>139</sup> is of the view that, in propagating and pressing their position too fiercely, the credibility of NGOs may be tainted by the use of sensationalism and focus on “trendy” environmental issues, falsehoods and distortion. Although it is true that some members of environmental NGOs sometimes get emotional regarding an issue that they feel passionate about, in most instances it is the media that is guilty of sensational and distorted reporting.

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<sup>136</sup> Grabosky et al (1998) op cit 100. Another example is the WWF which carries out licencing arrangements with companies wishing to use its Panda symbol. Yet another example of such an award, is the Goldman environmental prize, which recognises exceptional achievements by environmental activists. See Gunningham, N & Sinclair, D “Instruments For Environmental Protection” in Gunningham, N & Grabosky, P *Smart Regulation* (1998) Clarendon Press Oxford 59.

<sup>137</sup> See Gunningham & Sinclair (1998) op cit 59. For other examples of awards and their strengths and weaknesses, see Gunningham & Sinclair (1998) op cit 67-69.

<sup>138</sup> Grabosky et al (1998) op cit 108. This effect of “green” consumers will be discussed further on in chapter 4.

<sup>139</sup> Grabosky et al (1998) op cit 104, 106, 94.

Grabosky<sup>140</sup> is further of the opinion that, despite the common interest amongst these groups, there is often a lack of unity in the environmental movement. It might seem as if there is a lack of unity among the environmental NGOs because they normally focus on different aspects of the environment. However, no matter what component of the environment is threatened they usually stand united in their ultimate goal to protect and conserve the environment as a whole for future generations. Thus, collectively, they normally have a huge impact on the outcome of an issue, especially in developed countries where they are very active.

Grabosky<sup>141</sup> also points out that the lack of financial resources or the imbalance between the resources of environmental NGOs and their adversaries, may limit the latter organisations in striving to achieve their nature conservation objectives. He is of the view that a government should subsidise these NGOs and supplement this funding with financial incentives and/or through taxation policies.<sup>142</sup>

#### 3.2.4 Conclusion

The positive role and advantages that active environmental NGOs can play in the protection of the environment and the conservation of fauna and flora in South Africa, by far overshadow the shortcomings of these organisations. One should agree with Grabosky that a lack of funds probably limits the contribution environmental NGOs make to the conservation of fauna and flora. It is also agreed that a government should assist, in whatever way possible, environmental NGOs to achieve their objective of protecting the environment. However, the author holds the view that in South Africa environmental NGOs would have to actively generate funds themselves as the South African government faces huge social responsibilities. The availability of government funds for environmental issues, let alone environmental NGOs, is not likely to improve in the foreseeable future because of the increasingly high unemployment rate. Unemployed South Africans not only add to the demands on the government's financial resources, but are not able to contribute to the treasury through the payment of taxes.

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<sup>140</sup> Grabosky et al (1998) op cit 104, 106, 94.

<sup>141</sup> Grabosky et al (1998) op cit 101-104.

<sup>142</sup> For other ways in which a government can support environmental interest groups, see Grabosky et

It is suggested that the South African government and environmental NGOs should form partnerships and alliances in their fight against environmental crime. In this way financial and human resources can be shared. It seems that environmental NGOs in South Africa do not campaign enough nationally or internationally to raise funds for their cause. As South Africa boasts one of the richest biodiversities in the world and a unique wildlife, including the big five<sup>143</sup> that annually attracts tourists from all over the world, environmental NGOs should not have much difficulty in raising funds for conserving South African fauna and flora.

#### 4. THIRD PARTIES (COMMERCIAL)

##### 4.1 General

The involvement of third parties is specifically to pressurise industry and business (individuals are not their target) through various means<sup>144</sup> to minimise and/or control their pollution and other environmentally harmful activities. Thus third parties contribute to the conservation of fauna and flora by pressuring the corporate world to comply with environmental laws. Gunningham<sup>145</sup> views the role of commercial third parties as *de facto* regulators and instruments of informal social control as they are capable of shaping future environmental outcomes.<sup>146</sup> The different third parties will now be discussed.

##### 4.2 “Green” consumers

If environmental education of communities in South Africa is effective, it will not only lead to compliance with environmental laws, but also create a heightened awareness of environment-related issues, including the conservation of fauna and flora. This awareness will not only lead to more active public participation in decisions affecting the environment, but also make the public more sensitive to the disastrous effect that environmental offences (environmental crimes) have on the

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al (1998) op cit 102, 103.

<sup>143</sup> The elephant, rhinoceros, buffalo, cheetah and lion are collectively known as the big five.

<sup>144</sup> A discussion of these means will follow.

<sup>145</sup> Gunningham (1995) 1 *SAJELP* op cit 71.

<sup>146</sup> Grabosky et al (1998) op cit 106.

environment and, ultimately, on the survival of humankind. A growing public sensitivity to environmental issues is usually reflected in consumer behaviour.

Consumers who are environmentally aware are inclined to purchase products that they perceive to be environmentally appropriate. The purchase of environmentally preferable goods and services thus entail an implicit rejection of less acceptable alternative products. According to Australian polls, many consumers are willing to make purchasing decisions, and even pay more for products that are less environmentally damaging.<sup>147</sup> Collectively, “green” consumers have the economic muscle to demand that environmentally unsound products are either improved or replaced.<sup>148</sup>

“Green” consumers support environmental boycotts organised by environmental interest groups. An example of a consumer environmental boycott is the boycott of Norwegian fish products organised in 1993 by Greenpeace in protest against that nation’s resumption of whaling.<sup>149</sup> “Green” consumers also tend to buy only products that are certified by the environmental interest groups as “green”.<sup>150</sup> Thus, substantial public relations and marketing advantages can flow from a legitimately earned reputation as an environmentally responsible company.<sup>151</sup>

However, for consumer pressure to be effective it is an essential prerequisite that consumers exercising “green” preferences have access to reliable information that reflect the relative environmental impact of various products. Fortunately, section 32 of the South African Constitution provides for an enforceable right to access information. Australia and New Zealand also have legislative provisions that provide for access to relevant information.

Unfortunately the South African public is currently not really as aware of or actively involved in environmental issues as Australians or New Zealanders. This is probably

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<sup>147</sup> Grabosky et al (1998) op cit 107; Gunningham (1995) 1 *SAJELP* op cit 71; Gunningham (1994) op cit 257; Gunningham & Sinclair (1998) op cit 65.

<sup>148</sup> Grabosky et al (1998) op cit 107.

<sup>149</sup> Grabosky et al (1998) op cit 107.

<sup>150</sup> Grabosky et al (1998) op cit 108.

<sup>151</sup> Grabosky et al (1998) op cit 107.

why there seems to be no “green” consumer movement in South Africa that has a significant influence on the behaviour of retailers, suppliers, and manufacturers regarding the impact of their products on the environment.<sup>152</sup> Hopefully this situation will change once environmental education is regarded as a priority compliance/conservation strategy in South Africa. The South African government not only taxes environmentally harmful practices, but is also an important consumer of goods and services. In many markets, government is the dominant purchaser and thus has considerable purchasing power to pressurise retailers, suppliers, and manufacturers to be environmentally responsible. Unfortunately, it seems as if the government is not using this power at all.

The public in Australia and New Zealand is much more informed and aware of environmental issues in their countries. According to Gunningham and Sinclair<sup>153</sup> public pressure for relevant information in Australia takes the form of demanding eco-audits<sup>154</sup> and eco-labelling.<sup>155</sup> However, the latter demand limits consumers in exerting their “green” purchasing power as governments experience difficulties in establishing workable eco-labelling programmes. Gunningham and Sinclair<sup>156</sup> are of the opinion that there are other difficulties with eco-labelling, namely that it relies upon the willingness of consumers to buy “green” products and consumer capacity to

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<sup>152</sup> There is no visibly active “green” consumer movement that the author is aware of or came across in the literature.

<sup>153</sup> Gunningham & Sinclair (1998) op cit 65. Also see Gunningham (1995) 1 *SAJELP* op cit 71; Gunningham (1994) op cit 258.

<sup>154</sup> Eco-auditing appeals to a company’s corporate image and attempts to steer companies towards “greener” methods through consumer pressure. The scheme is designed to measure the complete environmental performance of a business, the results are then made public, perhaps through the use of a symbol or badge. The objective of an eco-audit scheme is thus to promote continuous improvements in the environmental performance of industrial activities by *inter alia* establishing and implementing environmental policies. The scheme is open to companies operating a site where an industrial activity is performed. It is the site, and not the company that is subject to the scheme. For more information, see Cameron, J & Mackenzie, R “Environmental Law and Policy developments in the European Community after Maastricht” in Boer, B & Fowler, R & Gunningham, N *Environmental Outlook* (1994) Federation Press Sydney 98, 99. Also see Coleman, M “Environmental Barriers to Trade and European Community Law” in Boyle, AE *Environmental Regulation and Economic Growth* (1994) Clarendon Press Oxford 163.

<sup>155</sup> Eco-labelling attempts to harness market forces in order to serve the interests of environmental protection. The eco-label award scheme is intended to promote the design, production, marketing and use of products which have a reduced environmental impact during their entire life-cycle, and to provide consumers with better information on the environmental impact of products. An eco-label can be awarded to products which meet these objectives and which are in conformity with community health, safety and environmental requirements. The scheme does not apply to food, drink or pharmaceuticals. For more information on eco-labelling, see Cameron & Mackenzie (1994) op cit 99,100. Also see, Coleman (1994) op cit 159.

<sup>156</sup> Gunningham & Sinclair (1998) op cit 69.

distinguish between these and other classes of product. These difficulties in exploiting the power of consumer preferences mean that it remains a largely untapped resource.<sup>157</sup>

Companies may respond to “green” consumer pressure in two ways. Firstly, by redesigning applicable products to make them less environmentally damaging or by making exaggerated claims about the environmental qualities of their products. To discourage the latter response some countries have opted for “truth in advertising” legislation, seeking to ensure the accuracy of “green claims” through a threat of injunction and prosecution.<sup>158</sup>

The pressure of “green” consumers is not only directly through their purchasing power, but it also has a significant influence on the behaviour of retailers, suppliers, and manufacturers. Companies (retailers, suppliers and manufacturers), mindful of their corporate image and their customers’ preferences, commonly affect each others’ behaviour.<sup>159</sup> Large retailer companies pressure their suppliers to improve their own environmental performance while overseas companies require suppliers to have a company environmental policy, affirmed by an independent audit. Suppliers in turn have to influence the “downstream” use of their products.<sup>160</sup>

If the company is exporting its products, it is not only the local consumers, retailers, suppliers and manufacturers that may have an effect on the company's sales and profits but also foreign traders. In order to achieve international competitiveness it may be necessary to follow the same route as in the trading partner's country if foreign consumers require the same degree of environmental awareness among their foreign suppliers as they require from their domestic suppliers. Companies will need to undertake environmental audits for their products to avoid the imposition of “green” tax to be levied on traders wishing to enter the European market.<sup>161</sup>

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<sup>157</sup> For other difficulties, see Grabosky et al (1998) op cit 109.

<sup>158</sup> Gunningham (1994) op cit 258.

<sup>159</sup> Grabosky et al (1998) op cit 109, 112.

<sup>160</sup> For more information on pressure from retailers and suppliers, see Gunningham (1994) op cit 261, 262.

<sup>161</sup> Henderson, PGW “Fiscal Incentives for Environmental Protection — Introduction” (1994) 1 *SAJELP* 52; Raney (1994) 1 *Stell LR* op cit 49.

Gunningham<sup>162</sup> is of the opinion that the key question to successful international trading may well be: how well do our products meet overseas regulatory requirements?

After the 1994 elections, when the ANC party came into power, South Africa became part of the global market and could more readily trade with foreign companies. As many South African companies export products overseas, it would be worth their while if the management of these companies evaluated the policies, products and activities of the company against the required environmental standards, not only of South Africa, but of all the countries with which the company is trading.

As a result of similar pressures, many companies in Australia have concluded that it is far better to be proactive and to go beyond compliance rather than wait to be caught out by regulators, the public or the financial community. Moving beyond compliance involves a gradual shift from a purely reactive strategy to a full proactive response, which involves internalising the environmental challenge as an element of quality management.<sup>163</sup> It has been stated that going “beyond compliance” is both good for business and good for the environment—that there is a happy coincidence between private profit and public interest.<sup>164</sup>

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<sup>162</sup> Gunningham (1995) 1 *SAJELP* op cit 71.

<sup>163</sup> Gunningham (1995) 1 *SAJELP* 74. The quality of management is measured by environmental management standards. There are two emerging environmental management standards: BS7750 and the International Organisation for Standardisation's (ISO) environmental quality assurance standard ISO 9001. The BS7750 will be an industry standard confirming that an organisation has an environmental policy and complies with it. The ISO standard is part of a series of general guidelines for quality assurance systems, based on a rigorous system for documenting procedures and operations in order to demonstrate that quality practices are in place and being used. ISO 14000 is a series of internationally accepted standards for the accreditation of the environmental management systems of companies. Any concern that desires to be accredited in terms of ISO 14001 must establish an environmental management system that meets certain requirements. See Gunningham (1995) 1 *SAJELP* 75; Barnard, D *Environmental Law for All* (1999) Impact Books Pretoria 162-164. Environmental management standards are beyond the scope of this study and will not be discussed further.

