

REFORM OF THE RESOURCE MANAGEMENT SYSTEM

A model for the future

Synthesis report

Greg Severinsen



Michael &
Suzanne
Borrin
Foundation



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Numerous other people contributed to this project including members of our Advisory Group, Watercare, interviewees at home and abroad, those who attended workshops over the past year, and those who provided direct feedback. Special thanks go to Raewyn Peart (who contributed to the report prior to her appointment to the government's review group on resource management system reform). We acknowledge all those contributions with thanks and respect.

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FOREWORD

This report represents the final in a series of publications that have taken a first-principles look at the resource management system in Aotearoa New Zealand. It is the synthesis of a number of working papers and an earlier interim report, and brings an unprecedented depth of analysis, thought and experience to considering what an improved system for managing our natural and built environments could look like.

The research, ably led by Dr Greg Severinsen, has spanned three years and has engaged with a wide range of experts and entities to garner a collective view of what the future system should look like. It makes tangible suggestions for reform that would be staged in a workable fashion. The reforms proposed have been built up from carefully considered ethical foundations and are calibrated for our future needs, not the past.

Central to the propositions we propose are the need for environmental bottom lines or limits. There is widespread agreement across society that we need to better protect our natural world. But our lens for this work has not just been an environmental one. The project has taken a wide focus including the need to enable sustainable economic development and improved social outcomes including in our towns and cities. The model described here is designed to work for all New Zealanders. It respects te Ao Māori and the obligations contained in the Treaty of Waitangi, though we do not speak for Māori.

The report concludes that reforming the resource management system needs to look beyond the law and consider underlying funding and institutional arrangements. It needs to be more future focused and strategic, and less siloed. Spatial planning is a tool that should be more widely deployed. To cope with future needs the system should be more fleet-footed and adaptable. We propose the creation of a Futures Commission to provide oversight and a future focus, so we anticipate needs instead of simply reacting to them.

Overall we conclude that a rewritten Resource Management Act – perhaps renamed – should form the core of the reformed system. We favour merging other laws in a more coherent and joined-up way, including those relating to the marine environment and nature conservation. Greater alignment and coordination is required to manage urban growth and infrastructure challenges and, above all, climate change. The challenges we face are long term ones, and require an injection of robust institutional independence that depoliticises issues. Regulation cannot be the only answer, and the system will need to engage deeply with economic and behavioural incentives to drive positive action.

During the life of the project, the government set up its own review of the resource management system, which is currently underway. We have helped stimulate that decision and are grateful that one of our project

researchers and authors, Raewyn Peart, has been appointed to the Panel chaired by the Hon Tony Randerson QC. We hope that this final report will be of assistance to the Panel.

We would like to acknowledge with thanks the primary funders for the project - the New Zealand Law Foundation and the Michael and Suzanne Borrin Foundation. Additional funding and helpful perspectives were also contributed by our partners, the Employers and Manufacturers Association (Northern), Property Council New Zealand and Infrastructure New Zealand. Thanks also to Watercare for its support.

Reforming our resource management system is a complex challenge. The extent of analysis in this final report underlines that. My plea is that everyone involved in this ongoing debate avoids rushing to ill-considered outcomes. We have had enough of bad decision-making and imperfect law. Let's engage in a genuine non-partisan discussion, free of hyperbole and point-scoring.

Nothing like this report has been done before and hopefully it will be a useful foundation for that national discourse.

Gary Taylor *CNZM QSO*
Environmental Defence Society



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LIST OF TERMS

CCO	Council-controlled organisation
CME	Compliance monitoring and enforcement
CESIG	Compliance and Enforcement Special Interest Group
EDS	Environmental Defence Society
EPA	Environmental Protection Authority
EEZ	Exclusive Economic Zone
EEZ Act	Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012
GDP	Gross domestic product
GPS	Government policy statement
GST	Goods and services tax
IUCN	International Union for Conservation of Nature
NEP	National Environment Plan
NES	National Environmental Standard
Nimby	Not in my backyard
NPS	National Policy Statement
NZCPS	New Zealand Coastal Policy Statement
NZTA	New Zealand Transport Agency
RMA	Resource Management Act 1991
Three waters	Drinking water, wastewater and stormwater
UNCLOS	United Nations Convention on the Law of the Sea

EXECUTIVE SUMMARY

In a nutshell

In its *Reform of the Resource Management System* project, the Environmental Defence Society (EDS) has looked, from first principles, at how Aotearoa New Zealand can manage its environment and resources better. Our resource management system is about protecting our natural heritage, providing for New Zealanders' social, cultural and economic wellbeing, and preserving our natural and physical resources for future generations. Reform requires more than just another amendment to the RMA, and there is now an urgent need for a comprehensive rethink.

This summary outlines the bones of what a future resource management system in New Zealand could look like. Our core proposals and suggestions are summarised below.

The Resource Management Act

- Retain the Resource Management Act 1991 (RMA), or an integrated statute like it, at the heart of the system, rather than starting again from scratch or splitting the Act
- Rewrite **Part 2** of the Act (its purpose and principles) to recognise the pre-eminence of environmental bottom lines, the importance of good urban planning, and the need to resolve allocative issues
- Strengthen obligations in the Act to give effect to **Treaty principles**
- Require the establishment of environmental **targets**, and put in place timeframes and an accountability framework around them
- Remove jurisdiction from the RMA (and regional councils) for oceans management beyond 3 nautical miles, and give them to an **Oceans Act** and **Oceans Agency**
- Require central government to produce a single, integrated and coherent piece of national direction (a **National Environment Plan**) addressing all matters of national importance and relationships between them
- Retain separate **National Planning Standards**, but expand them to apply to national direction as well as council plans
- Replace existing **council planning processes** with two new processes: (1) a process for creating and reviewing plans that resembles the Auckland Unitary Plan making process, and (2) a process for plan changes involving a single-stage hybrid decision-making panel
- Require councils to work together (and with **iwi and hapū**) to create a combined regional plan, paving the way for a conversation about greater **regionalisation** of local government functions
- Provide a greater role for the **Environmental Protection Authority** (EPA) in regulation making in national direction and council plans (notably for freshwater)
- Revise settings for **resource consenting** in various ways, including by removing jurisdiction from elected members and Boards of Inquiry
- Establish an independent **Environmental Defender's Office**, charged with undertaking public interest litigation
- Revise settings for **compliance monitoring and enforcement**, including by providing a stronger role for the EPA
- Strengthen **water conservation orders**, and introduce other **order-based tools** of a similar nature (such as a Heritage Area Order)
- Replace a first in, first served approach to **freshwater allocation** with a more structured approach (potentially consisting of regulatory and economic mechanisms, and trading mechanisms where appropriate), and allow a space for Treaty obligations to evolve
- Establish a national **Environmental Water Holder** to participate (representing the public interest) in any future water markets
- Provide **direct assistance** (financial and otherwise) from a national level body to councils to implement national direction

Other legislation for the urban and built environment

- Integrate the Local Government Act 2002, Land Transport Management Act 2003, and other infrastructure-focused legislation into a single **Local Government and Infrastructure Act**
- Amalgamate **councils** where they are no longer viable economic entities
- Over time, provide a process for **regionalisation** of some council functions, and for conversation to continue as to how exactly that would look in terms of structural reform of local government
- Align planning and funding **decision-making processes** more closely under the RMA and infrastructure-focused legislation
- Strengthen the regulation of “**three waters**” (drinking water, wastewater and stormwater) services for environmental and health reasons
- Establish regional or cross-regional **council-controlled organisations** for the delivery of drinking water and wastewater services, including Crown involvement
- Establish an **economic regulator** to oversee three waters services investment and pricing
- Expand the **funding and financing** tools available to councils, including the further investigation and deployment of a locally levied GST (although not as a replacement for rates)
- Strengthen the **Building Act 2004** and Building Code to enhance environmental outcomes
- Establish an **urban development authority** framework, but make considerable changes from what is currently proposed

A new Future Generations Act

- Create a new, overarching piece of strategic legislation: a **Future Generations Act**
- Establish a new **Futures Commission**, an independent, standing watchdog body having roles under various other statutes (including in the review of instruments under the RMA)
- Alongside, or within, this Commission, establish a **Tikanga Commission** (or commissioners) having a comparable watchdog and review role, but from a Māori perspective
- Over time, merge other independent institutions with the Futures Commission, such as the **Parliamentary Commissioner for the Environment** and the **Climate Change Commission**
- A Futures Commission would be charged with periodically issuing public authorities with a **scorecard**, auditing their performance against criteria in the Act. Public authorities would be required to respond.
- A Futures Commission would have a **futures scanning** role (looking ahead to identify threats and opportunities), to which the government would be required to respond
- Establish a standing, cross-departmental grouping of officials to act as a steward for the resource management system as a whole, and to provide integrated advice to Ministers and Cabinet (a **Futures Group**)
- Provide a set of general **duties and criteria** that would apply to all public decision-making (including non-statutory decisions like investment and procurement)
- Provide for the creation of national and regional **strategic spatial plans** with meaningful legal influence on other frameworks, such as the RMA and infrastructure legislation (to, among other things, provide coordinated management of urban growth)
- Require strategic spatial plans to be accompanied by indicative sources of **funding**
- Strengthen **Māori** involvement in strategic spatial planning
- Over time, integrate various pieces of existing cross-cutting legislation into a Future Generations Act (eg the framework for environmental reporting and legislation establishing institutions)
- Establish a process for **reviewing all other relevant legislation**, including their purposes and principles, to align them with new imperatives (including climate change) in a Future Generations Act

Climate change legislation

- Integrate the strategic climate change measures under the **Climate Change Response (Zero Carbon) Amendment Act 2019** into a Future Generations Act
- Provide for stronger enforcement mechanisms for failures to meet **targets and carbon budgets**
- Strengthen the **emissions trading scheme** and related mechanisms, including through the meaningful pricing of agricultural emissions
- Introduce **novel tools** (including financial tools) to encourage mitigation and adaptation
- Create a **Climate Change Adaptation Fund** to be deployed in a strategic way
- Establish a clear legal relationship between (1) elements of a National Futures Strategy concerned with emissions reduction and climate change adaptation and (2) the frameworks needed to make change on the ground (eg the RMA, Climate Change Response Act and Local Government and Infrastructure Act)

A new Oceans Act

- Establish an integrated **Oceans Act** combining aspects of the RMA, Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012, biosecurity, maritime transport, and fisheries
- Establish a new **Oceans Agency** and a **Minister for Oceans**
- Provide for the creation of an integrated **Oceans Plan**
- Provide a clear legal mechanism by which **marine spatial plans** can be developed and implemented

Integrated conservation legislation

- Rationalise conservation legislation into an integrated **Protected Areas and Species Act**, applying to both land and sea, and having two substantive parts: one focused on protected areas, and one focused on species protection
- Rationalise and strengthen protections for **protected areas**, including internationally significant areas
- Strengthen **species protection**, based on improving the framework of the Wildlife Act 1953
- Strengthen **Māori** concepts and involvement
- Strengthen the role of independent institutions, including a review role for a Futures Commission in relation to conservation strategies and plans
- Further investigate and establish a national **biobanking** framework to deploy biodiversity offsets in a strategic way
- Strengthen the influence of threatened species management plans on decision-making under the RMA and Biosecurity Act

System-wide measures

- Retain and uphold existing **Treaty settlement legislation**, improving cross-referencing
- Strengthen **monitoring, information-gathering and reporting** requirements
- Require the establishment of pre-set indicators, requiring **corrective action** to be taken if triggered
- Strengthen measures to transition to a **circular economy**, notably under the Waste Minimisation Act 2008
- Strengthen **directors' duties and corporate disclosures** in relation to the environment and climate change
- Deploy **green taxes** with more vigour
- Take a more strategic and systemic approach to **subsidies** and payments for ecosystem services
- Deploy **resource rentals** in a nationally coherent, systematic, and fair way over time
- **Hypothecate** revenue raised through green taxes and resource rentals by channelling it back into environmental restoration measures
- Gradually shift part of our broader tax base towards an **environmental footprint tax** (and rebate) system
- Provide a more active role for government in **green certification**
- Embed environmental and climate change principles in the **school curriculum**
- Strengthen behavioural incentives in the system, and establish a cross-agency **behavioural nudging unit**

1 Introduction

In its *Reform of the Resource Management System* project, EDS has taken a fresh look at Aotearoa New Zealand’s resource management system and presented a model for fundamental change. System reform is not just about the Resource Management Act 1991 (RMA). It is much wider than that, and includes many different laws, institutions, processes and incentives. The need for a comprehensive rethink is urgent, given the sub-optimal environmental outcomes we are currently seeing and the scale of future challenges before us. There has been cross-sectoral and cross-party support for a comprehensive review for some time now, and the government has recently established an independent review group to do just that. At the time of writing, the review group’s Issues and Options paper has just been released.¹

The EDS project had two phases. Phase 1 (*The Next Generation*) was completed at the end of 2018, and culminated in the publication of a final report in February 2019. That outlined three possible broad models for what a reformed system could look like, and provided the analytical foundation for Phase 2. We encourage readers to engage with it separately.²

Phase 2 of the project was undertaken over the course of 2019. This synthesis report is the culmination of that work. The overall intention of Phase 2 of the project has been to provide a tangible vision and roadmap for change. It presents a preferred model for a future system. Our hope is that it will serve as a useful reference for a government embarking on its own reform journey,³ and as a platform for others wishing to be part of that process.

The overall structure of the report is presented below in Figure 0.1. Broadly speaking, it is structured according to the key pieces of legislation we see operating in the future. These are highlighted in beige below. We then address, in Chapter 13, aspects that cut across multiple statutory frameworks or are not directly related to legislation (wider system change).

Ch	Topic
1	Introduction
2	Preferred criteria for reform
3	Criteria, ethics and the roles of a future system
4	What we have now: The current system
5	The future of the RMA: Legislative design and Part 2
6	Planning under a new RMA: Central government
7	Planning under a new RMA: Local government
8	Strategic legislation: A Future Generations Act
9	Climate change legislation
10	Other legislation for the “built” or “urban” environment
11	Oceans legislation
12	Conservation legislation
13	Wider system change
14	Concluding comments: A pathway to reform

Figure 0.1: Structure of this report



Hobsonville Point

How reforms would occur over time is also crucial. Not everything needs to, or should, happen at once. Within each chapter, we therefore consider how a particular statutory framework would emerge or change over time. We are thinking about a reform pathway in three broad steps: short term, medium term and longer term. We do not put a specific timeframe around those, other than to say they will need to be ambitious, while taking into account the resourcing that is available. The important thing is to prioritise effort and stage reforms over time towards a coherent vision or end point, not continue to tinker in response to particular problems or political point scoring.

No doubt readers will be most interested in short- or medium-term changes, as they involve realistic policy proposals to put before a reform-minded government. It is therefore useful to identify and describe those kinds of reforms in more detail. For example, we have provided drafting for how a new purpose and principles section for the RMA might look, which we see emerging in the short term.

Our short-term proposal is primarily about building on the basic frameworks we already have, with some significant additions. For example, we propose keeping an Act like the RMA at the core of the system, but changing the Act's purpose and principles, rethinking its planning processes, and expanding its toolbox. We would also see a new statute – a “Future Generations Act” – and a new, independent institution – a “Futures Commission”. A layer of strategic spatial planning would appear.

In the medium term, we envisage more far-reaching reforms, albeit still ones that build on many of the basic structures we already have. For example, we would see the emergence of a new Oceans Act and Oceans Agency tasked with the integrated management of our deep sea environment, and the rationalisation of conservation legislation.

However, longer-term reform is equally important. For example, in Chapter 13 we propose a shift in our tax base away from mechanisms that penalise positive outcomes (eg income tax and GST) and towards things that penalise negative behaviour (eg environmental degradation). Thinking beyond one term of government should not be dismissed simply because it cannot form an immediate reform bill or the focus of a political mandate defined by an election cycle.

Throughout the report, we also identify various “conditional” reforms. These do not have predetermined timeframes around them, but would be carefully considered or triggered if certain things happened (or failed to happen). Sometimes, we need a “Plan B” prepared in advance.

We end the report in Chapter 14 by focusing on a pathway to reform. We provide a rough timeline for how change to the system as a whole would occur over the short, medium and longer term.

2 Criteria for reform

In Chapter 2 we select and present a preferred set of criteria for reform. In essence, we are adopting the “progressive” set floated in Working Paper 1.⁴ Our criteria recognise the need for far-reaching change to achieve ambitious goals, but do not seek to overturn all aspects of the current system. Realism, and a staggered approach to reform, is important if change is to actually happen. We also do not want a knee jerk reaction that wipes the slate clean, risking the loss of many good aspects of the system (eg important case law). We do not want unnecessary disruption, but we also recognise that disruption will, in many cases, *be* necessary.

We are treating criteria as a broad anchor for debate, rather than driving particular answers or producing blueprints for reform. As such, we have held them in mind when considering our options, rather than treating them as a checklist. Generally speaking, our criteria emphasise the need to establish and hold firm essential biophysical bottom lines or environmental limits, including where necessary for human survival and to protect the intrinsic worth of the natural world. They also recognise the need to uphold Treaty settlements and implement the principles of the Treaty. Moreover, human wellbeing is seen as being about more than just economic and social freedom to act, or the provision of public goods. It is about many other things, including building social and economic resilience, respecting communities' wishes, and outcomes and processes that are fair rather than just efficient. We stress the need for equity, as well as certainty, but also recognise the need for agility and timely outcomes.

Key points

- We adopt a “progressive” set of criteria for reform, striking a balance between the need for ambition and change, and the need for pragmatism.
- Criteria form useful anchor points for debate, but do not spit out a blueprint for reform. Considerable debate will still be possible as to how they are applied.

In Chapter 3, we consider what reform criteria mean for the ethics and principles that will define a future system, and the roles it will be expected to perform. We recognise that multiple worldviews or ethics will need to underpin the system. We are not adopting a particular variant of a theory like ecocentrism, for example. This is not only because mediating between a melting pot of worldviews will be the political reality, but also because we see a plurality of ethics as a good thing. We can learn a lot from each other's perspectives. Indeed, we are already seeing a positive convergence of thinking in this area with concepts like Te Mana o Te Wai. A future system will need to seek out similar nodes of agreement as well as mediate between legitimate tensions in people's worldviews.

Ultimately, there is growing acceptance and convergence among New Zealanders about the outcomes we need to see. If changes in ethics – eg seeing nature as having moral worth rather than just instrumental value – help us to achieve those, then that is a positive thing. In particular, while economic tools (eg natural capital valuation, taxes and resource rentals) will be important in driving change, we should not be attached to a narrow neo-liberal economic orthodoxy in how we manage our taonga and resources. There is a strong moral component to be considered here, too, over which experts and technicians have no particular claim.

In Chapter 3 we also reinforce the conclusions reached in the Phase 1 report about when it will be appropriate for the system to intervene (ie when public intervention is appropriate).⁵ In short, we consider that a narrow rationale based on remedying market failure or internalising externalities would be overly constraining, and that the system should have a role where either the public interest is at stake or where the interests of Māori as Treaty partners need to be addressed. This leads to seven core roles we see the system as a whole needing to perform:

- 1 Imposing and maintaining firm biophysical bottom lines or limits
- 2 Facilitating trade-offs above bottom lines
- 3 Actively pursuing positive outcomes – managing a transition to something better
- 4 Providing public goods – particularly in the built or urban environment
- 5 Protecting and respecting the interests of Māori, including giving effect to the principles of the Treaty of Waitangi
- 6 Allocating non-private resources
- 7 Resolving disputes

Key points

- Many ethics and worldviews will need to be reflected and embraced in a future system.
- Nodes of agreement and convergence should be embraced, as in the concept of Te Mana o Te Wai.
- Intervention will be appropriate where there is a public interest or where needed to provide for the interests of Māori.
- That leads to seven core roles that a future system as a whole will need to perform. Central to that will be the imposition and maintenance of firm environmental bottom lines.

3 The current system

In Chapter 4 we briefly outline the core features of the current system, by looking in turn at our existing statutory

frameworks. This is important because what we have now is a reference point for what needs to change. Yet the “current” system is actually a moving feast, especially in light of a range of proposed changes being floated and progressed by the government. What some of these will end up looking like (eg an urban development authority model, or institutional arrangements for drinking water and wastewater services) is unclear.

We highlight the most important of these, and the need to consider how they would (or would not) be integrated into a future model. Of particular importance is the government’s recent establishment of a panel looking at the future of the resource management system as a whole, which is due to report back to the Minister for the Environment in May 2020.⁶

Key points

- The current system provides an important foundation upon which reform would be built. In light of the government’s active reform agenda, it contains many moving parts that need to be considered, integrated, or reconfigured.
- Of particular importance is the government’s independent review group for resource management system reform, which is due to report in mid-2020



Whareniui, Ōrakei Marae

4 The legislative and institutional architecture of a future system

Over the course of Chapters 5–13 we present our preferred model for system reform. But before summarising those chapters, it is worth pausing to provide a birds' eye view: a snapshot of the legislative and institutional skeleton off which most other reforms would hang. We consider the overall legislative architecture first, and Figure 0.3 outlines what would happen to existing legislation.

We see merit in retaining the RMA, or an integrated statute like it, at the heart of a future system. While there would be many attractive features of having, for example, a separate "Planning Act" and "Environment Act", on balance we think that the risks of such a split would outweigh its benefits. In particular, there is the need to retain close connections, within a single statute, between land use planning and other "environmental" domains like water, air, climate and soil. To weaken that link would be a retrograde step.

Implicit in the retention of the RMA is also a rejection of the idea of rearranging our core statutes along completely different lines (eg separate sectoral, domain-based, or location-specific acts).⁷ At the heart of the system would continue to be an integrated, outcomes-based statute that applies across the country and encompasses air, water, land and marine domains. Additional layers of legislation would then fill gaps in a similar kind of way as in the current system.⁸ For example, the RMA would not be concerned with the "sustainable" allocation of Crown-owned minerals or with the active provision of water infrastructure. There would remain separate frameworks to deal with those functions. The notable exception, explored further below, would be a dedicated "Oceans Act" (a largely spatial separation) for the environmental management of the deep sea.

Key points

- We envisage that an integrated, outcomes-based statute like the RMA would continue to exist at the core of a future system. It would not be split into separate statutes for "planning" and "environment".
- However, this Act would not do everything, and would have fundamental changes made to it to improve its utility.

Alongside the RMA, we envisage that separate legislation for local government and infrastructure could usefully be merged into an integrated "Local Government and Infrastructure Act". That would incorporate the existing Local Government Act 2002, Land Transport Management Act 2003 and any separate legislation for "three waters" (drinking water, wastewater and stormwater) infrastructure.⁹ A Local Government and Infrastructure Act could also subsume recently enacted legislation setting up an Infrastructure Commission.¹⁰ This is not to suggest that

local government is just about infrastructure provision, simply that a more integrated or aligned process for local and central infrastructure planning and funding (including for transport and three waters) would be desirable. That could be facilitated by having an integrated statute.

Key points

- Legislation for local government and infrastructure planning and funding would remain separate from the RMA.
- However, an integrated Local Government and Infrastructure Act could be enacted to combine the Local Government Act, Land Transport Management Act, and other relevant legislation.

At the moment, misalignment between the RMA and frameworks concerned with infrastructure is causing problems, especially in the context of rapid urban growth. There is little point rezoning land for residential development under the RMA without the infrastructure (eg roads and water pipes) to service it, or for infrastructure to be planned in areas where land use changes are not enabled. The result has been a shortage of developable land in some places, exacerbating issues with housing affordability. Retaining separate statutes for land use and infrastructure planning means there would be a pressing need to align them better in other ways.

To coordinate land use and infrastructure functions, we envisage that higher level strategic spatial planning would occur at a regional scale. Spatial plans would be produced under a new piece of legislation, which we are calling a "Future Generations Act". This would be an overarching, integrative statute of quasi-constitutional significance, that would flow down into other more targeted "implementation"-style statutes. Spatial plans would, generally speaking, need to be implemented in more detailed plans made under the RMA and a Local Government and Infrastructure Act. (A Future Generations Act would also have broader significance, as explored below).

The RMA, Local Government Act and Land Transport Management Act (and associated spatial planning to align them) are sometimes presented as being synonymous with the resource management system as a whole. In the urban growth context, they are certainly of central importance. But there are many other statutory frameworks we see operating in a future system: there are good reasons for having more targeted "implementation" statutes focused on particular things.

In particular, statutes designed to impose environmental protections should be separate from other statutes focused on driving development.¹¹ For example, we would not wish to see a framework like the RMA integrated with statutes requiring the provision of infrastructure or encouraging the extraction of minerals. Too much integration can also make a statutory framework unwieldy, vague in its purpose, and inaccessible to users.¹²

Separate statutes can also be appropriate where they use quite different tools, as long as they can operate largely independently from each other. For example, the Building Code, RMA plans, council long-term plans, product stewardship schemes and hazardous substances approvals may have a degree of overlap in terms of outcomes sought (eg sustainability), but they rely on very different trigger points for action. We would not expect to see a framework for the emissions trading scheme or the Building Code integrated into the RMA. Fragmentation is, therefore, a good thing to some extent; but only insofar as the system's statutes are consciously designed to form pieces of a coherent overall solution. They should not pull in different directions. We envisage that an umbrella Future Generations Act, with a common set of high level principles, will provide a degree of alignment across all of them.

In short, we do not see an unlimited scope for legislative integration. A "super RMA" should not devour all other frameworks, even environmentally protective ones (eg the Conservation Act or Waste Minimisation Act). The RMA's purpose is broad, but the kind of restrictions/tools it provides for are narrow when compared to the bigger picture. Nor would a Future Generations Act be a place where all other statutes are simply stitched together. Its role would be to provide strategic alignment at the top of the system (in ways outlined further below), not to combine every kind of plan, permit and other mechanism in one place.

Key points

- We envisage a number of other targeted statutes continuing to exist in a future system, alongside the RMA and a Local Government and Infrastructure Act.
- There would also be a higher level layer of strategic legislation above these – a Future Generations Act.
- Among other things, this Act would provide a framework for regional level spatial planning to coordinate land use and infrastructure planning in areas of high urban growth or change.

That said, in the longer term we see a case for integrating several existing statutes into a Future Generations Act. These would be statutes that are about establishing the broad architecture of the system rather than those (eg regulatory statutes like the RMA) that are about making direct, on the ground change. For example, environmental reporting (including the Environmental Reporting Act 2015) could be subsumed, recognising that this activity needs to cut across and influence all other frameworks, in the ways that a Future Generations Act would be designed to do.

State of the environment monitoring requirements under the RMA, which are crucial to inform such reporting (and

not just for RMA functions), could be shifted too. Other legislation of a cross-cutting or "strategic" nature could also be integrated – such as the Energy Efficiency and Conservation Act 2000, the Environment Act 1986 and the Environmental Protection Authority Act 2011. While it would not be strictly necessary, it may make some sense for the Environment Court to eventually be established/continued under such a system-wide statute, given that the Court has roles under multiple statutes and not just the RMA.

Of particular significance here is Zero Carbon legislation, which has been recently enacted. This has taken the form of an amendment to the Climate Change Response Act 2002 (which under current settings makes a great deal of sense), but it is at heart a framework for strategic planning for climate change mitigation and adaptation. It provides for targets and carbon budgets, and for the preparation of emissions reduction and adaptation plans. All of those things will need to have meaningful flow-on effects under multiple frameworks, not just the Climate Change Response Act itself. For example, it is hard to picture a world in which a climate change adaptation plan did not rely heavily on land use restrictions under the RMA, or infrastructure investment decisions under a Local Government and Infrastructure Act. Clear links therefore need to be made between those frameworks. Strategic planning for climate change seems well suited to integration within the high level strategic planning framework of a Future Generations Act.

Key points

- A Future Generations Act could subsume some existing statutes (or parts of them) having "system-wide" application.
- In particular, the Act could be a suitable location for the strategic aspects of climate change mitigation and adaptation currently contained within the Climate Change Response (Zero Carbon) Amendment Act.

We also see significant room for the further rationalisation of legislation. Our statute book has become unnecessarily complex and fractured. For example, consideration should be given to integrating components of the Forests Act 1949 into the RMA and the Climate Change Response Act, and a new Local Government and Infrastructure Act would seem a logical home for legislation concerned with erosion and flood control responsibilities.¹³ Of greater significance is the fact that our current set of "conservation" statutes is defined by considerable fragmentation and cross-referencing between acts that, broadly speaking, seek to do very similar things. We envisage that these would be integrated into a single "Protected Areas and Species Act", encompassing both land and sea. The Act would have a clearer purpose and principles, and rationalise our complex array of protected area categories.

As mentioned earlier, we are also floating the idea of an integrated Oceans Act. This would recognise that closer connections need to be made between multiple frameworks dealing with the marine environment. An Oceans Act would (for RMA-type functions) apply on the seaward side of a line drawn at 3 nautical miles from the coast. It would incorporate parts of the RMA and Biosecurity Act 1993, as well as the EEZ Act, Fisheries Act 1996 and Maritime Transport Act 1994. Conservation frameworks applying partly or wholly to the oceans – like marine reserves, marine mammals and wildlife – would instead be integrated into dedicated conservation legislation described above, but with clear inter-statutory links made with an Oceans Act.

Key points

- Existing conservation legislation could be rationalised into a single Protected Areas and Species Act, which would span land and sea.
- We are suggesting a new Oceans Act, which would integrate many marine-focused aspects of legislation into one place. For RMA-style functions, it would apply on the seaward side of a line 3 nautical miles from the coast.
- There seems potential for the rationalisation of other legislation, including the Forests Act and legislation concerned with erosion and flood control measures.

Colville Channel



There are persuasive reasons to keep other more targeted frameworks separate (but with links between frameworks clarified). Into this category would fall:

- The Hazardous Substances and New Organisms Act 1996
- The Building Act 2004 (and Building Code)
- The Waste Minimisation Act 2008
- The Biosecurity Act 1993 (except for its marine components)
- The Climate Change Response Act 2002 (which would remain a framework primarily targeted at the emissions trading scheme)
- The Ozone Layer Protection Act 1996
- Dedicated urban development authority legislation (Kāinga Ora – Homes and Communities Act 2019), which would be subject to considerable change from what is currently proposed
- The Crown Minerals Act (integrating the Continental Shelf Act 1964)
- The Marine and Coastal Area (Takutai Moana) Act 2011
- The Heritage New Zealand Pouhere Taonga Act 2014

Treaty settlement legislation (eg the Māori Fisheries Act 2004 and Te Urewera Act 2014, alongside many other acts) would remain, but we see a case for embedding their provisions more clearly in the more general frameworks (like the RMA) that they alter or influence. That could occur through simple cross-referencing or “flagging” provisions.¹⁴ The complexity of bespoke processes is inevitable here, but accessibility could be improved. As the government’s resource management review panel has pointed out:¹⁵

There are now 70 pieces of settlement, collective redress or hapū/iwi specific legislation with 76 groups (comprising a mix range of iwi, hapū and various collectives). It is timely to consider how the resource management system responds to this new landscape.

Key points

- There are good grounds for keeping many other targeted frameworks separate in a future system.
- Generally, stronger links would be made between them, and an overarching Future Generations Act would provide a stabilising force and common principles.

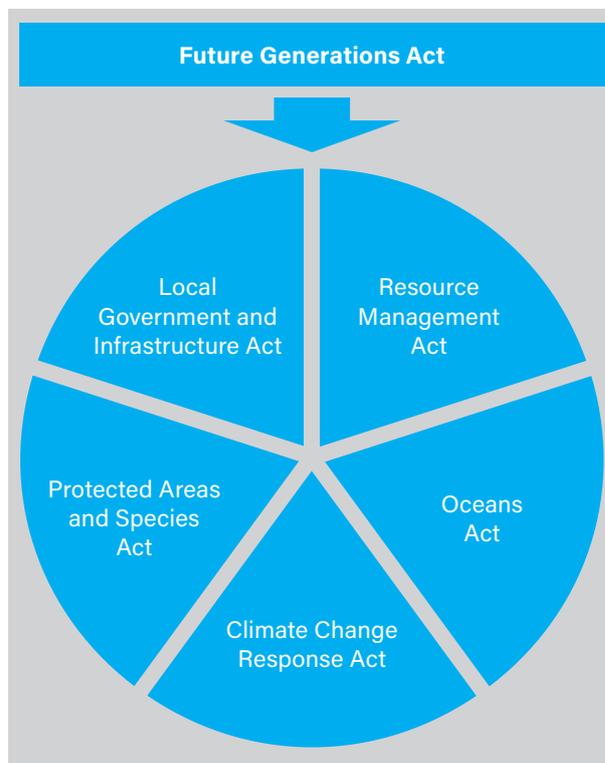


Figure 0.2: Six core statutes in a future resource management system. A strategic Future Generations Act would have overarching principles and provide for higher level strategic planning to occur, which would influence other frameworks. Significant rationalisation of statutes would occur, but many frameworks would remain separate. Closer links would need to be made between many of them.



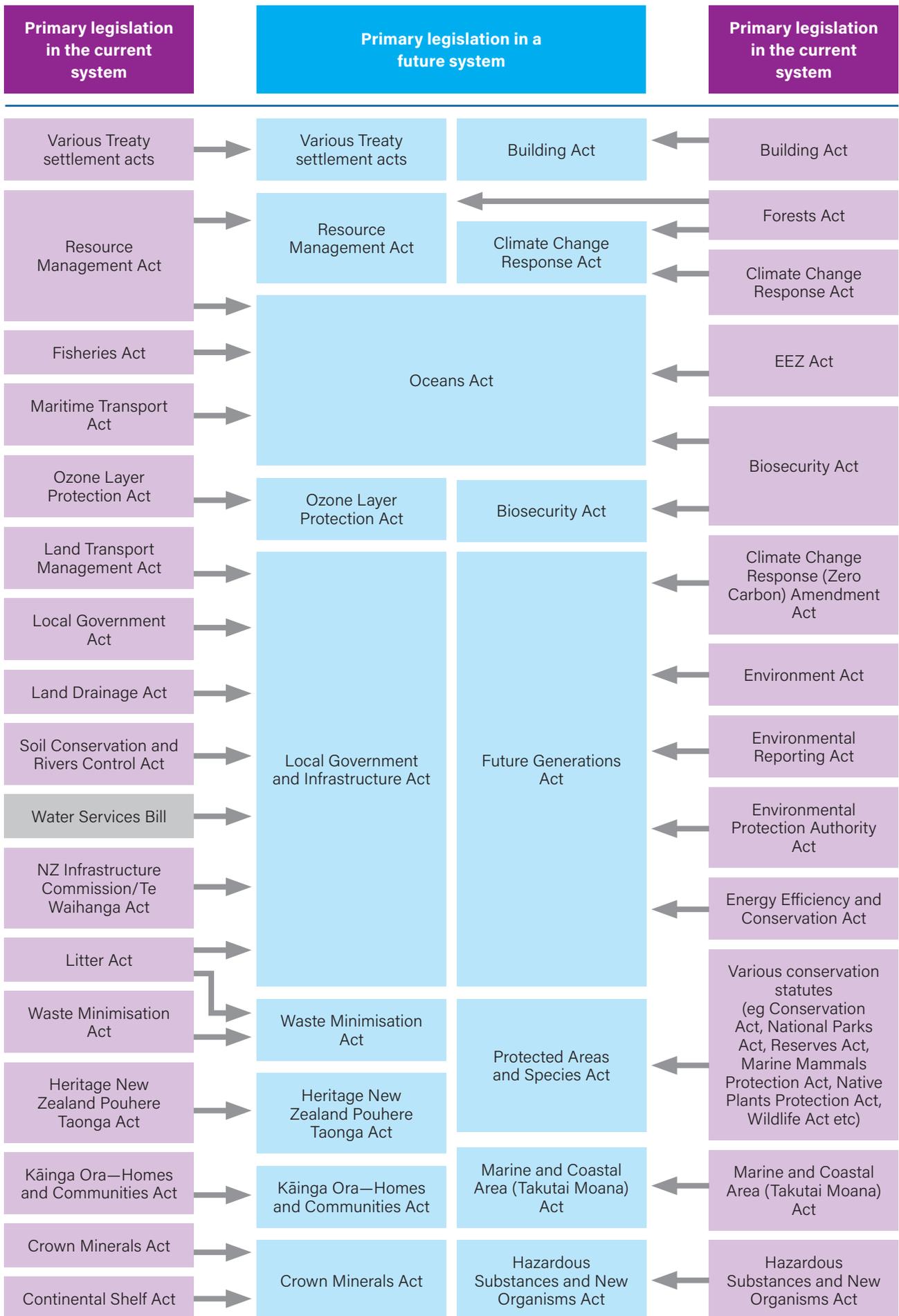


Figure 0.3: Legislative design: Statutes in the current and future system

Alongside legislative design considerations, it is worth flagging some high level points about institutions in a future system. Notably, while it is crucial that decision-makers remain accountable when making decisions about policy and values (eg through Ministers and councils), we also see dangers in a system that relies too much on political will to make change, and the incentives provided by short-term political cycles. There need to be firmer checks and balances through institutional design, and we need to enhance the voice of independent institutions.

Central to this is the idea of a standing, independent “Futures Commission”. A Futures Commission would be charged with taking a long-term view and safeguarding the interests of future generations. We are already seeing this type of concern being addressed in a piecemeal way (eg in the idea of a Climate Change Commission, an Infrastructure Commission, and a Chief Freshwater Commissioner).¹⁶ As outlined below, a Futures Commission would take on a number of roles under different statutory frameworks, including the RMA and a new Future Generations Act. For example, it would have a role in reviewing various instruments under the RMA, a role in issuing public authorities a scorecard based on their environmental performance, and a role in futures scanning (looking ahead to identify threats and opportunities). It would be accompanied by a separate Tikanga Commission (or by dedicated tikanga commissioners within the Futures Commission), to provide a tikanga Māori focus.

We see potential, in the longer term, for other independent or arm’s-length commissions to be incorporated within the umbrella of a Futures Commission. Another way of looking at this would be an expansion of, and a more structured role for, the Parliamentary Commissioner for the Environment. It would be most appropriate for a Futures Commission to be an officer of Parliament.

Key points

- We see potential for the establishment of a Futures Commission, a standing, independent institution with structured roles under multiple pieces of legislation. It would be tasked with safeguarding the interests of future generations.

We also see value in other institutions that are more holistic and cross-cutting in their concerns. For example, it makes little sense to take a siloed approach to something like climate change policy, or to give responsibility for it to one particular Ministry. While different agencies are important to provide focus, leadership and accountability, it is troubling that they can pull in different directions on issues that require a common approach. There is considerable potential to make improvements through current state sector reforms.

We are proposing the establishment of a formal, permanent cross-departmental group within central government that would be tasked with providing integrated advice on the resource management system to

Ministers and Cabinet. This would be a true, accountable, whole of system steward, comprised of senior officials from various departments and chaired by a senior official from the Department of the Prime Minister and Cabinet. We are calling this a “Futures Group”. It would be complemented by a Futures Commission, in that both would have a system-wide focus, but one would be accountable and the other independent. A proper balance between those two things will be crucial in the future, as we face environmental challenges that are long term and require a degree of policy stability.

We also propose the creation of various other national-level institutions. An “Environmental Water Holder” would represent the public interest in any future trading or auctioning framework for freshwater. A cross-agency behavioural insights group would assist public authorities, including councils, with driving behaviour change on the ground. And an independent, publicly funded “Environmental Defender’s Office” would be charged with taking on public interest litigation. Among other things, it would have appeal rights in relation to notification decisions under the RMA.

Key points

- A future system should see greater alignment and integration of mandates across central government. That would see the formal establishment of a standing, cross-departmental grouping of senior officials concerned with the resource management system as a whole (a Futures Group). In other words, we would have a true whole of system steward.
- In addition, various other national-level bodies should be created: an Environmental Water Holder, an independent Environmental Defender’s Office, and a cross-agency behavioural insights group.

Last, but by no means least, we turn to local government. We see a strong case for amalgamation where councils are no longer viable economic units relative to the challenges they face and the populations they draw on. While we are not suggesting *instant* wholesale structural reform of local government across the country, we do see a compelling case for change over time. Scale needs to be embraced for some matters (eg water infrastructure at a regional or cross-regional level), and the transfer or escalation of some functions needs to be progressed (eg stronger enforcement and regulation-making jurisdiction for the arm’s-length EPA). Indeed, central government needs to move into spaces where it has traditionally been absent or weak, especially through active support and resourcing for the implementation of a coherent package of nationally important environmental limits. We also support an ongoing conversation around how we test evolving communities of interest, and who should be responsible for what. That includes what council boundaries should be.

Our model sees regional cooperation as crucial, and would be consistent with a shift towards regionalisation of council

boundaries themselves (eg the merging or rearrangement of territorial authorities). In fact, overall complexity in our model would reduce were that to happen (eg proposals for regional level spatial planning, regional combined plans under the RMA, and jointly owned regional water service providers would become simpler). We do not comment on exactly what revised council boundaries would look like; such revision is something that must happen in close partnership with communities themselves.

This is also not to dismiss the importance of localism and community ownership and identity. Greater regionalism needs to be pursued for some things where scale and coordination are important, but localism needs to be strengthened for others where there are diseconomies of scale and where community input and engagement is vital. Top-down approaches need to be complemented by bottom-up measures. For example, we are proposing the deployment of citizens' assemblies as part of RMA plan-making, and that concept has wider relevance than under the RMA. We also propose that a clearer definition of subsidiarity be enshrined in the law, recognising that local government is a constitutional partner with the Crown, not an agent of central government. Furthermore, we see merit in the notion of "city deals", whereby bespoke arrangements can be reached for the transfer of some powers (and associated funding) to recognise the needs and opportunities of particular places.

Thus, while conversations about the role of local government often seem to be framed coarsely and

pejoratively in terms of council "amalgamation" and "restructuring", the more important thing in our minds is to test where particular functions should be exercised and to build institutional arrangements around them. For example, it would be entirely possible to have regional unitary authorities for things requiring scale and consistency (eg network infrastructure, strategic growth planning) and for those to be complemented by locally elected boards with clearer functions, stronger powers and more secure budgets. The conversation should focus first on what functions should lie where, not where a council boundary should be drawn.

Key points

- We see a strong case for amalgamation of councils where they are no longer viable economic units, and for scale to be embraced (eg for the provision of infrastructure and some regulatory services).
- Stronger cooperation will be vital at a regional level, and that could pave the way for some form of regionalisation or unitisation of council boundaries.
- We encourage a conversation around this issue to continue, which must cover territory beyond the scope of the resource management system. That conversation should be framed according to where functions should lie, not around council boundaries or amalgamations per se.

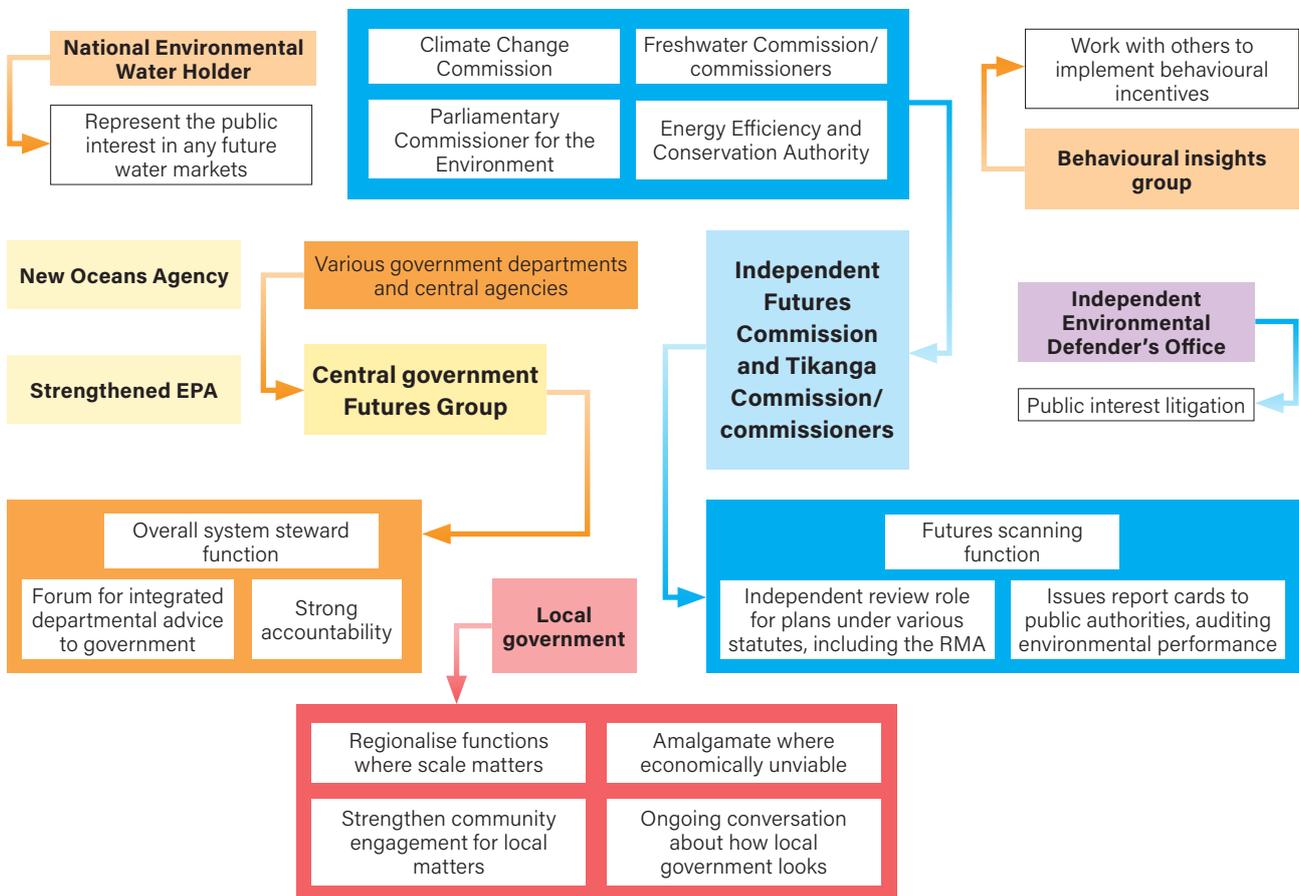


Figure 0.4: Key institutional settings in a future resource management system

5 A reformed RMA

Having described the high level architecture of our model from a legislative and institutional design perspective, from this point we explore the key legislative frameworks we see operating in the future.

In Chapter 5, we consider the future of the RMA. While we do not recommend “scrapping” the Act or splitting it along fundamentally different lines (with a partial exception in relation to oceans beyond 3 nautical miles), we do contemplate substantial change to it. Key changes would be to the Act’s purpose and principles (Part 2), planning processes at national and local level, and associated institutional arrangements. The RMA would continue to be the place where allocative issues were addressed in relation to resources protected under it (eg freshwater, coastal space), but it would do so in a more proactive and structured manner than at present.

5.1 A new purpose and principles

We propose that Part 2 of the Act be rewritten, and in Chapter 5 we provide some potential drafting. We consider that a redraft is required for several reasons, including:

- There needs to be a clearer distinction between matters that require true “bottom lines” and those that involve balance, as well as a stronger direction about the pre-eminence of bottom lines
- There needs to be a stronger recognition of the need to enhance the natural environment
- Climate change mitigation needs to be recognised
- The language used needs to be more “outcomes-focused” and contemplate active positive change, not “effects based” and responsive to harm
- Subject to a clear statement of bottom lines, there needs to be greater recognition of the benefits of environmentally sustainable resource use (including considerations of good urban design)
- There should be a stronger statement to give effect to the principles of the Treaty
- There is the need to provide a stronger normative “hook” for allocative decision-making

On balance, we consider that the need to drive change through a revised Part 2 outweighs legitimate pragmatic concerns about change (eg risks of losing case law). Careful drafting would be needed to retain aspects on which valuable case law depends.

Key points

- We see room for significant changes to Part 2 of the RMA to, among other things, better provide for environmental bottom lines, implement Treaty obligations, and recognise the importance of good urban planning and design

5.2 A new approach to national direction

We see considerable merit in changing our approach to national direction under a revamped RMA. We look at this in Chapter 6. In particular, we envisage a more proactive and coherent role for central government, alongside a greater role for independent institutions, in how decisions are made. At the moment, the Act does not compel central government to plan or intervene, other than in the context of the coastal environment. It does, however, *enable* government involvement in a wide variety of ways.

We are suggesting a *requirement*, not just a power, for central government to promulgate national direction that gives effect to a revised purpose and principles of the Act. This would mean that matters identified as being of national importance – including where they impose environmental bottom lines – then have an expectation of at least *some* national policy response. This would be accompanied by a clearer definition of subsidiarity, outlining what can reasonably be expected (and not expected) from central, regional and local government. There would be an obligation to set time-bound targets for key areas of environmental wellbeing or improvement, and pre-set trigger points requiring a review or corrective action.

Presently, national direction under the RMA is at risk of misalignment. It is not always clear how different National Policy Statements (NPSs) are meant to work together or influence each other. In other words, we lack a “regional policy statement”-type instrument for the country as a whole. Furthermore, regulatory provisions in a National Environment Standard (NES) can exist in a vacuum, without any clearly associated policies in an NPS. The format and structure of national direction can also look very different, adding to confusion for councils expected to give effect to it. This issue is becoming more pronounced as more national direction is promulgated to target particular problems.

We are therefore proposing that existing national direction (NPSs and NESs) be incorporated, over time, into a single, internally coherent and comprehensive “National Environment Plan” (NEP). There will be gaps to be filled, notably in relation to climate change. In relation to the climate, important links will need to be made between national direction in the RMA and broader climate change-focused instruments like emissions reduction plans and adaptation plans (currently provided for under the Climate Change Response (Zero Carbon) Amendment Act. An NEP will be one place in which a nationally coherent approach to mitigation and adaptation could usefully be implemented. National Planning Standards would remain separate, but would have no substantive content and would standardise the format of both council plans *and* national direction.¹⁷

Transitional arrangements leading to an NEP would be crucial. We do not want to lose much of the valuable work that has been done to create national direction over the past decade, including processes that are underway (eg see the recently released discussion document on an NPS for Indigenous Biodiversity). That is particularly important for national direction that imposes firm environmental limits.

We are suggesting a process for producing and reviewing an NEP that in some ways resembles the current process for creating national direction. However, there would be greater involvement for Māori and councils in co-production, and a review function for the new, independent Futures Commission described earlier (and the Climate Change Commission, if it were to remain separate). We do not, at least in the short to medium term, suggest allowing merits appeals on an NEP to the Environment Court.

A strengthened role for the EPA in setting aspects of national direction should also be considered closely. While Ministers should retain responsibility for establishing objectives and policies (the NPS-style element of an NEP), as well as most regulatory provisions (the NES-style element of a NEP), for some things (especially freshwater) there is a case to be made for minimum standards to be set by a more independent agency with a firmly protective mandate.

In Chapter 6, we also propose the strengthening of water conservation orders, and the deployment of other, similar types of order. In particular, we float the idea of a “Heritage Area Order”, which would be designed to provide a more nuanced layer of landscape and biodiversity protection over private land. Other orders, to address environmental “emergencies” (degraded environments) could also be developed along similar lines.

Key points

- We propose the gradual creation of a single, integrated piece of national direction under the RMA: a National Environment Plan.
- There would be a new process for creating and reviewing an NEP, including a role for an independent Futures Commission, and we see a case for the EPA to have a stronger regulatory role for some things like freshwater.
- National Planning Standards would remain separate, but would apply to national direction as well as council plans.
- We also suggest the deployment of a wider range of “order”-based tools, modelled on the concept of water conservation orders.

5.3 A revised approach to council planning

In Chapter 7 we look at local government planning under the RMA. National direction would not do everything in a future Act, and the system would not be a centralised one. A greater and more coherent role for national direction would simply recognise that nationally important matters require a degree of central government input. Again, a future system could more clearly define what subsidiarity means (which things are to be locally or centrally decided or influenced, and for what reasons). But much will be left to local government, for two reasons: (1) nationally important outcomes (eg general policy direction) may still require specific local expression (eg through regulation);

and (2) some things will be of purely local, not national, concern (eg urban place-making).

Of course, there are questions as to what “local” should mean when we think about local government boundaries, and we touched on this earlier in the context of institutional design. Overall, we see room for greater cooperation and integration to occur at a regional level, and that would include plan making under the RMA.

Plan making under the RMA also needs to be more agile. Plans must respond to new threats and rapidly changing biophysical and social contexts. However, reforms need to balance the desire for more timely outcomes with the need for robust decision-making and meaningful public involvement. That suggests to us the desirability of having a single-stage hearings process for plans, or at least a truncated two-stage process. This revised approach should not be limited to particular contexts like urban growth or freshwater, as such carve outs add complexity to the system and the need for agility applies across the board.

We consider that communities should be more involved in co-creating plans at their earliest stages, not just responding to a notified plan through submissions and appeals. A future system could usefully formalise the deployment of citizens’ assemblies in plan development. Iwi and hapū (the institutional nature of which we think could be more clearly defined) would also be closely involved in plan leadership and co-production, not just consulted or engaged with.



There would still, however, be a need for a formal hearings process. One option would be to adopt a variant of the Auckland Unitary Plan model (Option 1). Here, multiple councils (in collaboration with Māori and others) would work together to produce a single proposed combined plan for a region (incorporating both regional and district instruments). Merits appeals to the Environment Court would be constrained by whether councils accepted or rejected the recommendations of the standing, independent Futures Commission mentioned earlier. In other words, the Commission would perform a role comparable to that of the Independent Hearings Panel of the Auckland Unitary Plan process.

Another option would be to have a single stage hearing by a “hybrid” institution (Option 2). This hybrid institution would combine representatives from the Environment Court, commissioner(s), council and iwi/hapū. There would be no integrated combined plan across a region (unless local government itself were to be unitised), although councils would be encouraged to work together across boundaries. Appeals from the hybrid panel’s decisions, to a separate appellate division of the Environment Court, would be limited to points of law.

Both of the options outlined above have positive and negative features. We think that a useful direction of travel could be to adopt both, but in different circumstances. Option 1, involving a wide ranging independent review from a standing Futures Commission and the ability for constrained appeals to the Environment Court, could be used as a robust process for “resetting” multiple existing plans under a reformed RMA at an integrated, regional level, in a similar way that the Auckland Unitary Plan “reset” the planning environment in Auckland. It could also be used for periodic whole of plan reviews, and where significant plan changes were escalated on the initiative of the responsible Minister or the Futures Commission itself (a form of “call in”).

Option 2, involving a single-stage hybrid decision-making panel, would be used as a process for other plan changes. Careful consideration would have to be given to the relative membership of such panels, especially the balance of independent and accountable members and Māori and non-Māori members. A third option for changing council plans in the coastal environment, which would be designed to give more direct effect to a marine spatial planning process, is discussed below in the context of an Oceans Act.

It would be vital to have a level of regional strategy sitting above, or embedded within, combined plans. However, there is a question over whether this should be in a purely RMA instrument (a regional policy statement) or a broader regional futures strategy produced under a separate Future Generations Act (see below). If both were to exist, they could be duplicatory. We leave that as an open question.

Regional combined plans would continue to contain both policy provisions and regulatory provisions (eg rules and standards). It is essential for policy making functions to

remain with accountable local government members, elected on behalf of their communities to make such value judgements. However, we see merit in providing a stronger role for the EPA to develop some regulatory elements of plans, especially where they are necessary to give effect to policy in national direction. Freshwater would be a good example, but there may be other areas in which the EPA could have a stronger role (eg biodiversity protections). In some cases, this might involve a transfer of regulatory functions for a period of time until performance or capacity could be improved, rather than a permanent removal of functions from local government. There should be stronger safeguards and criteria around when such transfer powers could (and should) be used.

Key points

- We propose revising council planning under the RMA to involve a single-stage hearing process (or a truncated two stage process).
- A feasible way forward may be to use a robust Auckland Unitary Plan-style process to “reset” plans at a regional level under a revised Part 2 (and to periodically review plans), but to use a more streamlined “hybrid” panel model for plan changes.
- Combined plans should be created in a cooperative manner (including with iwi and hapū) at a regional level, even if extensive local government restructuring did not occur.
- For some things, we see a case for regulation-making responsibility to be given to a strengthened EPA, on a temporary or permanent basis.



Orere Point

5.4 Consenting and compliance

In Chapter 7 we also consider consenting and compliance under a reformed RMA. While we suggest change on a number of fronts, we remain unconvinced that removing merits appeal rights in relation to resource consent decisions is the answer. In relation to consenting, we suggest that:

- A future system should provide greater predictability by focusing effort at the planning stage and relying less on the discretionary weighing of general (and potentially conflicting) policies through consenting decisions. The solution is not greater use of permitted activity standards. Instead, greater predictability could be provided by the use of more specific, hierarchical policies, default minimum consent conditions for particular activities, and stronger use of prohibited activity status and moratoria.
- A robustly independent, publicly funded statutory Environmental Defender's Office should be charged with taking on public interest litigation, and have standing to appeal councils' notification decisions to the Environment Court.
- A new notification status could be introduced, whereby a proposal is publicly notified and submissions invited, but no appeal rights follow (or they follow only for an Environmental Defender's Office).
- A future system should provide for an integrated permitting process (a "project consent") for complex or nationally significant projects, which would align permitting process under multiple statutes.
- Resource consent decisions should be required to be at least "consistent" with national direction, not just "have regard" to it.
- Restrictions on councils considering the impacts of activities on climate change when assessing consent applications should be removed or amended.
- Jurisdiction for consenting decisions could be removed from elected members, or restricted, in favour of independent commissioners, council staff, and the Environment Court.
- A pool of nationally accredited independent commissioners should be established under the auspices of an independent Futures Commission or the EPA, to be deployed upon council request.
- An independent Futures Commission should be provided with a power to call in matters of national significance alongside the Minister for the Environment.
- The option for Boards of Inquiry to be appointed to consider consent applications should be removed

(with direct referral to the Environment Court retained).

- There should be a greater role in consenting for the EPA for some matters (eg freshwater), to complement a stronger regulatory role for the EPA under national direction and council plans. Again, however, there should be clear criteria and constraints around when transfer of powers to the EPA can be used.

We also propose a range of changes in relation to compliance monitoring and enforcement, notably:

- Standardising approaches or minimum requirements (eg through national direction or regulations).
- Broadening the range of penalties available under the RMA for non-compliance.
- Strengthening the ability to decline or revoke consent in the event of persistent non-compliance.
- Formally removing enforcement decision-making from elected councillors.
- Strengthening the enforcement role of the EPA (broadly in line with proposals in the latest amendment bill to the RMA).
- Providing greater guidance about when it is appropriate for the EPA to initiate or intervene in enforcement action.
- Giving the EPA an oversight role over enforcement activities by councils (and potentially other agencies).
- Including compliance monitoring and enforcement activity in environmental reporting.
- Achieving greater cost recovery for the monitoring of permitted activities.

Key points

- A number of settings should be revised for consenting and compliance monitoring and enforcement under a reformed RMA.
- More predictability should be provided in plans, reducing the need to rely on extensive arguments and discretion in consenting decisions.
- We do not recommend removing appeal rights in relation to consenting decisions.
- The EPA should be given a stronger role for consenting and enforcement, but there should not be a blanket removal of those functions from local government.
- Appeal rights in relation to notification decisions should be given to a robustly independent Environmental Defender's Office.

5.5 A more structured and principled approach to allocative issues

We consider that a future system will need to approach allocative questions in a much more proactive and courageous way than in the past, especially under the RMA. That is particularly important in the context of freshwater (both abstraction of water and the use of its assimilative capacity). Most urgent is the need to reduce total allocation where environmental limits have been exceeded, and (failing consensus through collaborative processes) to provide a regulatory mechanism for the relative reductions of existing uses to be determined and enforced. That will require the development of allocative principles, both through a revised Part 2 of the RMA and in national direction.

Yet at some point in the near future we will also need to grasp the nettle on questions about reallocating rights, not just to meet environmental limits but also to meet concerns about fair distribution. The current landscape of rights has emerged in an ad hoc way where questions around fairness have not really been considered, largely based on who has applied first and an expectation that rights will continue in perpetuity. Relying only on a “first in, first served” model will not be good enough in the future, and there should be no general expectation of grandfathering based on existing or historical use (although reforms will need to be sensitive to issues of fairness in any transition). Of course, looming large over all such questions are issues of Māori rights and interests.

There are no clear answers to allocative questions, and they will need to be explored in depth through the government’s ongoing freshwater programme over the course of 2020 and beyond. However, we see merit in having a more structured approach for allocating new freshwater abstraction rights (including where existing consented rights expire). We suggest a potential way forward, involving the allocation of two separate tranches of rights:

- (1) a regulatory allocation (to fulfil Treaty obligations, to allocate to public important uses, and to allow communities a degree of control through an attribute weighted tendering process); and
- (2) a purely economic allocation above regulatory allocation (eg auctioning).

To the extent that market mechanisms were to be adopted in the allocation and reallocation of water rights (auctioning and trading), a publicly funded Environmental Water Holder should be established to operate in markets (buy and sell water rights) to pursue public interest outcomes. Over all of this, the system will need to provide for issues of Māori rights and interests in freshwater to play out, and to provide a pathway for those outcomes to be implemented. It is hard to predict what shape that will take.

A more consistent approach to resource rentals should be deployed over time (including for freshwater), and implications for Māori interests need to be closely considered here too. An option would be for a portion of a rental to be directed to Māori for use in environmental restoration activities as kaitiaki, and a portion to be directed to councils for similar purposes.

We see significant merit in water trading being deployed more in a future system. The use to which our water is put needs to be fairer, more efficient and more responsive to change once it has been allocated initially. However, we do not see it as a complete replacement for a more structured regulatory approach to allocation, and we need to be careful to counteract the potential social and environmental impacts of trading (eg the potential for the corporatisation of water rights in water barons, financial speculation, and localised ecological impacts).

Key points

- Allocative issues need to be addressed more directly in a future system, particularly for freshwater. The law needs to provide for common allocative principles, including through national direction.
- A reduction in existing freshwater “rights” is urgent in overallocated catchments, and where collaborative processes are not likely to succeed, a regulatory backstop is required.
- A more structured approach to allocating new rights, and for reallocating rights upon the expiry of existing consents, should be implemented where scarcity is reasonably foreseeable.
- This could involve a portion of regulatory allocation (eg through attributed weighted tendering) and a portion of “economic” allocation (eg through auctioning).
- Trading should be closely considered where appropriate, subject to careful constraints.
- A nationally consistent approach to resource rentals should be deployed over time in a way that is fair.
- Across all of this a reformed system will need to offer pathways for issues of Māori rights and interests to be addressed.

6 A new strategic statute: The Future Generations Act

Overarching the RMA, as well as other resource management “implementation” statutes, we envisage the enactment of a new Future Generations Act. We consider this in Chapter 8. The Act would form something of a “constitution” for the environment, and would do two key things:

- (1) provide a broad set of principles and duties to apply to public decision-making.
- (2) provide for a strategic (and spatial) planning process that would flow down into more detailed decision-making frameworks. As mentioned earlier, one aspect of that would be to coordinate land use planning and infrastructure planning/funding for urban growth, through regional (or cross-regional) spatial plans.

6.1 General principles and duties

A Future Generations Act would have a broad purpose statement that would, among other things, recognise the pre-eminence of bottom lines set under other frameworks (including, but not limited to, the RMA). It could also provide recognition of general moral rights for nature (and associated government responsibilities in relation to nature). It would provide a degree of stability for any future reforms to more targeted frameworks, to prevent the system's overall coherence from eroding over time; any legislative amendments would need to be assessed against the purpose of the Future Generations Act, in a way not dissimilar to the Bill of Rights Act.

We also envisage that the Act would contain common decision-making principles or duties that would apply to all public decision-making, not just when making decisions under specific "protective" statutory frameworks like the RMA. For example, climate change mitigation and adaptation are considerations that need to cut across and permeate all decisions, whether they have a specific statutory basis or not. It would ensure that the environment and the wellbeing of future generations were closely considered in decisions relating to investment, procurement and non-statutory plans and programmes.

We also suggest the establishment, in the Act, of a whole of system steward within government (the Futures Group mentioned earlier), comprised of high level officials from relevant departments and Crown agents and chaired by a senior official from the Department of the Prime Minister and Cabinet. This standing group would allow officials to speak with one voice to Ministers and Cabinet, or at least for differences in perspective across departments to be highlighted and addressed. Alongside this accountable government body, an independent one – a Futures Commission (and Tikanga Commission/commissioners) – would act as an independent watchdog over the whole of the system. It would issue public authorities, and the government as a whole, with a scorecard on a periodic basis. This would assess the government's performance against the purpose and principles/duties in the Future Generations Act and in light of the results of environmental reporting, and be tabled in Parliament prior to a general election. Effectively, it would be a form of environmental audit on which voters could ruminate when going to the polls. A government would be required to respond.

An audit would be about reviewing past performance, but the Futures Commission would – consistent with its name – also be about looking forward. It would have a "futures scanning" role, periodically identifying and reporting on threats and opportunities, and producing reports to which the government would be obliged to respond. The Futures Commission could, eventually, be merged with other robustly independent watchdog-type institutions such as the Parliamentary Commissioner for the Environment and Climate Change Commission. Alternatively, it could be seen as an expansion of the existing Parliamentary Commissioner for the Environment.

A Future Generations Act would also impose a stronger general duty on people to protect or even enhance the environment (although care would need to be taken here), and could be a place where directors' environmental duties were strengthened (alternatively, that could done in the Companies Act 1993). In the longer term (as already described), we are attracted to the idea of further integrating existing legislation into a Future Generations Act to the extent that it is about the whole of the system. That could include the Environmental Reporting Act, the Environmental Protection Authority Act, and the Environment Act.

Key points

- A Future Generations Act would sit above other legislative frameworks, and provide for a broad, constitutionally important set of principles and duties to apply to public decision-making.
- The Act would establish an independent Futures Commission and a whole of system government steward (a Futures Group).
- It would provide for the Futures Commission to audit and report on the environmental performance of public authorities in the form of a periodic scorecard, and task it with scanning the future for threats and opportunities. The government would be required to respond to both.

6.2 Strategic spatial planning in a Future Generations Act

The second thing a Future Generations Act would do is provide a statutory basis for strategic spatial planning at national and regional levels. There would be a cooperative process for producing a "National Futures Strategy", with its spatial expression in a "National Spatial Plan". Māori would be closely involved in co-creation. At a regional level (and cross-regional level), there would be a comparable process for creating futures strategies and associated regional spatial plans. There would be a strong role for the Futures Commission in both.

These instruments would not be directly binding in a regulatory sense. However, they would have real legal influence on decision-making under more targeted

frameworks (eg the RMA and a Local Government and Infrastructure Act). We do not think it would be feasible for strategies and spatial plans to be *given effect* to in these other statutes – and for good reason: Acts like the RMA have their own specific purposes and processes to work through. But a reasonably strong legal direction should be put in place to ensure strategic planning is worth doing. One option would be for spatial plans to be given effect to *unless there were good reasons not to*. “Good reason” could be defined to include inconsistency with the purpose of other frameworks (eg bottom lines set under the RMA).

Regional and cross-regional spatial plans would be particularly important to manage rapid urban growth, where (as mentioned earlier) alignment is required between the land use components of RMA instruments and the infrastructure planning and funding components of other legislation. For example, a spatial plan with real legal influence would be useful in coordinating various agencies’ functions and activities when planning integrated urban growth and transport development between Auckland, Hamilton and Tauranga. But they would be useful in other contexts too; for example, as a mechanism to coordinate actions across multiple statutes, institutions and tenures to create a drylands protected area in the Mackenzie Basin.

Futures strategies and spatial plans should also, from the outset, be accompanied by a description of anticipated costs, and where funding is envisaged to come from. A vision in a spatial plan that relied on significant sums of money should not fall over later because there was no real plan for where the money was going to come from. This could still be of a general nature, however; we want a vision to be realistic, but we do not want its ambition to be overly constrained by having to secure specific sources of funding in advance. (For example, water clean-up costs can run into the millions or billions of dollars, which could not realistically be earmarked in advance).

The other important thing to note here is that a national strategy and spatial plan would not be binding on regional ones as a matter of law. They would be integrative *within* each level of government, not hierarchical *between* levels of government. A National Spatial Plan should not, for example, be a back door for central government to influence decision-making by councils under the RMA – the appropriate routes for that would be contained in the RMA itself. That would be supported by a clearer definition of subsidiarity.

