



Niue



Environmental Legislation Review



Environmental Legislation Review - Niue

1993

*Prepared by
Clark Peteru*

*Report for the
South Pacific Regional Environment Programme
and the
Government of Niue*

*produced as documentation in support of the
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Foreword

The Environmental Legislation Review in Niue has been produced as an important component of the National Environmental Management Strategies (NEMS) Project. The NEMS Project was developed to address sustainable environmental development and planning issues in a number of Pacific island countries. It was funded by the United Nations Development Programme (UNDP) and implemented through the South Pacific Regional Environment Programme (SPREP) as part of a broader UNDP assistance project called PMI: Planning and Implementation of Pacific Regional Environment Programme which concentrates on regional and in-country institutional strengthening and training of environmental managers.

Pacific islanders have lived in close harmony with their island environment for thousands of years and are well aware of its importance to their way of life. Pacific peoples today face the complex challenge, common to many other countries of the world, of integrating economic development with the need to protect the environment. This is the primary aim of sustainable development and must be addressed if the Pacific way of life is to survive. The introduction of appropriate legislation represents one important means by which sustainable development can be achieved in the Pacific. A fundamental first step is the identification and review of existing environmental laws, taking into account also traditional customary measures aimed at environmental protection. This review also investigates administrative procedures and policy to determine ways of incorporating and strengthening environmental laws within the existing structure in each of the Pacific island countries associated with this project.

The Environmental Legislation Review of Niue looks at laws, administrative procedures and policy in terms of their effectiveness in addressing the major environmental issues existing in Niue. The research has had a particular focus on the development of practical recommendations that build on the findings of the review. This review provided a valuable reference document at the national seminar which produced the first draft of the National Environmental Management Strategy (NEMS) for Niue and represents an important step along the road to improved environmental management and protection of the Pacific region.

This review forms one part of a series of legal reviews undertaken in several Pacific island countries. I would like to thank Mr Clark Peteru for his work in preparing this Environmental Legislation Review on behalf of the South Pacific Regional Environment Programme (SPREP) and the Government of Niue.



Vili A. Fuavao

Director

South Pacific Regional Environment Programme

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Clark Peteru

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- List of Bills before the Niue Assembly as at February 1992

Acronyms

EEZ	Exclusive Economic Zone
NCAP	Niue Concerted Action Plan 1987
NEMS	National Environmental Management Strategy
NGOs	Non-governmental organisations
NNDP	Niue National Development Plan 1980-1985
SPFFA	South Pacific Forum Fisheries Agency
SPREP	South Pacific Regional Environment Programme
UNCED	United Nations Conference on Environment and Development

Glossary

fono	prohibition placed on an area (land or sea) to protect it and its crops or resources (e.g. coconut leaves tied around fruit trees indicate both trespass and the taking of crops is forbidden)
fono mate	prohibition imposed on an area on the death of the owner
karoama	small, seasonal (Jan - Mar) pelagic fish, eaten raw or cooked
magafaoa	in relation to any Niuean land - the family or persons descended from a common ancestor
tapu	forbidden, sacred

1 Introduction

This review commenced in February 1992 for the Government of Niue under the auspices of the National Environmental Management Strategy Task Team (NEMS) and the South Pacific Regional Environment Programme (SPREP), with funding made available to SPREP by the United Nations Development Programme (UNDP).

1.1 NEMS and sustainable development

NEMS is a SPREP-administered project which aims at producing a statement of Niue's environmental principles and a detailed plan for the realisation of its long-term environmental goals. The development of NEMS follows a dialogue among government departments, NGOs, the private sector, and individual citizens.

The National Environmental Management Strategy analyses Niue's environmental issues in a comprehensive, multisectoral framework and sets forth a long-term strategy for sustainable development that does not degrade the country's natural environment, or jeopardise the health and safety of its population or its cultural heritage.

NEMS includes planning and training components. The planning component includes activities such as an assessment of the state of the environment; a review of existing legislation; a review of institutional capabilities; an environmental education and awareness review; development of environmental management strategies; and recommendations on environmental monitoring programmes. The training component includes comprehensive short courses and on-the-job training.

This review draws heavily on material from the *Niue Country Report for UNCED, 1992* which identified the Government's economic priorities and environmental concerns.

1.2 Terms of reference

This review concentrates on the 'review of existing legislation' component identified above and encompasses four tasks.

1. Collection of data on policy, legislation, regulations, decrees and administrative practices which have a bearing on environmental and resource management.
2. Interviews with relevant government and non-government personnel to identify environmental issues that need addressing in the review and identification of overlaps.
3. Review and assessment of the effectiveness of this legislation, policies, administrative practices, and identification of any overlaps or gaps.

4. Recommendations relating to amendments to existing legislation, and/or the need for new legislation.

1.3 Geography

Niue is a Polynesian island situated in the South Pacific ocean. Although only 259 square kilometres in area, it is one of the largest coral islands in the world and also one of the highest. Its terraces give it the shape of a wedding cake. The lower terrace rises sharply from the sea, creating cliffs for most of the island's 60 kilometre circumference; the terrace rim averages 28 metres above sea level. Faulting during the uplifting of the island has created chasms, crevices and caves of great scenic beauty. The higher terrace also rises sharply behind the coastal belt forming a central plateau averaging 69 metres in elevation.

The country is composed of this one island, located approximately 580 kilometres east of Tonga, 930 kilometres west of the Cook Islands and 660 kilometres southeast of Western Samoa.

Niue is surrounded by a fringing reef breached at only one small area opposite the wharf at Alofi, the nation's capital. Below the reef lie submarine terraces marking, like the terraces above, previous sea levels. A large proportion of the island is covered with scrub, and there are several thousand acres of dense, indigenous forest. Vegetation has been considerably modified by man. The original tropical rainforest is composed of tall trees, with a scanty shrub and herbaceous layer below. This rainforest probably originally covered much of the island but is now reduced to remnants mainly in the centre, east and south-east.

Huvalu Forest is the largest remaining forest and includes a tapu area. There are large areas of secondary forest, in various stages of regrowth. The secondary forest is richer in species than the primary forest. Where agricultural activity has been prevalent, including burning and clearing by bulldozer, the vegetation has formed patches of scrub or thicket which are often dominated by a few shrubs. The most modified area is the desert, a fernland community dominated by mohuku (staghorn fern).

2 Policy

2.1 Development policy

The paramount policy objective of the Niuean Government is to work for the maintenance of a 'living community'. The promotion of economic development in Niue is essential to the maintenance of a living community because it provides a sense of purpose which can no longer be derived from traditional subsistence activities, or even from Public Service employment, unless there is a wider community to serve. This sense of purpose becomes stronger if development is towards supplying New Zealand with goods and services which Niue is uniquely able to supply because of its climate, soils, and geographic position.

There is no realistic prospect of economic self-sufficiency for Niue and continued economic assistance from New Zealand, with some remittances from Niueans overseas, must remain key elements in maintaining living standards above subsistence levels. Exports have played a minor economic role in relation to imports. The substantial and generally increasing negative trade balance has been financed largely through external forms of assistance.

Niue's economic, social, and cultural institutions constitute a village mode of production which retains the ability to sustain itself, has control over most of the land resources and accounts for the production of most subsistence goods and cultural services. Alongside this, and closely integrated with it, is the large government sector, built up initially by New Zealand to supply modern services and now largely maintained by subventions from New Zealand.

The *Niue National Development Plan 1980-1985* (NNDP) stresses increased support for village life and rural development. It emphasises the importance of people active in village projects; strengthening of village community responsibilities; production from the land for local and export markets; and the development of crafts for sale and for cultural satisfaction. Under the plan the government sector provides essential services and administrative functions. This option preserves the subsistence capacity of the village, ensuring that in the event of a breakdown in the cash income flow, the institutions and practices of subsistence production remain available.

In view of the declining role of external economic assistance, there is both a need and a desire on the part of the Government to encourage the development of private sector initiatives. The traditional attitude towards individual profit-making in Niue as well as in other Polynesian societies has not been positive and the process of changing such attitudinal patterns can sometimes be slow and difficult.

2.1.1 Population

A striking feature of Niue's recent history has been its population situation. The high incidence of migration to New Zealand has resulted in a sharp population decline and persistent shortages of skilled manpower. When the airport opened in 1971 the national population was estimated at around 5,000. In 1974 New Zealand granted self-governing status to Niue, which included the provision that all Niueans would continue to be considered citizens of New Zealand.

In 1989 the Agricultural Census put the island's population at around 2,267 (including 288, or 13 percent who are non-Niuean). It is estimated that 12,000 to 15,000 Niueans live outside the island, most of them in New Zealand.

The objectives for future direction are intended to supplement the essential economic assistance provided by New Zealand with economic development activities which will: provide the people with a sense of purpose by generating additional income for Niue; avoid a sense of complete dependence on donor countries and organisations; and revive and maintain the traditional bases of village life and rural skills. The major avenues of expansion are hardwood forestry, tourism, deep sea fishing, and renewed fruit production for export.

Economic development is needed to stem the tide of migration to New Zealand. A population of a certain size is required for a living community. However, the smallness of Niue means that opportunities for economic development are rather limited, both in terms of the size of potential businesses, as well as in the number of businesses of the same type that could be supported by such a small population. Such economic development is seen as necessary to attract a larger number of Niueans to either remain on the island or to return from New Zealand.

2.2 Environmental policy

2.2.1 Environmental objectives

The NNDP lists the following environmental objectives:

- (1) To promote an awareness and understanding of the environment;*
- (2) To improve the existing environment by specific projects;*
- (3) To ensure that all proposed projects on Niue are assessed for environmental impacts and that, where possible, projects include an environmental improvement proposal; and*
- (4) To protect and preserve through conservation our natural environment, including all ecological species."*

2.2.2 Environmental methods

The Niue Concerted Action Plan 1987 (NCAP), Section 20, entitled 'Protection of the Natural Environment' outlines future directions based on the overall objective of ensuring that the qualities of the natural environment are maintained in the development of a living community in Niue. The following ten methods were associated with achieving this objective.

- (1) Raise awareness of the importance of environmental protection through the schools and community education programmes;
- (2) Undertake anti-litter and clean-up campaigns, seeking to establish littering as socially unacceptable on Niue;
- (3) Legislate against indiscriminate dumping of rubbish and general littering where present coverage is inadequate;
- (4) Continue the programme to improve Alofi township, including the siting and design of developments in the business and government centre.
- (5) Provide legislative protection for living coral by prohibiting its removal from the reef and its export from Niue, except under licence for coral jewellery manufacture in Niue;
- (6) Establish a legislative base for a system of reserves, consistent with customary land ownership, for the protection of landscape, fauna and flora;
- (7) Provide reserve status for forests, caves and other important natural features, stipulating conditions of entry, and providing for monitoring and maintenance of the reserves;
- (8) Cooperate with the South Pacific Commission in deriving information from the South Pacific Regional Environment Programme;
- (9) Assess the risks and benefits of maintaining goats on Niue in view of the potential damage they would do to Niue's environment if they escaped and established feral herds; and
- (10) Require the use of a floating boom around the oil tanker and delivery hose link during discharge operations.

2.2.3 Environmental needs

In addition, the NCAP highlights the need for:

- (1) Technical expertise to plan and implement the action strategy, and expert legal

environmental legislation.

- (2) Access to technical facilities necessary for monitoring.
- (3) Improved monitoring of the freshwater lens both for contamination (biological, chemical, radioactivity and salinity) and the effects of abstraction.
- (4) Improved water catchment so as to become less dependent on the freshwater lens.
- (5) Restriction on the use of bulldozers and weedicides related to land clearance.
- (6) Protection of sea caves to halt disfigurement.

3 Law

3.1 Background

Explorers and missionaries were for many years forbidden from setting foot on Niue. It was not until the 1840s that missionaries established themselves on the island. In 1990, assisted by the missionaries, Niueans successfully petitioned Queen Victoria to make the island a British protectorate. New Zealand consequently annexed the island in 1901 and administered it as part of the Cook Islands.

In 1903 Niue was placed under separate administration. It was administered under the *Cook Islands Act 1915* (NZ) until 1966 when the *Niue Act 1966* (NZ) was passed. Under the latter Act the Niue Island Assembly could only make laws on matters that were not reserved to the New Zealand Government.

In 1974, by virtue of the *Niue Constitution Act 1974* (NZ), Niue became a self-governing country in free association with New Zealand. Under the Act close ties are maintained with New Zealand which undertakes responsibility for Niue's external relations and defence as well as for the provision of administrative and economic assistance. The Niuean people retain New Zealand citizenship under this special relationship.