<sup>164</sup> Gunningham points out that limits to the “win-win” approach include, for example, where costs of implementing environmental protection measures will not be offset by any resulting savings from improved economic performance. He is further of the opinion that while moving beyond compliance provides a great challenge to industry, government is also faced with challenges: How can government regulation be designed so that it encourages rather than discourages a proactive business response to the environment? What should governments do when business does not have a self-interest in cleaning up their act? How can a flexible, responsive and effective regulation be achieved? ((1995) 1 *SAJELP* op cit 74)

No less important than the pressures that might induce business to go “beyond compliance” are the enormous opportunities for competitive advantage and increased profitability in adopting a proactive environmental strategy. Examples of USA companies that turned environmental risk into environmental opportunity and profit are 3M<sup>165</sup> with a “Pollution Prevention Pays” philosophy and Dow Chemical<sup>166</sup> with a “Waste Reduction Always Pays” policy.<sup>167</sup> Both companies improved their profitability, enhanced their corporate image, improved efficiency and quality, fostered a greater consumer acceptance of their company and products and reduced potential legal liability. These are some of the advantages for “beyond compliance”.<sup>168</sup>

Moving beyond compliance would also give companies the incentive to develop environmental technology to compete effectively in the global environmental market, save substantial sums of money, increase profits, and enhance their corporate image. In this way the business community can combine the objectives of environmental protection and economic growth. According to Gunningham,<sup>169</sup> Australian business needs to move from a position of reaction to a stage where the environment provides the motivation and stimulus for innovation.

### 4.3 The financial community

#### 4.3.1 Investors

An informed and environmentally “alert” public not only has the power as consumers to influence the behaviour of retailers, suppliers and manufacturers, but also an influence as investors on companies that are listed on the stock exchange. Companies with poor environmental performance records are likely to see the value of their corporate stock decline substantially. In Australia this can be seen in the growth of “green” investment funds, in the demands for environmental disclosure as a condition of stock exchange listing and in the costs of dealing with environmental damage.<sup>170</sup>

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<sup>165</sup> The 3M company was committed to reducing air emission by 90% at the turn of the last century. For more information, see Gunningham (1994) op cit 264.

<sup>166</sup> The Dow Chemical company is involved with waste reduction. Gunningham (1994) op cit 265.

<sup>167</sup> Gunningham (1994) op cit 264.

<sup>168</sup> Gunningham (1994) op cit 265.

<sup>169</sup> Gunningham (1995) 1 *SAJELP* op cit 74.

<sup>170</sup> Gunningham (1995) 1 *SAJELP* op cit 114.

“Green” institutional investors also avoid companies and industries with poor environmental reputations and/or specialise in investing in environmentally reputable companies. In doing so, specialised environmentally conscious investment funds have emerged. For example in a number of USA jurisdictions, state pension fund managers are required to give preference in their investment decisions to companies that comply with the Valdez (now CERES) Principles. One trustee of New York Employees Retirement System was quoted as saying “We hold the view that when corporations treat the environment badly, they treat their investors badly...”<sup>171</sup>

Environmental performance is thus increasingly regarded as an indicator of business health. The view is that good environmental management reflects good management in general. The extent to which investors are able to effectively discriminate between companies that do and those that do not have commendable environmental practices, will ultimately determine the overall impact of environmentally responsible investment.<sup>172</sup>

Investors who wish to exercise a preference for environmentally conscious investment will demand access to adequate information with regard to a company's performance to enable them to make informed investment decisions. Investors will require environmental audits in obtaining vital details about the activities of specific client companies.<sup>173</sup> Grabosky and Gunningham<sup>174</sup> are of the opinion that governments can facilitate investment by ensuring that there are reliable sources of information about company environmental performances for the market to access. Examples of how a government can assist investors include “community right to know” (CRTK) legislation and corporate environment reporting requirements. According to Gunningham,<sup>175</sup> environmental reporting will have a direct impact on the share price of a company. In Australia, for example, the Australian Stock Exchange now requires listed companies to make a statement in their annual report about how they identify and manage environmental risks to their business.<sup>176</sup>

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<sup>171</sup> Grabosky et al (1998) op cit 114.

<sup>172</sup> Grabosky et al (1998) op cit 114.

<sup>173</sup> Gunningham (1994) op cit 263.

<sup>174</sup> Grabosky et al (1998) op cit 115.

<sup>175</sup> Gunningham (1994) op cit 261.

<sup>176</sup> Grabosky et al (1998) op cit 115.

#### 4.3.2 Financial institutions/lenders

Lenders (bankers) have become aware that the way in which they manage their environmental risk<sup>177</sup> has considerable bearing on the real value of their assets. In addition to their activities as institutional investors, banks and other lending institutions are in a position to exercise considerable influence over their clients' behaviour. In Australia lenders are beginning to impose pressure on their clients to reduce and better manage their environmental risk.<sup>178</sup>

Banks must now be concerned about the environmental risks posed by any assets that they might hold as security for a loan. In the event of foreclosure, banks could end up owning a liability rather than an asset.<sup>179</sup> Lenders will require environmental audits in obtaining vital details about the activities of specific client companies.<sup>180</sup> According to Grabosky and Gunningham<sup>181</sup> it can be predicted that in Australia an environment audit report is likely to become an integral part of a loan application. In the USA, some lenders already have an environmental compliance checklist as part of the loan application.<sup>182</sup>

The major way in which government can foster a "green" lending philosophy among financial institutions is through strong liability legislation where bankers are made liable for environmental damage caused by their investors. A lender can be exposed to liability in a number of ways. For example, a contaminated property held as security may reduce in market value and thereby undermine a financial institution's asset base.<sup>183</sup> Increased lender liability may lead to a reduction in the number of environmentally damaging activities that are financed and, in turn, to industries of an environmentally damaging nature being forced from the market.<sup>184</sup>

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<sup>177</sup> According to Bradsen risk management deals with managing processes that can be used by corporations to avoid or manage environment risks and potential liabilities ((1994) op cit 236).

<sup>178</sup> Gunningham (1994) op cit 262.

<sup>179</sup> Grabosky et al (1998) op cit 115.

<sup>180</sup> Gunningham (1994) op cit 263.

<sup>181</sup> Grabosky et al (1998) op cit 116.

<sup>182</sup> For more information on lenders' liability, see Jeffery, MI "Environmental Liability: A Continuing Concern for Lenders" in Boyle, AE *Environmental Regulation and Economic Growth* (1994). Clarendon Press Oxford 163.

<sup>183</sup> Grabosky et al (1998) op cit 116.

<sup>184</sup> Grabosky et al (1998) op cit 117.

To assist financial institutions in evaluating potential clients, companies can be “eco-rated”. This is an assessment method whereby worldwide, companies would be compared on universally applicable ecological criteria such as environmental impact, ecological profile of products and compliance with environmental laws and guidelines.<sup>185</sup> It is believed that these measures will be much more effective as a “penalty for poor environmental performance” than anything government has been able to achieve.

Although financial institutions may have a considerable influence on their clients, access to finance as an instrument for environmental protection also has its limits. A factor that must be considered by a particular financial institution is that it competes with other lending institutions for business and thus cannot afford to insist upon its clients having higher environmental credentials than those required by other lending institutions. It will lose business if it does.<sup>186</sup>

To conclude: It could not be ascertained<sup>187</sup> if any South African bank has environmental criteria in their policy or included in application documents as part of the approval process for loans to industry or companies. It would be surprising if an environmental performance or eco-audit report is one of the criteria for a loan being approved. This would be a very interesting survey for further study.

#### 4.3.3 Insurance institutions

Not only financial institutions in Australia but also insurers have become aware that the way in which they manage their environmental risk has considerable bearing on the real value of their assets. Insurers are beginning to impose pressure on their clients to reduce and better manage their environmental risk.<sup>188</sup> By requiring higher insurance premiums from poor environmental performers, the insurance market creates an incentive for responsible corporate conduct.<sup>189</sup> This pressure will increase if insurers,

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<sup>185</sup> Gunningham (1994) op cit 265.

<sup>186</sup> Grabosky et al (1998) op cit 118.

<sup>187</sup> Telephonic enquiry to Statistics South Africa and the Reserve Bank revealed that such surveys have not been conducted in South Africa.

<sup>188</sup> Gunningham (1994) op cit 262.

<sup>189</sup> Grabosky et al (1998) op cit 118.

as in the case of lenders, are made liable for environmental damage caused by their policy holders (insurers might have to pay for clean-up operations or compensation).

Governments can foster a regulatory role for insurance by requiring insurance as a condition of authorisation to engage in activities that pose an environmental risk.<sup>190</sup> In Australia, as a result of legislation, insurance companies may require a certificate of audit before offering environmental liability insurance to corporations. Most public liability and industrial special-risk policies provide only very limited cover for, or even exclude entirely, environmental liability claims.<sup>191</sup>

It could not be ascertained<sup>192</sup> if any South African insurance company has included environmental criteria in their policies or application documents as requirement for insuring an industry or company's assets. Such a survey would constitute interesting material for further study.

#### 4.3.4 Government support to commercial third parties

As mentioned above, a government may support commercial third parties by enacting strong lender and insurance liability legislation, which would encourage financial institutions to use external audits<sup>193</sup> as a normal part of doing business. A government may also directly subsidise (or provide for tax incentives for) environmental audits conducted by businesses that would otherwise lack sufficient financial resources to pay for the audits themselves.<sup>194</sup> A government may also give preferential treatment for companies that voluntarily enter an audit scheme, for example by purchasing or tendering from these companies.

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<sup>190</sup> Grabosky et al (1998) op cit 220.

<sup>191</sup> Grabosky et al (1998) op cit 119.

<sup>192</sup> Telephonic enquiry to Statistics South Africa revealed that no such survey had been conducted in South Africa.

<sup>193</sup> Being financially dependent on industry, auditors "do not want to bite the hand that feeds it". There are however, several ways in which the independence of auditors can be reinforced. These include, creating a pool of government accredited auditors which is required to meet high independent standards, by including independent environmental technical experts on audit teams and by instituting a system of peer review between auditors. For other ways to ensure auditors independence, see Grabosky et al (1998) op cit 123, 223.

<sup>194</sup> This approach has been adopted by the Australian government. Grabosky et al (1998) op cit 122-123.

Another way in which a government may support commercial third parties is by encouraging the use of independent environmental consultants to assess and recommend the environmental performance of companies.<sup>195</sup> Environmental consultants vary in terms of the services they provide, which may range from risk assessment to training. Their professional services are claimed to reduce exposure to litigation and criminal penalties and include improved risk management.<sup>196</sup>

#### 4.3.5 Conclusion

From the above discussions it is evident that it is good business to manage environmental risk effectively. This allows the company to benefit from the purchasing power of “green” customers and the government, and to have access to loans and have insurance coverage for company assets. It seems that environmentally friendly policies and their effective implementation may become vital for the survival of a company that is trading with overseas countries.

### 5. VOLUNTARY AGREEMENTS

#### 5.1 General

Voluntary agreements are commonly initiated by government, and may involve government playing the role of co-ordinator and facilitator.<sup>197</sup> These agreements are usually between the government and either landowners (individually or collectively as a community) or the business sector.<sup>198</sup> They may be entered into with or without a legally binding contract.

#### 5.2 Agreements without a legal contract

An agreement without a legal contract provides opportunities for joint activities between landholders and community groups by invoking a sense of responsibility for land conservation. An example of such a voluntary agreement is the Australian

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<sup>195</sup> For more ways how government can encourage the use of environmental consultants, see Grabosky et al (1998) op cit 122-123.

<sup>196</sup> For further benefits and advantages, see Grabosky et al (1998) op cit 121.

<sup>197</sup> Gunningham & Sinclair (1998) op cit 56.

<sup>198</sup> According to Gunningham & Sinclair (1998) op cit 58, voluntarism has the virtue of being non-interventionist and of having a high industry acceptability.

Landcare Program (Landcare).<sup>199</sup> Landcare have helped rural communities to become more involved in natural resource management projects. Programmes with an educational component can facilitate attitudinal changes among land managers towards conservation goals and foster public support for conservation policies.<sup>200</sup>

An extension of community-based “Landcare” educational schemes is voluntary programmes whereby landowners join a specific scheme under which they endeavour to protect specific habitats. These voluntary programmes have been favoured over binding contractual arrangements as a mechanism for conserving biodiversity on private property. Examples of these programmes include “Land for Nature” (Qld) and “Land for Wildlife” (Tasmania).<sup>201</sup>

### 5.3 Agreements with a legal contract

Agreements in terms of a legally binding contract include management agreements and property rights approaches. Management agreements are entered into for a period of time, during which a land user agrees to refrain from certain activities and to undertake other environmentally friendly activities in return for reimbursement. Management agreements are seen as financially attractive, flexible, co-operative, non-intrusive (where voluntary), and easily targeted. In the areas of land and biodiversity conservation, management agreements with the person responsible for managing an area of land will be of particular significance.<sup>202</sup> An example is the conservation agreements under Victoria’s Flora and Fauna Guarantee Act 1988.<sup>203</sup>

A limitation on management agreements is the high administration costs associated with negotiation and monitoring. This type of agreement also requires periodic oversight, auditing, or other forms of supervision on the part of government. As a stand-alone mechanism, management agreements are subject to a serious limitation,

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<sup>199</sup> Another example of a voluntary agreement without a legal contract, is programmes that exist in all Australian States that assist in the voluntary use of land for the protection of wildlife. See Gunningham & Sinclair (1998) op cit 56, 57.

<sup>200</sup> Gunningham & Sinclair (1998) op cit 56, 57.