However, if all partners in the spatial planning process agreed, there would be a case for them to be obliged, to some degree, to follow through. That might be necessary, for example, to implement a spatial plan coordinating urban growth (where expensive infrastructure may be involved) or providing for climate change adaptation (where it would be crucial for central and local contributions to be aligned).

As mentioned earlier in the context of the RMA, it would be possible to replace regional policy statements under

a revised RMA with regional futures strategies created under a Future Generations Act. Otherwise, there may be concerns that the two would be too duplicatory. This would, however, have its risks, in that regional futures strategies would contain a wider and more balanced range of matters than a regional policy statement. An alternative would be for a more focused regional policy statement under the RMA to remain, and be given effect to in a regional futures strategy.

Finally, national level spatial planning would not be about giving central government greater powers. It would be about coordinating the use of existing powers, including under specific statutory frameworks, towards a more joined-up end point. It would certainly not be an opportunity for a government to override environmental considerations in other statutes, and safeguards in the Act would make this clear.

Key points

- A Future Generations Act would provide for integrated strategic and spatial planning at national and regional levels.
- Futures strategies and accompanying spatial plans would not be binding, but would have strong legal influence over decision-making under other regimes.
- Regional (or cross-regional) spatial plans would be particularly important to align land use and infrastructure planning under the RMA and a Local Government and Infrastructure Act in the context of urban growth, but would not be limited to that context.

7 Climate change

Climate change will need to inform almost all decision-making in a future resource management system. As foreshadowed earlier, we see potential for the “strategic” elements of climate change legislation, contained in the recently enacted Climate Change Response (Zero Carbon) Amendment Act, to be integrated into a Future Generations Act. Emissions reduction plans and adaptation plans would be contained in a National Futures Strategy, and expressed in an associated National Spatial Plan. They would have real legal weight.

A strengthened purpose and principles for climate change action (including seeking overall carbon neutrality by 2050), and the target and budget setting/review process, could also be integrated into the Future Generations Act framework. Furthermore, we see room for stronger enforcement mechanisms for a failure to achieve climate change targets and budgets. And, in the longer term, we would suggest giving close consideration to integrating the Climate Change Commission into a broader framework of a Futures Commission.

Climate change would also need to be a significant driver of regional spatial planning, particularly in the context of adaptation, managed retreat, and infrastructure investments, and would need to flow through meaningfully into other frameworks (especially land use planning under the RMA). It would make some sense for a new "Climate Change Adaptation Fund" – which we see as vital – to be established and managed in a strategic way under the Future Generations Act.¹⁸ Elements of the emissions trading scheme will need to be strengthened, and we see promise in ramping up the deployment of novel financial tools and strengthening frameworks for corporate disclosures and directors' duties.

An important theme of the report, however, is that particular issues should not be thought about in silos. That includes climate change. There are many synergies to be pursued, particularly the co-benefits for climate change mitigation, ecological resilience, biodiversity enhancement, and freshwater quality that would emerge from greater indigenous planting.

Key points

- We see potential for the strategic elements of climate change response in the Climate Change Response (Zero Carbon) Amendment Act to be integrated into an overarching Future Generations Act.
- From there, climate change mitigation and adaptation plans would have real legal influence over decision-making under multiple other frameworks, including the RMA.
- Change is also required to the emissions trading scheme, and other novel tools should be deployed.
- A new Climate Change Adaptation Fund should be established and deployed on a strategic basis at a national level.
- Synergies need to be pursued between climate change goals and wider environmental aims.



Lake Wanaka

8 Other legislation for the built and urban environments

In the model we are floating, many statutory frameworks will be relevant to the management of built or urban elements of the environment. The RMA and the Future Generations Act (especially in its provisions for regional spatial planning) would be among them, and we explore those aspects in Chapters 5–8. In particular, the RMA needs to provide for quality and environmentally friendly urban intensification rather than facilitating unchecked, car dependent urban sprawl, and reflect urban planning principles in Part 2. However, there is a need for an additional layer of legislation, primarily to ensure that certain public goods and services – notably three waters and transport – are planned for and delivered effectively and efficiently. That is well beyond the remit of the RMA, and is currently performed under local government legislation and the Land Transport Management Act. In Chapter 10, we consider this layer of legislation.

Alongside robust strategic and spatial planning, we see a strong case for further aligning decision-making processes under more targeted statutes that would implement it. In particular, land use planning and infrastructure funding should occur in a more connected manner, and along timeframes that are more coordinated. To facilitate greater alignment, we have suggested integrating the Local Government Act and Land Transport Management Act (and other relevant legislation) into a Local Government and Infrastructure Act.

Frameworks for the delivery of public infrastructure and services are intimately related to the ways in which those things are funded. That raises broader questions about how responsible institutions raise revenue. For example, three waters services are currently provided and funded largely by councils through processes under the Local Government Act (and related statutes), giving rise to questions about how councils raise revenue and finance their activities. In short, we are suggesting the following.

- Environmental considerations within development-focused legislation (including a Local Government and Infrastructure Act, the Building Act, and a proposed Urban Development Bill)¹⁹ would be strengthened and aligned with imperatives in a new Future Generations Act, including to reflect climate change.
- Regulation of the three waters sector, for both health and environmental reasons (in particular, wastewater and drinking water) would be strengthened, consistent with measures being proposed in the government’s three waters review.
- We see merit in deploying jointly owned council-controlled organisations (CCOs) at a regional level for the planning, funding and delivery of drinking water and wastewater infrastructure and services. A “regional” level would not necessarily reflect the

current boundaries of regional councils, and may well be wider (or just different).

- A CCO model could be altered by allowing for the Crown to be a partner in these organisations alongside local government, reflecting the considerable Crown funding commitment that may be required in some places.
- An economic regulator would be created (which could be a new institution like the Futures Commission or an existing one like the Commerce Commission) with responsibility to ensure that investment levels and pricing in water services were sufficient and fair when looked at from an inter-generational perspective.
- We see a continued role for central government, through the New Zealand Transport Agency (NZTA), in co-funding local transport infrastructure through the Land Transport Fund.
- A conditional reform may be the deployment of regional CCOs (alongside the NZTA) for land transport planning and delivery, although such CCOs would continue to require council funding.
- A greater focus on regionalising key functions might lead to regionalisation of local government units over time, as long as there were strong mechanisms for retaining truly local decision-making at a more devolved level. As mentioned earlier, this conversation needs to be focused on which functions we locate where, not simply redrawing the boundaries of existing institutions.

Key points

- We see potential in the deployment of regional level CCOs, with a degree of Crown support, for the delivery of drinking water and wastewater services (and potentially transport infrastructure).
- That should be accompanied by the introduction of an economic regulator, with responsibility to ensure that investment levels and service pricing were sufficient and fair (especially for water services).
- We see merit in integrating the Local Government Act and Land Transport Management Act into a single Local Government and Infrastructure Act, with planning processes under that Act and the RMA more closely aligned.

To complement institutional and legislative change for the built environment, reform is needed to underlying funding mechanisms. Here, we largely echo the recent findings of the Productivity Commission. We see a strong case for expanding funding and financing tools to address issues in the built environment (including rapid urban growth,

tourist pressures, and the replacement or upgrade of infrastructure). In particular:

- There should generally be greater deployment of user charging (including volumetric charging for water and wastewater) where appropriate.
- Where users cannot be charged directly, proxy measures should be available (eg an accommodation/bed tax to address tourist pressures).
- Predictable, need-based central government contributions should be forthcoming where required (eg to upgrade or replace water infrastructure to meet national standards).
- Value uplift capture mechanisms should be deployed to capture some of the private financial benefit that arises from public investments in infrastructure.
- There should be further deployment of special purpose vehicles to finance growth where councils are nearing their debt limits.

However, user charging should not be deployed without close consideration of regressive effects on the poor or vulnerable. Adequate funding is important, but transport and water infrastructure are still public goods to which people should have access.

Overall we agree with the Productivity Commission that the way forward is to expand our funding and financing toolbox, not replace it. Rates remain a stable, predictable source of revenue for councils, and should remain core to a future funding model. However, it remains that funding sources can provide powerful incentives to invest in certain ways, or to underinvest. The incentives provided by over-reliance on rates, combined with other constraints (eg debt ceilings), require correction. Notably, this has contributed to constraints on developable land in areas of high urban growth, putting further pressure on housing affordability.

We therefore see merit in including in a future toolbox the ability to levy a local GST, or at least for that option to be explored further. The prospect of reaping the financial benefits of investment in growth or tourist infrastructure, rather than just facing the financial or political costs, would be a positive incentive on councils to invest, and easier to sell to constituents. It would also recognise the independent nature and fiscal autonomy of local government when compared to solutions based on central government grants.

However, we need to be extremely careful that powerful financial motivations for councils to grow and develop – to build – do not in practice lead to perverse incentives for environmental outcomes. New development is essential to provide housing supply, but it must be done in a way that respects an envelope of true environmental limits. Councils wear quite different hats here, reinforcing the need for strong regulatory safeguards to be put in place under the RMA and Future Generations Act.

Key points

- The funding incentives and constraints provided by the current system in the context of urban growth, tourism pressures and ageing infrastructure require correction.
- Targeted measures to shift the costs of infrastructure onto those who benefit will help (eg a bed tax, grants from central government, value uplift capture).
- We also see merit in allowing councils to levy a local form of GST, which would provide incentives for funding growth while allowing communities more control. That cannot be a complete replacement for rates, but would be a useful addition to the toolbox and allow communities greater choice.
- Safeguards are needed to ensure that powerful financial incentives for growth do not undermine the envelope of environmental limits within which development must occur.

In Chapter 10 we also consider the place of the Building Act, concluding that construction standards should remain in a separate statute (and Code). However, these (and infrastructure standards) should be strengthened to recognise the essential contribution that “green” construction will make to environmental outcomes in a future system, including in relation to climate change, waste, freshwater, biodiversity and energy efficiency. Stronger links need to be made with the urban planning system under the RMA.

Finally, we see a place for an urban development authority, under bespoke legislation, to form part of a future system. An urban development authority is an arm’s-length public entity that would be responsible for planning, funding and delivering urban development within a spatially defined project area. The government has now enacted a bespoke legislative framework to create this entity (called Kāinga Ora – Homes and Communities) and defined its general roles, but it has yet to legislate its specific powers to override other statutes. This is expected later in the year (in the form of an Urban Development Bill), and all indications are that powers will be substantial, including powers to override the RMA.

The proposition for an urban development authority would look very different in our preferred model. In particular, we suggest that targeted legislation would need to:

- Clarify that a strengthened Part 2 in the RMA remained the primary test for decision-making when exercising powers under that Act.
- Not include powers to override provisions of council plans that do not relate to the land use or subdivision functions of territorial authorities.

- Treat regional councils more like territorial authorities and require their agreement up front to establish a project.
- Build key environmental protections – and enhancements – into strategic objectives when a project is established.
- Emphasise that national direction under the RMA (an NEP) would, as elsewhere, need to be given effect to.
- Clarify that a project is a way to implement a regional spatial plan made under the Future Generations Act, not an excuse to override it for a narrower purpose.

Key points

- The Building Act should be strengthened to contribute to positive environmental outcomes.
- Dedicated urban development legislation is probably necessary in a future system as a backstop measure, but should be significantly amended from the current proposal in the interests of environmental wellbeing.

9 A new Oceans Act

We are floating the idea of a separate legislative framework for oceans management – an Oceans Act. We describe this in Chapter 11. There has been a complex history of oceans management in New Zealand, resulting in a patchwork of legislation targeting different things. Much is no longer fit for purpose, and a more integrated approach to oceans management is needed. The marine environment is quite different in character from the terrestrial environment and needs to be managed in different ways. In particular, jurisdictional boundaries do not always reflect the interconnected nature of the marine environment.

In a future system, regional councils would continue to have jurisdiction over truly coastal matters, out to a 3-nautical-mile boundary (which would be mapped on ecological grounds). This would reflect the need to have integrated management of catchments and coasts, and the RMA would continue to apply there. Other parts of the marine area would be managed by a well-resourced, dedicated “Oceans Agency”. This would be the operational agency for the Oceans Act, and operate at arm’s length from the government. Alternatively, a strengthened EPA could take on this role. Either way, Māori input into decision-making by the Agency would be strengthened.



Waitematā

We see a case for integrating most existing legislation relevant to the marine area – including the EEZ Act, Fisheries Act, Maritime Transport Act, aspects of the Biosecurity Act and aspects of the RMA – into a single Oceans Act. We also think there is strong case under a new Act for rationalising and strengthening the currently fragmented policy and planning framework for oceans. At the top of the planning hierarchy would be an integrated “Oceans Plan”.

Conservation legislation would remain separate, and that would include marine components of conservation (eg marine protected areas, marine mammals protections etc). While links between an Oceans Act and conservation legislation would need to be strong, on balance we see greater benefits in having separate conservation legislation integrated across marine and terrestrial contexts (especially given the migratory nature of some species).

A National Futures Strategy and National Spatial Plan, described in Chapter 8, should have a strong oceans component within it. Furthermore, alongside the regional futures strategies and spatial plans discussed in that chapter could be a more targeted process for regional *marine* spatial planning. Marine spatial plans would flow through into decision-making under various “implementation” frameworks, including an Oceans Act, the RMA, and integrated conservation legislation. As foreshadowed, there could even be a more direct process for marine spatial plans to be implemented, involving a collaborative process and decision by the Environment Court.

Key points

- A new Oceans Act would apply (for RMA-type functions) beyond 3 nautical miles from land, and integrate multiple pieces (or aspects) of existing legislation (including fisheries, biosecurity, maritime transport and EEZ Act protections).
- An Oceans Act would provide for a robust planning process centred on an Oceans Plan. This would be administered by a dedicated Oceans Agency.
- Marine spatial planning would occur under a Future Generations Act, but could have a more direct route to implementation under regulatory frameworks like the Oceans Act and the RMA.



10 Nature conservation: A new Protected Areas and Species Act

In Chapter 12 we consider the place of conservation legislation in a future system. We make a number of suggestions for comment and further discussion. Central to these would be the integration, over time, of our fragmented array of existing conservation legislation into a single Protected Areas and Species Act (eg the Conservation Act, National Parks Act, Reserves Act and Wildlife Act). Within that, there would be a rationalisation (while being careful not to reduce the level of existing protections) of protected area categories, and a strengthening of the protected species element currently founded on the Wildlife Act.²⁰ This more integrated framework for conservation will require further exploration, including to ensure that Māori perspectives on conservation are adequately reflected.²¹ Under a protected areas hierarchy, there would be stronger recognition and protection for sites of cultural significance.

Clear requirements for corrective action would be included in new legislation, based on pre-set trigger points. For example, a change in the threat status of a protected species would require measures to be taken. Environmental reporting would include information on the state and trends of species and ecosystems, as well as relevant actions taken in response (including enforcement).

Links to the RMA and Biosecurity Act framework would also be improved, including explicit recognition of the need to implement or support threatened species management plans. There would also be a greater role for independent institutions, including a review role for a Futures Commission in relation to conservation strategies and management plans, and potentially the introduction of limited appeal rights for an Environmental Defender's Office in relation to concessions. Appeal rights would need to be thought through carefully, however, as the concessions framework is quite different to the consenting framework under the RMA.

A biobanking framework would be further explored and introduced, through which biodiversity offsets under multiple other regimes (eg the RMA) would be deployed in a coherent and strategic way to optimise overall biodiversity outcomes. We think that the most appropriate home for that cross-cutting tool would, however, be a Future Generations Act rather than dedicated conservation legislation, because it would require close links to be made across multiple other statutes under which biodiversity offsetting requirements were imposed (eg the Crown Minerals Act). Similarly, while we envisage the development and active deployment of new, directive tools like Heritage Area Orders and habitat protection orders, the best place for those (given their potential impacts on private property interests) would be within the RMA.

At a broader level, we envisage placing a clearer overall stewardship responsibility for biodiversity on central government (the Department of Conservation), which would be reflected in stronger influence for the Department in regional planning under the RMA. Council

responsibility for biodiversity would be set firmly at a regional rather than district level, including under the RMA.

As in most other parts of the system, funding will also be crucial if we are to improve nature conservation outcomes. That must involve significant sums from public authorities for activities like pest management, proactive restoration, investment in fundamental science, and advocacy.

Key points

- Conservation legislation could be integrated into a single Protected Areas and Species Act.
- Requirements relating to species protection would be strengthened, protected area categories would be rationalised and strengthened, and there would be clear requirements for corrective action for the exceedance of pre-set triggers.
- More (and more consistent) funding would be required, and a biobanking model would be further explored and deployed.
- Clear stewardship responsibility for biodiversity outcomes would be placed on the Department of Conservation, with biodiversity functions under the RMA squarely placed on regional rather than district councils.

11 Wider system reform

In Chapter 13 we explore two kinds of matters. First, we identify a range of separate statutes that we generally see continuing to operate in a future system. These include statutes relating to hazardous substance and genetic modification, biosecurity, heritage, and the management of Crown land. We suggest that these frameworks should be subject to more in-depth review over time to align them with a reformed system's core (including a Future Generations Act and climate change imperatives), and point out some areas for further consideration.

We look at waste minimisation in more depth, concluding that the Waste Minimisation Act should remain the cornerstone of New Zealand's efforts to move towards a circular economy. Yet the Act and its tools (eg product stewardship schemes, product restrictions, Waste Minimisation Fund and waste disposal levy) need to be strengthened.

Secondly, we consider more systemic, cross-cutting, kinds of reforms that would not comfortably fall within any given statutory framework, or that require a more holistic perspective. Central to those are questions of funding. Not much will be able to be achieved in a future system without money. Many funding issues play out in the context of the built environment (discussed in Chapter 10), and climate change (discussed in Chapter 9) given that a lot of pressures arise from the need to create, move and maintain infrastructure. Overall, we see merit in expanding the funding and financing tools available to public authorities (especially local government) and providing

a more active and strategic deployment of central government funds. We also propose that a future system needs to protect vulnerable but essential public functions, like environmental enhancement and nature conservation, through greater hypothecation (requiring defined sources of revenue to be used for particular purposes). Funding for pest management activities and environmental advocacy are particularly vulnerable.

It is vital that adequate revenue be collected and spent by public authorities to discharge their functions, but money can be powerful in other ways: to incentivise private action. We consider that economic instruments should be used in a more deliberate manner in a future system to improve environmental outcomes. We see a case for gradually deploying resource rentals over time in a way that is fair and sensitive to context. That should include freshwater and a consistent approach to coastal occupation charges. We also echo the findings of the Tax Working Group that we need to deploy green taxes with more vigour. Similarly, we suggest more strategic deployment of subsidies to drive environmental enhancement.

Over the longer term, we support further investigation and transition towards measures that will more fundamentally transform our tax base by embedding positive incentives into the way we raise revenue. That would be in the form of an environmental footprint tax (and rebate) system.

Furthermore, a future system should seek to influence people's underlying behavioural drivers, not just financial ones. We recommend the creation of a cross-agency behavioural nudging unit, and a more active mandate to investigate and deploy behavioural incentives to improve environmental outcomes. We also see value in imposing firmer environmental duties and disclosure requirements on company directors (not just for financial risks created by climate change), and propose a more active role for government in robust green certification. Education is crucial as well, and we have proposed a future system in which environmental and climate issues are embedded in the Education Act 1989 and school curriculum, and where there is a more active approach to public service messaging.

We conclude Chapter 13 by exploring the importance of a system that is self-evaluative. Neither the system nor the environment in which it operates will remain static. It needs to constantly test its performance, and respond to change. Effective information gathering is crucial here and needs to be broadened and strengthened. There are too many gaps in our knowledge at present. We recommend a system of environmental monitoring and reporting that more effectively links outcomes with both causes and the responses of public authorities and others.

The system also requires a much stronger approach to corrective action. In particular, more effort needs to go into establishing trigger points, in advance, for when pre-planned responses get deployed. In short, we suggest that our system for environmental management needs to resemble more closely frameworks for biosecurity incursions and civil defence. A breach of bottom lines should set off alarm bells.

Key points

- More systemic change will be required alongside reforms to particular legislative frameworks.
- A future system should embrace economic instruments, including resource rentals, green taxes, and a more strategic use of subsidies.
- More emphasis should be placed on behavioural incentives, not just financial ones. The education system, public messaging, behavioural nudging, green certification and corporate disclosures are all areas in which change can be made.
- A more robust approach to monitoring, reporting and evaluation must define a future system.

12 The importance of resource management reform

In this report, we traverse the key features of a future resource management system that we think would be a good fit for Aotearoa New Zealand. A visual snapshot of this model is shown in Figure 0.5 below. The pathway to get there will be crucial, and in Chapter 14 we outline a rough timeline for when different measures could be taken. Some measures are urgent and can be deployed fairly easily, while others will require careful thought and development.

To some, resource management system reform might seem like an endless cycle of arguing about the same things. Upon digging out the various papers produced as part of the reforms of the late 1980s, one is struck by how much the challenges and hopes identified by the authors correspond with those identified in the present report.

Some of their analysis would not be out of place and could be copied almost verbatim. Furthermore, there are some eerie parallels. The chair of the present government's independent review group on system reform (the Hon Tony Randerson QC) was, in a previous life, the chair of the then Minister for the Environment's review group tasked with recommending changes to the Resource Management Bill before it was enacted in 1991. And the above-mentioned Minister for the Environment is now New Zealand's Parliamentary Commissioner for the Environment.

But the many similarities hide significant differences. We are not just relitigating the same old things. Environmental indicators have continued to decline since 1991, many now to alarming levels. There is talk of climate and ecological emergencies, not just sustainability or protection. We have a larger population. We are a more diverse society. We have much greater technological prowess – for both better and worse. We are more focused on restoring past ecological damage. And we have a new generation of engaged young people who have their own expectations and priorities.

Overall, the issues we are facing go to the heart of who we are as New Zealanders and human beings. There are both threats and opportunities. Our choices will affect not just ourselves, but also our grandchildren and beyond. And there are few right and wrong answers. We therefore welcome a continuing conversation about resource management system reform and the steps to be taken along the way. Above all, we encourage people to engage closely with the government's independent system review panel, and hope that the model presented in this report provides food for thought as the government, and New Zealand society as a whole, contemplate the need for generational change. We implore lawmakers to remember that how we manage our environment and resources is not a political football. It is our future.



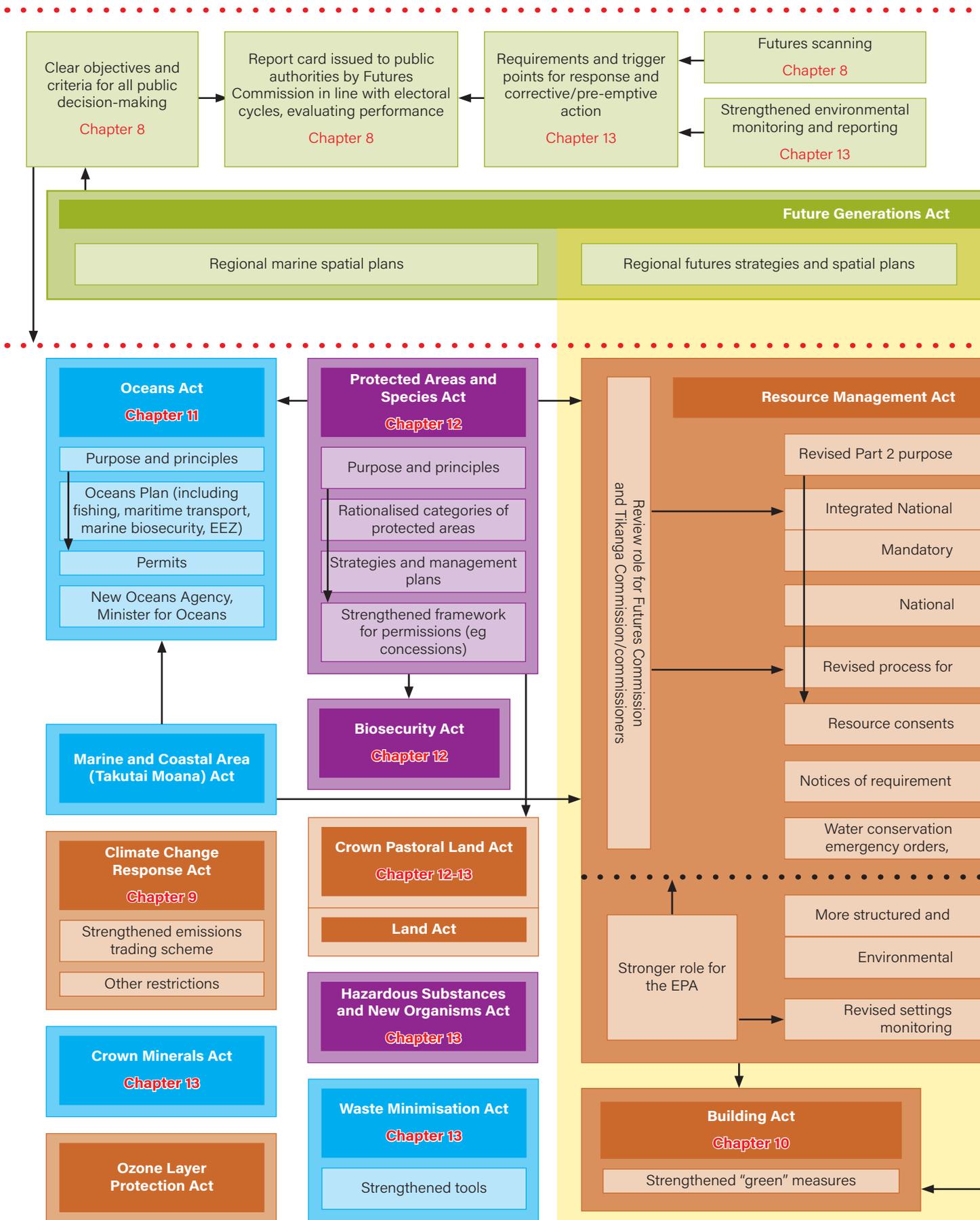
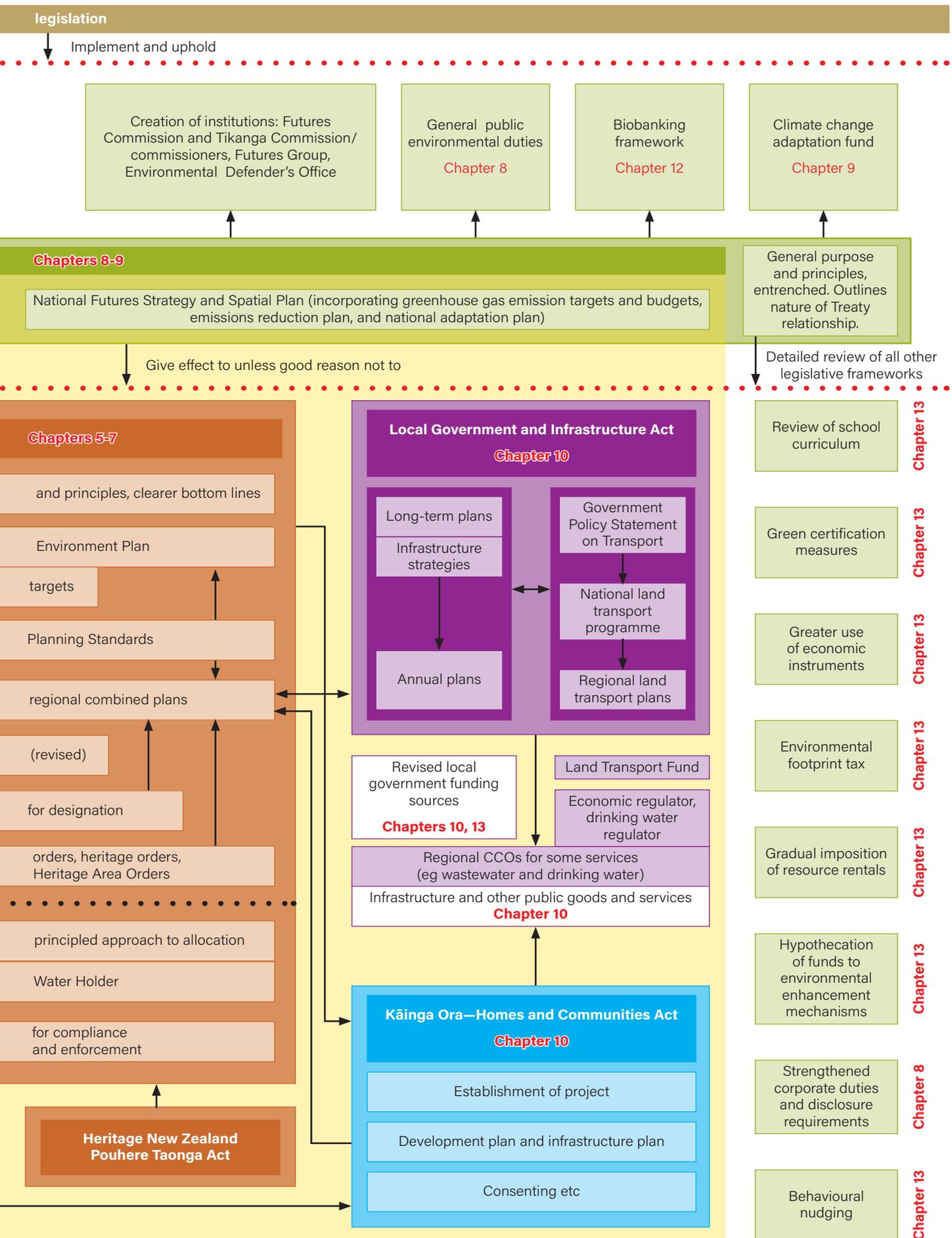


Figure 0.5: Key elements of a proposed future system. Yellow shading indicates frameworks particularly important for managing



urban issues. Arrows indicate key connections, although they are not exhaustive.

ENDNOTES

- 1 Resource Management Review Panel *Transforming the resource management system: Opportunities for change – Issues and options paper* (2019).
- 2 See <www.eds.org.nz/our-work/rm-reform-project/>
- 3 On the use of EDS's work as one input into the process, see *Comprehensive review of the resource management system: Scope and process* (2019 Cabinet Paper) at 18.
- 4 Available at <www.eds.org.nz/our-work/rm-reform-project/>
- 5 G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019), ch 6.
- 6 Resource Management Review Panel *Transforming the resource management system: Opportunities for change – Issues and options paper* (2019).
- 7 See G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019), ch 8.4, on different lenses that could be used to divide our statutes.
- 8 See Chapter 4 of the report, describing the current system. Statutes would do different things, or the same kinds of things for different reasons.
- 9 It is unclear what proposals for infrastructure and service delivery will emerge from the government's three waters review, but options being seriously considered include some that would see responsibility for planning and funding being shifted away from councils. Generally, see <www.dia.govt.nz/Three-Waters-Review>
- 10 New Zealand Infrastructure Commission/Te Waihanga Act 2019.
- 11 See G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 123; *Legislative Design and Advisory Committee Legislation guidelines: 2018 edition* (2018) at 9; Parliamentary Commissioner for the Environment *Making difficult decisions: Mining the conservation estate* (2010).
- 12 See G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 124.
- 13 The Land Drainage Act 1908 and the Soil Conservation and Rivers Control Act 1941.
- 14 G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 123, 125, 152; *Legislative Design and Advisory Committee Legislation guidelines: 2018 edition* (2018).
- 15 Resource Management Review Panel *Transforming the resource management system: Opportunities for change – Issues and options paper* (2019) at 6.
- 16 See <www.mfe.govt.nz/climate-change/climate-change-and-government/establishing-climate-change-commission>; New Zealand Infrastructure Commission/Te Waihanga Act 2019; Resource Management Amendment Bill 2019, cl 13.
- 17 Although the Ministry for the Environment is now moving towards a more standardised and directive format for NPSs.
- 18 The scale of investment that will be required will be enormous, given that billions of dollars of assets and tens of thousands of people are at risk. New funding mechanisms will likely be needed: see J Boston and J Lawrence *The case for new climate change adaptation funding instruments* (Institute for Governance and Policy Studies and New Zealand Climate Change Research Institute, 2017); New Zealand Productivity Commission *Local government funding and financing* (Draft report, July 2019).
- 19 See below on the concept of an urban development authority model.
- 20 An integrated Act would also continue to address issues other than ones relating to species and particular areas (including heritage, fish and game provisions, and general nature conservation advocacy).
- 21 *Ko Aotearoa Tenei* (Wai 262 Waitangi Tribunal Report, 2011).

1. INTRODUCTION

1.1 The context

There is an urgent and compelling need for Aotearoa New Zealand to rethink how it manages its natural and physical taonga, resources and environment. Our resource management system – New Zealand’s collection of laws, regulations, institutions and incentives – is extremely important to improving environmental, social, economic and cultural indicators of wellbeing. This system, and its significance, goes well beyond just environmental protection. It is about stewardship, wellbeing, resilience and using our country’s natural wealth prudently and wisely.¹

In a nutshell, the resource management system dictates how we shape our physical surroundings. But at the outset we should mention our unease at the very nature of the term “resource management”. It arguably denotes passivity or reactivity (management), a degree of anthropocentric arrogance about what the subject of the system really is (resources, rather than the wellbeing of nature or humans), and is focused on what we are doing (managing) rather than the nature of the outcomes we really need to be pursuing (restoration, fairness, vitality, resilience). That said, it is a convenient term, and one that most are familiar with. It is also a term that could be re-imagined by defining it in a broader way. We will therefore continue to use it, despite our reservations as to its fitness.

Like the rest of the world, New Zealand faces enormous problems and challenges in this area. Reforms to the Resource Management Act 1991 (RMA) – the country’s main environmental statute – have occurred in a piecemeal fashion since it was passed, producing an overarching framework and patchwork of provisions that, in 2019, have lost much of their original simplicity and coherence. An overall review of the Act as a whole is now due. While an exhaustive look at the RMA – provision by provision – is beyond the scope of this work, it is something that we think will need to follow reforms at a framework level.

The system through which we manage our natural and built environments is much wider than the RMA, however. It embraces infrastructure planning and funding, conservation management, climate change mitigation, the role of Māori, institutional structures, capacity and capability, and a raft of other “topics” that overlap and intersect. A formal system that engages with this web of social and ecological matters is, and will always be, complex. It will also always be the subject of argument and debate, because it involves conflicting values.

Yet many things are of common concern, where our values need to converge if we want to prosper in the future. In particular, significant environmental challenges have emerged or worsened in recent times.² Many indicators of

environmental health are now rapidly declining. For some, such as freshwater and coastal environments, tipping points appear not far away. When pressures become too great, steady ecological and social states can rapidly shift, in unpredictable ways, to less desirable ones. Cumulative effects are not being addressed well, and the result has been an inexorable creep towards environmental degradation. Climate change is a pressing issue that needs addressing. Environmental laws like the RMA – now over 25 years old – have not fully realised their aspirations of sustainable resource management and ecosystem integrity.

As well as failing to address environmental (in the broad sense of “ecological” or “biophysical”) problems, the system is failing to deliver on social, economic and cultural outcomes. This is particularly evident in large urban areas (especially Auckland), where dramatic increases in population and development pressures have caused many to question whether the system remains fit for purpose in the context of planning how cities grow and develop. Prominent issues have coalesced around the general topics of infrastructure, urban growth, housing unaffordability, water quality, process complexity, and many others. We seem to be under pressure no matter what direction we turn.

Much ink has been spilled describing particular problems, proposing solutions, and attributing blame. But at some point the accumulation of problems becomes so great, and so suggestive of deeper systemic problems, that there is merit in sitting back and considering how the system works as a whole, and the foundations on which it is based. This is so we can reflect on the system’s overall health, and not just treat symptoms as they emerge. There is a growing feeling among many people and public and private sector organisations in New Zealand that we have reached such a systemic reflection point.

We have reached a point where problems and challenges are so great that a system-wide rethink is needed.

There is now substantial political appetite for system-wide resource management reform. In particular, the Minister for the Environment has set up an independent review group to undertake a first principles review of the system, centred on (but not limited to) the RMA.³ At the time of writing, that group has just released an initial Issues and Options paper,⁴ with a final report due in May 2020. A consortium of varied interests that makes up the Resource Reform NZ group has, over recent years, pushed strongly for such a rethink.⁵ Indeed, a broad appetite for fundamental and integrated reform has only become more noticeable over the past two years, with several high profile conferences and reports having themes or dedicated sessions on system design or a return to first principles.⁶

It is crucial that the government's numerous other reform measures relevant to resource management – almost too many to count⁷ – are thought about in the context of this wider system change. New Zealand is well placed, as a small country with a strong history of innovation and reliance on a clean, green image, to achieve meaningful change in environmental management. The main point may be to protect our own interests, but (particularly for climate change) there is an opportunity to be leaders, encouraging other countries to follow our example.

There is now substantial political, sectoral and public appetite for exploring significant change. New Zealand has the potential to be world leading.

1.2 The EDS project

EDS has been pushing for a broad conversation about fundamental reform. In our *Reform of the Resource Management System* project, we have been looking, over the past two and a half years, at how we could do better. We are asking fundamental, future-focused questions about how our overall package of relevant laws and institutions should and can work. We are not just reacting to particular problems or looking at better ways to do the same things. We are asking *why* we do certain things, *whether* we should be doing them, and *how* we should be doing things in the future. Rethinking the RMA is a part of that, but by no means the only part.

The project has had two phases. Phase 1 (*The Next Generation*) was completed at the end of 2018, and culminated in a final synthesis report that was launched in February 2019. This outlined three possible broad models for what a reformed system could look like. That report

is referenced extensively in this report, and provides its analytical foundations. We also encourage readers to engage with it separately, and the two should be read as a package.⁸

The project's second and final phase – of which this report is the culmination and synthesis – seeks to complete the project in three key ways:

- 1 A normative element: generating a set of criteria to guide reform choices
- 2 A descriptive element: outlining the core elements of a preferred model
- 3 A temporal element: identifying how reforms leading to a preferred model can be staged

In a nutshell, the intention of Phase 2 of the project is to provide a tangible roadmap for change that will serve as a reference for a government embarking on its own reform journey⁹ and as a platform for others wishing to be part of that process.

We recognise that the process of change is not easy. It has costs, must be carefully managed, and does not have to happen all at once or by the same means. However, that should not be used as an excuse to be less ambitious, or to compromise, about much needed reform. A model that some may disagree with may seem less objectionable when reasonable timeframes and safeguards are put around the process of getting there. Meaningful and durable reform is about the journey as much as the product.

This report builds on Phase 1 of the EDS project, and outlines the bones of a preferred future system and how it could be implemented over time.



1.3 The structure of this report

The resource management system is extremely large and complex, and we provide our definition of it below in Figure 1.1.

The system covers all of New Zealand's area (including its exclusive economic zone (EEZ)), all "environmental" domains (eg water, air, soil etc), and all human activities that use or protect natural and physical resources (eg agriculture, fisheries, mining etc). A description of a future system spans a lot of ground and therefore needs to be approached in a logical, structured way.

Our first step (in Chapter 2) is to choose a coherent set of criteria for reform. This will guide all other choices. The second step (in Chapter 3) is to consider, at a high level, what that means for the kind of ethics and principles that will underpin the system, and what roles the system as a whole will need to play in the future (ie on what grounds we allow public intervention). The third step (in Chapter

4) is to get a high level sense of the system we have at the moment. This is important not only to understand how different a "final" reformed system would be from the current one, but also to make it easier to conceive of a pathway between the old and the new.

In Chapter 5, we commence our description of a preferred model for change. We begin (in Chapters 5–7) by looking at the future of the RMA. To us, that Act should remain at the core of a future system. Subsequent chapters explore other key statutory frameworks we envisage operating in the future, including new strategic legislation (a Future Generations Act – see Chapters 8 and 9); more targeted legislation for the "urban" and "built" environment, including intimately related questions of funding (Chapter 10); and more integrated laws for our oceans (Chapter 11) and conservation (Chapter 12). Some aspects of reform (eg broader questions of funding, underlying incentives and environmental reporting) are cross cutting, and we consider those in Chapter 13.

"New Zealand"	The resource management system operates within the geographical constraints of New Zealand , which includes (with relevant limitations) areas where New Zealand has sovereignty or sovereign rights.
"Resource"	A resource can be broadly defined as a natural and physical resource. (To the extent that seeing the environment in terms of "resources" is objectionable, the system can be recast as the "environmental" management system.) Resources and environment include: <ul style="list-style-type: none"> ▪ Both natural resources/environment (broadly, things that would exist if humans did not)¹⁵ and built resources/environment (buildings, infrastructure) ▪ Both private resources (eg land, buildings, infrastructure) and public resources (eg air, water,¹⁶ infrastructure) ▪ Urban, rural, conservation and marine resources (across all New Zealand's geographical areas)
"Management"	Resource management includes the following public ¹⁷ interventions in relation to the resources described above: <ul style="list-style-type: none"> ▪ Regulation: requiring or restricting human action (you must/must not) ▪ Behavioural incentives: influencing human action (you should) ▪ Resourcing/funding: enabling human action (you can) In order to generate the following kinds of action: <ul style="list-style-type: none"> ▪ Limiting or preventing the use of resources to manage adverse impacts (environmental protection – whether resources are used, and how) ▪ Influencing the use of resources for environmental, social and economic benefit (economic and social planning, and environmental enhancement – how and why resources are used) ▪ Shaping the spatial distribution of resource use, protection and enhancement (spatial planning – what happens where) ▪ Shaping the temporal distribution of resource use, protection and enhancement (strategic planning – when things happen) ▪ Distributing resources to different parties or communities of interest (allocation – who gets what)
"System"	The system is the framework of norms, functions, structures and tools within which all of these interventions interact.

Figure 1.1: Defining the resource management system

Ch	Topic
1	Introduction
2	Preferred criteria for reform
3	Criteria, ethics and the roles of a future system
4	What we have now: The current system
5	The future of the RMA: Legislative design and Part 2
6	Planning under a new RMA: Central government
7	Planning under a new RMA: Local government
8	Strategic legislation: A Future Generations Act
9	Climate change legislation
10	Other legislation for the "built" or "urban" environment
11	Oceans legislation
12	Conservation legislation
13	Wider system change
14	Concluding comments: A pathway to reform

Figure 1.2: *Structure of this report*

There is no one "right" way to describe or split up a future system. In the Phase 1 report we structured our thinking according to a cascade of "themes": from norms (ethics and principles), to functions (what roles the system should and should not play), to structures (laws, institutions, public participation), and finally tools (concrete interventions, like regulations and taxes, which shape people's actions). The idea was that higher level themes (eg our ethics and principles) needed to be discussed before others, to inform later ones (eg what tools we use). For example, deploying legal personhood for nature, or auctioning rights to common pool resources, requires us first to think deeply about our worldviews and values. A thematic approach was useful because it encouraged thinking about the system as a highly interconnected whole, not just as a collection of independent sectors, spaces and domains, or a series of existing statutes or discrete topics.¹⁰

However, this report is different. Its purpose is to describe a single preferred model for the future.¹¹ In our minds, this requires a different approach. It is most useful, and intuitive, for readers to be guided through the legislative "skeleton" of a future system, off which most formal regulatory, policy and institutional measures will hang. For example, a reader will probably want to know what the RMA will look like in the future before asking about how will ecocentrism be provided for. Proposed statutes are a much more digestible way to *present* a future system, even if the underlying thought process has still been based on cross-cutting, system-wide themes like legislative and institutional design or public participation.¹²

That said, the system cannot always be confined to sharp legislative boundaries.¹³ For example, are the Education

Act 1989, the Companies Act 1993, and the State Sector Act 1988 resource management statutes? It is not immediately obvious that they are, but they can still have influence on how we use and protect resources. Important things go on in boardrooms and classrooms. Some reform measures may even be so systemic as to not comfortably fit within a specific statutory framework at all. We might think, for example, about things like how the government makes budget, investment and procurement decisions.

We structure this report primarily by considering, in turn, the key statutory frameworks we envisage operating in the future. Because they are connected, there will be extensive cross referencing between chapters. Some aspects of the system do not comfortably fit within legislation.

Throughout the report, we provide boxes (in blue, like the one above) summarising particular sections, and shine "spotlights" on specific features and examples that warrant more in-depth exploration. The temporal element of reform (how we see reforms being introduced over time) is also crucial in the report's structure. Within each chapter, we consider how a particular statutory framework would emerge or change over time. There are many reasons why a staggered approach to reform looks best, and these were explored in Working Paper 1.

As such, we do not just select one arbitrary point in time at which we propose that a single preferred model would snap into existence. Roughly speaking, we are thinking about a reform pathway in three broad steps (short term, medium term and longer term), without putting a specific timeframe around them other than to say we will need to be ambitious while taking into account the resourcing that is available. The important thing is to prioritise effort and build up reforms over time towards a coherent vision or end point, not continue to tinker in response to particular problems.

No doubt readers will be most interested in short- or medium-term reforms, as only they could probably involve realistic policy proposals to put before a reform-minded government. It is therefore useful to identify and describe those kinds of reforms in more detail (eg how we might redraft Part 2 of the RMA). However, longer-term reform is equally important, and a transformational end point is still desirable. Thinking a decade or more ahead should not simply be dismissed because it cannot form an immediate reform bill or the focus of a political mandate defined by parliamentary terms.

Our short-term proposal is primarily about building on the basic frameworks we already have, with some significant additions. This still requires considerable legislative change. In the medium term, we see more far-reaching reforms, albeit still ones that build on many of the basic structures we already have (including the RMA, or a renamed statute resembling it). Longer-term proposals will be more about far-reaching systemic change to the underlying drivers of human behaviour (eg the tax system), not just the legal frameworks that

tend to react to those drivers. Throughout the report, we also identify “conditional” reforms that do not have predetermined timeframes around them, but would rather be reconsidered or triggered if certain things happened (or failed to happen). We end the report by looking at a rough pathway to reform: how key changes, across the system as a whole, would occur over time.

We are thinking about a reform pathway in three broad steps: short term, medium term and longer term. We do not put specific timeframes around those, however. Some reforms are to be conditional on whether another measure proved to be successful or adequate, rather than being deployed at particular points in time.

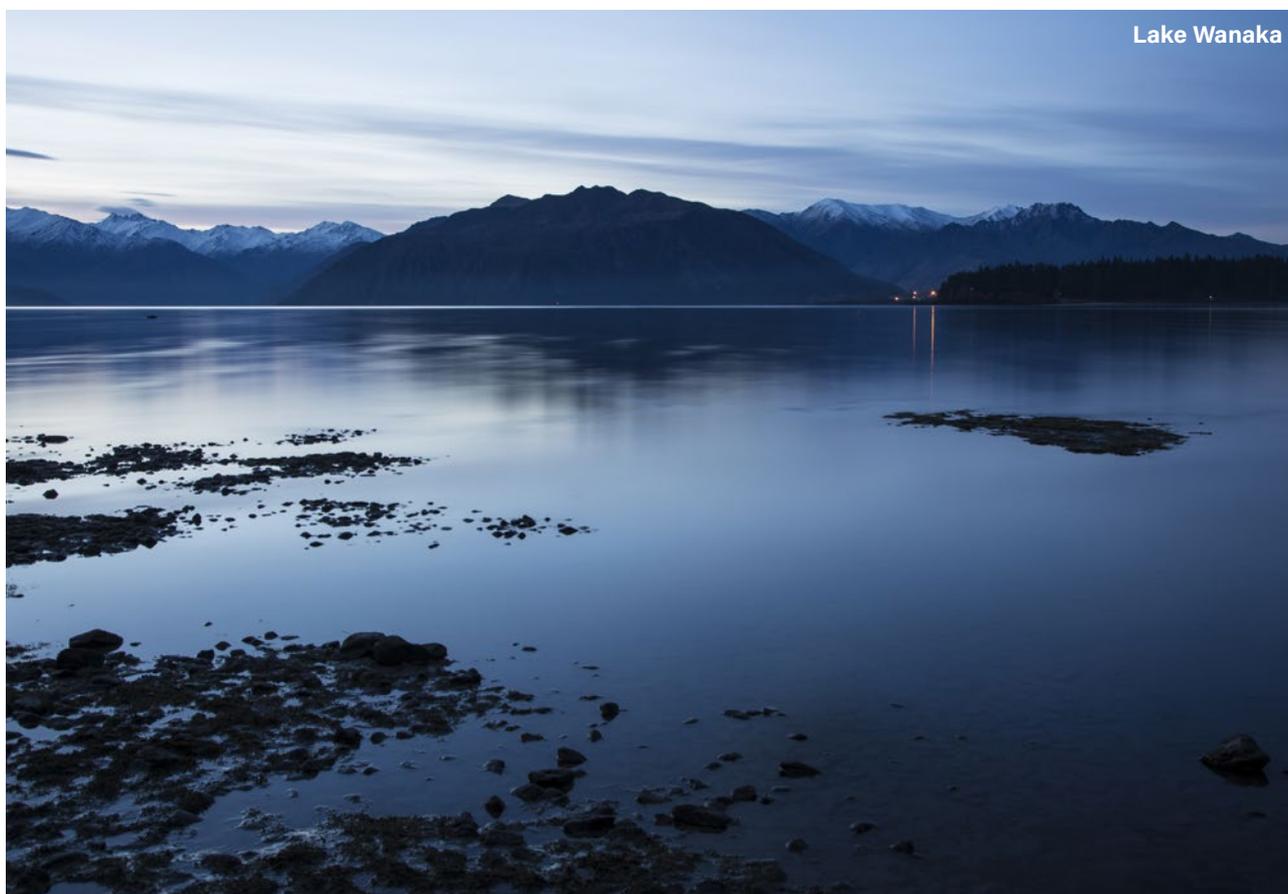
1.4 The importance of system reform

Resource management reform is critical to New Zealand’s future. In recent times we have seen the nature of the reform conversation change from one of “sustainability” to one of “emergency”. This cannot be dismissed as just a marketing strategy for lobby or interest groups. It is reflective of a broader reality that, as a country and as a world, we are facing tipping points from which we may struggle to recover. The quality of our freshwater is declining. We are losing indigenous biodiversity. Some of our most valuable land for growing food is at risk of being paved over. Some of our key infrastructure is ageing and failing. Our soils are at risk. So too are our iconic landscapes. The Treaty relationship continues to

be contested, with significant flashpoints (eg around freshwater rights) imminent. We face enormous climate change risks and costs, and a growing population. We lack affordable housing. Unprecedented change hovers on the horizon – technological, social, demographic, and biophysical. There are profound implications here not just for what we protect, but also for how we arrange ourselves as a society. Yet we still live in a society that on some levels seems to be complacent, resistant, or to want to target particular problems as an alternative to a more systemic rethink.

Of course, reform relies on political – and ultimately underlying social – appetite for change. Pragmatism is important if we do not want to recommend everything and achieve nothing. We are not in the business of describing a utopia. That is reflected in our criteria described in Chapter 2. Yet New Zealanders have a rare and valuable opportunity to influence a once-in-a-generation political and social appetite for change.

Ultimately, the stumbling blocks for reform in a democratic country like New Zealand are not capitalism, big business, or entrenched sectoral interests. In fact, these are core to the solution.¹⁴ The biggest threat is the apathy of ordinary New Zealanders who have the power to demand meaningful solutions from their politicians, and the sense that all of this is beyond the control of the man or woman on the street. That is not true. We have the means to reform our resource management system, and we must stride forward with conviction and courage. The need is urgent, and the benefits will be significant.



ENDNOTES

- 1 In the general meaning of this term, which is not to imply a return to the "wise use" provisions in the Town and Country Planning Act 1977 that carried with it the assumption of command and control planning.
- 2 See Ministry for the Environment and Statistics New Zealand *New Zealand's environmental reporting series: Environment Aotearoa 2019* (2019).
- 3 <www.mfe.govt.nz/rma/improving-our-resource-management-system>
- 4 Resource Management Review Panel *Transforming the resource management system: Opportunities for change – Issues and options paper* (2019).
- 5 M Steeman "A coalition of powerful business groups urges a complete overhaul of the resource management system", <www.stuff.co.nz>, 19 November 2018.
- 6 For example, the "Founders debate" at the 2017 Resource Management Law Association (RMLA) conference; the system-focused theme of the 2014 and 2018 RMLA conferences; "blue-skies" work by Local Government New Zealand; work by the Productivity Commission on the urban planning system; and work by Infrastructure New Zealand on integrated planning, governance and delivery.
- 7 For example, the "three waters" (drinking water, wastewater and stormwater) review, the creation of an urban development authority, the Essential Freshwater programme, the (recently enacted) Climate Change Response (Zero Carbon) Amendment Act, measures to tackle plastics and other waste, new and reviewed national direction under the RMA (on productive soils, urban development, biodiversity, water, and forestry), a pending review of the Building Act 2004 and heritage system, and a raft of other proposals. See Chapter 4.
- 8 See <www.eds.org.nz/our-work/rm-reform-project/>
- 9 On the use of the EDS work as one input into the process, see *Comprehensive review of the resource management system: Scope and process* (2019 Cabinet Paper) at 18.
- 10 For example, one sector (eg agriculture) can use multiple resources and impact multiple domains (eg water, soil), while one domain or resource (eg water) can support multiple sectors (eg fishing, electricity generation). Sectors (eg transport) and domains (eg air) can also cut across multiple spaces (eg urban, rural), while multiple sectors and domains can exist within one kind of space (like a city). As described in the Phase 1 report, we also have existing statutes that focus on domains, on sectors, on general outcomes, on particular institutions, or on particular spaces; see G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019), ch 8. Finally, "problems" or "topics" (eg housing affordability) cut across all of the above categories. A system needs to be cognisant of the links between all of them.
- 11 The system as defined in the project is one of *public interventions*, so does not include "informal" social, moral or ecological systems. We are not describing how nature works, or promoting a moral utopia; we are presenting a system of laws, institutions and tools that we can look to public authorities to implement.
- 12 On the importance of statutes in resource management law, and in law reform, see G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019), ch 8.
- 13 For example, the property system (eg dealing with covenants on land or access to minerals) and local government system (eg how councils are funded) intersect strongly with the resource management system, even if entire statutes cannot be called "resource management" statutes.
- 14 J Diamond *Collapse: How societies choose to fail or survive* (Penguin, 2011) at 17.
- 15 For example ecosystems, including their constituent parts, freshwater, air and atmosphere, land/soil, marine and heat.
- 16 However, acknowledgement is also made of the existence of broad claims by Māori around rights to water.
- 17 Purely private actions are not conceived of as forming part of the "system", although public actions that influence private behaviour are.

2. PREFERRED CRITERIA FOR REFORM

2.1 Options for criteria

In Working Paper 1, we explored the concept of criteria: a set of statements against which we can measure how desirable different reform measures are. As a country, we face so many choices (ecocentrism or anthropocentrism? Sustainability or resilience? Centralism or localism? Market or regulation?) that we need a way of deciding which options are best. Criteria can help us do so. Essentially, they express the overall objectives of the reform exercise – what we as a country want to get out of it.

We also explored why criteria are important. This is to focus on the *why* of reform before the *what* or the *how*; to reduce the risk of incoherence and instability resulting from ad hoc negotiations between interests over time; and to make choices more transparent by justifying them against clear, overarching metrics. Criteria don't provide specific answers, but they at least *frame* conversations in ways people can agree on at the outset,¹ so that the goalposts do not keep shifting as we talk about different problems, challenges, or topics. They tell us not to dilute our overall goals when policy choices become tough at a more granular level. They remind us of the bigger picture.

Criteria express the overall objectives of the reform exercise – what we as a country want to get out of it. They are a way to measure and compare the different options we face in a consistent and coherent way.

We looked at many different individual criteria we could adopt (or reject), and the key relationships between them. Some criteria are mutually exclusive alternatives (eg subtle but important variations in wording like “enabling” or “providing for” human wellbeing). Others are mutually reinforcing (eg the resilience of ecosystems and the resilience of communities that rely on those ecosystems reinforce each other). Other criteria are compatible, but only if the relationships between them are well defined (eg promoting economic growth and respecting the intrinsic worth of nature). How those relationships are expressed is crucial to producing a set of criteria that is coherent and not simply a wish list of things we might like to (but cannot realistically) have.

One of the most important considerations in any set of criteria is the relationship between what we have called “substantive” criteria (the outcomes we *want* to achieve) and “pragmatic” criteria (what we think could actually *be* achieved through the reform process). For example, there could be overwhelming political opposition to the rapid deployment of resource rentals (a charge for the use of a public resource like freshwater), or there could be resourcing issues within government if we tried to do too much at once. But what is realistic or possible can change depending on timeframes. A political mandate can develop over time as society changes its views. Just

look at what has happened with freshwater and climate change over the past ten years! Legislative change can also happen gradually to allow case law and users to adjust. The pathway to a future system, not just the features of the final system itself, is therefore of critical importance to what can be achieved.

It is interesting to observe that such questions do not tend to receive the attention they deserve until they are put into the real-world context of what changes people are willing to stomach. On paper, we have overall received broad support for outcomes not being overly stymied by pragmatic concerns (like increased uncertainty, resourcing implications, or overriding existing case law). Most people are, by nature, ambitious. But we have also seen that when this is talked about in the context of, for example, reforms to Part 2 of the RMA, or institutional change, some preferences have become much more conservative and geared towards slow, incremental and cautious change. While agreeing with the need to significantly strengthen environmental protections, some have at the same time expressed horror at the prospect of something as inconsequential as changing the name of the RMA.

That is okay – often our true appetite for reform only comes into focus when the practical challenges hit home – and the criteria and the reforms that follow will continue to exist in an evolving relationship with each other. However, if the need to amend criteria to “soften them” gives us pause for thought, then that is also a good thing. For our own part, we see that as a call to think closely about achievable timeframes and how we get to an ambitious end point, rather than dispense with the desired end point altogether.

One of the most important things in developing criteria is how to describe the relationships between them. Criteria can sometimes pull in different directions, and we need a sense of what that means.

Criteria also do not spit out an obvious blueprint for reform. There is a lot of room for argument in how they are applied. For example, we may all easily accept that the system needs to safeguard the ability of the natural world to support human life as one “bottom line” outcome. But what does that mean for reform options? For example, would splitting up the RMA be the best way to do that? It is by no means obvious. Settling criteria at the outset does, however, move the conversation forward. It changes the focus of the conversation from a value-based debate to an evidence-based one (even if some evidence cannot be talked about in empirical or even scientific terms).²

Of course, that doesn't always make the reform task easier – even if we agree on the outcomes we want, evidence about what would best get us there can still be contested.³ For example, many have debated the extent to

which urban planning restrictions have been responsible for housing unaffordability.⁴ Sometimes hard evidence is impossible to find. For example, how does one prove that splitting the RMA would produce better outcomes? The reality is that we often lack clear information to base decisions on, or people interpret it differently.

Furthermore, applying criteria is not *just* about assessing evidence – considerable subjective judgments can remain. What does a criterion of “fairness” or “efficiency” mean in specific contexts? In short, criteria are useful to provide an anchor for debate, but by no means a substitute *for* that debate.

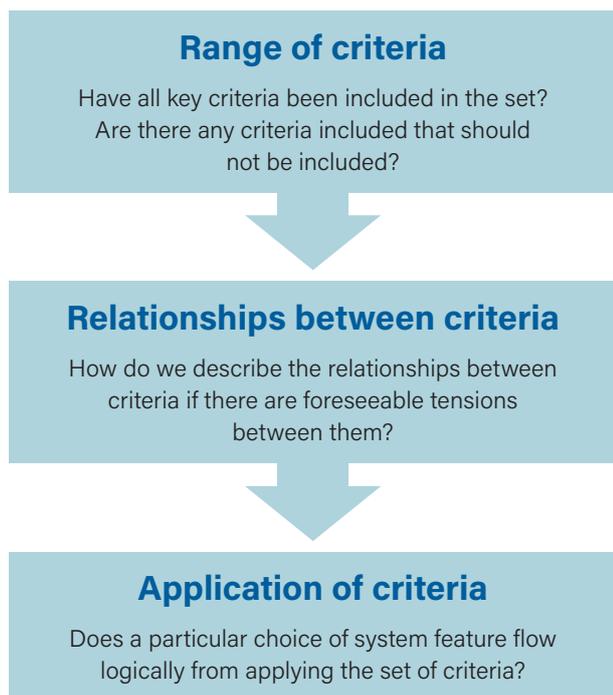


Figure 2.1: Three points at which debates are needed in relation to criteria. In Working Paper 1, we looked at the first and second boxes. In this report, we choose a preferred set of criteria and then apply it (the third box) to construct a recommended model for the future.

Criteria do not spit out a blueprint for system reform. Instead, they offer a guide, and an anchor for discussions. These discussions are often about evidence – which reform options would best fulfil the criteria and why. Relatively few models that have been proposed for reform are actually seeking completely different outcomes; they simply see different mechanisms as being more effective at achieving them.

In Working Paper 1, we concluded by offering three alternative sets of criteria that could be adopted. These were described respectively as “progressive”, “transformational” and “market-led”. Other sets are possible, but we considered that these three spanned an appropriate range of viewpoints while all being realistic. The differences between them were not so much based on the inclusion of entirely different criteria, but rather subtle differences in language within criteria and in the

descriptions of relationships between them. We direct readers to Working Paper 1 for descriptions of these.⁵

2.2 Which criteria set is best?

Generally, we have adopted the “progressive” criteria outlined in Working Paper 1. We emphasise, however, that there is no objectively *correct* manner in which one set of criteria can be chosen over another. We are not adopting a particular pre-existing theory or ideology to drive our choice, nor have we chosen criteria based on a general sense of what current New Zealanders as a “whole” currently value (eg based on surveys or interviews).

Instead, we are adopting criteria that we think will drive changes that are the best fit for New Zealand now and in the future. We entirely accept that this is a matter of judgement. Yet while people are certainly free to disagree, we do not think that the criteria we have selected are one-eyed. Indeed, we think it is important that most New Zealanders see their own concerns, and outlooks, reflected or respected. Those are about social and economic wellbeing as well as environmental protection, and as much about Māori concerns as Western perspectives. The system needs to work for all, even if it is not *perfect* for all. And we think that a degree of consensus is needed to make a system durable, even if some aspects of change may be confronting for some.

We also note that substantive criteria – an expression of the outcomes we want – ultimately come from a person’s worldview. However, it is equally true that a person’s worldview can be changed or influenced by the outcomes he or she experiences or desires. In other words, if people are faced with the hard reality of choices, changing societal perspectives, or a growing body of evidence, they may choose to change their outlooks in response. One hundred years ago, for example, it would have been extremely challenging to convince a government to curtail the emission of greenhouse gases, to recognise the intrinsic worth of nature, or to implement co-governance arrangements with Māori. Times have changed, and so have most people’s perspectives. Similarly, we think that the coming decades will demand a different perspective to that which shaped twentieth-century resource management systems. The system itself can actively shape people’s outlooks to achieve the best outcomes for the future, not just respond to them as “bad stuff” happens.⁶

In our view, the “progressive” criteria set presented in Working Paper 1 generally offers the best fit for the New Zealand of the future. We present this criteria set in full below. This is not intended to be something that actually appears in a statute; it is, instead, an overall guide for the reform exercise.

As a whole, our adopted criteria generally reflect the need for real change – not just tinkering around the edges. We are convinced that the system needs fixing, and not just through “soft” mechanisms or a focus solely on “implementation”.⁷ That said, it is by no means a foregone

conclusion that the need for change in *outcomes* requires a complete overhaul of the *machinery* of the current system – starting again from scratch – to get there. A significant change in outcomes can sometimes be achieved by making targeted but forceful interventions within legal frameworks that already exist. Such surgical measures are certainly not the same thing as the ad hoc “tinkering” that has plagued the system over the past two decades (“serial reform and quick fixes”).⁸ Indeed, many parts of the system strike us as being underused or even “sleeping”, and as having great potential (eg product stewardship schemes, economic instruments, and water conservation orders).⁹

Our criteria set reflects the need for real change, not tinkering. However, change in outcomes does not necessarily mean overhaul of the current framework and starting again from scratch. To some extent, it may be frustrations over the many failings of something like the RMA that lead to a desire to throw it in the bin, rather than a true conviction that nothing about it is worth keeping.

We outline our preferred criteria in full below, followed by a diagram showing relationships between them. The key messages, though, are presented first.

- (1) We see two key categories of criteria: substantive (outcomes we want, including relationships or hierarchies between them) and pragmatic (what reform measures we are willing to take to get there). We recognise that changes need to be politically *possible*, but that there should be no automatic bias towards the status quo. This is particularly important when we think about timeframes for reforms, and the pros and cons of disrupting case law.
- (2) Within substantive criteria, we see four key categories: environmentally protective outcomes, resource use outcomes, the Treaty of Waitangi, and procedural outcomes.
- (3) Existing and future Treaty settlements will need to be upheld. This does not, however, mean that the broader frameworks with which particular settlement acts interact (eg the RMA) need to be set in stone.
- (4) A future system will need to give effect to the principles of the Treaty. There is a degree of flexibility and ability to evolve built into those principles themselves.
- (5) True biophysical “bottom lines” or limits need to be pre-eminent over considerations of resource use, and held firm.
- (6) Necessities for current and future human survival are non-negotiable, and we cannot speak about trade-offs in that context.
- (7) Alongside the broader intrinsic worth of the natural world as a functioning whole, indigenous species specifically have intrinsic worth that

are deserving of firm bottom lines. This is not just where they are threatened or faced with extinction.

- (8) Overall human wellbeing is about more than just economic and social freedom to act, or the provision of public goods to support private choices. It is about many other things – including building social and economic resilience, respecting communities’ wishes, and outcomes and processes that are fair and inclusive rather than just efficient.
- (9) Fairness is not just about the interests of current versus future generations of humans. It is also about the future of the natural world, and about fairness between different groups of people presently alive (including future residents of urban areas).
- (10) Flexibility and agility are important to provide for timely outcomes. But within that, the system should maximise certainty; we do not desire vagueness for its own sake or as an excuse to pass responsibility to others (or avoid it altogether).
- (11) Public participation in processes cannot come at the expense of timely outcomes, but needs to reflect what is fair.
- (12) An accessible and user-friendly system is important, but it cannot come at the expense of clarity. The system will always, to some extent, be complex.



Dotterel

A preferred set of criteria for reform

(1) The reform choice will protect and enhance aspects of the natural world on which all humans (including present and future, and of all socioeconomic circumstances) rely for their survival and basic quality of life. This includes the idea that nature is a human habitat, and must retain its ecological ability to function and provide services in the future.

(2) **Reinforcing (1)**, the choice will recognise people's responsibility to protect the intrinsic right of nature as a whole, and indigenous species specifically, to exist and thrive in New Zealand.¹⁰

(3) **Subject to (1) and (2)**,¹¹ the choice will protect and enhance aspects of the natural world on which humans (present and future, and of all socioeconomic circumstances) rely for overall collective wellbeing.¹²

(4) **Reinforcing the biophysical protections in (1)–(3)**, the choice will strengthen biophysical resilience to disruptive change.

(5) **Within the constraints of the biophysical protections in (1)–(3)**,¹³ the choice represents a fair allocation of rights and responsibilities between people (including present and future, and of all socioeconomic circumstances).

(6) **Subject to the biophysical protections in (1)–(3)**, the choice will promote the social wellbeing (Te Oranga), economic wellbeing (Te Ōhanga) and cultural wellbeing (Te Rarawatanga) of New Zealanders where it is in the public interest (including the protection of cultural and non-natural heritage).¹⁴

(7) **Reinforcing the promotion of wellbeing in (6) and biophysical resilience in (4)**, the choice will result in social and economic resilience to disruptive change where the change would impact on the public interest.

(8) **Subject to the public interest restrictions in (1)–(7)**, the choice will provide people the freedom to provide for their own social, economic and cultural wellbeing.

(9) **Subject to biophysical protections and fairness in (1)–(5), and in considering the promotion of wider human wellbeing and resilience in (6) and (7)**, the choice will promote efficiency and cost-effectiveness in resource use.

(10) **In considering all substantive criteria (1)–(20)**, the choice will implement the Crown's obligations under the Treaty of Waitangi and reflect the principles of the Treaty, including greater recognition of Māori rights to exercise tikanga and upholding Treaty settlements.