Not surprisingly Niue has adopted the New Zealand system of parliamentary democracy comprised of national and local administration. There are 12 government agencies: Office of the Secretary to Government; Department of Administrative Services; Treasury; Office of Community Affairs; Department of Agriculture, Forestry and Fisheries; Department of Public Works; Department of Health; Department of Education; Department of Posts and Telecommunications; Department of Police; Department of Transport; and the Niue Public Service Commission. At the level of local government there are 13 Village Councils: Makefu, Tuapa, Namukulu, Toi, Hikutavake, Mutalau, Lakepa, Liku, Hakupu, Vaiea, Avatele, Tamakautoga and Alofi.

In 1991, all statutes and regulations in force in Niue as at August 1990 were published for the first time in a set of four volumes. The statutes are listed in order of their short title and are published in three volumes. Volume 1 contains the Constitution, a reference table of all the statutes in force in Niue, a chronological table of the statutes enacted in Niue, a table of statutes excluded as not being Niuean law and statues listed 'A' to 'C'. Volume 2 contains statutes 'D' to 'M' and volume 3 statutes 'N' to 'Z'. The regulations are collected in Volume 4 which is in two parts. A supplement updates the law to 1 March 1991.

3.1.1 Modern trend

The legislative situation in Niue prior to 1974 was that either Acts were passed for Niue by the New Zealand Parliament or Ordinances were passed by the Island Council of Niue (1916-1959) or the Niue Island Assembly (1959-1974). From 19 October 1974 the Niue Assembly has had the authority to pass laws. No Act of New Zealand made after that date

has become part of the law of Niue without the request and consent of the Niue Assembly. Similarly no subordinate legislation made after that date has become part of the law of Niue unless it was made under an Act extended to Niue and was requested and consented to by the Niue Assembly.

Regulations may be made under the Constitution or under any statute in force in Niue. The power to make regulations is typically a power granted to Cabinet to make regulations. There have been few regulations passed since 1974 but there is a substantial body of regulations and rules that are part of the law of Niue that were enacted in New Zealand prior to 1974.

The trend of legislation in Niue in its early period was towards the regulation of day-to-day activities. There was little emphasis on commercial or economic development apart from those laws regulating copra production and export.

From the 1960s up until 1987 laws were passed which facilitated economic development. This was followed by a brief period where administrative type legislation was passed. Economic events and a plummeting population have however forced attention back to economic issues. Accordingly, in 1990 Government embarked upon a programme of legislative reform having as one of its principal objectives the establishment of a legal environment which will encourage and make economic development possible.

3.1.2 Sources of law

The sources of law in order of priority are the Constitution, Acts of Parliament, regulations, bylaws and the Common Law of England. Niuean custom, although not recognised as a source of law nevertheless, on occasion, has the force of law.

With regard to the Common law of England, s672 of the *Niue Act 1966* (NZ) provides that the law of England as it existed on 14 January 1840, if not inconsistent with the *Niue Act 1966* (NZ) or inapplicable to the circumstances of Niue, is in force in Niue. This is subject to further qualification in respect of the statutes of England, Great Britain or the United Kingdom that were in force in Niue on 1 January 1967. The Common Law of England is taken to be that for the time being. It is unclear what scope this category of law has in Niue. The answer must wait until such time as the question is brought before the High Court for determination.

With regard to case law, there is very little civil litigation in Niue. Moreover, cases are not officially reported. The Clerk of the High Court was able to recall a few incidents three or four years ago involving compensation for property damage caused by fires spreading from neighbouring properties. Invariably these matters are settled out of court as the parties are often related to each other.

Similarly there are very few criminal cases, and fewer still with an environmental aspect. Incidents involving animal trespass, that is, stray pigs, are frequently solved by the pig being shot.

3.1.3 Customary law

Customary law operated for several centuries in Niue before the English legal system came to apply. Customary law continues to have currency and has importance to conservation work. This topic is discussed in more detail in Section 10.

3.2 The draft Conservation Bill, February 1992

This Bill is based on the *Cook Islands' Conservation Act 1987*. It would be useful to know what the Cook Islands experience with their Act was prior to the court ruling in May 1991 which suspended its operation.

The Bill is a mixture of several environmental concerns which are brought under the jurisdiction of the Conservation Service, which is to be a division of the Department of Community Affairs. There will be a jurisdictional overlap between Community Affairs and the Department of Agriculture which is currently working in several of the areas provided for in the Bill. A working arrangement needs to be arrived at in order to avoid both duplication of work and possible conflict between the Departments. The stipulation that the Director of Agriculture be a member of the Conservation Council should help in achieving a more efficient result. There will also be overlaps with other Departments but to a lesser degree.

3.2.1 Conservation and development

There are several factors which indicate that the Conservation Service will not be purely conservationist in nature but will also have a strong developmental focus.

Firstly, one of the Bill's two aims is to provide for the conservation, development and management of the environment and national resources in a sound and sustainable manner. This aim is given effect in clause 9 which states the Service's principal objective as being the development, management, protection and conservation of the environment in a manner that will permit the *sustained utilisation* of its resources. The language indicates that protection and conservation are not goals in themselves but are subservient to the objective of sustained utilisation of the country's resources. (Possibly the use of 'sustained' is incorrect and the correct term is 'sustainable').

Secondly, Government has recorded its firm commitment to a policy of economic development in several policy documents.

Thirdly, it is Cabinet that will appoint the Conservation Council. The Council is to consist of three to five members. The criteria for selection are not given other than that one of the members is to be from the private sector with knowledge of conservation and environmental matters. The council is to meet at least quarterly. Rather than leave the appointments open it is suggested that they be specified and include such appointees as the Director of Agriculture, the Director of Health, the Director of Public Works, the Government Solicitor and community representatives.

The Council has a minimal advisory role and will effectively run the Service. Typically, a Council such as this would be primarily advisory in nature and the Minister would make final decisions.

Conservation officers will have a range of powers which may be additional to powers they already possess, for example, as health or agricultural inspectors. It may be as well to precede the power to search with the power to enter the premises where the search is to take place. The power of arrest as it stands is unrestricted, and should be confined to more serious offences (i.e. those punishable by imprisonment).

In the event of any inconsistency arising between the Bill and any other Act, the provisions of the Bill are to prevail. This is useful in overcoming anomalies, for example, in definitions. Thus, 'animal' is widely defined in the Bill, is defined in a slightly different way in the *Agriculture Quarantine Act 1984* and receives a narrow definition in the *Wildlife Ordinance 1972*. The definition of 'plant' under the Bill differs with the definition under the *Agriculture Quarantine Act 1984*. 'Wildlife' is defined under the Bill and includes plants but is not defined in the *Wildlife Ordinance 1984*.

3.2.2 Part IV

Part IV of the Bill is concerned with national parks and protected areas. Cabinet has the power to prescribe by regulation and by notice published in the Niue Gazette that a certain area is required for a national park or as a protected area. (Compare this to the Cabinet power under ss10 and 11 of the *Niue Amendment Act (No 2) 1968* (NZ), to take land for a public purpose and also s44 of the *Land Ordinance 1969* where the leveki mangafaoa with the consent of the majority of the members of the mangafaoa can apply to the Land Court for an order setting apart land not subject to a charge as a reservation for a specified purpose for the common use of the residents).

The Bill does not define what national parks or protected areas are, or what purpose they are meant to serve. At present there are no existing parks or protected areas.

Crown acquisition of land is a sensitive and often unpleasant matter notwithstanding that compensation may be paid. There is the real possibility that opposition by landowners to the creation of a national park or protected area would cause Cabinet to avoid the issue altogether. The process may still be of value though for the creation of marine parks; sea areas are apparently less contentious than land areas.

An alternative to the national park approach would be to work through traditional methods such as the tapu or the fono. Villages could be encouraged to declare their own tapu areas or observe a system of fono for short term environmental protection. This might achieve a level of protection similar to that which could be provided by a system of national parks. Traditional methods would entail considerably less public opposition and moreover would not require a government agency to enforce compliance.

3.2.3 Part VI

Part VI of the Bill is concerned with coastal zones. The 'coastal zone' is defined as all those areas comprising the 'foreshore' and 'coastal waters'.

'Foreshore' is defined as meaning the land component 50 metres landward of the high water mark. It encompasses a much wider area than the definition of foreshore in the *Territorial Sea and Economic Zone Act 1978*.

'Coastal waters' is defined as all that area having as its inner boundary the mean high water mark, and as its outer boundary the outer limit of the territorial sea and includes every lagoon and the bed of such sea or lagoon. (This definition differs slightly from that of 'territorial sea' found in the *Territorial Sea and Economic Zone Act 1978*. The territorial sea concept relates to coastal state territorial jurisdiction, whereas the coastal waters concept relates to human activity).

The coastal zone in some jurisdictions encompasses a substantially greater landward component because of the recognition that the impact of what happens inland is often manifested at the coast. Because of the intense planning pressures that occur in that thin strip where land meets sea, activities here are usually comprehensively regulated.

The above terms should also be contrasted with the concept of 'Niuean waters'.

3.2.4 Part VII

Part VII of the Bill concerns pollution of seas and inland waters. In contrast to Part VI which deals with mining or building within the coastal zone, this part deals exclusively with pollution, specifically from ships.

'Niuean waters' is defined as comprising the 'territorial sea' and the 'internal waters' of Niue.

The 'territorial sea' means those areas of sea having as their inner limits a baseline measured from the low-water mark along the coast of Niue, or, where there is a coral reef along any part of the coast of Niue, the low-water mark along the outer edge of that coral reef. The outer limit is defined by a line measured seaward from that baseline, every point of which is distant 12 nautical miles from the nearest point of the baseline.

'Internal waters' means any areas of the sea that are on the landward side of the baseline of the territorial sea and includes the waters of any surface or subterranean river, stream, or lake. Arguably, Niue's water lens could be described as a subterranean lake.

Although pollution of the sea is clearly covered, the situation is not so clear concerning freshwater. Under clause 37(b) pollution of freshwater is not an offence unless matter deposited in any place *shall be liable to be washed into* Niuean waters whereby navigation shall or may be impeded or obstructed or the level of pollution of such waters is increased.

The reference to internal waters really only makes sense with regard either to lakes that are large enough for vessels to travel on or to navigable rivers. As Niue has neither lakes nor rivers it is difficult to see what purpose the inclusion of 'internal waters' serves.

The repeal of s222 of the *Niue Act 1966* (NZ) appears to be premised on the assumption that the internal waters of Niue are adequately covered. As this is not the case, s222 should not be repealed.

3.2.5 *Part VIII*

In Part VIII of the Bill, marine casualties are covered in almost identical terms to Part III of the *Marine Pollution Act 1974* (NZ), which is in force in Niue. This may therefore be superfluous. The Bill does not regulate other pollution activities although it provides for management plans to deal with the subject.

Finally, unless separate environmental assessment legislation is contemplated, the Bill should include in the regulations clause a subclause providing for environmental impact assessments to be undertaken as a prerequisite to development proposals. It may also be useful to add a clause acknowledging that common law remedies are preserved.

4 *Administrative structure*

4.1 *The Constitution*

4.1.1 *The Constitution 1974*

The Constitution of Niue came into force on 19 October 1974. It is set out in the First Schedule (Niuean language version) and Second Schedule (English language version) of the *Niue Constitution Act 1974* (NZ). It is the supreme law of Niue (s4(1) of the Act). Acts or provisions of Acts which are inconsistent with the Constitution are invalid to the extent of the inconsistency (article 28(4) of the Constitution). The Constitution's supremacy is also reflected in article 35 which requires a special procedure to be followed in the event that the Niue Assembly wishes to repeal, amend, modify or extend it.

The Constitution provides for an executive, a legislature and a judiciary.

Executive authority is vested in the Queen in right of New Zealand. A Cabinet consisting of the Premier and 3 members of the Niue Assembly, overseeing twelve government departments is empowered to exercise executive authority on behalf of the Queen. A Public Service assists the Cabinet in its work. Statutory bodies are appointed by Cabinet, roles being defined in specific legislation. Examples are the Niue Development Board, the Niue Tourist Board, the Housing Authority, and the Liquor Control Authority.

The Legislature consists of the Speaker and twenty members. This body is charged with making laws for the peace, order and good government of Niue. Elections are held every three years under a system of universal suffrage. The Assembly is the supreme law-making body with authority to veto executive government policies.