<sup>201</sup> Richardson, BJ “Incentives for sustainable use of wetlands: Australian experience and ideas for South Africa” (1998) 5 *SAJELP* 228.

<sup>202</sup> Gunningham & Sinclair (1998) op cit 57.

<sup>203</sup> For examples of legislation in other States under which these agreements operate, see Richardson (1998) 5 *SAJELP* 229.

namely: that they need to be periodically renegotiated, and at each re-negotiation the person involved has an opportunity to hold benefits of their work for ransom.<sup>204</sup>

Another way for landowners who wish to enter into legally binding agreements to conserve natural values, is to create clear and enforceable property-rights and obligations for wildlife with commercial value. An incentive will then exist for those holding property-rights on species to maintain them and their habitat to maximise the profits that accrue from selling that right. At the same time, funds will be generated that could be used for further conservation measures. In circumstances such as these, property-rights mechanisms offer a powerful means to encourage people to conserve environmental resources and limit their use to that which is sustainable.<sup>205</sup>

#### 5.4 Co-regulatory instruments

Agreements between government and business are usually co-regulatory in nature. Co-regulatory instruments cover a variety of initiatives where the interactive relationship between the regulator and the regulated is particularly close. The environmental objectives are set by the public authorities, while the methods in achieving that objective are determined by the regulated industry. An example of a co-regulatory instrument is a negotiated agreement.<sup>206</sup>

According to Hanks<sup>207</sup> no such agreements have yet been entered into in South Africa between the business community and either the national or provincial government. Hanks<sup>208</sup> favours a co-regulatory approach to policy-making firstly, because co-regulation may in principle be seen as more conducive to sustainable development in that it ensures active collaboration and co-operation between government and industry, and thus facilitates the effective integration of long-term economic, social

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<sup>204</sup> Gunningham & Sinclair (1998) op cit 59.

<sup>205</sup> Gunningham & Sinclair (1998) op cit 71. For more information on the weaknesses of the free market approach, of which property-rights is an example, see Gunningham (1998) op cit 85-88.

<sup>206</sup> Hanks (1998) 5 *SAJELP* op cit 309 & 320. Hanks (1998) 5 *SAJELP* op cit 327, suggests that there is merit in examining the potential role of negotiated agreements for promoting environmental innovation within industry in developing countries, in the belief that environmental innovation is a necessary requirement for achieving sustainable development more generally. For more detail on the preconditions and guidelines for successful negotiated agreements and the status thereof in South Africa, see Hanks (1998) 5 *SAJELP* op cit 327-335.

<sup>207</sup> Hanks (1998) 5 *SAJELP* op cit 320.

<sup>208</sup> Hanks (1998) 5 *SAJELP* op cit 323 & 324.

and ecological priorities.<sup>209</sup> Secondly, because directive-based regulation on its own is not sufficient to address the longer-term issues associated with sustainable development.

Specific provisions are made in NEMA for the conclusion of “Environmental Management Co-operation Agreements” subject to the fulfilment of certain specified conditions. The introduction of environmental agreements in South Africa will form part of a considered strategy aimed at ensuring the effective attainment of sustainable development. DEAT undertook to formulate a National Environmental Strategy and Action Plans as a means of implementing the policy proposals in the White Paper on Environmental Policy for South Africa. This may be seen as the most appropriate opportunity for the introduction of innovative environmental policy instruments.<sup>210</sup>

According to Hanks<sup>211</sup> DEAT believes that voluntary agreements will not work in South Africa until there is greater capacity for more effective enforcement of existing directive-based regulations. He also is of the opinion that DEATs’ lack of capacity to enforce existing regulations should be an incentive to explore alternative non-regulatory means of promoting environmental responsibility in the business community.

## 5.5 Conclusion

By making landowners and the business sector aware of conservation-worthy areas under their control, voluntary agreements promote an ethic of environmental stewardship. These agreements “allow” for environmental protection to become part of the “community norm”, and as such they may lead to the improved compliance with environmental laws and the avoidance of adversarial relations.<sup>212</sup>

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<sup>209</sup> Hanks (1998) 5 *SAJELP* op cit 353 is of the opinion that by using negotiated agreements, thereby shifting greater responsibility to the business community which has a number of significant resource advantages over government, it is stated that it is more likely that an effective balance between the needs of economic development and the requirements of environmental protection will be achieved, and that the innovation that is necessary for realising ecological sustainability will result.

<sup>210</sup> Hanks (1998) 5 *SAJELP* op cit 345.

<sup>211</sup> Hanks (1998) 5 *SAJELP* op cit 336, 342.

<sup>212</sup> Also see, Gunningham & Sinclair (1998) op cit 59.

However, although voluntary agreements may contribute to the conservation of fauna and flora, their impact as a stand-alone strategy on the overall conservation efforts in South Africa will not be large. Nevertheless, as part of a holistic conservation strategy, voluntary agreements are an essential component to reach specifically private landowners and communities owning land.

## 6. MARKET MECHANISMS

### 6.1 General

According to Jones,<sup>213</sup> the market mechanism is a strategy to conserve fauna from extinction: for example, the rhinoceros. The simple solution of the market mechanism is the decriminalisation of rhino farming<sup>214</sup> and trade in existing and potential rhino products. The authorities should saturate the market, which would then drive down the price of products and this would reduce poaching and even, according to Jones, stimulate poachers to start protecting and even breeding rhino. The authorities should not act ignorantly and naively by burning the products, thereby creating a shortage in the market that would increase prices and poaching. Jones<sup>215</sup> further submits that the market mechanism has many advantages over all other proposals and it has been thoroughly tried and tested. This is demonstrated by the fact that some animals are being slaughtered on a much larger scale than endangered species and yet their numbers keep multiplying. Contrary to this, countries with the most draconian laws against game ownership, slaughtering and trade laws have the most rapidly diminishing numbers.

Bradsen<sup>216</sup> disagrees with Jones's view. He is of the opinion that market mechanisms fail to take the conservation of biodiversity sufficiently into account because the market fails to allocate value adequately to biodiversity within the economic system.

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<sup>213</sup> Jones, G "Black Rhino Poaching" (1996) 3 *SAJELP* 181.

<sup>214</sup> The decriminalisation of rhino trading means that it would be legal, and not a criminal offence, to trade with rhino horns.

<sup>215</sup> Jones (1996) 3 *SAJELP* op cit 181, 182.

<sup>216</sup> Bradsen (1994) op cit 191.

## 6.2 Conclusion

It is submitted that this mechanism, which functions on a “demand and supply” principle, will not lead to the conservation or saving of protected or endangered fauna. Why not? The demand for these animals and their products is so enormous that there is not enough of these animals left in the world to saturate the market. However, it is agreed that burning the products has the opposite result — more animals will be killed for their horns and other products. Furthermore, it is viewed that it would be far more beneficial to conservation, once the animals are killed and their horns seized, if the products are sold by the conservation authorities themselves to supplement much needed funds for conservation projects or to replace killed animals or invest in an active breeding programme for the animals.

## 7. ECONOMIC INSTRUMENTS

### 7.1 General

Economic instruments<sup>217</sup> are designed to achieve environmental goals by influencing the behaviour of landowners, but mainly of industries involved in activities that may cause pollution. The Organization for Economic Cooperation and Development (OECD) defines economic instruments as “instruments that affect costs and benefits of alternative actions open to economic agents, with the effect of influencing behaviour in a way favourable to the environment.”<sup>218</sup> Hanks<sup>219</sup> describes economic instruments as “efforts to encourage beneficial behaviour by altering the prices of

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<sup>217</sup> Examples of such economic instruments are pollution charges, market instruments such as emission trading, subsidies, grants, tax allowances and tax exemptions, tradable pollution permits, environmental bonds and deposit-refund schemes. Fuggle & Rabie (1998) op cit 39-47 & 131; Hugo et al (1997) op cit 186-187; Kidd (1997) op cit 26; Richardson, BJ “Economic Instruments and sustainable management in New Zealand” (1998) *JELaw* 22; Milne, CDA *Handbook of Environmental Law* (1992) Royal Forest and Bird Society of New Zealand Inc Wellington 94. For more detail on these economic instruments, see Raney (1994) 1 *Stell LR* op cit 71-72 and Henderson, PGW “Fiscal Incentives for Environmental Protection — Conceptual Framework” (1995) 1 *SAJELP* 152-165.

<sup>218</sup> Richardson (1998) *JELaw* op cit 22. Economic instruments were also referred to in Agenda 21 (UNCED blueprint for sustainability) and in Principle 16 of the UNCED’s Rio Declaration on Environment and Development. Richardson (1998) *JELaw* op cit 23.

<sup>219</sup> Hanks (1998) 5 *SAJELP* op cit 309. Also see Fuggle & Rabie (1998) op cit 41; Richardson (1998) *JELaw* op cit 24.

resources and of goods and services in the marketplace, so that they more accurately reflect the environmental costs of production and/or consumption".<sup>220</sup>

Economic instruments are seen by some commentators as useful alternatives to the more regulatory type of controls in that individuals or industry are induced to act in a particular way through economic measures, rather than by the threat of sanctions.<sup>221</sup> However, Richardson<sup>222</sup> views economic instruments, not as an "alternative" to regulation, but as a form of regulation and an integral tool for achieving sustainable development.

In theory economic instruments have the ability to *inter alia* reduce the government's enforcement costs as well as the resource user's compliance costs and to give resource users an ongoing incentive to develop better environmental approaches. Since relatively few economic instruments have been implemented in environmental policy, and most of them only recently, there is little experience of how they actually work.<sup>223</sup> According to Richardson<sup>224</sup> the acclaimed advantages of economic instruments include, the provision of environmental protection at a minimum cost and the generation of incentives for ongoing environmental improvement.<sup>225</sup> However, Bradsen<sup>226</sup> is of the view that economic instruments are legally very complex, ineffective and, because they are not self-enforcing, may involve considerable control costs.<sup>227</sup>

The OECD report of 1996 "Making Markets Work for Biological Diversity" has been unable to reach any general conclusion about the effectiveness, efficiency and acceptability of economic instruments.<sup>228</sup> The extent to which economic mechanisms

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<sup>220</sup> In New Zealand an economic instrument has been defined as "one that uses a pricing mechanism to achieve an agreed resource management objective". See Williams (1997) op cit 119.

<sup>221</sup> Kidd (1997) op cit 26. Also see Fuggle & Rabie (1998) op cit 41.

<sup>222</sup> Richardson (1998) *JELaw* op cit 22, 34.

<sup>223</sup> For more examples of strengths, see Gunningham & Sinclair (1998) op cit 81.

<sup>224</sup> Richardson (1998) *JELaw* op cit 24.

<sup>225</sup> For further comments on the advantages and disadvantages of economic instruments, see Hanks (1998) 5 *SAJELP* op cit 308, 316-317.

<sup>226</sup> Bradsen (1994) op cit 192.

<sup>227</sup> Gunningham & Sinclair (1998) op cit 82. For information on other economic instruments, see Gunningham & Sinclair (1998) op cit 71-80; Richardson (1998) 5 *SAJELP* 227-228. Also see comments by Lubbe, DS "Die regsgeleerde en die omgewing — 'n ekonomiese oorsig" (1994) 19 *TRW* 47.

<sup>228</sup> Gunningham & Sinclair (1998) op cit 81.

can make a positive contribution to environmental protection depends on the particular contexts in which they are applied, the threats which they address, their inherent attributes and their particular design and implementation.<sup>229</sup>

The authorities, on behalf of the community, should act to preserve those common resources, such as fauna and flora, traditionally regarded as public property. One of the ways to protect these resources is by using economic instruments to create economic incentives (also known as fiscal incentives).<sup>230</sup> A “fiscal incentive”<sup>231</sup> is an economic instrument with the objectives of raising revenue (“eco-tax”) for environmental purposes and of facilitating environmental protection by influencing economic behaviour.<sup>232</sup>

According to Richardson<sup>233</sup> South Africa has hardly begun to explore the use of economic instruments in the environmental field. However, the emerging interest in economic instruments may provide a way for South Africa to reconcile the pressing demands for economic growth and poverty alleviation with that of environmental protection.

New Zealand is a leading example of “free market” economic reforms. The RMA promotes “sustainable management” as its guiding principle, but allows for economic instruments as a means of implementing environmental policy. The RMA<sup>234</sup> merely provides an opportunity to use economic instruments, but rarely mandates their application.<sup>235</sup> Establishing and implementing economic instruments in terms of the

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<sup>229</sup> Gunningham & Sinclair (1998) op cit 81.

<sup>230</sup> Raney (1994) 1 *Stell LR* op cit 74; Grabosky et al (1998) op cit 108. Rabie, A “Integrated resource management: the New Zealand model and some lessons for South Africa” (1999) 14 *SAPR/PL* 173 points out that the government should give guidance and training to authorities on how to implement mechanisms such as economic instruments.

<sup>231</sup> Examples of fiscal incentives are pollution charges, credits, subsidies, marketable permits, environmental bonds or allowances that reduce or rebate the amount of money owed if the tax payer takes certain defined actions. Henderson (1994) 1 *SAJELP* op cit 49, 51. For the advantages and disadvantages of these fiscal incentives used for pollution control, see Fuggle & Rabie (1998) op cit 42-44.

<sup>232</sup> For further detail on other objectives, see Henderson (1995) 1 *SAJELP* op cit 49, 54-60.

<sup>233</sup> Richardson (1998) 5 *SAJELP* 232.