(11) **In considering the biophysical protections in (1)–(4)**, the choice will implement an anticipatory and precautionary approach to risk and uncertainty associated with actions that threaten survival, intrinsic values, and collective wellbeing in the future.¹⁵

(12) **Subject to the public interest restrictions in (1)–(7), Treaty and precautionary obligations in (10)–(11), and process concerns in (15)–(18)**, the choice will ensure an efficient management system (including decision-making processes).¹⁶

(13) **To achieve the biophysical protections in (1)–(4) and broader human wellbeing outcomes in (6)–(7), and taking into account fairness in (5) and subject to Treaty obligations in (10)**,¹⁷ the choice will provide sufficient agility to address existing problems and future challenges in a timely way.

(14) **Subject to the need for agility in (13)**, the choice will maximise regulatory certainty to users and permit holders, and respects existing property and statutory rights.¹⁸

(15) The choice will promote transparency in public decision-making.

(16) **Subject to the flexibility in (13) and Treaty obligations in (10)**, the choice will allow and encourage people to have a say to the extent there is a public interest (unless their interests are already represented) or their interests are directly affected.¹⁹

(17) **To the extent it reflects fairness in (5) and reinforces either Treaty obligations in (10), efficiency in (12) or transparency in (15)**, the choice will maximise knowledge and facilitate its transmission.

(18) **Subject to the need for certainty in (14)**, the choice will make the system accessible to users.

(19) **Reinforcing, but also subject to the biophysical protections in (1)–(3)**,²⁰ the choice will address current problems according to their urgency.

(20) **Reinforcing the biophysical protections in (1)–(3), and Treaty obligations in (10)**, the choice will allow New Zealand to meet its international obligations.²¹

(21) **All substantive criteria (1)–(20) are subject to the need for choices to be within the realms of political possibility and workable in practice.**

(22) **In considering what is workable and achievable in (21)**, choices are to take into account the feasibility of staggering or ramping up reforms over reasonable timeframes, keeping in mind the urgency of issues and the likelihood of imminent social change.²²

(23) Prefer choices that minimise disturbance to the status quo, retain existing case law, and support legal stability **only if they are equally or more effective at achieving all substantive criteria in (1)–(20) than alternatives.**

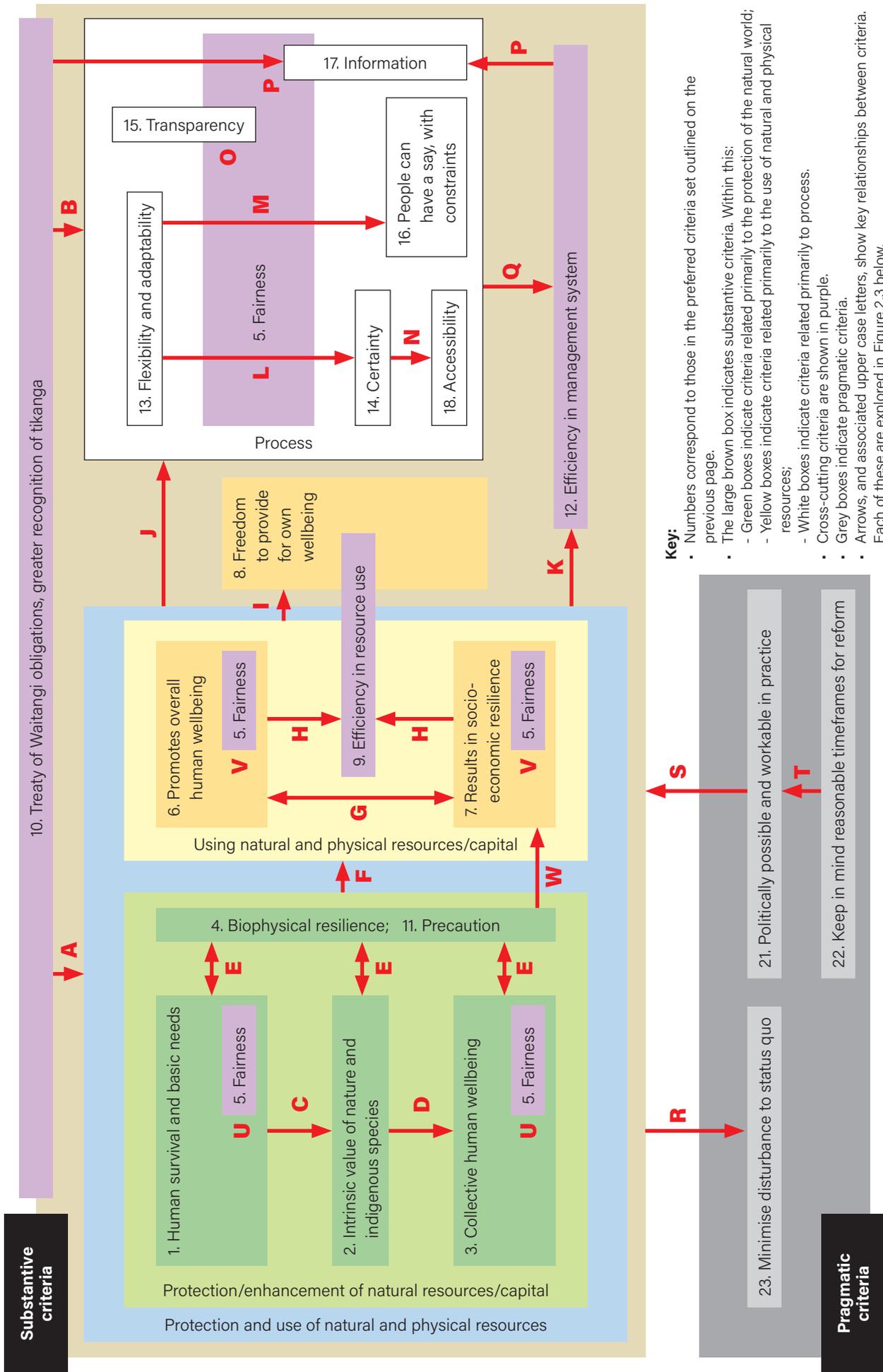


Figure 2.2: Key relationships between criteria in a preferred set

A	All substantive criteria are subject to the need to implement the Crown's obligations under the Treaty of Waitangi, including reflecting Treaty principles, as well as greater recognition of tikanga. However, while this is a hierarchical relationship, it should be emphasised that the nature of Treaty obligations and principles themselves are not absolute, and are constantly evolving. More specifically, actual Treaty settlements will need to be upheld in any reform.
B	As in (A) above, Treaty obligations and a greater recognition of tikanga are to be reflected in the <i>processes</i> of the system. In particular, the need for flexibility is subject to the need to uphold specific Treaty settlement rights.
C	The human responsibility to protect the intrinsic worth of nature as a whole, and indigenous species specifically, will realistically be subject to the need to manage resources in a way that allows for the survival and basic quality of life for all New Zealanders. Primarily, the two things reinforce each other, but there may be some tensions in particular applications.
D	Protecting the natural world (natural capital, natural resources) on which humans rely for wellbeing <i>above a basic quality of life</i> is subject to the intrinsic worth of nature as a whole and indigenous species.
E	If the ecosystems/biosphere on which humans and indigenous species rely for survival and wellbeing are resilient to disruptive change, the latter reinforces and supports the former. Precaution is related to resilience, because it recognises that sometimes we do not know how far human use can push ecosystems/resources before they reach tipping points.
F	Promoting the social, cultural and economic wellbeing of people more broadly (ie everything in the yellow box) is subject to protecting the natural world/natural capital to the extent needed to achieve human survival/basic needs, recognise the intrinsic value of indigenous species, and secure overall human wellbeing (ie everything in the green box).
G	Securing people's social, economic and cultural wellbeing over time is supported by increasing the resilience of people and communities to disruptive change.
H	Using resources in the most efficient way possible is desirable, but is subject to the need for fairness (in allocating both rights and responsibilities) and subject to what would promote overall social, economic and cultural wellbeing and resilience. In some cases, the most efficient resource use may support those things, but in other cases it may not. Similarly, in some cases, enabling people to provide for their own wellbeing may produce efficient outcomes, but not always (indicated by the overlap between boxes 8 and 9).
I	People are to have the freedom to manage resources to provide for their own wellbeing, as they are often best placed to decide such questions. However, that is subject to the need to defend biophysical bottom lines (ie everything in the green box) as well as to secure overall human wellbeing more broadly where there is a public interest (eg urban planning, infrastructure, green spaces etc – ie everything in the yellow box).
J	Processes are ultimately designed to achieve the system's substantive outcomes (ie those in the blue box), but can do so in different ways. Specific process outcomes are important. In particular, flexibility and adaptability are needed to ensure that biophysical protections can be implemented in a timely way where needed (to achieve those things in the green box), but also to achieve change where there is an element of public interest in securing social, economic and cultural wellbeing (ie those things in the yellow box). Some of these are urgent and should not be delayed. Flexibility is subject to Treaty obligations – see (B) above.
K	Efficiency and cost-effectiveness in the design of the system, including in its processes (ie more than just the efficient use of resources), is subject to the need to achieve its other substantive outcomes (ie those matters in the blue box).
L	Subject to the need for the system to be flexible enough to achieve its substantive outcomes in a timely way (ie address problems and future challenges), it must provide as much certainty and security to people (eg property and statutory rights holders) as possible. Fairness is important to consider here, not necessarily to determine whether change should happen (although that may well be fair in some contexts), but to determine what should happen in response to change (eg compensation).
M	There is a need for public participation not to come at the expense of timely outcomes where needed urgently to achieve matters contained in (1)–(3) and (6)–(7) (those in the green and yellow boxes). However, broader "efficiency" is subject to other outcomes we wish to see from giving people a voice (fairness and where a public interest is at stake). Furthermore, constraints on involvement do not apply where needed to implement Treaty obligations – see (B) above.

N	It is important that the system is as accessible and easy to use as possible, but that is subject to the need to provide sufficient certainty and predictability concerning legal rights and processes. This recognises that the system is inherently complex and needs to address many interrelated matters. An overly simplified system may simply require later amendments or extensive interpretation through case law in order to provide clarity.
O	Fairness demands that decision-making be as transparent as possible, although fairness may also influence where the costs of that transparency fall.
P	The system should strive to use and transmit the best information and knowledge possible (including mātauranga Māori), and the ways in which information is obtained and shared can make decision-making more efficient (reinforcing criterion 12) and transparent (reinforcing criterion 15). However, information can be costly and imperfect, and the system's approach to it must reflect what is fair (criterion 5).
Q	Efficient and cost-effective processes are important, but subject to other process outcomes we wish to achieve (ie those matters in the white box).
R	It is desirable to minimise disturbances to the status quo, but only to the extent that doing so would be as effective or more effective as other measures in reflecting substantive criteria.
S	All other criteria are subject to the need for a choice to be workable in practice and at least within the realm of political possibility.
T	What is considered within the realm of political possibility and workable in practice should be determined in light of what is possible over reasonable timeframes, and the extent to which the urgency of problems may drive sharp changes in social and therefore political will. More measures may become possible when viewed in this light.
U	Achieving fairness is important when considering, in the context of what natural resources need to be protected and enhanced, what "human" survival and wellbeing is. In particular, fairness constrains our ability to reduce one person or group's wellbeing in favour of others' wellbeing, or to look only at the overall wellbeing of the country without thinking about different communities and generations.
V	Overall human wellbeing cannot be increased without regard to how the relative wellbeing of groups and people within society are affected by resource management decision-making. Fairness, rather than absolute equality, needs to be achieved.
W	The resilience of ecosystems/the biosphere supports the social and economic resilience of people and communities that rely on them existing in a stable state.

Figure 2.3: Explanation of key relationships between criteria in a preferred set

2.3 Concluding comments

In this chapter, we have outlined a preferred set of criteria for reform. We have described this as a "progressive" set, recognising both the need for change and the envelope of pragmatic factors within which realistic reforms could happen. Criteria will always be about balancing inherent tensions in the system, and a lot will be about the institutional and legislative arrangements that follow – including *who* gets to decide where that balance lies, and under what legislative principles. However, we consider that it is useful to provide a general framework of criteria to drive our choice of such system features. In exploring the core features of a future model in coming chapters, we have held these criteria in mind rather than treating them as an inflexible checklist.



ENDNOTES

- 1 Or at least, if there is not agreement, in a way that makes it obvious what is being sought and in what measure.
- 2 For example, how do we measure if the intrinsic value of indigenous species has been recognised and provided for?
- 3 For example, it requires us to consider counter-factual scenarios (what if the RMA had not been enacted?).
- 4 See T Hazledine "Economics and the resource management system" in G Severinsen and R Peart *Reform of the resource management system: The next generation – Working paper 3* (EDS, 2018) at 158.
- 5 G Severinsen and R Peart *Reform of the resource management system: A pathway to reform – Working paper 1: Criteria for reform* (EDS, 2019) available at <www.eds.org.nz/our-work/rm-reform-project/>
- 6 Education or advocacy campaigns are examples of this (eg the recent advertising of the Energy Efficiency and Conservation Authority concerning climate change and energy use).
- 7 This is a common thing to hear: that the RMA itself is not broken, it is just implemented poorly. That may well be the case, but our formal system of laws and institutions should also be expected to facilitate or demand effective implementation.
- 8 M Williams "Resource management system: Reform or transform?" (April 2018) *Resource Management Journal* 3 at 4.
- 9 For example, section 17 of the RMA imposes a general environmental duty on all people, but has not really been used in a meaningful way.
- 10 Including the natural systems on which they rely for these things. A focus on indigenous species (as opposed to introduced species) is deliberately broader than endemic species (those that exist *only* in New Zealand). This is on the basis that intrinsic or moral value is not just about preventing the extinction of a species on a global scale; it is also about preserving New Zealand's unique natural heritage and respecting a Māori perspective on kaitiakitanga.
- 11 The hierarchy here is significant, because enhancing natural resources for overall human wellbeing (eg forestry, horticulture) can still threaten the survival of indigenous species. Furthermore, enhancing natural resources to increase the wellbeing of some may threaten the basic quality of life of others (eg through some forms of offsetting that mean adverse impacts are felt in some places and benefits are felt in others).
- 12 Where wellbeing is measured in an inclusive way (eg the wellbeing that people obtain from connection with nature and wilderness).
- 13 This means fairness is important *within* criteria (1)–(3) (eg environmental protection that produces human wellbeing means sufficient wellbeing for people of all socio-economic circumstances and generations), but also that fairness is *subject to* the outcomes in criteria (1)–(3) (eg one cannot breach environmental bottom lines in order to give additional rights to people who are currently deprived of them).
- 14 In many cases that will be consistent with safeguarding and enhancing natural resources/natural capital, because there is a direct link between them. In some cases, it may not (eg urban expansion into versatile soils), hence the need for a hierarchy.
- 15 This may include proactive measures to prevent tensions between different outcomes from arising in the first place (eg over allocation of freshwater can produce issues over fairness, so it is prudent not to over allocate).
- 16 Efficiency should not necessarily be equated with centralisation or a drive for economies of scale.
- 17 For example, if measures are needed to compensate or reduce the impact on people where not to do so would be unfair, or where there is a tension between Treaty obligations and urgent action.
- 18 This is intended to safeguard Treaty settlement rights encompassed by (10), as well as support people's freedom to provide for their social and economic wellbeing (8).
- 19 Reinforcing (5), concerning fairness.
- 20 "Subject to" in the sense that addressing one problem should not exacerbate problems that threaten the outcomes contained in criteria (1)–(3).
- 21 In particular, in the context of climate change mitigation.
- 22 In that more measures may become politically possible if these matters are considered.

3. CRITERIA, ETHICS AND THE ROLES OF A FUTURE SYSTEM

3.1 Introduction

The structure of this report is based on key pieces of legislation we are floating for a future system. We start with a discussion of the RMA in Chapter 5. However, there are two preliminary points that should be made. Both of these points are important for the same reason: they are general, system-wide or cross-cutting conclusions that need to be held in mind when thinking about what all statutory frameworks do and how they do it.

The first point is what worldviews/ethics and principles should underpin a future system. The second is what roles the system, as a whole, will need to perform.

3.2 What criteria mean for ethics and worldviews in a preferred model

Ethics and principles will form common threads running throughout a future system. They may not be expressed in exactly the same way in all statutes (after all, statutes are often deliberately split up because they pursue quite different aims, or similar aims in different ways,¹ and in some ethics may be implicit rather than specifically described).² But very few provisions in the law will not rest on strong, coherent, normative foundations, and it is

best to be clear about what we see those foundations as being. Ethics and principles represent who we, as New Zealanders, want to be, and what we want our country to look like. In the Phase 1 report, we investigated various ethical theories, and said:

In relation to resource management, big picture ethical questions concern the basic ways in which we see ourselves in relation to our surroundings and the natural world. Many different ethical theories exist, but they all seek to strike a balance between resource use and protection. Neither one of these things is ever absolute.

There are four key questions here: how to distribute costs and benefits amongst people alive today, between current and future generations, between private and public interests, and between humans and non-humans (nature). Although it is a dramatic simplification, it is useful to think of Western theories about the environment as being either anthropocentric (human-focused) or ecocentric (nature-focused). An economic approach informed by anthropocentrism tends to reduce the natural and physical world to monetary terms. This is only one possible way of valuing the environment and resources within it. A non-economic anthropocentric worldview focuses



Awana Beach, Aotea

on the weighing of a broader range of human values concerning the environment, and rejects money as the only measure of value. In contrast, an ecocentric worldview sees the natural world as having intrinsic value, dignity and rights beyond its usefulness to humans. It rejects economic measurement and human values as the only metrics for valuation.

Māori worldviews – Te Ao Māori – are arguably more closely aligned to Western notions of ecocentrism than to anthropocentrism or an economic worldview. However, they are by no means the same thing. Te Ao Māori is a specific way of seeing the world, developed over centuries and incubated within an integrated social and cultural setting. It does not so much put nature at the heart of things or as something apart from human activity, rather it sees humans and nature as part of the same cosmology where the physical, economic and spiritual cannot be separated.

So should an ethical theory drive the outcomes we are seeking or, instead, should the outcomes we desire shape what our ethics look like? This is a chicken and egg situation. However, as will be obvious from our discussion of criteria, we have chosen the latter approach. We therefore emphasise again that we are not adopting a single theory or worldview.³ We will not, for example, be seeking to construct an “ecocentric” system or an “anthropocentric” one.⁴ Nor – even though we envisage a significant space for its growth and influence – are we proposing a future based entirely on tikanga Māori.⁵ In fact, the plural worldviews and norms reflected in our criteria set make this kind of thinking impossible. So while different worldviews are highly visible *within* criteria (eg it is easy to see a generally ecocentric train of thought in the notion of intrinsic worth, and an economic perspective in the notion of efficiency), as a whole our criteria are not driven by a particular ethical perspective.

On this approach, worldviews, ethics and principles are not ways to decide what we want. Instead, they are useful tools in legal frameworks for achieving the outcomes we already know we want. For example, we see legal personhood (eg for a river or mountain) less as something that is necessary to reflect an inflexible moral perception of the natural world, and more as a potentially useful way to ensure it is protected in a way that achieves what society is seeking (eg healthy water, respect for tikanga, landscape value etc).⁶ In some situations, that may be useful (eg in the situation of Te Urewera – a former national park). In others, it may make less sense (eg giving legal personhood to a dairy farm – what would we assume such a “person” to want?).⁷

Similarly, the use of economic instruments (eg in the use of resource rentals or water trading schemes) would not be embraced because we see the world in an instrumentalist way (property to be exploited), but rather because they could be useful tools to achieve outcomes we want (eg to reduce wasteful consumption, to provide a return to New Zealanders for the private use of a non-private resource, or to direct things to their highest value use).⁸

That said, “changes in people’s mindsets may happen over time in response to the ways in which they are compelled or encouraged to behave”.⁹ Thus the use of more ecocentric language and tools in the system may, over time, mould people’s perspectives so that they become much stronger, self-regulating social norms, driving action that is considered natural rather than as something being imposed on them. That might be a very good thing given the nature of the ecological challenges we are facing.

Our preferred criteria describe the outcomes we would like to see the system deliver. They reflect many different ethics and worldviews. These outcomes, rather than any given ethical theory, are our starting point for reform. The extent to which changes in ethics and worldviews can help us achieve those outcomes will then determine how, and in which parts of the system, those ethics and worldviews are embraced.

In particular, we consider that embracing synergies between anthropocentrism, Te Ao Māori and ecocentrism more, within a plurality of ethics, will provide both a positive normative direction of travel and bring better recognition of the Treaty relationship. We need to seek nodes of agreement where possible, rather than ringfencing Māori concepts like kaitiakitanga (broadly, stewardship) as islands surrounded by a sea of Western ideas, or simply mentioning nature’s intrinsic value within a framework still targeted at “resources”.¹⁰ This is not to suggest that Māori concepts (or, indeed, ecocentrism) have a monopoly on environmental wisdom, or that a Western Judeo-Christian tradition is responsible for environmental decline.¹¹ It is simply to say that no worldview has an unassailable claim to be “right”. A more integrated ethical approach can be seen within concepts like Te Mana o Te Wai,¹² in which most people, we think, could see something to identify with.¹³ That approach should be continued and extended to other domains and statutes.

Our approach here is partly because a multiplicity of worldviews reflects the reality of New Zealand society (and therefore future political appetite for change). It is a pragmatic concern. In fact, we see much more room for agreement and constructive dialogue over the *outcomes* we want as a country than in a debate about the value of particular ethical, religious or cultural traditions. There is growing convergence about the former, even if there are considerable tensions about the latter. And we are a diverse country, with a multiplicity of people and cultures, and we will do well to remember that our future will not be one ruled by philosopher kings trumpeting ideologies (even if we may listen to what they have to say from time to time). As we have said previously, “a system in which significant parts of the population cannot see their own basic outlooks reflected is unlikely to be durable”.¹⁴

Aside from practical considerations, though, we also think that plurality is a very good thing.¹⁵ There are many synergies to be explored.¹⁶ Almost 20 years ago, one commentator described the RMA simply as “a complex set of values enshrined in law”,¹⁷ and this, we think,

remains a good way of describing how we see the broader system's norms operating in the future. We would add one further thing: such values need to be steered more towards common outcomes and ethical convergence (eg economic drivers supporting broader environmental outcomes, and nodes of agreement between Māori, Western and other values, as in Te Mana o Te Wai). Our values also need to be geared much more towards the need for action, not just reaction.

In our view, embracing synergies between anthropocentrism, Te Ao Māori and ecocentrism more within a plurality of ethics, will provide a positive normative direction of travel. Concepts like Te Mana o Te Wai will be useful and should be deployed elsewhere.

At this point, we comment on what this project is seeking to do in relation to Māori views. This report ultimately represents an EDS view of the world, and while we have sought expert input, the constraints of the project have meant we have not been able to conduct as comprehensive an approach to tangata whenua engagement (eg hui) as may be expected of, say, the Crown. We recognise that Māori will have their own views on resource management reform. It is also possible that there will be a diversity of perspectives within Māori on reform.

That said, we do not consider that the suggestions put forward in this report come from a solely "Western"

perspective. We propose measures that, in our view, would better reflect the partnership nature of the Treaty relationship as well as recognising the value of Māori approaches to environmental management. We do not purport to represent Māori views, and recognise there will be a need for Māori input at all stages of the conversation, but note that we have given careful thought to the Treaty relationship in developing our own views.

3.3 Principles

A future system will need to incorporate a number of more specific legal principles, summarised below in Figure 3.1. These were discussed in the Phase 1 report as options, and while we direct readers there for a more fulsome account, we amend them slightly below to reflect what are firmer requirements of the criteria we have adopted.¹⁸

This does not mean that the principles below would be repeated in every single statutory framework, or that they will always be expressed in the same way. In some cases, principles can be implicit in more detailed provisions rather than being specifically listed as considerations for discretionary decision-making. For example, we already see a highly precautionary approach to marine dumping under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (EEZ Act),¹⁹ even though the word "precaution" is not mentioned in those sections. All the principles outlined below will need to be reflected across the system in some way.

Sustainability ²⁰	<p>Sustainability provides a framework within which other more detailed substantive principles can be applied. It is essentially about balancing the value of resource use with the value of environmental protection in a way that can be maintained over time. Sustainable development is (to some) concerned not only with ensuring environmental protection in the face of development pressures, but also with active recognition of the need to drive socioeconomic development.</p> <p>Sustainable management, in the New Zealand experience of the term, has a narrower tradition of protecting the environment. Its scope will need to expand to encompass the active pursuit of other indicators of wellbeing (including environmental enhancement and specifically urban outcomes), while being much firmer about protecting true biophysical bottom lines.</p> <p>Alternative "umbrella" principles to sustainability in a future system could include resilience and risk management. Resilience will be particularly important as an addition to sustainability.²¹</p>
Environmental justice and distributional equity ²²	<p>Environmental justice and distributional equity seek to distribute the costs and benefits of resource use and protection between groups in present-day society, according to equity or sensitivity to harm. Ecological justice is an extension of this idea, which embraces separate rights or interests for the natural world (and corresponding responsibilities on humans to defend them). Both will be important in the future, including to address fairness in resource allocation.</p>
Inter-generational equity ²³	<p>Inter-generational equity seeks to distribute costs and benefits of resource use and protection between present and future generations, so that the interests of future generations are recognised and valued. There will need to be considerably greater emphasis placed on the moral equality of future generations, not just safeguarding their basic needs.</p>
Polluter-/user-pays ²⁴	<p>The principle of polluter-/user-pays seeks to distribute the costs of resource use between private and public interests. It generally places costs on the polluter or user unless there is good reason not to. A future system will need to be much clearer and more transparent about who actually bears the cost of polluting activities, and provide measures to transition towards a more equitable distribution of costs.</p>

Common but differentiated responsibilities ²⁵	The principle of common but differentiated responsibilities seeks to distribute the costs of environmental protection among the international community. It means that New Zealand bears greater responsibility for the costs of mitigating climate change than some other countries. It also has relevance in other contexts (eg responsibility for reducing relative contributions to pollution in catchments). ²⁶
Subsidiarity ²⁷	Subsidiarity seeks to locate decision-making responsibilities closest to (and according to the values of) the relevant community of interest. There is a separate Māori community of interest alongside national, regional and local ones. Subsidiarity is not the same thing as devolution, and communities of interest can change over time in light of social, cultural and biophysical circumstances. A future system will need to be much clearer about what subsidiarity actually means, and expectations as to what will be done at a local and central level.
Principles of the Treaty of Waitangi ²⁸	The principles of the Treaty of Waitangi include active protection, good faith, remediation of past grievances, and informed decision-making. They will be extremely important in a future system and will need to be given effect to beyond the context of specific Treaty settlement acts.
Kaitiakitanga, mauri and mātauranga Māori ²⁹	Māori values in the system are not just a way to provide recognition or power to Māori as a distinct group. They also have merit in their own right. In the resource management context, the central Māori idea is often kaitiakitanga (stewardship), but other important concepts are mauri (life-force or essence) and mātauranga Māori (knowledge and ways of knowing). A future system will need to provide recognition not only for these concepts, but also for the ability of Māori to exercise them.
Resource development	The development principle is a convenient label for a principle that recognises that the resource management system should place value on, and incentivise or mandate, some resource uses that are in the public interest. It is not usually recognised as a separate “principle”, but in reality underlies many frameworks for the provision of public goods. A future system will need to more explicitly recognise the need for the development of resources, but ensure that this does not infringe biophysical bottom lines and that it also complements efforts to improve environmental wellbeing.
Conservation ³⁰	The conservation principle recognises that protection and enhancement of the environment must be relatively absolute in some geographical areas, for some species, and for the functioning of the natural world as a whole. It encompasses the principle of non-regression, which states that measures beneficial for the environment should not subsequently be removed or eroded, and the public trust doctrine, under which the state acts as trustee of the ecological health of public areas. It demands an ecosystem wide view to be taken. It is not just about preventing extinctions or saving threatened species from further decline.
Precaution ³¹	The precautionary principle states that where there is uncertainty as to the adverse effects of an activity, this is not a reason to fail to take action to address them. It includes approaches to risk identification, risk assessment, and risk management. Precaution will need to be implemented at a system-wide level in a future system, not just on a project-level basis.
Participation ³²	The participatory principle provides that the public have a legitimate interest in being involved in decisions about resources and the environment that impact on them or are of significant public interest. It is essential that decisions are based on robust information, which can be provided by offering wide participation. But such rights are not absolute. They must be balanced against the need for efficiency, and cannot be permitted to prevent timely decision-making where the need is urgent. Māori should have relatively strong participatory rights because of their status as Treaty partners, but that is not a substitute for other Treaty obligations. Access to information, transparency of process, and access to justice are also important.
Efficiency ³³	In terms of process, decisions should be streamlined and use comparable units of measurement where possible, but must be balanced against the need for good information, public participation, and the evaluation of values, not just monetary units. It must also be remembered that efficiency is only about the most efficient way to achieve a desired outcome, not a substitute for a debate about what that outcome is. Sometimes the best outcomes will require time and cost.

Figure 3.1: Principles that a future system will need to adopt

A future system will need to adopt, in some shape or form, all of the legal principles discussed above. These include sustainability, inter-generational equity, the principles of the Treaty, polluter-pays, and subsidiarity. How they are expressed specifically in particular statutory frameworks (or if they need to be explicitly stated at all) will vary. They will be explored within the context of the chapters that follow, including in a revised purpose and principles for the RMA.

3.4 Criteria and the roles a future system needs to perform

The second preliminary observation we want to make in this chapter relates to the roles that a future system, as a whole, will be expected or allowed to perform. This question cuts across, and will influence, all statutory frameworks. We devoted considerable space to it in Chapters 6 and 7 of the Phase 1 report, and will not repeat that material here.³⁴

In short, the “system” we are concerned with in this project is limited to public intervention (although public intervention is much wider than just *regulatory* intervention).³⁵ It is about formal laws and institutions; we are not talking about reforming social systems, moral systems or ecological systems.³⁶ But this system does not need to do everything, and its scope needs to be defined with reference to what it is allowed or expected

to do. It is about resource management, not resource micro-management. Nor is the system a replacement for private action. Many good outcomes already come from dedicated individuals and groups doing great things in their communities, or even from people acting in their own interests.³⁷ They deserve support, encouragement, coordination and visibility – not constraints, prohibitions or inflexible directions.³⁸

We have heard some support for a narrow role for the system, in that the role of “planning” (at least in the urban context) should be limited to the internalisation of negative externalities (ie implementing the polluter pays principle), the provision of public goods (eg infrastructure) and the coordination of these two things.³⁹ Some have expressed concerns about scope creep and the uncertain boundaries of (in particular) council controls on development.⁴⁰

Furthermore, some outcomes can be left to be achieved by other “systems” of public intervention (eg the health system, justice system, or education system).⁴¹ There is a question here about where things are done, and how targeted “resource management” frameworks should be. For example, should urban planning under the RMA play a role in tackling obesity by encouraging active transport? Or by designing communities and infrastructure to minimise crime?⁴² And should environmental management be not just about *stopping* people doing things, but also *making* people do things? Or reaching out into the school curriculum? These boundaries are often fluid, given that there is no clear definition of what constitutes such “systems”.



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We recognise that there are legitimate concerns underlying such perspectives. We do not want disproportionate regulation or objective overload. However, in our view, there are risks in going too far in the other direction. We have previously pointed out several reasons why a narrow focus on externalities would have significant risks.⁴³ Our criteria support the general view expressed in the Phase 1 report that public intervention is warranted in broader circumstances – where there is a public interest in how we interact with our environment and use resources, and where it is needed to implement the Crown’s Treaty relationship.⁴⁴ In fact, this broader rationale for intervention already underpins a lot of our current system.⁴⁵

Ultimately, our future is too full of challenges – including climate change and the need to restore and enhance degraded aspects of the environment – to unduly narrow the scope of what the system can do based on an outdated neoliberal orthodoxy and arguments about market freedom. As we pointed out in the Phase 1 report, the public interest may need to encompass:⁴⁶

a set of incentives to encourage the uptake of electric vehicles, funding for community-led environmental enhancement measures, or measures to transition land uses to those that are more sustainable for the country as a whole (eg [permanent] forestry on erodible hill country). It embraces the principle of resilience, and could proactively shield people from external and non-attributable impacts (such as natural hazards, a changing climate, and global economic shocks). It also recognises

that outcomes-based urban planning is not just about guarding against “bads” or providing public goods like infrastructure. It is also about creating a wide variety of future-focused strategies to enhance the wellbeing of communities and to move our collective human endeavour forwards – getting people on bikes, reducing criminal activity, encouraging social connection.

Again, we emphasise that this does not mean a regulatory approach is always the right one.⁴⁷ Regulation, where used, also needs to be proportionate. It is simply to recognise that the system has a broad role to play in the resource management system of the future, for many reasons. We are not convinced that intervention should be constrained to where the market has clearly “failed” – rather, the market should be seen as a tool that is useful if it helps achieve the outcomes we want. In many cases it will, but sometimes it will not.⁴⁸

Therefore, although we are not adopting an ecocentric approach, we also resist the idea of limiting the role of the system to the language of economic approaches. As Professor Tim Hazledine has said, giving legal personhood to the natural world is “fundamentally subversive of economic orthodoxy”⁴⁹ and is clearly much more than the internalisation of a negative externality. But we shouldn’t close our minds to it. Similarly, Dr Tim Denne has pointed out that the relative reduction of people’s existing rights to pollute (eg nutrients in an overallocated catchment) is a dilemma well outside the comfort zone of traditional environmental economics.⁵⁰ But it is a pressing problem and one that people are increasingly willing to grapple with.



We reinforce our conclusions in previous work that the system as a whole will be expected to perform seven core roles:

- 1 Imposing firm environmental bottom lines or limits
- 2 Facilitating trade-offs above bottom lines
- 3 Funding and ensuring the delivery of public goods (including infrastructure)
- 4 Pursuing broader “good” outcomes (not just preventing or managing “bad” outcomes)
- 5 Protecting and promoting Māori interests⁵¹
- 6 Resolving disputes
- 7 Allocating rights/privileges to use non-private resources

We also think that these seven roles will need to be performed differently in the future, in the ways outlined in the Phase 1 report.⁵² How they do so will be explored within the contexts of more specific statutory frameworks (especially the RMA). For example, revisions to Part 2 and national direction under the RMA (see Chapters 5 and 6) will be important in performing a “bottom lines” role, and revisiting our funding model for local government (Chapter 10) will be crucial in delivering public goods.

In our view, a future system will be required to perform seven core roles. These reflect a relatively expansive view of when the system can intervene in people’s lives, although it is important to note that such intervention will not always be regulatory in nature (forcing people to do or not do things) and should be proportionate.

The seven roles identified above are not a viable way to split up statutes. We cannot realistically have one act for bottom lines, one for dispute resolution, and another one for allocation, for example.⁵³ Many roles are too interconnected to make that kind of approach to legislative design workable or desirable as a blanket rule.⁵⁴ For example, there are benefits in one institution or statute performing multiple roles (eg under the RMA the Environment Court decides on environmental restrictions while at the same time resolving disputes), or in multiple institutions or statutes performing a single kind of role (eg different kinds of bottom lines are imposed under the RMA and conservation legislation).⁵⁵ Sometimes, it may even be necessary for a single *decision* within a statutory framework to perform several roles that are inextricably connected (eg in Chapter 7 we conclude that (1) determining environmental limits for freshwater abstraction and (2) determining who is allocated rights to use freshwater within those limits should both occur within the RMA, rather than having a separate “Allocation Act”).⁵⁶

However, there is value in holding each of these core roles in mind while discussing more specific statutory frameworks. The system, when looked at as a whole, needs to be adequately performing its roles in an integrated and coherent way. For example, we need to

think about allocative questions across the system: is it acceptable for minerals and fisheries to be allocated in a highly structured way, but for the allocation of freshwater to be largely left to market forces (first in, first served)?

The same applies to bottom lines: is it right to impose a bottom line on carbon emissions under climate change legislation (eg through targets, budgets and caps on trading) but continue to promote the exploitation of fossil fuels that may undermine them?⁵⁷ Or for environmental bottom lines under Part 2 of the RMA to be overridden by the strategic development objectives of a specific urban area (eg to promote housing)?⁵⁸ And is it anomalous that in current legislation we have several different variants of “sustainability”, and different directions in relation to Treaty principles? We need to start thinking about the system’s seven core roles in a more holistic way.

3.5 A final thought on ethics, principles and the roles of the system

We end this chapter with a provocative thought that is relevant to both ethics and the roles the system will be expected to play, and which will be good to hold in our minds as we explore the (inevitably) more technical aspects of system design. The thought is this: most would consider it morally repugnant to talk about our children/tamariki in the way we continue to talk about natural “resources” and the internalisation of “externalities”. We do not look after our children because they are a future source of labour, an input into our economy, or market actors. We do not avoid hurting them because of some economic theory or laws demanding the internalisation of harm to ourselves. Instead, we do so because we love them. They have beauty and potential, not amenity and monetary value. When it comes to our families and friends, we are first and foremost ethical and social creatures, not rational economic actors.

Why then, is there often so much opposition to treating the natural world – comprised in part by living, sentient, and threatened forms of life with whom many have a profound emotional or spiritual connection as well as reliance on for human health – as a thoroughly moral one as well as an economic one? One answer is obvious – our children occupy a very different place in our hearts than a chicken or a cow, or a totara. As Professor Jared Diamond has somewhat apologetically pointed out in his book *Collapse*, “While I do love New Guinea birds, I love much more my sons, my wife, my friends.”⁵⁹ We suspect that would be true for most of us, and this provides a powerful lesson for how we market resource management reforms: something that will have direct benefits to people and the things they care about most. Indeed, there is truly existential significance for our children here, not just another round of reforms aimed to improve a vague notion of “wellbeing” or to save the birds and trees for their own sake. As the government’s resource management system review panel has pointed out:⁶⁰

Degradation of our natural environment is reducing ecosystem resilience to system shocks that can radically alter the flow of ecosystem services, affecting associated livelihoods and the wellbeing of communities.

Environmental decline will affect our daily lives. But there is not just an economic or even anthropocentric element here – there is a moral imperative too. We are used to moralising over the extinction of creatures like the dodo, the deforestation of the Amazon rainforest, or (closer to home) the threat to iconic features or species like kiwi, kākāpō or kauri. But there is much less recognition of the moral place of nature as a whole in our collective consciousness. We need to push back against the idea that moral, spiritual or emotional concern has no place in public policy discourse on environmental matters, or that it is *only* the concern of integrated socio-spiritual systems like tikanga Māori.⁶¹ As one commentator has noted, it is:⁶²

important to acknowledge that the natural environment has intrinsic value that goes beyond utility, because our sense of who we are as people is deeply embedded in our connection to it. Through manaakitanga (care and respect) we are incentivised to practise kaitiakitanga and our whanaungatanga (relationships to each other) are enhanced.

These values are not exclusive to Te Ao Māori. It is evident ... that many New Zealanders are deeply concerned about the state of the environment. Their concerns cover effects at the local, national and global levels including pollution in our waterways, declining biodiversity, threats to our coastal zones and the impacts of climate change.

Falling back only on the economic language of externalities, management, transactions and cost-benefit analyses can de-emphasise the importance of an ethical element in what we are trying to do. For example, some have suggested that while cost-benefit analysis is certainly useful, it should deal with trade-offs only where they are small scale and within our moral comfort zone.⁶³ It is not a substitute for values-driven and regulatory environmental limits.⁶⁴ As discussed in Chapter 13, we also need to be wary about crowding out positive moral responses by replacing them with economic instruments (the idea that if one is charged for something, then there may be a perception that no further action is needed).

The biggest question for our future, and one that encompasses all others, is about the balance of values we hold. When conflicts emerge between them, we can ask: are we a market-driven, primary-producing nation seeking to maximise its economic output? Or are we a clean, green, beacon in the South Pacific that will maintain a sustainable, fair and inclusive society for those living centuries from now? As Jared Diamond has noted, “Perhaps a crux of success or failure as a society is to know which core values to hold on to, and which ones to discard and replace with new values, when times change.”⁶⁵ How will we respond to that challenge?

There is a considerable moral component to be considered in resource management reform, which cannot be answered by economists or experts. We require a nationwide conversation about what we value and why.



McNeills Beach, Westland

ENDNOTES

- 1 For example, we have various expressions of "sustainability" and "precaution" in our existing laws (eg under the Fisheries Act 1996, EEZ Act and Hazardous Substances and New Organisms Act 1996).
- 2 For example, in providing for participation, Māori involvement, or precaution.
- 3 To do so would probably require the adoption of the perspective of a single theorist, given that there are huge differences in approach and detail within these general categories. For some different theories, see DR Keller (ed) *Environmental ethics: The big questions* (Wiley Blackwell, 2010); RL Revesz *Foundations of environmental law and policy* (Oxford University Press, 1997); K Bosselmann *The principle of sustainability: Transforming law and governance* (Ashgate, 2008) at 102; E Hargrove *Foundations of environmental ethics* (Prentice Hall, 1989); K Palmer "Introduction to environmental law" in D Nolan (ed) *Environmental and resource management law* (5th ed, LexisNexis, 2015).
- 4 In that there are many different approaches to these broad categories – including approaches where boundaries break down entirely (eg ecological economics). On variants of ecocentrism, see C Stone "Should trees have standing?" (1972) 45 S Cal LR 450; P Taylor and J Kleinig *Valuing Life* (Princeton University Press, 1991); P Burdon "Wild law: A proposal for radical social change" (2015) 13 NZPJL 157; P Singer *Animal liberation* (Random House, 2015); P Taylor *Respect for nature* (Princeton University Press, 1986); C Stone *Earth and other ethics* (Harper and Row, 1987).
- 5 While we are not the right people to do it, we do see merit in the development of a tikanga-based model by Māori as a tangible option for reformers to explore.
- 6 Of course, that may be different depending on who you are.
- 7 See G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 231 for some misgivings about rolling out legal personhood across the country, on a pan-tenure basis and without thought of Treaty partnership implications.
- 8 For an account of why we should embrace economic instruments more in the allocation (and reallocation) of water resources, see E Crampton *Valuing the priceless* (New Zealand Initiative, 2019).
- 9 G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 62.
- 10 For example, see Resource Management Act 1991, ss 6-7.
- 11 For example, green taxes are an economic concept, but could be extremely effective at improving environmental outcomes. See T Hazledine "Economics and the resource management system" in G Severinsen and R Peart *Reform of the resource management system: The next generation – Working paper 3* (EDS, 2018); T Denne "Resource management law reform and economics" in G Severinsen and R Peart *Reform of the resource management system: The next generation – Working paper 3* (EDS, 2018).
- 12 See the National Policy Statement for Freshwater Management.
- 13 See also the more tikanga-focused solutions in the bespoke frameworks for Te Urewera and Tu Awa Tupua/Whanganui River: Te Awa Tupua (Whanganui River Claims Settlement) Act 2017; Te Urewera Act 2014. See also G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 60.
- 14 G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 61.
- 15 Compare SJ Burton "Normative legal theories: The case for pluralism and balancing" (2012–2013) 98 Iowa L Rev 535.
- 16 For example, in the field of ecological economics.
- 17 D Young *Values as law: The history and efficacy of the Resource Management Act* (Victoria University of Wellington Institute of Policy Studies, 2001) at 85.
- 18 See G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019), ch 5.
- 19 There is a presumption that something cannot be dumped unless expressly listed as acceptable (see Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012, ss 10(1)(b), 20G). This implements the "white list" approach required by the London Protocol on marine dumping.
- 20 A general term incorporating different terms (eg sustainable development, management, utilisation etc). On sustainability, see D Grinlinton "Integrating sustainability into environmental law and policy in New Zealand" in K Bosselmann, D Grinlinton and P Taylor (eds) *Environmental law for a sustainable society* (2nd ed, New Zealand Centre for Environmental Law, 2013); World Commission on Environment and Development *Our common future* (Oxford University Press, 1987); Resource Management Act 1991, s 5; Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012, s 10. See also *Reith v Ashburton District Council* [1994] NZRMA 241 (PT).
- 21 See N Robinson "Re-conceptualising sustainability: The Anthropocene agenda" (2015) 11 RM Theory & Practice 99.
- 22 Sometimes referred to as "intra-generational equity". On these principles, see generally V Been "What's fairness got to do with it?" (1993) 78 Cornell Law Review 1001; K Bosselmann *The principle of sustainability: Transforming law and governance* (Ashgate, 2008) at 9; E Hudspeth "Freshwater management in New Zealand" (2013) 16 NZJEL 277 at 285; *Meridian Energy Limited v Central Otago District Council* [2011] 1 NZLR 482 (HC) at [119]; K Palmer "Resource Management Act 1991" in D Nolan (ed) *Environmental and resource management law* (5th ed, LexisNexis, 2015) at 111-112; *Ministry for the Environment Report of the review group on the Resource Management Bill* (1991) at [3.3]; *St Columba's Environmental House Group v Hawkes Bay Regional Council* [1994] NZRMA 560 (PT) at 528; *Central Plains Water Trust v Ngai Tahu Properties* [2008] NZCA 71, [2008] NZRMA 200 (CA) at [90]-[91]; S Beder "Costing the Earth" (2000) 4 NZJEL 227 at 236; Resource Management Act 1991, ss 85A, 104(3)(c)(iv); D Sheppard "The Resource Management Act – from principles to practice" in T Daya-Winterbottom (ed) *Frontiers of resource management law* (Thomson Reuters, 2012) at 233; *Treasury guide to social cost benefit analysis* (2015) at 47.
- 23 On inter-generational equity, see generally K Palmer "Origins and guiding ideas of environmental law" in K Bosselmann, D Grinlinton and P Taylor (eds) *Environmental law for a sustainable society* (2nd ed, New Zealand Centre for Environmental Law, 2013) at 16; Resource Management Act 1991, s 5(2) (a); Conservation Act 1987, ss 2, 6(c); Local Government Act 2002, s 14(1)(h) (iii); EB Weiss *In fairness to future generations* (United Nations University Press, 1989); EB Weiss "Intergenerational justice and international law" in S Busuttill and others (eds) *Our responsibilities to future generations* (Foundation for International Studies, 1990), from 98; J Boston *Safeguarding the future: Governing in an uncertain world* (Bridget Williams Books, 2017).
- 24 On the polluter-pays principle, see generally *Machinery Movers v Auckland Regional Council* (1993) 1A ELRNZ 411 (HC) at 416. In the international context, see P Schwartz "Principle 16: The polluter-pays principle" in JE Viñuales (ed) *The Rio Declaration on Environment and Development: A commentary* (Oxford University Press, 2015).
- 25 See generally D Shelton "Using law and equity for the poor and the environment" in Y Le Bouthillier and others (eds) *Poverty alleviation and environmental law* (Edward Elgar, 2012).
- 26 For example, the Land and Water Forum has recommended that when a catchment is overallocated, high emitters of nitrogen that contribute most to overallocation must reduce, while at the same time providing some upward movement for those with no or little discharge: see Land and Water Forum *Advice on improving water quality: Preventing degradation and addressing sediment and nitrogen* (May 2018) at 2.
- 27 See generally M Bramley "Institutional and governance structures of environmental law" in P Salmon and D Grinlinton (eds) *Environmental law in New Zealand* (1st ed, Thomson Reuters, 2015) at 398; B Gussen "Subsidiarity as a constitutional principle in New Zealand" (2014) 12 NZPJL 123.
- 28 See generally Treaty of Waitangi Act 1975, s 8; *New Zealand Māori Council v Attorney General* [1994] 1 NZLR 513 (PC) at 515; *New Zealand Māori Council v Attorney General* [1987] 1 NZLR 641 (CA) (Lands Case); *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 (HC) at 210; R Boast "The Treaty of Waitangi and environmental law" in R Harris (ed) *Handbook of environmental law* (Royal Forest and Bird Protection Society of New Zealand, 2004) at 513; R Joseph "The Treaty, tikanga Māori, ecosystem-based management, the RMA and power sharing for environmental integrity in Aotearoa New Zealand – possible ways forward" in G Severinsen and R Peart *Reform of the resource management system: The next generation – Working paper 3* (EDS, 2018) at 30-32; R Beverley "The incorporation of the principles of the Treaty of Waitangi into the Resource Management Act 1991" (1997) 1 NZJEL 125; M Palmer *The Treaty of Waitangi in New Zealand's law and constitution* (Victoria University Press, 2008); Carter Holt Harvey Ltd v Te Runanga o Tuwharetoa ki Kawerau [2003] 2 NZLR 349 (HC) at [27]. In practice, it is arguable the extent to which this has been done. See the report from Wai 262, *Ko Aotearoa Tenei; McGuire v Hastings District Council* [2002] 2 NZLR 577 (PC) at [21].
- 29 See generally U Klein "Belief-view on nature" (2000) 4 NZJEL 81; A Tunks "Tangata whenua ethics and climate change" [1997] 1 NZJEL 67 at 8; R Joseph "The Treaty, tikanga Māori, ecosystem-based management, the RMA and power sharing for environmental integrity in Aotearoa New Zealand – possible ways forward" in G Severinsen and R Peart *Reform of the resource management system: The next generation – Working paper 3* (EDS, 2018) at 33.
- 30 See generally J Sax "The public trust doctrine in natural resources law" (1970) 68 Michigan Law Review 471; P Wallace "Integrated conservation management" (2011) 15 NZJEL 185 at 191; J Ruru "Managing our treasured home" (2004) 8 NZJEL 243; Department of Conservation *Te Kōiara o Te Kōiara: A discussion document on proposals for a biodiversity strategy for Aotearoa New Zealand* (2019).
- 31 See generally A Gillespie "Precautionary New Zealand" (2011) 24 NZULR 364 at 365; G Severinsen "Letting our standards slip? Precaution and the standard of proof under the Resource Management Act 1991" (2014) 18 NZJEL 173; C Iorns Magallanes and G Severinsen "Diving in the deep end: Precaution and seabed mining in New Zealand's exclusive economic zone" (2015) 13 NZPJL 201; *Shirley Primary School v Christchurch City Council* [1999] NZRMA 66 (EnvC) at [136]; *Contact Energy v Manawatu-Wanganui Regional Council* [2010] NZEnvC 406, [2011] NZRMA 155 at [71]; Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012, s 34(2); Fisheries Act 1996, s 10(c); Hazardous Substances and New Organisms Act 1996, s 7.
- 32 See generally B Barton "Underlying concepts and theoretical issues in public participation in resources development" in D Zillman, A Lucas and G Pring (eds) *Human rights in natural resources development* (Oxford University Press, 2002); G Palmer "The Resource Management Act – how we got it and what changes are being made to it" (2014) RM Theory & Practice 22; D Sheppard

- "The Resource Management Act – from principles to practice" in T Daya-Winterbottom (ed) *Frontiers of resource management law* (Thomson Reuters, 2012) at 226; *Ko Aotearoa Tenei* (Wai 262 Waitangi Tribunal Report, 2011).
- 33 See generally E Hudspith "Freshwater management in New Zealand" (2013) 16 NZJEL 277 at 284; Resource Management Act 1991, s 32(2)(b); M Christensen "Valuation of natural assets under the Resource Management Act" (2013) 17 NZJEL 291 at 294; JR Jackson "The role of economics in the RMA" (1999) 3 NZJEL 19 at 32.
- 34 See G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019), esp 94–100 concerning the imposition and defence of biophysical bottom lines.
- 35 There are many other forms of public intervention (eg education, subsidies, economic penalties, formal collaborative processes, behavioural incentives and so forth).
- 36 A formal system of public intervention can, of course, influence connected social and moral systems (eg through public education campaigns), so that remains within scope. The point, however, is that we are not concerned with reforms to informal systems themselves, only with reforms to public interventions that can influence them.
- 37 For example, people are unlikely to degrade their own property (eg land) to the extent that it loses value in their own lifetimes, and many feel a moral or spiritual connection to the world around them and act accordingly.
- 38 For example, people wanting to grow food on road margins.
- 39 See New Zealand Productivity Commission *Better urban planning* (2017) at 39 and 47; (4 July 1991) 516 NZPD 3019–3020. On externalities, see G Hardin "The tragedy of the commons" (1968) 162 *Science* 1243; T Denne "Resource management law reform and economics" in G Severinsen and R Peart *Reform of the resource management system: The next generation - Working paper 3* (EDS, 2018).
- 40 New Zealand Productivity Commission *Better urban planning* (2017).
- 41 On statutes that span different "systems", see G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 132 (Figure 8.13).
- 42 See New Zealand Productivity Commission *Better urban planning* (2017) at 412.
- 43 G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 83. These include risks of an overly short-term focus; undervaluing intangible or immeasurable effects, including nature; a lack of information until it is too late; giving up opportunities to improve people's and nature's wellbeing; and removing the impetus for changes in ethics.
- 44 *Ibid* at 88.
- 45 *Ibid* at 85.
- 46 *Ibid*.
- 47 *Ibid* at 88.
- 48 For example, the market has failed to provide for large scale urban development projects where land parcels are fragmented or the development landscape is complex. This is one legitimate reason for the introduction of an urban development authority model looked at in Chapter 10.
- 49 T Hazledine "Economics and the resource management system" in G Severinsen and R Peart *Reform of the resource management system: The next generation - Working paper 3* (EDS, 2018) at 154.
- 50 See G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 244, and endnote 33.
- 51 See generally *ibid* at 110. For perspectives on what that role entails, see R Beverley "The incorporation of the principles of the Treaty of Waitangi into the Resource Management Act 1991" (1997) 1 NZJEL 125; R Boast "The Treaty of Waitangi and environmental law" in R Harris (ed) *Handbook of environmental law* (Royal Forest and Bird Protection Society of New Zealand, 2004) at 513.
- 52 We went through these at some length in the Phase 1 report (pp 100-114), and those general conclusions are applied when we cover particular statutory regimes in a future system, rather than being repeated here.
- 53 Many people have pointed out to us that the allocation of things like freshwater cannot be meaningfully separated from decision-making on limits to human use as a whole, and decisions on trade-offs above those limits.
- 54 Although in some cases it may make sense. For example, we floated one option in the Phase 1 report where the RMA would be split into separate acts focusing on (1) bottom lines and (2) making trade offs above them.
- 55 See G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019), ch 9.
- 56 See *ibid* at 148.
- 57 See Crown Minerals Act 1991, s 1A, which promotes the mining of Crown-owned minerals.
- 58 As proposed in the concept of an urban development authority (see Chapter 10).
- 59 J Diamond *Collapse: How societies choose to fail or survive* (Penguin, 2011) at 16.
- 60 Resource Management Review Panel *Transforming the resource management system: Opportunities for change – Issues and options paper* (2019) at 11.
- 61 We would suggest that a great many New Zealanders have strong emotional or spiritual connections to aspects of the natural world.
- 62 Tax Working Group *Future of tax: Final report volume 1 - recommendations* (2019).
- 63 T Hazledine "Economics and the resource management system" in G Severinsen and R Peart *Reform of the resource management system: The next generation - Working paper 3* (EDS, 2018).
- 64 See G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 255.
- 65 J Diamond *Collapse: How societies choose to fail or survive* (Penguin, 2011) at 433.

4. WHAT WE HAVE NOW: THE CURRENT SYSTEM

4.1 Introduction

While many features of the current system have been described at various places in the project,¹ and problems identified with them, we have deliberately not used that as the starting point for analysis. This is because we did not want our options and analysis to be constrained by existing ways of thinking, or tinkering with existing frameworks or silos.

But to fully understand where we should be going, it is useful to refresh ourselves – at a framework level – about what we currently have. For one, visualising the “gap” between what is there now and what we want allows us to think about pragmatic concerns in a meaningful way. For example: how much effort would be required to make a change? Does it represent a sharp jolt, or a continued evolution? How much political and social appetite would there be for this extent of disruption? We cannot answer these questions without knowing how different a new system would be from what we have.

Furthermore, the reality is that we are not creating a system from scratch. Charting a rough pathway to reform – what happens when – therefore relies on having a reasonably clear picture of a starting point. We also need to have a sense of what is wrong with what we have (and, equally, what is *not* wrong) before recommending change.² There is much that we might want to keep.

It is important to have a sense of what the current system looks like so that (1) we understand the extent of change envisaged between old and new; (2) we have a clear starting point for a pathway to reform; and (3) we can identify deficiencies in the current system.

To make comparisons between the old and the new easier, it makes sense to describe them in roughly the same way. Therefore (unlike in the Phase 1 work, where the current



system emerged through themes) we will look at the existing system in terms of its different statutory frameworks.³ A simplified version of this is presented visually (see Figure 4.7). If, however, the reader is more interested in jumping straight to a description of our proposed model, he or she may wish to move on now to Chapter 5.

4.2 The current system

New Zealand's current resource management system is complex and has a fascinating history.⁴ We will not attempt to describe every detail of it. From a purely legislative design perspective, we have already discussed the key statutes we have in Phase 1 (see Chapter 8 of that report). There, we concluded that while there are significant tensions and overlaps, and much room for rationalisation and reorganisation, the basic logic of what we have makes some sense.

At the heart of the system are broad, outcomes or effects-based statutes like the RMA and EEZ Act (as well as more targeted ones concerned with, for example, biosecurity and waste minimisation). Outcomes-based statutes generally apply across the whole country and are based on general cross-cutting aims or effects rather than categories of human activities (eg sectors).⁵ Other types of statutes then fill gaps (or, with some things like climate change and fisheries, they fill deliberate carve-outs) in outcomes-based statutes. First is a layer dealing with domains not covered under more general legislation but which still apply across the board (eg climate change), then particular areas that require an additional layer or modified set of provisions (eg in national parks), and then sectors (eg mining, fisheries, forestry) and institutions (eg local government).⁶

Each layer of statutes – those based on outcomes, domains, locations, sectors and institutions – generally seeks to do a different kind of thing. More specific ones concerned with particular domains or locations tend to fill gaps in broader, outcomes-based ones (see Figures 4.1 and 4.2 below). For example, mining legislation is about the proactive allocation of the Crown's property (Crown-owned minerals) and access arrangements, not the environmental effects of mining. Thus while the RMA applies to almost all kinds of activity having environmental impacts (including mining), mining has an additional management framework on top of that, which makes sense.⁷

Where there *is* an overlap in aims (statutes seek the same kinds of outcomes), legislative separation sometimes reflects the fact that frameworks use quite different kinds of tools (eg an emissions trading scheme, or product stewardship scheme, looks quite different to RMA plans and consents, even though the RMA's broad purpose encompasses the outcomes they are pursuing). There are still, however, tricky boundary issues to navigate (eg a sectoral one between the RMA and Fisheries Act on which the Court of Appeal has recently pronounced,⁸ or a spatial one between the RMA and EEZ Act).⁹

Outcomes-based statutes	Domain-specific statutes	Location-specific statutes	Sector-specific statutes	Institution-specific statutes
Resource Management Act 1991	Climate Change Response Act 2002	National Parks Act 1980	Crown Minerals Act 1991	Local Government Act 2002
Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012	Ozone Layer Protection Act 1996	Reserves Act 1977	Forests Act 1949	Environment Act 1986
Biosecurity Act 1993	Marine Mammals Protection Act 1978	Marine Reserves Act 1971	Land Transport Management Act 2003	Heritage New Zealand Pouhere Taonga Act 2014
Hazardous Substances and New Organisms Act 1996	Wildlife Act 1953	Continental Shelf Act 1964	Fisheries Act 1996	Environmental Protection Authority Act 2011
Waste Minimisation Act 2008	Native Plants Protection Act 1934	Numerous location-specific conservation statutes	Building Act 2004	Queen Elizabeth II National Trust Act 1977
Litter Act 1979	Marine and Coastal Area (Takutai Moana) Act 2011	Numerous Treaty settlement statutes	Housing Accords and Special Housing Areas Act 2013	Local Government (Auckland Council) Act 2009
Environmental Reporting Act 2015	Wild Animal Control Act 1977	Conservation Act 1987	Electricity Act 1992	
		Crown Pastoral Land Act 1998	Energy Efficiency and Conservation Act 2000	
			Gas Act 1992	
			Kāinga Ora – Homes and Communities Act 2019	
			New Zealand Infrastructure Commission/Te Waihangā Act 2019	

Figure 4.1: Core statutes in the current system

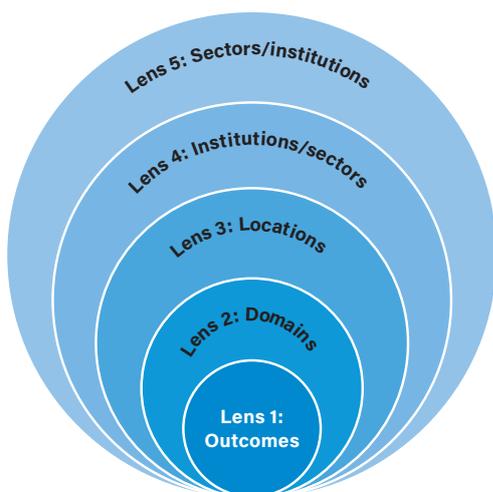


Figure 4.2: How statutes of different types tend to relate to each other in the current system. The widest circle represents the boundaries of the system as a whole. Outcomes-based statutes like the RMA form the core of the system. Subsequent layers of statutes generally fill the gaps left by previous ones (represented by layers of crescent shapes), rather than overlap with them.

In the Phase 1 report we also canvassed the core institutions in the current system, in terms of the characteristics they have (eg central or local, independent or accountable),¹⁰ and the appropriateness of those characteristics for the roles they should play (eg to what extent independence is desirable in setting bottom lines).¹¹ Furthermore, we outlined the key planning instruments used in the system (and permits), and the relationships between them, both within statutes and across statutes.¹² For example, under the RMA a regional plan must give effect to a national policy statement (NPS), but there is a much weaker connection between an NPS under the RMA and the land transport programme under the Land Transport Management Act.¹³ Relationships across statutory boundaries tend to be relatively weak, unclear and complex even where strong coordination is required (eg between the RMA and infrastructure-related legislation to manage urban growth).¹⁴

The purpose of this chapter, then, is to draw all that theme-based analysis together to provide a more holistic bird's eye view of what we have now in terms of statutory frameworks. It provides a snapshot of the current system that can be compared to a snapshot of a future one.

4.3 The RMA

At the core of the current system is the RMA. It establishes the framework for the management of “natural and physical resources” in New Zealand to the outer limits of the territorial sea. It is a product of its time (the late 1980s and early 1990s), and reflects a desire for integrated management, effects-based rather than prescriptive decision-making, open and transparent government, Māori values, devolution, public input, and a degree of faith in the market as to how resources are used.¹⁵ The Act has a broad purpose of “sustainable management”.¹⁶ Despite a chequered history and ongoing debate about what this purpose does and means (culminating in the *King Salmon* decision and subsequent case law),¹⁷ its intention has always been to ensure that firm environmental bottom lines are imposed. Many of these are expressed within the principles of the Act in section 6 (matters of national importance, which decision-makers must recognise and provide for) and section 7 (other matters, to which they must have particular regard). The Act applies to a wide variety of “domains”, including land, freshwater, the coastal and marine environment, soil, air, and impacts on the “environment” more broadly (which is defined to include the condition of communities as well as more tangible resources).

While the purpose of the Act is extremely broad on its face (and has been interpreted in an even broader way),¹⁸ the things that it actually does in practice are largely limited by Part 3 of the Act. This, essentially, outlines what people are not allowed to do (eg dam, divert or take water, discharge contaminants, occupy the seabed etc) without express permission.¹⁹ People are free to use private land how they wish,²⁰ unless its use is expressly restricted.²¹ In practice, most land uses are restricted in some way. But the RMA is not, for example, a place in which infrastructure is planned or funded, where the generation of waste is minimised, or where the construction of buildings is regulated. It can seek positive outcomes,²² but the ways in which it can do so are limited.²³ Some have therefore described it as a reactive, or (adverse) effects-based, framework.²⁴ Yet it is also a framework by which land use decisions are made, and therefore the main statute by which urban planning occurs.²⁵ Its suitability for this kind of thing has been questioned in light of its predominantly “protective” purpose and principles.²⁶

The RMA operates in practice through the development of a hierarchy of subordinate instruments (see Figure 4.3 below). Central government can, if it wishes, promulgate national direction in the form of NPSs and national environmental standards (NESs). The New Zealand Coastal Policy Statement (NZCPS) is the only mandatory form of national direction, but a number of other NESs and NPSs have been created.²⁷ These must be given effect to in a cascade of lower level instruments: regional policy statements, regional plans and district plans. That is a strong direction.²⁸ Regional plans are developed by regional councils according to their functions (largely although not exclusively to do with the management of common pool resources like air, water and the coastal marine area).²⁹ District plans are developed by territorial

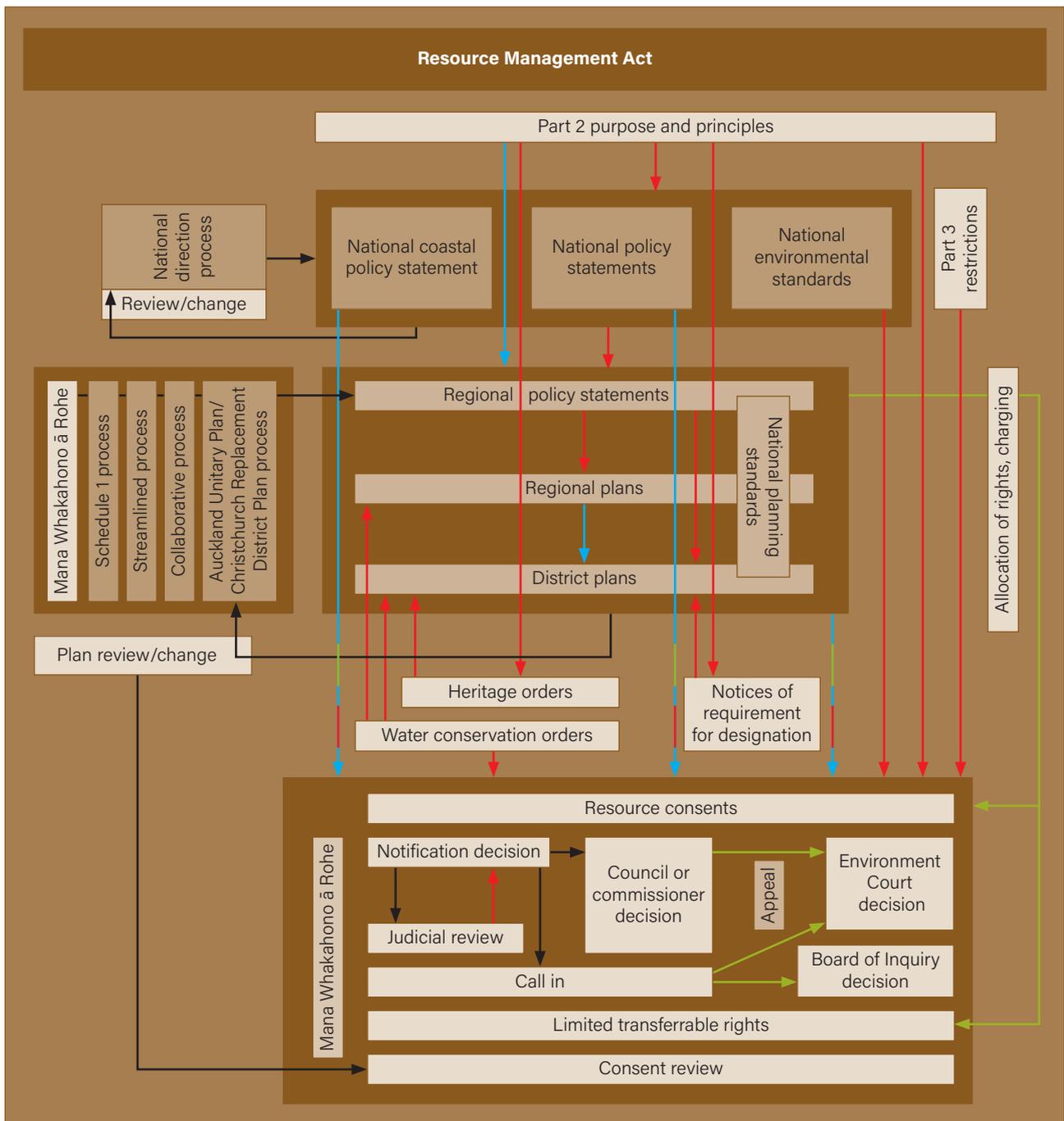
authorities, and are primarily concerned with land use.³⁰ Combined plans can also be created, which are effectively a combination of a regional policy statement, regional plans and district plans.