The Judiciary consists of the High Court of Niue and the Land Court. The High Court is the court of general jurisdiction (criminal and civil) and has all the power necessary to administer the laws of Niue. The Court consists of the Chief Justice and other judges and commissioners. There is a Chief Justice but no other judges. The commissioners are local lay people and the bulk of cases are heard before them.

The Land Court has exclusive jurisdiction in all matters relating to Niuean land.

Niue's Constitution differs from the constitutions of other island states, such as Western Samoa, in at least two ways. First, it does not contain fundamental rights provisions. Arguably the rights of Niuean citizens are adequately safeguarded under existing statute law and so may not need to be enshrined in the Constitution. There is, however, a limited safeguard in the Constitution provided by article 31 whereby the Chief Justice can comment on measures affecting the criminal law or personal status. This article will be repealed if the Constitution Amendment (No 1) Bill is passed in its present form.

Secondly, there is a conceptual difference regarding the source of authority. The preface to

the Samoan Constitution acknowledges that the Constitution derives directly from the people: 'we the people ... adopt, enact and give to ourselves this Constitution.' In contrast, Niue's Constitution is grounded in the New Zealand experience which in turn follows the English experience where, historically, power resided in the monarch and was only gradually ceded to the people. Hence, under Niue's Constitution, executive authority is vested in the Queen in right of New Zealand and all land is vested in the Crown in right of the Government of New Zealand.

4.1.2 *The Constitution Act 1986, (NZ)*

This Act is part of the law of Niue by implication. It contains sections on the Sovereign, the Executive, the Legislature and the Judiciary.

4.1.3 *The Niue Act 1966, (NZ)*

This is an omnibus Act written in the form of a code. Although it is an ordinary Act of Parliament its subject matter gives it pre-eminence relative to other Acts. It deals with matters of the executive and legislative government that were not brought under the Constitution and contains a substantial number of provisions relating to the establishment and operation of the High Court of Niue. It also contains the criminal code, provisions on family law and a list of New Zealand statutes in force in Niue.

The *Niue Amendment Act (No 2) 1968 (NZ)* is perhaps the most important of the various amendments to the *Niue Act 1966 (NZ)* in that, together with the *Land Ordinance 1969* it sets out the principal features of Niue's land law. *The Property Law Act 1952 (NZ)* is also part of Niue's land law but need not be considered for the purposes of this review.

4.2 *Enforcement*

Conservation officers will be responsible for the enforcement of the Conservation Bill. Questions as to the exercise of their powers should be dealt with by the Government Solicitor as should questions involving prosecutions and evidential matters.

The *Niue Act 1966 (NZ)*, 248, makes the provisions of Part VI of the Act applicable to any offence committed in Niue. It would be useful to have a similar provision in Parts V and VIII thus allowing matters such as 'parties to offences', 'defences' and evidential matters to likewise apply to all offences contained in various enactments committed in Niue and not just those offences found in the Act.

Prosecutions in Niue are generally undertaken by the police, but in serious cases the Government Solicitor appears on behalf of the Crown in both criminal and civil matters. In minor cases the conservation officers, with a little training, may be able to bring prosecutions. The more serious prosecutions can be handled by the Government Solicitor.

Since there is no practising lawyer in Niue, the defence in criminal matters is undertaken by lay persons, known as public defenders. These are appointed by Cabinet, and are

remunerated by Government under an informal system of legal aid. New Zealand lawyers have a right of audience in the High Court, as do other agents with the leave of the Court.

4.2.1 Village control

At the village level, most villages have at least one constable stationed in the village. Village constables are employed on a three year contract and work closely with the Village Council. These constables can be educated in environmental principles as well as the offence sections of the Bill in a manner that emphasises a preventative rather than a remedial approach to environmental problems.

As regards enforcement of traditional laws, there is no chiefly system as with other Polynesian islands and many decisions are made by elders and church pastors. Village Councils have limited disciplinary powers and where, because of blood connections, they find it difficult to enforce sanctions, they may complain to the Central Police Station. The police can only act as conciliators because they cannot intervene unless the matter complained of involves a criminal offence or is likely to lead to a breach of the peace.

Village Councils can be very effective. One example is the village of Tuapa where there is collaboration between the council and mangafaoa. Each mangafaoa has title not only to land, but also to part of the reef. The Tuapa reef is a major gathering place of the karoama, a valuable food source, whose numbers can be severely depleted by intensive fishing. The mangafaoa members have all agreed on the importance of not only limiting fishing, but also avoiding any situation that may discourage the karoama. During the karoama season, the Village Council imposes restrictions such as: prohibiting fishing on the reef at night; allowing fishing from canoes at night but prohibiting the use of lights; and prohibiting outsiders onto the reef.

Overall, however, there is a feeling that Niue's environmental laws are often not obeyed either because of a lack of capability or a lack of political will to enforce them. Avoidance of confrontation is understandable in communities of this size but inevitably the community itself will suffer if it stands by as its laws are breached. In the absence of a firm stand by the legislature, supplementary means of compliance, such as customary law (see Section 10) and education (see Section 17) need to be considered.

4.2.2 Environment unit

An Environmental Task Force has been set up and has produced a Country Report to the Earth Summit which was held in Brazil in June. It is planned that the Task Force will include representatives from the community and will serve a future function as the oversight committee for the development of a National Environmental Management Strategy (NEMS), and provide a springboard for institution-building plans in the environment sector.

It is also planned to set up an environment unit. Such a unit would be located in the Department of Community Affairs, which would be redesignated the Department of

Internal Affairs and would be directly responsible to the Secretary to Government and to Cabinet. The environmental unit would be tasked with the comprehensive responsibility of protecting and conserving the environment, and would have broad, multisectoral representation, and would be the forum for environmental decision-making and sustainable development planning.

Although each department would have regulatory and enforcement roles with respect to environmental protection and conservation needs, the ultimate responsibility to ensure that such functions are operating in an effective manner would lie with the Department of Internal Affairs and the Secretary to Government. Institution-building would be achieved by an initial empowering Act, which would be followed by a comprehensive Environment Act rather than a Conservation Act to reflect an emphasis on balanced, sustainable economic development-cum-environment, rather than a more one-sided conservation approach to environmental concerns.

5 *Environmental planning and assessment*

The NNDP observes that very little environmental planning has been undertaken to this point but that many of the development plans being prepared will have an effect on the environment. In the past the Agriculture Department has taken wildlife into account when carrying out projects, and some environmental components have been considered by the Public Works Department in relation to building and construction activities (see for example the *Niue Building Permits Ordinance 1959*).

There is provision in Part VII of the *Niue Public Health Ordinance 1965* for the sanitation of buildings and dwellings, but no conscious effort has been made to deal with environmental problems in a comprehensive manner. It is, however, now intended to adopt a more technically developed approach to environmental questions as Government is conscious of the dangers involved from unwise environmental practices.

Land use plans, zoning and other controls are not in use although the way is open for Village Councils to pursue the use of these processes under the *Niue Village Councils Ordinance 1967* (see s27 and the schedule). Resource use planning is needed in order to coordinate projects and to rationalise resource utilisation. There are no environmental impact assessment laws (which would require reports on certain projects to determine or predict the adverse consequences of development on the environment) although s6 of the Conservation Bill states that the function of the proposed Conservation Council is to carry out investigations and research into the protection and conservation of the environment.

6 *Land tenure*

6.1 *Law*

The Constitution, apart from establishing the Land Court, makes only one reference to land. This is article 33 which deals with 'special provisions with regard to measures affecting Niuean land'. That article provides for scrutiny (by way of a Commission of Inquiry) of bills before the Niue Assembly affecting Niuean land or the Land Court. The *Niue Amendment Act (No 2) 1968* (the 'Amendment Act') which predates the Constitution contains together with the *Land Ordinance 1969* (the 'Ordinance') the principal features of Niue's land law. The Ordinance in its preamble states its purpose as being to 'provide for the control and tenure of land, the survey of land, the registration of title to land and other like purposes.'

Important provisions in the Amendment Act include the following.

All land is either Crown land or Niuean land (s3).

'Crown land' is defined in s2 as:

'land vested in the Crown in right of the Government of New Zealand, being land that is free from Niuean custom.'

'Niuean land' is defined in s2 as:

'land in Niue vested in the Crown but held by Niueans according to the customs and usages of Niue; and includes any land granted by the Crown in fee simple before the commencement of the Cook Islands Act 1915, and any customary land declared to be Niuean freehold land or native freehold land by an order of any Court before the commencement of this Act.'

The commencement dates referred to above are the 1st of April 1916 and the 1st of November 1969.

All land is vested in the Crown though subject to all rights lawfully held by any person at the commencement of the Act whether by virtue of Niuean custom or otherwise (s4). This includes Niuean land (s21):

'All land in Niue which at the commencement of this Act is held by Niueans in accordance with Niuean custom is hereby vested in the Crown as the trustee of owners thereof, and shall be held by the Crown subject to Niuean custom, and all such land is hereby declared to be Niuean land accordingly, but shall remain subject to any right which may have been lawfully acquired in respect thereof before the commencement of this Act'

otherwise than in accordance with Niuean custom.'

Most of the land of Niue is held by the mangafaoa whose membership is constantly adjusted according to complex social rules. 'Mangafaoa' is defined in the Ordinance as:

'in relation to any Niuean land ... the family or group of persons descended from a common ancestor, including any person who has been legally adopted into the family, who at any given time are recognised as entitled by Niuean custom to any share or interest in the land, and excludes a former member of the family legally adopted into some other family. Where Niuean land is owned by a single person exclusively, that person is the mangafaoa of the land.'

The 'leveki mangafaoa' is defined in s2 as:

'a trustee or guardian of a family having any right, title, estate, or interest in Niuean land.'

The leveki mangafaoa administers the land on behalf of and for the benefit of the owners. In light of the high incidence of absentee landowners the position assumes added importance.

6.1.1 Public purpose

Authority for the taking of land for a public purpose is found in ss10 and 11 of the Amendment Act.

'The Cabinet may from time to time, by Warrant, take any land in Niue for any public purpose specified in the Warrant' (s11).

'Public purpose' is defined in s2 as meaning:

'all purposes for which money is appropriated ... by the Niue Assembly, and all lawful purposes and functions of the Government of Niue; and includes naval, military, and air defence, education, public health, fisheries, public buildings, wharves, jetties, harbours, prisons, water supply, sites for villages, housing purposes, public recreation, land development, and the burial of the dead.'

Compensation is payable to those who have had any right, title, estate or interest extinguished or divested as a result of their land being taken. The procedure for the taking of land is set out in s51 of the Ordinance.

6.1.2 Reservations

The Ordinance allows for the creation of reservations on Niuean land (s44). The leveki

mangafaoa with the consent of the majority of the members of the mangafaoa (the majority of this class must be ordinarily resident in Niue) may apply to the Land Court for an order setting apart land not subject to a charge

'as a reservation for the common use of the residents of a village, or of a Church or other group or institution for such purposes as a burial ground, fishing ground, village site, landing place, place of historic interest, source of water supply, Church site, building site, recreation ground, bathing place or any other specified purpose whatsoever.'

The inclusion of fishing ground, landing place, place of historic interest and bathing place presupposes the Land Court has a marine jurisdiction.

6.1.3 The Land Court

The work of the Land Court under the Amendment Act and the Ordinance involves consideration of the customary rules which govern the land system.

The Land Court is established in Part 3 of the Constitution. Its jurisdiction however is set out in s47 of the Amendment Act. That section grants the Court exclusive jurisdiction in all matters (e.g. ownership, possession, occupation, utilisation, right to proceeds from alienation, determination of boundaries etc.) relating to Niuean land. This jurisdiction encompasses almost all of the land area of Niue as perhaps only 5% of the land area is Crown land.

The workload of the Land Court should be assisted by the Land Titling Project which began in October 1989. The project's goal is economic: to enable land to be precisely identified - as well as ownership of it - thus facilitating its use as collateral for loans. Experience has shown that a comprehensive survey followed by secure titling procedures is necessary for the economic development of individual land holdings. With a secure title, the landowners can obtain development loans using their land as security.

The project should help the Court's workload by providing an incentive for people to do something about ownership now rather than when a dispute arises at which time records or family members may no longer be available. At the time of this review about 8% of the land was estimated to have been registered under this system.