<sup>234</sup> There are several references in the RMA to economic instruments, for example s (b), s26(h) and s32, s108 (9), s109, s360(1) (c). See Richardson (1998) *JELaw* op cit 27 and Williams (1997) op cit 119. References to economic instruments are also in the New Zealand government’s Environment 2010 Strategy of 1994.

<sup>235</sup> Richardson (1998) *JELaw* op cit 21, 26.

RMA are a means of governmental control over the management of resources. It is a function that will generally be exercised by the central government<sup>236</sup> although it might be exercised by local government,<sup>237</sup> if there is appropriate empowering legislation.

Economic incentives are classified according to their impact on human behaviour as either negative<sup>238</sup> or positive.<sup>239</sup> A negative incentive may be defined as an incentive that, through the application of a fiscal measure, discourages a taxpayer from embarking on or continuing with an act that has unfavourable environmental consequences. Examples of negative incentives applicable to fauna and flora, are environmental taxes (also known as eco-taxes or “green” taxes) and monetary contributions to statutory funds.<sup>240</sup>

A positive incentive may be defined as an incentive that, through the application of a fiscal measure, persuades a taxpayer to adopt a particular act that has favourable environmental consequences. Positive incentives seek to reward rather than to punish and, they therefore, influence economic behaviour and the modification of tax rules facilitating environmental protection. Modification of tax rules takes place by permitting tax exemptions or tax deductions to stimulate the conservation of natural resources (including fauna and flora) or to control environmental pollution.<sup>241</sup> Examples of positive incentives applicable to fauna and flora are tax deductions for relevant scientific research and relevant inventions, designs and patents.<sup>242</sup> These negative and positive economic incentives applicable to the conservation of fauna and flora will now be discussed.

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<sup>236</sup> The Minister for the Environment may consider the use of incentives, levies, charges, taxes or other fiscal measures to achieve the objectives of the Resource Management Act 107 of 1991 (RMA). See Peart, R “A new generation of environmental law. The New Zealand reform and lessons for South Africa” (1996) 3 *SAJELP* 145; Milne (1992) op cit 93.

<sup>237</sup> Local authorities are able to provide incentives and to levy charges to change behaviour that impacts on the environment. See Peart (1996) 3 *SAJELP* op cit 145; Milne (1992) op cit 93.

<sup>238</sup> An anomaly may appear in the use of the words “negative” and “incentive” together. It has been stated that an incentive is not necessarily a positive motivational act. See Henderson (1995) 1 *SAJELP* op cit 67-68; Raney (1994) 1 *Stell LR* op cit 71.

<sup>239</sup> Henderson (1995) 1 *SAJELP* op cit 68; Gunningham & Sinclair (1998) op cit 56.

<sup>240</sup> For examples of other negative incentives, see Henderson, PGW “Fiscal Incentives for Environmental Protection — The way Forward” (1995) 2 *SAJELP* 159-162.

<sup>241</sup> Raney (1994) 1 *Stell LR* op cit 50.

<sup>242</sup> For other examples of positive incentives, see Henderson (1995) 2 *SAJELP* op cit 162-165.

## 7.2 Economic incentives

### 7.2.1 Negative incentives

#### 7.2.1.1 Environment taxes

The main argument justifying the use of environment taxes for the protection of fauna and flora is that industries do not take into account the full costs of the non-renewable resources they use; that is, they do not internalise all the costs of producing a product. Therefore, the costs are not included in the market price of the product. A probable consequence of this is that greater-than-optimal levels of use and consumption of these resources occur. By imposing environment taxes the loss of future use of such non-renewable resources is penalised by being taxed.<sup>243</sup>

#### a) South Africa

There is academic support<sup>244</sup> in South Africa for the implementation of economic incentives. It was stated that income tax law might be used to an extent as a conservation tool, through tax exemptions or allowing deductions that would stimulate the conservation of natural resources or the control of environmental pollution.<sup>245</sup> The principle of implementing some form of incentives was accepted by some departments, *inter alia* the Department of Environmental Affairs. This indicates a move to promote the introduction of economic incentives for environmental protection. The emphasis is, however, on incentives in the form of taxes and not on incentives that seek to change behaviour in other ways.

The Margo Commission reviewed the income tax legislation in 1984 to decide whether to impose a severance tax on the exploitation of non-renewable resources. This tax would be designed to slow down the consumption of scarce resources. The Commission was opposed to severance taxation because, *inter alia*, it would be very complicated to administer.<sup>246</sup>

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<sup>243</sup> Henderson (1994) 1 *SAJELP* op cit 50.

<sup>244</sup> For further detail on these arguments and counter arguments, see Henderson (1994) 1 *SAJELP* op cit 52-53.

<sup>245</sup> Henderson (1995) 1 *SAJELP* op cit 52.

<sup>246</sup> The Commission favoured indirect taxation over direct taxation because, *inter alia* it is easier to administer. The justification for employing indirect taxes is to be found in the "benefit principle" which means that those who receive particular benefits end up paying for them. Thus a factory

The application of economic instruments is almost exclusively used by government as an enforcement tool to control the pollution activities of industries.<sup>247</sup> They are thus not directly relevant to the conservation of fauna and flora and currently play only a minor role in improving the conservation of fauna and flora. There are, however, provisions in the Income Tax Act 58 of 1962 that have green tax implications.<sup>248</sup> These provisions include tax deduction of any expenditure incurred by a farmer with regard to the eradication of noxious plants, the prevention of soil erosion and the planting of trees, shrubs or perennial plants. Individual landowners should be encouraged to conserve fauna and flora on their land. There are various ways in which this might be achieved. These include the elimination of legal obstacles to create economic incentives for the conservation of the natural environment, the development of legal mechanisms to facilitate voluntary conservation,<sup>249</sup> the payment of subsidies, the granting of tax incentives, and the provision of advisory conservation services.<sup>250</sup> There is also tax exemption for any receipts or accruals of any company or association of persons where the sole object of the company is to engage in or promote nature conservation or animal protection activities. Upon termination, the company must donate its assets, after payment of all debts, to a similar organisation.<sup>251</sup>

The international trend<sup>252</sup> appears to be that economic incentives are appropriate measures to achieve environmental goals. As discussed earlier in this chapter, to be

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indirectly pays for the unblemished environment it "uses up". However in 1991 the President's Council reported (in the Report of the Three Committees) that "green" tax is a more efficient way of achieving pollution control than a fine or some other penalty. One method proposed to assist in the monitoring and control of "green" taxes is to require environmental audits to be submitted together with certain taxpayers' annual tax returns for approval by officials from the then Department of Environmental Affairs. For further information, see Raney (1994) 1 *Stell LR* op cit 52, 73.

<sup>247</sup> It is mainly for the control of air, waste and water pollution.

<sup>248</sup> Raney (1994) 1 *Stell LR* op cit 73 is of the opinion that the implementation of green taxes should be seen to be in the national interest.

<sup>249</sup> Voluntary conservation by individual landowners may come about by *inter alia*, unilateral commitments (eg covenants and dedication), incentives and disincentives (eg tax benefits and subsidies) and contracts (eg leases, servitudes and management agreements). See De Klemm & Shine (1993) op cit 239-251 for further detail.

<sup>250</sup> De Klemm & Shine (1993) op cit 239. De Klemm et al are also of the opinion that conservation NGOs need assistance from the state to purchase, preserve and manage land for conservation. Assistance to them may be given by voluntary reserves, national trusts and tax exemption and subsidies. For further information, see De Klemm & Shine (1993) op cit 251-255.

<sup>251</sup> Section 10(1)(cB)(i)(cc). For other examples, see Raney (1994) 1 *Stell LR* op cit 56-70.

<sup>252</sup> As early as 1994, Wensley has indicated that one of the future global trends will be greater focus on economic instruments and environmental economics ("Global Trends: The emergence of international environmental law" in Boer, B & Fowler, R & Gunningham, N *Environmental Outlook* (1994) The Federation Press Sydney 12).

internationally competitive foreign suppliers should take cognisance of foreign consumers to determine if these consumers require the same degree of environmental awareness from their foreign suppliers as they require from their domestic suppliers. Companies wishing to enter the European Community will need to undertake environmental audits of their products to avoid the imposition of “green” tax (environment tax).<sup>253</sup> Environmental audits thus assist in evaluating whether products have been produced in a manner not harmful to the environment.

If companies cause harm to fauna and damage flora in order to produce a product, it should be reflected in an environmental audit. Not only environmental audits should be compulsory, but also the reporting<sup>254</sup> of any environmentally harmful activities in which the company is involved. It is hoped that the probability of such a “negative” report (and the threat of “green” taxes and reduced trading opportunities) might encourage companies to explore alternative ways of doing business. The requirement of environmental audits and the possible imposition of environment taxes may thus influence companies to comply with environmental laws and thus, indirectly, conserve fauna and flora.

There are a number of disadvantages<sup>255</sup> to the implementation of environmental taxes. For example, such taxes would imply that government intervenes in the economy and influences the tax-neutrality requirement.<sup>256</sup>

Although effective control of pollution activities will indirectly contribute to the protection and conservation of fauna and flora, it is time for the authorities to give attention to tax incentives that are specifically applicable to the conservation and

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<sup>253</sup> Henderson (1994) 1 *SAJELP* op cit 52; Raney (1994) 1 *Stell LR* op cit 49.

<sup>254</sup> The King Committee also states that directors should report on *inter alia*, environmental issues concerning their companies. Unfortunately this reporting was not made compulsory and compliance thereof depends on peer pressure. See Armstrong, P “The King Report on Corporate Governance” (1995) *Boardroom* 19, 20.

<sup>255</sup> Henderson (1994) 1 *SAJELP* op cit 52-53. These disadvantages include the problem of regressivity, or the distributional impact across income groups, regional impacts, impacts on the economy, the effect on international competition, and market changes brought by the tax. See Henderson (1995) 2 *SAJELP* op cit 152-157.

<sup>256</sup> The tax-neutrality requirement refers to the fact that a person should not be influenced by the tax system to choose one course of action rather than another solely or predominantly because his tax position is improved by the choice.

rehabilitation of fauna and flora and their habitat. Tax law can be used effectively as a conservation tool.

## b) Australia

In Australia income tax and land tax rules provide significant opportunities for encouraging land-holders to adopt environmentally sound practices. Income tax is collected by the federal government and land taxes are levied by State and Territory governments. Income tax deductions are permitted to primary producers for expenditure on environmental improvements, while taxes may also be levied on environmentally inappropriate activities.<sup>257</sup>

The Federal Income Tax Assessment Act 1997 (Cth) allows deductions from taxable income for gifts of money or property made by individuals to specified non-government environmental groups (s 30-55). However, the effect of the incentive is diminished because to qualify as a tax deduction the donation of property must be made within 12 months after its purchase by the current owner (s 30-15). All losses and expenditures (for example cost of vegetation management)<sup>258</sup> to the extent that they are incurred in gaining or producing the assessable income are an allowable deduction except to the extent that they are of a capital, private or domestic nature.<sup>259</sup>

According to Richardson<sup>260</sup> the capacity of tax law to aid environmental management has not been fully realised in Australia. The tax incentives tend to favour those with larger land holdings and those in a higher income tax group. This means that the value of the incentive is determined by factors unrelated to the desirability of improved nature conservation. The legislation provides no incentive for activities associated with biodiversity conservation.

In Australian States, land taxes may provide a disincentive for nature conservation on

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<sup>257</sup> Richardson (1998) 5 *SAJELP* op cit 225.

<sup>258</sup> In Australia, the Commonwealth has allowed tax deductions for expenditures incurred on environmental impact studies. See Pain, N "Commentary" in Boer, B & Fowler, R & Gunningham, N *Environmental Outlook* (1994) The Federation Press Sydney 175.

<sup>259</sup> For other tax incentives, see Richardson (1998) 5 *SAJELP* op cit 226.

<sup>260</sup> Richardson (1998) 5 *SAJELP* op cit 226.

private property. For example in NSW, land used for primary production may be exempted from land tax in terms of the Land Tax Management Act 1956. This creates a “perverse” incentive<sup>261</sup> as it encourages activities such as vegetation clearing that have negative externalities. In 1984, an amendment to section 10 of the Land Tax Management Act inserted a new exemption from land tax for land that, in accordance with the approval of the Director-General of the NSW National Parks and Wildlife Services, is certified as primarily used for the maintenance of indigenous endangered species. However, this provision has not been utilised because it requires the granting of an “approval” for which the Director-General has no specific power under the National Parks and Wildlife Act 1975 (NSW). Thus, section 10 does not provide an incentive for primary producers to engage in conservation measures as they are already exempt from land tax in terms of the Land Tax Management Act.<sup>262</sup> Richardson<sup>263</sup> points out that if incentive measures to landowners are to achieve their full potential in Australia, considerable work is needed to remove perverse incentives in the land tax systems and inefficiencies in the income tax rules.

### c) New Zealand

In New Zealand increasing attention is being given to the economic analysis of environmental problems and governments are being urged to find ways to utilise market forces and economic instruments to solve environmental problems.<sup>264</sup>

Economic instruments that are attracting some prominence in New Zealand are those that relate to air pollution; for example, a carbon tax to control the burning of fossil fuels.<sup>265</sup> There is also provision in the RMA for financial contributions as conditions for resource consents. “Financial contributions” are defined as including cash, land, services and works, including the “protection, planting or replanting of any tree or other vegetation” or the “protection, restoration or enhancement of any natural or

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<sup>261</sup> Another example of a perverse incentive is to encourage biodiversity protection but at the same time subsidise deforestation. Thus subsidising environmental harmful activities. The value of the former will then be lost/minimised because of the existence of the perverse incentive to deforest.