RMA plans contain objectives, policies and rules that expand on the purpose and principles of the Act, and determine what people are and are not allowed to do in relation to land, water, air, soil, and so forth. Plans can now be created and/or changed according to different processes (eg collaborative,³¹ streamlined, directly referred), but there is opportunity for public participation and, usually, appeal rights on the merits of a plan for submitters to the Environment Court for final determination. More bespoke, and quite different, planning processes have also been introduced for the creation of the Auckland Unitary Plan (following council amalgamations) and the Christchurch Replacement District Plan (to facilitate the post-earthquake rebuild).³² National Planning Standards – designed to provide consistency between different council plans – are now another measure that central government can use.³³

Rules in district and regional plans, and NESs at a national level, can either prohibit or allow an activity. They can also require a person to obtain different categories of resource consent before undertaking an activity.³⁴ Consent decisions are usually decided by councils. Most applications are not publicly notified,³⁵ and the RMA provides for restrictions on what can be considered for some kinds of things.³⁶ If an application is notified (or “limited” notified), submitters generally have appeal rights to the Environment Court, and there is the ability for some consents to be “called in” and referred directly to the Court (or to a specially appointed Board of Inquiry) for decision.³⁷ There are no appeal rights in relation to notification decisions, although judicial review is possible.

It is also worth noting that, while a resource consent under the RMA is primarily a formal recognition that an activity meets the purpose of the Act (essentially, that it does not have unacceptable impacts on the environment), in some cases it effectively doubles as an exclusive allocation of rights to one person over another in the nature of a licence (eg to take freshwater, or to occupy coastal space). While the Act does allow for more structured approaches to allocating resources (eg freshwater, coastal space, geothermal energy),³⁸ for the most part the first person to apply for permission gets the right to use what may be a scarce resource.³⁹ A degree of trading of consented rights (eg to take freshwater) is allowed, but is fairly heavily restricted.

The RMA also provides for other project or site-specific mechanisms: designations (where an approved requiring authority is able to make decisions on land use instead of the relevant council),⁴⁰ heritage orders (a similar concept where decision-making power rests with an approved heritage protection authority, not the council),⁴¹ and water conservation orders (a more protective tool that can be imposed, upon application, to safeguard the values of a specific water body).⁴² It also contains enforcement



KEY

Arrows indicate different relationships between elements of the system

➔ Red arrows: a strong direction (eg "give effect to", "directly insert" or equivalent)

➔ Blue arrows: a medium strength direction

➔ Green arrows: a weak direction (eg "have regard to", simple "input", or equivalent)

➔ Black arrows simply indicate the direction of a process without a particular normative instruction

Figure 4.3: A simplified outline of the RMA planning and consenting framework

provisions, including abatement notices, enforcement orders, and prosecutions.⁴³

There is the ability under the RMA for councils to transfer powers to iwi authorities, or for joint management agreements to provide for the shared exercise of powers

with Māori.⁴⁴ However, uptake has been patchy. Some Treaty settlement legislation requires joint management agreements to be entered into.⁴⁵

The RMA has been subject to many amendments over its lifetime, and has become significantly larger and more

complex than it used to be. Another amendment – to reverse some recent changes (such as strengthening public participation and removing the collaborative planning track) as well as provide for another planning process (for freshwater) and strengthen the enforcement role of the EPA – has been recently introduced into the House.⁴⁶ Overall, the RMA provides a framework within which a substantial amount of discretion is exercised in relation to the protection and use of natural and physical resources, with oversight by an independent and expert Environment Court.

4.4 Local government and infrastructure legislation

Alongside the RMA are statutes with quite a different purpose. The Local Government Act and the Land Transport Management Act relate to the active provision (including funding) of public goods and services (including infrastructure like roads, footpaths, streetlights and water pipes), with the former also providing for the pursuit of overall community wellbeing and the exercise of local democracy.⁴⁷

Both acts provide for separate planning frameworks. Under the Local Government Act, councils are charged with producing long-term plans (describing the activities and community outcomes to be pursued over the coming 10 years, and including both a financial and infrastructure strategy) and annual plans (including budgets), which support the achievement of the long-term plan.⁴⁸ Local councils are also obliged to assess the need for, and provide, water services (with some exceptions),⁴⁹ and provide some other public services.⁵⁰ (In this context, the government is conducting a wide-ranging review of the water sector, including the potential for institutional and funding reform.)⁵¹

Local government legislation also provides for the establishment of council-controlled organisations (CCOs) – arm’s-length entities owned by councils and tasked with pursuing particular goals or performing operational functions on a business footing.⁵² Many of these have been established around the country. Some, such as Wellington Water, are owned by multiple councils.⁵³

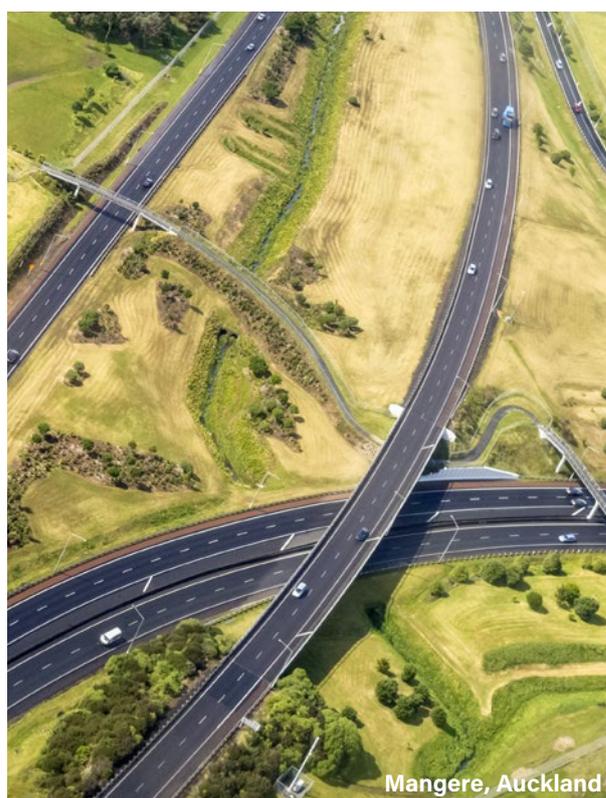
There is a wide ability under the Local Government Act for councils to engage in strategic planning for many things (including spatial plans for urban growth).⁵⁴ However, these do not have immediate effect under other legislation that could put them into effect (eg under the RMA).⁵⁵

Land transport infrastructure (eg roads) is jointly funded and planned between central and local government. State highways are planned and maintained nationally.⁵⁶ But while local contributions ultimately come through the long-term and annual planning processes, the Land Transport Management Act provides for an additional layer of processes by which central government transport planning intersects with local planning. National contributions come from a national Land Transport Fund, which has multiple sources of revenue.⁵⁷ A key point of

the framework is for these central government funds to be distributed to local roading projects according to both national and local priorities.

In short, national and regional land transport programmes under the Act are informed by an overarching government policy statement (GPS) on land transport. The Minister of Transport issues the GPS, which must contain a three-year land transport investment strategy and must take into account national direction under the RMA.⁵⁸ The New Zealand Transport Agency (NZTA) develops a land transport programme, which sets out what is expected to be funded by the national Land Transport Fund. This must give effect to the GPS, but also take into account regional land transport plans (as well as instruments under the RMA). In this way, transport planning is both top-down and bottom-up, meeting in the middle (in a national land transport programme).

Regional councils are required to establish regional transport committees (with regional, local and central government membership),⁵⁹ which are tasked with developing regional land transport plans.⁶⁰ These plans contain a list of projects for which national land transport funding is sought, over a six-year period, and must be consistent with the GPS.⁶¹ They must also take into account all possible sources of funding (including through Local Government Act processes)⁶² as well as RMA instruments. A simplified version of the way in which the Local Government Act and Land Transport Management Act operate (including in relation to the RMA) is shown in Figure 4.4, and we also refer readers to the more detailed Figures 14.1 and 14.2 in the Phase 1 report. Of note are the strong connections that exist between instruments made within a single statute, but much weaker connections between instruments made under different statutes.



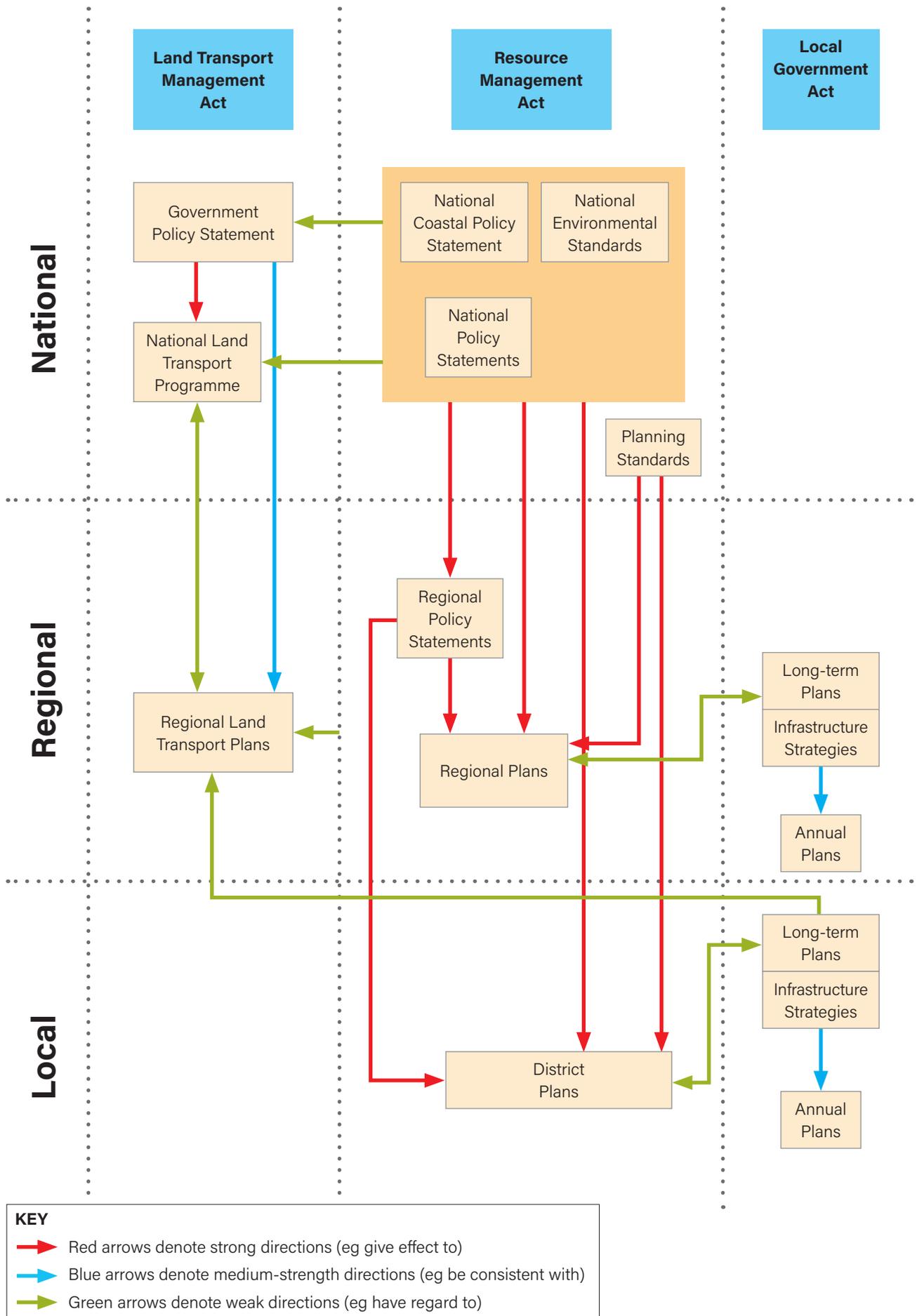


Figure 4.4: National, regional and local planning instruments under the Local Government Act, Land Transport Management Act and RMA.

Public authorities have a variety of other proactive duties to provide public goods and services. For example, regional councils (as successors to catchment boards) have positive obligations for flood and erosion control measures under separate legislation, not just functions under the RMA to regulate for these things.⁶³ On a broader view, legislation has recently been enacted to create an arm's-length Infrastructure Commission, which (among other things) is to work with multiple layers of government and the private sector to develop a 30-year infrastructure strategy. As explored in Chapter 10, an urban development authority (Kāinga Ora – Homes and Communities) has also now been established. This is a Crown entity that is proposed to have significant infrastructure planning and funding powers (among other powers, including under the RMA) in designated project areas.⁶⁴

It is also worth noting here that bespoke local government legislation has been enacted for Auckland. That includes provisions relating to the RMA (a bespoke process for producing a unitary plan for the region), the provision of infrastructure (in the institutional form of Watercare and Auckland Transport), and the mandatory development of a higher level spatial plan for Auckland intended to inform multiple other statutory frameworks.⁶⁵

4.5 Building Act 2004

The Building Act (and Building Code) regulates how buildings themselves are constructed, rather than their impacts on the surrounding environment. It is designed, primarily, to ensure people can use buildings safely and without endangering their health, but has no real spatial element (such as indicating which things should go where). It recognises that buildings should have attributes contributing to the wellbeing of people, but also that “buildings are designed, constructed, and able to be used in ways that promote sustainable development”.⁶⁶ The Act requires building consents to be obtained, meaning that often the development of land requires authorisation under both the RMA (eg land use consent, designation, subdivision consent) and the Building Act.

We noted in the Phase 1 report that there is a degree of conceptual overlap between the Building Act and the RMA, in that both are concerned with the potential impacts of activities on people's health and safety, with the latter restricting the use of land (including for buildings) partly for this purpose.⁶⁷ Although the Building Act covers a lot of matters that are not about resource management per se, we have previously highlighted the need to align its objectives and ensure it contributes to the outcomes the system is pursuing.

4.6 Heritage legislation

Historic heritage is partly protected under the RMA. Section 6(f) of the Act requires all decision-makers to recognise and provide for the protection historic heritage from inappropriate subdivision, use and development as a matter of national importance. Historic heritage

can be more specifically addressed through a heritage order, which, like a designation, ensures that protected features or places are identified in the relevant district plan.⁶⁸ But even in the absence of heritage orders, territorial authorities play a significant role here. District plans identify heritage issues, prescribe objectives and policies, outline information requirements and standards for assessing relevant consent applications, and contain a heritage schedule.⁶⁹

Alongside the RMA is a statute dedicated solely to heritage: the Heritage New Zealand Pouhere Taonga Act. Its purpose is to promote the identification, protection, preservation, and conservation of New Zealand's historical and cultural heritage. Heritage New Zealand (an autonomous Crown entity) is tasked with maintaining the New Zealand Heritage List/Rārangī Kōrero (previously the Historic Places Register), and is informed by the Māori Heritage Council. The purposes of the List are to inform the public about historic heritage, to notify the owners of historic heritage, and to be a source of information for the purpose of more formal protections through the RMA. The List identifies historic places, historic areas, wāhi tūpuna, and wāhi tapu areas. Historic places are divided into Category 1 (places of special or outstanding historical or cultural heritage significance or value) and Category 2 (places of historical or cultural heritage significance or value). However, the List does not have direct regulatory consequences – protections need to be progressed through tools like district plans or heritage orders under the RMA. District councils must have regard to relevant entries on the List when preparing or changing district plans.

That said, Heritage New Zealand also has statutory responsibility for the identification and protection of archaeological sites. It is charged with issuing archaeological authorities where activities may modify or destroy part or all of an archaeological site. In contrast to the Heritage List, this is a tool that has regulatory effect.⁷⁰

4.7 Climate change legislation

Climate change mitigation and adaptation are becoming increasingly central issues within the context of resource management. To date, climate change has primarily been addressed through the Climate Change Response Act, which has established an emissions trading scheme designed to allow greenhouse gas emissions to be traded and offset, and to meet New Zealand's international obligations.⁷¹ There have been criticisms of the scheme, including its effective lack of a “cap” on emissions and the insulation of some sectors (notably agriculture) from emission obligations.⁷² It has been subject to several reviews,⁷³ and there is currently a reform bill being progressed through the House that should address some of the more systemic issues with the scheme.⁷⁴

In contrast, the RMA does not address climate change mitigation in a meaningful way (except to promote renewable energy generation in a very general sense). In fact, councils are expressly prohibited from considering the climate impacts of greenhouse gas discharges, and

central government has not chosen to exercise its powers to fill that gap through national direction.⁷⁵ The RMA itself goes further in the context of climate change adaptation,⁷⁶ although it still lacks national direction on the subject.⁷⁷ Alongside climate change legislation, New Zealand's commitments under the Montreal Protocol on substances that deplete the ozone layer are contained in the Ozone Layer Protection Act and regulations. That Act establishes broad controls for ozone-depleting substances.

As discussed further in Chapter 9, the Climate Change Response (Zero Carbon) Amendment Act has recently been enacted.⁷⁸ This strengthens the Climate Change Response Act considerably beyond being a framework for emissions trading. It endows the Act with a stronger purpose, a legislated set of targets, a carbon budgeting framework, and roles for a new and independent Climate Change Commission. There are to be national level plans for emissions reductions and adaptation.

4.8 Marine legislation and mining

The RMA encompasses the management of most natural and physical resources within New Zealand's coastal marine area. Regional councils are largely responsible for this, alongside roles for the Minister of Conservation.⁷⁹ But fisheries are managed separately to the RMA, partly for historical reasons and partly in recognition that allocative issues, and proactive stock management of fish as a renewable resource, require more targeted attention than under a laissez-faire environmental effects regime.⁸⁰ The Fisheries Act – a sectoral framework – therefore governs fisheries management throughout New Zealand's territorial sea and EEZ. There are property rights – quota – by which rights to take fish are recognised.⁸¹ Alongside the Fisheries Act is the Māori Fisheries Act 2004, which puts into effect a settlement with the Crown concerning Māori fisheries rights.

More generally, the Fisheries Act encourages utilisation (different from the RMA's effects-based ethos), while ensuring sustainability.⁸² The Minister of Fisheries is responsible for taking sustainability measures and for approving fisheries plans under the Act. Sustainability measures can include setting a total allowable catch, and implementing measures to manage the impacts of

fishing activities on fish stocks and the broader marine environment. Fisheries plans are not mandatory. Regional councils under the RMA are not allowed to regulate coastal wild fisheries takes or quota, although they retain a role in managing aquaculture (more directly relevant to the use of coastal space).⁸³ There is a tricky interface between what can be done under the RMA and what can be done under fisheries legislation to protect the natural environment.⁸⁴ That said, the Court of Appeal in a recent judgement has confirmed that a regional council may include provisions in its plans to protect or control indigenous marine biodiversity provided it does not stray into managing resources for Fisheries Act purposes.⁸⁵

Also relevant to the environmental management of the coast and oceans are aspects of the Biosecurity Act, the Maritime Transport Act 1994, various conservation statutes (explored further below), and the Marine and Coastal Area (Takutai Moana) Act. The latter Act restored a right for Māori to claim customary rights and title over parts of the common marine and coastal area.⁸⁶ As to be expected, there is a complex relationship between these rights and the RMA and plans made under it, including provision for additional permission rights to be granted by rights holders and for customary activities to occur.⁸⁷ Regional councils must consider whether RMA plans need to be changed to recognise and provide for plans concerning customary rights. But subject to existing private rights and the establishment of Māori interests, the Act makes clear that no one can own the foreshore and seabed.⁸⁸ The Act also safeguards access rights for all New Zealanders as well as fishing and navigation rights.⁸⁹

The RMA is complemented by a similar, but much simpler, framework for managing natural resources in the EEZ and continental shelf.⁹⁰ Decision-making here is much more centralised, with roles performed by central government and the EPA through regulations, national policy, and the issuing of permits.⁹¹ The Act has a generally comparable purpose to the RMA based on sustainability, but a number of novel features (including a much more directive purpose relating to marine pollution, and a firm statutory precautionary principle).⁹² This framework has proved controversial, especially in the wake of high profile applications for seabed mining being declined.⁹³



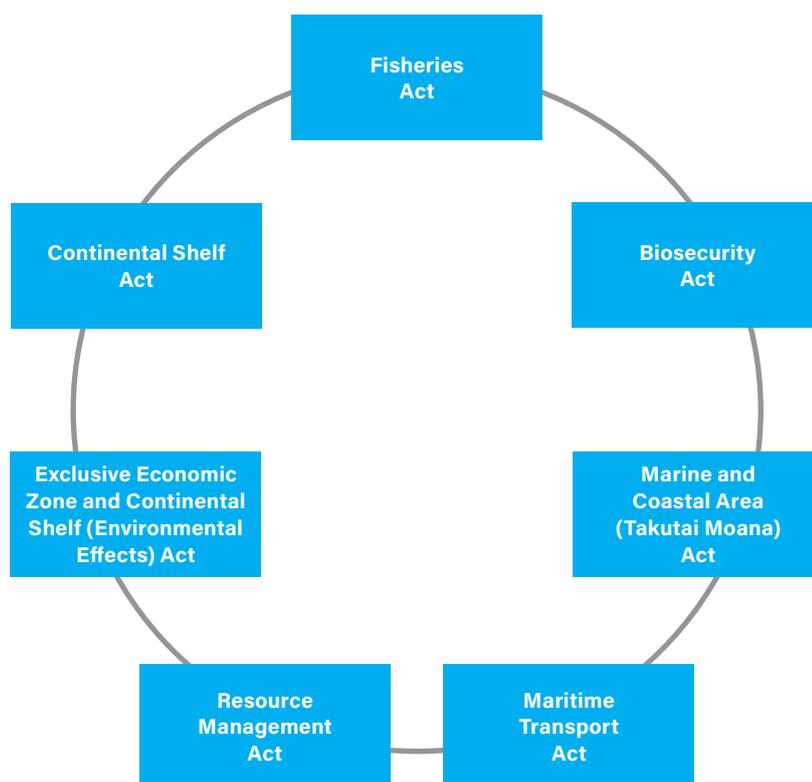


Figure 4.5: Legislation having a bearing on marine management in the current system

The Continental Shelf Act, which previously formed the much less robust framework under which some of the EEZ Act's decisions are now made,⁹⁴ remains in existence. However, it is now primarily a vehicle for making decisions about mining, and piggybacks on and extensively cross-references the more evolved framework of the Crown Minerals Act. That Act is about encouraging the exploitation of Crown-owned minerals for the benefit of New Zealanders,⁹⁵ and is primarily about the Crown allocating rights (often through competitive processes like block offers) to explore for and mine its property (as well as access arrangements so miners can get to them).⁹⁶ That includes oil and gas.

The minerals regime is highly discretionary (and involves the development of minerals programmes and the issuing of permits largely in isolation of other regimes like the RMA).⁹⁷ The current government has signalled that it will not be allowing new offshore oil and gas exploration (largely for climate change reasons).⁹⁸ Authorisation to explore for or mine minerals does not, however, remove the need to obtain other permissions, for example under the RMA or EEZ Act.⁹⁹ It is primarily an allocative and access framework, not an environmental one. To complement that separation, the RMA is explicit that sustainable management does not include the rate of depletion of mineral resources.

4.9 Conservation legislation

The current system's approach to conservation issues has been fairly fragmented, with a number of protective statutes addressing different conservation concerns.¹⁰⁰ Some are species-centric, as in the case of the Wildlife Act or Marine Mammals Protection Act, whilst others are

location-specific. Among those that are location-specific, the protective scope and rationale varies, from highly protective national parks to a wide variety of reserve categories.¹⁰¹ The RMA applies across the whole country, but conservation legislation provides an additional layer of restrictions and obligations in relation to particular areas or species.

The Conservation Act forms something of an overarching framework for conservation, and extensive cross-references are made to it in more targeted statutes. It empowers the Department of Conservation to protect natural and historic resources (both within protected areas and throughout New Zealand), and provides for the establishment and categorisation of various areas.¹⁰² These are managed through hierarchies of general policy instruments, management strategies, and conservation plans. There are many categories of protected areas that have different, albeit overlapping, purposes. For example, conservation parks are about protecting natural and historic resources and providing for recreation, while amenity areas are about protecting indigenous natural and historic resources and fostering their recreational attributes. Other categories include wilderness areas, ecological areas, sanctuary areas, watercourse areas, and wildlife management areas. Areas listed in Schedule 4 of the Act may not be mined. The Act also establishes various institutions.

Alongside the Conservation Act itself are more targeted frameworks. There is the National Parks Act, which aims to preserve in perpetuity designated national parks, which "contain scenery of such distinctive quality, ecological systems, or natural features so beautiful, unique, or scientifically important that their preservation is in the

national interest".¹⁰³ Status as a national park requires legislative change to remove.

There is also the Reserves Act, which provides a different kind of area-based protection for many different reasons (eg recreational use, wildlife, landscape amenity or scenic value; the preservation of representative natural ecosystems or landscapes and the survival of indigenous species; and the preservation of public access to the coastline, islands, lakeshore and riverbanks).¹⁰⁴ Reserves can be administered by many different bodies, depending on who is appointed or in whom the reserve land is vested (including the Department of Conservation, councils, or trustees). There are many different kinds: national, recreation, historic, scenic, nature, scientific, government purpose, and local purpose.¹⁰⁵ Reserves can be specified as wilderness areas under the Conservation Act, which has further implications for their management. Crown land can be set apart as a reserve for any public interest reason under the Land Act 1948.¹⁰⁶

Then there is the Wildlife Act, under which many wildlife species are absolutely protected and some partially protected. No one is allowed to kill or capture any bird or animal that is absolutely protected unless a permit is obtained.¹⁰⁷ Various types of areas can be recognised under the Act: wildlife refuges, sanctuaries (which may prohibit entry of the public), management reserves and districts.¹⁰⁸ The Act provides for management plans to be developed. Alongside these protections for fauna is an act focused on flora: the Native Plants Protection Act,¹⁰⁹ and wild animals are controlled (eg through hunting) under the Wild Animals Control Act 1977. Public access for recreation and enjoyment, one important (albeit not pre-eminent) consideration in conservation efforts, is facilitated through the Walking Access Act 2008. This seeks to open up access to the outdoors, including on private land.¹¹⁰

Some frameworks are focused more specifically on marine conservation. Notable are the Marine Reserves

Act and the Marine Mammals Protection Act. Some conservation statutes span both terrestrial and marine environments (eg the Wildlife Act). To add further complexity to the conservation regime, we have a range of bespoke statutes that set up distinct management and institutional frameworks for particular areas (eg for the Waitākere Ranges, Fiordland's marine area, and the Hauraki Gulf).¹¹¹ Some acts, like the Queen Elizabeth II National Trust Act (which provides for, among other things, the imposition of open space covenants on properties and an advocacy role for the Trust), are not limited to a particular place but instead targeted at the roles of a particular institution or a specific kind of tool.¹¹² Others, like the Crown Pastoral Land Act 1988, have important conservation elements, but are focused mainly on particular kinds of Crown land and tenure types that also require management for other reasons (eg as a working and productive landscape).¹¹³ The process of tenure review (by which different parts of leasehold land are reduced to full public and private ownership, potentially with covenants and easements applied) has proved controversial, and is being phased out.¹¹⁴

Various Treaty settlement statutes complete the picture, some of which can be described as being focused on conservation (eg the Te Urewera Act 2014, which provides legal personhood and a bespoke co-management framework for a place that used to be a national park).¹¹⁵ Similarly, legislation for Te Awa Tupua/Whanganui River and Waikato River can be said to contain important conservation components.¹¹⁶

Overall, the regime has become complex and fragmented. Generally speaking, links between conservation legislation and the RMA are not strong, and there are effectively two layers of plans that apply on conservation land. In practice, RMA plans tend to reflect that reality, by zoning areas for "conservation".



Figure 4.6: Legislation in the current system relating to "conservation"

4.10 Biosecurity

The Biosecurity Act is about dealing with unwanted organisms, for both economic and environmental reasons. It is a framework for border controls aimed at preventing unwanted organisms from entering the country, for establishing surveillance to detect organisms once they have arrived, and for the control and eradication of pests once they have become established.¹¹⁷ It applies out to the limits of the EEZ and therefore spans terrestrial and marine environments.

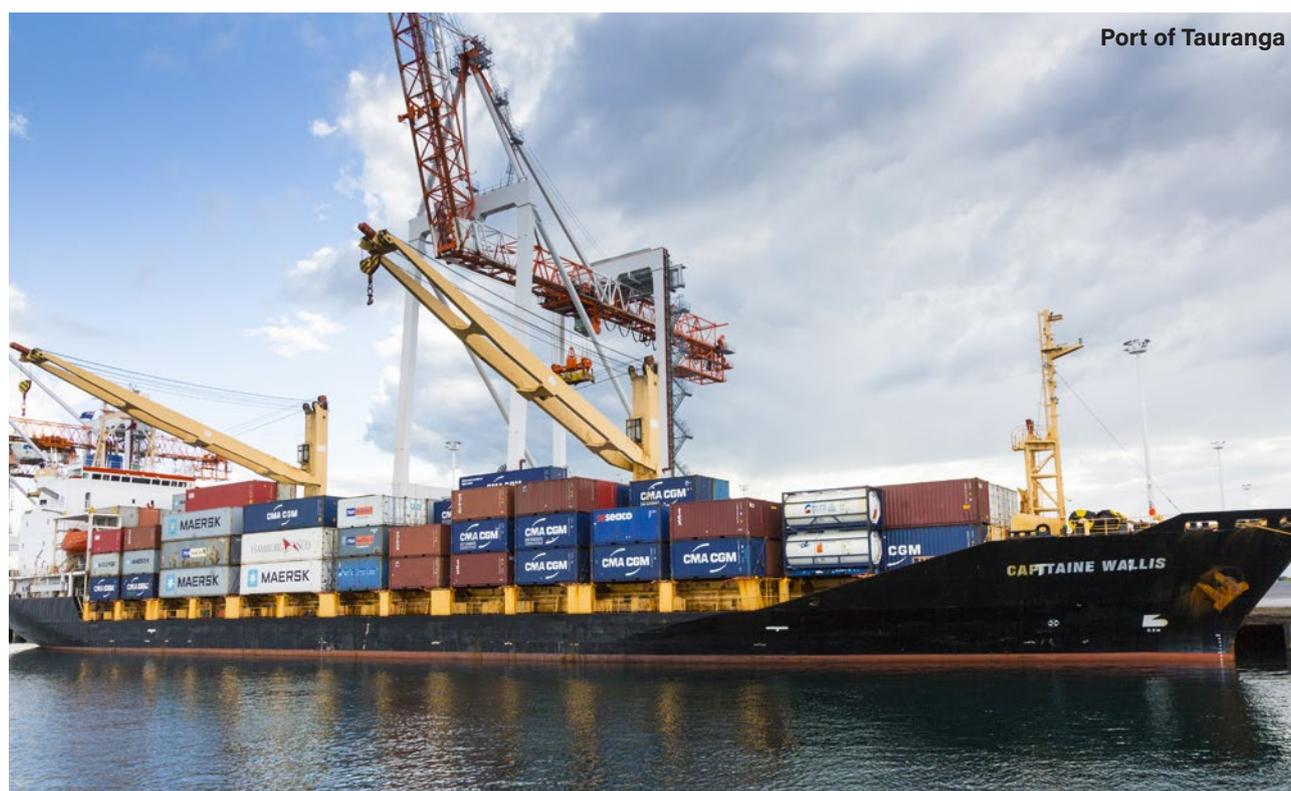
Functions under the Biosecurity Act are split between the Ministry for Primary Industries, other government departments, and regional councils. The Ministry for Primary Industries oversees the implementation of the legislation, undertakes border control, manages national surveillance programmes, carries out responses to incursions and manages national control programmes. Regional councils monitor established pests and prepare regional pest management plans¹¹⁸ and pathway management plans.¹¹⁹ These cannot be inconsistent with regional policy statements and regional plans made under the RMA. Regional councils are also required, under a National Pest Management Plan of Action, to provide leadership by promoting coordination of pest management between regions. A National Policy Direction for Pest Management¹²⁰ was developed in 2015 to improve the alignment and consistency of pest management plans and programmes across the country.

Significantly, the Act also provides the ability to compel private persons to act to address pests on their property and which emanate from their property,¹²¹ which is quite a different stance to a reactive framework like the RMA. Thus while biosecurity is also very much about sustainably

managing our natural and physical resources,¹²² the regime is one that *can* be much more directive (eg for pest incursions). This may be partly explained by the significant implications that pests have for the economy and the livelihoods of primary producers. There are fewer questions of values or trade-offs to be considered than under a framework like the RMA (eg we do not angst over whether we should eradicate possums or try to stop kauri dieback, as we do not receive any real benefit from allowing those things to happen). That said, the regime is still permissive, in that it does not compel authorities to require action. It frequently sees the enormous cost of measures balanced against their benefits, particularly for environmental pests and weeds.¹²³

4.11 Hazardous substances and new organisms

New Zealand has a more targeted framework for the management of hazardous substances and genetically modified organisms, under the Hazardous Substances and New Organisms Act. While there is some tension and overlap between what the RMA and this Act are concerned with, the latter controls some things that the RMA does not (eg the import, manufacture and use of manufactured chemicals that have hazardous properties – not just their release to a receiving environment).¹²⁴ Import or manufacture requires approval, which outlines controls relating to storage, identification, emergency management and disposal. The Act is also the place in which the control, testing and release of genetically modified organisms is regulated.¹²⁵ There is ongoing debate about whether this framework is too restrictive, in light of the potential benefits and risks for the economy and environment.¹²⁶



4.12 Waste management

Waste management (in the sense of the disposal of unwanted material)¹²⁷ is the concern of a number of statutes and institutions in the current system. The RMA, for example, deals with pollution by prohibiting discharges of contaminants (including solid or liquid waste onto or into land) unless expressly allowed.¹²⁸ Aspects of this “pollution” control are overseen by regional councils (eg in relation to risks to waterways).¹²⁹

However, we also have a more targeted framework for waste *minimisation*. The Waste Minimisation Act seeks to protect the environment from harm and to provide environmental, social, economic and cultural benefits. It is a more proactive regime than the RMA, in that it tries to prevent waste issues from arising in the first place, rather than just dealing with the effects of things that can become waste when discarded. To do that, it allows for harmful “priority products” to be declared, and mandatory product stewardship schemes created (cradle to the grave management of the product).¹³⁰ Businesses can also be accredited in relation to voluntary schemes.¹³¹

Some products can be banned altogether (we have recently seen a ban on single-use plastic bags).¹³² The framework also allows for the development of incentives for waste reduction. For example, the government has recently signalled the introduction of measures like a deposit refund scheme.¹³³ Funding is another component of the framework; a waste disposal levy is imposed on disposal facilities (and is set to expand).¹³⁴ Half of this is received by territorial authorities and the other half made available to projects aiming to reduce waste through the Waste Minimisation Fund. The Act also creates a Waste Advisory Board to advise the Minister.¹³⁵ The legislation specifically outlines its relationship with the Local Government Act, given that waste management needs to be planned for under the latter’s long-term and annual plans.

Alongside this broad statute is the narrower Litter Act, which deals with one particular problem of waste disposal: littering. Among other things, it provides for enforcement officers and litter wardens who may issue fines and abatement notices for littering offences, allows councils to require the removal of litter, and provides for the making of bylaws.¹³⁶

4.13 Other sectoral frameworks

We have mentioned the Crown Minerals Act, Land Transport Management Act and Fisheries Act above, but there are other sector-focused frameworks in the current system. For example, there is the Forests Act, which is concerned with imposing restrictions on felling, processing and exporting indigenous timber,¹³⁷ and with aspects of climate change.¹³⁸ While they stray beyond the resource management system, aspects of the Electricity Act and Gas Act are also relevant to the provision of particular types of publicly important goods that are largely privatised.

4.14 Cross-cutting frameworks

Most of the statutory frameworks described above could be described as “implementation” statutes – they target particular outcomes, domains or sectors and impose restrictions and obligations on government and people. However, we also have a large number of statutes that are concerned with establishing more cross-cutting or framework-type features – eg creating institutions with multiple roles, producing cross-cutting strategies, and outlining general processes that feed into other statutes. We have mentioned Treaty settlement legislation in the context of protected areas (eg the Te Urewera Act), but such statutes can also alter how more general acts like the RMA apply.¹³⁹ A good example is settlement legislation relating to the Waikato River, on which we shone a spotlight in the Phase 1 report.¹⁴⁰

We also have a dedicated Environmental Reporting Act, which requires the government (the Ministry for the Environment and Stats NZ) to issue information on the state of the environment at a national level, including a rolling cycle of reporting on particular domains (eg the atmosphere and climate, air, freshwater, land, and marine).¹⁴¹ The Environmental Protection Authority Act establishes the EPA as a Crown entity (with a fairly loose mandate), although it is given particular roles mainly under other acts (eg the RMA, EEZ Act, Climate Change Response Act and hazardous substances legislation).¹⁴² Some cross-cutting institutions (like the Environment Court, Department of Conservation and Conservation Authority) are established/continued under legislation where they have their primary or initial role (eg the RMA and Conservation Act),¹⁴³ not in bespoke legislation. However, both the Parliamentary Commissioner for the Environment and the Ministry for the Environment are established under a statute (the Environment Act) where that act of creation (and associated mandate) is the Act’s primary purpose.¹⁴⁴ It is fairly unusual for a ministry to be established formally in legislation.

The Parliamentary Commissioner is a particularly significant framework feature of the system. This officer of Parliament has a wide but firmly protective mandate, and is charged with conducting investigations and reviews on environmental issues.¹⁴⁵ It is strongly independent, and reports directly to Parliament. There is also a targeted statute for energy efficiency and conservation.¹⁴⁶ This establishes an arm’s-length Energy Efficiency and Conservation Authority, and provides for strategies to be created which must be had regard to when making plans under other statutory frameworks (including the RMA and Land Transport Management Act).¹⁴⁷

Finally, the system contains a number of non-statutory measures, including the management of various government funds (eg the Housing Infrastructure Fund, Freshwater Improvement Fund)¹⁴⁸ and initiatives (eg the One Billion Trees programme; a “wellbeing framework” for the government budgeting process; and cooperative arrangements with local government, Māori and others – like the Auckland Transport Alignment Project,

Auckland to Hamilton spatial planning exercise, and Sea Change initiative).¹⁴⁹

In Figure 4.7 below, we provide a highly summarised representation of the core of the current system, although it does not (and cannot) cover all the frameworks described. If we had to sum this up in one word, it would be “complex”. In fact, there is a huge number of other, more detailed aspects of the system that could be added to the above description. To do that would take hundreds, if not thousands, of pages. This overall complexity is an important thing to keep in mind for future changes, in

that no system-wide reform exercise could possibly result in something that is “simple”. Instead, we can strive to make the system no more complex than it needs to be to achieve the outcomes we want.

A feature of the current system is its considerable complexity. We have many separate statutes, planning process and institutions. While there may be scope for rationalisation and simplification, the system will to some extent always be complex, because it manages complex issues.



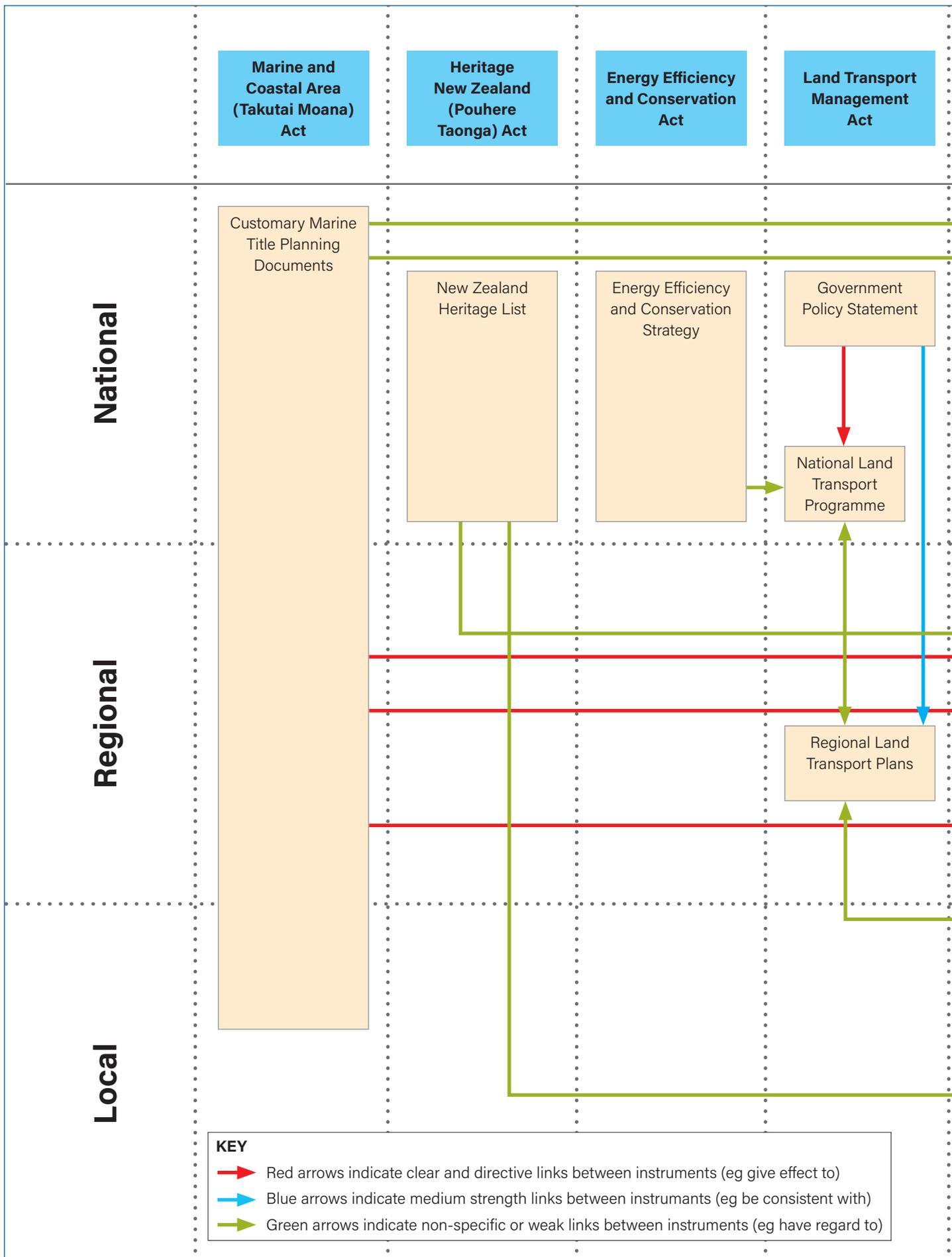
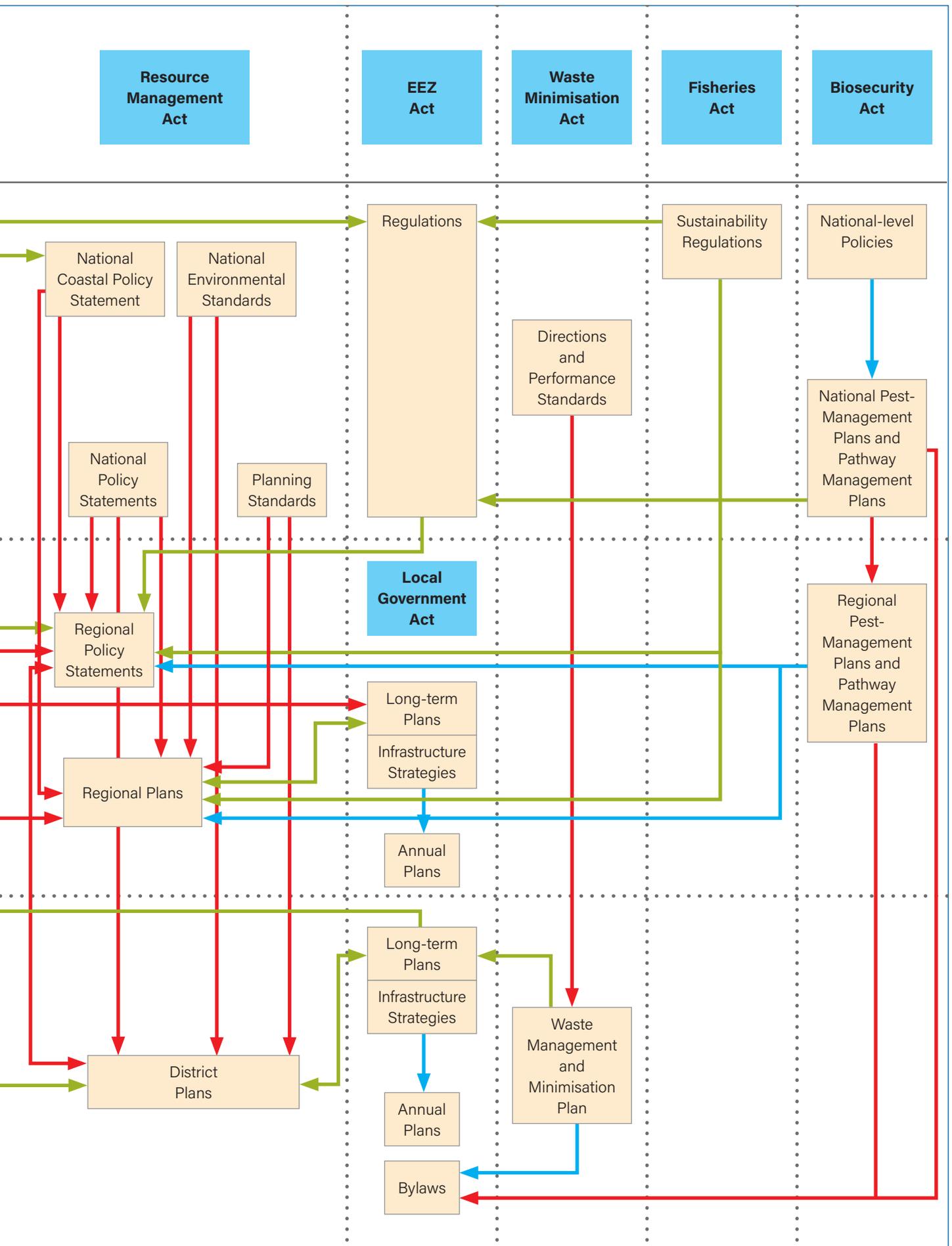


Figure 4.7: A simplified representation of the current system, based on key statutory frameworks



4.15 Problems with the current system

Having described the features of the current system, it is worth briefly thinking about what is wrong with it. Fixing problems is not the entire basis for a reformed system. It is equally about what as a nation we want the system to look like, the need to have laws that are fit for purpose for a future that will look very different,¹⁵⁰ and the desire to have a system that is sensitive to a uniquely New Zealand cultural and historical context.¹⁵¹ Central to that is the contested relationship between Māori and the Crown, which forms an important backdrop to reform.¹⁵² Yet problems – poor outcomes that are manifesting now – also need to be addressed.

We outlined a number of problems and challenges in the Phase 1 report.¹⁵³ We will not repeat those in full here. Suffice it to say that, despite some areas of improvement,¹⁵⁴ overall a concerning number of environmental indicators are poor and continuing to decline (notably in relation to biodiversity, freshwater, soil, coastal and marine areas, and climate change).¹⁵⁵ More recent results of national environmental reporting over the last year have told a similar story.¹⁵⁶ New Zealand is among the highest emitters of greenhouse gases per dollar of GDP;¹⁵⁷ nearly three-quarters of native forests have been cleared; nearly 4,000 native species are threatened or at risk of extinction; almost one-third of our waterways are not swimmable.¹⁵⁸ Environmental issues arise in both urban and rural areas, and substantial and largely unchecked expansion and intensification of agricultural activity has had a large impact on rural water quality in the last two decades.¹⁵⁹ Problems also exist with monitoring, compliance and enforcement across the board.¹⁶⁰

Urban-specific challenges are becoming increasingly prominent too (eg housing affordability, homelessness, urban congestion, resistance to densification, climate risks, and the need for major infrastructure upgrades for things like water supply and treatment).¹⁶¹ Significant challenges have been driven by population growth, especially in urban areas.¹⁶² Many have complained that the RMA is unresponsive to such growth, preventing expansion outwards (eg through urban limits) and through densification (because of nimbyism), while others have highlighted that, even where growth is allowed, infrastructure funding and financing arrangements can prevent residential land actually being developed in practice (a new subdivision is useless without running water). Some have expressed disappointment with economic and productivity outcomes more broadly, too.¹⁶³ The increasing scarcity of natural resources in parts of the country, including freshwater, has put pressure not just on environmental limits but also raised questions of fairness over resource allocation.¹⁶⁴

Across all of this, the system has become increasingly complex and fragmented, and inaccessible to users. That will be obvious from the description provided earlier in this chapter, but is equally true of specific statutes within it (like the RMA). Former Chief Justice Sian Elias put it well when she said that the RMA is “meant to engage communities, not alienate them” and bemoaned the

“impenetrability” of the Act.¹⁶⁵ Multiple carve-outs exist,¹⁶⁶ some frameworks pull in different directions,¹⁶⁷ and there has been a proliferation of alternative processes.¹⁶⁸ Māori voices are saying that they feel excluded or marginalised from decision-making processes and that the system does not reflect Treaty principles.¹⁶⁹ The government’s resource management system review panel has pointed out, for example, that “much remains to be done to ensure that the principle of partnership inherent in the Treaty moves towards an everyday reality.”¹⁷⁰ When considered against criteria, in our view all of these are significant deficiencies in the current system that need to be addressed.

We also identified in previous work that problems can be of a very different character. “Systemic” challenges, for example, exist because the system was not really designed to do some things it should have been required to do (eg resolve allocative questions, coordinate tools needed to support urban growth, or provide for environmental enhancement under the RMA).¹⁷¹ Part of these deficiencies may be down to the market-led ethos of the era in which much of the system was put in place.¹⁷² “Coherence” challenges are different: they exist because of ad hoc changes that have, over time, resulted in an excessively complicated and fragmented system (eg carve-outs for special housing areas and a proliferation of distinct planning processes under the RMA).¹⁷³

Some challenges are not problems per se, but reflect inherent tensions that will never be resolved or “fixed” to the satisfaction of all parties (eg the tension between participation, efficiency and timeliness of decision-making).¹⁷⁴ These can *become* problems, however, if the balance is skewed too far in one direction. In our view, for example, there is a need for more timely decision-making in RMA planning even if it means limiting opportunities for public involvement in some ways. But perhaps the most significant problem is that the system has failed to achieve what it was always clearly meant to: notably in its establishment and defence of many environmental bottom lines and associated limits on human activities. Some of these problems are nearing crisis point.¹⁷⁵

The current system has a great many problems and challenges. Some are gaps to be filled, some are tensions to be recalibrated, and others are broken promises to be fixed. There is also a great deal of complexity in the system.

We have broadly defined the resource management “system”, but it is not easy to define an associated set of peculiarly resource management “problems”. Problems often defy such neat categorisation because their causes (and their solutions) can come from multiple places. This is important, because it shapes our expectations of exactly what things reforms will be expected to “fix”.

It is often more appropriate to talk not about resource management problems, but rather the extent to which the resource management system – a particular collection of public interventions – can address more general problems. These problems can arise from, and can cut across, many other systems.¹⁷⁶ For example, the problem of obesity is not a “resource management” problem; it is a general problem

that may find solutions or contributions in many places (eg facilitating active transport choices through urban design, but equally through other solutions like a sugar tax or a response through the public health system).

Affordable housing is another example of this challenge. Often the blame for housing unaffordability is laid at the door of restrictive planning provisions produced under the RMA (including urban limits and nimby – “not in my backyard” – restrictions on density). That is certainly part of the picture,¹⁷⁷ but is by no means the whole story (other factors have played their part in the problem, and must also play their part in the solution).¹⁷⁸ Furthermore, housing affordability problems partly arising from one tool (eg an urban boundary) can be addressed or mitigated through the use of another tool (eg mandatory provision of smaller dwellings as part of new residential developments).¹⁷⁹ Urban land markets must operate effectively, but only within an envelope of environmental limits.¹⁸⁰

Overall, it might be more reasonable to expect the resource management system not to *solve* problems, but rather to *contribute as much as it can* (within its scope) to addressing them.¹⁸¹ This kind of wider thinking needs to temper our seemingly insatiable appetite for tinkering with statutory frameworks like the RMA in the future,¹⁸² or only blaming regulatory restrictions for poor outcomes. For example, some have suggested joining immigration and spatial planning portfolios to make sure related things are joined up in decision-making.¹⁸³

In some cases, however, the resource management system may be more obviously responsible for providing solutions to problems, either because the system itself has caused a problem or because the only real means of fixing a problem is through the direct management of natural and physical resources. In such cases it is more reasonable to talk about a specifically “resource management” or “environmental” problem (eg the decline in indigenous biodiversity, the poor quality of freshwater, or a failure to engage Māori in RMA processes).

These distinctions are important when it comes to measuring the success of a future system (see Chapter 13). For example, a system that does not make housing “affordable” – or even one that has a some negative impact on affordability (eg an urban limit or density restrictions) – is not necessarily problematic in itself.¹⁸⁴ Restrictions can exist for very good, long-term reasons not necessarily reflected in market forces (eg protecting productive soils for food security).¹⁸⁵ Solutions or contributions may instead be required from elsewhere. However, a resource management system that does not protect a clean freshwater resource for drinking has categorically failed, because there are no other systems that can do so effectively.

Just as it is impossible to speak of distinctly “resource management outcomes”, it is sometimes hard to speak of a “resource management problem” as distinct from other problems. The system is often expected to contribute to solving problems of a much more general nature, which have multiple causes and can only be addressed through multiple systems.

4.16 Future challenges

In the Phase 1 report, we highlighted that the future will be very different to the present.¹⁸⁶ A reformed system will need to pre-empt and address future challenges as much as it will need to fix current problems. In particular, the system will need to contemplate:

- Human population change, and its implications for urban growth, food and water security, and environmental pressures
- Changes in primary production, including impacts on the environment
- Climate change, including its implications for land use change and funding of new and existing infrastructure
- Other forms of environmental change, which may be unpredictable
- Technological change, including its implications for environmental, social and economic disruption
- The need for significant infrastructure development, replacement, relocation, and renewal
- Global political and economic dynamics
- Increasing political and economic expectations of Māori¹⁸⁷

A future system will need to pre-empt and address issues, and pursue opportunities, in a future that will be very different from the present.

4.17 Reform measures underway

Problems with the current system have not simply been ignored by the government. Some targeted reforms have been completed over the years, and now find themselves part of the fabric of the existing system. For some of these (such as the Auckland Unitary Plan), only time will tell whether they have been effective in addressing particular problems (eg housing affordability). Targeted reforms have also caused or exacerbated some problems, notably contributing to complexity and incoherence in the wider system.¹⁸⁸

Other reform measures are still underway and at various stages (see Figure 4.8 below). Wider system reform needs to be sensitive to all of this. For some measures (eg climate change legislation in the form of a Zero Carbon Act), it may be a matter of locating the substance of reforms within a wider narrative of a system review, and clarifying how it would fit in. We want to keep the good things. For others (eg an urban development authority) we consider it may be a matter of amending or reshaping proposals more fundamentally.

One measure that deserves particular emphasis is the government’s recent creation of an independent review panel on fundamental system reform, which has a broad

terms of reference to investigate the future of the resource management system.¹⁸⁹ However, the focus of the terms of reference as it stands is on the RMA and its connections to other legislation, rather than the broader system defined in this project.¹⁹⁰ Our work is intended to feed into that process to the extent it falls within its scope.

There is an active reform programme being pursued by the current government. Wider system reform will need to be cognisant of such measures. Of particular importance is the government's establishment of an independent review group to rethink the resource management system as a whole.

Kāinga Ora – Homes and Communities (an urban development authority proposal) ¹⁹¹
Three waters review (not only how we regulate the supply of drinking water and the disposal of stormwater and wastewater, but also how we deliver those services) ¹⁹²
A short-term amendment bill to the RMA (focusing on a bespoke freshwater planning process, greater enforcement role for the EPA, and the repeal of several previous RMA amendments) ¹⁹³
A review of the Building Act
A review of the state sector, and a new Public Services Act (among other things, to encourage cooperative working arrangements within the public service) ¹⁹⁴
The Essential Freshwater Programme (including a proposal for NESs for Freshwater and for Ecological Flows, and a new NPS for Freshwater Management, under the RMA) ¹⁹⁵
A proposed NES for Marine Aquaculture
A review of the NES on Plantation Forestry under the RMA ¹⁹⁶
The development of an NPS for Urban Development (to replace and expand on the NPS on Urban Development Capacity) ¹⁹⁷
Development of a (non-statutory) forestry strategy, and rollout of the One Billion Trees programme ¹⁹⁸
Development of an NPS concerned with the protection of highly productive land ¹⁹⁹
Implementation of the Climate Change Response (Zero Carbon) Amendment Act 2019, ²⁰⁰ including the development of subordinate instruments under it (eg adaptation and emissions reduction plan)
An amendment bill to the Climate Change Response Act, concerning (among other things) a backstop provision for the entry of biological emissions into the emissions trading scheme ²⁰¹
A refresh of New Zealand's Biodiversity Strategy ²⁰²
The development of an NPS on indigenous biodiversity under the RMA (following a report and draft NPS produced by the Biodiversity Collaborative Group) ²⁰³
Spatial planning work under the urban growth agenda ²⁰⁴
Work exploring New Zealand's heritage protection system
A Productivity Commission inquiry into local government funding ²⁰⁵
Review of the biosecurity framework
Ongoing work to consider or implement the environmental aspects of the Tax Working Group's recommendations ²⁰⁶

Figure 4.8: Resource management reform measures and instruments currently being pursued

4.18 Concluding comments

In this chapter we have described the core features of the current resource management system, and considered the nature of problems and future challenges to be addressed. The government is engaged in an active programme of more targeted reforms that, when combined, will have significant implications for the system as a whole. It is important that those measures are aligned within a more comprehensive rethink of a future system, which is now on

the cards following the establishment of an independent review panel.

In the following chapter, we begin a description of a preferred model for change, which can be compared with or contrasted to the current system described in this chapter. Most of the government's existing reform programmes will be incorporated in some way into this model, although – as will become apparent – not always in the form currently envisaged.



ENDNOTES

- 1 For example, in the Phase 1 work we looked at different statutes' approaches to public participation, and provided a brief history of the current system. See G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019), ch 3.2; G Severinsen and R Peart *Reform of the resource management system: The next generation – Working paper 2* (EDS, 2018), appendix 3.
- 2 This will not be exhaustive as a problem definition, and there would be merit in future work unpicking this further. We will be focusing on big picture problems (eg a failure to achieve environmental bottom lines) that need to be addressed in changes to resource management frameworks.
- 3 Again, this is not to say that we have approached our analysis by looking at the statutes we have and how we could change them. Our thinking has been more systemic and cross-cutting than that.
- 4 D Young *Values as law: The history and efficacy of the Resource Management Act* (Victoria University of Wellington Institute of Policy Studies, 2001); G Palmer "The Resource Management Act – how we got it and what changes are being made to it" (2014) RM Theory & Practice 22. See also the historical account of Catherine Knight in *Beyond Manapouri: 50 years of environmental politics in New Zealand* (Canterbury University Press, 2018).
- 5 Which was a deliberate choice by the framers of such statutes.
- 6 Some sectors are managed within broad institutionally focused legislation (eg water services under the Local Government Act), while some narrower institutional arrangements are subsumed within sectoral legislation.
- 7 See Chapter 7 on the reasons we may wish to integrate allocative frameworks with protective frameworks or keep them separate.
- 8 See G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 136; *Attorney-General v The Trustees of the Motiti Rohe Moana Trust & Ors* [2019] NZCA 532.
- 9 There are numerous other examples, including the boundaries between the Wild Animal Control Act, Biosecurity Act, Local Government Act, and RMA in the context of biodiversity (see *Report of the Biodiversity Collaborative Group* (2018)).
- 10 G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 164-173.
- 11 *Ibid* at 174-193.
- 12 See *ibid*, Fig 14.3 at 280-281 for brief descriptions of relationships between instruments, and Fig 14.5 (*ibid* at 285) for a description of relationships between permits.
- 13 *Ibid* at 277.
- 14 *Ibid* at 280-281 (Fig 14.3).
- 15 *Ibid* at 39-40.
- 16 Resource Management Act 1991, s 5.
- 17 See G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 97; *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593. See also *Report of the Minister for the Environment's Resource Management Act 1991 Principles Technical Advisory Group* (2012).
- 18 Especially in the context of urban planning and allocation of resources. Triggers for urban planning are weak in Part 2 of the Act, relying on things like the efficient use of land as a resource, the improvement of a widely defined "environment", and amenity effects.
- 19 Sections 9, 11, 12, 13, 14, 15, 15A and 15B of the RMA impose restrictions on the use of land, subdivision, the use of the coastal marine area, the use of lake and river beds, the use of water, and the discharge of contaminants into the environment.
- 20 In accordance with their property rights, of course.
- 21 Section 9.
- 22 See section 7 of the Act, in relation to environmental enhancement.
- 23 For example, there are issues with imposing green taxes, which require clear statutory authorisation: see G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019), ch 13.
- 24 See New Zealand Council for Infrastructure Development (now Infrastructure New Zealand) *Integrated governance, planning and delivery: A proposal for local government and planning law reform in New Zealand* (2015). See also G Severinsen "Glass half empty or glass half full? Adverse effects, positive effects and conditions under the Resource Management Act 1991 and Resource Legislation Amendment Bill 2015" (2016) 11(9) BRMB 110. For example, the RMA requires consent conditions to be linked to adverse effects (s 108AA), as does the EEZ Act (s 63(1)).
- 25 See *Report of the Environmental Defence Society Technical Advisory Group on the review of sections 6 and 7 of the Resource Management Act 1991* (April 2012); Ministry for the Environment *Building competitive cities: reform of the urban and infrastructure planning system* (2010).
- 26 See New Zealand Productivity Commission *Better urban planning* (2017); Ministry for the Environment *Building competitive cities: reform of the urban and infrastructure planning system* (2010).
- 27 See <www.mfe.govt.nz/rma/rma-legislative-tools>
- 28 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593.
- 29 Resource Management Act 1991, s 30. Regional councils also regulate land use for particular reasons.
- 30 Resource Management Act 1991, s 31.
- 31 Note, however, the proposal to replace this process with a more directive one related only to freshwater: see Resource Management Amendment Bill 2019.
- 32 Local Government (Auckland Transitional Provisions) Act 2010; Canterbury Earthquake (Christchurch Replacement District Plan) Order 2014.
- 33 Resource Management Act 1991, ss 58B-58J.
- 34 The Act classifies activities into six primary categories: permitted, controlled, restricted discretionary, discretionary, non-complying and prohibited.
- 35 G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019), ch 10.
- 36 For example, councils are heavily restricted from considering impacts of activities on climate change. Controlled or restricted discretionary activity status can also constrain the matters that can be considered by a consent authority.
- 37 Resource Management Act 1991, pt 6AA.
- 38 *Ibid*, pt 7 and 7A; s 31(1)(fa).
- 39 *Fleetwing Farms Limited v Marlborough District Council* [1997] 3 NZLR 257 (CA).
- 40 Often for significant infrastructure having public importance (eg networks like transmission lines, prisons, schools etc).
- 41 Resource Management Act 1991, pt 8.
- 42 *Ibid*, pt 9.
- 43 *Ibid*, pt 12.
- 44 For example, that established between Taupō District Council and the Tūwharetoa Māori Trust Board on 17 January 2009. This agreement provides for publicly notified resource consents and private plan change applications, in relation to multiply owned Māori land within the rohe of Ngāti Tūwharetoa and within the Taupō district, to be decided by a panel of decision makers comprising two commissioners chosen by each party and a jointly appointed fifth commissioner and chairman.
- 45 See G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019), ch 9.
- 46 Resource Management Amendment Bill 2019.
- 47 Local Government Act 2002, s 10.
- 48 *Ibid*, ss 93-97.
- 49 *Ibid*, pt 7.
- 50 A previous obligation to have particular regard to core services (eg network infrastructure) has recently been repealed, reflecting a return to the idea of local government being about broader wellbeing, not just about infrastructure provision.
- 51 See <www.dia.govt.nz/Three-Waters-Review>
- 52 Local Government Act 2002, pt 5.
- 53 See Wellington Water "Our story" <www.wellingtonwater.co.nz>
- 54 For example, the Smart Growth initiative in the Bay of Plenty and Urban Development Strategy in greater Christchurch: Greater Christchurch Partnership "Urban Development Strategy" <www.greaterchristchurch.org.nz>; SmartGrowth <www.smartgrowth.org.nz>
- 55 For example, the Christchurch Urban Development Strategy (including an urban boundary) needed to be translated into the Canterbury Regional Policy Statement through extensive litigation under the RMA.
- 56 Land Transport Management Act 2003, s 95(1)(c).
- 57 *Ibid*, s 10.
- 58 *Ibid*, ss 66-91.
- 59 *Ibid*, s 105.
- 60 *Ibid*, s 13.
- 61 *Ibid*, ss 13-18H. Regional councils also adopt regional public transport plans: see *ibid*, ss 117-129.
- 62 *Ibid*, s 14(c)(iii).
- 63 See Soil Conservation and Rivers Control Act 1941; Land Drainage Act 1908.
- 64 See <www.hud.govt.nz/urban-development/kainga-ora-homes-and-communities/related-documents/>; Kāinga Ora–Homes and Communities Act 2019.
- 65 Local Government (Auckland Transitional Provisions) Act 2010; Local Government (Auckland Council) Act 2009.
- 66 Building Act 2004, s 3.
- 67 G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 151.
- 68 Resource Management Act 1991, pt 8.
- 69 *Ibid*, ss 72-77.