7 Forestry

7.1 Overview

Niue has substantial forests which have a rapid regeneration capacity, and which at times have supplied most of its construction timber needs. The only sawmill in Niue, which is under the jurisdiction of the Public Works Department, is not operating at present. When operational, several hundred cubic metres of wood are typically cut per year to meet local construction needs, which are supplemented by timber imports. It is anticipated that the sawmill will be operational again once the present land titling process is completed. The sawmill is capable of cutting timber to the specifications most frequently in local demand. The natural forest, with its small number of species, restricts the type and quality of millable logs suitable for export purposes.

Between 1980-1985, the NNDP identified three main categories of forest resources. Coastal forest covers approximately 2,500 hectares in a strip around the coast. This forest is difficult to log due to surface coral rock and is important in the protection of land crabs and inland areas. The development of sea tracks and bushroads has led to invasion of areas that were inaccessible in the past.

Light and scattered forest covers approximately 14,000 hectares. This is the largest area of forest, and is mainly forest that has been regenerated from bush gardens but is not sufficient for commercial purposes. When trees approach a sufficient size, they are often cut down again by people re-establishing bush gardens.

Merchantable forest covers approximately 5,500 hectares, covering both virgin forest and abandoned cultivation which has been allowed to regenerate.

The Merchantable Forest Survey conducted after cyclone Ofa in 1990 revealed that estimates of the area of merchantable forest have been reduced from 5,500 to 3,200 hectares, and the area for regenerating forest has dropped by one seventh. Open areas increased by 144% over the same period. Logging activity has only accounted for approximately 250 hectares of the loss in acreage of merchantable timber. The remaining deforested acreage has been a result of clearing for agricultural purposes.

Plans are being made to rehabilitate over-used areas through reforestation and plantation forestry using exotic hardwoods. Implementation of this rehabilitation programme was scheduled to begin in the second half of 1991.

Planning in the forestry sector for logging is on an ad hoc basis because the land tenure system has yet to be sufficiently clarified through the present land titling efforts, a factor which has greatly contributed to the present disruption in timber supplies. As with forestry plantations, logging practices should not be copied from overseas because of the special considerations needed for the type of machinery available and the terrain of the forest areas in Niue.

The introduction of goats to Niue may present an environmental hazard. While constrained they could be useful providers of weed control and meat, but if they were to escape and multiply they could do irreparable damage to Niue's forests and regenerating areas.

7.1.1 *Traditional conservation*

Although there is valuable production potential in Niue's forests, they have great conservation value as well. Tapu forests have been an effective means of preserving fauna and flora. Further extension of this conservation concept into legislation is now necessary. This would enable a balance to be determined between utilisation and conservation of natural resources, and provide for the protection of animals, landscapes and forests with special scientific, cultural and aesthetic values. Government has directed departments responsible for natural resources to identify natural sanctuaries as reserves. At this stage, for economic and environmental reasons, it would be inappropriate to develop pressurised timber preservation treatment facilities in Niue.

7.2 *Law*

The Conservation Bill describes one function of the proposed Conservation Service as being to protect, conserve, manage and control native forests, silviculture projects and tree planning measures (s6(c)). Provision is made for preparation of management plans for indigenous forests (s30). Regulations may be made providing for the prevention or control of the clearing, cutting, lopping, felling, burning or removal of trees and other plants (s54).

8 *Agriculture*

Because of the scarcity of soil and the absence of surface water, potential for agriculture is restricted. The small size of the island and the mangafaoa land tenure system mean that Niue has an especially limited land area that has potential for large scale agricultural use. Soil fertility is also relatively poor in comparison to most neighbouring countries, and is thinly distributed over coralline limestone and basement rock; approximately 30 to 40 percent of the land area is unsuitable for agricultural purposes. Soil information is well documented, and maps are available showing where the physical conditions are most limiting and where the land could most easily be managed for production.

8.1 *Agricultural productivity*

The soils of Niue, though often written off as poor because of the rocky outcrops and surface boulders, nevertheless have substantial agricultural potential for export crops if they are managed well and are not damaged by unsuitable cultivation techniques. Before contact with the West, Niue was able to support a population of over 5000 with traditional subsistence agricultural practices. Most local agricultural practices use shifting cultivation and long periods of fallow are common.

There is a substantial area of potentially productive land. Lack of moisture in some seasons limits production and, occasionally, severe droughts occur. Because of the depth of the water lens and the porous nature of the soil, irrigation is not practical except in the isolated case of a small area of intensive use, such as a nursery in which soil is enriched with organic matter thereby increasing moisture retention.

Around the villages, which are predominantly on the lower terrace, the main crops grown are cassava, banana, pawpaw and coconut. Breadfruit also occurs but no food is as popular as taro. Unfortunately taro grows best on forest soil and much of the primary forest is cleared for growing taro either by slashing and burning or spraying chemicals or a combination of both. Bulldozers are used with care as the pH level beneath the thin layer of top soil is either too acidic or alkaline for taro to grow. Similar degradation occurs on areas formerly in agricultural production. There is concern arising from the traditional hair-cutting practice for male offspring and the ear-piercing ceremony for female offspring in which large amounts of taro are grown.

Traditionally the amount of taro grown for either ceremony was limited by how much land per household could be cleared by hand, planted and, most importantly, weeded by hand. Today, bulldozers are used to clear land and paraquat is used to kill weeds. It is estimated that an average household uses between 5 to 10 litres of this weedicide per month. The land is cleared in anticipation of taro needs for an upcoming ceremony, and often is not farmed again for the next six to eight years.

Typically, after clearing indigenous forest through a combination of bulldozing and burning, and then planting the one crop of taro, only ferns or scrub grow back. This

practice results in large losses of top soil, rapid destruction of long-standing forests, and large usage of a very poisonous weedicide, posing a considerable threat to the integrity of the freshwater lens.

The conditions imposed by the commercial market on traditional production systems when producing for export markets are also of concern.

8.2 *Agricultural census*

In 1989 the first agricultural census was conducted in Niue.

The total number of households was 522 in a population of 2,267, indicating an average of 4.4 persons per household. All but one of the 466 households recorded as agriculturally active had at least one parcel classified as a crop parcel; 57% had at least one coconut parcel and 82% had at least one fallow parcel.

Eighty five percent of all households were recorded as being agriculturally active, but the majority were engaged solely in subsistence agriculture. Only 4% of all households were engaged in commercial agriculture. Patterns of land parcel holdings were fragmented. Such fragmentation inhibited large-scale commercial production.

The acreage of land in use was 6,820 acres. Of the land in use, 23% was under crops, 3% was ready for planting and 74% was fallow. The land tenure pattern indicated that 94% of land parcels are family owned and in use. Forty five percent of parcels in use had been in continuous use for less than five years.

An estimated total number of land parcels was 3,903, of which 50% were fallow, 30% were in crops (i.e. in use) and 20% were in coconuts.

With the exception of 6.4% of the total acreage (which is in bananas and root crops other than taro), crop lands were nearly equally distributed between the two main crops, taro and coconuts. Of these, taro production accounts for the majority of land-clearing and agricultural chemical application activities.

The aggregate acreage planted in various food crops was taro (1,042 acres); coconuts, excluding coconut-only parcels (990 acres); bananas (81 acres); and other root crops (59 acres). Taro was the main export crop accounting for 92% by weight of all exports.

The breakdown by percentage of agricultural households using the following methods of land clearance was as follows: bulldozer 80%; slash and burn 18%; other methods 2%.

The breakdown by percentage of agricultural households using the following agricultural chemicals was as follows: weedicides 87% used at the rate of 5-10 litre/month/household, primarily paraquat; fertilisers 47%; pesticides 14%; fungicides 5%.

8.3 Law

Regarding soil erosion, s6(e) of the Conservation Bill describes one function of the proposed Conservation Service as being to protect, conserve, manage and control soil resources and the coastal zone. Provision is made for the preparation of management plans regarding soil erosion (s30). Regulations may be made providing for the prevention or control of soil erosion (s54).

The *Niue Village Councils Ordinance 1967* provides that a Council may take such action as it deems desirable for the improvement of standards of housing and of agricultural, pastoral, forestry, horticultural or other methods [s27(b)]. The schedule similarly states that the general function of a council is that of undertaking provision, construction, maintenance, and regulation of agricultural, pastoral, horticultural and forestry industries and the economic use of Niuean customary land.

Regarding pesticides, the *Pesticides Act 1991* deals with the importation and sale of pesticides but does not provide for their use or the monitoring of amounts used.

The Land Titling Project which is seen as a vehicle to promote economic growth may, once completed, lead to both a more intensive use of land and a more vigorous clearing of forested areas.

9 Mining and minerals

9.1 Overview

The *Mining Act 1977* provides that all minerals on or under the surface of any land (including the seabed) within the territorial limits of Niue are to be the property of the Crown. No compensation would therefore be payable in respect of the value of any mineral on, in, under, or forming the surface of the land. Compensation is however payable for Niuean land acquired for mining purposes. Persons desiring to prospect or mine for minerals must first obtain a licence. Makatea (crushed or powdered coral limestone) occurs in relative abundance and some monitoring of its mining is desirable, both as to the sites it should be taken from as well as the rehabilitation of those sites.

In 1978 the Avian Mining Pty. Ltd. was issued a licence by the Government, to explore primarily for uranium. In 1979 a consultant from the International Atomic Energy Agency concluded in a report to the Niue Government that the possibility of locating an exploitable and economically attractive uranium deposit on the island was slight. The report went on to say that:

'even in the highly improbable event of the discovery of a uranium deposit, it is difficult to conceive of a feasible method of mining such a deposit. The government would not agree to open-cast mining for environmental reasons, and the cost of removal of the overburden and its disposal, as well as the perhaps insurmountable task of sealing off deposits saturated with (contaminated) water, render this option unviable. Similar sealing problems, as well as the expense of solving ventilation problems, would also make the underground mining option of highly questionable viability. In-situ leaching is also not feasible as acid leach solutions pumped down would be totally consumed by reaction with the limestone before any uranium was leached.'

The report recommended that the Government would be well-advised to terminate its involvement in the exploration programme as soon as possible and use its scarce resources in other more promising and useful directions.

The scenario is no more promising regarding offshore minerals. As Niue sits upon a seamount such that the depth of the water does not exceed 4000 metres, scientists at the South Pacific Applied Geoscience Commission estimate that there is little likelihood of finding commercially significant deposits of deepwater mineral deposits within Niue's EEZ as the sedimentation rate is not rapid enough.

9.2 Law

The Conservation Bill provides that regulations may be made for the taking of gravel, sand, soil, rock, coral or like materials (s54). (*See also the Mining Act 1977*).

10 Biodiversity conservation

10.1 Overview

Given the isolation and distance of Niue from other land masses in the Pacific, the extent of the naturally occurring flora and fauna species is very limited. The relatively late and limited scope of migration patterns to Niue from the neighbouring islands of Tonga, Samoa and perhaps Fiji meant that few species were introduced during this period. The number of species introduced during modern times has also been limited by the nature of the soils and water supply. Noxious weeds such as the Honolulu rose, lantana and mimosa are spreading to agricultural land and pose a threat to more desired species. There is a need for a thorough update on cataloguing and monitoring of existing species.

Wildlife is still plentiful but a decline in the numbers and types of birds is becoming more noticeable. Legislation to protect the coconut crab by banning any form of export is in preparation. It is not certain whether feral cats, dogs and pigs are destroying wildlife or whether the young of wildlife are being affected by the liberal use of pesticides.

10.1.1 Coral reefs

Coral reefs, though very large in volume as they lie around the whole island margin, are readily accessible in relatively restricted areas. It is in these areas that the reef is most likely to be damaged by visitors. A healthy 'coral garden' can be quickly destroyed by people removing pieces of living coral. Regrowth is slow and may become slower if there is a crown of thorns starfish infestation. The use of fish poison is known to adversely affect marine and coral life. In 1990, cyclone Ofa devastated much of the coral reefs on the western side of the island.

Offshore from Alofi township there is some silting of coral reefs caused by runoff from rain and worsened by the incidence of cyclone Ofa. Extensions to the wharf system are under construction but no further blasting is envisaged for these works.

Legislation should be passed prohibiting the removal of coral from the reefs as well as their export. Some controlled exception may need to be made regarding the sustainable use of black or red coral for jewellery.

10.2 Law

Unwritten traditional law is used in the day-to-day regulation of local affairs. This regulative process is respected and provides a reasonable means of environmental control which helps sustain the productivity of land and coastal resources. For example, the coastal zone, which really includes the terrestrial island mass, is not planned or managed in an integrated way, but is reasonably well safeguarded by local environmental sensitivities reflected in traditional law.