<sup>262</sup> Richardson (1998) 5 *SAJELP* op cit 227.

<sup>263</sup> Richardson (1998) 5 *SAJELP* op cit 235.

<sup>264</sup> Williams (1997) op cit 15.

<sup>265</sup> Williams (1997) op cit 119.

physical resource”.<sup>266</sup>

#### 7.2.2.2 Statutory funds

The payment of money into statutory funds may also be used to conserve fauna and flora. In this case a trust fund system imposes a tax or fee on a particular activity in order to create a fund dedicated to an environmental undertaking. According to Henderson<sup>267</sup> there are a number of statutory funds operating in South Africa, none of which relate to the environment and, therefore, calls have been made for statutory funds to be established to promote environmental protection.

#### 7.2.2 Positive incentives

An example of a positive incentive is to allow tax deductions on expenditure incurred for the purpose of relevant scientific research, for example with regard to artificial insemination of wild animals, behavioural studies of wild animals, veld management strategies and the like.

Another positive incentive that may be applied to the conservation of fauna and flora is to encourage the development of patents, inventions and designs that could improve operations in the environmental field by the granting of tax deductions.<sup>268</sup> Examples of such “developments” are the designing of protected areas and botanical gardens and the patenting of tracking equipment for wildlife.

### 7.3 Conclusion

In all three countries under discussion, economic instruments are not used extensively in the environmental field and when they are it is mainly for pollution control. However, tax laws have the potential to encourage compliance with environmental laws and conservation of fauna and flora through deductions and incentives.

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<sup>266</sup> Peart (1996) 3 *SAJELP* op cit 145; Williams (1997) op cit 119.

<sup>267</sup> Henderson (1995) 2 *SAJELP* op cit 158.

<sup>268</sup> Henderson is of the view that in South Africa such tax deductions may be granted upon the certification by the Minister of Environmental Affairs and Tourism and the Council for Scientific and Industrial Research that the developments concerned (patents, inventions and designs) constitute an improvement in the environmental field ((1995) 2 *SAJELP* op cit 156).

Regarding imposing environmental tax, it seems that the administration costs of such taxes is too high and overshadows the potential revenue that might be generated for non-compliance with environmental laws. The role of economic instruments, especially environmental taxes, should be investigated to determine their potential to encourage specifically landowners to conserve fauna and flora on their land.

It is noteworthy that despite the alternative and/or additional strategies described above, a survey of 200 South African companies found that legislation and the associated threat of criminal sanctions remain the principal pressure for greater environmental responsibility.<sup>269</sup>

## 8. COMBINATIONS OF STRATEGIES TO PROMOTE THE CONSERVATION OF FAUNA AND FLORA

Command and control regulation has been described as adversarial, inflexible, excessively costly and centralised. Despite this criticism, direct regulation through criminal sanctions has generally achieved some significant victories in stopping, or at least slowing down, some forms of environmental degradation.<sup>270</sup> However, many of the gains have been achieved at an unnecessarily high social and economic cost, causing direct regulation (command and control) to be ineffective. It has also been stated that command and control regulation is not well equipped to deal with complex and systemic environmental problems, such as the loss of biological diversity. However, in practice, this reliance on command and control regulation has so far been substantially unshaken by various “assaults” from other enforcement mechanisms. According to Gunningham,<sup>271</sup> there is little reason to believe that environmental outcomes would be any better if the criminal sanction was replaced by other non-adversarial approaches as have been discussed in this chapter. The limitations of these approaches are also severe.

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<sup>269</sup> Hanks (1998) 5 *SAJELP* op cit 337-338. Of the companies surveyed, 76% believe that the environment is already a strategic issue, with 36% indicating that environmental issues are considered “very strategic”. In addition, 84% of the companies maintain that environmental issues are likely to have an increasingly significant impact on their company activities over the next five years. These results and the high level of company participation in the myriad of time-consuming environmental processes during the last three years, contradict the suggestion that in the absence of pressure there remains little incentive for companies to improve their environmental performance.

<sup>270</sup> For example, in Australia water and air quality have been improved in many jurisdictions as a result of command and-control regulation. See Gunningham (1998) op cit 6 & 7.

<sup>271</sup> Gunningham (1998) op cit 9.

Thus, on the one hand, the drive towards deregulation has lost some momentum, having proved to be a less-than-adequate solution to many areas of social (as opposed to economic) concern and because there remains considerable public support for direct government intervention regarding the environment. On the other hand, traditional regulatory approaches have reached their limits, while fiscal constraints and government overload<sup>272</sup> threaten efforts to expand this regulation.

Gunningham<sup>273</sup> is of the view that an approach in terms of either regulation or deregulation inhibits attempts to find solutions that contain the best of both approaches. The challenge for the regulatory strategy is to find ways to overcome the inefficiencies of traditional regulation on the one hand and the pitfalls of deregulation on the other; in other words, devising better ways of achieving environmental protection at an acceptable economic and social cost. It will still involve government intervention but selectively and in combination with a range of market and non-market solutions. According to Gunningham,<sup>274</sup> good regulation means invoking different strategies, not only the criminal sanction.

An optimal regulatory mix must be identified.<sup>275</sup> Merely listing the different mechanisms available is not enough. It is crucial to identify how and in what circumstances the different instruments should be used. The comparative advantage of different instruments in different institutional, economic and social contexts should be identified, as well as a combination of regulatory mechanisms which will produce the most cost-effective outcomes.<sup>276</sup>

It is for this reason that the Environmental Protection Agencies in Australia tend to use a mixture of reactive (criminal) and proactive (for example conciliation, negotiation and education<sup>277</sup>) strategies to secure compliance with environmental laws. In New South Wales prosecution, conciliation and education are all regarded as

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<sup>272</sup> Government overload refers to the situation where demand for policy and services exceeds the capacity of the government to respond.

<sup>273</sup> Gunningham (1998) op cit 9, 10.

<sup>274</sup> Gunningham (1994) op cit 273.

<sup>275</sup> For comments on how to achieve (design) an optimal regulatory framework, see Gunningham (1994) op cit 277-278.

<sup>276</sup> Gunningham (1994) op cit 276.

<sup>277</sup> Norberry (1993) op cit 53, 54, 88. These "alternative" enforcement mechanisms have been discussed earlier on.

part of the necessary mix of strategies for compliance with environmental legislation. In Queensland negotiation and education are viewed as more effective than prosecution. The latter approach will be used only when it is obvious that a person was causing a significant environmental problem. In Western Australia prosecution is regarded as a poor measure of performance because "...if the Environmental Protection Authority has to prosecute, then it has failed to prevent pollution". Prosecution should be available when education, co-operation and management approaches fail and penalties should be consistent with penalties in other jurisdictions.<sup>278</sup> Thus most States use a mixture of strategies and view conciliation and education as very important in enforcing environmental legislation.<sup>279</sup>

Because the combination of strategies of EPAs from one State to another may differ, the nature and level of enforcement of environmental laws may also differ from State to State.<sup>280</sup>

In an attempt to achieve flexible, responsive and cost-effective regulation applicable to pollution control, Braithwaite proposes a mix of different regulatory strategies forming an enforcement pyramid. The pyramid is divided into levels with the severest penalty, licence withdrawal, at the top. The other levels from the bottom upwards are, self-regulation, incentives, civil penalties, mandatory audit, criminal penalties and licence suspension.<sup>281</sup>

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<sup>278</sup> Norberry (1993) op cit 14, 95.

<sup>279</sup> Norberry (1993) op cit 91-95.

<sup>280</sup> A general survey (1984-85) of the enforcement strategies pursued by Australian environmental agencies specialising primarily in pollution control and waste disposal, found that 80% viewed education and persuasion as more important functions than law enforcement. According to Farrier enforcement tools were important as "bargaining chips" and the threat of prosecution or licence suspension was "generally viewed as an adversarial breakdown indicative of failure by the regulatory agency". He is also of the opinion that the obligation to provide the community with access to information constitutes a far greater deterrent to aberrant behaviour than the threat of criminal sanctions ("In search of Real Criminal Law" in Bonyhady, T (ed) *Environmental Protection and Legal Change* (1992) The Federation Press Sydney 89, 124).

<sup>281</sup> See Gunningham (1994) op cit 273. Regulators start at the bottom of the pyramid (self-regulation) assuming that business is willing to comply voluntarily. However, they also make provision for circumstances where this assumption is incorrect, by being prepared to escalate up the enforcement pyramid (levels of pyramid) to increasingly deterrence-orientated strategies. The administration imposes all levels except for one or two levels that may be imposed by the Environment Court. Australia has few examples of an innovative and flexible regulatory strategy. However, the State of Victoria has one, the accredited licencing scheme (EPA 1993). The latter is also applicable to pollution control and will not be discussed. See Gunningham (1994) op cit 275-276 for further detail.

The advantage of such a pyramid of enforcement strategies is that it allows for uniformity with regard to enforcement, offers certainty to offenders regarding penalties, eliminates subjectivity (discretion) when imposing penalties as well as alleviates work pressure on the courts. The latter advantage follows from the fact that the public administration may impose most of these regulatory levels.

It is submitted that a regulatory pyramid might possibly be adapted for the enforcement of legislation in South Africa and made applicable specifically to the conservation of fauna and flora. Furthermore, the hierarchy of enforcement strategies (pyramid) applicable to individuals (from bottom to top) would be as follows: warning; informing/educating; criminal sanction (fine); suspension of licence (if applicable) plus a fine; licence withdrawal (if applicable) plus a fine; community service plus a fine and finally imprisonment. The pyramid applicable to businesses in South Africa (from bottom to top) might be as follows: self-regulation, incentives, alternative dispute resolutions, criminal penalty (heavy fine), suspension of licence and withdrawal of licence. It would, however, be essential for the determination of a penalty's most effective position on the pyramid that criteria be developed to determine the severity of the penalty.

## 9. CONCLUSION

### 9.1 General

As discussed in chapter 3, there is general dissatisfaction with the effectiveness of criminal sanctions in all three countries under discussion. However, it also seems that the non-judicial or so-called “alternative” or “additional” strategies available to improve compliance with environmental laws have not decreased the reliance of government or third parties on criminal sanctions as a preferred method of enforcement. Except for mediation and arbitration, the strategies discussed in chapter 4 are really not “alternatives” to the law *per se* or criminal law, but rather proactive ways to indirectly improve or encourage compliance with relevant environmental laws. These strategies are thus promoting conservation of fauna and flora by avoiding the necessity of criminal sanctions (or any other punitive sanction). However, as stand-alone strategies, these additional strategies have their own limitations and do not pose a threat to replace the law or criminal sanctions as enforcement mechanisms.

## 9.2 ADR as alternative mechanism

Mediation and arbitration could serve as effective alternatives to litigation and are mainly applicable to disputes where the industry, business or interested third parties are involved. These mechanisms have distinct advantages over the traditional adversarial responses to environmental disputes. However, they have limitations in that their effectiveness depend on certain conditions. For example, the parties involved should be in an equal bargaining position, and transparent and reasonable in their behaviour. Furthermore, although the possibility is there, there is not enough evidence that ADR strategies are more effective, less time consuming and cheaper than litigation. Thus as a stand-alone alternative, they are not necessarily suitable as a replacement for the traditional regulatory strategies. However, mediation may be well suited as a first option to resolve environmental disputes between parties or, in the pre-hearing stage of litigation, to identify and limit the issues. The threat of criminal sanctions is always present if consensus-based approaches, such as mediation, fail.

In South Africa (through NEMA), New Zealand (through RMA) and Australia mediation is being promoted as a mechanism to explore before the parties resort to the court. Mediation was already being promoted in Australia in 1979 when the Land and Environment Court Act 1979 (s61B) introduced such a process. South Africa is just beginning to explore such a strategy in environmental disputes. The fact that NEMA promotes mediation should lead to more disputes being submitted to mediation before litigation is resorted to.

## 9.3 Environmental education

Technology, industry and development do not mandate environmentally destructive activities. People have a choice to behave in an environmentally friendly way or not.<sup>282</sup> Therefore, environmental education is essential to sensitise the public on environmental issues. However, it seems as if the contribution of environmental education as a strategy to promote compliance with environmental laws is

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<sup>282</sup> Mossop, D "Commentary" in Boer, B & Fowler, R & Gunningham, N (ed) *Environmental Outlook* (1994) The Federation Press Sydney 252.

underestimated and neglected in South Africa. It is submitted that public awareness can play a vital role in the successful conservation of fauna and flora. Educating the public in general will lead to an increased awareness of environmental issues and, in turn, to more and active participation in environment-related decisions and, most probably, an increase in the membership of environmental interest groups or organisations. It is apparent that the South African public is not as informed and aware of environmental matters as the Australian and New Zealand public.

However, the biggest challenge for the South African government is to inform and educate previously disadvantaged communities living in the rural areas. Not only must these communities become more aware of environmental matters, but their attitude towards the environment must change. These communities live mostly on and off the land, and it is vital for the conservation of fauna and flora that their perception of nature conservation in particular be changed. These communities regard the proclamation of protected areas as a discriminatory and racist way to justify their forceful removal. Being regarded as less important than fauna and flora is also experienced as an insult. It is thus essential for the conservation of fauna and flora that community perceptions and behaviour towards nature conservation change in order to prevent harmful activities and practices.