- 70 Heritage New Zealand Pouhere Taonga Act 2014, ss 42-64.
- 71 Climate Change Response Act 2002, s 3.
- 72 On the history and challenges of the emissions trading scheme, see C Leining and S Kerr *Lessons learned from the New Zealand emissions trading scheme* (Motu working paper 16-06, 2016).
- 73 See <www.mfe.govt.nz/climate-change/new-zealand-emissions-trading-scheme/reviews-of-nz-ets>
- 74 Climate Change Response (Emissions Trading Reform) Amendment Bill 2019.
- 75 Resource Management Act 1991, ss 70A, 70B, 104E, 104F.
- 76 Resource Management Act 1991, s 7(i).
- 77 See <www.environmentguide.org.nz/issues/climate-change/domestic-law/resource-management-act/>
- 78 Climate Change Response (Zero Carbon) Amendment Act 2019.
- 79 For example, in the production of the NZCPS and in the signing off of regional coastal plans.
- 80 See G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 150, where we noted that protections for fish (to be able to continue to consume them) are imposed for quite different reasons to the protection of, say, kiwi.
- 81 See R Peart *Voices from the Sea: Managing New Zealand's fisheries* (EDS, 2018).
- 82 Fisheries Act 1996, s 8.
- 83 Resource Management Act 1991, s 30(2).
- 84 See G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 136.
- 85 *Attorney-General v The Trustees of the Motiti Rohe Moana Trust & Ors* [2019] NZCA 532. The Court also identified five indicators (necessity, type, scope, scale and location) as guidance as to whether any particular control was lawful. See R Peart, A Greenaway and L Taylor "Enabling marine ecosystem-based management: Is New Zealand's legal framework up to the task?" (2020) 23 *New Zealand Journal of Environmental Law* (forthcoming at the time of writing).
- 86 Marine and Coastal Area (Takutai Moana) Act 2011, pt 3.
- 87 *Ibid*, pt 3.
- 88 *Ibid*, s 11.
- 89 *Ibid*, ss 26-28.
- 90 Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012.
- 91 *Ibid*, pts 3, 3A.
- 92 Partly to implement strong international agreements on dumping under the London Protocol.
- 93 See generally C Iorns Magallanes and G Severinsen "Diving in the deep end: Precaution and seabed mining in New Zealand's exclusive economic zone" (2015) 13 *NZJPI* 201.
- 94 Much was also contained within regulations made under the Maritime Transport Act 1994, in recognising that many environmental risks and human activities have traditionally been associated with ships.
- 95 Crown Minerals Act 1991, s 1A.
- 96 Crown minerals will often exist under private land.
- 97 Crown Minerals Act 1991, pts 1A, 1B.
- 98 See Crown Minerals Amendment Act 2019; <www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=12030956>
- 99 Access arrangements include access to conservation land, and relevant decision-making criteria are in the Crown Minerals Act rather than the Conservation Act (unlike all other activities on conservation land). See Crown Minerals Act 1991, s 61.
- 100 We note that "conservation" itself is a fuzzy term, and is often used to denote more active management and stricter protection of species, areas and historic or built features from weaker "sustainability", which also applies to activities that can threaten species, heritage and protected areas. But other "forms" of conservation exist: for example, soil "conservation" is about making sure that soils do not disappear through erosion or degradation, while resource "conservation" more generally is about making sure we do not "waste" natural resources.
- 101 Some are contained within frameworks that are not about conservation in the same sense. For example, there is provision in the Soil Conservation and Rivers Control Act for soil conservation reserves, and the ability to acquire land to address erosion issues.
- 102 Conservation Act 1987, pt 3.
- 103 See <www.doc.govt.nz/about-us/our-role/legislation/national-parks-act/>
- 104 Reserves Act 1977, pt 3.
- 105 *Ibid*, pt 3.
- 106 Land Act 1948, s 167.
- 107 Wildlife Act 1953, pt 1.
- 108 *Ibid*, ss 9-14AA.
- 109 "An Act to provide for the protection of native plants" under which the taking of protected plants is restricted.
- 110 See s 3.
- 111 Waitākere Ranges Heritage Area Act 2008; Fiordland (Te Moana o Atawhenua) Marine Management Act 2005; Hauraki Gulf Marine Park Act 2000.
- 112 The Trust has functions to advise the Minister of Conservation on the protection of open space, to formulate policies, undertake reviews, classify any potential reserves or recreation areas, promote interest in the establishment of other areas and encourage coordination of activities among government departments, local bodies and other persons, and enter covenants to protect land.
- 113 Although ecological concerns are, by law, pre-eminent: for example, see Crown Pastoral Land Act 1988, s 24.
- 114 *Ibid*, pt 2; <www.beehive.govt.nz/release/government-end-tenure-review>
- 115 See G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 60.
- 116 *Ibid*.
- 117 See <www.environmentguide.org.nz>
- 118 Biosecurity Act 1993, ss 68-78.
- 119 *Ibid*, ss 88-98.
- 120 <www.mpi.govt.nz/dmsdocument/9464-national-policy-direction-for-pest-management-2015>; Biosecurity Act 1993, ss 56-58.
- 121 Biosecurity Act 1993, s 73(5).
- 122 *Ibid*, s 54.
- 123 For example, the Auckland Council decided against taking measures to control cats in areas containing threatened species vulnerable to cats.
- 124 Hazardous Substances and New Organisms Act 1996, pt 5.
- 125 *Ibid*, ss 34-45B.
- 126 See, for example, New Zealand National Party *Our environment: Discussion document* (2019) at 23-24.
- 127 As opposed to "wasting" a valuable resource or inefficient use.
- 128 Resource Management Act 1991, pt 3.
- 129 *Ibid*, s 30.
- 130 Waste Minimisation Act 2008, pt 2.
- 131 *Ibid*, s 11.
- 132 See <www.mfe.govt.nz/waste/single-use-plastic-shopping-bags-banned-new-zealand>
- 133 See <www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=12270651>
- 134 Waste Minimisation Act 2008, pt 3; <www.mfe.govt.nz/more/funding/waste-minimisation-fund/about-waste-minimisation-fund>
- 135 Waste Minimisation Act 2008, pt 7.
- 136 Litter Act 1979, ss 5-8, 9-12.
- 137 Forests Act 1949, pt 3A.
- 138 *Ibid*, pt 3B.
- 139 See Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010.
- 140 G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 189.
- 141 Environmental Reporting Act 2015, pt 2.
- 142 For example, see Resource Management Act 1991, s 42C.
- 143 Conservation Act 1987, s 5; RMA, pt 11.
- 144 Environment Act 1986, long title.
- 145 *Ibid*, s 16.
- 146 Energy Efficiency and Conservation Act 2000.
- 147 *Ibid*, s 8.
- 148 G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 256.
- 149 See *ibid*, at 187.
- 150 See *ibid*, ch 3.
- 151 *Ibid*, from 38; Waitangi Tribunal *Wai 1040 Claim; Ko Aotearoa Tenei* (Wai 262 Waitangi Tribunal Report, 2011); Waitangi Tribunal *The stage 2 report on the national freshwater and geothermal resources claims* (Wai 2358 report, 2019).
- 152 See G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 38.
- 153 See *ibid*, ch 3.3.
- 154 For example, air quality and some aspects of freshwater – see *ibid* at 41.
- 155 MA Brown and others *Vanishing nature: Facing New Zealand's biodiversity crisis* (EDS, 2015); MA Brown and others *Evaluating the environmental outcomes of the RMA* (EDS, 2016).
- 156 Ministry for the Environment and Statistics New Zealand *New Zealand's environmental reporting series: Environment Aotearoa 2019* (2019).
- 157 Tax Working Group *Future of tax: Final report volume 1 - recommendations* (2019).
- 158 *Ibid*.
- 159 See Resource Management Review Panel *Transforming the resource management system: Opportunities for change – Issues and options paper* (2019) at 12, citing Ministry for the Environment and Stats NZ *Our Land* (2018).
- 160 See MA Brown *Last line of defence: Compliance, monitoring and enforcement of New Zealand's environmental law* (EDS, 2017); MA Brown *Independent analysis*

of the 2017/2018 compliance monitoring and enforcement metrics for the regional sector (The Catalyst Group, 2018).

- 161 Beca *Cost estimates for upgrading water treatment plants to meet potential changes to the New Zealand drinking water standards* (2018); GHD and Boffa Miskell *Cost estimates for upgrading wastewater treatment plants to meet objectives of the NPS Freshwater final report* (September 2018).
- 162 Resource Management Review Panel *Transforming the resource management system: Opportunities for change – Issues and options paper* (2019) at 11.
- 163 Infrastructure New Zealand *Building regions: A vision for local government, planning law and funding reform* (2019) from 9.
- 164 See New Zealand Government *Essential freshwater: Healthy water, fairly allocated* (2018) at 14.
- 165 S Elias *Righting environmental justice* (address to the Resource Management Law Association, 25 July 2013) at 2. Compare TM Lenihan and J Bartley *Review of Māori planning futures: Review of the Productivity Commission's "Better urban planning" draft report* (Nga Aho and Papa Pounamu, 2016) at 36.
- 166 For example, in the use of special housing areas under bespoke legislation (altering the application of Part 2 of the RMA), and in the removal of local government consideration of climate change mitigation.
- 167 For example, the idea of a development-oriented Government Policy Statement on Housing and Urban Development could jar with protective instruments under the RMA.
- 168 For example, in the streamlined and collaborative processes available as alternatives to the normal planning process.
- 169 See R Joseph "The Treaty, tikanga Māori, ecosystem-based management, the RMA and power sharing for environmental integrity in Aotearoa New Zealand – possible ways forward" in G Severinsen and R Peart *Reform of the resource management system: The next generation – Working paper 3* (EDS, 2018).
- 170 Resource Management Review Panel *Transforming the resource management system: Opportunities for change – Issues and options paper* (2019) at 4.
- 171 For example, there is very little guidance in the Act about how to allocate resources like freshwater.
- 172 See G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019), ch 3.2.
- 173 See S Berry and H Andrews "The final straw for the RMA? Some shortcomings of the Resource Legislation Amendment Bill 2015" (2016) *Resource Management Journal 1*; S Berry S, H Andrews and J Vella "The death of the RMA by a thousand cuts: The next two incisions" (2017) *Resource Management Journal 3*.
- 174 See G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019), ch 10.
- 175 See Ministry for the Environment and Statistics New Zealand *New Zealand's environmental reporting series: Environment Aotearoa 2019* (2019).
- 176 Or that arise outside any formal system; for instance, where human behaviour or natural systems create outcomes that are undesirable and require intervention.
- 177 See New Zealand Productivity Commission *Better urban planning* (2017); Ministry for the Environment *Building competitive cities: Reform of the urban and infrastructure planning system* (2010).
- 178 See T Hazledine "Economics and the resource management system" in G Severinsen and R Peart *Reform of the resource management system: The next generation – Working paper 3* (EDS, 2018) at 158.
- 179 Which the market might not ordinarily be incentivised to provide.
- 180 Compare Resource Management Review Panel *Transforming the resource management system: Opportunities for change – Issues and options paper* (2019) at 6.
- 181 Again, "solving" problems here means reflecting a better *balance* of outcomes, not pleasing everyone (or solving one problem while creating a worse one). Conceivably, that may mean in some cases that housing would be less affordable than it would if the resource management system did not exist.
- 182 See G Palmer "Law-making in New Zealand: Is there a better way?" (2014) 22 *Wai L Rev*.
- 183 This has occurred in some overseas jurisdictions.
- 184 It may be beyond its capacity to fix, or it may be required to pursue other outcomes more vigorously and leave it to other systems to mitigate impacts.
- 185 Reflected in the proposed NPS on Highly Productive Land.
- 186 See G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019), ch 3.5.
- 187 A specifically Māori economy is thought to currently be around \$50 billion. See Chapman Tripp *Te Ao Māori: Trends and insights* (June 2017) <www.chapmantripp.com>; Treasury *He tirohanga mokopuna: 2016 statement in the long-term fiscal position, New Zealand* (2016).
- 188 See G Palmer "Law-making in New Zealand: Is there a better way?" (2014) 22 *Wai L Rev*; S Berry and H Andrews "The final straw for the RMA? Some shortcomings of the Resource Legislation Amendment Bill 2015" (2016) *Resource Management Journal 1*; S Berry S, H Andrews and J Vella "The death of the RMA by a thousand cuts: The next two incisions" (2017) *Resource Management Journal 3*.
- 189 See <www.mfe.govt.nz/rma/improving-our-resource-management-system>
- 190 The group has released an Issues and Options paper: Resource Management Review Panel *Transforming the resource management system: Opportunities for change – issues and options paper* (2019).
- 191 The entity itself has been established under the Kāinga Ora – Homes and Communities Act 2019, and further legislation is anticipated later in the year to give development powers to it.
- 192 See <www.dia.govt.nz/Three-Waters-Review>
- 193 Resource Management Amendment Bill 2019.
- 194 <<https://ssc.govt.nz/resources/changes-state-sector-act-1988/>>
- 195 New Zealand Government *Essential freshwater: Healthy water, fairly allocated* (2018); New Zealand Government *Action for healthy waterways* (2019).
- 196 <www.mfe.govt.nz/land/land-acts-and-regulations/national-environmental-standards-plantation-forestry/about-standards>
- 197 New Zealand Government *Planning for successful cities: A discussion document on a proposed National Policy Statement on Urban Development* (2019).
- 198 <www.mpi.govt.nz/funding-and-programmes/forestry/one-billion-trees-programme/about-the-one-billion-trees-programme>
- 199 New Zealand government *Valuing highly productive land: A discussion document on a proposed national policy statement for highly productive land* (2019).
- 200 Climate Change Response (Zero Carbon) Amendment Act 2019.
- 201 Climate Change Response (Emissions Trading Reform) Amendment Bill 2019.
- 202 Department of Conservation *Te Koiroa o Te Koiroa: Our shared vision for living with nature* (2019).
- 203 A discussion document on a proposed NPS has, at the time of writing, recently been released. See <www.mfe.govt.nz/more/biodiversity/upcoming-government-biodiversity-initiatives/developing-national-policy-statement>
- 204 <www.hud.govt.nz/urban-development/urban-growth-agenda/>
- 205 <www.productivity.govt.nz/inquiries/local-government-funding-and-financing/>. At the time of writing, the Commission has released a draft report and is in the process of completing a final report.
- 206 <www.beehive.govt.nz/release/govt-responds-tax-working-group-report>

5. THE FUTURE OF THE RMA: LEGISLATIVE DESIGN AND PART 2

5.1 Introduction

In the chapters that follow, we explore the statutory frameworks that we see forming the core of a future system. It makes sense to start with the RMA. This Act sits at the heart of New Zealand's current resource management system, and arose from a complex and shifting set of political and social priorities in the late 1980s.¹ The Act's main point is to protect the environment from human activities (although it is, of course, not the only framework that does this, and some may disagree).² It seeks a balance between a range of outcomes, which are enshrined within a carefully defined purpose statement of sustainable management. There have been complaints that it is primarily a regulatory, reactive, and effects-based framework, as opposed to being strategic, proactive and outcome-focused.³ In other words, to some, it lets things happen if they're not too bad, but it doesn't make things better. In fact, it has clearly allowed many things to get *worse*.

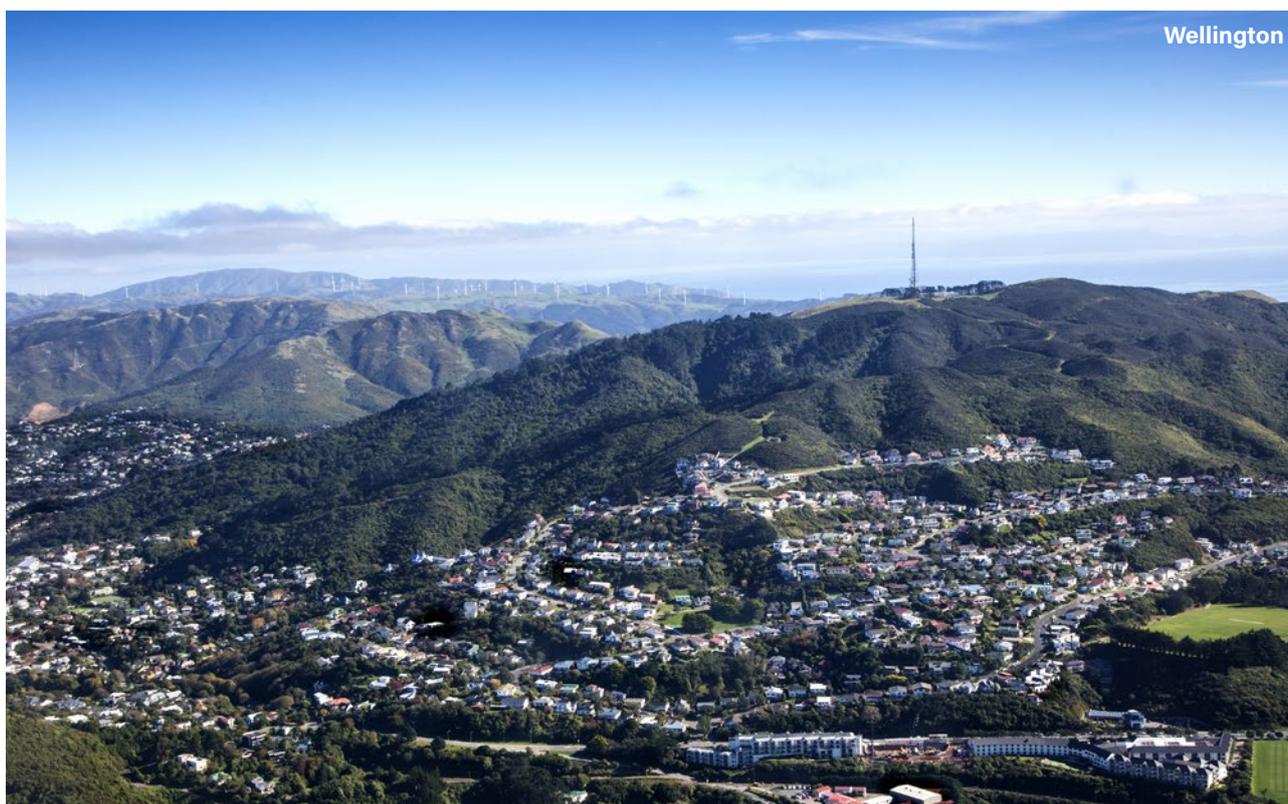
There are considerable strengths in the RMA. The Act is not primarily about regulating specific sectors or spaces,⁴ and (at least in theory) it provides restrictions based on the effects that activities have rather than on arbitrary distinctions between activities themselves or between private and public activities.⁵ It is also integrative, in that it brings together a wide range of "environmental" domains into one decision-making framework. Its purpose and principles (in Part 2 of the Act) are important, but its actual application – what it does – is constrained by the

activities that are restricted (in Part 3). These relate to land use, subdivision, noise, discharges, and the use of various "resources" like water and coastal space. In other words, the RMA does a lot, but it does not do as much as its purpose might suggest.⁶

The RMA and its integrative approach was revolutionary when it was enacted in 1991. By international standards it remains innovative. And yet it has been the subject of many complaints, and almost constant amendment, since it was enacted. It is now reasonably clear that it lacks coherence and that it has become overly complex, as well as failing to do what it was meant to do: protect the environment.⁷

So is the RMA, as it stands, an appropriate framework to have at the core of a future system? Or is it time for a fundamental overhaul?

That is not an easy question to answer. Many complaints about the RMA are legitimate (eg interminable delays in planning, a failure to respect environmental limits, and a lack of enforcement).⁸ But that itself is not a good reason to throw the entire Act in the bin and start again. Other reasons for overhauling the Act – including that land use planning and associated infrastructure provision need to be more closely linked in a radically different "Planning Act", especially to manage urban growth – have a stronger conceptual basis and need to be closely considered. At the other extreme, some talk about the need simply to implement the Act better rather than fundamentally change it.



In light of the disruption that a fundamentally new approach to legislative design could create, we think that it is at least worth thinking about whether the outcomes we are seeking could be delivered by building on the basic framework we already have. We need to be cautious about getting rid of something simply out of frustration at some of its features, just as we need to be cautious about retaining something just because we are wary of change. In other words, it may be possible for the RMA to change considerably while still retaining its basic integrity as an integrative, outcomes-based statute at the heart of our system.

Some have suggested throwing the RMA away and starting again. Others have said we should keep it and focus on “implementation”. We see merit in exploring the middle ground – where we build on the RMA to make meaningful legislative change. We should not treat this as another round of tinkering, however.

5.2 Should we split the RMA?

Let us consider the question of splitting the RMA more specifically, not just whether we chuck the Act in the bin. Should the RMA continue to do the very wide range of things it does (or is meant) to do? There are, after all, many conflicts and gaps in it.⁹

In the Phase 1 report, we looked at principles of legislative design,¹⁰ and investigated various options for splitting the RMA by looking through different lenses.¹¹ One option was for “bottom line” outcomes to be established and defended in one act (eg freshwater quality limits), and for the facilitation of trade-offs to occur in another (one might think of urban amenity concerns). That would reflect the idea that balancing equally weighted considerations does not belong in a truly protection-focused act, which must be uncompromising.¹² While it makes some conceptual sense, this kind of hard split is not an immediately attractive option because of the complexity it would create. There would be a need for complicated links to be made between different statutes dealing with the same ecosystems and the same resources, where the distinctions between bottom lines and balance would not always be obvious (and may shift with time). Instead, as explored later in this chapter, we think the RMA itself needs to be much firmer about the distinction between bottom lines and trade-offs.

Nor do we recommend redesigning our legislation along completely sectoral or spatial lines (eg one act for agriculture and one for forestry, or one for cities and one for the countryside). Similarly, although we already have a domain-based split for climate change (which is largely carved out from the RMA),¹³ we think returning to separate statutes for domains like freshwater, land, air and so forth would be a retrograde step.

A different way of splitting, however, which has received a lot of traction in recent times, is to have separate statutes dealing with environmental protection on one hand, and “planning” on the other.¹⁴ This idea is summarised below.

A spotlight on a Planning Act

Infrastructure New Zealand and others have proposed a radical rethinking of what resource management legislation could look like in the future.¹⁵ There would be a separate “Development Act” alongside a specific statute designed to protect the biophysical environment: an “Environment Act” (not to be confused with the existing Environment Act). Three core statutes – the RMA, Local Government Act and Land Transport Management Act (and potentially others)¹⁶ – would be rearranged along different lines to morph into these two new acts. The Development Act would be concerned with “planning”, and might alternatively be called a Planning Act.¹⁷ The Environment Act would be concerned with environmental sustainability.

There would be a cascade of plans created under a Development/Planning Act at a national and regional level¹⁸ (including regional unitary plans, regional spatial plans, long-term plans, various targeted investment plans, infrastructure strategies, asset management plans and transport plans), which would be subject to national and regional environmental policies and regulations made under an Environment Act. We summarised how that would look in the “Model 2” option floated in the Phase 1 report.¹⁹

Such a proposal is designed to address a wide range of very real and legitimate issues. In particular, it would address the fact that the:²⁰

existing planning framework (the Land Transport Management Act, Local Government Act and RMA), requires separate plans without strong linkages between them. Where linkages do exist, these have different weightings and are often inconsistent between the statutes.

This results in a “complex maze of approvals” and a situation where there is “a lack of common purposes and goals across the planning framework and the hierarchy between the ... plans is unclear”.²¹ There is also temporal misalignment to be fixed – plans under the different acts are made according to different timeframes and processes. The overall thrust is that land use and infrastructure planning and funding are not well aligned, and that this leads to confusion, complexity, and a lack of timely outcomes, particularly in fast-growing urban areas. Misalignment has serious implications for the availability of developable land, which in turn affects housing affordability.

There is a lot to be said for having this kind of split, as long as planning/development legislation were firmly subordinate to “natural environment” legislation (in other words, “the Environment Act would put the environment first”).²² Indeed, we have heard from some environmentalists, not just the development community, that such a strict separation could be a very good thing. It could help to enshrine a hierarchy (one act trumps another) under clear and distinct environmental principles. It therefore avoids the balancing approach that has

for most of its history proved so damaging under an integrated RMA,²³ where the temptation is always to make trade-offs between protection and use. It could also enable decisions that do not involve consideration of the natural environment to be subject to a less detailed and expensive assessment process (eg a subdivision consent where the only potential effects relate to traffic safety and capacity).

The idea is that an Environment Act would outline a biophysical envelope within which development can occur, and planning legislation then facilitates (and, indeed, encourages) quality and timely development within it. Conceptually, it would not be too different to the context of minerals: mining is subject to the RMA, but is explicitly encouraged in separate legislation within the parameters of RMA restrictions.²⁴ A planning/environment split could cause some additional complexity (inter-statutory links would still need to be made), but it could arguably produce better environmental and development outcomes.

Powerful arguments have been made for splitting the RMA into separate statutes related to environmental protection and planning, and for infrastructure planning and funding legislation to be merged into a new Planning Act.

So is this the way forward? The question certainly requires close attention. In particular, the mechanics of separating “environment” and “planning” need to be picked apart. How would it work? For the reasons outlined below, on balance we think that a single, integrated statute like the RMA should remain at the heart of a future system. However, we want to be very clear about one thing: this does not mean another round of tinkering with the Act. Meaningful, systemic change to the RMA (and other frameworks) will be needed, and change will need to be reasonably durable.²⁵ The concerns that have led to proposals for a separate Planning Act – notably urban ones – are legitimate and need urgent attention through other reforms, particularly those related to spatial planning.

5.3 What do we mean by integrated management?

Sometimes, the question of splitting the RMA is presented as a dichotomous tension between “integration” and “fragmentation”. Implicit in this is the idea that fragmentation is bad and to be resisted, and integrated management is a good thing to be retained. But the crucial question is more nuanced and finely weighted: *what* should we integrate? And *what* should we fragment? After all, we already split up many things (see the vast range of statutes in the current system presented in the Phase 1 report).²⁶ Some of this is for good reasons; targeted frameworks, with focused purposes and separate institutions, can be very valuable.²⁷

In particular, the idea behind a Planning Act is that, despite much rhetoric around the RMA’s integrated management,²⁸ the current system is actually quite fragmented in one important way. Laws relating to the

planning of how land is used (or not) are found in a completely different framework (the RMA), and operate under different processes and principles, to laws relating to planning and funding the infrastructure needed to make changes in land use actually happen (largely the Local Government Act and Land Transport Management Act). There is no point rezoning land from, for example, farmland to residential purposes if there is no plan (or money) for roads to get people there, or for water to come out of taps. Similarly, roads and pipes are useless if a plan doesn’t allow for houses to be built on the land.²⁹ There is also a question of timing here – outcomes under one planning process should not wait too long for outcomes under the other.

If we were to put those things – land use and infrastructure – in one statute, managing rapid land use change (particularly urban greenfield growth where a lot of new infrastructure is required) could become more timely and effective. There would be one process by which it all happened. The important political and social context to note here, of course, is the idea that timely development of residential land will lead to greater supply, and therefore affordability, of housing. Housing affordability is an issue that is both socially urgent and politically pressing,³⁰ and this has lent credence to the idea of an integrated framework for urban development that could deliver on it.³¹

It is neither feasible nor desirable to have a single, “mega statute” that does everything. Targeted frameworks are important. And yet integrating the system in one way can cause fragmentation in another. In the current system, land use planning under the RMA happens in a separate framework to the planning and funding of infrastructure often needed to make land use change actually happen (especially in and around cities). These things *could* be integrated into a Planning Act.

In the notion of a planning/environment split, it is usually clear what changes in *outcomes* are being sought (eg recognising the benefits of integrated urban growth and timely development, or reducing inefficiency and confusion). But less clear is what, respectively, the different acts would actually do to achieve those outcomes.

The implication, at least, is that “planning” is about the spatial aspects of how we use land (notably restrictions under sections 9 and 10 of the RMA – land use and subdivision restrictions)³² and that the “environment” is about protecting or enhancing common pool resources like water, soil and air (essentially, most of the other human actions restricted under the RMA).³³ The crucial question, in our minds, is where the *stronger* (intra-statutory)³⁴ connections are needed. Do we loosen the connections between land use and “environment” to achieve stronger connections between land use and infrastructure? As we noted in the Phase 1 report:³⁵

The strength of connection needed ... between land and other domains under the RMA may mean that legislative separation between the RMA [and

infrastructure legislation] is desirable in a future system. Connections can [instead] be made through aligning planning processes under each. Some may, however, see the connection between infrastructure planning and land use as more significant. That could see the integration of the infrastructure and land use components of the ... acts within a single statute (such as a Planning or Development Act).

Intuitively, splitting the RMA sounds like a good idea. The natural environment would get its own act, with firm purpose, principles and restrictions, to which a separate Planning/Development Act would be subservient. And the latter would then be free to extol the virtues of development and focus on getting it done in a timely and integrated way. That is also important, alongside environmental protection, for human wellbeing. But what exactly do we mean by the natural environment? Is it just about preventing "pollution" or maintaining the quality of common pool resources like water and air? And is the control of land use distinct enough from the rest of the environment to warrant a separate act? That is largely how things are still done overseas, but in the RMA have we moved on from all of this?

Building on our conceptual analysis of legislative design in the Phase 1 report, there seem to be four key grounds on which we might want land use controls to be put into a separate act from other aspects of resource management. We address each below.

1. To better align decision-making on land use with associated planning and funding of infrastructure

This is a legitimate concern, especially in the context of urban growth, and we have touched on it above. However, we also note that there are other ways to align statutory frameworks without integrating them into one act (eg aligning decision-making processes, and engaging in higher level spatial planning – which would also have many farther reaching benefits). We also see potential, in the longer-term, for separate infrastructure planning and funding components to be integrated more closely, in a single "Local Government and Infrastructure Act". These measures are discussed in Chapters 8 and 10.

2. The kinds of tools used under each framework are fundamentally different

The purpose and principles of the RMA are broad enough already to encompass the minimisation of waste, construction standards, climate change mitigation, pest management, hazardous substances and genetically modified organisms (among other things). But these don't generally happen there;³⁶ they have more targeted frameworks, largely because they provide for a very different architecture of decision-making from the planning and consenting framework of the RMA.³⁷ However, we are not convinced that this is a reason to separate land use controls from controls relating to other aspects of the environment. The RMA planning and consenting framework already comfortably encompasses the core kinds of tools

needed for managing land use. It is not clear that fundamentally different kinds of mechanisms would be used under a Planning Act than, for example, those contained in a district plan (zoning, rules, performance standards, policies and objectives, resource consents, designations etc).³⁸

3. To provide for a different or faster process for decision-making concerning land use

There has been much debate in recent years about the need to make land use planning faster. The RMA has proved too slow to deliver timely outcomes. The most tangible examples of responses to this issue have been in the bespoke planning process by which the multiple plans in the Auckland region were combined into a single unitary plan (although this was not limited to land use or, indeed, to the urban context),³⁹ and the introduction of a streamlined planning process in the RMA.⁴⁰ Special housing areas were introduced in 2013 to partially override the RMA, and (as discussed in Chapter 10), there is now a proposal for an urban development authority to do so in a much more comprehensive manner.⁴¹

However, we do not consider this need for speed to be an issue unique to urban planning or land use, or a reason to split its management into another act. Equally pressing is the need to ensure planning for other aspects of the environment – notably freshwater and climate change – are progressed in a much faster way.⁴² In fact, plan agility is a concern across the board and our criteria reflect this. As such, we are proposing a revised planning process, the development of new tools, and stronger support for the implementation of national direction (see Chapters 6 and 7).

4. To provide for a different purpose and principles under which land use decisions are made

In our view, this comes to the crux of the debate. A key reason to separate statutes is because different acts are directed by different purposes and principles.⁴³ We do not, for example, provide for the funding and construction of roads under the RMA, because that is not the point of that act (sustainable management does not demand the construction of roads, only that their construction is done in a way that does not unduly harm the environment). Clarity of purpose is important when it comes to defending the environment from harm, as we have seen from a turbulent history of interpreting Part 2 of the Act.⁴⁴ For that reason, we do not suggest that we integrate all acts – including those concerned with infrastructure development and funding – into one "super-RMA", just as we should not integrate laws promoting mining into conservation legislation.

So where does land use fit in this legislative puzzle? Rather than land per se, some have suggested that the "built" environment should be subject to different decision-making principles to the "natural" environment *within* the RMA (a soft split, if you will).⁴⁵ As discussed in the Phase 1 report, we are certainly sympathetic to the

view that the RMA does not do enough to recognise the benefits of using resources and good urban design, or to clarify the relationship between use and protection.⁴⁶ It needs to do both of those things – as long as there are clearer bottom lines. There could, therefore, be new principles inserted into the RMA relating to the “urban” space (just as there is already for the “coastal” space)⁴⁷ or broader recognition of the value of urban design or the use of land than there is currently. We discuss this further below in the context of a new Part 2 for the Act.

The implication of an entirely separate *statute* for land use is that its principles would be quite different from those applying to other domains. By comparison, we might consider the coastal environment, which also looks very different. Yet we do not consider it necessary to put that into a different statute. So does land use (urban, built, or otherwise) warrant a fundamentally different set of decision-making principles? We urge caution here. Historically, we may have thought of town and country planning as being quite a different thing to environmental protection. The former was primarily about sanitary conditions and health concerns, and subsequently about managing people’s interactions with each other when living in close proximity.⁴⁸ The latter was about stopping point source pollution and protecting specific areas or species from harm (more akin to our conception of nature “conservation” or the “commons”). However, in our view, thinking has moved on.

We are painfully aware in 2019 that how we use land has significant implications for the wider environment; they are not separate things. Urban development and expansion can result in the discharge of construction sediment and other contaminants to rivers and the sea. It also has more systemic implications over the long term for biodiversity (many of New Zealand’s most threatened land environments are found within or close to urban centres),⁴⁹ the climate, and food production. If done right, it can also be positive (eg by recognising the value of and providing for urban biodiversity corridors). It is particularly difficult to reverse urban sprawl once it occurs – we are giving up many alternative land use choices (eg food production) when we concrete over soils, and locking in transport modes in our choice of urban form.

Rural land uses (eg dairy or forestry conversions) have similar implications. Our land use choices can lock in environmental risks for decades to come. For example, it can take many years for agricultural nutrients to find their way into water bodies, and afforesting steep land can create an expectation for clear fell harvest decades into the future.⁵⁰ Of course, equally robust or even identical environmental principles could be built into a Planning Act dealing only with land use. But then, what would be the point of splitting up the RMA in the first place?⁵¹

There are also important cross-cutting concepts like landscape, ecosystem-based management, and catchment scale management that require a tightly integrated regime between land use choices and their consequences for other domains. How would these concepts be meaningfully provided for if land use planning

were to be located under a different regime? It is by no means obvious what kinds of things should be in one act or another, and how they should relate.⁵² Splitting the RMA in this way could therefore cause considerable confusion and overlap, and risk extensive litigation to define boundaries and jurisdictions. To us, this suggests the need for a single act concerned with land, water, air and so forth. How land is used – and not just the health of the soil under it – is a crucial part of the environment, and strong connections need to be made between all aspects of the biosphere. Often, how we manage land is crucial to a precautionary and preventative approach to environmental management more broadly.

There are four potential reasons we might want to split the RMA into statutes focused on planning and environment: (1) to better coordinate decision-making on land use and infrastructure; (2) because the kind of tools required for land use and other environmental domains would be fundamentally different; (3) to provide a more agile planning process for land use decision-making; and (4) to make decisions on land use under a separate purpose or principles. We find the latter three unconvincing. Greater coordination between land use and infrastructure planning and funding is needed, and can occur in other ways – including a layer of strategic spatial planning (discussed in Chapter 8).

An integrated statute like the RMA – combining decision-making on land use and other aspects of the environment like water, soil and air – should remain at the heart of a future system.



5.4 An Oceans Act

Finally, we note in the context of splitting the RMA that we are floating the idea of a separate “Oceans Act” (see Chapter 11). This would not be a split between domains (eg land vs other domains) in the same way as the concept of a Planning Act, but rather a spatial separation (applying beyond 3 nautical miles) in a conceptually similar way that the RMA is currently separated from the EEZ Act. An Oceans Act would provide for the more tightly integrated management of the deep sea, by integrating various other legislation relevant to oceans in one place.⁵³ An integrated RMA would continue to apply to the coastal area within 3 nautical miles.

We are floating the idea of a separate Oceans Act managing the marine area on the seaward side of a boundary 3 nautical miles from land, which is discussed in Chapter 11.

5.5 Significant change to the RMA: Why is it needed?

Although we recommend keeping the RMA broadly intact, we see merit in some fairly significant legislative, institutional and process changes to it. In particular, change to the RMA is needed to protect biophysical bottom lines, to more actively recognise and pursue positive outcomes above bottom lines (including environmental enhancement and urban development), to implement the Treaty relationship, and to provide for allocative functions. In the remainder of this chapter, we consider changes to the purpose and principles of the Act. In the chapters that follow, we consider changes to planning processes (and related reforms) at both national and local levels.

Of overriding importance is the fact that the current RMA has failed to protect many biophysical bottom lines that it was meant to.⁵⁴ This is a serious problem. A new RMA must, and will, do so better, even though it will not be the *only* framework under which bottom lines are imposed.⁵⁵ In the Phase 1 report we looked at the question of what a biophysical “bottom line” means.⁵⁶ Not all environmental protections warrant this term. Instead, we are treating bottom lines as those aspects of the biophysical world that are sacrosanct, and are described in terms of inflexible outcomes rather than trade-offs. Many are fundamental to human survival and basic wellbeing (eg a drinking water supply that does not make anyone sick, or rivers that are swimmable), while others recognise the intrinsic worth of elements of the natural world (eg preserving the wild and scenic nature of some rivers).⁵⁷ Often these things go together (eg the moral right of nature as a whole to persist and regenerate, by which it also supports human life and wellbeing). Some bottom lines may express general outcomes, but others may be more specific (eg no further loss of wetlands or no further loss of indigenous forest cover).

Bottom lines (statements of outcomes) also need to be translated into firm limits or restrictions on what people are or are not allowed to do. They need to “bite” in a regulatory sense.⁵⁸ For example, to achieve waterways that are swimmable, firm restrictions are needed on diffuse discharges from both urban and rural activities. Specific regulatory limits may need to change over time (eg become tighter) in order to make sure bottom line outcomes are not infringed or (where they have been overshot already) are recovered, but the overall goalposts should not be anticipated to shift according to changing government policy. They are about preventing or fixing a clearly defined outcome, not weighing up various matters or mitigating harm.

Environmental bottom lines are outcomes-based lines in the sand that need to be defended strictly and vigorously against erosion by cumulative human actions. They are not just about preventing harm; in some cases securing bottom lines is about enhancing the environment to an acceptable state. They need to be translated into firm regulatory restrictions on human action.

In workshops, we heard some people object to the very concept of a “bottom line”. It was described as unambitious and as setting a low bar when what we need is a more aspirational, proactive push towards enhancement and restoration. Let us be clear: in no way are we advocating for a system that *only* imposes bottom lines. We also see a pressing need to improve environmental outcomes considerably, and to align incentives so that economic and social drivers actually enhance the environment.⁵⁹

However, we still see a bottom line as a valuable concept. If we do not set a firm threshold between the outcomes that are absolutely unacceptable and those that we are wanting to push towards (improvement), it raises risks that the two get blurred in decision-making, to the detriment of bottom lines. That has been the experience under the RMA, because the distinction between bottom lines and trade-offs has been conflated in interpreting Part 2 of the Act.⁶⁰ Bottom lines are a necessary safety net, not a goal.

The concept of an environmental bottom line is not enough for environmental wellbeing. However, it is a valuable and necessary measure in a future system.

5.6 What’s wrong with Part 2 of the RMA?

With the necessity of bottom lines in mind, we can turn to what specifically needs to change about the RMA. This will not *just* be about recognising environmental bottom lines. The Act is also deficient when it comes to urban issues and allocative questions, as well as Treaty obligations. Part 2 – the RMA’s purpose and principles – has been described as the normative “engine room” of the

Act.⁶¹ If the RMA is to remain, it is a logical place to start when thinking about reform.

Over the years, there have been many attempts to change Part 2. Some (such as a focus on natural hazards) have succeeded politically, while others have failed.⁶² The purpose of the Act in section 5 has proved remarkably stable (although some might say that is because it can mean anything to anyone). More attention has tended to focus on what needs to change in sections 6 and 7 of the Act, which is where most environmental bottom lines, and other normatively meaningful statements, are contained.

Part 2 is important because it has a very active and direct role to play in specific, legally binding decisions. While it is not an “operative” provision,⁶³ very few other statutes have a purpose or principles section with the direct legal influence of Part 2,⁶⁴ or a framework whereby public decisions are legally scrutinised with such care against these provisions (often by a specialised court).⁶⁵ Part 2 will be an important touchstone – and often an ultimate legal test – for decision-making.

With respect to bottom lines, we think that the range of “topics” or “domains” contained in Part 2 (notably sections 6 and 7) is *generally* appropriate. The lists, containing things like public access, historic heritage, ancestral lands, and indigenous vegetation, are certainly hard to argue with at a conceptual level. In many ways (with some glaring exceptions like climate change), the Act’s framing of the things we value remains as relevant today as it was in 1991.

This is an understandable motivation behind some commentators’ desire to retain Part 2 itself and focus instead on better implementation through process and institutional change.⁶⁶ We agree that many of the matters in Part 2 provide a good starting point for thinking about what a future system needs to treat as sacrosanct.⁶⁷ Where there is desirable case law to be retained, a future Part 2 should piggyback on the kinds of language that underpinned those decisions.

However, on balance, we see merit in reworking Part 2 more thoroughly. This is for a number of reasons.

1. There needs to be a clearer distinction between the kinds of outcomes that are true environmental bottom lines (eg freshwater quality, biodiversity) and aspects that are more inherently about trade-offs where there is a need to balance many interests (eg urban amenity, the efficient use of resources). Part 2 is not just a policy framework within which many value-based judgments are to be resolved⁶⁸ – some values need to be preeminent as a matter of law.⁶⁹ And where values are not preeminent, there needs to be clearer guidance about what that means for trade-offs.⁷⁰

In practice, the stronger and more active direction in section 6 of the Act, which largely contains key biophysical protections rather than matters that are likely to come into tension, have been treated as resembling bottom lines.⁷¹ Those things need to be “recognised and provided for”. In contrast, section 7

contains a more diverse (yet still clearly incomplete) range of matters, some of which are biophysically focused and others that are not.⁷² These things need to be had “particular regard” to. Yet there is significant room for interpretation, and it is still by no means clear that there are coherent reasons for some things to be “elevated” to section 6 and other things to be “demoted” to section 7.

Overall, Part 2 could be said to lack a clear and coherent vision.⁷³ It would therefore, in our view, be useful to introduce and specifically define a term like “bottom line” in terms of a series of inflexible outcomes to be achieved, rather than relying on wording that still requires legal weighting to be considered.⁷⁴ In a proposed redraft of Part 2 below, this is encapsulated in a new concept of “natural heritage”.

2. There is a need for a clearer statement in Part 2 concerning the *relationship* between clearly defined bottom line outcomes and trade-offs. The former needs to be more explicitly insulated from the latter than at present (eg by replacing the term “while” in section 5 with the term “subject to”). As explored in the spotlight below, the *King Salmon* jurisprudence took positive measures, but has still not really addressed the crux of this issue. In our redraft of Part 2 below, we are much more explicit about this relationship.
3. There are problems with how several so called “bottom lines” (notably in the current section 6) are expressed. In particular, using words like “inappropriate” and “significant” to qualify protective provisions are vague and can create perverse or unclear outcomes that often rely on private litigants to clarify.⁷⁵ Below, we shine a spotlight on the importance of preventing the further decline of common species and habitats, not just those that are “significant” or “threatened”.



A spotlight on the protection of “common” species⁷⁶

The resource management system has long placed emphasis on threatened species management, as a logical response to the large number of species threatened with extinction, and in order to retain the greatest diversity of species compositions with limited resources to do so. In more recent decades, there has been a shift to wider ecosystem and habitat management, albeit still with an emphasis on threatened species. Outside of conservation land, policy and protection has focused on biodiversity that has been identified to be “significant indigenous vegetation and significant habitats of indigenous fauna” and therefore a matter of national importance under section 6(c) of the RMA.

Criteria commonly used to identify “significant” areas include the presence of threatened or at-risk species, and habitat types that have been substantially reduced from their former extent. Thus, controls on the management of biodiversity on private land have also had an emphasis on rare and threatened species and habitats, and captured only a subset of what is arguably “significant”, and focused even less on what is common.⁷⁷ It is possible that this has resulted from legacy institutional arrangements, which saw the former Wildlife Service focus on wildlife, and the former Forest Service focus on commercial forestry and the recreational aspects of native forests.

Other RMA provisions can require or encourage vegetation retention (or reinstatement) on hillslopes or within riparian margins, and these initiatives can have the added benefit of providing some protection or enhancement for biodiversity (including more common species and habitats). Examples include erosion control regulations that protect indigenous woody vegetation, and riparian planting programmes. However, these policies and strategies, like those for meeting section 6(c) requirements, are ad hoc and inconsistent when considered at the national scale. Critically, they do not have biodiversity outcomes as the primary consideration.⁷⁸ Consequently, our current approach to nature conservation has largely ignored common species outside of conservation land.

Common species are the species which occur in high abundances, are typically widespread within their natural range, and are encountered frequently – they make up the bulk of the biomass and create structure in ecological systems. Common species are therefore critical for sustaining ecosystem processes that enable ecosystem function (eg nutrient cycling, pollination, energy transfer between trophic levels) as they collectively make the greatest contribution to these processes. For example, common bird species such as tūi play an important role as pollinators and dispersers. Sustaining these ecological processes are fundamental to the provision of ecosystem services that underpin our ability to produce food and fibre, and on which food and water security and human health are reliant.⁷⁹

Unfortunately, the systematic decline of common species has been a frequent occurrence, despite these species being equally worthy of conservation effort.⁸⁰ Ecological fragmentation, habitat loss and degradation,⁸¹ and invasive species all impact on common species,⁸² and these events and processes have led to reductions in their areal extent and condition as well as the loss of individuals.⁸³ Such losses have cascading effects. For example, in New Zealand birds play an important dispersal role, and declines in once common and widespread bird species (eg korimako/bellbird and hihi/stitchbird) have consequential impacts on plant communities.⁸⁴ We cannot hope to halt the decline of biodiversity, much less turn the tide, when impacts on a substantial proportion of our natural assets are given relatively low weight or relegated to unmonitored, resource-user implemented permitted activity standards.

Conservation of common species and habitat is important for both their own sake (a moral recognition of intrinsic value) and ours. Providing greater levels of protection for them will also help ensure the persistence of species we as yet know little about, beyond the important functional role they play in maintaining systems (eg insects). Further, protecting common species will help address the need to maintain functioning, resilient landscapes which will be of increasing importance as the imperative to address climate change and biodiversity loss becomes more pressing. In that regard, it makes little sense to continue to relegate wider considerations of biodiversity conservation to a largely uncontrolled, unmonitored framework. These wider considerations need to be better incorporated into a formal decision-making process, and strengthening their recognition in Part 2 of the RMA would be a good start.

Tūi (Bernard Spragg)



There are several other reasons why we consider a rethink of Part 2 is necessary:

1. The existing provisions are a fairly scattergun approach to particular topics,⁸⁵ and incomplete in their coverage. Climate change mitigation is a good example of something that is almost completely missing in action, but there are also questions around why, for example, the protection of the habitat of game fish species should be singled out over aquatic habitat more broadly, or non-significant habitats of indigenous fish.⁸⁶ (It may, however, be that this deserves specific mention as a “canary in the coalmine” – an early indicator of underlying environmental issues). More significantly, freshwater quality is not explicitly included as a matter of national importance.⁸⁷ Soil conservation is singled out in the broad purpose of the Act in section 5 but, strangely, not in the more directive sections 6 or 7.

2. There is a need for Part 2 to more strongly recognise the need for environmental enhancement and restoration. The Act is not just about setting bottom lines and then seeing what people choose to do. Having “particular regard” to the maintenance and enhancement of the environment is no longer good enough, especially since it is not directed at any particular outcome (What are we restoring? To what end? By when?).⁸⁸ It is clear that restoration is now a matter of national importance in order to achieve bottom lines that have been infringed.

Furthermore, we can question whether the “passive” language in sections 6 and 7 is good enough. “Recognising and providing for” is a strong direction, but the descriptions of the things being recognised and provided for (“preservation” or “protection” of various matters) envisages a world in which we are stopping further decline rather than recognising we have already overshoot in many areas. The environment is on the defensive. The general direction to “avoid, remedy and mitigate”, enshrined in the overarching purpose in section 5 that spans all domains – especially “mitigate” – is a tacit invitation to make things worse, not better.⁸⁹

3. More broadly, there is a need for the Act's purpose and principles to be more outcomes-focused than effects-focused.⁹⁰ They need to upgrade from the reactive concept of management, to one embracing the need for active and conscious change – both to achieve bottom lines that have been infringed and to pursue positive social and environmental outcomes beyond them (including resilience in the face of climate change and other aspects of environmental and social change).⁹¹ There should be no bias towards the status quo.⁹²

Currently, the protective matters in section 5 – the lodestar of the Act – set a fairly low bar for what the Act is trying to achieve (“... to meet the reasonably foreseeable *needs* of future generations”; “safeguarding the *life-supporting* capacity of air,

water, soil, and ecosystems”). We suggest that we require more ambitious targets or objectives to be embedded into the fabric of the Act, and proactive measures to achieve them.⁹³ In the Phase 1 report, we mentioned the more proactive approach of the Welsh Wellbeing of Future Generations Act 2015, which sets out seven wellbeing goals for the future (including, for example, by defining a “resilient Wales”).⁹⁴ More recently, we can look at the example of the United Kingdom's Environment Bill, which requires specific targets to be set and met within defined timeframes.⁹⁵ That stands in contrast to the RMA, which has been described as not “providing direction on desired environmental and development outcomes” and therefore a framework where “a long-term perspective [is] under-emphasised”.⁹⁶

4. Firmly subject to the need to defend bottom lines, there is a need to give greater recognition to the benefits of using resources (including the way in which land is used in, for example, urban planning). The government has proposed an NPS on Urban Development, which would engage more closely in matters of urban planning (eg by defining and pursuing the concept of a “quality urban environment”) but it is hard for such measures to find a hook in the Act's purpose and principles.⁹⁷ We think that the RMA is about much more than just imposing minimum environmental standards and then walking away to let the market work its magic. It is also about planning resource use in a way that improves overall wellbeing, and facilitating trade-offs and resolving tensions between competing values.⁹⁸ Urban land use planning is an integral part of that.

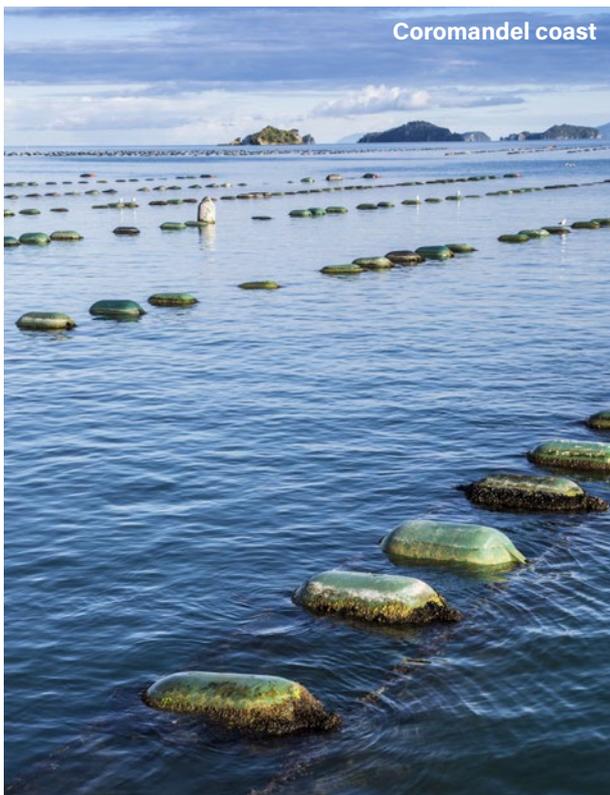
More broadly, social and economic factors are increasingly relevant in how we manage resources as a country, despite some historical resistance to engaging with them in Part 2.⁹⁹ For example, it is far from ideal that we now have national direction being promulgated on the protection of highly productive (food producing) land, largely on the Part 2 “hooks” of using resources efficiently or considering their “finite characteristics”.¹⁰⁰ Where is the reference in the RMA to the true issues and outcomes we are seeking – food security for future generations, social resilience, and the land uses (or controls on them) that will have the most benefit for society in a future besieged by uncertainty and risk?

Alongside food security, we can consider forestry in this context.¹⁰¹ Given the increasing risks of massive forest loss as a result of climate change and biosecurity risks, should we be considering the role that national direction under the RMA might play in building the resilience of future forests, not just regulating their adverse effects? This might see the inclusion of rules concerning firebreaks, the management of slash and residue to reduce fire risk, the tighter regulation of clonal forestry (monoculture heightens biosecurity concerns), active species diversification, and climate-resilient management

practices for thinning, fertilising, weeding, and pest control. The importance of considering firebreaks, in particular, is emphasised by the fires that occurred in the Tasman area earlier this year.

5. The weak obligation in section 8 to take into account the principles of the Treaty of Waitangi, in a framework with environmental wellbeing and natural resource management at its heart, strikes us as being inconsistent with the Crown's Treaty obligations.¹⁰²
6. There is a need to provide some kind of meaningful normative "hook" for resolving allocative questions (eg for freshwater and coastal space). This function is specifically provided for in the Act,¹⁰³ but there is no meaningful guidance in the purpose and principles as to what should drive such decisions or what outcomes that should be achieved.¹⁰⁴ That is a fairly astonishing (albeit politically understandable) omission, given how foreseeable these issues have always been. The relationship between the principles of the Treaty of Waitangi and allocative guidance will be significant, especially in the context of freshwater.

We see a need for Part 2 of the RMA to be reconsidered rather than just added to or amended. It needs to better provide for a more coherent set of true environmental bottom lines (including action where these have already been infringed). That is its first, and overriding, task. Beyond that, it needs to more explicitly pursue positive outcomes, recognise the value of responsible resource use (including urban design), give effect to the principles of the Treaty of Waitangi, and provide a normative hook for questions of allocation to be considered.



A spotlight on Part 2 of the RMA: Why is *King Salmon* not enough to protect bottom lines?

The *King Salmon* jurisprudence has made a significant positive contribution to how environmental bottom lines are recognised in the RMA.¹⁰⁵ The legal position prior to the case was that decision-makers were to engage in reaching what was generally called an "overall broad judgment" when making decisions.¹⁰⁶ That meant that a decision-maker was ultimately to have recourse to Part 2 of the RMA in balancing the benefits and costs of a proposal, even if objectives and policies in lower planning instruments were much more specific, directive and protective.

In *King Salmon*, the Supreme Court overturned that approach. It emphasised that in certain circumstances the Act was about defending firm environmental bottom lines set under it, not weighing up many factors. Central to the decision was the fact that the NZCPS contained directive and firm provisions concerning the protection of the coastal environment.¹⁰⁷ It made clear that national direction could impose firm, policy-based¹⁰⁸ bottom lines and that subsequent lower level decisions would not be allowed to undermine them by referring back to the wider, more balanced set of considerations in Part 2 of the RMA. Since 2014, the Supreme Court's message has been applied and refined through a number of other decisions.¹⁰⁹

However, overall, this line of case law still falls short in a number of senses. It has since been made clear that a balancing approach (including in the consenting context) will often still need to happen (eg where there are no firm and directive policies to point to, or where there are multiple provisions that conflict).¹¹⁰ The Supreme Court also said that Part 2 is not an operative set of provisions; it sets an expectation that a cascade of subordinate instruments will impose strict protections.¹¹¹ But it does not itself *demand* that firm bottom lines are generated through planning instruments; regional plans are not mandatory, rules are not required, and the government could make the NZCPS *less* protective if it wished.¹¹² *King Salmon* does not change the "deliberate openness" of Part 2 itself, and questions still abound over what exactly the Court means when it concluded that the word "while" means "at the same time as" – after all, enabling people to provide for their economic wellbeing cannot always happen at the same time as protecting crucial biophysical bottom lines.¹¹³ The important lesson from the Supreme Court is, essentially, that authorities can impose bottom lines if they consider Part 2 demands it, and it is not permissible to undermine a higher level authority's decision to do so.¹¹⁴

In the context of the coastal environment, that is a very good thing. Reasonably firm environmental bottom lines are imposed under the NZCPS for varying (including historical and cultural) reasons. That has been confirmed in a number of subsequent cases in which litigants have tried to carve out exceptions

for particular sectors or activities (like ports or aquaculture).¹¹⁵ But outside of the coastal environment, the policy landscape is much more varied, and there are fewer comparable bottom lines to give effect to (especially in national direction).

There are other risks here, too. As the government becomes more active in producing national direction, not all of it is about setting environmental bottom lines. A concerning trend is, essentially, for the RMA to be used to impose “top lines” or “social and economic ceilings” in the interests of wider policy agendas, even where corresponding national level environmental bottom lines are not in place.¹¹⁶ This highlights something of an identity crisis about what the RMA is really for, which has been at least latent since its inception.¹¹⁷ For example, the latest discussion document on a proposal for a new NPS on Urban Development specifically talks about bottom lines as *minimum* levels of development.¹¹⁸ A similar trend can be seen in the NES for Plantation Forestry, where in the interests of inter-jurisdictional consistency there are limits on the environmental restrictions councils can impose, despite Part 2.¹¹⁹

This is not to say that those measures are inherently undesirable. Densification in cities is, indeed, important to support environmental outcomes. It is simply to point out that there are risks that the key contribution of *King Salmon* – the primacy of firm and directive policies, especially in national direction – can swing both ways depending on what those policies actually say. The jurisprudence sounds protective, but is not necessarily so. To us, this suggests a need to focus on improving Part 2 itself, to ensure both that national direction is appropriate and that any balancing that continues to be necessary has constraints based on clear bottom line outcomes in legislation.

A spotlight on urban issues in Part 2 of the RMA

The RMA is not just about imposing environmental bottom lines, despite how some have perceived it. The reality is that, even above firm bottom lines, many trade-offs need to occur. Planning is also about actively pursuing people’s and communities’ wellbeing. This is particularly the case in urban settings, where there are more people doing more things close together; these activities can be coordinated in ways that both minimise their bad effects and enhance people’s lives (sometimes described as agglomeration benefits). In other words, “Good planning practice goes well beyond the avoidance, remediation and mitigation of adverse effects on the environment; it is about maximising good social, economic and cultural outcomes in their own right.”¹²⁰ For example, while urban density is not appropriate everywhere, it can have significant benefits for both the natural environment and other indicators of urban wellbeing.¹²¹

Some have complained that this kind of thinking is not well reflected in Part 2 of the RMA.¹²² In the Phase 1 work, we pointed out that:¹²³

To some, the RMA is little more than a “regulatory” statute (one that addresses “bads”). For example, [Part 2] contains scant references to social, economic and cultural wellbeing or the benefits of urban development and design. It is reactive. Some have even said that “the concept of sustainable management has failed to provide a philosophical foundation for planning under the RMA”.¹²⁴

... we have sympathy for those who complain that the RMA is not a particularly proactive or inspirational framework for planning our cities. A future system needs to be more explicit and specific about what many of its users already practice.

If an Act like the RMA is going to be used to actively pursue social, economic and cultural wellbeing in cities in a proactive way, we suggest that its purpose and principles should be amended to reflect this.¹²⁵ It is anomalous that we are now seeing national direction on urban matters (eg “quality urban environments”) being developed under an Act with a purpose and principles that have very little to say about them, aside from the need to address adverse effects and to consider amenity and the efficient use and finite characteristics of land.¹²⁶

Previous suggestions to include the value of resource use alongside protective matters in Part 2 (in a non-hierarchical way) were, quite rightly, met with strong resistance and ultimately failure (notably in the wake of the recommendations of the Minister’s Technical Advisory Group on the purpose and principles of the RMA).¹²⁷ This is because such proposals were intended to conflate environmental bottom lines with the making of trade-offs, and essentially codify the “overall broad judgement” approach that was, at the time, the legally correct approach.¹²⁸ It was not the right one.

What we are suggesting here is very different. Bottom line outcomes would be defined and firmly protected. Only above them would there be the ability to consider the benefits of development. We do not think that this would be environmentally unfriendly. In fact, we envisage that many of the development-focused matters to consider would strongly integrate environmental outcomes, in order to embrace the many synergies that exist (eg in the densification and greening of urban areas, the energy efficiency and climate change benefits of compact urban form etc).¹²⁹ As we have mentioned previously, “We need no longer accept that a project that enhances economic [indicators of] wellbeing must come at an environmental cost.”¹³⁰ Nor, we might add, should opportunities be passed over for *improving* the environment.¹³¹ At present, the lack of guidance in the RMA means there is a risk that development is seen as constantly in conflict with the environment, and as constrained by protections and red tape. The system needs to move towards a model where, through careful planning, the benefits of both can occur at the same time.¹³² Part 2 needs to reflect that better.¹³³

The RMA needs to set firm environmental bottom lines, but also provide for greater recognition of the benefits of good urban design and environmentally sustainable development as long as those bottom lines are not infringed. Good urban design should include strong recognition of the synergies between urban and environmental outcomes.

5.7 Is changing Part 2 worth the effort?

When it comes to changing Part 2, pragmatic considerations are important. It has become something of a political football,¹³⁴ and that is unlikely to change. Amendments would also involve disruption to provisions that have proved remarkably resilient and stable when



a lot of other things have changed in the RMA. To some that may be good; to others it may be bad. Some have expressed unease about “giving up” jurisprudence like *King Salmon*.

However, we are not convinced that a desire to retain case law on Part 2, or to retain the stability of the current system, should be overriding factors in reform if changes are both politically realistic and would drive better outcomes.¹³⁵ There are certainly risks to be aware of, and many questions of detailed drafting to be worked through to avoid unintentional consequences.¹³⁶ But the reality is that significant changes in outcomes are clearly needed, and Part 2 is uniquely placed to be one driver for that change.¹³⁷ Fundamental reform means questioning or strengthening the norms that arose in a time very different from the present and no longer reflect society or the current biophysical context.

Even if Part 2 is not to *blame* for our problems (some suggest focusing instead on poor implementation and process),¹³⁸ changes to it can still make a meaningful contribution to solutions. In short, disruption is part of the point. Within that, we must be careful to embed, and build on, positive aspects of case law. In particular, *King Salmon* provides a good foundation for change, but (as explored earlier) can be taken further.

In workshops, we also heard a quite different perspective. Some said that rethinking Part 2 of the RMA is a red herring. It was put forward that meaningful change will not happen by agonising over the specific words used in a general statement of purpose and principles. That is particularly the case with section 5, in that sustainable management is arguably only a buzzword, “pushing and pulling the boundaries of true primary norms”.¹³⁹ We would by no means go that far – the ink that has been spilled in court defining almost every word in it, and cross-referencing to it in the Act,¹⁴⁰ reinforces a view that it is significant. So too does a new provision specifically stating that plans must include only matters relevant to the purpose of the Act.¹⁴¹ But we do take the point that, in isolation, changes to the Act’s purpose and principles will not be *enough*. We explore institutional and procedural changes to the RMA below, but also recognise that a lot comes down to more fundamental social and economic incentives that people face in society and the economy.¹⁴²

The extent to which reform of Part 2 is needed may therefore depend on how much we expect these provisions to do. On the one hand, have we come to expect too much from a list of general principles? Are decision-makers drawn reluctantly back to the generalities in Part 2 because they cannot always trust the coherence, robustness or completeness of subordinate instruments made under the Act? In other words, would the importance of Part 2 diminish if we got higher level instruments right in the first place?¹⁴³ On the other hand, don’t we *need* a reasonable degree of legal precision and clarity in Part 2 if it is to form the basis of even high level decision-making in a space that will always contain fiercely contested values and discretionary decision-making?¹⁴⁴

We suggest the answer is somewhere in between. A strengthened Part 2 will remain extremely important as the top of a cascade of decision-making criteria in a reformed RMA, and will set a crucial normative tone for what people do under the Act. It is well worth the reform effort. But we should also not expect to find all the answers there, or rely on it too much. It is a starting point, not something that needs to provide for every eventuality.

We therefore remain unrepentant about suggesting the inclusion in Part 2 of fairly subjective concepts relating to fairness or justice.¹⁴⁵ After all, concepts like “justice” pervade our legal discourse and have done for centuries, without a single definition; yet they are still vital to our legal system. Indeed, an entire field of law has developed (albeit in other contexts) around “equity”,¹⁴⁶ and inter-generational equity already appears in the RMA.¹⁴⁷ There are even proposals for national direction that include novel and subjective terms like “quality urban environments”.¹⁴⁸ The reality is that ideas like fairness will always come up in resource management decision-making (especially for allocative questions, the distribution of adverse effects, and transitional measures). Recognising this in legislation at least provides a hook or anchor for such questions to be explored, even if concepts cannot be defined exhaustively.¹⁴⁹

On balance, we consider that the need to drive change through a revised Part 2 outweighs pragmatic concerns (eg changes to case law). The purpose and principles of the Act would continue to be legally meaningful, and would therefore be well placed to drive change when accompanied by further reforms to processes, subordinate instruments, and institutions.



We consider that this change to Part 2 of the RMA could usefully happen in the short term. This is because it is something that would be able to be drafted in a single bill, and norms are a good starting point for change (they need to drive all subsequent decisions). There would, of

course, need to be an appropriate term for transitional arrangements (eg for planning instruments to be reworked over time to give effect to it). Below, we offer our thoughts on what a revised Part 2 would do differently, and then offer a potential way in which that could be drafted.

- Replace “sustainable management” with the need to manage Aotearoa New Zealand’s environment sustainably and fairly (including for reasons of resilience)
- Specifically refer to the importance of climate change mitigation
- Remove the specific reference to avoidance, remediation and mitigation. Decisions could still *require* these things, but they would need to do so in a way that complied with the purpose and principles of the Act
- More clearly define the kinds of things that are subject to bottom lines (eg including freshwater, but excluding urban amenity),¹⁵⁰ including recognising the intrinsic worth of nature as a whole¹⁵¹
- Strengthen and clarify the legal direction in relation to things that are truly bottom lines (in that broader considerations of wellbeing would be “subject to” biophysical bottom lines)
- Clearly *set* bottom line outcomes (not just provide for them to *be* set in subordinate instruments). These would be expressed in language embracing both Māori and European traditions (as in Te Mana o Te Wai), although we welcome thoughts on how that could happen in the suggested drafting below
- Make clear that bottom lines are not just about protecting and preserving what we have left, but also about returning to acceptable outcomes where the environment has been degraded already
- As time went on, Part 2 could more clearly articulate the bottom line outcomes that are being imposed (eg rather than just “preserve” or “protect”, state that the Act requires freshwater to have a particular set of characteristics or attributes, or that species are no longer threatened).¹⁵² Alternatively, this could take the form of mandatory targets set elsewhere in the Act, or required to be set in national direction.
- Explicitly recognise that environmental bottom lines require limits on human activities
- Recognise that the natural world is a human “habitat” vital for life, not just a supermarket shelf of resources to be exploited or “environmental” values to be protected
- Be geared towards positive action (including environmental enhancement), not management
- Strengthen directions in relation to the Treaty of Waitangi (including to “give effect to” Treaty principles)
- Embed synergistic concepts like Te Mana o Te Wai, including the development of similar concepts for other domains
- Better reflect the wording of the Declaration on the Rights of Indigenous People, and envisage the growth of ancestral relationships
- Provide for the consideration of mātauranga Māori alongside other forms of knowledge
- Subject to (and embracing synergies with) bottom lines, recognise the importance of good urban planning and design and responsible resource use
- Recognise that people’s wellbeing is not to be secured only by enabling them to do so themselves, but also by proactively pursuing wellbeing (especially in urban contexts)
- Provide a normative hook for allocative decision-making based on fairness, efficiency and the public interest
- Provide an explicit principle of precaution
- Clarify that the interests of future generations (of both people and nature) are as important as the interests of current generations, and that a long-term view must be taken in all decision-making
- Recognise, in accordance with the Rio Declaration, that access to information, public participation and access to justice are key pillars of sound environmental governance

A spotlight on a revised Part 2 of the RMA

The deficiencies in the existing Part 2 of the RMA, pointed out above, could be addressed by replacing the existing sections 5–8 of the Act with the following sections 5 to 8A. Close consideration should be given to amending sections 30 and 31 of the Act (functions of regional councils and territorial authorities) to reflect a revised Part 2.¹⁵³

Purpose

- (5) The purpose of this Act is to ensure that the environment¹⁵⁴ of Aotearoa New Zealand is sustainably and fairly managed¹⁵⁵ by:
- (a) recognising that use and development must occur within environmental limits, because environmental limits sustain the natural environment and the survival and wellbeing of current and future generations;
 - (b) in accordance with (a):
 - (i) protecting, as a matter of national importance, Aotearoa New Zealand's natural heritage;
 - (ii) protecting, as a matter of national importance, the essential social wellbeing of current and future generations;
 - (iii) mitigating significant risks from, and fostering resilience to, natural hazards including climate change;
 - (iv) subject to the achievement of (i)–(iii), enabling people and communities to provide for their economic wellbeing and resilience, and other aspects of their social wellbeing;
 - (c) giving effect to the principles of the Treaty of Waitangi; and
 - (d) recognising that access to information, public participation and access to justice are key pillars of sound environmental governance.¹⁵⁶

Natural heritage

- (6) Protecting natural heritage means ensuring that use and development do not compromise:¹⁵⁷
- (a) Aotearoa New Zealand's contribution to mitigating global climate change in accordance with its international obligations or under relevant legislation;
 - (b) maintenance of indigenous biological diversity, the resilience, life-supporting capacity and intrinsic value of ecosystems, and the enhancement of indigenous ecosystems and threatened species where they have been degraded or depleted by human activities;
 - (c) maintenance of the condition and extent of areas of significant indigenous vegetation and significant habitat of indigenous fauna;
 - (d) maintenance of the quality, quantity and flow variability of freshwater in accordance with Te Mana o Te Wai, and the quality of coastal water; and their enhancement where they are degraded such that ecosystem health or human health are not safeguarded;
 - (e) maintenance of air quality; and its enhancement where it is degraded such that ecosystem health or human health are not safeguarded;
 - (f) maintenance of soil health; and its enhancement where it is degraded such that ecosystem health or human health are not safeguarded;
 - (g) protection of attributes of outstanding natural landscapes¹⁵⁸ and outstanding natural features that contribute to their outstandingness; and
 - (h) protection of attributes that contribute to the natural character of the coastal environment, wetlands, lakes, rivers and their margins.¹⁵⁹

Essential social wellbeing

- (7) Protecting essential social wellbeing means:
- (a) ensuring that use and development do not compromise:
 - (i) Aotearoa New Zealand's contribution to mitigating global climate change in accordance with its international obligations or under relevant legislation;
 - (ii) the food and water security of current and future generations;
 - (iii) people and communities' understanding of, connection to, and enjoyment of nature, including through public access to green spaces in urban environments, and to and along the coastal environment and water bodies;
 - (iv) the protection of historic heritage.
 - (b) ensuring that the benefits and costs of using and developing natural and physical resources are fairly and efficiently shared between people and communities now and in the future;
 - (c) promoting use and development that minimises waste, consistent with a circular economy and society.¹⁶⁰

Treaty obligations

- (8) Without limiting section 5(c), giving effect to the principles of the Treaty of Waitangi includes:
- (a) the protection of protected customary rights; and
 - (b) protection and enhancement of the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, wāhi tapu and other taonga.¹⁶¹

Exercise of functions and powers

- (8A) All persons with functions and powers under this Act must:
- (a) exercise their functions and powers in a manner that implements the purpose of the Act;¹⁶² and
 - (b) adopt an approach by which they:
 - (i) have particular regard to cumulative effects of use and development;
 - (ii) take a long-term view;
 - (iii) take a precautionary approach where effects on the environment are uncertain, unknown, or little understood, but potentially significantly adverse; and
 - (v) promote the alignment of measures under this Act with measures under other relevant statutes;
 - (c) take steps to restore and enhance natural heritage and social wellbeing; and
 - (d) without limiting (a), have particular regard to and make provision for:
 - (i) the exercise of kaitiakitanga;
 - (ii) the ethic of stewardship;
 - (iii) protection of the habitat of trout and salmon;
 - (iv) the benefits of environmentally sustainable social and economic development, including infrastructure, affordable housing, and a quality urban environment;
 - (v) the efficient use of natural and physical resources;
 - (vi) the finite characteristics of natural and physical resources;
 - (vii) the importance of energy security, and the benefits to be derived from renewable electricity generation.