Before the establishment of a Westminster style government and legislature, Niueans lived in family or village units which prescribed their own rules of conduct. Because they had no contact with the outside world they had to survive with what the land and sea could supply. Various customs evolved which, whether intended or not, aided in conserving the environment. This is not to say that all traditional conservation practices were effective or even good. Some may have been neither. Generally however they worked.

Prior to the arrival of man the entire island was probably covered by tropical rainforest, but over the last 1,000 years, the shifting agricultural system traditionally used by Niueans has resulted in the total area of primary forest being reduced to 6,000 acres, less than 10 percent of the total. The remaining unsettled area consists of secondary forest recovering from recent cultivation, and vast scrub areas, resulting from prolonged over-cropping and subsequent soil impoverishment. As the primary forest shelters most bird species, the flying fox and edible land crabs, and as many indigenous plant species will only grow in a forest environment, it is essential that the existing forest areas be preserved.

10.2.1 Custom

'Custom' is defined in Black's law dictionary, abridged 5th edition, as:

'A practice of the people, which by common adoption and acquiescence, and by long and unvarying habit, has become compulsory, and has acquired the force of a law with respect to the place or subject matter to which it relates. It results from a long series of actions, constantly repeated, which have, by such repetition and by uninterrupted acquiescence, acquired the force of a tacit and common consent.'

More simply stated, a custom is:

'A rule of conduct obligatory on those within its scope, established by long usage.' (Osborn's concise law dictionary, 6th edition).

Black's dictionary defines 'usage' as: 'a repetition of acts'. Usage differs from custom in that custom is the law or general rule which arises from such repetition. Hence there may be usage without custom, but there cannot be custom without usage.

Custom is not a direct source of law. The Constitution does not put it on par with the conventional law as is the case with some Pacific island constitutions (for example Papua New Guinea). To the extent that a custom contradicts the law, it is illegal. There is, however, recognition of custom in various enactments. The *Niue Act 1966* (NZ) states that judicial notice is to be taken of 'Niuean custom so far as it has the force of law' (s296).

10.2.2 Customary conservation

Two customary sanctions which aid in conservation are those of '*fono*' and '*tapu*'.

The *Niue Fish Protection Ordinance 1965* actually gives the fono legal expression, albeit only in the context of that Ordinance. Cabinet has the power to declare by public notice a fono for fish (ss6 and 7). Fono is not defined in that Ordinance but the effects of a fono are spelt out in s7, namely, to prohibit any person from: entering the area over which the fono has been declared; taking any inorganic substance, material or matter from or in any such area; and, taking or killing fish in any such area.

Fono is a not infrequently used device invoked to protect land by appealing to supernatural beliefs. It is generally used to ward off poachers.

Fono mate is a fono which relates specifically to death. When a family member dies no person is permitted onto the land over which the fono mate is invoked. The period involved varies but 12 months is common. In the case of drowning a fono mate is invoked on fishing grounds and the sea track associated with the death, but the period involved is much less.

Tapu is another supernatural and more potent form of land protection. People are prohibited entry into the area over which a tapu is in force. Areas of bush or reef may be declared tapu by an individual owner, a descent group, or a village. There is a large tapu area several miles north of Hakupu, which has been tapu for four generations. The tapu area is part of Huvalu, one of the surviving large areas of tropical rainforest, and consists of tall trees forming a dense cover over a fairly sparse herbaceous layer below.

These traditional controls are a powerful force in Niuean society and should not be overlooked when considering national park enforcement methods. Tapu protected forests have been an effective means of preserving fauna and flora.

10.2.3 Statutory conservation

Village Councils have the function under item 16 of the schedule to the *Niue Village Councils Ordinance 1967* for the protection of flora and fauna.

The Conservation Bill states two functions of the Conservation Service as being to administer, manage and control national parks and reserves and to protect, conserve, manage and control wildlife (s6). Regulations may be made under s54 providing for:

'the protection and conservation of wildlife including rare or endangered species;

regulating or prohibiting the interference with, removal from Niue or trade and commerce in wildlife including rare or endangered species;

providing for the development, management, protection or preservation of national parks, protected areas, and things in national parks and protected areas;

regulating or prohibiting public use of and entry to national parks or protected areas or to parts of any national park or protected area; and regulating or prohibiting the collection of wildlife in national parks or protected areas.'

The *Wildlife Ordinance 1972* provides for the protection of animals (defined as mammals and birds of a wild species) and enforcement by wildlife wardens who have powers of arrest, search and seizure. It does not apply to domesticated animals or plants.

Protection for flora and fauna from outside pests and diseases is provided by the following legislation:

Agriculture Quarantine Act 1984;

Agriculture Quarantine (Prevention of Animal Disease) Regulations 1991;

Agriculture Quarantine (Disease Control) Regulations 1991;

Plant Quarantine Regulations 1985.

The provisions of the *Convention on Biological Diversity 1992* should be examined closely for compatibility with domestic law if Niue intends to become a party to it.

11 Pollution control

11.1 Air

Given the isolation and small size of Niue, its small population and the existence of sea breezes which reach most of the island, there is little immediate danger of an air pollution problem.

11.2 Marine

The wharf at Alofi is small and restricted to use by fishing vessels only. All of the vessels regularly calling on Niue anchor offshore and transfer cargo ashore via barges to the wharf or in the case of the small product tankers, pump fuel ashore via a floating hose to the terminal. The risk of pollution incidents therefore is limited to the possibility of a grounding at the anchorage or a spill of product from the fuel transfer operation. This could be prevented by putting a floating boom around the oil tanker and delivery hose link during the discharge operation. There is no importation or shipping of bulk heavy oils which are the most damaging and persistent in the marine and coastal environment. All oils which are used in Niue are light grade. This includes all known shipping traders whose vessels are powered by diesel rather than bunker (or heavy fuel) oil.

Most cargo vessels are regular callers and are familiar with the anchorage. They do not work cargo at night. Other vessels stand well off and present minimal risk. Some passing traffic is sighted from time to time, possibly en route to New Zealand or Tahiti. The island does not have any offlying reefs or atolls and, because of its steep nature, presents a good radar target. Passing vessels therefore keep well clear and are not considered to present a risk.

Should any oil be spilt in quantity and be blown ashore on the east side of the island, it would be rapidly dispersed by the prevailing south-easterlies against the steep and exposed rocky headlands. It is doubtful that the effects of pollution would be long-term unless oil was entrapped in some of the caves and chasms. This is considered unlikely.

Oil impacting the west coast, would however, expect to have more effect upon the population as it could penetrate the caverns and, dependent upon the subsequent weather conditions, persist for a while. Fortunately, as such oil would be a light product it would be subject to fairly rapid evaporation.

The escape of a persistent grade of bunker fuel occurring from a grounding may have a more adverse effect. Again, this is an unlikely scenario as winds are generally offshore and none of the known traders to the island carry persistent fuels. Accordingly the risk of oil pollution to Niue is considered to be minimal.

11.3 Waste management

Waste and sewage disposal is still inadequate, especially as it relates to health. Rubbish dumps are found along the roadside, and the effects of latrines on ground water quality are of concern. Alofi town dump is located a few kilometres south of the township and is sprayed periodically by an official from the Health Department.

There is an aluminium can crusher on the island donated by a New Zealand brewery and a bottle recycling project operated by the Catholic Mission which has received establishment assistance from the New Zealand Government and from SPREP.

11.4 Law

The Conservation Bill lists the functions of the proposed Conservation Service as being to prevent, control and correct pollution of air, water, and land resources and to promote litter control (s6). Regulations may be made providing for regulating or prohibiting the pollution of air, water, or land, and the depositing or dumping of litter or any substance of a dangerous, noxious or offensive nature (s54). Part VII of the Bill deals with pollution of seas and inland waters; Part X deals with control of litter.

Under the *Agriculture Quarantine (Prevention of Animal Disease) Regulations 1991* the Director of Agriculture may require the owners, occupiers or users of rubbish dumps which contain meat or other animal products or animal carcasses to manage them in such a way as to minimise pigs, poultry or dogs gaining access.

Pollution at sea is covered by the *Marine Pollution Act 1974* (NZ) and the *Wreck and Salvage Ordinance 1968*. (There are two marine pollution protocols under the *Convention for the Protection of the Natural Resources and Environment of the South Pacific Region 1986* which are relevant in the event Niue was a party to that Convention).

Under the *Mosquito Control Act 1980* every person who litters or dumps on any land whatsoever (not being land designated for that purpose by Cabinet) any bottle, tin, coconut shell, shell or any other article whatsoever likely to retain water and so become a breeding place for mosquitoes commits an offence against the Act.

Part VII of the *Niue Public Health Ordinance 1965* provides for the sanitation of buildings and dwellings. Requirements for dwellings are set out at s43.

Item 4 of the schedule to the *Niue Village Councils Ordinance 1967* states that village cleanliness is a council function, in addition to health, sanitation and abatement of nuisances.

12 Water quality

12.1 Overview

Investigations of ground water resources by drilling have confirmed that a thin layer of freshwater is present and floats on sea water. There is no surface water on Niue; rainwater seeps down into an underground lens, perhaps the island's most precious resource, which is accessible at one or two outlets near sea level and through deep wells. The aquifer is very susceptible to pollution because of the fissured and permeable limestone and because of the lack of soil cover.

Where present, the soil is shallow and porous. On much of the lower terrace soils are restricted to shallow pockets between the coral rocks. Rain percolates through porous limestone, is collected in chasm pools, and then re-emerges through seaside springs. Waste disposal in the outer 500 metres of the coastal strip is less hazardous because groundwater flows toward the coast from this area and not back into the interior of the island.

The two most serious issues involve the protection of the quality of the water lens, and the halting of some of the current agricultural practices which lead to deforestation, loss of topsoil, one-crop agriculture and the overuse of agricultural compounds. The unintended and possibly negative effects of such agricultural practices may be threatening the integrity of the water lens.

Water quality sampling has been conducted on numerous occasions. The most recent tests were in September 1991 and January 1992. The results were within the World Health Organisation recommendation for drinking water despite there being high levels of iron present. There was no salinity content although there was a high nitrate content in a bore hole in the agricultural farm, most likely due to excessive use of fertiliser. Some samples showed an oil film and russet colour due to the leakage of diesel oil.

Bacteriological tests for faecal coliform were negative but total coliform count was positive in some bore holes. The two main sources of coliform contamination have been identified as septic tanks and piggeries. Accordingly there is a threat by chemical and bacteriological pollution.

A freshwater monitoring programme is needed to determine:

- biological content (in view of the proximity of septic tanks to some water pumping stations);
- chemical content (in view of the probable percolation of agricultural chemicals through the porous limestone cap to the lens);
- radioactive content (in view of the unusually high irregular distribution of

background radiation levels); and

- salinity (in view of the need to avoid extraction at rates and locations which might endanger the integrity of the lens and sustainability of present water consumption patterns).

Niue's freshwater lens is critical to life on the island. Numerous water tanks utilising rainwater exist but the population is becoming more and more dependent upon the lens. The rainwater catchment system has been extensively developed but has been allowed to fall into decay. Plans are underway to revive the system as some bores are now known to be contaminated.

There is an economic aspect to having a well developed catchment system. Approximately two thirds of Niue's rainwater runs off the island and remains an important and presently untapped source of water for economic development purposes. For example, if an investor is encouraged to set up a brewery on Niue, then there needs to be an ample quantity of high quality water available.

A two page report by Nwe Nwe Nyo of the Public Works Department entitled 'Water Quality' listed the following recommendations (hereunder paraphrased) for urgent action.

- (a) Catchment areas should be protected from pollution of any sort.
- (b) As a matter of practice, community housing, livestock, septic tanks, grave yards, rubbish dumps and waste disposal systems should be restricted to an area 200 metres from a water bore until a limit is set by law.
- (c) Each bore hole site should be fenced off.
- (d) All bore hole sites should be cleaned.
- (e) Old bore holes should be closed systematically.
- (f) Bore hole sites should be higher than the surrounding area.
- (g) Diesel pumps should be cleaned and maintained.
- (h) No dumps to be situated inland and in any case no more than 500 metres from the coastline.
- (i) Proper water tight waste disposal systems (septic tanks) should be established and all waste treated. A sewage system and sewage treatment plant is recommended.
- (j) Chlorination or similar should be introduced to disinfect the water.
- (k) The use of fertilisers and agricultural chemical should be controlled.