The Australian and New Zealand public is much more aware of environmental issues than their South African counterparts. It is not clear from the literature why this is so. It is probably as a result of a combination of factors. One of these factors is that both Australia and New Zealand have adequate funds available for purposes of environmental education, awareness programmes and projects. Furthermore, it seems as if environmental interest groups and “commercial” third parties are much more active in these two countries and succeed in making the public aware of environmental issues. The public in Australia<sup>283</sup> and New Zealand also regard damage to the environment as a punishable crime. This might be a reason why the Environment Court in these countries is prepared to impose heavier fines and even imprisonment on transgressors of environmental laws. Furthermore, the fact that there

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<sup>283</sup> Opinion polls confirm that, in the long term, Australians believe that the environment is the single most important issue they face. See Gunningham (1995) 1 *SAJELP* op cit 71.

is an Environment Court that is specifically instituted for environmental issues helps to highlight these issues and thus draw public attention to them.

#### 9.4 Environmental NGOs and other third parties

Environmental interest groups play an important role in informing the public and raising awareness of environmental issues; also bringing their attention to environmental harm done or planned by the government, industry and business. South Africa needs active environmental interest groups to bring the public's attention to environmentally harmful activities and to rally their support in campaigns to protect the environment. It is not clear why there are so few environmental interest groups in South Africa and why they are so seldom involved in campaigns to protect the environment in general, and fauna and flora in particular.

Commercial third parties can play a vital role in forcing industry to comply with relevant legislation. The powers of these third parties are underestimated and under-utilised. It is therefore suggested that environmental interest groups put pressure on these commercial third parties, specifically in South Africa, to use their untapped financial power to play their part in promoting nature conservation.

#### 9.5 Voluntary agreements

The implementation of voluntary agreements constitutes an ideal way to muster the co-operation of landowners in the conservation of fauna and flora. Although it seems that currently these agreements only make a small contribution to the conservation of fauna and flora, the potential of such agreements, especially among rural communities in South Africa, should be explored.

#### 9.6 Economic and market instruments

Economic instruments are developed and used mainly to force industry and business to comply with environmental laws. However, environmental taxes and subsidies can

also be used effectively to get the co-operation of individual landowners to assist in the conservation of fauna and flora.

With regard to market mechanisms as compliance strategy, there seems to be no agreement on their effectiveness. It is doubtful if these will indeed offer a solution to save any fauna species. The cost in animal life might also be too high to “saturate” the market as a means to get poachers to start “protecting their trade”. It is highly unlikely that poachers will start protecting a specific species. Furthermore, the question to be answered is “how many killed animals will saturate the market”?

## 9.7 Conclusion

Alternative/additional strategies to enforce, or improve compliance with environmental laws have the potential to collectively improve the conservation of fauna and flora in South Africa. However, criminal sanctions should always be available as deterrent — after all, it is still the only way through which fines and imprisonment can be imposed and enforced.

## **CHAPTER 5**

### **CONCLUSIONS AND RECOMMENDATIONS**

#### **INTRODUCTION**

Conclusions and recommendations were made in each of the previous chapters. The objective of this chapter is to integrate and evaluate these conclusions and recommendations to determine how and to what extent they may contribute to better enforcement of and compliance with environmental laws in South Africa. It is submitted that effective enforcement and encouragement to comply with environmental laws should lead to the successful conservation of native fauna and flora and, ultimately, sustainable development.

The discussion in this chapter will be carried out under the following headings: biodiversity, integrated environmental management, enforcement of environmental legislation and other strategies of compliance. The reason for choosing these headings is because biodiversity (comprising fauna and flora) and enforcement of, or compliance with, environmental laws are the main themes of this study. However, these themes all form part of a holistic approach to the management of environmental matters (including nature conservation) in South Africa, hence, the heading: “integrated environmental management”. Under “biodiversity” aspects that are important to the conservation of fauna and flora (as components of the natural environment), which are also vital to human survival, will be discussed. This is followed by a discussion of integrated environmental management in South Africa, which embraces co-operative governance and the quest for sustainable development. The third section highlights enforcement mechanisms used in South Africa, especially criminal sanctions, and their effectiveness in solving environmental disputes. Shortcomings of criminal sanctions and enforcement in general will be discussed, as well as possible ways to address them. Strategies other than criminal sanctions to encourage compliance with environmental legislation is the topic of the last section of this chapter.

## 1. BIODIVERSITY

Fauna and flora do not exist in isolation but form part of the natural environment and are essential components of complex ecosystems. Thus the survival of a particular plant or animal species and the variation of species (diversity) depend on the effective interaction of all the components of an ecosystem. Unfortunately, the balanced interaction between ecological components is destroyed and/or interfered with by the irresponsible behaviour and actions of human beings. The devastating effects of these actions on the environment (including fauna and flora) have been published in numerous newspapers and reports<sup>1</sup> prepared for the World Summit on Sustainable Development to be held in Johannesburg at the end of August 2002. Some of the alarming information and statistics regarding the state of the Earth include:

- ecosystems worldwide have decreased by one third during the last three decades while the ecological pressure has increased by fifty percent;<sup>2</sup>
- 45% of South Africa's forests, 62% of the grassland and 90% of the wetlands have decreased;<sup>3</sup>
- 10% of the approximately 24 000 plant species in South Africa are endangered while 69 species are extinct;<sup>4</sup>
- the black rhino population in Africa has dropped from around 65 000 in 1970 to just more than 3000, while the number of African elephants has fallen from 1,2 million in 1980 to just over half a million;<sup>5</sup>
- the global Ecological Footprint<sup>6</sup> has grown from about 70% of the planet's biological capacity in 1961 to about 120% in 1999. While the earth's capacity is 2,4 hectare per person, South Africans use 4 hectare per person, Australians 7,8 hector per person and New Zealanders 8,8 hectare per person to sustain their life styles.<sup>7</sup>

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<sup>1</sup> The most interesting report is *Our Living Planet 2002* published by the World Wide Fund for Nature.

<sup>2</sup> Bonthuys, J "Die onmoontlike eise wat die mens aan sy omgewing stel" *Beeld* of 17 July 2002.

<sup>3</sup> Zwecker, W "Suid-Afrika oorskry biodiversiteit-vermoë, drakrag, lui 2de verslag" *Beeld* of 18 July 2002.

<sup>4</sup> Zwecker *Beeld* of 18 July 2002.

<sup>5</sup> Donaldson, A "Time running out for Earth" *Sunday Times* of 14 July 2002.

<sup>6</sup> Ecological footprint refers to a measure of the consumption of renewable natural resources by humans. Humankind's demands are currently 20% higher than the capacity of the earth. See Donaldson *Sunday Times* of 14 July 2002; Bonthuys *Beeld* of 17 July 2002.

<sup>7</sup> Bonthuys *Beeld* of 17 July 2002.

Future projections based on likely scenarios of population growth, economic development and technological change show that humanity's footprint will grow from 180% to 220% of the Earth's biological capacity by the year 2050. This means that if humankind continues to exploit the world's natural resources at its present rate, it will have to colonise two planets in outer space within the next fifty years to survive.<sup>8</sup>

It is thus evident from the above statistics that a survival crisis for humans is looming and that it is vitally important that humans not only use resources such as water and energy responsibly, but also conserve fauna and flora to ensure the functioning of living healthy ecosystems. Fauna and flora species are crucial to humankind as food sources, for their medicinal properties, for research and educational purposes and for their positive psychological effect on humans and other reasons.

Fortunately the government has realised that the richness in South African's biodiversity should be conserved as a national asset and that nature conservation is vital to the survival of humankind. It has responded to this realisation by including an environmental right as a fundamental human right in the Constitution and by promulgating new environmental legislation such as the National Environmental Management Act 107 of 1998 (NEMA). The government has also declared numerous protected areas in which native fauna and flora enjoy varying degrees of protection depending on their "conservation status". However, the pressure of a growing population on natural resources, and concomitant social responsibilities, makes nature conservation a challenging exercise owing to insufficient funds being available to allow relevant provincial departments to declare more protected areas and effectively enforce relevant legislation. However, the modern day challenge lies in achieving the ultimate goal of sustainable development. This concept describes a relationship between humankind and nature which attempts to create harmony (balance) between economic development and environmental conservation. This relationship involves a stewardship position for humankind, implying that the planet is being held in trust for future generations. South Africa has accepted sustainable development as part of the

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<sup>8</sup> Donaldson *Sunday Times* of 14 July 2002.

Constitution and as a basic principle of integrated environmental management. South Africa is also committed to fulfil its obligations in terms of Agenda 21.<sup>9</sup>

Consequently, the public can no longer afford to remain “neutral” and leave environmental issues and concerns to the government and researchers to solve. It is time to take up our stewardship role and participate actively in decision-making processes involving the environment and nature conservation. In this regard the present generation also has a duty as trustee of the environment to ensure that future generations will be in a position to enjoy the beauty and benefits of nature.<sup>10</sup> Stewardship is an integral principle of sustainable development and not only an obligation of governments alone, but of all human beings. The balance between nature conservation and economic development can only be achieved through a system of integrated environmental management.

## 2. INTEGRATED ENVIRONMENTAL MANAGEMENT

### 2.1 Co-operative governance

Attempts to establish an integrated environmental management system in South Africa are reflected in the Constitution, and further supported by NEMA (ss23, 24). Achieving integrated environmental management is essential to the successful conservation of fauna and flora in South Africa and to this effect the Constitution has designated environment (and nature conservation) as functional areas of both the national and provincial spheres of government. The consequence of this is that both the legislative and administrative responsibilities regarding environmental matters are shared in a relationship of co-operative governance, as provided for in the Constitution (s40) and NEMA (s11). Co-operative government within government spheres is therefore a prerequisite for successful management of environmental matters and for achieving sustainable development. NEMA also facilitates co-operation by providing for the compilation of environmental implementation plans and management plans by the relevant national and provincial spheres and for these

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<sup>9</sup> Agenda 21 is an action plan and blueprint for sustainable development adopted at the United Nations Conference of Environment and Development in 1992 and which forms part of NEMA.

<sup>10</sup> It is most disturbing that as a result of the drought and food shortage in some African countries, hundreds of fauna (for example baboons and gorillas) are killed to be sold as “bushmeat”.

plans to be submitted to the Committee for Environmental Coordination to scrutinise and make recommendations regarding the adoption and implementation of them (ss11-14).

Sections 146-150 of the Constitution also address possible conflict that may arise between national and provincial legislation falling within a shared functional area. For example, national legislation will prevail over provincial legislation if such national legislation is necessary for the protection of the environment (s146 (2)(c)(vi)). The implication of this section is that although legislative responsibility regarding the environment is shared by the national and provincial spheres and co-operative governance is promoted, the national sphere is actually in a stronger “bargaining” position. However, there is an obligation on “stronger” spheres to strengthen traditionally “weaker” partners so that they can fulfil their obligations in terms of co-operative government and intergovernmental relationships.<sup>11</sup>

Section 146(2)(c)(vi) implies that the national sphere has a “duty” or responsibility to promulgate legislation to protect the environment (including fauna and flora) if it seems necessary to do so.<sup>12</sup> Furthermore, the section also implies that the Department of Environmental Affairs and Tourism (DEAT), in fulfilling its “environment” portfolio, has no excuse to take the leading role in protecting and conserving fauna and flora. It appears as if DEAT is not as strong a “leader” in environmental matters as it should be. A possible reason for this might be because this department also has “tourism” as a portfolio, which may in some cases be in conflict (or in competition) with conservation of the environment. It is suggested that in South Africa, as in Australia and New Zealand, there should be a national department responsible only for environmental matters.

The situation of shared portfolios repeats itself in the provincial government where nature conservation is shared with other portfolios such as agriculture and tourism. This seems to negatively influence the effective management of environmental

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<sup>11</sup> See s41(1)(h) of the Constitution where it is stated that spheres should *inter alia* assist and support one another. Also see s 154 (1) of the Constitution which provides that national and provincial governments should support and strengthen the capacity of municipalities to *inter alia* perform their functions.

<sup>12</sup> Also see s146 (4) in this regard.

matters in the relevant province. It is suggested that, as in the Australian States, Environmental Protection Agencies (EPA) be established in every province with the sole responsibility of protecting the environment and conserving fauna and flora. The EPA should be an independent government (provincial) body that administers, regulates, controls and enforces environmental laws. It would contribute significantly to the conservation of fauna and flora in South Africa if the allocation of human resources and available funds were focused in one agency and not shared with other portfolios as is currently the case.

Whatever the reason may be, it seems as if the co-operation between the national and provincial spheres regarding environmental matters is not yet functioning as effectively as was envisaged. If this situation continues, it means that the sharing of environmental matters might actually result in further fragmentation, reducing the likelihood of success in the conservation of fauna and flora.

In Australia, the legislative and administrative powers regarding the environment are also shared between the Federal and State governments. Yet it seems as if they manage this situation well by facilitating intergovernmental co-operation through initiatives such as the Intergovernmental Agreement on the Environment (IGAE). The IGAE defines the roles and responsibilities of all levels of government. With the drawing up of the IGAE, Commonwealth, State and Territory governments agreed to integrate environmental considerations into government decision-making at all levels and pursue the principles of ecologically sustainable development. This co-operative approach is aimed, *inter alia*, at reducing disputes between Federal and State governments on environmental issues; establishing certainty about procedures and functions; improving consistency at all levels of government; avoiding duplications of process where more than one level of government is involved; and avoiding delays in processes.