Definitions (to add to section 2):

Circular economy means an approach to resource use in which resources are kept in use for as long as possible, the maximum value is extracted from them whilst in use, and then their products and materials are recovered and regenerated at the end of their service life.

Quality urban environment means an urban environment that makes it possible for all people, whānau, communities and future generations to provide for their wellbeing, including by:

- a) offering people access to a choice of homes that meet their demands, jobs, opportunities for social interaction, high-quality diverse services and open space;
- b) providing businesses with economies of scale, with access to many consumers, suppliers, skilled people and sources of innovation;
- c) using land, energy and infrastructure efficiently;
- d) responding to changing needs and conditions;
- e) protecting natural heritage and ecological connectivity, enabling people to experience nature and open space close to their homes, and adopting environmentally sustainable design approaches.¹⁶³

5.8 Concluding comments

In this chapter, we have considered two related matters. The first was a question of legislative design at the heart of a future system: should we keep, or split, the RMA? In particular, we have put forward a view that there is considerable strength in having an integrated, wide-ranging, and protective statute like the RMA at the core of the system. While there are many attractive things about splitting the RMA into separate statutes for planning and environment, on balance we do not recommend doing so. In particular, we need land use to be proactively managed alongside other domains, in a tightly knit planning regime, to produce better environmental outcomes. That said, we do stress the need to better align land use decision-making

under the RMA with infrastructure planning and funding under separate legislation. Central to that will be a role for spatial planning, explored in Chapter 8.

The second matter we have considered in this chapter is the place of the purpose and principles of the RMA. In short, we see considerable potential for revision rather than just further tinkering, and we have offered some potential drafting as a prompt for debate. Part 2 is legally significant in a way that the purposes of other statutory frameworks are not (or are less so), and is therefore well placed to drive the real change that is required for the future. The mechanics of how that would be realised in practice – through planning processes that implement the normative direction of a new Part 2, and consent decisions that are consistent with it – are explored in the chapters that follow.

ENDNOTES

- 1 See G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019), from 38. See also G Palmer "The Resource Management Act – how we got it and what changes are being made to it" (2014) RM Theory & Practice 22; C Knight *Beyond Manapouri: 50 years of environmental politics in New Zealand* (Canterbury University Press, 2018).
- 2 Some may argue that the Act is much wider than just an environmentally protective one. For example, the definition of "environment" is much wider than biophysical concerns, and includes communities.
- 3 See New Zealand Productivity Commission *Better urban planning* (2017) at 97; Parliamentary Commissioner for the Environment *Managing change in paradise: Sustainable development in peri-urban areas* (2001); B Rae "Urban design and reform of the RMA" (April 2009) Resource Management Journal 16; New Zealand Council for Infrastructure Development (now Infrastructure New Zealand) *Integrated governance planning and delivery: A proposal for local government and planning law reform in New Zealand* (2015).
- 4 Although subordinate instruments can and do take a more focused approach (eg for forestry or urban areas).
- 5 Although those can be targeted within subordinate instruments (eg forestry, urban areas) and some sectors like aquaculture and renewable electricity generators are, rather unusually, singled out in the Act itself.
- 6 For example, the following are (at least currently) beyond its mechanics and require measures to be taken elsewhere: waste minimisation, the internal design of buildings, restrictions on greenhouse gas emissions, fisheries stock management, export restrictions on native timber etc.
- 7 G Palmer "The Resource Management Act – how we got it and what changes are being made to it" (2014) RM Theory & Practice 22; S Elias *Righting environmental justice* (address to the Resource Management Law Association, 25 July 2013) at 2.
- 8 See MA Brown *Last line of defence: Compliance, monitoring and enforcement of New Zealand's environmental law* (2017); MA Brown "Compliance, monitoring, enforcement and evaluation" in G Severinsen and R Peart *Reform of the resource management system: The next generation - Working paper 3* (EDS, 2018); M Brown *Independent analysis of the 2017/2018 compliance monitoring and enforcement metrics for the regional sector* (The Catalyst Group, 2018).
- 9 For example, climate change mitigation is a significant gap, as is the absence of meaningful principles to guide allocative decision-making. Significant tensions exist between efficient and timely outcomes and public participation, between urban development and the protection of productive soils, and more generally between enabling economic wellbeing and protecting the natural environment.
- 10 In short, these principles can be described as: coherence, certainty, accessibility, integration, durability, being tailored to New Zealand circumstances, and efficiency.
- 11 See G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019), ch 8.
- 12 See Parliamentary Commissioner for the Environment *Submission to the Minister for the Environment on improving our resource management system* (Discussion document, 2013) at 9; G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 145.
- 13 See Chapter 9.
- 14 On potential distinctions between "urban" or "built" and "natural" environments, see New Zealand Productivity Commission *Better urban planning* (2017); New Zealand Government *Urban development authorities* (Discussion document, 2017); *Report of the Minister for the Environment's Urban Technical Advisory Group* (2010); New Zealand National Party "New urban planning law for cities" (Press release, 4 September 2017).
- 15 See New Zealand Council for Infrastructure Development (now Infrastructure New Zealand) *Integrated governance, planning and delivery: A proposal for local government and planning law reform in New Zealand* (2015) at 5; Infrastructure New Zealand *Building regions: A vision for local government, planning law and funding reform* (2019). See also Local Government New Zealand A "blue skies" discussion about New Zealand's resource management system (2015) at 41. Also see generally A McLeod "From scratch" (2012) 185 Planning Quarterly 10.
- 16 For example, heritage legislation.
- 17 It could also establish and provide for the wider functions of institutions, including local government.
- 18 A focus on regional planning is because such proposals are sometimes accompanied by regional amalgamation of councils themselves. However, that is not a pre-requisite to legislative separation.
- 19 See G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 282-283 (Figure 14.4).
- 20 New Zealand Council for Infrastructure Development (now Infrastructure New Zealand) *Integrated governance, planning and delivery: A proposal for local government and planning law reform in New Zealand* (2015) at 34.
- 21 Ibid.
- 22 Infrastructure New Zealand *Building regions: A vision for local government, planning law and funding reform* (2019) at 59.
- 23 As explained later in this chapter, this continues to be an issue, despite the *King Salmon* jurisprudence.
- 24 Obtaining a mining permit does not remove the need to obtain resource consent under the RMA.
- 25 On the risks of constant tinkering, see S Berry and H Andrews "The final straw for the RMA? Some shortcomings of the Resource Legislation Amendment Bill 2015" (September 2016) Resource Management Journal 1; G Palmer "Law-making in New Zealand: Is there a better way?" (2014) 22 Wai L Rev.
- 26 G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 132.
- 27 Ibid at 141, 144, 169.
- 28 Very accurate when compared with the fragmented approach to environmental legislation prior to its enactment.
- 29 See generally New Zealand Council for Infrastructure Development (now Infrastructure New Zealand) *Integrated governance, planning and delivery: A proposal for local government and planning law reform in New Zealand* (2015).
- 30 Although, as noted earlier, not all blame for housing unaffordability can be laid at the door of restrictive land use rules and policies under the RMA. See T Hazledine "Economics and the resource management system" in G Severinsen and R Peart *Reform of the resource management system: The next generation - Working paper 3* (EDS, 2018) at 158.
- 31 Compare also the more extreme proposal for an urban development authority, discussed in Chapter 10.
- 32 That is a simplification, given that land use restrictions can be imposed by both territorial authorities and regional councils to discharge quite different functions, not all of which are spatial (eg to maintain water quality or address erosion).
- 33 That is sometimes not made explicit. For example, Infrastructure New Zealand sees the role of an Environment Act as including the protection of "land" as something distinct from the "planning" of land use; see New Zealand Council for Infrastructure Development (now Infrastructure New Zealand) *Integrated governance, planning and delivery: A proposal for local government and planning law reform in New Zealand* (2015) at 77. But if both frameworks are intended to have a role in how land use decisions are made, is this more, or less, integrative than the RMA? Are there, instead, different reasons or trigger points when each Act would be expected to control land use? It may, alternatively, be that Environment Act protections are intended to refer to the protection of soil health rather than the spatial aspects of land use (what activities can go where relative to each other).
- 34 Which tend to be more certain, and can be managed more easily: see G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) from 139.
- 35 Ibid at 143.
- 36 Although there are some interface questions: eg provisions that control genetically modified organisms in district plans and some limited pest control where an activity regulated under the RMA would exacerbate it.
- 37 For example, the Building Code, the emissions trading scheme, product stewardship schemes, packaging, labelling and transport requirements for hazardous substances, and pest management plans.
- 38 Spatial planning would be a different tool, but that relates to the need to align land use and infrastructure (explained above), not a fundamentally different way of controlling land use itself.
- 39 Auckland as a region is, of course, not all urban.
- 40 Resource Management Act 1991, sch 1, pt 5.
- 41 Kāinga Ora – Homes and Communities has been established, but at the time of writing has not yet been invested with development powers. That is expected later in the year.
- 42 See the proposed changes to plan making for freshwater in the Resource Management Amendment Bill 2019, cl 13.
- 43 See G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) ch 8.
- 44 See *North Shore City Council v Auckland Regional Council* (1996) 2 ELRNZ 305 (EnvC) at 344–346. Contrast *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [24]; but compare aspects of *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, [2018] 3 NZLR 283. On the turbulent history of Part 2 in the courts, see G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 97.
- 45 See New Zealand Productivity Commission *Better urban planning* (2017).
- 46 See G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 100-105.
- 47 Ibid at 103.
- 48 Urban design has developed considerably since those days, to encompass things that are much more about enhancing a community's wellbeing in places where they live, play and work.
- 49 B Clarkson and C Kirby "Ecological restoration in urban environments in New Zealand" (2016) 17 Ecological Management & Restoration 180.
- 50 Or a difficult trade-off between harvesting pine trees or letting them fall down. There are many other examples of where land use choices have systemic

- environmental impacts or risks (eg planting new trees requires a lot of water, and planting a monoculture can create risks of disease).
- 51 Duplication and overlap should be avoided unless there is good reason for it: see G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 125; Legislation Act 2012, s 3(e)(ii).
- 52 Compare G Palmer and R Blakeley *Submission on the New Zealand Productivity Commission's better urban planning inquiry draft report* (2016).
- 53 For example, the EEZ Act, Maritime Transport Act, Fisheries Act and aspects of the Biosecurity Act.
- 54 See Ministry for the Environment and Statistics New Zealand *New Zealand's environmental reporting series: Environment Aotearoa 2019* (2019).
- 55 For example, environmental bottom lines are also found in conservation legislation, biosecurity legislation, and many other acts.
- 56 See G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 94-100.
- 57 Some may argue with the concept of intrinsic value, and an alternative way of thinking about it is the overriding value that people place on particular aspects of the natural world (eg the survival of the kiwi) even if they do not affect people's basic needs.
- 58 Compare Parliamentary Commissioner for the Environment *A Zero Carbon Act for New Zealand* (2018) at 10.
- 59 For example, through valuing the natural world (through ecosystem services or natural capital accounting).
- 60 See G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019), ch 7.2.
- 61 *Auckland City Council v John Woolley Trust* (2008) 14 ELRNZ 106 (HC) at [47].
- 62 In particular, the most recent proposals to reshape sections 6 and 7 into a completely different configuration were unsuccessful.
- 63 *Environmental Defence Soc Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [151].
- 64 Of course, the *King Salmon* jurisprudence has, in a sense, reduced the direct effect of Part 2 in cases where subordinate instruments are clear on a matter, but those subordinate instruments themselves are only influential because they have been created to directly implement Part 2.
- 65 Many other discretionary decisions of a public nature are made in accordance with a prescribed process and guided by decision-making principles, but with legal challenge by way of general administrative law principles (reasonableness, relevance etc) rather than an extensive legal definition of a statute's purpose statement.
- 66 M Williams "Resource management system: Reform or transform?" (2018) *Resource Management Journal* 3 at 3. On sections 6-8 as a hierarchy, and the nature of the language used, see *Unison Networks Ltd v Hastings District Council* EnvC Wellington W011/09, 23 February 2009.
- 67 G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019), at 156.
- 68 On the view that sustainability is inherently value based, see N Robinson "Re conceptualising sustainability: The Anthropocene agenda" (2015) 11 *RM Theory & Practice* 99 at 100-102; D Young *Values as law: The history and efficacy of the Resource Management Act* (Victoria University of Wellington Institute of Policy Studies, 2001) at 31; B Harris "Sustainable management as an express purpose of environmental legislation" (1993) 8 *Otago Law Review* 51. Compare E Louka *International environmental law: Fairness, effectiveness, and world order* (Cambridge University Press, 2006) at 19.
- 69 Richard Macrory describes these as having a moral dimension if contained within primary legislation: see R Macrory *Regulation, enforcement and governance in environmental law* (Bloomsbury, 2014) at 264.
- 70 Dr Tim Denne has pointed out that "decision-making criteria can become paralysed" in the absence of trade-offs: see T Denne "Resource management law reform and economics" in G Severinsen and R Peart *Reform of the resource management system: The next generation - Working paper 3* (EDS, 2018).
- 71 See *Report of the Environmental Defence Society Technical Advisory Group on the review of sections 6 and 7 of the Resource Management Act 1991* (April 2012) at 13; *Wakatipu Environmental Society Inc v Queenstown Lakes District Council* [2000] NZRMA 259.
- 72 For example, section 7 provides for things like the "efficient use and development of natural and physical resources".
- 73 Compare R Peart *A place to stand: The protection of New Zealand's natural and coastal landscapes* (EDS, 2004), in which this was identified as an issue in the context of natural landscapes 15 years ago: the Act is not clear on what it is actually trying to achieve, other than ensuring the recognition of landscape.
- 74 For example, there is a significant difference between having to "recognise and provide for" something like the maintenance of wetlands and a direction that there be "no further loss" of wetlands.
- 75 See, for example, Resource Management Act 1991, ss 6(a) and 6(c).
- 76 Acknowledgement: M Doole *Conservation system reform: A proposed model to better protect and enhance species and ecosystems in New Zealand* (Unpublished commissioned paper, The Catalyst Group, 2019).
- 77 FJF Maseyk and P Gerbeaux "Advances in the identification and assessment of ecological significant habitats in two areas of contrasting biodiversity loss in New Zealand" (2015) 39(1) *New Zealand Journal of Ecology* 116; S Walker and others "Halting indigenous biodiversity decline: Ambiguity, equity, and outcomes in RMA assessment of significance" (2008) 32(2) *New Zealand Journal of Ecology* 225.
- 78 FJF Maseyk, EJ Dominati and AD Mackay "More than a 'nice to have': Integrating indigenous biodiversity into agroecosystems in New Zealand" (2019) 43(2) *New Zealand Journal of Ecology* 3372.
- 79 FJF Maseyk and others "Managing natural capital stocks for the provision of ecosystem services" (2017) 10(2) *Conservation Letters* 211; KJ Gaston and RA Fuller "Biodiversity and extinction: Losing the common and widespread" (2007) 21(2) *Progress in Physical Geography* 213.
- 80 KJ Gaston and RA Fuller "Biodiversity and extinction: Losing the common and widespread" (2007) 21(2) *Progress in Physical Geography* 213.
- 81 See, for example, A Monks, E Hayman and S Walker "Attrition of recommended areas for protection: Clearance of ecologically significant vegetation on private land" (2019) 43(2) *New Zealand Journal of Ecology* 3367.
- 82 See, for example, GP Elliott and others "Declines in common, widespread native birds in a mature temperate forest" (2010) 143 *Biological Conservation* 2119.
- 83 KJ Gaston and RA Fuller "Biodiversity and extinction: Losing the common and widespread" (2007) 21(2) *Progress in Physical Geography* 213; KJ Gaston "Valuing common Species" (2010) 327 *Science* 154.
- 84 SH Anderson and others "Cascading effects of bird functional extinction reduce pollination and plant density" (2011) 331 *Science* 1068.
- 85 Compare A Dormer and others *Report of the Minister for the Environment's Technical Advisory Group* (February 2009) at 38.
- 86 Compare M Williams "Resource management system: Reform or transform?" (2018) *Resource Management Journal* 3.
- 87 Resource Management Act 1991, s 6.
- 88 There is a specific function for councils to pursue environmental improvements (See *ibid*, ss 30(1)(a) and 31(1)(a)), but the strength of direction in Part 2 ("have particular regard to") is fairly weak. Furthermore, enhancement needs to be accompanied by practical measures to achieve it, which are weak under the primarily regulatory framework of the RMA. Triggers are generally focused on adverse effects: see *JF Investments v Queenstown Lakes District Council* EnvC Christchurch C48/2006, 27 April 2006 at [40].
- 89 See G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019), ch 7.
- 90 For example, Rt Hon Simon Upton said that the RMA would impose "tightly targeted controls that have minimum side effects" (4 July 1991) 516 *NZPD* 3020.
- 91 See N Robinson "Re-conceptualising sustainability: The Anthropocene agenda" (2015) 11 *RM Theory & Practice* 99 at 108; MH Benson and RK Craig "The end of sustainability" (2014) 27 *Society and Natural Resources* 777 at 778. See G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 224.
- 92 Compare Resource Management Review Panel *Transforming the resource management system: Opportunities for change - Issues and options paper* (2019) at 14.
- 93 See G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 95, 106. Compare *Report of the Biodiversity Collaborative Group* (2018) at 90.
- 94 *Ibid* at 105; Well-being of Future Generations (Wales) Act 2015 (UK), s 4.
- 95 Environment Bill 2019-2020 (UK).
- 96 Resource Management Review Panel *Transforming the resource management system: Opportunities for change - Issues and options paper* (2019) at 14.
- 97 This lack of urban-focused content has legitimately been seen as a barrier, but we also note that it has not in practice prevented much good urban planning from occurring: see G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019), ch 7. On the inadequacy of Part 2 in urban planning see, for example, *Report of the Minister for the Environment's Urban Technical Advisory Group* (2010) and *New Zealand Productivity Commission Better urban planning* (2017).
- 98 See G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 95.
- 99 See, for example, S Upton "The Stace Hammond Grace Lecture: Purpose and Principle in the Resource Management Act" [1995] 3 *Wai L Rev* 17 at 40.
- 100 Resource Management Act 1991, ss 7(b), 7(g).
- 101 See generally M Wright, S Gepp and D Hall *A Review of the Resource Management (National Environmental Standards for Plantation Forestry) Regulations 2017* (2019).
- 102 Compare R Joseph "The Treaty, tikanga Māori, ecosystem-based management, the RMA and power sharing for environmental integrity in Aotearoa New Zealand - possible ways forward" in G Severinsen and R Peart *Reform of the resource management system: The next generation - Working paper 3* (EDS, 2018).
- 103 Resource Management Act 1991, s 30(1)(fa).
- 104 See G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 111-112. There is no provision for allocative policies to be developed, and no recognition that allocation is at all a function of central government (despite some more general policy development outside the RMA: see, for example, Ministry for the Environment *Water programme of action: Water allocation and use* (2004)).
- 105 *Environmental Defence Soc Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593.

- 106 *New Zealand Rail Ltd v Marlborough District Council* [1994] NZRMA 70 (HC). Contrast earlier cases where the primacy of bottom lines was explicitly recognised: see *Shell Oil New Zealand Ltd v Auckland City Council* W8/94, 2 February 1994 (PT) at 10.
- 107 Section 67(3)(b) of the RMA requires a regional plan to "give effect to" the NZCPS. See *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [127]-[129].
- 108 Ones that are so firm that they have to be given effect to in rules and resource consents, rather than being directly binding in a regulatory sense.
- 109 *Man O' War v Auckland Council* [2017] NZCA 24; *Hokio Trusts v Manawatu Wanganui Regional Council* [2017] NZHC 1355; *Royal Forest and Bird Protection Society v Bay of Plenty Regional Council* [2017] NZHC 3080; *Transpower New Zealand Ltd v Auckland Council* [2017] NZHC 281; *Turners & Growers v Far North District Council* [2017] NZHC 764; *Thumb Point Station v Auckland Council* [2015] NZHC 1035; *Royal Forest and Bird Protection Society Inc v Bay of Plenty Regional Council* [2017] NZHC 3080, (2017) 20 ELRNZ 564; *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, [2018] 3 NZLR 283 (noting the Court of Appeal's comments about the applicability of the *King Salmon* rationale to resource consents); *Environmental Defence Society Inc v Otago Regional Council* [2019] NZHC 2278.
- 110 See G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 97; *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316. See also *Turners & Growers v Far North District Council* [2017] NZHC 764 at [46]; *Transpower New Zealand Ltd v Auckland Council* [2017] NZHC 281 at [84]. Generally, national direction should be read in a way that reconciles any perceived conflicts: see *Royal Forest and Bird Protection Society Inc v Bay of Plenty Regional Council* [2017] NZHC 3080, (2017) 20 ELRNZ 564.
- 111 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [146].
- 112 See Resource Management Act 1991, ss 68(1), 76(1). In practice, rules are found in all plans.
- 113 On this point, see *New Zealand Rail Ltd v Marlborough District Council* [1994] NZRMA 70 (HC); *Mangakahia Māori Komiti v Northland Regional Council* [1996] NZRMA 193 (PT).
- 114 See G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 97.
- 115 See *Environmental Defence Society Inc v Otago Regional Council* [2019] NZHC 2278.
- 116 For example, corresponding bottom lines in an NPS on biodiversity or an NPS protecting productive soils.
- 117 Essentially, the Act was a marriage between the environmental movement's concerns for biophysical bottom lines and the free market ideology prevalent in the late 1980s and early 1990s. As Caroline Miller has said, "[E]veryone learned at least a slightly different lesson" from the RMA: see New Zealand Productivity Commission *Better urban planning* (2017) at 122, citing the submission of C Miller.
- 118 *New Zealand Government Planning for successful cities: A discussion document on a proposed National Policy Statement on Urban Development* (2019) at 31.
- 119 That may make sense in relation to repeatedly litigated, narrow, scientific questions like the health effects of electro-magnetic waves from cell phone towers, but is less obviously the case where there are still many long-term environmental effects and value judgments to be made about where and how forestry operations occur.
- 120 See G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 108; *New Zealand Council for Infrastructure Development* (now Infrastructure New Zealand) *Integrated governance, planning and delivery: A proposal for local government and planning law reform in New Zealand* (2015) at 34.
- 121 For example, to support efficient and environmentally friendly mass transit systems.
- 122 Compare Ministry for the Environment *Building competitive cities: Reform of the urban and infrastructure planning system – A discussion document* (October 2010); A Dormer and others *Report of the Urban Technical Advisory Group* (July 2010).
- 123 G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 108.
- 124 *New Zealand Productivity Commission Better urban planning* (2017) at 258, citing C Miller *Culture and capability within the New Zealand planning system* (2016). See also S Owens "International developments in environmental planning" in R Peart (coll) *Beyond the RMA: An in-depth exploration of the Resource Management Act* (EDS, 2007); *Report of the Minister for the Environment's Urban Technical Advisory Group* (2010).
- 125 Compare *Report of the Minister for the Environment's Urban Technical Advisory Group* (July 2010) at 68; *Report of the Minister for the Environment's Resource Management Act 1991 Principles Technical Advisory Group* (2012) from 35; *New Zealand Productivity Commission Better urban planning* (2017) at 211.
- 126 Resource Management Act 1991, s 7.
- 127 *Report of the Minister for the Environment's Resource Management Act 1991 Principles Technical Advisory Group* (2012).
- 128 *New Zealand Rail Ltd v Marlborough District Council* [1994] NZRMA 70 (HC).
- 129 One may compare the somewhat vague and undefined notion of "quality urban environments" proposed to be included in an NPS on Urban Development (New Zealand Government *Planning for successful cities: A discussion document on a proposed National Policy Statement on Urban Development* (2019)). This might include the importance of synergies between the social and environmental benefits of urban design choices. On the "environmental" benefits of urban design, see City of Melbourne *Green our city strategic action plan 2017-2021* (2017), and on the importance of urban tree cover, see *Report of the Biodiversity Collaborative Group* (2018) at 120.
- 130 G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 106. Compare See I Carlman "The Resource Management Act through external eyes" (2007) 11 NZJEL 181.
- 131 Although questions of fairness need to be carefully considered, in terms of who pays where improvements are unrelated to harm.
- 132 See G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 147.
- 133 There is also benefit in having a wider range of principles to consider, to provide the ability to resolve what are essentially private disputes (eg the height of a fence) without reference to lofty principles of "environmental" wellbeing. See *ibid* at 111.
- 134 Especially during the most recent attempts to amend it in 2017.
- 135 M Williams "Resource management system: Reform or transform?" (2018) *Resource Management Journal* 3 at 4 and 5.
- 136 For example, undermining the positive contribution that *King Salmon* has made.
- 137 Others are institutional or process-based.
- 138 On revised planning processes and implementation, see Chapters 6 and 7.
- 139 See V Lowe "Sustainable development and unsustainable arguments" in A Boyle and D Freestone (eds) *International law and sustainable development* (Oxford University Press, 1999) at 31.
- 140 For example, consenting decisions are explicitly subject to Part 2 of the Act. Compare *Lee v Auckland City Council* [1995] NZRMA 241 (PT), where section 5 was described as the "lodestar" of the Act.
- 141 Resource Management Act 1991, s 18A(b).
- 142 For example, the tax system, what one's neighbour is doing, social licence, ethical perspectives, the ability to shift costs and benefits, the state of the economy, and so forth.
- 143 That is one important lesson from *King Salmon*. At [137], the Court bemoaned the uncertainty of outcome created by abandoning the specific directions of the NZCPS in favour of an overall broad judgement. However, that uncertainty of outcome is often unavoidable in an effects-based system that often relies on project level interpretation of general and potentially conflicting policies.
- 144 We can contrast resource management law with, for example, criminal law, where there is (with some notable exceptions), much stronger social consensus about what is right and wrong.
- 145 See G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019), ch 5.
- 146 See A Butler and others *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, 2009).
- 147 Resource Management Act 1991, s 5.
- 148 *New Zealand Government Planning for successful cities: A discussion document on a proposed National Policy Statement on Urban Development* (2019) at 26.
- 149 For example, "precaution" is not mentioned under the RMA specifically, but the precautionary approach has been developed in a fairly sophisticated way in the courts. See A Gillespie "Precautionary New Zealand" (2011) 24 NZULR 364; G Severinsen "Bearing the weight of the world: Precaution and the burden of proof in the Resource Management Act" (2014) 26 NZULR 375.
- 150 This will not be an easy task but, as pointed out in the Phase 1 report, there is a significant difference between the need to protect the life supporting capacity of resources like freshwater and concepts like urban amenity (defined in the RMA as "natural or physical qualities and characteristics of an area that contribute to people's appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes").
- 151 We provided a starting point for what these could be in the Phase 1 report, although we note that it will not be straightforward making a distinction between things that warrant inflexible bottom line outcomes and those that do not. See G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 98.
- 152 On the relationship between threatened species management plans under conservation legislation and RMA instruments, see Chapter 12.
- 153 Grateful thanks go to Sally Gepp for assistance with drafting.
- 154 This moves away from the current reference to "natural and physical resources" which has two shortcomings. First, it is an anthropocentric conception of the environment as a suite of resources and, secondly, it does not encompass the social aspects of the environment that are contained within the definition of "environment".
- 155 "Sustainable management" encompasses protection. The (existing) definition of sustainable management includes the word "protection" in the phrase "use, development and protection", and use of the word "avoid" in section 5(2)(c) contemplates that particular environments may need to be protected from the adverse effects of activities in order to implement sustainable management: *Environmental Defence Society Inc v New Zealand King Salmon* [2014] NZSC 38 at [24(d)]. It would now also encompass enhancement.
- 156 The proposed section 5 replaces the existing section 5 with:

- A new phrase "natural and physical environment" rather than "natural and physical resources"
 - An express reference to use within environmental limits as being essential
 - A clear hierarchy (instead of the current term "while") of protecting natural heritage and promoting essential social wellbeing and mitigating significant natural hazard risks, and only then enabling people and communities to provide for their economic wellbeing and resilience, and other aspects of their social wellbeing. No express hierarchy is proposed as between protecting natural heritage and promoting essential social wellbeing. The two provisions are unlikely to conflict because the requirement to protect essential social wellbeing is concerned with ensuring use and development does not compromise social wellbeing; it is not about enabling development
 - A direction to give effect to the principles of the Treaty of Waitangi would sit outside the hierarchy
 - The reference to certain matters being of national importance (the current section 6) is retained
 - A new provision about public participation and access to information and justice is included. In principle, the RMA implements the Rio Declaration on Environment and Development, but Principle 10 is not expressly incorporated and this has led to an erosion over time of its public participation and devolved decision-making aspects, contrary to New Zealand's commitment to the Declaration.
- 157 In relation to the list that follows, further work should be done to explore whether more specific bottom line outcomes could be enshrined in legislation, rather than general references to "maintenance" and "protection". For example, see the attributes for freshwater identified as national bottom lines in New Zealand Government *Action for healthy waterways: A discussion document on national direction for our essential freshwater* (2019).
- 158 The policy intention is to cover natural landscapes and those with some human modification. The courts' interpretation of the term "outstanding natural landscape" encompasses landscapes with some modification. In *Long Bay-Okura Great Park Soc Inc v North Shore City Council* EnvC A078/08, it was held that a natural landscape does not mean one that is pristine, as this will only ever occur in very rare instances. There is a spectrum of naturalness from a pristine natural landscape to a cityscape, and a cultured nature landscape could still be an outstanding natural landscape. In *High Country Rosehip Orchards Ltd v Mackenzie District Council* [2011] NZEnvC 387 the Court stated that criteria of naturalness include relatively unmodified and legible landforms, the presence of water, the presence of (usually native) vegetation, and being uncluttered by structures and/or obvious human influence.
- 159 The proposed section 6 includes the natural heritage aspects of the current section 6 as environmental bottom lines, plus several new natural heritage aspects for which there should be environmental bottom lines (eg maintenance or enhancement of water quality) along with the climate goal from the Climate Change Response (Zero Carbon) Amendment Act. For some aspects of natural heritage, maintenance of current state is acceptable. For others, restoration or enhancement is necessary where current state is degraded. The drafting identifies where restoration or enhancement is part of the environmental bottom line. This strong enhancement focus significantly changes the current approach of maintaining current state (other than for freshwater quality and coastal and freshwater ecosystems, where there is an existing requirement to maintain or enhance quality in section 30).
- 160 Proposed section 7 describes essential social wellbeing requirements. As climate change is both a natural environment and a social wellbeing threat, it is included again in section 7. The provision includes historic heritage protection (currently in section 6), along with other essential social goals such as food security that are not currently expressly provided for in the RMA but are inferred from other provisions (such as the finite characteristics of resources). It provides for fair and efficient allocation (between people and communities in the current generation, and between current and future generations). It provides for consideration of waste as part of use and development.
- 161 Proposed section 8 contains the section 6 matters that are relevant to Treaty obligations. This is proposed as a starting point only. Tangata whenua input on the content of this provision would be essential in legislative processes.
- 162 This provision is arguably unnecessary, as statutory powers must always be exercised in accordance with the statutory purpose, but it provides a clear directive linking the hierarchy in the Act's purpose with actual decision-making.
- 163 This definition is based on objective 2 of the proposed NPS on Urban Development, with an additional reference to the need for urban environments to protect natural heritage, enabling people to experience nature and adopting environmentally sustainable design approaches (eg water sensitive design, sediment controls).

6. PLANNING UNDER A NEW RMA: CENTRAL GOVERNMENT

6.1 Introduction

There are limits to what reforms to Part 2 of the RMA will be able to achieve. They would be helpful and necessary, but not a silver bullet. We therefore need to direct attention to the hierarchy of more detailed instruments that puts Part 2 into effect. We may generally call this RMA “planning”.¹ In the two chapters that follow, we are floating significant change over time – albeit change that builds upon the foundations of what we already have.

6.2 Tensions in RMA planning: Central vs local, accountability vs independence

Planning, especially in the hierarchical context of the RMA – cannot be separated from the institutional question of who should do it. Generally speaking, plan making currently occurs at three levels under the RMA: central, regional and local. There can be a tension between what is done at what level.

It is an interesting feature of the system that there is no clear delineation between central and local/regional responsibilities by topic or domain. This mirrors the lack of clear constitutional role for these branches of government more generally in New Zealand. The RMA does not distinguish between things like freshwater quality and urban amenity – in theory, both can be tackled by multiple levels of government.

In practice, central government has often been seen as a reactive intervenor in a resource management system that is, by default, largely devolved (except in the context of coastal management).² Over the first 20 years of the RMA, this may have created an expectation of subsidiarity as localism, but that is increasingly being tested as more resource management issues require, and are receiving, national input.³ For example, government interest in land use and local infrastructure has spiked in recent times due to nationally significant growth issues in places like Auckland.

The delineation between regional and local functions under the RMA is clearer, although there is still some overlap when it comes to functions relating to biodiversity, regional level land use planning, cross-boundary issues, and natural hazards.⁴ The distinction largely breaks down when it comes to unitary authorities (which are both regional councils and territorial authorities in one).

There is a further tension in RMA planning between value-based democratic decision-making and technocratic independent review. We explored this question at a more general level in the Phase 1 report.⁵ This tension between independence and accountability exists at both the national and regional/local levels. For example, councils develop regional/district plans and consider most consent

applications, but merits appeals on all of these are often available to a national level, standing, expert Environment Court that has little direct accountability to communities. This arrangement is more about having a check and balance on *local* decision-making, not an independent check on *democratic* decision-making. Central government planning – primarily under the authority of the Minister for the Environment – is not subject to the same independent judicial oversight, but there are varying degrees of independent input on a recommendatory basis (eg Boards of Inquiry).

That said, when it comes to project-specific decisions, independence is relatively strong at the national level compared to the local. Ministers are expected not to get their hands dirty. For example, resource consents can be called in by the Minister and directed to a Board of Inquiry or the Environment Court,⁶ but cannot be directly decided by him or her.⁷

These quasi-constitutional questions about the roles of localism and centralism, and independence and accountability, are significant as context when it comes to reform of RMA planning processes. In short, we see merit in a more proactive, coherent role for central government under the RMA, a planning process that produces more timely outcomes, and a greater role for independent institutions in national level planning rather than just project-specific authorisations like consents.

There are tensions in the RMA planning process between central and local decision-making and between elements of democratic and independent input. We think the balance needs to change in some areas. In particular, there is (1) potential for a more proactive and coherent role for central government, (2) a process for achieving more timely planning outcomes, and (3) a greater role for independent institutions in how decisions are made.

The failure of the RMA (and, indeed, the wider system) to identify clear principles around subsidiarity – what is local and what is national – is problematic. As we have said previously, “We tend to fudge the issue in New Zealand by centralising powers when it becomes urgent to do so, not by having a conversation in advance about where dominant communities of interest should reside.”⁸ Others have expressed a similar sentiment, in that we need to develop a “common understanding of, and respect for, the roles, duties and accountabilities of both spheres of government”⁹ and that central government needs to come to the party more “to participate in the co-operative mandate that the RMA created”.¹⁰

This confusion is reflected in the RMA’s rather odd distinction between (1) matters of national “importance” in section 6; and (2) matters of national “significance”

on which national direction can be promulgated. Not all nationally significant matters are specified as being nationally important. For example, freshwater quality, which is managed under an NPS and listed as a regional council function to maintain or improve, is not contained in section 6 of the Act. Furthermore, not all nationally important matters need be seen as nationally significant (warranting national direction). For example, for a long time the NZCPS was the only national direction made under the Act.

We have heard, in equal measure, from people who think that in creating national direction the government is finally discharging its responsibilities and people who think it is intruding into local democracy and frustrating the chance for communities to take action in their own way. Either way, there is a great deal of uncertainty, which can result in either droughts of national direction (too little guidance) or avalanches (which councils are expected to implement). National direction can also be, and frequently is, changed in significant ways with little notice, and often according to the political dynamics of central government.

Part of this issue may be due to opposing views about the role of the government in general terms. Localists may feel that local action is more effective across the board.¹¹ But it is equally about what *kinds* of things belong where. For example, there has always been a strong case for national direction on freshwater quality, climate change, and biodiversity. In a similar way that New Zealanders would not expect significantly different health outcomes in different parts of the country (witness the outrage and subsequent review from the contamination of Havelock North's drinking water supply), there is increasingly a consistent expectation of clean waterways and thriving nature across New Zealand.

There is also a strong case for some central levers to control land use – not to shape local communities, but because broad land use choices (eg forestry, urban growth, agriculture) have significant implications for many nationally important outcomes.¹² That is not limited to nationally important environmental bottom lines; indeed, as we have seen, national concern can be equally about resource development (eg in forestry, aquaculture urban development and housing). Planning – even in the sense of town and country planning – is therefore not *just* a local thing.¹³

There is always going to be a difficult line to draw here between overlapping national and local communities of interest. In some countries, the nationally important status of some large urban centres sees much greater central intervention,¹⁴ whereas in New Zealand things have tended to progress in a more ad hoc way.¹⁵ But there is a significant risk in throwing out the baby with the bathwater. Central influence should not be too strong. The most extreme example of this risk is in the concept of an urban development authority, and its potential powers to plan large chunks of urban areas to progress narrow (albeit still important) government agendas (like housing) at the expense of local place shaping and essential environmental protections. We discuss an urban development authority model further in Chapter 10.¹⁶

A sensible approach would seem to be that if a matter is identified as being of national importance, then there is a reasonable expectation that some form of national guidance will follow.¹⁷ A degree of clarity is desirable as to what things are – or are not (or for what reasons) – nationally important and therefore open to a role for central government. The existing Part 2 of the RMA (particularly section 6 matters) provides a useful starting point for matters of “national importance”, although this hierarchy has been used mainly to refer to things that are *more* important rather than to provide a transparent trigger or justification for when central government can step in.¹⁸ Some nationally significant matters may be locally controversial, such as a proposition that the government be required to proactively identify and map important natural and cultural landscapes across the country.¹⁹

For now, we leave this as an open question, and simply note that we see a case for some more formal expression of subsidiarity in the system.²⁰ This could form a “principle” in Part 2 of the RMA, but would probably be more suited to parts in the RMA dealing with the functions of various levels of government.²¹ It could also be expressed more broadly as a quasi-constitutional principle in local government legislation, or in higher level “strategic” legislation (described in Chapter 8).

We suggest that a future system should more clearly define what subsidiarity means (which things are to be locally or centrally decided and for what reasons). If a matter is identified as being of national importance, then there is a reasonable expectation that some form of national guidance should follow.

6.3 A more proactive role for central government

Central government needs to be both a system steward (providing oversight, and making sure the system as a whole is working well) and an active player (making decisions). The RMA already allows it to be both of these things,²² but does not generally require it to be the latter. For example, the only national direction that is mandated by the Act is the NZCPS. Ministers generally have rights, rather than responsibilities, to intervene in instruments at regional and local levels.²³

Is that the right approach for the future? We have heard many people express a frustration that the government has, over most of the life of the Act, failed to produce national direction, even though it was intended to happen.²⁴ We share that sentiment. For example, it is concerning that national direction on indigenous biodiversity is only now forthcoming, even though that was already a pressing issue when the RMA was enacted almost 30 years ago. More generally, many issues facing New Zealand are of a scale or complexity that could prove challenging for councils to address, and require more central government involvement. Climate change is a good example, although there are many others.

This situation is frequently described by commentators as a failure of “implementation”. That may be true, but it is equally true that a failure of implementation can be seen as a failure of the legal framework to *require* implementation. In hindsight, it may have been naïve to expect a non-directive framework like the RMA to result in central government action, especially in light of the political and economic circumstances leading to its enactment (eg a reaction against Muldoon-era central planning, faith in the wisdom of the market, maximising economic productivity).²⁵ The pendulum has swung back in recent years with the creation of more national direction, but it has taken a long time to do so. For some things (eg climate change and freshwater), it has come far too late and will require a painful process to correct. This is not the “fault” of particular groups or sectors – it is the product of a system that has not done what it was meant to do.

The RMA generally does not compel central government to plan or intervene, other than in the context of the coastal environment. It does, however, *enable* government involvement in a wide variety of ways.

Aside from greater clarity around the roles of central and local government (a definition of subsidiarity), we consider that it is desirable for the system to provide an active obligation on central government to act, not just to react. With the exception of the NZCPS, national direction has to date, to a large extent, responded to issues rather than pre-empted them, and has therefore not been particularly precautionary. Freshwater is a prime example of where we have had to play catchup.

Furthermore, we do not think we should see an increasingly complex patchwork of NPSs and NESs, of varying specificity, format and topic, promulgated only when to do so becomes politically feasible or when problems are already manifest. We should also not see national direction targeted at low hanging fruit, or imposing “maximum” environmental outcomes in the absence of “minimum” bottom lines. For example (leaving aside the question of how desirable it is in principle), it is difficult to see how a minimum level of urban development (in the form of a proposed NPS for Urban Development) is more important than, or can exist without, national policy bottom lines on biodiversity.²⁶

It is telling that, in the absence of a proactive obligation, a significant portion of national direction has been driven by direct impacts on people’s health²⁷ or the desire to facilitate development or resource use.²⁸ There is nothing inherently wrong with that (the reasons behind them are usually legitimate), but it speaks to the risks of leaving nationally important environmental protections solely to political prioritisation. If there is a high profile incident where people get sick, there is often (rightly so) an immediate national outcry (as in Havelock North); but if we slowly ruin our rivers or erode our biodiversity, government can be much slower to take notice or action. Illness, GDP and fiscal outcomes can be measured

fairly easily in three-yearly political cycles, but many environmental problems are slower burning, and political blame can be easier to shift.²⁹ National direction requires leadership, and should not appear only as a result of problems as they enter the public consciousness.

In our proposed model, there would be an acceptance that, in recognising outcomes as being of national importance,³⁰ there is a corresponding obligation to provide some form of national guidance and action. That does not mean that central government does everything. On the contrary, even for matters of national importance, local action and ownership – including locally imposed regulation – will often (although not always) be more effective than a top-down imposition from Wellington.³¹ However, it does mean that the government has a duty to turn its mind to whether, and to what extent, it needs to intervene to achieve the purpose and principles of a revised Part 2. Central to that will be the imposition of environmental bottom lines and associated limits. Sometimes that will require a regulatory response; for example, an NES on freshwater quality should really have come much earlier. Sometimes it may even require targeted national direction for different parts of New Zealand. But we would envisage that at least some form of guidance, in the form of policy, would be needed for all matters of national importance.³²

We are suggesting a requirement, not just a power, for central government to promulgate national direction that gives effect to a revised purpose and principles of the RMA. This would mean that matters identified as being of national importance then have an expectation of at least some national response (which might take the form of policy, regulation or both).

6.4 A more coherent role for central government

At the time of writing, the government is in the process of promulgating several new NPSs and NESs and reviewing or reworking a number of existing ones.³³ This is, in principle, not a bad thing at all. Also positive is that some of this new guidance can be said to impose meaningful environmental bottom lines.³⁴ What has been politically unpalatable in the past is now well within the realms of achievability, partly on the back of significant social change and environmental awareness.³⁵

Yet the lack of a defined role for central (as opposed to local) government under the RMA, and the lack of any active obligation to create national direction in a considered and proactive way, means that this is being done in a fairly ad hoc manner in response to particular issues. The more separate pieces of national direction that are promulgated, the more complicated the relationships and cross-referencing between them (if any) become.

To exacerbate things further, many NPSs are characterised by fairly general wording. Few impose the kinds of firm, directive bottom lines contained in parts of

the NZCPS (the interpretation of which, incidentally, *still* required litigation to the Supreme Court to clarify).³⁶ The outstanding example may be the NPS for Renewable Electricity Generation, which arguably expands very little beyond what the Act already says and certainly does not meaningfully resolve direct tensions between renewables projects and other RMA concerns like landscape or biodiversity protection.

Some policies in NPSs can even pull in different normative directions. They seek to achieve quite different (and arguably not entirely compatible) things, which we might call “horizontal misalignment”. For example, there are real tensions between the NZCPS and NPS on Urban Development Capacity, and between the proposed NPS for Urban Development and the proposed NPS for Highly Productive Land. Again, part of this might be due to the crisis of identity at the core of the RMA (is it about imposing environmental bottom lines? Or is it also about preventing the extent to which environmental protections can be imposed?). But it is also a product of a system that sees central government as a reactive intervenor rather than proactive planner. We are left with “a rather curious collection [of national direction] given the original [environmental] intention of the legislation”.³⁷

We can also see “vertical misalignment” in the system. There is no express hierarchy between NPSs and NESs, but the function of rules (NESs) is to implement objective and policy direction (contained in NPSs). It would appear to follow that rules in NESs should be fully consistent with achieving the objectives and policies of any applicable

NPSs. Yet that is not always the case: for example, the proposed NES on Marine Aquaculture does not enable effects on marine species’ habitat to be considered when consenting existing marine farms, despite the NZCPS requiring that adverse effects on threatened and at risk species are avoided.

Regulatory provisions in an NES can even exist in a kind of policy vacuum, with no clearly associated policies (in an NPS) to clarify why rules and standards are there, or even to guide decisions where rules require resource consent. For example, it seems anomalous that there are (admittedly very limited) regulatory provisions relating to biodiversity protection in the NES for Plantation Forestry, but no accompanying NPS on indigenous biodiversity (which is set to follow only years afterwards). This begs the question: if a permitted activity rule is not met, what policy framework is the consent authority to apply in considering whether to grant consent? That is not to say that it would have been preferable to delay addressing real issues with forestry;³⁸ it is simply to point out that there are drawbacks in having a legal regime where sector-specific regulation can realistically be created without a formal or consistent policy framework to drive it.

A positive sign is that more specific sectoral provisions under an NES (for agriculture) are being developed as part of a wider package of measures for freshwater under the Essential Freshwater programme (including a new NPS).³⁹ However, there is nothing in the law that *requires* that to happen.

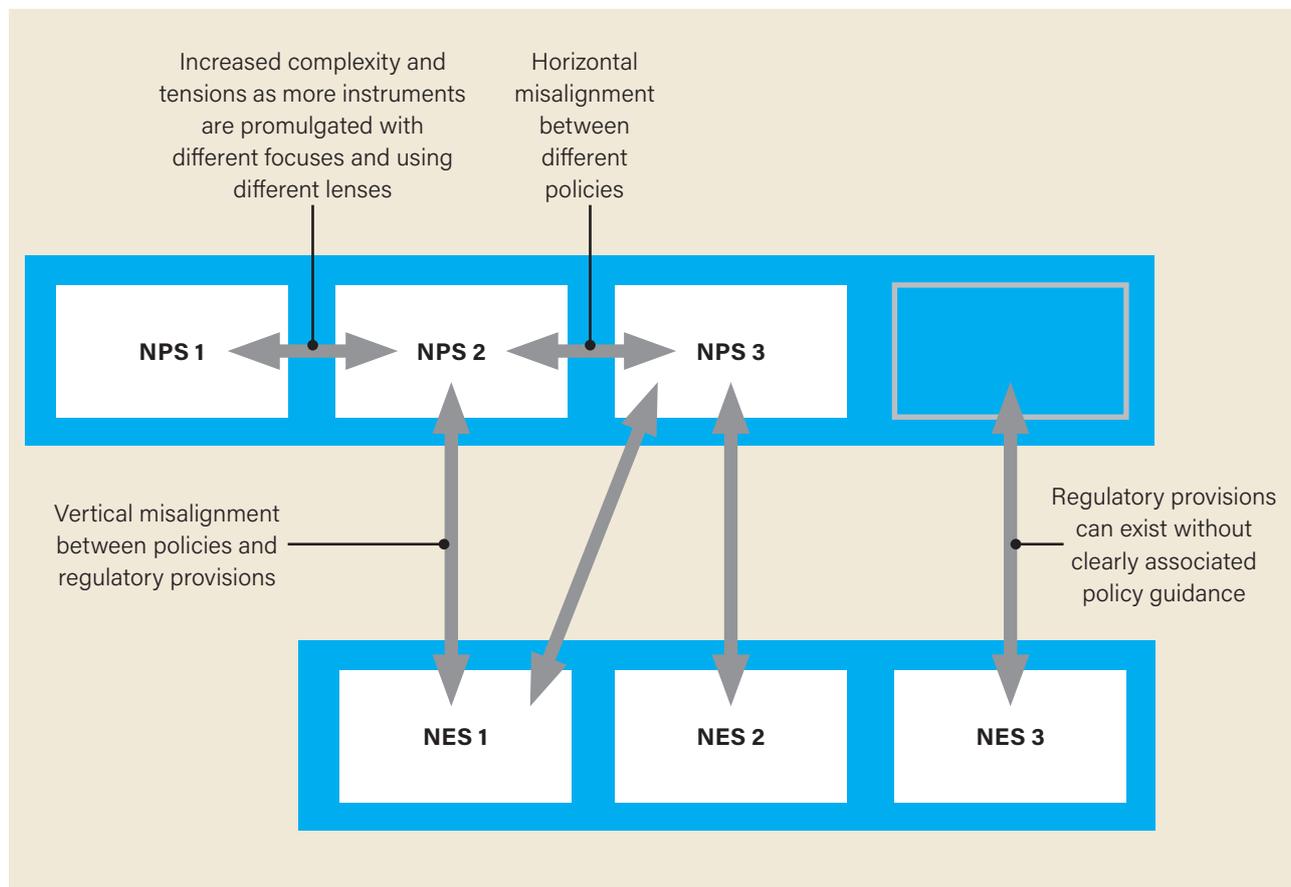


Figure 6.1: National direction: Potential for horizontal and vertical misalignment

A spotlight on relationships between NPSs

A number of NPSs have been promulgated by the government under the RMA. As we highlighted in the Phase 1 report, relationships between them, and their overall purpose as a package, can be unclear. For example, the NPS for Renewable Electricity Generation is partly in place to achieve environmental goals (eg the reduction of greenhouse gases), but the adverse effects of activities are not addressed in detail (only one policy in that NPS contemplates that there may be “residual adverse effects”).⁴⁰

Similarly, the NPS on Urban Development Capacity is concerned almost entirely with making more land available for urban development, with no consideration of the environment within which that capacity is being provided (eg the rivers that may need to be crossed or piped, or the significant natural areas that may be impacted) or whether the values of that environment might place a sensible cap on expansion. The quality of the natural environment within cities is given only cursory attention.⁴¹

A proposed replacement for this NPS – one more broadly focused on urban development – aims to insert considerations relating to intensification and urban design.⁴² But there are few cross-references between instruments, and significant questions about relationships (in particular, between urban objectives and proposed measures to protect highly productive land or to manage land use for climate change adaptation).⁴³

At the very least, every policy proposal for a new NPS now has to go to increasingly heroic lengths to try to outline the relationships with a web of existing and proposed NPSs that have been created for very different reasons, and can be reduced to somewhat hopeful statements such as, for example, that they “are intended to be compatible” and “should be complementary”.⁴⁴ While it is in the nature of much RMA policy to require tensions to be balanced and resolved in more specific contexts (which often needs to play out at the local level), meaningful cross-referencing should still be made within a coherent package of national direction. As we have previously said, the system as a whole needs to be “much clearer and more honest about the hierarchy of our basic objectives ... where they may come into conflict”.⁴⁵ Central government is no exception.

National direction also has no standardised format and structure (despite, ironically, a big push for *councils* to standardise terminology and formatting through National Planning Standards). It is a case of “do as I say, not as I do”. Any standardisation has been left to the discretion of Ministers.

Instruments have also been produced using inconsistent lenses. For example, some (like freshwater) are of broad, domain-based application (focused on the things in need of protection, which can be impacted on by multiple activities); others, like plantation forestry and renewables

projects, are focused on sectors (particular ways in which people use resources and which can impact on multiple domains); and still others, like urban development capacity and the NZCPS, are focused on particular spatially defined areas (which contain multiple domains and multiple sectors). It is largely left to local government to figure out how everything works together in practice, through plan reviews and consenting decisions.⁴⁶ In a future system, we think that National Planning Standards should provide consistency in the format and structure of national direction as well as council plans.

National direction under the RMA is at risk of both horizontal misalignment (it is not clear how different instruments are meant to work together or influence each other), and vertical misalignment (regulatory provisions can exist without a broader statement of policy, or be inconsistent with that policy). The format and structure of different pieces of national direction can also look very different, adding to confusion for councils expected to give effect to them. This issue will become more pronounced as more national direction is promulgated to target particular problems.

One problem is that we lack a national level version of a regional policy statement, within which all significant matters relating to central government’s functions can be dealt with in an integrated way (and which regulation must then give effect to).⁴⁷ This has led to authorities looking at “bite-sized pieces rather than ... a high level vision”.⁴⁸ We should also keep in mind lessons from the Auckland Unitary Plan process; several people have highlighted to us the importance of getting the broader policy landscape right *before* thinking about more detailed questions of rules and standards for particular areas or activities.

All of this leads us to propose not just an active obligation for central government to promulgate national direction on matters of national importance, but for it to do so in a single, integrated document. We are calling this a “National Environment Plan” (NEP).



A spotlight on a National Environment Plan

An NEP would be a one-stop shop for central government direction under a new RMA. It would encompass all matters that the government would be obliged, in a new RMA, to provide direction on. This would ensure (1) coherence across policy provisions (currently contained in different NPSs); (2) consistency between regulatory and policy provisions (which can currently exist as islands); (3) adequate connections (all direction would be in one place with close links);⁴⁹ and (4) completeness (it would be an integrated instrument covering all matters of national importance). An NEP would have a broadly defined structure and format either in the Act itself or in National Planning Standards. It would be designed to dovetail with a more standardised format and structure of council plans.

An NEP would be required to give effect to a revised Part 2 of the RMA. This means that its first task would be to provide a comprehensive coverage of the biophysical bottom lines set out in those provisions, on a domain by domain basis (those things we want to protect and enhance) but within an overarching concept of the ecosystem or biosphere. There would no longer be a situation where nationally significant development priorities could be given effect to – through a targeted NPS – without corresponding environmental bottom lines. Nor could there be regulatory provisions (eg for forestry) that did not link closely to associated policies and objectives (eg for biodiversity and climate change). There could still, of course, be targeted, sector-specific provisions (eg regulatory provisions on electricity transmission). But all such parts would need to be created within a broader policy framework targeted at domain-based bottom lines. Clear national level biophysical thresholds or indicators would be established in an NEP that, if breached, would trigger an obligation for the government to investigate and take corrective action.⁵⁰

The role of central government here would not, however, just be to expand on the RMA's bottom lines and impose associated limits. It would also be to resolve tensions between matters requiring a coherent framework for trade-offs at a national level, and to embrace synergies. Many matters of national importance involve complex trade-offs (eg a tension between landscape values and renewable electricity projects; between the provision of housing and the protection of highly productive food growing land; and between the necessity for climate change adaptation measures and respect for private property interests). If such tensions were addressed in a single instrument, the idea would be that they would be identified and addressed in a much clearer way than at present.⁵¹ To reflect its more nuanced role, the Ministry for the Environment's mandate under the Environment Act could usefully be expanded to more explicitly include good urban planning and design.⁵²

It would be important for targets to be accompanied by an assessment of (and indicative source for) the funding required to achieve them.⁵³ In the Phase 1 report, we pointed out that "it does not seem unreasonable for central government to fund local planning to the extent needed to implement national level instruments

We have heard from some people that the concept of an NEP would amount to a considerable centralisation of functions, and the decline of a devolved system. That is not the intention, other than to say that central government should be expected to produce at least some direction concerning matters of national importance. We also note that while the current system may in practice be fairly devolved, it could in theory actually be highly centralised (and is becoming more so by the day as more national direction is produced).

That said, an NEP *could* be a place in which more directive and geographically targeted powers were exercised by central government, if outcomes were nationally important. This could include particularly vulnerable, at risk, or valuable areas. Some matters can be nationally important but locally unique, and these are not limited to Crown-owned land or the conservation estate. For example, an NEP could provide a useful integrative policy environment under the RMA for an area like the Mackenzie Basin,⁵⁴ which spans multiple local authority boundaries, or to develop policies for areas defined by ecology or landscape rather than catchments (regions) or communities of interest (districts). The RMA already provides for NPSs to be regionally targeted,⁵⁵ and this cross-cutting aspect could be a key part of an NEP to encourage a more nuanced, place-based integration that councils may not be able to achieve as effectively.

An NEP would not, however, just be an integrated set of NESs and NPSs. It would also be oriented towards change and "anticipatory governance",⁵⁶ to reflect the nature of a revised Part 2 of the RMA. In this sense, it would be an "action plan" (a way to get from A to B)⁵⁷ as well as a "regulatory" plan (a framework for making decisions about what is and is not allowed). Central to that would be the mandatory establishment of targets for nationally important environmental indicators, especially (but not solely) to achieve bottom lines that had already been breached. These would be a form of commitment device,⁵⁸ elevating the status of the outcome and ensuring a long-term view is taken.⁵⁹ We have heard from many people that we are now at the point where we need to change footing from management to action, and our legal regimes need to reflect that. This is increasingly being recognised anyway (through climate change targets and freshwater targets),⁶⁰ but we see merit in embedding that approach in the RMA itself. In the United Kingdom, for example, there are legislative proposals for mandatory targets to be set and for timeframes to be established for various elements of environmental enhancement.⁶¹

There could even be a cascade of responses "waiting in the wings", to be deployed if targets were not met. For example, some have suggested the use of fast-track measures to allow changes to input controls for nutrient management (eg stocking rates) if output controls were not effective at achieving targets.⁶² Careful thought should be given to what such "Plan B" measures could look like when establishing targets in an NEP.

It would be important for targets to be accompanied by an assessment of (and indicative source for) the funding required to achieve them.⁶³ In the Phase 1 report,

we pointed out that “it does not seem unreasonable for central government to fund local planning to the extent needed to implement national level instruments ... where control is already present but without corresponding funding”.⁶⁴ The costs of implementing national direction can be significant, and must be considered closely at the outset.

We are proposing a requirement for all national direction to be incorporated, over time, into a single, coherent and comprehensive National Environment Plan. The government should be required to set targets for all matters of national importance within specific timeframes, and the Plan would be oriented towards action. Careful consideration should be given to “Plan B” measures to deploy if targets were not met.

Transitional arrangement would be crucial here. We are not suggesting that we clean the slate of national direction and start again. There is much of value to retain, and years’ worth of effort. Existing NPSs and NESs (and regulations)⁶⁵ would be deemed to be incorporated into a single NEP framework and added to and reviewed.

This will take time and resource, but prioritisations should be made according to a coherent set of criteria. That should be made plain in transitional arrangements. We would envisage this starting with a general alignment process for existing national direction (in the short term). For example, we have previously recommended that a review should be undertaken to align the NES on Plantation Forestry with the NPS for Indigenous Biodiversity and new NPS for Freshwater Management, once the latter are promulgated.⁶⁶ This would be followed by a systematic assessment of which gaps in national direction needed to be filled under the Act’s new purpose and principles (over the medium term). Alongside that, there would need to be reasonable time (and assistance) for the NEP to be given effect to in council plans (see Chapter 7).

Transitional arrangements leading to the integration of national direction into an NEP would be crucial. We do not want to lose much of the valuable work that has been done to create national direction over the past decade, including processes that are underway or nearing completion. That is particularly important for instruments that impose firm environmental bottom lines and associated limits. There would be a process by which existing national direction was aligned, followed by a process in which any gaps were filled.

6.5 A National Environment Plan and climate change

It is worth noting specifically that an NEP would be required to address climate change mitigation measures in order to implement a new Part 2. At the moment, an NES *can* but does not *have* to do so.⁶⁷ It is a curious

oversight that the potential to develop an NPS on climate change is unclear, and this needs to be clarified.⁶⁸ In practice, however, the important point is that we have neither an NES nor an NPS. It is a gap.

The RMA would not be the *only* legal framework within which climate change would be addressed – that issue is almost uniquely cross-cutting and needs to be dealt with in multiple places⁶⁹ – but an NEP would be the logical place to provide a nationally consistent approach under an Act that has real potential to do something.⁷⁰ A key question though, and one we address in Chapter 9, is the nature of the relationships between specifically climate-focused “planning” (emissions reduction plans and adaptation plans proposed under the Climate Change Response (Zero Carbon) Amendment Act) and RMA instruments (including an NEP, and council plans). Such relationships will need to very clear, as well as legally meaningful.

There will be an important link to be made between an NEP and broader climate change-focused instruments created under other legislation. The NEP will be one place in which a nationally coherent approach to climate change mitigation could be implemented. Climate change is discussed in Chapter 9.

6.6 A process for producing and reviewing a National Environment Plan

How would an integrated NEP be created or reviewed? We envisage a process broadly similar to how national direction is currently produced, albeit with some significant structural differences. The process for changing an NEP would be the same as the process for its development,⁷¹ and is outlined below in Figure 6.2. It would involve (1) co-development, (2) public notification, (3) the consideration of submissions and independent review in light of a revised Part 2 of the RMA, and (4) continual review based on new information from (among other things) environmental reporting.

Changes could, of course, be made to an NEP once in place, but such changes would not be able to target particular domains or sectors without considering the impact on the instrument as a whole. At present, changes to NPSs under the RMA can be pursued largely independently of changes to others (or the development of others).⁷²



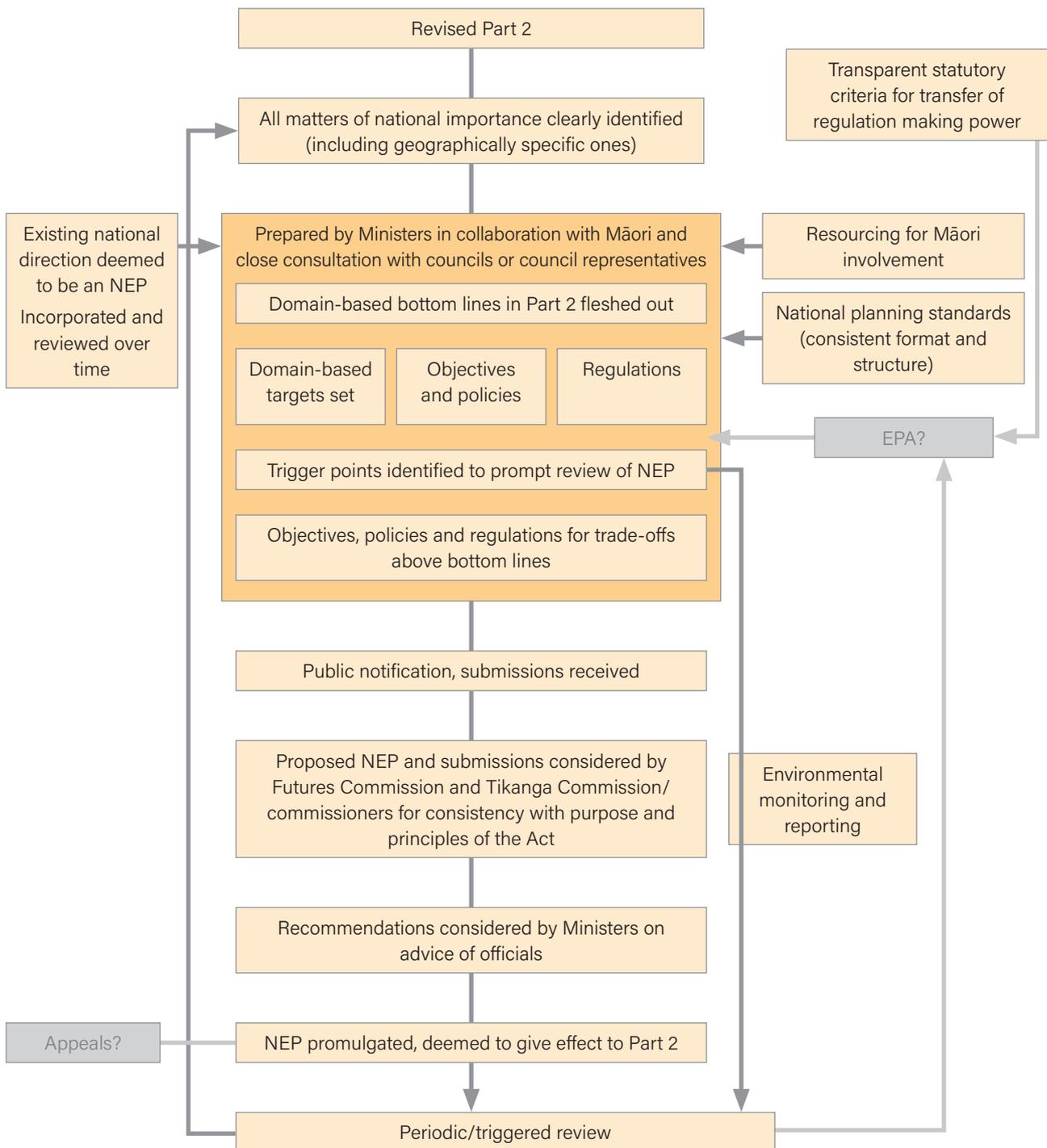


Figure 6.2: A process for producing a National Environment Plan

There are several novel elements of this process to note. The first is that an NEP would be prepared and reviewed in close collaboration with Māori, to better reflect the importance of the Treaty partnership. How that would happen in practice poses significant challenges, especially in terms of what a “representative” Māori body would look like at a national level with whom the Crown would collaborate.⁷³ To some extent that kind of question needs to be resolved by Māori, not imposed from the top as part of “system reform”. However, we think it merits close attention and further investigation, as part of a broader process for defining relevant iwi and hapū groups with whom councils will be required to collaborate.⁷⁴

An NEP would also be developed in close consultation with councils, recognising that much of the actual leg work of implementation (eg translating to more detailed, place-specific policies and regulation) will still need to be done at the local and regional levels. We have heard repeatedly that meaningful council involvement in actual development (more than just ad hoc secondments) would produce much better outcomes and much less pushback as opposed to presenting a finished policy proposal for feedback and submission, which implies that decisions have already effectively been made. It might also mean that local funding concerns are brought to attention much earlier, and (ideally) addressed sooner. The basic idea, albeit on a fairly informal basis, can be seen in the

establishment of a Regional Sector Group as part of the government's Essential Freshwater programme. It also echoes the Productivity Commission's concept of a "partners in regulation protocol" under which it would be made clearer how local government would be involved in central processes (and vice versa): a "meaningful dialogue" early in the process.⁷⁵ Councils deserve a place at the table.

Perhaps the most significant innovation in the NEP process is the role for a new independent "Futures Commission". This would be tasked with considering submissions, reviewing an NEP (including the adequacy of targets within it) in light of the purpose and principles of the Act, and providing advice to the government on changes. The government would be required to provide reasons for departing from any recommendations. This is not too different from the existing process for creating NPSs, in that the Futures Commission would take the general place of appointed Boards of Inquiry. However, the nature of this Commission would be quite different, and we envisage that it would evolve over time. It would have much wider significance than under the RMA, and is explored further in Chapter 8.