12.2 Law

A draft Water Resource Act and draft Water Resources Regulations were drawn up in 1981 but have been ignored right up to the present time. A controversial feature of the draft regulations was regulation 8 which provided for a protection zone consisting of a 500 metre radius from the bore hole to be kept free from, amongst other things, buildings and animals. There is considerable resistance to the extent of the protection zone from those on whose land water bores are situated. Nevertheless, if the experts state that a protection zone of considerably more than a token distance is necessary then Government will have to take a firm stand on the issue in order to maintain the water quality of the lens.

Provisions dealing with pollution of freshwater on the island include s59(a) of the *Niue Public Health Ordinance 1965* and s222 of the *Niue Act 1966* (NZ). The latter section will be repealed if the Conservation Bill is passed in its present form.

The draft Act has a repugnancy clause but unlike the blanket clause in the Conservation Bill will only prevail over the two Acts mentioned in its schedule (*viz.* the *Village Councils Ordinance 1967* and the *Mining Act 1977*) in the event of an inconsistency.

Part IX of the *Niue Public Health Ordinance 1965* relating to 'water supply' is to be repealed when the Act comes into force. There is no mention of repealing s222 of the *Niue Act 1966* (NZ).

The Conservation Bill lists one of the proposed Conservation Service's functions as being to protect, conserve, manage and control water catchments (s6).

Item 4 in the schedule to the *Niue Village Council Ordinance 1967* notes a function of the Council as being the prevention of pollution of water sources.

13 Fisheries

13.1 Overview

Niue is situated on a relatively barren sea mount, with limited access to deep sea resources. Its fishing grounds are not particularly fertile as there is little surface runoff to provide nutrients. The potential to develop fisheries is further limited by the nature of the difficult access to the sea via its rugged and steep coastline as well as by the unprotected nature of the coast to open and sometimes very rough seas, in the absence of a natural harbour or a lagoon system.

Niue is a net importer of fish. The primary scope for the development of fisheries in Niue is the reduction of fish imports, as the local demand presently exceeds the local supply. The rugged coast and limited access to the ocean bottom means that fishing is labour-intensive. Hence, it is unlikely that inshore fishing could develop an industry in competition with other Pacific countries with easier fishing conditions.

In terms of local demand, the small population of Niue and its long coastline suggest that fishing will continue to be a small industry, mostly on a part-time basis, and that there will not be great pressure on the fish resources due to local demand. Current exports of fish are solely on the basis of travellers to New Zealand carrying cooked or frozen fish as gifts to friends and families, valued at approximately \$50,000 per year.

The 1989 Agricultural Census found that 61% of all households go fishing, with 51% of these households owning canoes and 17% owning dinghies and outboard engines. Shore fishing is the most frequent method of fishing, followed by the use of canoes, dinghies and catamarans. Ninety percent of all households indicated that they never sold any fish. Of the 10% of all households selling fish, the majority sold fish approximately once a month. Accordingly, while fishing is an important activity in which more than half of all households regularly participate, there are few commercial operations and most fishing is for household consumption.

There is medical evidence in support of the contention that the stupefying of fish with poisons such as pyrethrum is practised. The incidence is, however, very low. No information was obtained on the effect, if any, of fertiliser, sewage or pesticide run off on fish populations.

Within this limited local demand for fish, two recent developments have taken place. Firstly, use of fish aggregating devices has made pelagic fish more accessible, reducing the time and fuel required to search for fish. Secondly, it has been established that there are bottom fish available in accessible depth ranges on the steep outer slopes of the sea bed. Under favourable sea conditions, this fishery could be worked with specially developed gear from powered dinghies and traditional canoes.

Niue owns three distant offshore reefs: Antiope and Harrans Reefs, of which little is

known, and Beveridge Reef, which is about 210 kilometres to the south east, and on which there has been some limited resource assessment. Indications are that the reef contains a substantial resource of clams and crayfish. The isolation of the reef and its open ocean exposure can pose problems for developing the resource from Niue, and could possibly limit recolonisation of fish from other sources if the resources were to be over-exploited. Some further resource assessment is now needed.

Niue's role in pelagic fishing in its 200 mile Exclusive Economic Zone (EEZ) is as a participant in the *Treaty on Fisheries between the Governments of certain Pacific States and the Government of the United States of America, 1987*. The only practical way to assess Niue's pelagic resource would be to utilise research reports from Japanese, Korean and other foreign boats that used to fish in the EEZ. If the resource proved sufficiently promising to attract bids for fishing rights, procedures for granting of fishing rights, reporting, monitoring and surveillance could be developed in collaboration with countries with contiguous EEZs.

There is concern that fishing vessels are fishing illegally in Niue's EEZ, including vessels using driftnets.

13.2 Law

13.2.1 Nearshore fishing

The *Niue Fish Protection Ordinance 1965*, s5, prohibits the use of dynamite, gelignite or any other explosive; firearms; akau Niukini or any other poison or stupefying agent; or underwater breathing apparatus for the purpose of taking or killing fish within Niuean waters (the *Niue Fish Protection Amendment Bill* will allow scuba gear to be used for scientific research where that research will benefit Niue's fishery resource). As well as protecting fish stocks, the reef and other marine organisms are also preserved. 'Niue waters' is narrowly defined as the sea adjacent to the coast of Niue within one mile of the external reef line and includes all water between that line and the coast. The definition of 'fishery waters' in the *Fisheries Bill* is much wider.

The Ordinance empowers Cabinet on the recommendation of the Chief Agricultural Officer to declare a fono for fish over any part of the reef (s6). The effect of the fono (s7) is to prohibit any person from entering the area over which the fono has been declared; taking any inorganic substance, material or matter from or in any such area; and, taking or killing fish in any such area.

Village Councils have the function under item 16 of the schedule to the *Niue Village Councils Ordinance 1980* for the protection of fish resources in accordance with the *Niue Fish Protection Ordinance 1965*.

The *Sunday Fishing Prohibition Act 1980* prohibits fishing or the use of a seacraft between 4 a.m. and 9 p.m. on Sundays (s3). This reflects the influence of religion, as a social factor, in law making. It also serves to provide a respite for all species of fish.

The *Territorial Sea and Exclusive Economic Zone Act 1978* allows Cabinet to determine the total allowable catch within the territorial sea (s11). Foreign fishing vessels require a licence in order to fish within the territorial sea.

13.2.2 Offshore fishing

The aim of the Fisheries Bill is to enable the promotion of conservation and efficient utilisation of any particular fishery resource. The Bill focuses on commercial fishing, primarily offshore and establishes a licencing system for vessels wishing to fish in Niue's fishery waters. An exception is made in the case of a Niuean or Niuean resident providing fish for domestic use. It is an offence to fish using driftnets, explosives, poisons or other noxious substances (s17).

There is a question as to Niue's ability to patrol its EEZ against illegal fishing. The *Treaty on Fisheries Surveillance and Law Enforcement 1992* may help provide Niue with a better surveillance and enforcement capacity.

13.2.3 The Conservation Bill

The Bill describes a function of the proposed Conservation Service as being to protect, conserve, manage and control wildlife [s6)a)]. Part VI deals with activities in the coastal zone. Part VII deals with pollution of seas and inland waters.

14 Tourism

14.1 Overview

The role of tourism in the economy has been relatively small to date. The number of visitor arrivals per year from 1985 to 1989 has been in the range of between 1,231 and 2,040, although a substantial number of visitors are visiting relatives and may even be classified as returning Niuean residents. Hotels, restaurant and air services are limited.

The physical characteristic of Niue suggests there may be a large and as yet relatively untapped potential for Niue to develop a 'niche' tourist market for the more adventurous tourist who would like to explore the caves, chasms and blowholes that abound along the coastline. The caves especially may require reserve status as there is a problem with disfigurement by carving graffiti on to rock faces as well as breaking of stalagmites and stalactites. Niue has potential for ecotourism. Tourists with an interest in ecology spend money on village accommodation and tours of village marine or forest ecosystems. They expect that their money will act to enhance conservation of these ecosystems and at the same time ease cash pressures facing villages without unduly altering their lifestyles.

Two potential constraints which would need to be addressed with respect to a rapid expansion in tourism are firstly, a continued supply of good quality water and secondly, an adequate solid-waste disposal plan.

An airport extension proposal, reconstruction of the Niue Hotel and restoration of sites damaged by cyclone Ofa as well as identification of new sites are part of the continuing effort towards developing tourism.

14.2 Law

The functions of the Tourist Board are set out in s4 of the *Tourist Board Ordinance 1970*. These include the promotion and encouragement of the tourist industry in Niue, and the regulation and controlled use and development of scenic attractions and recreational facilities. The powers the Board has for the effective performance of its duties are listed at s5.

Item 3 of the *Niue Village Councils Ordinance 1967* cites a function of a council to include the undertaking, provision, construction, maintenance, management and regulation of public parks, gardens, recreation areas scenic reserves, and lookouts and other public places and reserves and land vested in the council. Item 9 cites a function as extending to granting money to associations for the promotion of handicrafts, recreation and sports and tourism.

15 Cultural heritage

15.1 Handicrafts

Niue has a tradition of producing high quality handicrafts (primarily woven wares), but the art is slowly being lost and production for sale is decreasing. In 1989 a craft curriculum was formulated for high school with the help of 10 skilled weavers and wood carvers. Crafts to be taught were selected for students in forms 1 to 4 and were begun on a trial basis in 1990. The Education Department's evaluation of this programme has not yet been released.

The Cultural Centre ran craft workshops prior to 1990. The programme was disrupted due to cyclone Ofa, and will be reused soon when the performance building is fully restored. Last year a pandanus planting project was started with funds provided by the Australian Government and many women participated. At the same time, a craft preservation project was also carried out. A bilingual book will be published when the project is completed. Illustrations and photographs will be included.

15.2 Law

The *Niue Act 1966* (NZ) allows for the establishment of Village Councils (s50). The Act provides that Village Councils may be empowered to make bylaws (s51). Any bylaw so made which is repugnant to any Act or regulation in force is to be read subject to that Act or regulation (s52).

The *Niue Village Councils Ordinance 1967* provides for the establishment of Village Councils. There are presently thirteen. The Ordinance empowers Village Councils to make bylaws (s29), very few however have been made. This is unfortunate because the functions of the council, which are set out in s27 and in the Schedule to the Ordinance, are extensive. There is a file in the Niue Government office which has solitary bylaws passed in 1977 by one Village Council regarding water, taxes and community works. Bylaws are generally ignored. For instance the Police Service does not have copies of any nor are they included in Niue's legislative volumes.

The *Niue Cultural Council Act 1986* provides for the establishment of a Cultural Council whose functions are to promote all aspects of work connected with culture and technology including documentation, conservation and repatriation of artifacts; to encourage and foster the study of oral traditions, language, and creative and performing arts in their traditional and contemporary forms; to encourage the promotion of salvage archaeology and the conservation of archaeological materials, sites and monuments; and to regulate and control the use and development of historic sites.

16 *Environmental treaties*

Under the constitutional arrangement, New Zealand retains the right and the responsibility to conduct for Niue any matter relating to foreign affairs, but only does so at the request of the Niuean Government. New Zealand has normally entered into treaties on behalf of Niue. At times New Zealand has passed legislation in order to give domestic effect to certain treaties, for example *The Marine Pollution Act 1974* (NZ), and the *Continental Shelf Act 1964* (NZ), both of which are in force in Niue.

Every treaty to which Niue is a party, and which is in force, is binding upon Niue and must be performed by Niue in good faith. By becoming a party to treaties, Niue signifies its acceptance of norms and standards of conduct developed and held by the international community.

A list of environmental or related treaties to which Niue is a party or a signatory had not been received from the New Zealand Representative's Office at the time of writing. Niue is a signatory to the *Treaty on Fisheries between the Governments of certain Pacific States and the Government of the United States of America, 1987* as well as the corollary *Treaty on Fisheries Surveillance and Law Enforcement, 1992*. It appears that Niue is a party to the *Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1973*. In light of its participation in regional marine pollution conferences Niue may well become a signatory or party to marine pollution treaties.

Apart from the treaties establishing such intergovernmental bodies as the South Pacific Forum Fisheries Agency (SPFFA), other treaties of relevance include:

Convention for the Conservation of Nature in the South Pacific, 1976 (the Apia Convention).

United Nations Convention on the Law of the Sea, 1982 (not yet in force).

South Pacific Nuclear Free Zone Treaty, 1985.

Convention for the Protection of the Natural Resources and Environment of the South Pacific Region, 1986 (the SPREP Convention).

Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific, 1989 (the Wellington Convention).

Niue's final status regarding the *Framework Convention on Climate Change 1992* and the *Convention on Biological Diversity 1992*, both of which were signed by well over 100 countries in Rio de Janeiro in June 1992, is not yet known. At present it is not noted as being a signatory to either convention. New Zealand has signed both, but it appears *not* on behalf of Niue.

17 Conclusion

17.1 Key areas

17.1.1 Economic development

The paramount policy objective of the Niuean Government is to work for the maintenance of a 'living community'. The promotion of economic development in Niue is essential to this end because it provides a sense of purpose which can no longer be derived from traditional subsistence.

Government wishes to forge ahead with economic reform in order to stimulate economic activity, provide a desirable standard of living and attract Niueans back to the island. The increase in economic activity (whether by foreign investors, people clearing agricultural plots, or people returning to Niue as the Government clearly wants), will in one way or another aggravate the existing environmental situation. For example land will be cleared for housing and agriculture. There will also be more residential and industrial wastes and sewage.

17.1.2 Environment unit

A structure needs to be in place to deal with problems that can be expected to arise from economic development. An environment unit with well-defined objectives and working according to a streamlined set of environmental laws is needed. As earlier explained this unit will be tasked with the comprehensive responsibility of protecting and conserving the environment and will have broad, multisectoral representation. It would be the forum for environmental decision-making and sustainable development planning.

17.1.3 Water lens

The water lens is important for life on the island. It also acts as an indicator of the ill effects of human activity, especially land clearing for agricultural purposes, an activity which should be regulated.

An effort should be made to re-establish the roof water catchment system Niue had before water bores were drilled. The water lens question touches on other areas of environmental concern. Chemicals brought onto the island whether for vehicles, industry, or agriculture will need to be carefully disposed of as they will eventually leak into the water lens.

17.1.4 Waste

There are different methods of waste disposal depending on the type of waste in question. Chemicals which are no longer useful should be disposed of at a specific storage site, incinerated, or taken off the island. Residential waste needs to be disposed of in designated sites around the island which need to be within 500 metres of the coast. Bio-toilets, water-

tight septic tanks, a sewage system and treatment plant for the entire island, or a combination of these, are some of the options available for sewage disposal.

Ultimately, Government will have to screen what it imports into the country with a view to finding environmentally friendly alternatives to what is at present being imported. What comes into the island stays within the island. As Niue is very small, the results will become manifest in a short span of time.

Weedicides need to be used sparingly because they will eventually find their way into the lens. This is true of any agricultural chemical.

If a reduction in weedicide were to result in a reduced rate of clearing land, then water quality would be enhanced as would biodiversity conservation. (Land clearing however could still be achieved by the slash and burn method or by bulldozing and these methods would also need to be controlled.)

17.1.5 Biological diversity

Worldwide, ecosystems of highest biological diversity include rainforests and coral reefs, both of which are present on Niue. These ecosystems are composed of plant and animal species which have evolved over many centuries and become adapted to the conditions on Niue. Their destruction will have implications regarding the habitability of the island. They have made it possible for inhabitants to obtain food and materials for shelter and clothing. Some rainforest plants are valued for their medicinal value. Moreover, rainforest and coral reef ecosystems have an aesthetic appeal quite apart from the spiritual or supernatural beliefs Niueans associate with them.

17.1.6 Customary conservation

The fono and tapu are traditional methods which have succeeded in preserving both forest and coral reef ecosystems. A system of national parks or protected areas relying on acquisition by the Crown, is likely to meet with opposition, especially as regards terrestrial parks or areas. The fono concept has already been embodied in legislation in a limited context (the *Niue Fish Protection Ordinance 1965*) and the same may be possible with the tapu concept.

17.1.7 Environmental impact assessment

If there is to be an economic thrust, for example a forestry logging venture, a black coral jewellery venture, or a commercial fisheries venture, then trade-offs are unavoidable. A tapu area such as Huvalu forest which is off limits for all purposes will be the exception rather than the rule.

Environmental impact assessments are useful tools for decision-makers and give advice as to how much of a resource can be harvested without undue effect on the resource, its replenishment, or other components of the environment. Likewise a social impact

assessment can be commissioned to determine how communities are affected.

17.1.8 Village Councils

Village Councils do not appear to be operating to the potential envisaged by the *Niue Village Councils Ordinance 1967*. They have wide functions and power to make bylaws - even though the bylaws are subject to Acts of Parliament. Nevertheless, within their sphere of jurisdiction there is much that Village Councils can accomplish. In the meantime there is a vacuum which may be partially filled by the Government which has a greater administrative and enforcement capacity. The hope though is that Village Councils will eventually be fully involved in local issues.

17.1.9 Planning

Niue is beginning a period of economic activity undertaken in an effort to improve the lot of its people. Planning legislation is required in order that changes occur in a rational manner with minimal environmental degradation. Planning for hotels, tourist sites, factories, infrastructure, a sewage system, dump sites, siting of water bores and the like needs to be done according to an overall blueprint and certain standards.

17.1.10 Education

Educational and Village Council or mangafaoa initiatives (such as traditional conservation methods) should be encouraged in order to supplement legal initiatives. An environmental education programme can be developed to teach children and adults about their environment.

Some environmental education is already integrated into the school science and social science programmes which are compulsory to Form 4. Ways should be sought to determine the best methods of bolstering the environmental component.

Students begin to specialise in forms 5 and 6 and accordingly choose from a range of optional externally prepared School Certificate and University Entrance subjects. If an optional course in environmental studies is to be developed (or adapted from an existing paper) then it will have to be able to compete with other available study options.

For adults or graduates, environmental courses may be available under the University of the South Pacific Continuing Education Programme.

17.1.11 Community education

The Community Education Unit of the Department of Community Affairs may be able to develop environmental materials for the village community. It may also be able to work in tandem with the Health Department which visits a different village every Wednesday as part of its village inspection programme. Its main message is hygiene and sessions are open to everyone.

17.1.12 Departmental programmes

The Fisheries Division of the Department of Agriculture, Forestry and Fisheries has distributed two fact sheets for public information, one on crayfish conservation (also translated into Niuean) and another for visitors regarding marine resources.

The Public Works Department expects to begin an education programme on health aspects of the water supply before June 1992.

Under s6 of the Conservation Bill, the proposed Conservation Council is to provide or assist in the provision of training skills associated with performing any of its functions; and to prepare, provide, disseminate, promote and publicise educational and promotional material relating to conservation, and publicise the benefits to present and future generations of the conservation of natural and historic resources of Niue.

17.2 Law

17.2.1 The Constitution

The Constitution has little direct effect regarding environmental matters. Nevertheless, because it is the supreme law, amendments to the Constitution must be scrutinised for possible effects on environmental laws.

17.2.2 Land law

Niue's land law likewise needs to be watched closely with regard to the development impetus hoped to be gained by the Land Titling Project as well as the proposed Land Law Amendments.

17.2.3 Water legislation

Water legislation will need to fit well with the Conservation Bill. There are bound to be some important overlaps because the water lens issue touches on other significant environmental concerns. The issue over the 500 metre bore hole radius is not likely to become any easier to resolve and Government will need to take a decisive stand on the matter.

17.2.4 Village Councils

Village Councils have the potential to play a major role in environmental management and the current review of their powers, functions and interface with national government may help bring out that potential.

17.2.5 The Conservation Bill

Government's commitment to economic development reflects a utilitarian view of nature.

The Conservation Bill, inasmuch as it stresses sustained utilisation of resources, falls squarely within this utilitarian consciousness. There needs to be care that the Conservation Service does not assume an inordinate developmental role. Environmental impact assessment legislation will help redress this developmental bias.

The Bill will operate as the cornerstone of environmental legislation; other environmental legislation will be read subject to its provisions. It covers a broad range of concerns: national parks and reserves; wildlife; forests; water catchments and Niuean waters; soil resources; pollution of air, water and land; litter control; investigation and research; and education. Several of these are areas not previously covered by existing legislation. The regulations which can be made under the Bill also cover a wide field.

The Bill, if passed, will require fine tuning concerning its integration with other laws and institutions. Hence there are some bodies which perform an overlapping function, for example the Tourist Board and the Department of Agriculture. Also, some jobs may not be required, for example the role of wildlife wardens could be performed by conservation officers. Again, it may be desirable to repeal such enactments as the *Wildlife Ordinance 1972* and to incorporate its concerns in the Bill to avoid duplication and confusion.

17.2.6 Enforcement

Well drafted legislation is useless without proper enforcement. Enforcement of environmental legislation is often an unpopular task and conservation officers will need the support of Government as well as the Conservation Council.

18 Recommendations

1. The Conservation Bill

- (a) That the Conservation (or equivalent) Bill be scrutinised regarding its alignment with existing and prospective law (e.g. the Fisheries Bill, planning legislation).
- (b) That the Bill specify who will be conservation officers.
- (c) That environmental impact assessment rules be introduced either under this Bill or separately.

2. Institutional

- (a) That consideration be given to the establishment of a stand-alone environment unit.
- (b) That an environment unit have oversight of policing and prosecuting of environmental legislation.
- (c) That government bodies identify their roles or functions in relation to development and environment issues.
- (d) That government bodies collate policy related to the sectors identified in Sections 7 to 15 of this review.
- (e) That the lists of roles, functions and policies be made available to the environmental unit.
- (f) That environment and development laws relevant to or administered by each government body be compiled for the use of that department and sufficient copies made available for staff.
- (g) That periodic training be given to officers in each department regarding comprehension and enforcement of the laws identified for that department.
- (h) That the environment unit annually assess the enforcement of existing environment and development legislation in Niue.
- (i) That the role of Village Councils be examined with reference to the proposed review of the *Niue Village Councils Ordinance 1967*.

3. *Planning*

- (a) That town and country planning legislation be prepared taking into account planning powers of Village Councils.
- (b) That a tourism development plan for the next decade be prepared.
- (c) That a disaster preparedness plan make allowance for remedial action required for wildlife recovery.

4. *Economic development*

- (a) That existing legislation relating to offshore fishing, hardwood forestry, tourism, fruit export or any other industry for the time being identified as a target industry, be compiled by the environment unit.
- (b) That proposed and existing legislation for the encouragement of business ventures (including business licences; enterprise incentives; development bank loans; etc.) encourage clean non-polluting industries.

5. *Forestry*

- (a) That legislation be passed preserving Niue's existing native forests.
- (b) That there be formal government recognition of tapu areas.

6. *Agriculture*

- (a) That legislation be sought regulating the clearing of land, particularly with regard to taro planting.
- (b) That loans for agricultural purposes, as a condition of lending, comply with land clearing regulations.

7. *Water*

- (a) That draft water legislation and regulations be enacted.
- (b) That s222 of the *Niue Act 1966 (NZ)* be preserved for the time being.

8. *Pollution*

- (a) That consideration be given to setting a quota on the number of motor vehicles allowed on the island.
- (b) That alternative transport to motor vehicles be encouraged.
- (c) That imported goods be screened and preference given to alternatives which are biodegradable, non-toxic, durable, reusable, repairable, recyclable and have minimal packaging.
- (d) That tariffs (and excise taxes) on environmentally sound products be reduced or eliminated and, conversely, that environmentally unfriendly products be banned or have a high rate of duty (and excise tax) imposed.
- (e) That a Summary Offences Bill take environmental offences into its purview.
- (f) That dangerous goods legislation (which would include petroleum) be prepared.

9. *Marine issues*

- (a) That fisheries legislation be enacted.
- (b) That suitable shipping and port legislation be prepared.

10. *Biodiversity*

- (a) That a list of endangered animal and plant species be compiled for inclusion under a schedule to the *Wildlife Ordinance 1972* and that the Ordinance be amended to accommodate this.
- (b) That an updated list of noxious weeds and animal pests such as goats be compiled for inclusion into appropriate legislation.
- (c) That a working hierarchy of protected area devices such as the following, be adopted:
 - (i) traditional conservation concepts: tapu and fono;
 - (ii) enshrinement into law of traditional conservation

concepts such as the fono under the *Niue Fish Protection Ordinance 1965*;

- (iii) *Niue Village Councils Ordinance 1967*, one function of villages councils regards the protection of flora and fauna;
- (iv) *Land Ordinance 1969* s44, allows for the creation of reservations (at the initiative of the mangafaoa) for any specified purpose;
- (v) Cabinet may take land for a public purpose under the *Niue Amendment Act (No 2) 1968 (NZ)*; and
- (vi) Part IV of the Conservation Bill allows Cabinet to prescribe by regulation certain areas to be national parks or protected areas.