With regard to co-operative governance involving environmental matters it should be worthwhile to examine the initiatives employed by Australia to facilitate co-operation between the Federal and State governments. These initiatives might assist the relevant South African departments in their quest for effective co-operative governance in environmental matters.

## 2.2 Environmental laws

Integrated environmental management takes place within a legal framework, which consists primarily of legislation providing the norms, principles, procedures and mechanisms for enforcement of environmental laws.

Entrenchment of an environmental right (s24) (and supporting rights) in the Bill of Rights of the Constitution is the most significant step towards the protection of the environment in general, including the protection of fauna and flora.

The most important legislation regarding the conservation of fauna and flora is NEMA, the Environment Conservation Act 73 of 1989, the National Parks Act 57 of 1976 and various provincial Acts and ordinances. Provisions in NEMA have increased promotion for the conservation of fauna and flora significantly. NEMA, *inter alia*, gives effect to relevant provisions in the Constitution, expands *locus standi* to rights not included in the Bill of Rights, facilitates co-operative governance between the spheres of government and provides for the imposition of criminal sanctions. NEMA repealed most of the provisions of the Environment Conservation Act of 1989. Therefore, and of relevance to this study, the latter Act provides for the declaration of protected areas such as protected natural environments (s16) and special nature reserves (s18), as well as the imposition of criminal sanctions should there be contravention of its provisions. The National Parks Act of 1976 provides for the declaration of national parks and the imposition of criminal penalties should anyone harm fauna or damage flora that exist in the park.

The provincial Acts and ordinances regulate the “utilisation” (by the public) of native fauna and flora in protected areas through a licence or permit system and provide for enforcement should any of the provisions be contravened. The effective enforcement of all the environmental laws is necessary to successfully conserve fauna and flora in South Africa.

### 3. ENFORCEMENT OF ENVIRONMENTAL LEGISLATION

Despite excellent environmental laws in South Africa, more native fauna and flora species are added to the list of endangered species annually. Many commentators have argued that the poor success rate of conservation relates to the ineffective enforcement of the relevant laws. Additionally, the restrictive *locus standi* requirements of the common law previously created an obstacle for individuals and environmental NGOs to approach a court of law to protect the environment. These two aspects will now be discussed briefly.

#### 3.1 *Locus standi*

*Locus standi* or “standing” refers to whether a person who approaches the court is legally permitted to present a matter to the court for adjudication. The common law rules of *locus standi* required the applicant to have a sufficient, personal and direct interest in the matter and disqualified applicants from litigating in the public interest, thereby denying a person standing to protect the environment as a matter of public interest. South African law has traditionally followed the common law rules, which have, over a long time, had a serious impact on environmental protection. Fortunately, the Constitution (s38) has altered the *locus standi* position substantially by liberalising it with regard to rights contained in the Bill of Rights. The post-1994 position is thus that any person, whether acting in his or her own interest or in the public interest, who can invoke the environmental right in the Constitution will have *locus standi* irrespective of whether that person or organisation is adversely affected by the alleged infringement of rights.

Furthermore, section 32 of NEMA reinforces and expands the constitutional position regarding *locus standi* by extending it to a breach (or threatened breach) of any provision of NEMA or any other statutory provision concerned with the protection of the environment or the use of natural resources. Furthermore, section 32(1)(e) also permits any person or group to approach the court in the interest of the environment. The importance of section 32 is that an applicant will also have *locus standi* regarding environmental issues that are *not* covered in the Bill of Rights. The liberalisation of the *locus standi* requirement by the Constitution, coupled with its extension by

NEMA, considerably increases the opportunities for public interest litigation in the environmental sphere. Thus, previous problems encountered with *locus standi* requirements should not pose an obstacle to the enforcement of environmental laws anymore.

### 3.2 Criminal sanctions

Most criticisms regarding enforcement were directed at the inappropriateness of criminal sanctions in solving environmental disputes. Shortcomings that indirectly affected criminal sanctions, such as the restrictive *locus standi* requirements, have been addressed by the Constitution (s32). However, it is argued that the shortage of human resources, lack of expertise and “inadequacy” of criminal penalties (fines and imprisonment) may still have an impact on the effectiveness of criminal sanctions in deterring environmental crime. These obstacles relating to human resources and inadequacy of penalties will now be discussed.

#### 3.2.1 Human resources

The shortage of human resources may be ascribed to the consequence of transformation and equity policies of the South African government. Although the lack of expertise is linked to a shortage in human resources, it is more directly ascribed to insufficient funds available for training purposes. This lack of funds, due to the huge social demands on the government’s budget, has had a negative impact on the effective enforcement of environmental laws. It is submitted that insufficient funds to address key components (such as human resources) of enforcement is a major obstacle in making South Africa one of the leading nature conservation countries in the world.

There are several ways to address the problem referred to above. Firstly, a concerted effort should be made to raise funds to create opportunities for employment and training. Although the “big five” attract thousands of tourists annually, not enough is being done by national, provincial and local government to raise funds for the conservation of wildlife in general. More appeals should be made to the public to voluntarily donate or contribute funds for nature conservation and the government has

to play an important supportive role for example, by allowing a tax reduction for any amount of money donated in this manner. This is successfully done in Australia where even one dollar donated to an environmental cause is deductible from income tax. Funds for conservation purposes could also be raised by involving schools in conservation projects sponsored by industry and businesses. A conservation trust fund earmarked for the conservation of fauna and flora should be established, and all fines imposed for environmental offences involving fauna or flora should be paid into this fund.

Secondly, as a long-term solution, prospective law students should be encouraged to specialise in environmental law to address the demand for experts in this field and related fields. However, formal education usually takes years to complete and at great costs and, unfortunately, endangered fauna and flora cannot “afford” such time delays to secure their protection and conservation. It is thus essential that short-term solutions be found as well.

Government should form alliances with environmental NGOs and share the responsibility for human and financial resources when embarking upon conservation projects. The option of compulsory “community” service for post-graduate students in nature conservation and law studies, especially those specialising in environmental law, should be investigated. This would temporarily ease the human resource problem with little financial cost to the government; at the same time it would provide valuable practical experience and exposure to such graduates.

The shortage of human resources may also be addressed in other innovative ways that do not necessarily place heavy demands on the budget. These ways include the placement of tertiary students in botanical gardens and wildlife parks (including any park or declared protected area) to comply with the experiential training component of nature conservation courses. Furthermore, perpetrators of environmental crimes should be sentenced to do community service (for example, in botanical gardens and/or wildlife parks) in addition to having to pay a fine.

Finally South Africa should also investigate the possibility of addressing the current shortage of human resources and expertise by following the example of Australia and

New Zealand in establishing Environmental Protection Agencies (EPAs), Environment Courts/Tribunals and by instituting an Environmental Ombudsman.

a) Environmental Protection Agency

It is submitted that a contributing factor to the decrease in the numbers of endangered fauna and flora in South African provinces is that the departments responsible for the implementation and enforcement of environmental laws often share various other portfolios with environment or nature conservation. These may include agriculture, economic affairs and tourism. Consequently human resources and available funds usually have to be shared between the different (and often unrelated) portfolios. Therefore, the focus of these provincial departments is not solely directed at addressing the environment or the conservation of fauna and flora. It is thus not surprising that one or more of the portfolios will be neglected as not all portfolios can attract the same commitment or attention from the relevant officials. Unfortunately, conservation is not regarded as important as agriculture, tourism or economics and is the portfolio most likely to be neglected. This neglect is probably reflected, to some extent, in the fact that several telephonic attempts to the relevant provincial departments to obtain statistics regarding prosecutions involving fauna and flora were fruitless. The officers spoken to did either not know of such records or did not know who would be able to provide the necessary information.

A situation where “no records are available” is an unacceptable shortcoming in the administration of nature conservation in South Africa. Proper records and statistics should be kept of all arrests, prosecutions, convictions and out of court settlements involving fauna and flora. In this way the effectiveness of existing enforcement mechanisms and/or other strategies can be monitored in an attempt to prevent environmental crime. It is virtually impossible to determine the effectiveness of enforcement mechanisms or strategies, especially criminal sanctions, if records of such information are not kept and made readily accessible to the public.

The opinion is held that the establishment of an EPA in each South African province, similar to those in Australian States and Territories, would solve the problem of shared portfolios, poor record keeping, unfocused missions, and a lack of expertise.

The functions of the Australian EPAs are to implement and enforce environmental laws on behalf of the Australian State or Territory in which they are situated. The allocation of funds to such an agency and the focus of its expertise are solely the protection of the environment, including the conservation of fauna and flora. Offenders arrested by the EPA officials are prosecuted by Environment Courts or Environment Tribunals.

#### b) Specialist courts/tribunals

Another way to address the lack of expertise in the field of environmental law is through the establishment of an Environment Court (or Tribunal) similar to those in Australia and New Zealand. Examples of these courts and tribunals are the Land and Environment Court (NSW) and the Resource Management and Planning Appeal Tribunal (Tasmania).

In Australia, the Environment Court is an integrated superior court of record of equal status to a State Supreme Court. It is vested with exclusive jurisdiction to decide environmental disputes and is therefore regarded as a “one-stop shop” for these disputes. Other important characteristics of an Environment Court are that it is effective, efficient, and disputes are resolved speedily. This is because they operate more informally than “ordinary” courts of law and are generally not bound by legal formalities and procedures, though procedural rules may be enforced to ensure a fair hearing. Furthermore, these Courts (and tribunals) have a very broad jurisdiction to hear all civil and criminal (summary) enforcement matters, judicial review and merit appeals relating to land and environment matters. A noteworthy aspect is that in addition to the final determination of matters by judges and assessors, alternative dispute resolution options of mediation and conciliation are also available to litigants.

Another important aspect of an Environment Court is that it is normally <sup>13</sup> composed of a legally qualified chairperson and assessors, who are qualified in disciplines that include environmental planning and management and nature conservation. The

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<sup>13</sup> In New South Wales non-judicial members have also been included as assessors for the first time. These assessors are not required to have legal qualifications, but must be qualified in fields such as planning, environmental sciences and natural resources.

composition of the specialist appeal bodies reflects the fact that they may be required to determine both the merits and the legality of an administrative decision. The officers thus have the necessary knowledge and experience to successfully prosecute offenders.

Cases brought before an Environment Court usually attract the attention of the public. This is normally instigated by environmental interest groups who draw the attention of the media to these cases. Such publicised cases should contribute significantly to making the South African public aware of environmental issues and should benefit the environment and nature conservation as a whole.

In New Zealand an Environment Court plays a very important role in the criminal justice system as it is a crucial part of environmental decision-making. The Court has established a practice of open hearings, and reasoned decisions that have normative value for professional decision makers and professional advisers. It travels to all parts of the country, reviews schemes, hears evidence in the locality, and makes comprehensive decisions.

It is thus evident from the above discussion that an Environment Court has numerous advantages over ordinary courts and should significantly improve the effectiveness of the enforcement of environmental laws in South Africa. South Africa is a small country compared to Australia and only one Environment Court needs to be established. This Court could then “travel” (as does the Environment Court in New Zealand) to the different provinces (if needed) to adjudicate environmental disputes.

A further important advantage that an Environment Court holds for the conservation of fauna and flora in South Africa is that environmental disputes could be adjudicated in such a court without having to “fall in line” behind the large backlog of cases (due to the huge crime rate and the shortage of human resources) in ordinary courts. This potential for a speedy adjudication of environmental disputes should contribute to the enhancement of a rehabilitation programme to restore and/or replace damaged ecosystems.

### c) Environmental Ombudsman

Australia and New Zealand created the office of a Parliamentary Commissioner for the Environment (PCE). The PCE occupies four different roles, all related to the protection of the environment, including the conservation of fauna and flora. One of these roles is that of an Environmental Ombudsman. The PCE has many functions and powers, including: participating in any appeal proceedings; summoning and examining persons under oath; investigating administrative structures and their effectiveness; and investigating “any matter” adverse to the environment. However, the PCE is not directly involved with the enforcement of environmental laws.

The view is that an Environmental Ombudsman (or Environment Protector), as an expert in environmental matters, can play an important role by reducing the demand on human resources in the investigation of environmental crimes where corporations are involved.

The Constitution of South Africa (s182) established a Public Protector whose functions include the investigation of any conduct in state affairs or in the public administration in any sphere of government. The scope of such a position is too wide to make any significant contribution to the conservation of fauna and flora, especially because the Public Protector Act 23 of 1994 does not make provision for specialised treatment of environment-related complaints. It is thus suggested that a “protector” specifically for environment-related issues is necessary to successfully contribute to the conservation of fauna and flora in South Africa.

Ideally, there should be two offices of environmental ombudsman, one responsible for addressing pollution-related complaints and the other responsible for complaints regarding fauna and flora or wildlife in general. It is viewed that issues or damage relating to fauna and flora are neglected by the government (and the media) and are not taken as seriously as pollution issues (specifically air, water and waste). The reason might be because pollution normally affects the health of humans and is thus regarded as more important than the degradation of habitats or the extinction of a species. It might also be that pollution issues get more media coverage because the government itself or large companies are involved as “offenders”. Be that as it may, it

is time that government and the public realise the unique and vital place that fauna and flora occupy in the context of sustainable development and stop treating them as the “Cinderellas” of the environment.