We are suggesting a process for producing and reviewing an NEP that in some ways resembles the current process for national direction. However, there would be greater involvement for Māori and councils in co-production, and review by a new, standing, independent Futures Commission.



A spotlight on a Futures Commission for New Zealand

Over recent years, we have seen a proliferation of plans for (or suggestions for) various standing commissions: for infrastructure,⁷⁶ climate change,⁷⁷ freshwater,⁷⁸ and the coastal environment.⁷⁹ We already have a Parliamentary Commissioner for the Environment. We have also had bespoke, task-based institutional arrangements of varying formality, such as the Independent Hearings Panel for the Auckland Unitary Plan or various government appointed advisory groups like those for freshwater management.⁸⁰

The basic driver for such institutional arrangements is similar. It is the desire to have an independent (or at least arm's-length) body tasked with both advising accountable bodies (usually the government, sometimes councils) and/or reviewing their actions. They are designed to enhance transparency and accountability even if they do not have final decision-making power.⁸¹ As we said in the Phase 1 report:⁸²

[A] degree of independence is valuable where its purpose is to enhance the accountability of elected institutions ... In particular, short-term political cycles make long-term, future-focused decisions less likely. Climate change decisions are a good example of this. Despite having good knowledge of the causes and implications of climate change for decades, decision makers at local, national and international level have been reluctant to make decisions today to decarbonise the economy because of the short term cost, without taking full account of the long-term benefits or the long-term costs that not making those decisions would incur on future generations.

We are seeing strong recognition of this in the proposal for an independent Climate Change Commission. But is climate change really so unique? Are other, slow-burning, environmental challenges so different? The RMA has generally taken the approach that strong independent oversight or input is crucial for local government decision-making (eg through the use of the Environment Court and commissioners), but less so for central government. In our view, that assumption needs to be challenged.

A future-focused, independent voice needs to be built into all decisions – including centralised ones – that will impact on people beyond both political cycles and the current generation. As we pointed out previously, "Elected institutions need to be held accountable to their promises, and constantly tested on their progress towards broad goals that transcend politics and the short term concerns of elected bodies."⁸³ We see this as a role for a Futures Commission.

So what would a Futures Commission look like in this model? It would be very different to the Commission for the Future that briefly existed in the 1970s (largely a science and technology focused think tank).⁸⁴ The nature of the Commission would evolve, from relatively humble beginnings, to an integrated and influential voice across many statutes. It would end up being of quasi-constitutional significance.

The Commission would be independent from government. In its beginning, it may be enough for it to be an independent Crown entity, rather than an officer of Parliament. It would be separate from the Parliamentary Commissioner for the Environment and the Climate Change Commission, recognising the risks of short-term disruption to those crucial institutions. However, from the outset, it could potentially incorporate any Freshwater Commission or other institution of a similar nature. Details of membership, the appointment process, and term of service/tenure would need to be worked through very carefully.

A Futures Commission would be established under statute⁸⁵ and be a permanent, standing institution. Initially, it would take on a handful of targeted functions to fill what we see as gaps in the system. Some of those would be under the RMA. In particular, it would play a crucial role in the process for developing an NEP, as outlined above. Other roles would be outside the RMA, and these are discussed elsewhere in this report (in particular, see Chapter 8).

Generally speaking, the idea is that a Futures Commission would have a structured role in the system's particular legal processes rather than just a general investigative or advisory function.⁸⁶ This would make it much more like the Climate Change Commission, which has been tasked with reviewing and recommending carbon targets and budgets and evaluating the government's progress. The Futures Commission would not be an "operational" or "regulatory" body; it would perform a structured advisory and watchdog function in relation to the decisions of accountable institutions, but not do things like decide particular authorisations (like resource consents).

Perhaps most importantly, the nature of a Futures Commission can be seen in its name. It would have a general, and powerful,⁸⁷ mandate⁸⁸ focused firmly on the future – and the interests of future generations – which are often not well represented in either politics or economic transactions.⁸⁹ The environment – and therefore the RMA – is one natural place for the Commission to have a meaningful role. It would be "a real, nationally-focused effort at looking ahead",⁹⁰ a force for policy stability, and a counterbalance to the important, but ultimately insufficient, accountability provided by the ever-changing elected institutions. The short-termism of parliamentary cycles means that we risk flip flopping on policies that really require continuity – this is as much about things like freshwater and biodiversity as it is about climate change. Adequate resourcing of the Commission would be crucial.

It would also be important to implement the Treaty relationship in the design of a Futures Commission. As in the Western tradition, it is important to have both "representative" and self-organising Māori bodies in the form of iwi and hapū (involved in co-development of instruments like the NEP, as mentioned earlier) and "expert" bodies (respected and independent persons having experience with mātauranga and tikanga).⁹¹

Such an expert Māori institution could exist alongside other independent experts in a Futures Commission, but we see two alternative ways in which this could happen. First, a single Commission could have a number of dedicated "tikanga commissioners".⁹² Alternatively, there could be a separate "Tikanga Commission" acting alongside (or as a clearly defined branch within) the Futures Commission, with the government having a relationship with both. That body could provide a separate assessment of the extent to which an NEP gave effect to Treaty principles and reflected tikanga, and make recommendations for change.⁹³

In the longer term, there is a very good question here about fragmentation and complexity in the system. As some have pointed out, we have a habit in New Zealand of seeking considerable legislative and institutional fixes to particular problems,⁹⁴ and we can ask whether it would be desirable to continue to have separate independent institutions, performing similar kinds of functions. We could think of the Climate Change Commission, a Freshwater Commission, and the Parliamentary Commissioner for the Environment in this category. We therefore see merit, in the longer term, in moving towards greater integration. One way of looking at this would be to expand the strongly independent role of the Parliamentary Commissioner for the Environment to subsume the previously separate roles of the other commissions. This would lead to a single, integrated Futures Commission as an officer of Parliament, with more targeted branches within it to discharge particular functions under different statutory frameworks (eg for climate change, freshwater, urban planning etc).⁹⁵ This would enable the establishment of focused pools of subject-matter experts. But a single Futures Commission would have one integrated mandate, and would be well placed to take a much needed holistic view of interconnected resource management issues, including under the RMA. We have already seen the risks of having different institutions focused narrowly on particular domains or particular sectors,⁹⁶ and that applies equally to independent institutions as it does to accountable ones (different government departments). We discussed the pros and cons of the "subject focus" of institutions in the Phase 1 report, concluding that at the highest levels of the system we require a wide, integrated focus that can then filter down into more targeted focus areas. Often, valuable synergies only appear where a subject focus is broad enough for the dots to be joined. That said, we are not convinced that a Futures Commission should incorporate the proposed Infrastructure Commission, which is a positive step but, by its nature, quite a different thing.⁹⁷

A final note should be made about concerns that a Futures Commission would be too powerful. We would respond that stronger independent influence is part of its point (and why an appointment process and questions of tenure are important), but also that its actual powers would vary depending on the statutory frameworks under which it had functions. For example, in the development of an NEP under the RMA, its role would not be to make

final decisions but rather to provide a fully independent assessment and recommendations to an elected government. In short, “Accountability is important, but elected institutions’ long-term focus needs to be watched closely by an independent body that is not on a short-term political cycle.”⁹⁸

We propose creating a standing, independent Futures Commission with a strong, future-focused mandate and roles under various pieces of legislation, including the RMA. To start with, the Futures Commission would be separate from other existing or planned commissions (eg the Parliamentary Commissioner for the Environment and the Climate Change Commission), but in the longer term could usefully be integrated with them.

6.7 Appeal rights for national direction?

Does a role for a Futures Commission in the development and review of an NEP provide an adequate check and balance on the decision-making power of Ministers? Does it go far *enough*? At workshops, we heard opposing perspectives on the role of accountable and independent institutions at a national level. Some thought that it wrong, for example, that there is a strong independent check and balance (binding Environment Court appeals) in the local planning process, but no comparable mechanism for central government action (only judicial review).⁹⁹ We have also previously highlighted that the lack of appeal rights under national decision-making frameworks (eg fisheries) can lead an uneasy coexistence with closely connected frameworks under which local environmental decisions *can* be appealed (eg regional coastal plans under the RMA).¹⁰⁰

Others thought that it would be inappropriate for an independent (less unaccountable) institution like a court to bind an elected government that may have a clear mandate for change.¹⁰¹ There was a fear in some quarters of rule by “philosopher kings”. A broadly similar debate occurred in relation to the Climate Change Commission, and whether its powers (eg to set carbon budgets) should be binding or only recommendatory.

There are compromise options here that could be pursued. For example, as with the bespoke Auckland Unitary Plan process, a future system could provide for merits appeals on an NEP, but only to the extent that the government departed from the recommendations of the Futures Commission. A still softer mechanism would be for the Environment Court (or higher court) to have power to make a declaration that an NEP was inconsistent with the purpose and principles of the Act, in a similar way that the courts can declare legislation to be inconsistent with the Bill of Rights Act.¹⁰² There would be no ability to “strike down” an NEP on these grounds, but it could send a powerful signal to voters.

However, we are not going so far as to propose blanket appeals to the Environment Court in relation to an NEP. In our view there are still too many value-based, nationally significant, questions to answer under the RMA (compared to arm’s-length decision-makers like the EPA under the Hazardous Substances and New Organisms Act or the Climate Change Response Act)¹⁰³ to remove policy-making power from Ministers (and, ultimately, Cabinet).¹⁰⁴ Accountability to the New Zealand public is important, and a court should not have the power to bind an elected government in matters that are still, ultimately, about values.

That said, the situation may be different for particular issues. To the extent that a decision can be seen as one purely of “science” or “implementation” rather than one of values or policy, an independent institution may be more appropriate.¹⁰⁵ For example, if we can quantify the aim we are after in specific terms, that can become a matter for technocratic decision-making. Arguably climate change, with legislated targets or at least a global agreement on outcomes and nationally determined contributions, falls into this category, and there is a robust debate happening now over what is a question of “science” and what is a question of “values”.¹⁰⁶ Targets for something like biodiversity or freshwater may be more difficult to describe with such precision in legislation, but that may change over time. In the longer term, we therefore leave the question of appellate jurisdiction open.

We also question the practical usefulness of providing a further step, by which the Environment Court could make a declaration that an NEP is inconsistent with Part 2 of the RMA (a Bill of Rights Act-type model). The concept is useful, but the appropriate place for such a declaration would be in the recommendations of an independent Futures Commission. To provide an additional step would be both inefficient and add complexity and confusion about what it meant for an NEP’s later interpretation in planning and consenting contexts.¹⁰⁷ Of course, judicial review would remain, and we see this option as being assisted by a Part 2 that is clearer and firmer.¹⁰⁸

We do not, at least in the short to medium term, suggest allowing appeals on an NEP to the Environment Court. While it would be useful for a Futures Commission to comment on whether a notified NEP would be consistent with the purpose of a revised RMA, we do not see room for an additional step whereby a formal declaration of inconsistency can be made by the courts.

6.8 A role for the Environmental Protection Authority?

As discussed in the Phase 1 report, there is, conceptually, a distinction to be made between policy-making and regulation-making.¹⁰⁹ Those tasks need to be closely connected; we have talked earlier about the need to have regulations firmly linked to a surrounding policy

landscape. At the same time, policy under the RMA lacks real teeth if not accompanied by regulatory restrictions.¹¹⁰ But objectives and policies usually involve some value-based choices to be made (elaborating on Part 2 of the Act), whereas regulatory provisions are for the most part about *implementing* those values.

We therefore do not see it as beyond the pale for an accountable institution (a Minister) to create the values-based policy component of an NEP, and for a more independent institution – perhaps an operational agency like a strengthened EPA – to translate that into regulatory provisions. In our view we are fast approaching a point at which there is a strong convergence in national values concerning things like freshwater,¹¹¹ and this might justify “a more consistent, independent voice in setting [regulatory] bottom lines in advance”.¹¹² If the EPA were to take on such a role, its mandate and its resourcing would have to be strengthened considerably,¹¹³ and the Victorian model may provide a good example. As we pointed out in the Phase 1 report:¹¹⁴

[The Environment Protection Act 2017 (Victoria)] establishes the objective of the EPA as being “to protect human health and the environment by reducing the harmful effects of pollution and waste.” This can be contrasted with the current objective of the New Zealand EPA, which is much vaguer: to undertake its functions in a way that “contributes to the efficient, effective, and transparent management of New Zealand’s environment and natural and physical resources; and enables New Zealand to meet its international obligations.” The Victorian model demonstrates the success of an EPA which has a clear purpose and tight focus on dealing with serious environmental risks.

On balance, we do not recommend giving the EPA a blanket NES-style regulation-making power under the RMA (ie removing that power from Ministers). However, the EPA’s capacity to do so should be developed in

the short term. That would allow specific powers to be transferred should it prove necessary in light of poor environmental outcomes (particularly for freshwater). The Act could also usefully provide criteria or trigger points for where a transfer of power from Ministers to the EPA could (or even must) occur.¹¹⁵

An NEP would contain both policy and regulatory components. It would be possible for Ministers to determine questions of policy, and for an arm’s length EPA to then create regulation that gives effect to it. We do not suggest that this should happen immediately, but should be carefully considered for some matters (eg freshwater). Capacity should be strengthened in the EPA to deal with such an eventuality, and criteria put in place to determine when that should happen.

6.9 Other roles for central government under the RMA

Central government currently has many functions under the RMA, and would continue to do so in a future model. While the production of national direction (and associated regulations and National Planning Standards)¹¹⁶ is core to that, the government’s role is broader. Most obviously, in our view, there is a pressing need for central government to get more involved in the implementation of national direction, not just in creating and imposing it.¹¹⁷ For example, there needs to be a clear, at least partially independent, central agency tasked with supporting councils (including through deploying funding and resourcing assistance) to achieve stricter freshwater standards.¹¹⁸ Elsewhere we have called this a “Freshwater Commission”,¹¹⁹ but we stress that this type of implementation agency would be quite different to the watchdog-type Futures Commission described earlier. It could, instead, form part of a strengthened EPA, or an entirely new government implementation agency.



The same theme emerges elsewhere in this report; for example, in the recommendation that active guidance and assistance be provided by central government to councils (and others) in implementing climate change mitigation and adaptation measures (see Chapter 9).

Other central government roles under the RMA can be traversed more briefly, and there is no need to cover them all. For example, the Minister for the Environment has a role in calling in (although not deciding) proposals of national significance (plan changes and consents); recommending the approval of requiring authorities and heritage protection authorities; and directing the preparation or change of a council plan (although, again, not making decisions on it).¹²⁰ In terms of the call-in process, we propose that the option of consideration by a Board of Inquiry be removed, and that matters called in be determined only through referral to the Environment Court.¹²¹ Furthermore, we see merit in the independent Futures Commission having the ability, alongside the Minister, to exercise call in powers.

Under the RMA, the Minister can also direct that functions be transferred from councils to other persons if there is poor performance, under a somewhat understated section 25 entitled "residual powers". This, in our view, is necessary,¹²² but warrants stronger safeguards to protect local democracy – including, for example, a review of the Minister's proposal to exercise such powers by the Futures Commission or Environment Court, to determine whether a measure is actually necessary, as a matter of law, for achieving the *protective* purposes of the Act.¹²³ It should be a power conferred to ensure nationally important elements of environmental wellbeing, not an open invitation to interfere in local democracy in order to pursue political agendas. The appropriate routes for the latter are through the creation or amendment of national direction, a direction that a plan change be pursued, or that a matter of national significance be called in.¹²⁴

Central government would continue to exercise various powers in a future system. But these could usefully be recalibrated. In particular, the Board of Inquiry process for making decisions on matters called in by Ministers would be removed, a new Futures Commission would have powers to call in matters, and there would be stronger independent review of ministerial powers to transfer functions away from councils. There would also be more operational assistance (including funding) provided to councils and others by central government to implement national direction.

6.10 "Order"-based mechanisms under the RMA

It is hard to characterise some tools under the RMA as purely "local" or purely "central". For example, the Minister effectively makes final decisions on water conservation orders,¹²⁵ and the Environment Court makes

recommendations in relation to them, but applications can come from the bottom up (anyone can apply)¹²⁶ rather than being developed by councils or Ministers through planning processes. It can be thought of as a thoroughly grass roots measure, but also one that ends up being imposed from the top down.

Water conservation orders are a fascinating feature of the system and, in our view, one that provides a template for other possible mechanisms to be deployed in the future. Such orders are a hangover from pre-RMA legislation,¹²⁷ and seek to provide targeted protection to water bodies having high intrinsic value (eg wild rivers). Uniquely, they are not subject to Part 2, and have their own highly protective purpose nested within the RMA,¹²⁸ in a way not dissimilar to separate conservation legislation (eg national parks or reserves). They could, in theory, be equally at home in other legislation.

We consider that water conservation orders could be strengthened in a future system. While in theory they should have:¹²⁹

strong implications for any and all decisions applying to the water body in question ... most rivers bestowed with [them] have and continue to undergo sharp declines in water quality due to local government decision-making (eg sharp opposition to [them] by regional councils, the agencies charged with implementing them).

That "sends a clear signal that the current framework does not provide sufficient security for our 'watery national parks'" despite being very firm and directive on the face of the legislation.¹³⁰ The issue is not to do with the ability to remove such orders (they can be revoked or varied, but that has not happened in practice).¹³¹ Instead, the problem is that they have been treated as a reactive tool, and under-utilised. Most applications have been by Fish & Game (with the Department of Conservation only having made one application), and only 13 rivers and two lakes have so far been protected. In the Phase 1 report, we posed the question: why don't we, at a national level, identify all outstanding water bodies and protect them in one go? Here, we provide an answer: we should.

Of course, there is a question of resourcing and timeframes here, but the existing model strikes us as too reactive. Orders are designed to protect (and not enhance) the unique and nationally important values of water bodies, so for every day that our rivers decline we are losing that opportunity. A waterway with no values left cannot be protected. Orders could also be sought in a more strategic manner, to support wider plans to enhance aquatic and other ecosystems through a coherent network of biodiversity corridors (which could be outlined in a spatial plan, discussed in Chapter 8). In fact, there could be a firmer mandate for the Department of Conservation to pursue this kind of tool, to support a more general strengthening in freshwater management across the country under RMA national direction.¹³²

Another problem is that water conservation orders do not affect existing uses, or trigger the review of consent conditions that can have real potential to impact on the

values protected. Some activities can make things worse in the future, even if they have already been consented (eg they may be able to intensify, or they may represent rights that have not yet been exercised).¹³³ That needs to change. Orders also do not prompt enhancement mechanisms (the Act specifies that they may be granted to protect outstanding values, rather than improving their condition in the face of human and other pressures, like climate change). That is also no longer good enough – we require a strong link to the public funding and resourcing (including oversight) necessary to ensure the values are maintained. In this sense it would be appropriate for a dedicated watchdog or guardian model to be put in place where we recognise outstanding values, to ensure that those values on a piece of paper actually result in corresponding outcomes on the ground.¹³⁴ Monitoring should also be clearly required by law for the values protected under water conservation orders, and results and trends reported on under an expanded system of national level environmental reporting.¹³⁵

Perhaps of most concern is that the strength of water conservation orders is limited to where consent authorities are considering water permits, coastal permits or discharge permits.¹³⁶ They do not directly influence other kinds of resource consent, which can nevertheless severely impact on the values being protected (notably in relation to the control of land).¹³⁷ For example, forestry and agricultural activities (especially new operations) really need to have appropriate conditions imposed, not just for their discharges or their direct taking of water, but for reasons connected to the use of the land itself that pose perhaps less obvious risks for the values being protected.¹³⁸ For example, many regional councils control diffuse discharges from agricultural stock as a land use rather than a discharge, so may not be required to consider the effects on a protected waterbody. Similarly, urban development that increases impervious cover will affect water quality but is usually managed as a land use. And even if it did not affect its flows or water quality, would we really want unchecked urban development butting up against a protected river?

Finally, there are process issues. Resource consent decisions must be issued within 15 days of a hearing concluding, but there is no timeframe for decisions on water conservation orders. In some cases, this can lead to unacceptable delays in decisions being issued, and degradation in the water body's condition in the meantime. For example, the Special Tribunal considering the Te Wāikoropupu Springs water conservation order application has taken 14 months (and counting) to release its decision. In the meantime, algal mats have been found in the springs.¹³⁹

In a future system, water conservation orders should be strengthened in various ways. There should be a stronger mandate for central government to proactively deploy them in a strategic manner, and the existence of an order should have meaningful influence over the exercise of existing consents and apply to future land use consents.

Water conservation orders are a direct mechanism by which the “normal” RMA planning process can be bypassed, where there are outstanding values to be protected. But why should that mechanism be limited in that way? For example, rather than just protecting examples of relatively pristine elements of the environment, could a similar process be used to impose directive environmental “emergency” orders at the other end of the spectrum – where bottom lines have been infringed and a water body is unacceptably degraded? In Chapter 7 we are proposing a more agile mechanism for council planning generally, and the government is currently proposing a similarly streamlined mechanism specifically for freshwater planning. But a more directive approach may be needed for the really bad cases, resembling more our approach to biosecurity incursions: a focused deployment of funding, resourcing and regulatory restrictions where key trigger points are breached (including compensation, where appropriate).¹⁴⁰

The significant degradation of freshwater bodies may often be much slower and “creeping” than a biosecurity incursion, or a specific incident like an oil spill, but that does mean it is any less of an emergency to be actively and intensively managed across agencies.¹⁴¹ The prospect of facing such an “emergency” order, automatically deployed on the event of certain trigger points, may be powerful incentive to avoid a breach of bottom lines in the first place, for both councils and a collective of users within a catchment.

We can also ask whether the concept of a bottom up, application-based “order” should be limited to the context of freshwater. In the Phase 1 report, we asked:¹⁴²

Could such an approach be usefully applied to other outstanding areas? Should we in a future regime, for example, make provision for Marine Conservation Orders, or perhaps Conservation Orders more generally, that could be applied to any outstanding area or feature?

In light of other changes recommended in the marine space in Chapter 11 (such as integrated marine spatial planning, a new Oceans Act, and the establishment of a coherent network of marine protected areas), there may be less need for marine conservation orders (although that remains an option). However, on land, the proposition of broadening a bottom-up, application-based order strikes us as an attractive one. As with freshwater, this could be an “emergency” type order (eg a more directive mechanism to protect critical habitat of threatened species on private land – a “conservation order” perhaps, or a “habitat protection order”).¹⁴³

On a more pre-emptive basis, though, orders could be deployed to impose an additional and more nuanced layer of protections for landscape and biodiversity across private land. The concept of a “Heritage Area Order” is explored in the spotlight below.

A spotlight on Heritage Area Orders

A reformed system could usefully provide more nuanced and protective mechanisms for the management of landscapes of national significance. One such model that we are exploring in EDS's Protected Landscapes research project is the concept of Heritage Area Orders. These would form a layer of management (on top of regular planning instruments) for private or public land of high landscape and/or ecological value.

We consider that water conservation orders, made under the RMA, provide a good basic template for this concept. It is envisaged that the RMA would set out the purpose of what heritage areas – as a broad concept – should achieve,¹⁴⁴ and the national values that should be protected. These would be the national criteria against which a landscape would be assessed.

Classification could occur through either a top-down or bottom-up process (as with water conservation orders). To enable a bottom-up approach, the law would include provision for any person or agency to submit an application to have a landscape classified as a Heritage Area. However, the application would need to demonstrate that the landscape satisfied the national criteria in order to be considered. An applicant would also need to be able to demonstrate local community and iwi support. Applications would be made to the Minister for the Environment, who would either reject the application (on the basis that it did not meet the purpose specified in the Act) or accept it in principle.

If the application were accepted, the Minister could be required to appoint a specialist tribunal to publicly notify the application, hear submissions (including from landowners who may be affected by the Order) and either provide a draft Heritage Area Order or recommend that the application be declined. Alternatively, that role could be performed by the Futures Commission. A final decision would then be made by the Minister (or, more accurately, through an order in council on advice from the Minister).

If an application were rejected, this could be challenged through appeal by any party who made submissions on the application. Appellate involvement by the Environment Court would be essential, as it provides transparency and independent oversight over the process.

If the application were accepted, the Heritage Area Order would be promulgated by order in council. The resulting Order would include the values to be protected for the specific landscape,¹⁴⁵ and the activities that must be restricted or prohibited to protect those values. It would have regulatory effect. This process is broadly comparable to the promulgation of water conservation orders, where each order identifies the characteristics of the specific waterbody to be protected and has a directive link to the broader planning and consenting framework of the RMA.

Once the Order was in place, resource consents granted within the area would not be able to be contrary to it and this would not be limited to particular types of consent (especially given that land use would usually be central to the values protected). It could also, potentially, trigger the review of some kinds of existing consents. Regional and district planning documents would also not be able to be inconsistent with it (or be required to give effect to it), and there would need to be consistency with any water conservation orders in the area. Heritage Area Orders would therefore provide a clear protective purpose, which councils and users would need to comply with. If a council failed to do so, there would be clear grounds for challenge and the ability to seek to have the consent overturned in the courts. There would be a guardianship model whereby an entity would be responsible for defending the values enshrined in the Order.

While the ownership and management of the land within a Heritage Area would remain the same, it would be expected that central government would provide dedicated funding to protect the landscape values of the area (which reflects our broader proposal that national direction under the RMA be accompanied by indicative sources of funding to make it work in practice).¹⁴⁶ This funding could be used to assist landowners to proactively manage the land in a manner that is sympathetic to the purpose of the Order (as in the United Kingdom). Whether that would amount to "compensation" for lost rights, "subsidies" for adhering to environmental obligations, or payment for ongoing public services, may depend on one's perspective. In the Phase 1 report, we noted:¹⁴⁷

From one perspective, if private persons are bearing the burden of achieving the public interest then that should be recognised through subsidies or compensation. However, from another perspective, if "enhancement" is, in reality, the remediation of damage already caused by private actors (eg much of New Zealand was originally forested), then why should the public purse pay? Is it because the government itself is partly responsible, since it may have authorised (or even encouraged) harm in the past (eg subsidising land clearance)? Or are payments really about protecting economically [or culturally] important industries [or activities]?

The purpose for which payments could be made requires ongoing debate, and could have relevant principles enshrined in legislation. But, overall, Heritage Area Orders would provide both a protective framework for the landscape and encourage proactive land use practices. It may be a useful tool to include in the toolbox for the complex, multi-layered issues present in the Mackenzie Basin, but would have value elsewhere too.

The expansion of the water conservation-type model to other things, like protected landscapes, would not be without its challenges. For one, it may arguably pose risks to the coherence of the broader planning regime, given the ability for ad hoc, order-based interventions across wide swathes of private land to override district

and regional plans concerned with land use. In Chapter 10, we criticise a proposal for a similar “override” power for an urban development authority to bypass the planning framework in the interests of general strategic objectives for an area. An alternative would be for nationally significant landscapes to be identified and protected through a more active (ie mandated) use of national direction within an NEP, which could include both policies and regulatory provisions to be given effect to in plans and consents.¹⁴⁸ Furthermore, a Heritage Area Order would be partly targeted at controls on how large areas of private land are used, which goes a great deal further than water conservation orders (which are about protecting a “common pool” resource, notably its flows). That said, planning under the RMA already has the ability to restrict land use, and the innovative thing here would be the ability for this to be done using a bottom up, application-based approach. We see the concept as having significant potential in a future system, just as strengthened water conservation orders do.

Finally, there is a question as to whether the RMA would be an appropriate place for a concept like Heritage Area Orders, or habitat protection orders, or similar tools resembling water conservation orders. Would we not want to put conservation-focused tools within conservation legislation? We consider this further in Chapter 12, but note that the strong connection with private land suggests they are probably most appropriately located in a framework like the RMA, even if they had their own bespoke purpose(s) within it (as with water conservation orders).¹⁴⁹

A future system could usefully expand on the concept of water conservation orders to include “emergency orders” that would be deployed to more actively manage the environment and human activities if bottom lines were breached. That could include a “habitat protection order”. Such orders would be accompanied by a rapid and coordinated agency response and support, resembling our response to biosecurity incursions. We are also floating another “order”-based tool that would impose an additional and more nuanced layer of protections for landscape and biodiversity across private land: a Heritage Area Order.

6.11 Concluding comments

In this chapter, we have considered the role of central government under the RMA. We have proposed the integration, over time, of national direction within a single NEP. We consider it anomalous that we have no equivalent to a regional policy statement for the nation, and that there can be significant gaps, political prioritisations and confusing inconsistencies in national direction. The concept of an NEP responds to these issues.

To accompany an NEP would be a clearer definition of subsidiarity, outlining the spheres of influence of local and central government, and provision for councils and

Māori to be much more closely involved in the co-creation and review of national direction. In a revised process for producing national direction, a completely new institution has also entered the stage in our model: a Futures Commission. We see this firmly independent entity as having roles under multiple statutes (as explored in subsequent chapters), but one important role would be in providing truly independent and impartial review of an NEP.

In this chapter we have also briefly canvassed other “central” roles under a revised RMA. In particular, we have proposed expanding central government’s role in implementing national direction (eg by providing operational and resourcing assistance to implement stronger freshwater requirements), strengthening water conservation orders, and expanding the concept of such orders to encompass other aspects of environmental protection, such as landscape and biodiversity.

A strong theme here was that we should have agile tools to respond to manmade environmental crises in a similar way to biosecurity incursions, where there is a focused and coordinated deployment of regulatory, compensatory, and active agency responses. More specifically, we shone a spotlight on one way in which a water conservation order model could be expanded: via the concept of a Heritage Area Order.

Having considered the role of central government in a reformed RMA, we turn in the next chapter to the role of local government. While an NEP, and more direct assistance in implementation, would amount to a more active involvement by central government under the Act, this should not take away from the fact that most of the groundwork would still be left to councils. We see considerable scope for reform in how that happens.



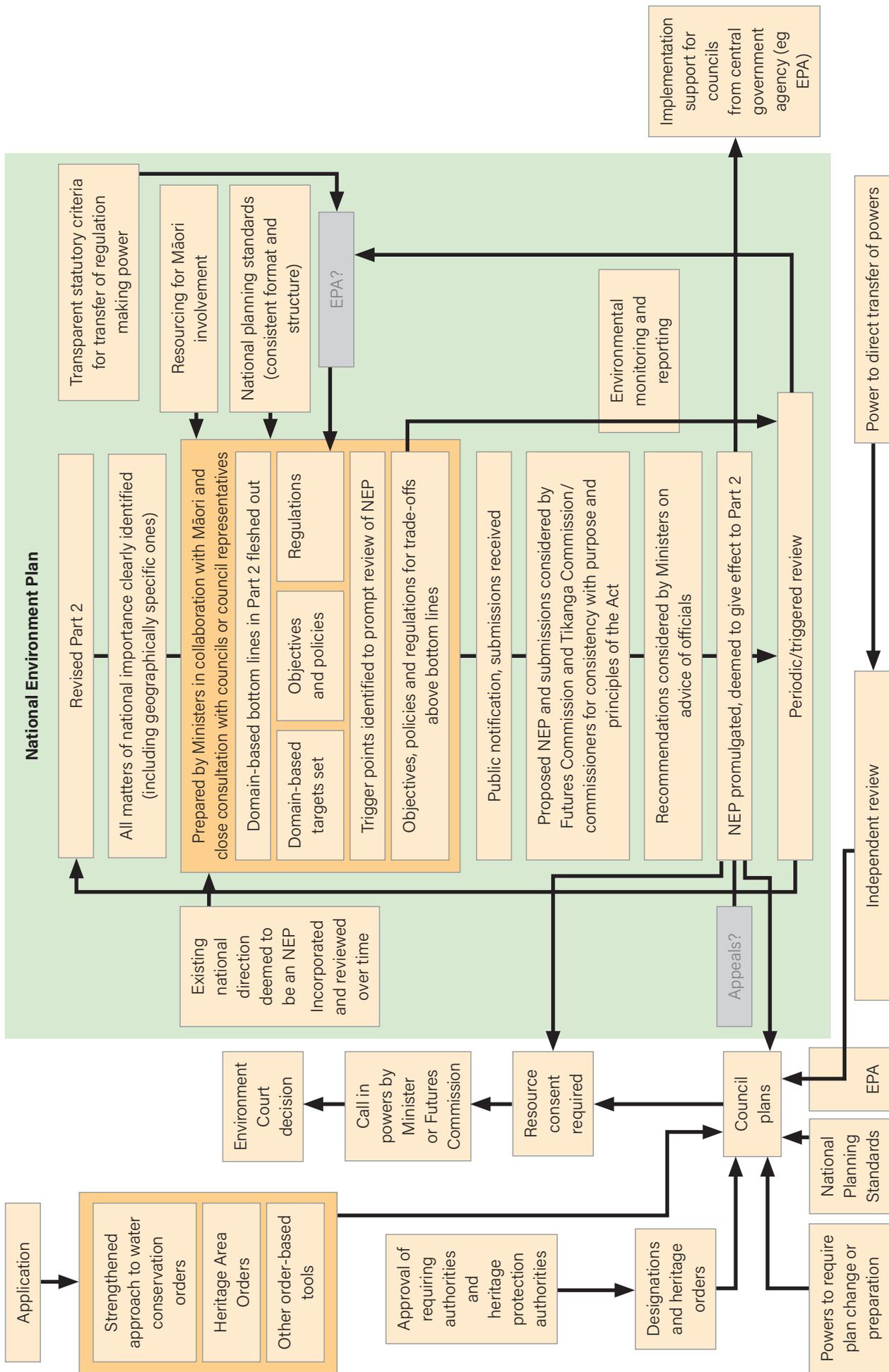


Figure 6.3: An NEP and other key roles for central government under a reformed RMA.

ENDNOTES

- 1 Planning is a general term for a collection of different but connected tools being deployed in the same place for the same purpose. It can encompass strategic tools, regulatory tools, and non-regulatory tools. See G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019), ch 12.
- 2 For example, the NZCPS is the only mandatory central government instrument under the RMA.
- 3 See, for example, The New Zealand Initiative *Go Swiss: Learnings from the New Zealand Initiative's visit to Switzerland* (2017). In recent times, central government has been much more involved in questions of urban planning (precipitated by housing issues) and other land uses (eg forestry). See G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 166-167.
- 4 Resource Management Act 1991, ss 30-31.
- 5 See G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019), ch 9.
- 6 Resource Management Act 1991, pt 6AA.
- 7 More direct powers of central intervention and approval are more noticeable in Australian states.
- 8 G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 167.
- 9 New Zealand Productivity Commission *Local government funding and financing* (Draft report, July 2019) at 180.
- 10 Resource Management Review Panel *Transforming the resource management system: Opportunities for change – Issues and options paper* (2019) at 16, citing C Miller *Implementing sustainability: The New Zealand Experience* (Routledge, 2011).
- 11 For example, see The New Zealand Initiative *Go Swiss: Learnings from the New Zealand Initiative's visit to Switzerland* (2017).
- 12 For example, climate change, food production, nationally significant infrastructure, energy, and housing.
- 13 Especially where it requires central funding.
- 14 For example, in Copenhagen.
- 15 For example, central government created a legislative framing for the development of the Auckland Plan and Auckland Unitary Plan, but decision making was largely left at a local level.
- 16 See also New Zealand Government *Urban development authorities: Discussion document* (2017).
- 17 Even if it is just a robust assessment that local jurisdiction is the best way to achieve the national interest.
- 18 For example, housing supply is not explicitly mentioned in Part 2 of the Act, yet has been a strong focus of recent national direction.
- 19 See R Peart *A place to stand: The protection of New Zealand's natural and coastal landscapes* (EDS, 2004), where it was suggested that nationally and regionally significant landscapes need to be insulated, to some extent, from local politics. On the need to map significant biodiversity areas, see *Report of the Biodiversity Collaborative Group* (2018) at 92, 107. Compare also the recently released discussion document on an NPS for Indigenous Biodiversity.
- 20 The closest the RMA comes is in section 45, where the purpose of an NPS is to deal with matters of national significance. That is not exhaustively defined.
- 21 Resource Management Act 1991, pt 4.
- 22 *Ibid*, s 24; Environment Act 1986, s 31.
- 23 See Resource Management Act 1991, ss 24A-25B. That said, the Department of Conservation has, under separate legislation, an obligation to advocate for natural and historic resources, which in practice results in an important litigation role under the RMA (see Conservation Act 1987, s 6).
- 24 Compare MA Brown and others *Evaluating the environmental outcomes of the RMA* (EDS, 2016), where it was pointed out that a lack of national direction has limited the potential of the system to effectively and efficiently achieve its environmental goals.
- 25 See G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019), ch 3.2.
- 26 At the time of writing, work on an NPS for Indigenous Biodiversity is still being progressed, with a discussion document having been recently released.
- 27 For example, air quality, contaminated land, the protection of drinking water sources, and even the concept of "swimmability" for freshwater are about human health.
- 28 For example, for forestry, urban development, electricity transmission, and renewable energy development.
- 29 Compare M Petrie "Reversing the degradation of New Zealand's environment through greater government transparency and accountability" (2018) 14(2) *Policy Quarterly* 32.
- 30 Which would also be expanded (see discussion on Part 2 of the Act in Chapter 5).
- 31 Communities need to have buy in to make measures most effective.
- 32 Or be targeted at the needs of particular places. Compare Local Government New Zealand *A "blue skies" discussion about New Zealand's resource management system* (2015) at 39.
- 33 See <www.mfe.govt.nz/rma/rma-legislative-tools>
- 34 For example, a new NPS and NES on freshwater.
- 35 Environmental issues were prominent during the most recent election.
- 36 *Environmental Defence Soc Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593.
- 37 G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 268.
- 38 On concerns with forestry, see M Wright, S Gepp and D Hall *A review of the Resource Management (National Environmental Standards for Plantation Forestry) Regulations 2017* (EDS and Forest and Bird, 2019).
- 39 See New Zealand Government *Essential freshwater: Healthy water, fairly allocated* (2018); New Zealand Government *Action for healthy waterways* (2019).
- 40 Policy C2.
- 41 Objective suite A.
- 42 Noting this is not yet in the form of a draft NPS, only a discussion document with some potential wording. See New Zealand Government *Planning for successful cities: A discussion document on a proposed National Policy Statement on Urban Development* (2019).
- 43 There are often sections in discussion documents on such relationships, but these are often fairly vague and are no substitute for cross referencing between actual legal instruments. See, for example, New Zealand Government *Planning for successful cities: A discussion document on a proposed National Policy Statement on Urban Development* (2019) from 57.
- 44 *Ibid* at 57-58.
- 45 G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 100.
- 46 *Ibid* at 268.
- 47 Compare also the United Kingdom National Policy Planning Framework, which was created to align fragmented and conflicting planning policies. See Ministry of Housing, Communities and Local Government (UK) *National Planning Policy Framework* (July 2018).
- 48 R Schofield *Alternative perspectives: The future for planning in New Zealand - A discussion for the profession* (commissioned by the New Zealand Planning Institute, 2007), cited in Resource Management Review Panel *Transforming the resource management system: Opportunities for change – Issues and options paper* (2019) at 16.
- 49 As in a combined plan for a region.
- 50 See also the discussion on a self-evaluative system in Chapter 13. Compare G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 287; MA Brown "Compliance, monitoring, enforcement and evaluation" in G Severinsen and R Peart *Reform of the resource management system: The next generation - Working paper 3* (EDS, 2018) at 196.
- 51 For example, EDS previously recommended the promulgation of an NPS on nationally important landscapes, which would proactively map landscape boundaries, outline the outcomes being sought from protection, and elaborate on what types of activities were inappropriate within such areas (see R Peart *A place to stand: The protection of New Zealand's natural and coastal landscapes* (EDS, 2004).
- 52 See Environment Act 1986, ss 31-32.
- 53 Compare the discussion in Chapter 13. See also G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 100.
- 54 An alternative to an NEP, explored later in this Chapter, would be to deploy a new tool: a Heritage Area Order.
- 55 Resource Management Act 1991, s 45A(3).
- 56 See J Boston "Anticipatory governance: How well is New Zealand safeguarding the future?" (2017) 12(3) *Policy Quarterly* at 11.
- 57 Compare the Welsh approach: see G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 224.
- 58 See J Boston "Anticipatory governance: How well is New Zealand safeguarding the future?" (2017) 12(3) *Policy Quarterly* at 11; and J Boston *Safeguarding the future: Governing in an uncertain world* (Bridget Williams Books, 2017).
- 59 Compare New Zealand Productivity Commission *Low emissions economy* (2018). Budgets, akin to carbon budgets, may also be appropriate for some things (eg pollution) where reductions are required over time to meet targets.
- 60 For example, in the NPS for Freshwater Management, pol A6.
- 61 Environment Bill 2019-2020 (UK).
- 62 Local Government New Zealand *A "blue skies" discussion about New Zealand's resource management system* (2015) at 39.
- 63 Compare the discussion in Chapter 13. See also G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 100.
- 64 *Ibid* at 249.

- 65 We don't see this incorporating National Planning Standards, although we also envisage that these would no longer have the ability to include substantive content. Any substantive policy and regulatory provisions would be contained within the NEP.
- 66 M Wright, S Gepp and D Hall *A Review of the Resource Management (National Environmental Standards for Plantation Forestry) Regulations 2017* (2019). It is by no means obvious that there will be consistency given the permissive approach of the NES, including in terms of staying within limits; integrated catchment management; protection of ecosystem health, wetlands, and outstanding water bodies.
- 67 See Resource Management Act 1991, ss 70A-70B.
- 68 See G Severinsen "Climate change considerations under the Resource Management Act: A barrier to carbon capture and storage deployment in New Zealand?" (2014) 22 *Wai L Rev* 117.
- 69 For example, firm climate change considerations need to pervade higher level strategic legislation, transport legislation, infrastructure planning, government investment and procurement decisions, and many other frameworks (see Chapter 9).
- 70 Not just in restricting or providing standards on direct emissions, but also through land use considerations (eg for urban form, which has the potential to lock in carbon-heavy transport modes).
- 71 Although reviews and changes would be triggered by the monitoring of particular indicators.
- 72 For example, there are separate but overlapping processes for developing national direction on freshwater and indigenous biodiversity.
- 73 On the need for a national level-partnership concerning freshwater and how that might look, see generally Waitangi Tribunal *Wai 2358: The stage 2 report on the national freshwater and geothermal resources claims* (2019).
- 74 In some places, that will be obvious. In others, there can still be considerable uncertainty and argument.
- 75 New Zealand Productivity Commission *Local government funding and financing* (Draft report, July 2019) at 265.
- 76 Now established through the New Zealand Infrastructure Commission/Te Waihangā Act 2019.
- 77 Climate Change Response (Zero Carbon) Amendment Act 2019.
- 78 See the concept of a Chief Freshwater Commissioner proposed in the Resource Management Amendment Bill 2019, and the quite different concept of a Commission in Waitangi Tribunal *Wai 2358: The stage 2 report on the national freshwater and geothermal resources claims* (2019).
- 79 There are many other targeted commissions, as opposed to "commissioners" (eg the Walking Access Commission established under the Walking Access Act 2008).
- 80 For example, the Land and Water Forum and the various advisory groups that have formed part of the Essential Freshwater programme.
- 81 See G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 164-166.
- 82 *Ibid* at 175. Compare New Zealand Productivity Commission *Better urban planning* (2017) at 240, where it is suggested that independence is important where oversight of government power is needed.
- 83 G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 175.
- 84 For example, issues with forestry planting being geared towards climate targets rather than long-term and more holistic or synergistic concerns.
- 85 Under a strategic Future Generations Act, discussed in Chapter 8. Formality of creation would be important to give it durability and insulation from outside pressure: see G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 172.
- 86 The Commission would also have other key roles (eg futures scanning, review of council plans under the RMA, and issuing a report card to the government on its environmental performance). See Chapters 7 and 8.
- 87 Contrast the weak mandate of an institution like the EPA: see Environmental Protection Authority Act 2011, s 12.
- 88 In the same sense as the "purpose of local government" in the Local Government Act 2002. On the importance of a clear mandate, see New Zealand Productivity Commission *Low emissions economy* (Final report, 2018) at 231.
- 89 See J Boston "Anticipatory governance: How well is New Zealand safeguarding the future?" (2017) 12(3) *Policy Quarterly* at 11; and J Boston *Safeguarding the future: Governing in an uncertain world* (Bridget Williams Books, 2017).
- 90 See <www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11745529>
- 91 Compare the Independent Māori Statutory Board that provides advice to Auckland Council, and the EPA's statutory Māori advisory committee, Ngā Kaihautū Tikanga Taiao.
- 92 A stronger approach than the appointments process for Boards of Inquiry, where there is generally a requirement to consider the need for appointees to have knowledge of tikanga. See, for example, the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012, s 52(5)(c).
- 93 This general approach, in a more informal sense, can be seen in the Kahui Wai Māori (Māori Freshwater Forum) arrangement under the Essential Freshwater programme.
- 94 G Palmer "Law-making in New Zealand: Is there a better way?" (2014) 22 *Wai L Rev* 1 at 3.
- 95 On the importance of targeted tasks and subject focuses, see G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 172.
- 96 For example, issues with forestry planting being geared towards climate targets rather than long-term and more holistic or synergistic concerns (eg indigenous biodiversity, landscape value).
- 97 It is focused on the future, but it is also concerned above all with development.
- 98 See G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 175.
- 99 *Ibid* at 214.
- 100 *Ibid*. That led us to suggest that fisheries sustainability decisions could usefully be integrated into a more holistic statute akin to the RMA, with its associated checks and balances (including the potential for appeals). We pursue this idea in Chapter 11 (on oceans legislation).
- 101 Compare the discussion at G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 173.
- 102 New Zealand Bill of Rights Act 1990.
- 103 For example, consenting being done by the EPA or independent commissioners.
- 104 Later we note a conditional reform that translating such policies to actual regulation could be done by an arm's-length EPA, if indicators did not improve.
- 105 See G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019), ch 9.
- 106 See <www.newsroom.co.nz/2019/07/05/667804/lighter-methane-target-for-farmers-a-question-of-equity-not-science-report>
- 107 For example, what would it mean for decision-making on council plans if councils were tasked with giving effect to an NEP, but there was also a declaration by the Environment Court that the NEP itself was not in accordance with Part 2? How would that affect the interpretation and weight given to different objectives and policies in the NEP? It would create a significant amount of uncertainty.
- 108 There would be more clarity around whether an NEP is unlawful (in administrative law terms) in light of Part 2, and whether anything has failed to be considered (especially climate change).
- 109 G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 164-165.
- 110 Policies under a regional policy statement can be "rule like" and even mapped (eg an urban boundary), but still require expression in a district plan to restrict what people can do on the ground.
- 111 See G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 174.
- 112 *Ibid*. Compare also New Zealand Council for Infrastructure Development (now Infrastructure New Zealand) *Integrated governance, planning and delivery: A proposal for local government and planning law reform in New Zealand* (2015) at 5 and 7.
- 113 Environmental Protection Authority Act 2011, s 12.
- 114 G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 176.
- 115 If powers were to be transferred, that may require the potential for appeals on national direction to be revisited, to provide an additional accountability mechanism for the EPA.
- 116 Technically, the recommendation of them for approval by order in council.
- 117 On the role of the EPA in enforcement, see Chapter 7.
- 118 A similar model would be required to implement national direction for biodiversity: see *Report of the Biodiversity Collaborative Group* (2018) at 92.
- 119 See Environmental Defence Society *Submission to the Environment Select Committee on the Resource Management Amendment Bill 2019* (2019) at 8. This would recognise that the government is increasingly expected to "get its hands dirty" in implementation, not just leading policy work or setting regulation.
- 120 See Resource Management Act 1991, s 24.
- 121 See *ibid*, pt 6AA.
- 122 In Chapter 7, we suggest that the development of rules for freshwater to give effect to national direction should, in at least some cases, lie with the EPA, which would rely on this power of transfer.
- 123 That could operate in a similar way to water conservation orders, where a decision to reject the recommendations of a review must be accompanied by a justification.
- 124 Compare positive steps to remove general powers for the Minister to intervene, through regulations, in proposals under the Resource Management Amendment Bill 2019 (going through the parliamentary process at the time of writing).
- 125 Technically, the Minister makes recommendations to the Governor-General for an order in council, which, by constitutional convention, are actioned.
- 126 Applicants are not limited to those who have been approved by the Minister, as with designations and heritage orders. See Resource Management Act 1991, s 201.
- 127 They were first brought into the statutory framework in 1981 through an amendment to the Water and Soil Conservation Act 1967 and were carried through into Part 9 of the RMA upon its enactment in 1991.
- 128 Resource Management Act 1991, s 199.

- 129 M Doole *Conservation system reform: A proposed model to better protect and enhance species and ecosystems in New Zealand* (Unpublished commissioned paper, The Catalyst Group, 2019) at 18.
- 130 Ibid.
- 131 New Zealand Conservation Authority *Protecting New Zealand's rivers* (2011).
- 132 See Resource Management Amendment Bill 2019; New Zealand Government *Action for healthy waterways: A discussion document on national direction for our essential freshwater* (2019).
- 133 For example, forestry activities that require harvesting in several decades' time. This does not mean harvesting cannot occur. It just means that the values protected in the order need to be protected when that happens.
- 134 For example, see the concept of the Fiordland Marine Guardians under the Fiordland (Te Moana o Atawhenua) Marine Management Act 2005, pt 3. This could be a specific role assigned to the EPA, or a bespoke arrangement encompassing those who sought the order and others in the community, including tangata whenua.
- 135 See Chapter 13.
- 136 Resource Management Act, ss 104 and 217.
- 137 Especially for regional council functions (eg sediment, erosion etc) but also for other things (eg amenity and landscape concerns, such as the impacts of forestry near protected waterways).
- 138 For example, future forestry harvesting rights (subject to permitted activity standards under the NES, and therefore not requiring consent) can have enormous impacts due to the runoff of sediment. New plantation forestry activities are also water thirsty, and can impact flows without there being a specific take authorised.
- 139 See <www.stuff.co.nz/environment/117091420/ongoing-silence-over-te-waikoropu-springs-conservation-bid-alarms>
- 140 Compare biosecurity, where compensation is forthcoming where livestock needs to be destroyed to prevent the spread of an incursion.
- 141 For example, through the strategic deployment of funding (as under the Freshwater Improvement Fund) based on where the risk or need is greatest.
- 142 G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019).
- 143 Compare MA Brown and others *Vanishing nature: Facing New Zealand's biodiversity crisis* (EDS, 2015).
- 144 Compare the bespoke purpose for water conservation orders in section 199 of the RMA.
- 145 Compare R Peart *A place to stand: The protection of New Zealand's natural and coastal landscapes* (EDS, 2004).
- 146 This raises questions about whether the Environment Court should have power to decide on the final form of a Heritage Area Order, given that the Crown may need to contribute money to its success. The Court should not be able to direct how central government spends money.
- 147 G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 107.
- 148 On the need to give effect to, rather than have regard to, national direction in consenting decisions, see Chapter 7.
- 149 Instead of having a separate purpose within the RMA, the outcomes sought could be deemed to be additional bottom lines for the purposes of a revised Part 2; for example, by inclusion of the values protected by water conservation orders as part of the definition of "natural heritage" (see Chapter 5).

7. PLANNING UNDER A NEW RMA: LOCAL GOVERNMENT

7.1 Introduction

As under the current RMA, in a future system it would be important for national direction (now in a proposed NEP) to be given effect to in council plans. In some cases, this may be a matter of simply inserting policies or regulatory provisions directly from the NEP without further process.¹ That is necessary to achieve timely outcomes where the need is urgent. However, in other cases, council plans would be expected to give local expression to general policies, or to put in place locally tailored responses to achieve national level targets.

An NEP is not intended to be a replacement for local government planning under the RMA. The idea is that a single, integrated, and coherent national level policy instrument would compel the government to provide direction on matters of national importance and at the same time make it easier to translate and implement that direction at the local level. Many things addressed in council plans would also be about matters of local rather than national importance, and would be constrained,² but not driven, by an NEP. Approaches to many aspects of land use (eg shaping places in urban communities) would be a good example of a firmly local responsibility.

We also see merit in linking new obligations in an NEP to expected funding mechanisms for local government (including, potentially, grants from central government).³ This would recognise that while councils are legally responsible for implementing national direction, they are also quasi-constitutional partners with the Crown in environmental management, not branches of central government. There would be close consultation with councils when central government is developing an NEP, so that cost implications for local government could be worked through from the outset. This is not to say an NEP needs to be *accompanied* by funding per se, only that expected costs and sources of funding should at least be identified and an opportunity provided to broadly agree on them as feasible and fair.⁴

An NEP would outline indicative sources of funding needed for implementation, and would involve need-based or demand-based grants from central government to councils. There would be closer involvement from central government in implementation.

7.2 Local government structural reform

Questions concerning local government boundaries can be fraught, and it is necessary to say a word about institutional design before considering local planning

processes under the RMA. While we are not suggesting instant wholesale structural reform of local government across the country, we see a compelling case for scale to be embraced for some matters (eg infrastructure provision – see Chapter 10), and the transfer or escalation of some functions (eg enforcement and regulation-making jurisdiction for the EPA – see later in this chapter). But if we start shifting functions substantially, it raises broader questions about the nature of local government institutions. For example, some have seen the prospect of losing functions related to the provision of drinking water and wastewater services as an existential threat to territorial authorities.

Questions about council amalgamation and restructuring stray beyond the scope of the resource management system (after all, local government does many other things). Impassioned arguments have been made in favour of greater regionalisation of council boundaries (eg combining all district and regional councils into a single unitary authority). Others have stressed the need to retain (or enhance) a system based on devolution. We also need to keep in mind the pragmatic implications of significant local government reform: it would be an intensely controversial and resource intensive process that could distract from other reform measures.

That said, it is an important conversation that needs to happen soon. We see a strong case for amalgamation where local government units are no longer economically viable, particularly where this is impacting on their capacity to discharge functions relating to environmental protection and the maintenance of essential infrastructure.⁵ This could be done through compulsory referenda.⁶ Scale does matter when it comes to the increasing complexity and challenges of integrated environmental management, especially in a small country like New Zealand.⁷

We also think it is desirable to sharpen some functions of regional and local government. In particular, territorial authorities have had under the RMA primary responsibility for managing land use impacts on terrestrial ecosystems, particularly on private land. Regional councils have had broader and more comprehensive powers related to water and air. There has been a degree of overlap relating to terrestrial biodiversity, which has in practice manifested as a gap, where there is a lack of accountability.⁸ We suggest that a sharper responsibility for biodiversity should lie with regional councils,⁹ which are generally better equipped to develop and implement biodiversity policy across a broader spatial scale. They are also generally better resourced with expert support and can exercise their rating powers to deliver biodiversity outcomes on a strategic basis.

More generally, we see a good case for stronger cooperation at a regional level in planning (especially under

the RMA). Infrastructure New Zealand has put forward persuasive reasons for thinking regionally for some things, including urban planning and infrastructure provision.

A spotlight on thinking regionally

Many have stressed the benefits of thinking regionally, which applies both to the specific functions of councils under the RMA and in a broader sense (eg through cross-statutory spatial planning, discussed in Chapter 8). We currently have dozens of regional, unitary and local councils, most of the latter being fairly small, and some have pointed out the increasing challenges and burdens facing them in light of their financial, technical and human capacity.¹⁰ Some of that relates to regulatory services under the RMA (eg plan making, consenting), and some of it is related to the provision of community services (including infrastructure like roads, water pipes and treatment plants, and streetlights). Economies of scale are important for some things.¹¹ That has led to suggestions for shared services or, more dramatically, to fundamentally overhaul what local government boundaries look like.¹²

A recurring criticism of district and regional planning under the RMA is its fragmented nature and a lack of consistency or integration between documents. Since the inception of the Act, there has been the ability for territorial authorities and regional councils to “agree to jointly prepare, implement, and administer” combined district plans and unitary plans (which incorporate both district and regional planning documents).¹³ Yet outside the six existing unitary councils, only the Wairarapa Combined District Plan and the newly announced West Coast Combined District Plan appear to have taken advantage of this. This is despite the direction to local authorities to “consider the preparation of a combined regional or district plan under this section whenever significant cross-boundary issues relating to the use, development, or protection of natural and physical resources arise or are likely to arise”.¹⁴

Despite its benefits (consistency across a region, accessibility for users, potential for shared resources, cross-boundary concerns like labour markets and movements of people), there are difficulties with doing this. Under section 80 of the RMA, a combined document must still be prepared in accordance with the provisions of Schedule 1 of the Act, and needs to be approved by each local authority. This exposes any combined planning process to potentially different political pressures, depending on the councils involved.

Some have therefore suggested that the solution is regionalisation of local government units themselves, whether along current lines or different ones.¹⁵

Overall, our model sees regional cooperation as crucial, and would not be inconsistent with a shift towards regionalisation of council boundaries. That could, for example, see territorial authorities merged with each other, or for them also to be merged with regional councils

to form unitary authorities. Indeed, overall complexity in our model would reduce were that to happen (eg proposals for regional level spatial planning and regional combined plans under the RMA would become simpler because there would be fewer actors involved). We do not comment on exactly how greater regionalisation of boundaries would look, and it is something that must happen in close partnership with communities themselves. It should be subject to a dedicated piece of further work.

Recognising the benefits of regionalism is not to dismiss the importance of localism and community ownership and identity. In many cases grass roots localism makes a great deal of sense.¹⁶ The more basic point, we think, is that issues need to be managed at scales where communities of interest lie and where there is the ability to address issues effectively, efficiently and fairly. There can be tensions between those things, and a difficult adjustment to be made where circumstances change (eg where costs become prohibitive to deal with things at one scale). Communities of interest do not always reflect the ability of a population to fund some of their functions. For example, small and dispersed populations are sometimes expected to fund planning and consenting activities across huge geographical areas that, in some cases (as in the Mackenzie Basin), can have nationally significant implications.

Thus, while conversations often seem to be framed coarsely and pejoratively in terms of council “amalgamation” and “restructuring”, the more important thing in our minds is to test where particular functions should be exercised, allow for those to shift according to context,¹⁷ and build institutional arrangements around them. For example, it would be entirely possible to have regional unitary authorities for things requiring scale and consistency (eg urban growth strategy, infrastructure provision), and for those to be complemented by local boards with clearer functions and more secure budgets.¹⁸ In fact, we have suggested elsewhere that the system have a clearer definition of subsidiarity, which would apply to different aspects of local government as much as it does to the relationship between central and local government. The conversation should focus first on what functions should lie where, not where existing council boundaries should be drawn.

We see a strong case for amalgamation of councils where they are no longer viable economic units, and for scale to be embraced where this is beneficial (eg for the provision of infrastructure and regulatory services). Stronger cooperation will be vital at a regional level, and that would not be inconsistent with further amalgamations or greater regionalisation of council boundaries. However, we encourage a conversation around that to continue, which must cover territory beyond the scope of the resource management system.

7.3 Local government planning under the RMA

There are serious questions to be asked around the RMA planning process for regional plans, regional policy statements, and district plans. The below discussion proceeds on the basis that current council structures remain broadly the same as now, but the proposals could easily be applied to a model in which there was a shift towards regionalisation or unitisation of councils.

There are two key things that we think need to be done differently in the future. The first is the need for more joined-up decision-making at a broader (regional) spatial scale. The second is that more timely outcomes are required (including for urban planning in areas of high growth¹⁹ and freshwater). The last five years or so have seen a stream of targeted and ad hoc measures designed to address some of these issues (eg special housing areas, an NPS on Urban Development Capacity, the Auckland Unitary Plan process, proposed planning powers for an urban development authority, a streamlined planning process, and proposed changes to freshwater plan making),²⁰

The need for plan agility, however, seems more systemic than those particular examples. There is urgency in relation to a whole range of matters, including in the defence of environmental bottom lines and climate change adaptation. We have heard many complaints that the Schedule 1 process is costly, time-consuming, and almost inevitably results in appeals that can drag on interminably. Plans can take up to 10 years (from notification to resolution of final appeals) to become fully operative, just in time for another review. An average timeframe of four to five years for a plan change is far from ideal.²¹

A need for speed is tempered by the need for robust, evidence-based decision-making and a role for the public to participate and provide input. There is an inherent

tension here, as explored in the Phase 1 report.²² And as at the national level, there are questions around the proper role of independent institutions (eg commissioners, the Environment Court) and accountable ones (councillors).

There are some surgical, less intrusive and incremental reforms that we consider would be useful in the short term. In particular, we encourage the further development of National Planning Standards, including a common core of definitions, format and structure for plans, along with reasonable timeframes for transition.²³ In particular, we encourage a structure that requires the clear bottom lines outlined in a new Part 2 of the RMA to be addressed in a common way, enabling easy comparisons across jurisdictional boundaries and making it easier to give effect to bottom lines in an NEP. More generally, we see room for reducing the complexity and the sheer length of the RMA.²⁴ Much of that complexity is tied up with the local planning process. We do not suggest specific measures by which that could happen here – it would involve an almost section by section analysis of the Act – but there should be a process to do this following framework level changes.²⁵

However, we also think that change is required to the core of the plan making process, by making it more agile at the same time as ensuring robustness of decision-making and encouraging participation.²⁶ These concerns were among the key drivers behind the bespoke process for developing the Auckland Unitary Plan, and this experience is instructive.

A new planning process under the RMA needs to be more agile, in order to respond to a rapidly changing biophysical and social context. This should be done in a way that provides for robust decision-making, meaningful public participation, and more timely outcomes.



A spotlight on the Auckland Unitary Plan process²⁷

The process for producing the Auckland Unitary Plan (an RMA instrument) was outlined in special legislation, following recommendations from the Royal Commission on Auckland Governance in 2009. Auckland's eight former city, district, and regional councils were amalgamated into the unitary Auckland Council, and with them went their associated district and regional plans. With the formation of an integrated institution came the need to integrate the former councils' RMA planning instruments.

However, the first step in the Unitary Plan process was a completely different plan required under another piece of legislation, called (rather confusingly) the Auckland Plan. This was a "spatial plan" for Auckland, the purpose of which was different to the RMA (to contribute to Auckland's social, economic, environmental, and cultural wellbeing through a comprehensive and effective long-term strategy for Auckland's growth and development). The Auckland Plan was to set a strategic direction for Auckland and provide a basis for aligning infrastructure plans, regulatory plans (including RMA ones), and funding programmes of the now unitary Council. We shone a spotlight on the Auckland Plan in the Phase 1 report.²⁸

The Unitary Plan followed a modified RMA (Schedule 1) process, whereby things were (generally) streamlined. For example, while the time for submissions and further submissions was extended (because of the enormity of the exercise), there was no discretionary ability to extend or waive time limits beyond that. The Council was then required to deliver up the proposed plan, all submissions, a section 32 (of the RMA) report and other information to an Independent Hearings Panel. That panel was established by the Minister for the Environment and Minister of Conservation. The entire process from notification to recommendations was required to be completed within three years.

When the Plan was notified in 2013, 13,000 submissions were lodged. Mediations were held on a large number of topics, with participants working on "marked up" versions of the notified plan. Those "marked up" versions were usually put forward by Auckland Council as their preferred version and often formed the starting point of the Panel's consideration. Across 249 days and 70 topics, the Panel considered over 10,000 items of evidence and presided over 4000 appearances by submitters. Hearings were held by topic, with the "big picture" regional policy statement and Auckland-wide topics heard first, before a host of more specific zoning questions.²⁹ Hearings largely followed the usual RMA process, with legal submissions, summaries of pre-circulated evidence, and questions from the Panel. Cross-examination was the exception, rather than the rule.³⁰

However, there were significant challenges, and important lessons. For example, the Council's

summary of requested decisions ran to some 4000 pages, presenting significant issues for submitters in identifying what areas they should lodge further submissions on. The Council itself lodged a lengthy submission on its own plan. Towards the end of the process, it became apparent that the Panel might not report within the three-year timeframe. Last minute changes were made in response.³¹

The result was that, by the end of the process, there was a significant increase in submitter burnout. The rezoning topics, which had a large number of site-specific submission points, were held at breakneck pace in the last four months of the 20-month process, after most of the other Auckland-wide topics had been heard but before any decisions had been made. Hearings on proposed changes to the rural urban boundary, another contentious issue, were also held towards the end of the process. The process was also still also open to political pressure. In February 2016 the Council voted controversially to withdraw evidence it had filed in support of intensification³² in some suburbs. There were also issues with timing, and a lack of higher order policy to inform lower level decisions.³³ Ultimately, decisions about whether to accept or reject the Panel's recommendations lay with the Council. Very little time was provided by law for the Council to consider and decide on the Panel's recommendations. A small number of recommendations were rejected, opening up merits appeal rights to the Environment Court.

The efforts of the Panel to consolidate and integrate Auckland's myriad planning instruments into one coherent document were heroic. That said, implementation has not been without its challenges. Despite constraints on appeals, a number of actions have been filed. A recent decision in the Court of Appeal has even said that the Panel failed to give proper reasons for declining a site-specific rezoning request, and so the Panel (now three years later) must reconstitute to give those reasons. There have also been declaration proceedings brought by landowners, successfully challenging the Council's interpretation of key provisions of its own plan. The result has been yet more plan changes.

In short, and as shown in Figures 7.1 and 7.2, we are floating the idea of reducing a two-stage process for plan making to (largely) a single stage. Because of this, we consider there would no longer be a need for a separate "streamlined" planning process in the RMA. However, as we expand upon below, we are also floating two sub options for feedback.

7.4 Option 1: An Auckland Unitary Plan-type model

Option 1 is based broadly on the kind of model used in developing the Auckland Unitary Plan, where an independent institution considers a proposed plan, makes recommendations to councils, and where merits appeals are then constrained.³⁴ However, there would also be significant differences to the Auckland Unitary Plan process.

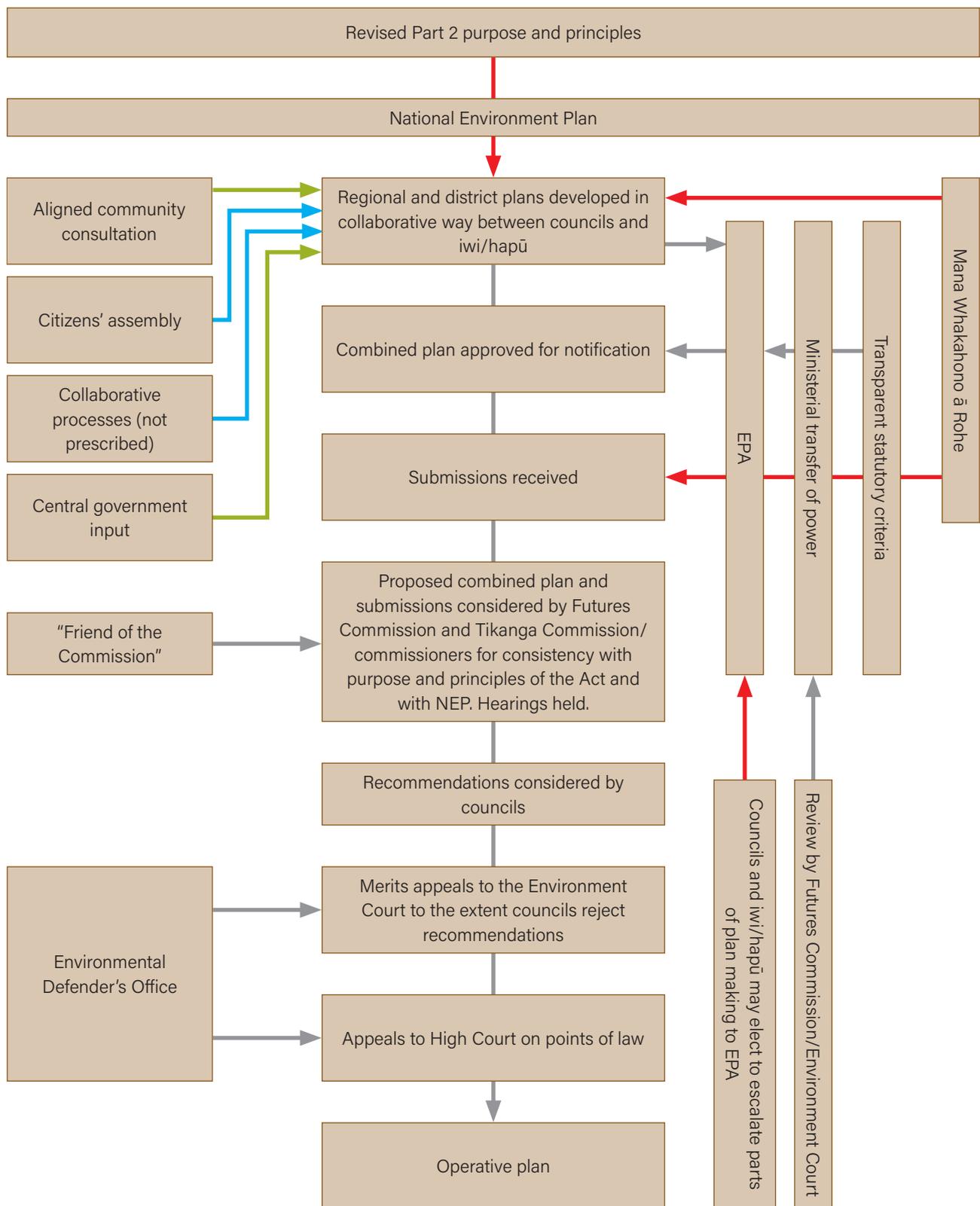


Figure 71: An Auckland Unitary Plan-type model for council planning under the RMA. Red arrows denote strong directions (eg give effect to); blue arrows denote medium-strength directions (eg have particular regard to); green arrows denote weak directions (eg take into account); black arrows denote process directions.