11. Mining

- (a) That makatea mining be regulated.

12. Treaties

- (a) That a list of environmental treaties to which Niue is a party or signatory be compiled.
- (b) That Niue determine its obligations under each of these treaties.

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Alphabetical list of interviewees

Chapman, Terry
Secretary to Government

Coffen-Smout, Scott
Fisheries Officer

Foran, Warwick
Forestry Officer

Levi, Ahohiva
Registrar of the Land Court

MacFadzien, John
Government Solicitor

Nyo, Nwe Nwe
Sanitary Engineer
Department of Public Works

Pihigia, Hakai
Deputy Director of Public Works

Punu, Bradley
Environment Officer
Department of Community Affairs

Siakimotu, Atapana
Director of Education

Tafea, Holo
Principal Health Inspector

Talagi, Billy
Clerk of the Niue Assembly

Talagi, Fifita
Director of Community Affairs

Talagi, Sisilia
Director of Agriculture, Forestry and Fisheries

Tongatule, Maria
Police Senior Sergeant

Tongatule, Toeono
Assistant Secretary to Government

Viliamu, Faama
Tourism

Welton, Barbara
Office of the New Zealand Resident Representative

Annex 1

List of environmental and related Acts and Regulations as at 19 February 1992

The following is a list of environmental and related Acts and Regulations in force in Niue.

- (a) *Agriculture Quarantine Act 1989*
 - *Agriculture Quarantine (Prevention of Animal Disease) Regulations 1991*
 - *Agriculture Quarantine (Disease Control) Regulations 1991*
 - *Plant Quarantine Regulations 1985*
- (b) *Atomic Energy Act 1945 (NZ)*
- (c) *Continental Shelf Act 1964 (NZ)*
- (d) *Development Fund Act 1983*
- (e) *Land Ordinance 1969*
- (f) *Marine Pollution Act 1974 (NZ)*
- (g) *Mining Act 1977*
- (h) *Mosquito Control Act 1980*
- (i) *Niue Act 1966 (NZ)*
- (j) *Niue Building Permits Ordinance 1959*
- (k) *Niue Cultural Council Act 1986*
- (l) *Niue Dogs Ordinance 1966*
- (m) *Niue Fish Protection Ordinance 1965*
- (n) *Niue Public Health Ordinance 1965*
- (o) *Niue Village Councils Ordinance 1967*
- (p) *Pesticides Act 1991*
- (q) *Planting of Land Ordinance 1963*
- (r) *Public Emergency Act 1979*
- (s) *Sunday Fishing Prohibition Act 1980*
- (t) *Territorial Sea and Exclusive Economic Zone Act 1978*
- (u) *Tourist Board Ordinance 1970*
- (v) *Wildlife Ordinance 1972*
- (w) *Wreck and Salvage Ordinance 1968*

Each measure is described briefly (item 1) and is followed by comments (item 2).

- (a) *Agriculture Quarantine Act 1984*
 - 1. Provides for the protection of plants and animals.
 - 2. Definition of 'animal', 'pest', 'plant', 'soil'.
Quarantine officers to be conservation officers?
Repeals Cook Island Quarantine (Aircraft) Regulations 1946?

Agriculture Quarantine (Prevention of Animal Disease) Regulations 1991

1. Regulates importation of animals and animal products.
2. Rubbish dumps are mentioned at s14.

Agriculture Quarantine (Disease Control) Regulation 1991

1. Deals with endemic and foreign diseases and pests of animals.
2. Authorised officers to be conservation officers?

Plant Quarantine Regulations 1985

1. Regulates entry of plants and plant pests.
2. 'Noxious weed' defined.

(b) *Atomic Energy Act 1945 (NZ)*

1. Provides for the control in Niue of the means of producing atomic energy and for the vesting of radioactive ores in the Crown.
2. Cross reference the *Mining Act 1977*.
It is unlikely that this type of mining will occur in Niue.

(c) *Continental Shelf Act 1964 (NZ)*

1. Provides for the exploitation and exploration of the continental shelf.
2. Islands do not generate continental shelves.
Cross-reference the *Territorial Sea and Exclusive Economic Zone Act 1978*, the Fisheries Bill and the United Nations Convention on the Law of the Sea 1982.

(d) *Development Fund Act 1983*

1. Establishes a source of local loan funds for development purposes.
2. Because of present land laws which prohibit the use of interests in land as security for loans, the activities of the fund have been confined to small projects, vehicles and the like. The Land Titling Project is a step towards overcoming this situation.

(e) *Land Ordinance 1969*

1. Provides for the control and tenure of land, its survey, registration of title and like purposes.
2. See Section 6.

(f) *Marine Pollution Act 1974 (NZ)*

1. Provides for preventing and dealing with pollution at sea.
2. Five regulations are promulgated under this Act.

Niue may be a party to (and have obligations under) international conventions on ship based pollution.

(g) *Mining Act 1977*

1. Provides for the mining of minerals.
2. Minerals are the property of the Crown.
Land may be acquired and compensation paid.
There is no requirement for an environmental impact assessment to precede each mining activity.
Cross-reference the *Atomic Energy Act 1945 (NZ)*.

(h) *Mosquito Control Act 1980*

1. Provides for mosquito control.
2. Duty to keep land clear of mosquitoes.
Prohibits littering and dumping; compare with the litter provisions under the Conservation Bill.

(i) *Niue Act 1966 (NZ)*

1. Written as a code to provide for a variety of matters.
2. See Sections 3 and 4.

(j) *Niue Building Permits Ordinance 1959*

1. Regulates construction of buildings.
2. Important for sanitation and structural integrity during natural disasters.
See Building Code Bill, Annex 2, below.

(k) *Niue Cultural Council Act 1986*

1. Promotion of the natural history and material culture of Niue.
2. Environment and culture are closely linked.

(l) *Niue Dogs Ordinance 1966*

1. Provides for the registration and control of dogs.
2. Stray dogs often pose health and safety problems and detract from the aesthetic quality of the environment.
See s19 of the *Niue Act 1966 (NZ)* dealing with animal trespass and the *Niue Impounding Ordinance 1967*.

(m) *Niue Fish Protection Ordinance 1965*

1. Outlaws destructive fishing methods (explosives, firearms and poisons

and underwater breathing apparatus).

2. Compare 'Niue waters' with 'fishery waters' under the Fisheries Bill. Compare also the definition of 'fish'. Agricultural officers to be conservation officers?

The fono is given statutory sanction.

See the *Niue Fish Protection Amendment Bill* in Appendix 2 below.

(n) *Niue Public Health Ordinance 1965*

1. Provides for public health.
2. Deals with sanitation of buildings and dwellings.
Deals with water supply.
Health inspectors to be conservation officers?

(o) *Niue Village Councils Ordinance 1967*

1. Establishes Village Councils.
2. See Section 15.
See s27 and the Schedule to the Act for functions of the Council.

(p) *Pesticides Act 1991*

1. Regulates the importation and sale of pesticides.
2. By the establishment of a licensing process for pesticides, this Act ensures safeguards to health and safety.
Importation and sale of pesticides has been taken over from Government by the private sector.
'Pest' is more satisfactorily defined than under the *Agriculture Quarantine Act 1984*.

(q) *Planting of Land Ordinance 1963*

1. Enforces the growing of fruit and vegetables by males for home consumption.
2. This is forced labour and would be unconstitutional in other jurisdictions. It is hoped that males are not encouraged to over-cultivate thereby aggravating the deforestation situation.
The Ordinance is a relic from colonial times and is no longer of relevance.

(r) *Public Emergency Act 1979*

1. Protection of the community in cases of emergency.
2. A plan for environmental recovery (flora and fauna) should be prepared especially after a cyclone. Baseline data is required.
Cross-reference the *Niue Public Emergency (Fire Control) Regulations 1983*.

Disaster relief funds should take into account wildlife and habitat restoration (see the *National Disaster Relief Fund Act 1980*).

(s) *Sunday Fishing Prohibition Act 1980*

1. Prohibits fishing on Sunday
2. Definition of 'fish' and 'fishing'
Enforces the belief that Sunday be kept holy.

(t) *Territorial Sea and Exclusive Economic Zone Act 1978*

1. Provides for a territorial sea and an exclusive economic zone and the exploitation of the fishery resource.
2. Definitions of 'fish', 'fishing' and 'foreshore'.
The Fisheries Bill proposes to repeal almost all of the Exclusive Economic Zone provisions but leaves intact the territorial sea provisions. Non-living resources may also be exploited in the Exclusive Economic Zone.

(u) *Tourist Board Ordinance 1970*

1. The purpose of the Board is to encourage the development and administration of the tourist industry in Niue.
2. Has power to enter into activities regarding land improvement and standards for buildings. It should conduct environmental impact assessments as a prerequisite.

(v) *Wildlife Ordinance 1972*

1. Protection of wild animals including wild birds.
2. Does not apply to domesticated species of mammals or birds or to plant life.
Wildlife wardens to be conservation officers?

(w) *Wreck and Salvage Ordinance 1968*

1. Provides for wrecks and salvaging.
2. Read together with the *Marine Pollution Act 1974 (NZ)*.

There is no text available of either the *Niue Village Council Regulations 1971* or the *Niue Water Supply Regulations 1981*.

The following regulations under the *Niue Act (NZ)* have an environmental bearing and should be reviewed as to whether they are still relevant and whether the situations they address are covered in subsequent legislation.

Cook Islands Cemeteries Regulations 1917
*Cook Islands Commerical Fishing Regulations 1951**
*Cook Islands Pearl Shell Fisheries Regulations 1950**
Cook Islands Qurantine (Aircraft) Regulations 1946
Niue Fruit Control Regulations 1924
Niue Fumigation Regulations 1933

* These regulations will be repealed if the Fisheries Bill is passed in its present form.

Town planning legislation is desirable, especially while it is still relatively easy to plan.

Annex 2

List of Bills before the Niue Assembly as at February 1992

There are a number of bills before the Niue Assembly as at February 1992 which have an environmental nexus. These are noted below with the exception of the Conservation Bill which is discussed in Section 3.

Building Code Bill

This Bill proposes a national building code having the force of law so as to enable enforcement of minimum building and construction standards. This Bill will help ensure that buildings can withstand natural disasters and so not affect the environment with debris or spillages of stored chemicals or hydrocarbons.

Constitution Amendment Bill

The structure of the Court is presently under review by the Niue Assembly as part of a broader review of the Niue Constitution. The Bill proposes combining the High Court and Land Court into one High Court having land, civil and criminal divisions. The Bill also proposes the repeal of the Commission of Inquiry procedure regarding bills seeking to amend matters concerning the Land Court. This may deny decision-makers and the voting public valuable information regarding customary land and the work of the Land Court. Presumably the rationale for setting up a separate court system in the first place was that the traditional land system was not entirely amenable to regular court processes.

Development Investment Bill

This Bill firstly offers encouragement to both local and foreign investors by setting out in one document the various incentives and concessions for which investors may apply to Cabinet and, secondly, has a regulatory function to protect existing local interests by providing that foreign interests cannot establish businesses in Niue without Cabinet approval. The Bill gives Cabinet the opportunity to properly vet proposals by foreign interests by setting out the information which must be provided with every application to establish a business.

Fisheries Bill

This Bill is economic in nature and deals primarily with offshore fishing. It will give Government greater control over its waters and its fishery resource.

Land Law Amendments (not yet in Bill form)

A consolidation of land laws has been prepared with a view to further amending them in a number of areas to enable land to be utilised for development purposes. A principal area of

change has been identified as the need to enable leasehold interests in land to be mortgaged, and for mortgagee sales to occur in the event of default, but without affecting the underlying ownership of the freehold title by the traditional landowners.

Niue Fish Protection Amendment Bill

This Bill allows scuba gear to be used for scientific research where that research will benefit Niue's fishery resource.

Summary Offences Bill

This Bill provides for summary offences and for offenders to be dealt with summarily. It should include the Conservation Bill within its purview. The Conservation Bill can provide for conservation officers to have a discretion, where a minor offence has taken place, to issue a summary offence ticket. The accused can plead guilty and pay his or her fine into court without a mandatory court appearance.

Village Council Review

The *Niue Village Councils Ordinance 1967* is currently under review by the Government Solicitor.

Water Resources Legislation

Discussed in Section 10 of this review.

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