### 3.2.2 Inadequacy of criminal penalties

The inadequacy of criminal penalties is another factor that is believed to hamper the effective enforcement of environmental laws and thus contribute to the failure of many conservation efforts. However, it is submitted that criminal penalties (fines, prison sentences and additional monetary penalties) provided for in South African environmental legislation for offences against fauna and flora, are quite adequate to deter the majority of South Africans and most industries and businesses from committing environmental offences. For example, section 21(1)(c) of the National Parks Act 57 of 1976 provides that the hunting or otherwise wilful and negligent killing or injuring in parks of any wild animals listed in Schedule 2 such as a leopard, (except the elephant and black and white rhinoceros), may lead to the imposition of a fine of between R4000 and R8000 or imprisonment of one year to two years. Similar offences committed against the elephant and black or white rhinoceros have much stiffer penalties, namely: a fine of not less than R30000 and not more than R100 000 or, in default of payment of such a fine, imprisonment for a period of not less than three years and not more than ten years (s24(1)(b)(i)). If a person has previous convictions, imprisonment may be imposed without an option of a fine and, on a first or subsequent conviction, an additional fine of three times the commercial value of the animal in respect of which the offence was committed is applicable. In the case of plants, section 21(1)(i) of the National Parks Act 57 of 1976 provides that the cutting, damage, removal or destruction of, *inter alia*, any tree (or any part of a tree), firewood, grass or other plant in a park, in respect of trees or other plants listed in Schedule 3, may attract a fine of between R1000 and R6000 or imprisonment of between three months. A previous conviction under the same subsection will result in imprisonment without an option of a fine (s24(6)).

The reason why penalties is perceived as inadequate in South Africa, is probably because potential offenders are either not deterred from committing an environmental crime, or offenders are not caught and arrested. Presumably offenders are not caught

or arrested because a shortage of environmental officials and inspectors exists. Furthermore, it seems as if arrested offenders are seldom prosecuted. This might be because of insufficient evidence gathered or investigative errors made by inexperienced officials, or because of an out-of-court settlement. Where offenders are convicted and sentenced the fine imposed by the court is very seldom the maximum fine prescribed by law. The consequence of the imposition of smaller fines, especially where corporations are involved, is that it does not serve as a deterrent for potential environmental offenders. It is submitted that the deterrent factor of penalties will improve if the courts more readily impose the *maximum* prescribed fine for an offence, and even imprisonment. The main problem of enforcement of environmental laws in South Africa is, therefore, not the inadequacy of penalties, but the failure to impose the maximum prescribed fines and the tendency to only prosecute offenders who have caused serious harm to fauna and flora; that is, where large numbers of valuable specimens are involved. This tendency might be attributed to the fact that the general public, environmental officials and inspectors do not yet regard damage to fauna and flora as a serious and punishable crime.

The general public often perceive penalties as inadequate because offenders are not sentenced to imprisonment. This leniency of the South African courts towards environmental offenders might be because the prisons are overcrowded with murderers, rapists and the like and that the court does not regard imprisonment as an appropriate form of rehabilitation for environmental offenders in these circumstances. It is submitted that imprisonment would be an ideal punishment for offenders of serious environmental crimes but the reality in South Africa is that prisons are already overcrowded because of the high crime rate. This situation makes imprisonment an inappropriate punishment for the environmental offender and does not contribute to the rehabilitation of the offender. In the light of the situation in South African prisons it is suggested that in the case of individual offenders, the imposition of community service (such as working in zoos, national parks, nature reserves, botanical gardens and even natural science museums) is a more appropriate "punishment" and rehabilitation tool than imprisonment. Community service involving fauna and flora should also serve as a valuable strategy in "educating" the offender on the importance of nature conservation. Drastically increased fines and prison sentences are currently being imposed on environmental offenders by the Environment Court in the

Australian State of Queensland. It is submitted that South African courts follow this example as soon as possible.

It is proposed that the environmental offences of corporations be publicised widely in local and national newspapers as well as in popular magazines. Corporations should also be obliged to publish their “environmental crimes” in their annual reports and indicate how they would rectify the damage that has been caused by their activities. If a corporation fails to rectify the damage or continue to harm fauna and flora, it should be “black listed”. The environmental management plans of the corporation should also be freely accessible to the public. The risk of “bad” publicity will definitely have a huge deterrent effect on corporations because of the influence it would have on the views and consumer behaviour of the South African public towards the corporation’s products or services. It will thus be in the best interests of the corporation to be viewed by the public as a “green” or environmentally friendly corporation. It is agreed that one of the most powerful deterrents to corporations from committing environmentally harmful activities is the threat of bad publicity and not the size of the criminal penalty.<sup>14</sup>

As part of a penalty and in addition to a substantial fine, corporations should also contribute to a nature conservation trust fund. This fund should then be used only for the conservation of fauna and flora (for example, to finance nature conservation projects and relevant research, or establishing breeding programmes). It is suggested that this fund be administered by an independent non-governmental environmental organisation to ensure that the funds are not used for non-environmental matters.

Finally, community service could also be imposed on corporations to require them to undertake activities that are beneficial to the community for example, the clearing of noxious vegetation.

In addition to the above recommendations relating to human resources and the “inadequacy” of criminal penalties, other innovative strategies may be employed to

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<sup>14</sup> See Jeffrey Bates’ quotation regarding to the effect of bad publicity on companies in Urbani, EJ & Rubin, CP *Transnational Environmental Law and its impact on corporate behaviour* (1994) Transnational Juris Publications, Inc Irvington-on-Hudson NY 128.

encourage compliance with environmental laws. These strategies will now be discussed.

#### 4. OTHER STRATEGIES OF COMPLIANCE

##### 4.1 General

The problems experienced with the enforcement of environmental laws have been ascribed to the many shortcomings of the criminal sanction as a deterrent and penalty for environmental crimes. Alternative and/or additional ways should therefore be explored in an effort to solve environmental disputes. These alternative/additional strategies will now be discussed.

##### 4.2 Alternative strategies for compliance

A strategy that might be effective in improving compliance with relevant laws is the employment of alternative dispute resolutions (ADR) such as mediation and arbitration. ADR is a collection of processes and forums other than judicial to which disputing parties have recourse as an alternative to litigation. Mediation is the most popular form of ADR, followed by arbitration.

Mediation is a form of structured negotiation where an independent mediator assists the disputing parties to identify and focus on the real issues in dispute and to offer solutions. The parties thus achieve their own solution with the assistance of the mediator. Arbitration involves a formalised procedure of hearings before an arbitrator appointed by the parties. The arbitrator sets the parameters for the issues to be arbitrated and, contrary to the process of mediation, the arbitrator makes a final ruling to which the parties are bound. Although there is still some debate whether mediation and arbitration are less time consuming and less costly than litigation, it is submitted that these consensus-based approaches do have numerous other advantages that make them worthwhile alternatives to litigation. Apart from the potential to solve environmental disputes speedily and cost effectively, both mediation and arbitration lead to a solution that is more likely to be sustained by the parties. The reason for this

is because these procedures are consensus-based, transparent and foster a mutual trust between the disputing parties, which is essential for their future co-operation. These consensus-based procedures provide a better way of solving environmental disputes where the parties involved are environmental interest groups and land or property developers. Indications are that parties also experience mediation and arbitration as less traumatic than litigation. The legislature has also recognised the potential of mediation and arbitration in environmental dispute resolution (EDR), for example, NEMA promotes mediation (s 17(1)(b)(i)(cc)) and arbitration (s19)) where there is a difference or disagreement between the national and provincial spheres of government regarding the protection of the environment.

It is apparent that the effectiveness of mediation and arbitration in solving environmental disputes and in replacing the traditional regulatory strategies, will only be evident in the future if they are employed more readily. However, it is submitted that consensus-based procedures may well be suitable as a first option to resolve environmental disputes between parties or in the pre-hearing stage of litigation to identify and limit the issues.

#### 4.3 Additional strategies

These strategies are not “alternatives” to the law *per se* or to criminal law. They should be seen as proactive ways to improve and encourage compliance with environmental laws. They promote the conservation of fauna and flora by indirectly preventing degradation of ecosystems and environmental crime. These strategies include environmental education, the use of economic instruments, the involvement of environmental interest groups and commercial NGOs. As “stand alone” strategies they have their own limitations. However, their effectiveness lies in their collective persuasive power. These additional strategies will now be discussed.

##### 4.3.1 Environmental education

It is submitted that the role of environmental education in promoting compliance with environmental laws and encouraging conservation of fauna and flora is an underestimated and neglected strategy. The objective of environmental education is to

“educate” the public on environmental matters thereby cultivating increased environmental awareness, active participation in environment-related decisions, a change in perceptions and attitude, and the creation of responsible behaviour towards the environment and nature conservation. Effective environmental education should thus have positive, far-reaching (and enduring) consequences for the conservation of fauna and flora.

It is primarily the responsibility of government to make and keep the public aware of environmental matters through environmental education. An involved and informed public would view environmental offences as punishable crimes and crimes against humanity. They would also fulfil their role as environmental watchdogs more readily and be committed trustees/stewards of the environment. Furthermore, they could form powerful pressure groups (as members of environmental interest groups) as “green” consumers against manufacturers, retailers and suppliers and influence commercial third parties (for example, lenders, investors and insurers) to pressurise industry to eliminate or decrease activities harmful to fauna and flora. NEMA makes provision for public participation (s2(4)(f) and (q)) and environmental education (s2(4)(h)) in terms of South Africa’s international obligations under Agenda 21, but participation and education must be implemented and applied to have any effect.

The government should investigate ways in which the public can actively be made aware of environmental matters and conservation. It should and also encourage voluntary contributions for the conservation of fauna and flora. The author’s personal experience is that the Australian public is bombarded with information on environmental matters through the media which promote environmentally friendly behaviour actively through, for example, advertisements. Voluntary work for environmental organisations is highly regarded by the government and private sector and is viewed as valuable work experience when employment is applied for. Businesses and industry view the opinion of the public as very important and therefore want to be seen by the public as acting environmentally friendly. Industries also donate a certain percentage of their sales to environmental matters. Public awareness campaigns contribute towards environmental alertness and keeps the public informed of their obligations towards the environment in general. The South African government and other interested parties should take cognisance of the strategies (and

methods) employed by Australia in its awareness campaigns, especially to determine their effectiveness and possible implementation in South Africa. Given the cascading effect of a successful awareness campaign, it is viewed that environmental education provides the key to successful conservation of fauna and flora in South Africa.

It is essential for the conservation of fauna and flora that the South African public becomes more aware of and involved in environmental issues. The public should not be fooled and become complacent by the fact that science and technology have developed in such a way that “extinct” species (for example, the South African quagga<sup>15</sup> and the Tasmanian tiger<sup>16</sup>) can be “revived” through genetic engineering and deoxyribonucleic acid (DNA) manipulation. Although it is a very exciting prospect that extinct fauna and flora species may be brought “back to life”, it remains an expensive and time-consuming process that offers no guarantees of success. It is thus much more beneficial to humankind to prevent the extinction of species rather than to try and revive them through DNA-manipulation.

#### 4.3.2 Economic instruments

Another additional strategy to force or encourage compliance with environmental laws is through the tax system. This strategy is mainly applicable to industry, businesses and landowners. Industry and businesses may either be “punished” for causing environmental harm through the imposition of “green” taxes, or they (and applicable landowners) may be encouraged to comply with relevant laws and regulations by tax incentives such as subsidies, grants and tax deductions. A review of the South African income tax legislation by the Margo Commission in 1984 revealed that the imposition of “green” tax would be too complicated and administratively too costly.

It is submitted that technology (especially the information technology) has improved significantly since 1984 and the possibility of using the income tax system to promote

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<sup>15</sup> The last quagga died on 12 August 1883 in the Amsterdam Zoo in Holland and became extinct. When the Cape Government (South Africa) gave the quagga legal protection in 1886 there were no quaggas left anywhere, in fact it had been 23 years since someone has seen one.

<sup>16</sup> The last known Tasmanian tiger in Australia died in 1936 at a Hobart Zoo. Owen-Brown, M “Cloning of Tasmanian tiger one step closer” 2002 *Sunday Mail* Brisbane 9 June 2002.

conservation of fauna and flora should be investigated again. The current improved technology should simplify the administration of severance taxes and minimise administration costs associated with them. In the light of the increasing numbers of South African fauna and flora species becoming endangered annually, it is of the utmost importance that every possible avenue should be investigated and effort employed to encourage the conservation of fauna and flora and the compliance with relevant environmental laws.

## 5. CONCLUDING REMARKS

South Africa has excellent and adequate environmental laws aimed at conserving fauna and flora. However, these laws should be enforced effectively by criminal sanctions and other alternative strategies of compliance. Furthermore, additional strategies should also be investigated and employed to improve compliance with relevant environmental laws and promote conservation of fauna and flora. These alternative/additional strategies or combinations of strategies should positively influence the perceptions, attitude and behaviour of the public, industry and businesses towards the conservation of fauna and flora.

Although the additional strategies do not address the shortcomings of criminal sanctions and thus cannot replace them as enforcement mechanisms, employing these strategies should make a significant contribution to the success of fauna and flora conservation in South Africa. Although mediation and arbitration have the potential to replace criminal sanctions in solving environmental disputes, the latter would always be available as they are the only means by which fines and imprisonment may be imposed and enforced. Finally, they should only be used as a last resort, except in the case where a gross violation of environmental legislation causing serious and irreparable damage to fauna and flora, has occurred.

The South African government, the public, business, industry and environmental interest groups should pool their respective resources and co-operate with each other

to prevent the further degradation of our environment in general and the extinction of our native fauna and flora.

The author concludes with the following quotation: “The earth has enough resources for its people’s needs; but not enough for their greeds”. (Ghandi)

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