In particular, a single plan – for convenience, a “combined plan” – would be developed in a collaborative way between a regional council, territorial authorities, and iwi/hapū, each consulting with their respective communities.³⁵ There would be an obligation to work together. This would effectively be compulsory use of what the RMA provides

for as “combined regional and district documents”.³⁶ A joint committee, based on the model provided by section 80 of the existing RMA, could be an effective means of implementing this. In terms of staffing arrangements, there would be merit in the use of cross-cutting “project teams” within and across councils. These could break down silos

and ensure that planning happened in a coordinated way (including making links to plans under other acts).³⁷ As we said in the Phase 1 report:³⁸

Councils write a huge number of plans: long-term plans and annual plans, pest management strategies, flood management plans and asset management plans, regional and district plans, and transport plans. Those are often produced by different parts of the same organisation...

Some councils have created central "policy" teams – for example Taupō District Council has a policy team that works across different legislation (notably the RMA and Local Government Act). This allows the council to deploy policy resources efficiently to meet fluctuating workloads ... [and could] help lead to more integrated plans as an alternative to legislative integration.

We would also envisage a framework that encouraged creative mechanisms for public engagement as part of plan creation, including the potential for informal collaborative processes³⁹ and citizens' assemblies and juries (see below). Plans should not *just* be imposed from the top down,⁴⁰ and more emphasis needs to be placed on community co-design rather than reactive submissions and litigation. Community and stakeholder buy in and ownership is essential to durable outcomes, and innovation in engagement will be important to reach out to what will be a more diverse and rapidly changing population, especially in urban areas.⁴¹ There is huge potential in the use of social media and technology to innovate, which many are already exploiting to positive effect.⁴² As the New Zealand Initiative has pointed out:⁴³

Simply put, when people get a chance to see how their efforts actually make a difference to the outcome, their level of interest in the discussions increases.

Greater experience in engagement also supports public understanding of the kinds of decisions councils face.⁴⁴ In particular, we see collaborative processes (which we shone a spotlight on in the Phase 1 report)⁴⁵ as a good idea in principle. Getting stakeholders in a room together to work through disagreements and find common ground can create more durable agreements, encourage creativity, reduce later tension and litigation, and provide for increased awareness of issues.⁴⁶ Although they were not without their challenges, significant steps forward have been achieved through groups like the Land and Water Forum and the Sea Change – Tai Timu Tai Pari Stakeholder Working Group, which were designed to influence policy more broadly than just under the RMA.⁴⁷

In the RMA specifically, a collaborative group's consensus recommendations could usefully be something to which decision-makers are obliged to have particular regard.⁴⁸ However, we see the existing collaborative planning track in the RMA as inherently risky, complex and difficult to formalise in legislation as a replacement for (or alternative to) a more general planning process.⁴⁹ In particular, it leaves few safeguards around who can be appointed to a collaborative group, raising risks of entrenching existing interests and creating power imbalances.⁵⁰ A collaborative process can bring with it a risk of relegating biodiversity

outcomes to the decisions of vested resource users, often with a short-term focus, and devolving statutory responsibilities to the public. It can unduly place a burden of responsibility on a collection of under-resourced environmental groups and individuals. While collaborative processes have significant value as inputs to broader planning processes, and potential in determining the "how" when evidence determines the "what" (eg in deciding how to deallocate existing rights within a catchment in order to meet environmental limits), they have weaknesses in setting hard agendas (the limits themselves). The most recent amendment bill to the RMA proposes dispensing with the formal collaborative process currently contained in it.⁵¹ That is for the best, but could usefully be complemented by the creation of more general principles for informal collaboration through national direction.

A spotlight on citizens' juries and assemblies

In the Phase 1 report, we floated the idea of formalising the use of citizens' juries in the local planning process, as a way to ensure a wider variety of voices are heard. We explained that:

Members of the jury are randomly selected from the relevant population. They jointly hear submissions and evidence, deliberate and reach a conclusion. Such juries have been extensively used overseas...

In the New Zealand context, such a jury could be established, for example, through randomly selecting between 10 and 20 participants from the relevant district or region. The jury could sit in on the public hearings of the proposed plan provisions and then meet to deliberate and provide recommendations to the council. The council could be required to take the recommendations into account.

This model could also be used much earlier in the process, so that a citizens' assembly actively contributed to creating a plan or plan change. For example, in Vancouver, the City Council established a citizens' assembly to develop a plan for the Grandview-Woodland community.⁵² An open invitation resulted in 500 volunteers, from which 48 members were selected by lottery.

Recommendations in such a model should not be binding (they are not a substitute for local democracy or a replacement for firm limits to achieve environmental bottom lines), but they should have substantial moral authority, contribute useful local information, and provide an indication of community feeling. They should be one matter to take into account.⁵³ Broad citizens' assemblies could be supplemented by ones targeted at under-represented groups (such as youth).

Furthermore, we see a valuable opportunity for direct input from central government in the development of council plans. That proactive input is lacking at the moment,⁵⁴ and would be valuable early on so that plans (and plan changes) could develop in a way that gave effect to an NEP and linked well to other statutory

plans.⁵⁵ Alternatively, the Ministry for the Environment and Ministry for Housing and Urban Development could be required to provide comment on a draft prior to notification.⁵⁶ A sub option would be for the Minister (or Department) of Conservation to have special consultative or even approval powers in relation to biodiversity related aspects of plans (instead of being just one submitter among many), as is the case for coastal plans already. That may be necessary to ensure that the Department has both the mandate and the tools to carry out effective system stewardship for biodiversity (see Chapter 12).

After it was prepared, a proposed combined plan would be publicly notified,⁵⁷ and submissions received and summarised. There may be some merit in preventing those who have developed the plan, and approved it for notification, from then making submissions on it. However, in a jointly prepared plan that may be a valuable safety valve by which any differences of opinion (eg between councils or between councils and mana whenua) could be highlighted for consideration. Topic-based mediation would be provided for.

A key difference from the Auckland Unitary Plan process would be that the standing Futures Commission and Tikanga Commission or commissioners would be tasked with reviewing the notified plan, section 32 analysis, and submissions. Hearings would be held in two stages.⁵⁸ The first would be to set the strategic policy framework (including, where relevant, targets), and the second would be to consider more detailed matters (including regulatory provisions).⁵⁹ There may be merit in limiting further submissions. The Commission(s) would make recommendations to councils, based on its assessment of whether the plan implemented Part 2 of the Act, gave effect to the NEP, and gave effect to the principles of the Treaty of Waitangi. Councils (for their respective jurisdictions) would then be able to decide whether to accept or reject those recommendations. As in the Auckland experience, only to the extent they were rejected would there be the opportunity for merits appeals to the Environment Court (in which case other persons could join proceedings as section 274 parties). There would also be appeals on points of law to the High Court.

The Futures Commission in this option would play a valuable role, not just as an expert, independent check and balance on local democratic decision-making.⁶⁰ It would also ensure that the plan formed a coherent whole at a regional level. Furthermore, it would provide a voice not just for future generations of people generally, but also future residents of an area. It would closely consider the national, not just local, interest.⁶¹ While local collaborative processes and citizens' juries are extremely valuable, they can still run the risk of presenting the views of current residents and seeking to entrench existing preferences (eg low density development). Even "representative" councils themselves can run this risk, given the characteristics of people who are most likely to vote in local elections and submit on plans (eg older, wealthier people).⁶² A role for the Futures Commission here would provide some balance.

Across all of this, reasonable timeframes and support for participants would be crucial. In the Auckland Unitary

Plan context, much feedback has indicated that the time available for submission and decision was too short, and there was considerable submitter burnout. A future system also needs to be mindful of the need not to discourage public involvement in what should be a reasonably informal and non-threatening setting.⁶³ Meaningful public participation is crucial for many reasons, as outlined in the Phase 1 report, and needs to be encouraged, not just allowed.⁶⁴ As explained in the spotlight below, we can draw similar lessons from the Christchurch experience of a bespoke, streamlined district planning process (albeit in a very different context).

It would in our view be a positive step to establish a publicly funded "friend of the court" (or, in this case, "friend of the Commission") model to assist participants (especially lay participants) through the process,⁶⁵ as well as a properly funded statutory Environmental Defender's Office charged with taking on public interest litigation (to the extent appeals were allowed).⁶⁶ At present, the Environmental Legal Assistance Fund is fairly constrained, and is not available to individuals,⁶⁷ and it is often left to civil society groups to litigate under their own steam. These reform measures would be intended to counteract the inequality of resources that often arises in the context of resource management court proceedings, as well as support people and communities through what can be a demanding process.

One option for reforming the local planning process under the RMA is to adopt a variant of the Auckland Unitary Plan model. Merits appeals would be constrained by whether councils accepted or rejected the recommendations of a standing, independent Futures Commission. A "friend of the Commission" model could usefully be established to assist submitters through the process, and there should also be a new, publicly funded Environmental Defender's Office established to pursue public interest litigation.

Creative, bottom-up measures for community engagement would be desirable, including the use of citizens' assemblies and juries and informal collaborative processes. We also see a case for more direct central government input (including resourcing assistance) in developing a plan.



A spotlight on the Christchurch Replacement District Plan process

The traumatic earthquake of February 2011 presented many challenges for the people of Canterbury, not least of which were crucial decisions as to how Christchurch was to be rebuilt and what shape it would take. Central to this was the development of a Replacement District Plan, effectively rewriting the rulebook for the Christchurch metropolitan area. Pursuant to the Canterbury Earthquake Recovery Act 2011, The Canterbury Earthquake (Christchurch Replacement District Plan) Order 2014 modified the RMA to provide a streamlined process for the review of the existing district plans and for the preparation of a comprehensive replacement district plan for Christchurch.

The process provided for the notification of proposals for a replacement plan and for the making of submissions. A hearings panel, appointed by the Minister for the Environment and the Minister for Canterbury Earthquake Recovery (in consultation with the Christchurch City Council) conducted hearings and made decisions on whether to make changes to any proposal. Almost 5000 submissions were considered, covering over 48,000 submission points in 134 decisions.

The process was complex, and made more so by the overlay of central government direction through a "Statement of Expectation" and the Recovery Strategy (the new Plan had to "have particular regard to" the former and "not be inconsistent with" the latter). The Plan was set down for hearing in three stages. Generally, the first dealt with the strategic level outcomes, temporary activities related to earthquake recovery, repair and rebuild of multi-unit complexes, and rezoning of particular land under the Land Use Recovery Plan. The remaining topics were heard across the remaining two stages, with decisions released on those stages in batches.

The panel notified the stage-one proposal in August 2014. At the other end of the process, final decisions were made in December 2016. Unlike the Auckland experience, the decisions of the Panel were final, and the Crown (through the Canterbury Earthquake Recovery Authority) participated heavily. There were no appeals to the Environment Court, only to the High Court on points of law.

The process was not without its critics. Participants reported feeling bruised by the adversarial nature of the hearing process. Unlike Auckland, cross-examination was the norm rather than the exception. An independent review part way through the process also found that the Council had "not produced an effective plan" for the panel to consider. Staging, in particular, made it difficult for participants to know on which topic and at what level to engage, and by the end of the process some submitters found out that their chance to effect change had already gone.

A spotlight on Māori as gatekeepers

There are significant questions to be asked in the local planning context about the role of Māori, especially in light of any strengthened Treaty obligations in a revised Part 2 of the RMA. Should iwi and hapū as "representative" groups be treated as gatekeepers (ie final decision-makers, among others) at the system-wide level,⁶⁸ not just as co-designers in plan production, or "expert" advisors on Māori issues or tikanga/mātauranga? Is a strengthening or greater resourcing of Mana Whakahono ā Rohe agreements the way forward, to allow those questions to be tailored and negotiated up front between councils and Māori?⁶⁹ Do they need to be brokered more actively by the Crown as Treaty partner?⁷⁰

In the model described above, there is provision for co-production of plans by mana whenua⁷¹ and independent review by a Tikanga Commission/ commissioners. This recognises that Māori are not just "objects" of the system to be protected, but also Treaty partners whose voices must be heard and contribute to plan development.⁷² This is more than just "consultation",⁷³ and should ensure that sites and landscapes of particular significance to Māori are identified in plans, preventing the kinds of issues that arose in relation to the non-notified consenting of earthworks on Te Mata Peak.⁷⁴ Support is needed for the proactive identification and management of sites of cultural significance as well as structured feedback about the adequacy of protections, not just provisions allowing for these things to be considered on a reactive basis.⁷⁵

Our model should also address concerns that iwi management plans have proved only a weak input to RMA processes despite councils having to take them into account,⁷⁶ given that there would be a champion for such plans in the plan development process. The exact nature of what collaboration looks like would not necessarily need to be prescribed by law.⁷⁷ But it may require greater resourcing by the Crown to allow some iwi and hapū to collaborate meaningfully.⁷⁸

However, recommendations in the model described above are still ultimately left to be accepted or rejected by councils, followed by potential (albeit constrained) appeals to the Environment Court. Thus while the model strengthens Māori involvement relative to the current RMA process, some may question whether it goes far enough to give effect to the principles of the Treaty.⁷⁹

Alternatively, there could be more fundamental institutional reform to actual decision-making entities. For example, a future system could introduce Māori wards for councils, or provide more specifically for co-governance arrangements and power sharing between councils and iwi/hapū (and potentially also the Crown, as under the Waikato River Authority model).⁸⁰ There could even be the mandatory transfer of some functions (eg where control is in relation to

significant taonga), beyond specific Treaty settlement obligations.⁸¹ The RMA provides a mechanism for that to happen, but no transfers of power to iwi authorities have occurred in the almost 30 year history of the Act.⁸² Another alternative would be, in the model described above, to provide an obligation for the Futures Commission's recommendations to be approved/rejected by mana whenua as well as the relevant councils (thereby opening up appeal rights).

The extent to which there is direct representation by Māori as final decision-makers across the system is a challenging issue – especially if there are many different iwi or hapū across a region. Self-organisation is a matter for Māori themselves rather than something to be imposed from above, but greater clarity around who has the authority to speak and engage with councils could be useful.⁸³ In the Phase 1 report, we noted that:⁸⁴

In some areas there is little or no ambiguity about which is the relevant iwi to engage with In other areas it is very unclear and often highly contested. For example, in Northland there are hundreds of hapū, some with populations greater than many iwi. In practice, engagement with hundreds of hapū is not

usually possible. How should councils determine which to engage with? What criteria are relevant when deciding this?

This is an area for which improved statutory definitions, processes and standards could be developed. In some places, such as Auckland City, the "mana whenua" recognised are those with Treaty settlements. While this ensures that the entities have a legal personality and constitutions providing for accountability to beneficiaries, a tikanga based solution is an alternative ... Whatever the solution, the problem is a real one for both councils and tangata whenua in many regions and could usefully be addressed in system reform.

In any reforms, we must also take care to ensure that existing Treaty settlements (which may significantly alter the default local government planning process) are upheld, as well as more general legislation like the Marine and Coastal Area (Takutai Moana) Act.⁸⁵

Māori involvement in local planning should be strengthened in a future system. There are several options for how that could happen.



7.5 Option 2: A hybrid hearings panel

Option 2, shown in Figure 7.2, looks quite different to both Option 1 and the status quo. It seeks to combine the independent and accountable aspects of decision-making into a single-stage hearing by one “hybrid” institution. This reflects the idea that independence and accountability, as well as central and local, can be reflected in the internal design of a single institution rather than having hierarchical roles for separate institutions (eg first instance decisions followed by appeals).⁸⁶

In this model, proposed regional and district plans would be prepared separately by territorial authorities and regional councils (albeit with a direction to work together), in close collaboration with iwi and hapū. (As in Option 1, there would be room for collaborative processes and creative forms of community engagement, such as citizens’ assemblies, to inform that process.) Regional and district plans would continue to remain separate (ie they would not be joined into a combined plan), although

regional plans and regional coastal plans would be integrated into a single regional document.⁸⁷

However, instead of a truly independent hearings panel (the Futures Commission) considering submissions and making recommendations, there would be a hybrid institution making a final decision. This would comprise Environment Court and/or independent commissioner expertise, iwi/hapū, as well as elected members of the relevant territorial authority or regional council.⁸⁸ There would also be the opportunity for Crown and (for district plans) regional council representatives to contribute as observers. In the current system, there are very few formal places where this kind of coming together of different levels of government, and government with Māori, occurs, and we think it would be a positive step.⁸⁹ An alternative way of looking at the model would be for the Environment Court to simply be “co-opting” members onto a panel in a way prescribed by statute.⁹⁰ Either way, the panel would have latitude to establish its own procedures.⁹¹

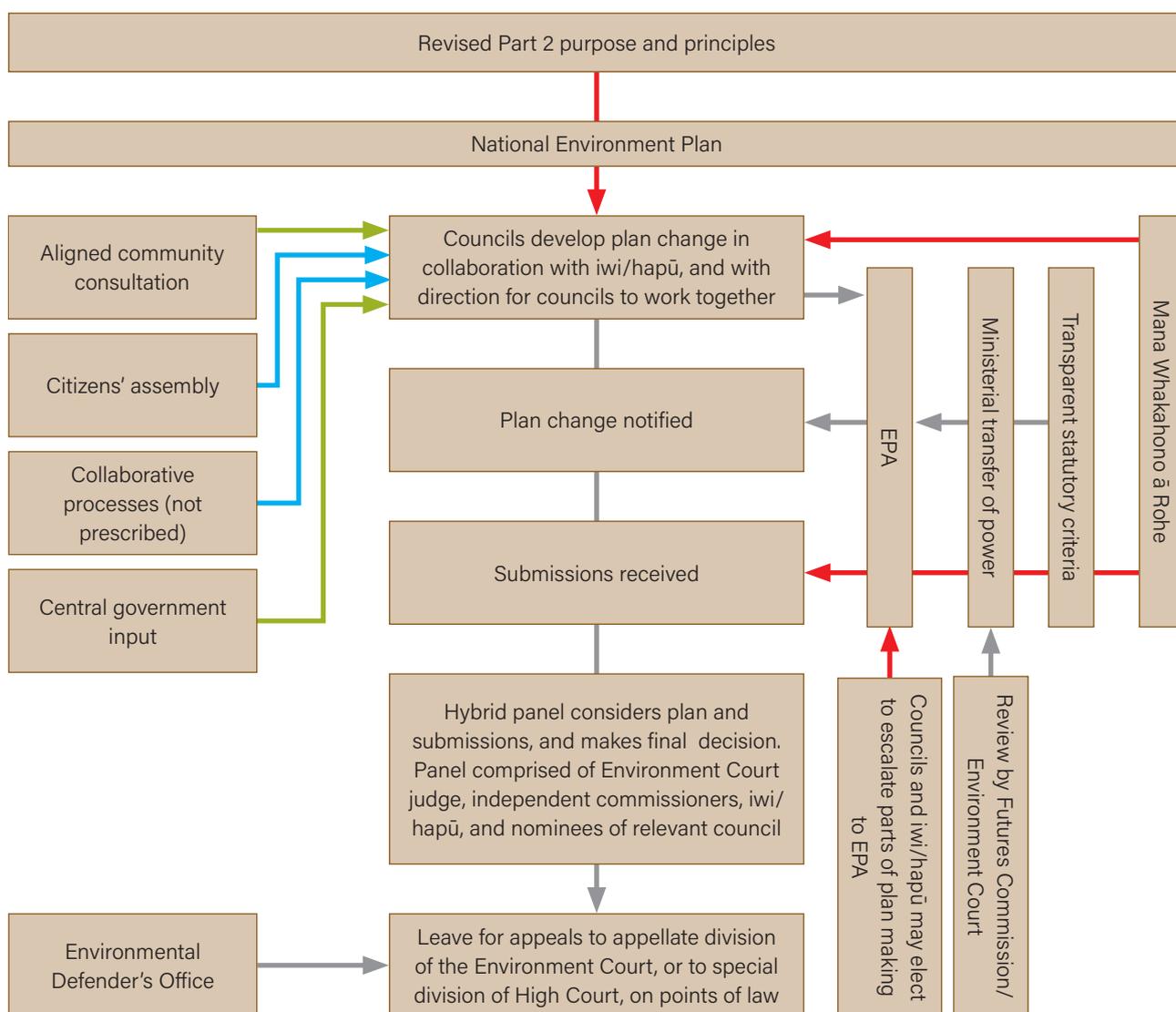


Figure 7.2: A “hybrid” panel model for council planning under the RMA. Red arrows denote strong directions (eg give effect to); blue arrows denote medium-strength directions (eg have particular regard to); green arrows denote weak directions (eg take into account); black arrows denote process directions.

Taking Wellington City as an example, a hybrid decision-making panel could comprise:

- An Environment Court Judge (Chair)
- One (or two) independent commissioners appointed by the Chair⁹²
- One member nominated by relevant iwi/hapū
- Two members nominated by the Wellington City Council
- Observers from the Greater Wellington Regional Council and the Crown

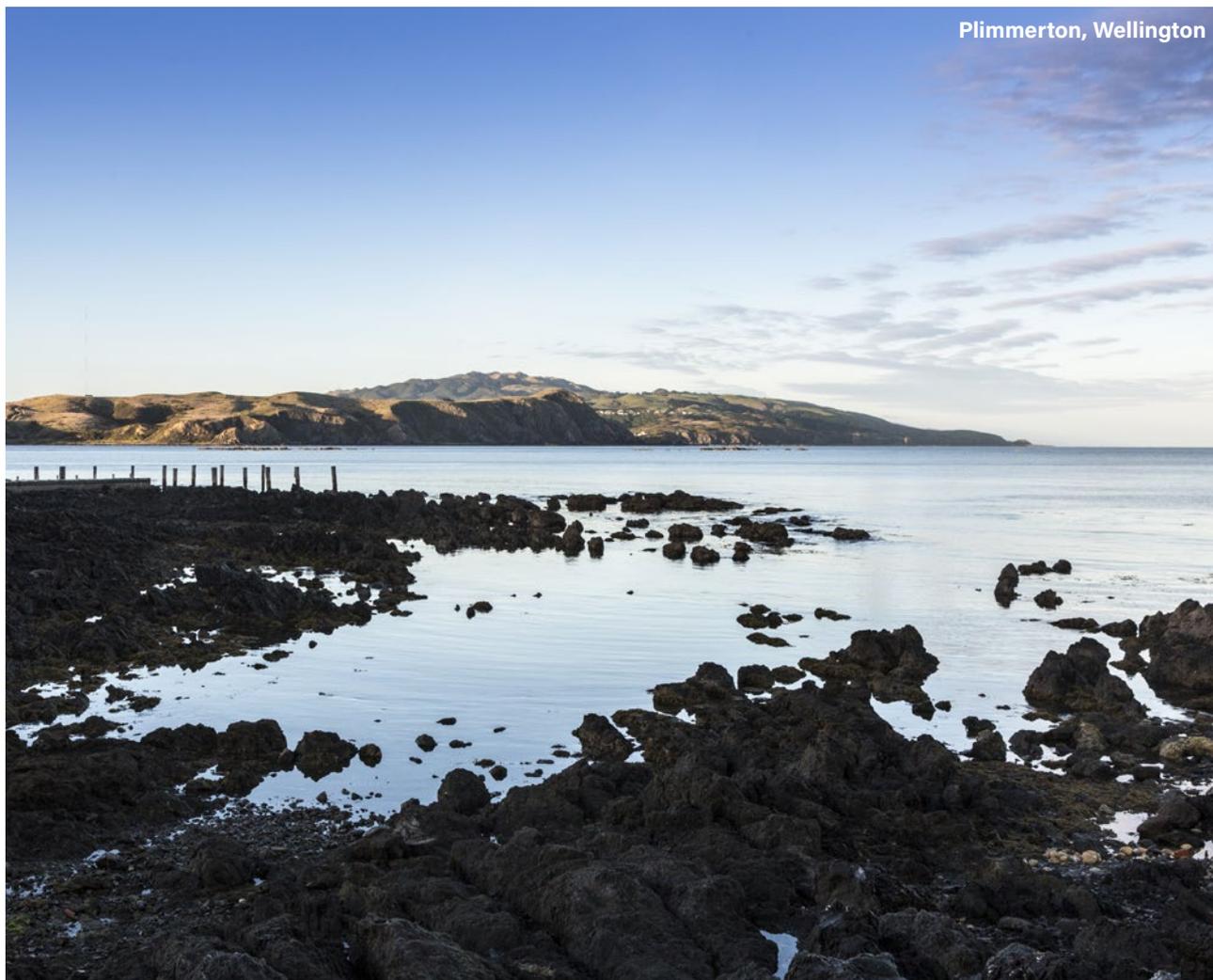
As in Option 1, there would be limited rights of appeal from the decisions of this hybrid institution. Appeals could either be limited to points of law to the High Court⁹³ or to a new senior “appellate division” of the Environment Court. In either case, there could also be a requirement to obtain leave, or prove a prima facie case. For example, appellants could be required to demonstrate an issue of local or regional importance, so that the Court at appellate level is not bombarded with site-specific zoning appeals.

In this hybrid model, it would be important to ensure relative parity between the independent and locally elected members of a decision-making panel. Such questions will no doubt prove controversial, and are open to allegations of undermining local democracy. However,

it is important to remember that the current system is already strongly defined by an (ultimately) independent decision-making power (in the Environment Court), even if merits decisions are limited by the scope of appeals. An institution with a preponderance of independent members would therefore not necessarily be “less” democratic than what we now have, just independent or accountable in a different way.

There may also be issues over the extent to which iwi/hapū should be represented relative to the community more broadly (or whether other mechanisms, like Māori wards for council elections, would be more appropriate), and how decisions are to be made in the event of intractable conflicts between members of the panel. The issues explored in the earlier spotlight on Māori as gatekeepers would be equally relevant, although we note that iwi/hapū *would* be directly represented on the hybrid decision-making panel in Option 2, not just as co-developers of a plan.

A second option for a revised RMA local planning process would be to have a single-stage hearing by a hybrid institution (combining the Environment Court, commissioner(s), councils and iwi/hapū). Appeals would be limited to points of law.



7.6 Which option is better?

While some may see the current Schedule 1 process as preferable to either option described above, on balance we consider a new approach is needed to provide greater agility. Option 2 offers some benefits in terms of (arguably) a more democratic blend of panel members, as well as a (largely) single-stage process. However, it has drawbacks. Some of these have been mentioned above (questions over the relative representation between different groups, and how conflicts are resolved).

Furthermore, the model would not address the fragmented planning landscape, or integrate plans at the regional level (through a combined plan). Instead, it would see the retention of district and regional plans as separate instruments. While it would be possible to require councils to work together across boundaries in developing a single plan for a region (as in Option 1), the hybrid institution proposed in Option 2 would present serious challenges when it came to making final decisions on such a plan. In particular, it would undermine local democracy if panel members from, or nominated by, one local authority (eg Porirua) could have influence over decisions applying to another (eg Wellington City). There would therefore need to be sub-panels that applied only to particular district plan or regional plan components, with the same judge and commissioners sitting across all of them. That strikes us as introducing too much complexity.⁹⁴

The model could, however, have real promise in the event of council unitisation at a regional level. Option 2 could also be a feasible model for future reviews of the Auckland Unitary Plan or the plans of other existing unitary authorities, where a single plan for a region can be produced by a single democratic institution.

Option 1 has definite attractions, including the consolidation of district and regional planning objectives, policies, and rules within a single combined plan. However, while it *constrains* merits appeals, it does not entirely do away with them. Furthermore, while a

recommendatory (rather than binding) role for the Futures Commission preserves some elements of local democracy (councils make final decisions on the plan),⁹⁵ it also opens the door to continued politicisation of issues. Whether that is a good or bad thing may depend on one's perspective.⁹⁶

Both of the options outlined above have positive and negative features. As described below, we see merit in deploying each of them in different circumstances.

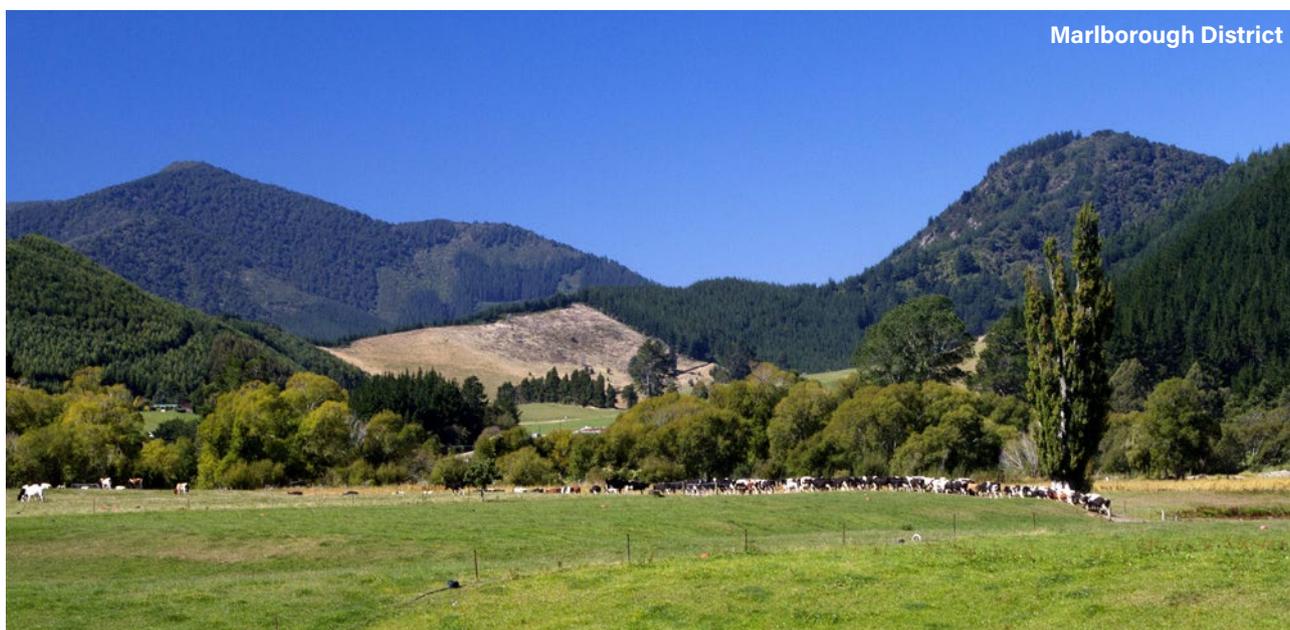
7.7 On the distinction between plan "creation", "change" and "review"

On balance, we are thinking that Option 1 is a preferable process for plan *creation*. This preference is because we see a greater regional level cooperation in plan making – through a single, coherent combined plan – as a good thing for the future. It would be difficult to achieve that in Option 2, because of the nature of the hybrid panel proposed.

However, there is a potentially important distinction in process to be made between plan "creation" and plan "changes". Lying somewhere between those two concepts is the idea of a plan "review". In some cases a plan review can be an assessment of a whole plan (similar to creating a new plan), and in others it can be more targeted (eg rolling reviews of particular "topics" that are more akin to changing a plan in a targeted way). Many RMA plans are now reviewed in this manner.⁹⁷

Do we really want an Auckland Unitary Plan-style process for every single plan change, given that these vary considerably in their potential impacts, geographical extent, and complexity?⁹⁸ The strength of the status quo is that simple or minor plan changes (or those having little opposition) need not be escalated to the Environment Court at all (if there are no appeals), with councils retaining effective control.

Currently, the Schedule 1 process in the RMA applies to both plan creation/review and plan changes, but that



would not need to be the case in the future. It is useful to consider, again, the Auckland Unitary Plan experience. What were the key drivers behind that kind of process?

Speed was one of them. A desire for a strong, independent and national voice was another. To us, those things are generally desirable features for future planning irrespective of the context, scale or significance of the issues in play. But in Auckland there was also the need to align multiple, complex plans in the wake of recent fundamental institutional change (council amalgamation into one super city), and in light of the higher level Auckland Plan (the non-RMA spatial plan). In short, the idea was to “reset” the planning environment in Auckland under a new unitary framework, not to fundamentally change how the RMA would apply to it in the future. We are now seeing many plan changes to the Auckland Unitary Plan largely progressing in the normal way.⁹⁹ Similarly, recent bespoke planning arrangements in Christchurch were designed as a one-off “emergency” intervention to address post-earthquake regeneration (including for reasons of speed and short-term central government involvement in recovery), not as a permanent state of affairs.

Thus there is a valid distinction to be drawn between a process that “resets” entire plans and one that represents an ongoing process by which parts of plans are then changed. In a future system, such “resets”, applying to whole plans, will in our view be needed for several reasons: (1) to align plans with each other (eg across a region, to form single combined plans); (2) to implement the direction in a new Part 2 (including strengthened Treaty obligations); and (3) to give effect to an integrated, comprehensive NEP. All of those things will take time, but they require a holistic view of a wider planning landscape irrespective of whether local government units ended up, in the longer term, being reorganised along regional lines. The Option 1 process provides this.

However, once plans are reset, is there an ongoing need for this process? In some circumstances, that may be justified. In particular, every so often (eg 10 years) a robust process like that may be required to ensure that everything is working well together (a periodic reset in the form of a whole of plan review).¹⁰⁰ We see the Futures Commission as having an important role here, where a holistic, future-focused and independent voice has input to all parts of a plan at the same time. The risk otherwise is that the cumulative effects of private and public plan changes (and consents) may lead to a plan becoming disjointed over time, and in need of a more drastic overhaul later on. That would not be a desirable outcome. Despite the best of intentions, plan changes and smaller scale reviews can have significant cumulative effects to the integrity of plans, and potentially, when viewed as a whole, end up departing from the purpose and principles of the Act.

There may also be the need for particularly *significant* proposed plan changes to be escalated to that process. Triggers based on significance may be difficult to pin down, but existing criteria for call-in may provide a useful

starting point. Such escalation powers could be exercised by the Minister or by the Futures Commission itself.

However, in between such periodic health checks and for matters that do not meet a significance test, we see merit in using an Option 2-style process. Plan changes will always be necessary in between whole of plan reviews, and in our view they need to be more agile than at present (as well as providing for both public input and more independent decision-making up-front). For example, Plan Change 13 in the Mackenzie Basin has seen an enormous amount of time, energy and cost expended. So too have the site-specific zoning changes to the Frankton Flats area in Queenstown, which have prompted an avalanche of appeals.

While significant steps have been taken in recent times to improve timeliness of outcomes at the Environment Court level (see the spotlight below), and there is the ability to call in (or request call-in of) plan changes for direct referral to the Environment Court, we see an opportunity to address more systemic issues with the two stage plan change process. In short, this would mean using the Option 2 process outlined above for plan changes, (including to implement rolling reviews of parts of a plan). The idea is that direct referral to the Environment Court would no longer be needed. How this would work is shown below in Figure 7.3.

A spotlight on timeliness in Environment Court decision-making

The Environment Court has established an effective process for narrowing issues in dispute, directing (as much as possible) parties towards resolution, and timely and effective decisions. Participation in alternative dispute resolution is now mandatory (if requested, and unless leave is granted).¹⁰¹ Other alternative measures, such as “charettes” or facilitated meetings held by one division of the Environment Court with parties and counsel present, are used to narrow legal issues (such as scope) before a hearing. Expert conferencing can be extremely valuable to identify technical points of agreement. The much more hands-on approach to case management at the Environment Court level means that we are less likely to see the sorts of time and cost blowouts of the past.

Such measures could usefully be applied to both the processes described above. Many (although by no means all)¹⁰² of these measures are about dispute resolution between parties rather than “planning” per se, but (as discussed in the Phase 1 report), the distinct role of “private” dispute resolution often cannot easily be separated from the “public” decision-making in which those tensions arise.¹⁰³ The important thing will be to resolve such disputes in a way that does not unduly impinge on the timeliness of publicly important outcomes. Proactive measures to resolve disputes can help, even though private settlements do not remove the need for decision-makers to consider all relevant issues under the Act.¹⁰⁴

Plan "reset" following development of NEP and revised Part 2

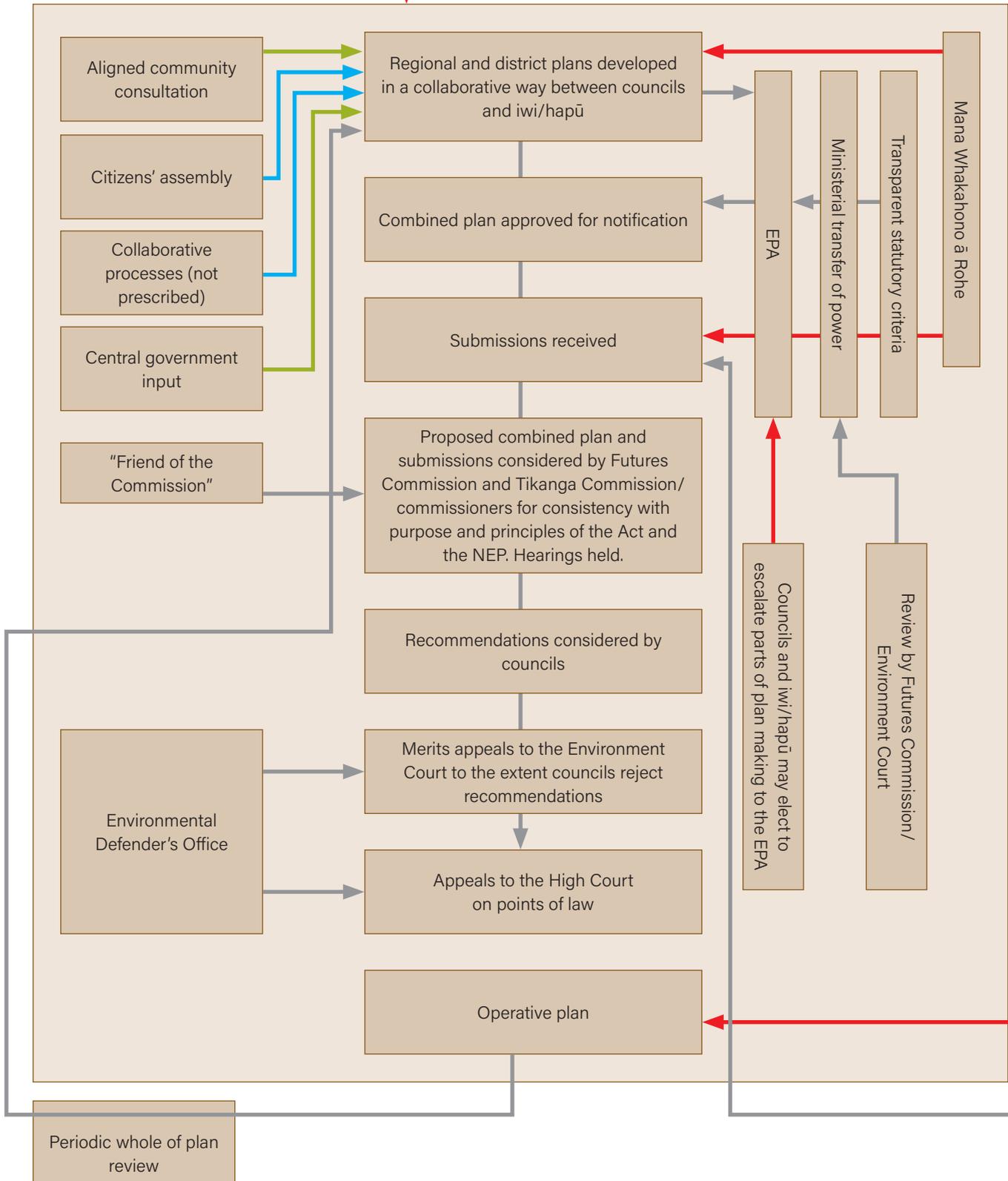
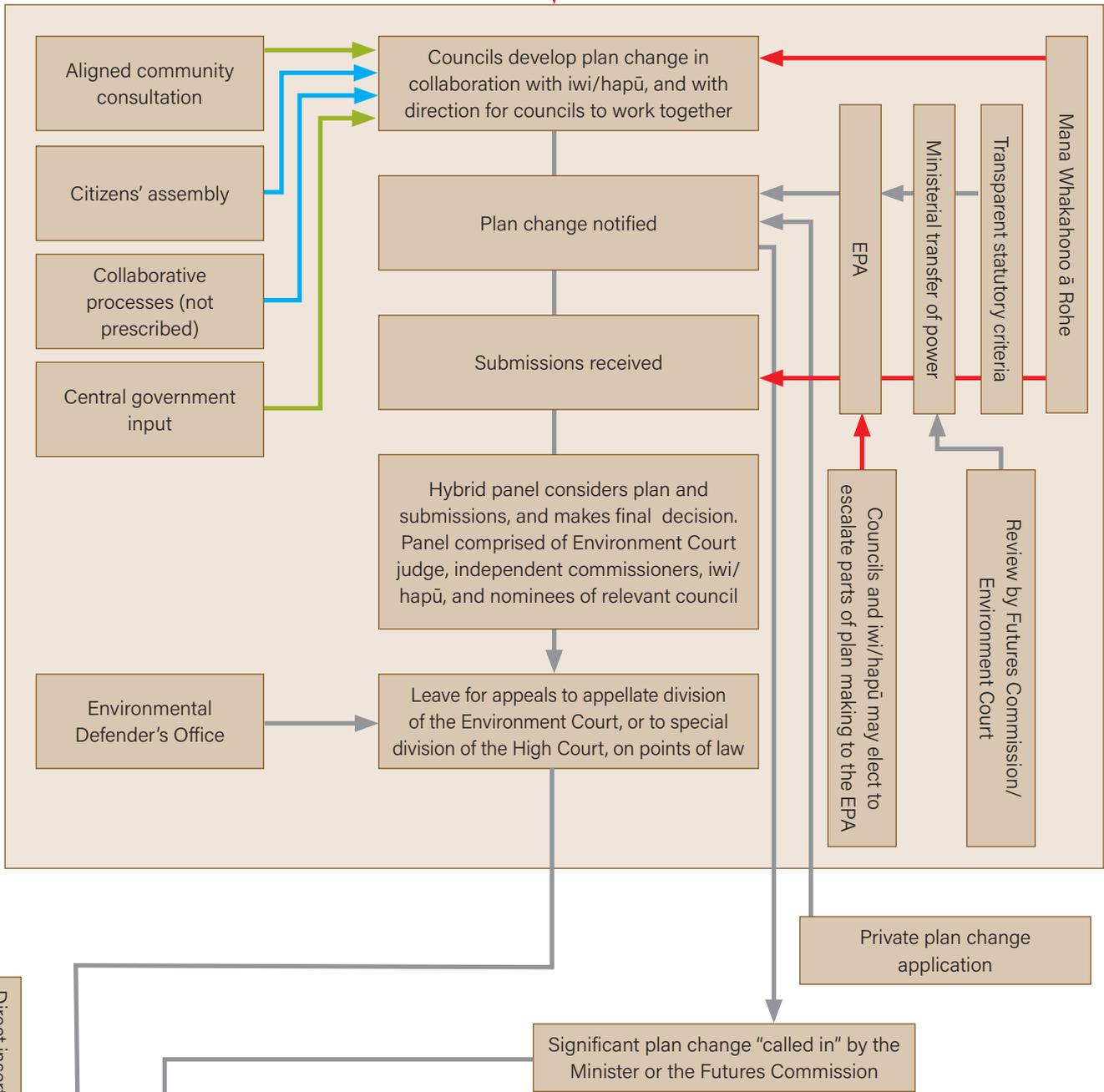


Figure 7.3: Separate processes for plan creation/review and plan changes.



KEY
 Arrows indicate different relationships between elements of the system
 → Red arrows denote strong directions (eg give effect to)
 → Blue arrows denote medium-strength directions (eg have particular regard to)
 → Green arrows denote weak directions (eg take into account)
 → Black arrows denote process directions

It is also significant that plan *changes* (rather than plan creation or whole of plan reviews) are likely to apply only to a single council area/jurisdiction (eg an application to rezone land in one district). This means that the hybrid decision-making entity in Option 2 is far more suited to that process than to a region-wide review of a combined plan. The panel's members would be comprised of a mix of independent members and nominees from the relevant council and iwi/hapū, but there would be no representatives of *other* councils and therefore no perverse outcomes for local democracy.¹⁰⁵

A spotlight on mixed-membership panels for private plan changes

Increasingly, decisions on private plan changes under the RMA are being handled by entirely independent hearings panels.¹⁰⁶ Those panels then report back to the relevant council with recommendations, which are either accepted or rejected. Other panels have included a blend of independent and councillor membership,¹⁰⁷ with a similar reporting and recommendatory function.

This trend is not so different in principle from what is being floated above, in that there would be a mix of independent and accountable decision-makers in a single institution. The key difference is that this would be formalised in legislation, and that the independent element would integrate the appellate function of the Environment Court with the first-instance hearing function of independent commissioners into a single stage. There would also be a more permanent place for *mana whenua*, and appeals from the panel's decisions would be limited to points of law.

An important thing to note is that plan changes are not all alike. In particular, some will be needed to give effect to changes to national direction (in an NEP). For some of these it would be appropriate for the normal plan change process (floated above) to apply, such as where general policies in an NEP need to be implemented over time. For others (such as regulatory components or policies of more specific or urgent application), it would continue to be important for NEP provisions to have the ability to be directly inserted into council plans.¹⁰⁸



We see merit in adopting both of the two options outlined above, but in different circumstances.

Option 1, involving a wide-ranging independent review from a standing Futures Commission and the ability for constrained appeals to the Environment Court, would be used as a robust process for resetting existing plans under a reformed RMA at an integrated, regional level. It would also be used for periodic whole of plan reviews, and where significant plan changes were escalated on the initiative of the responsible Minister or the Futures Commission.

Option 2, involving a single-stage hybrid decision-making panel comprised of Environment Court judge/commissioners, council representatives, and iwi/hapū representatives, would be used as a process for other plan changes (except where an NEP required direct insertion of a provision into a plan).

7.8 Regional policy statements in a future system

One of the key lessons coming from the Auckland Unitary Plan process has been the need to resolve higher questions of policy before addressing more detailed questions around rules and zonings. And while regional and district plans contain objectives and policies, the ideal place to provide strategic guidance is in the higher level regional policy statement. This must be given effect to in plans, and cannot be changed through private plan change applications.¹⁰⁹ It therefore offers a valuable form of policy stability and integration. We have heard from many people that getting this level of decision-making right is crucial, and that in some cases its potential is not being realised. Some have pointed out, for example, that these instruments have sometimes been used primarily to parrot general statements from the RMA rather than elaborate on them in the regional context or provide for their specific spatial expression. One reason offered for this was that councils fear legal challenge if they stray too far from what the Act clearly states.

We agree that a regional level policy instrument is vital to integrated management. In the Auckland model, a regional policy statement has been incorporated into the unitary plan.¹¹⁰ That approach could be rolled out more broadly in the model described above, with decisions taken on that component before proceeding to more detailed questions.

However, in Chapter 8 we discuss the need to have regional spatial planning that aligns not just matters under the RMA, but also other legal frameworks (eg those concerning transport and other infrastructure). This would happen under an overarching piece of legislation – a “Future Generations Act”.

The key question, then, is whether it would then be too duplicatory to have both regional spatial plans under that legislation *and* regional policy statements under the RMA.

The former could, instead, be treated as a replacement for the latter. For now, we simply note that some form of regional strategic framework (including its expression in spatial terms), will be desirable in a future system, either as part of a combined plan or sitting above it.

It would be vital to have a level of regional strategy sitting above, or embedded within, combined plans. However, whether this would be an RMA instrument (a regional policy statement) or a broader strategic spatial plan produced under separate, overarching legislation, we leave as an open question. We discuss that separate act and strategic planning in the following chapter.

7.9 A thought on the role of the Environmental Protection Authority

In the discussion above, we have not specifically mentioned an increased role for the EPA. Independent input is primarily designed to be provided by either the Futures Commission (for plan creation and review) or (for most plan changes) the Environment Court/commissioners. However, in the context of national direction, we said in Chapter 6 that serious thought should be given to separating responsibility for the policy aspect of national direction (ie NPSs) from the regulatory aspect (ie NESs) in some cases, such as for freshwater.

We consider that a similar stance should be taken in relation to local planning. While councils should generally have the role of developing¹¹¹ objectives and policies for their area, the translation of those to regulatory restrictions (eg specific environmental limits and restrictions that bind people) could instead be given to regional branches of an expanded and strengthened EPA, at least to the extent that biophysical bottom lines were at stake.¹¹² The removal of regulation-making power might even provide an incentive to councils to draft policies with greater specificity (ie “rule-like” policies), making consenting decisions more predictable. Careful thought would need to be given to whether a rule-making function could be divorced from a policy-making function, or whether the two need to go hand in hand.

Alternatively, conferring regulatory powers on the EPA might be a less intrusive measure that central government could be permitted to take in the event of council dysfunction (rather than replacing a council with commissioners). In other words, it could be the next step to seriously consider if things worsened or did not improve (eg if environmental limits were exceeded in a catchment), or where it was considered necessary to achieve compliance with national direction within ambitious timeframes. For both those reasons, a greater role for the EPA is a particularly attractive prospect to address freshwater issues in some regions, where issues are already apparent and where complying with national direction is a daunting task both politically and in terms of resourcing.

Of course, this should not be a *carte blanche* for the EPA to override all council planning functions.¹¹³ There should be clear principles around when central government can (and should) intervene to transfer powers, in line with a clearer definition of subsidiarity in the Act.¹¹⁴ For example, one would not want the EPA taking over local zoning powers from councils, but the case for independent development of freshwater quality rules is much more compelling. Capacity within the EPA should, in the short-term, be strengthened with this possibility in mind.

Finally, we see a case for councils to be *able* to escalate planning issues to the EPA (or other suitable agency) where there are genuine resourcing issues or where necessary to give effect to national direction.¹¹⁵ That could be useful, for example, to implement aspects of an NEP relating to climate change adaptation or mitigation, where local political considerations can make such questions fraught. A government agency would be obliged to accept such a transfer when criteria were met.

While we are not proposing a blanket removal of RMA regulation-making powers from councils, a strengthened ability to transfer such powers to the EPA (either permanently or on a temporary basis) would be a useful measure where needed to give effect to national direction or to address at-risk or degraded environments. Capacity should be strengthened in the EPA to anticipate such a measure, and close consideration should be given in the short term to deploying it in the context of freshwater planning.

7.10 Consenting under the RMA

We note that while the planning framework will be crucial in a future system, consenting will also be important. A number of suggestions have been put forward on that front.¹¹⁶

Consenting is not just a local government matter. For example, consent applications can be called in by the Minister, directly referred to the Environment Court, and triggered by rules in national direction. Strictly speaking, it strays beyond the focus of this chapter. However, most RMA consenting is a local business, and here is a logical place to address it.

In our view, it should be more obvious in a plan what development is allowed and not allowed and in which places,¹¹⁷ providing greater predictability of outcome for developers as well as firm and transparent environmental limits.¹¹⁸ Over-reliance on a series of site-specific or activity-specific consenting decisions, within a planning landscape defined by general (and sometimes conflicting) policies, has contributed to unacceptable cumulative impacts over many years, as well as extensive complaints from applicants who do not know whether a consent will be granted or not. In the Phase 1 report, for example, we noted that it is “alarming that the imposition of bottom lines in the landmark *King Salmon* decision relied on an

extensive argument and interpretation of a 'rule-like' policy ... Where were the actual rules?"¹¹⁹

There are different ways in which we could move our emphasis away from consenting and towards planning. One would see greater use of permitted activity status in plans. In other words, if people met minimum standards, which would be prescribed in more detail, no consent would be required. We do not think reforms should travel down that path. Standards for what may be carried out "as of right" have generally been too large and should, in contrast, be strengthened. If nothing else, compliance with permitted activity standards is much harder to monitor than consent conditions.

It would be preferable, we think, to focus on making policies more specific, clarifying the relationships and hierarchies between them, and tailoring them towards requirements for particular activities and sectors rather than general statements of desirable environmental outcomes.¹²⁰ It would also be desirable to provide for more common minimum consent conditions for particular types of activity.

In some senses, this would be a shift away from an "effects-based" framework. While consents would still be required, it would be clearer in advance what the outcome would be and what kind of conditions would need to be complied with. A revised Part 2 of the Act would also make clear that environmental bottom lines (minimum outcomes) would need to be translated into regulatory limits. We expect they would be associated more strongly with prohibited activity status and moratoria in plans, for which consent could not be applied for.¹²¹

Close consideration should also be given to smoothing the regulatory pathway for projects that have significant environmental *benefits* (eg through permitted or controlled activity status).¹²² However, there is a need to be acutely aware of the risks that many "beneficial" measures (eg renewable electricity) can still have. For example, we have previously highlighted that a high trust model for plantation forestry embedded in a sector-specific NES (including extensive use of permitted activity standards and a permissive approach to clear-felling methods) is an uneasy fit for a high risk industry that requires close consideration through a consenting process (including at the point of afforestation or replant, where many legacy impacts can be locked in for decades to come).¹²³ However, there is a stronger case for implementing permitted activity standards (in appropriate areas) where continuous cover forestry is proposed.¹²⁴

Overall, we think a future system should provide greater predictability in advance through environmental standards and clear policies in plans, rather than relying on the discretionary weighing of general and potentially conflicting policies through a string of consenting decisions. Environmental limits defined in a revised Part 2 would need to be translated into regulatory limits, associated more strongly with prohibited activity status, moratoria, or common mandatory consent conditions.

That said, a degree of discretion in consenting will always be important, as plans cannot cover every eventuality. Tailoring conditions to the needs of a particular proposal can also lead to better overall outcomes. So while more relative emphasis should be placed on the planning stage, some form of project-specific authorisations will be required in a future system. However, we suggest a number of reforms.

We see a case for jurisdiction over some forms of consent (eg for freshwater in vulnerable catchments) to be assumed by the arm's-length EPA, through the exercise of the Minister's powers of transfer.¹²⁵ That would be a logical complement to the transfer of related regulation-making powers from councils to the EPA, as mentioned earlier. Again, there should be clearer principles in the Act around when such a power can and should be exercised, to provide safeguards for local democracy.

Furthermore, a more holistic view of consenting should be taken where possible. In particular, there should be stronger directions for consent authorities to bundle related applications and consider them as a package. At present, as has been experienced in the context of the Mackenzie Basin, it is possible for consent authorities to assess a string of consent applications one by one to the detriment of the bigger picture.

For the same reasons, we see merit in formalising tailored, property-specific, environment plans (eg farm level environment plans) rather than consenting individual activities on an ad hoc basis.¹²⁶ Those would need to have regulatory effect and be enforceable (ie in the nature of a holistic resource consent), not be a parallel or alternative framework to the RMA. However, at the same time, they could be linked to funding and other support from councils and/or government (eg to provide for ecosystem services and environmental enhancement activities).

Public participation in consenting – especially whether we retain a two-stage hearing process – is an even bigger question. Some consider that the consenting process is too long and cumbersome, although that is as often a complaint about council practice as it is about the availability of appeals. There may be some grounds for private appeals to be curtailed if we were to have an effective, independent and adequately resourced Environmental Defender's Office to take on public interest litigation under a firm advocacy mandate.¹²⁷ Constraining merits appeals in this way might even then allow for greater public notification of consent applications (because notification would no longer be automatically linked to hearing or appeal rights),¹²⁸ enhancing both communities' and decision-makers' understanding of what is happening in their environment and reducing developer pressure for applications to be non-notified.¹²⁹

However, as we have seen with the Department of Conservation's advocacy role in recent memory, institutional arrangements for public interest litigation can be susceptible to budgetary and political constraints.¹³⁰ We need to think carefully about whether appeal rights are truly worth giving up in the context of consents. While

red tape is a common complaint, the Environment Court has developed effective case management and dispute resolution mechanisms over the years (see spotlight earlier in the chapter), and the fact remains that the vast majority (96 per cent) of consent applications remain non-notified.¹³¹ Where notification does occur, there is generally good reason for potential appeal rights to follow. And while complaints about abuse of process are legitimate, and have been counteracted through various reforms (eg restrictions on vexatious litigation and trade competition arguments), the fact remains that less than 0.5 per cent of consent decisions are appealed,¹³² and most of those on legitimate grounds. Providing greater clarity in plans should reduce developer concerns. An alternative would be for appellants to be required to prove a prima facie case or discharge some form of evidential burden, and allow the Environment Court to grant or decline leave for merits appeals. However, that raises issues of access to justice, especially for those appellants representing environmental interests that are often less well-resourced than consent applicants.¹³³ We do not recommend it.

Overall, we remain unconvinced that the benefits of constraining appeal rights to the Environment Court in the consenting context outweigh the risks of doing so. We also see a strengthened role for the EPA in consenting where there is a national interest, and stress that a more holistic view of consenting should be taken where possible.

Perhaps a more important aspect to focus on than appeal rights is the need for more independent oversight over notification decisions. These have enormous significance, in that the notification status of an application determines who has rights to submit and appeal. Presently, people

may not be aware an application has even been made; if they are, their only recourse is judicial review. Reform on this front *could* involve introducing new appeal rights to the Environment Court in relation to notification decisions, an idea that has been seriously floated for a while now.

While we consider that to be a desirable move in principle, it would add an additional step to a process that many want to be more streamlined. A reasonable alternative would be for the Act to require councils to send all information on applications and notification decisions to a new Environmental Defender's Office, which could then determine whether to exercise appeal rights within a reasonable timeframe.¹³⁴ In other words, only that office would have standing to appeal in relation to council notification decisions.

Alongside that measure, a new notification status could be introduced: where a proposal is notified and submissions invited, but where there are no associated appeal rights (or appeal rights only for an Environmental Defender's Office). That would allow for valuable information to be received by councils (reducing the risk of a situation like the Te Mata Peak walkway occurring, where consent was granted and construction commenced before iwi and the public knew about the proposal),¹³⁵ and for communities to feel in touch. It would also allow the public to approach an Environmental Defender's Office to exercise its appeal rights if people felt a notification decision was wrong.

In a future system, an independent, publicly funded Environmental Defender's Office should have standing to appeal councils' notification decisions to the Environment Court.



Close consideration of the duration of consents and how they are reviewed will be important too,¹³⁶ as will procedural alignment between different permitting processes (including cross-statutory ones). We have previously highlighted that:¹³⁷

For consents, we have direct referral to the Environment Court and call-in procedures where council decision can be bypassed, and a separate designations regime... we also have separate ... permitting processes under multiple conservation statutes, mining legislation, marine and coastal legislation, and the Building Act. Is this too complex? Is it time to rationalise, or at least connect these ... processes even if we do not integrate statutory frameworks themselves?

We see merit in the idea of an integrated “project permit”.¹³⁸ This would be for complicated projects requiring multiple authorisations across statutes (eg those mentioned above), and would be used to align decisions in a procedural sense. An application could be lodged with the EPA, which would oversee the process.¹³⁹ However, it would not be a “carve-out” for significant projects, and would still require each authorisation to be obtained from decision-makers under the usual decision-making criteria (eg Part 2 of the RMA for resource consents).

A future system could usefully provide for an integrated permitting process (a “project consent”) for complex or nationally significant projects, which would align permitting process under multiple statutes.

Furthermore, if there were to be a robust process for producing integrated national direction in the form of an NEP, and that were deemed to implement Part 2, we see little justification for then throwing everything up in the air again at the consenting stage in a big bowl of policy soup. It is remarkable that we have a statutory direction for consent decisions only to “have regard” to national direction alongside a whole range of other matters (including anything relevant and reasonably necessary to consider), yet a clear directive to “give effect” to national direction in local plans.¹⁴⁰ This should be changed to a direction to “give effect to” or at least “be consistent with” national direction when considering resource consents.¹⁴¹

Restrictions on how councils can consider climate change in consenting decisions, in place since 2004, also need to be removed or heavily amended. It is anomalous not only that the greatest existential environmental threat of our age fails to get a mention in Part 2 of the Act, but also that (effectively) it specifically cannot be considered at all when planning and consenting decisions are being made under the RMA.¹⁴² That requires urgent attention. We discuss this further in Chapter 9.

Section 104 of the RMA should clarify that consenting decisions must at a minimum be consistent with national direction. Restrictions on councils considering the impacts of activities on climate change should be removed or heavily amended.

Intimately related to a consenting framework is a framework for monitoring and enforcing compliance with consent conditions and other regulatory requirements.¹⁴³ This is explored in the section that follows. Alongside both of those things, though, institutional (and funding) arrangements will be crucial.¹⁴⁴ In particular, we have pointed out previously that:¹⁴⁵

it is arguable that an institution responsible for creating policy and regulation at the beginning of the policy cycle should not be tasked with enforcement or dispute resolution at the end of it. This reflects an idea central to the separation of powers more generally, that those responsible for creating the law should not be those responsible for interpreting and applying it. Although resource consent decisions are essentially a regulatory role, they are also about implementing values rather than determining them. We can see a recognition of these risks in a trend towards the use of independent commissioners for consenting decisions within councils, and the use of good practice guidelines in depoliticising enforcement decisions.

... a future system could formalise the already common practice of using independent decision-makers (eg commissioners or the Environment Court, or even an expanded EPA) to make decisions on individual projects (eg through resource consents or similar). Infrastructure New Zealand’s concept of a Planning and Environment Commission can be understood in this light; that is about independent decision-making on projects.¹⁴⁶

As mentioned above, while we see a case for the EPA to become more involved with consenting certain types of application where there is a national interest, it would be excessive and unnecessary to remove all consenting responsibilities from councils. However, we see a firmer case for removing consenting functions from elected councillors, and placing them firmly with council staff, independent commissioners, or (on appeal or direct referral) the Environment Court. Presently, only a small fraction of consents are decided by elected members anyway.¹⁴⁷ Consenting decisions are arguably much more about applying values already established through planning instruments, rather than deciding value-based questions, and therefore much more amenable to independent analysis.¹⁴⁸ Furthermore, rather than having councils appoint independent commissioners, we see merit in establishing a nationally accredited pool of standing independent commissioners (perhaps under the umbrella of the Futures Commission, or the EPA), which would be deployed upon request from councils.

A future system could usefully see jurisdiction for consenting decisions removed from elected councillors and placed firmly with council staff or commissioners (or, upon direct referral, the Environment Court). Commissioners could be drawn from a standing pool of accredited commissioners under the umbrella of the Futures Commission or EPA.

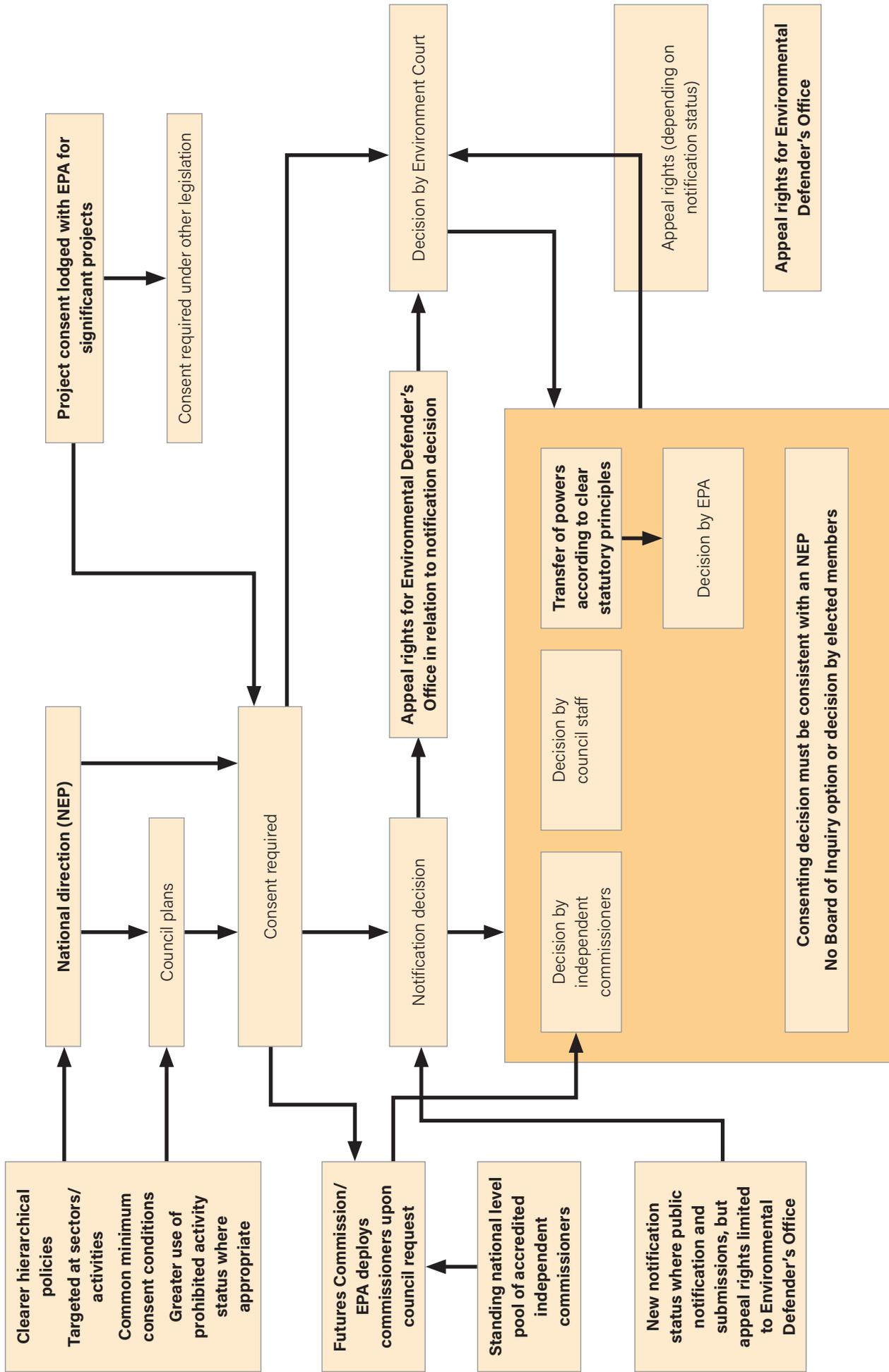


Figure 7.4: Consenting under a reformed RMA. Bold text shows key differences.

7.1 Compliance monitoring and enforcement under the RMA¹⁴⁹

There is no point having a system that imposes limits on human activities (eg through prohibited activities or consent conditions) if those limits are not respected in practice. Ensuring that the regulated community is actually complying will be crucial, particularly under a future RMA that, through national direction, local plans, and consents, still allows substantial resource use subject to a wide range of carefully considered environmental limits.¹⁵⁰

Although robust monitoring and information gathering is important for much wider reasons, it is also essential for reasons of ensuring compliance. In other words, authorities need to know if people are conforming with their environmental obligations (eg through baseline and ongoing monitoring)¹⁵¹ and, if they are not, the extent to which there is non-compliance (eg through reactive investigations). Similarly, while formal enforcement is important (in the sense of forcing people to comply through mechanisms like abatement notices, enforcement orders and prosecutions) it is not the only method of achieving compliance and other softer measures can be used (eg education and positive reinforcement).¹⁵² The system must also have robust mechanisms to address any failures to comply if they do occur. Enforcement is about remedying breaches (eg cleaning up any pollution) as well as providing punishment and a deterrent for future breaches.

This aspect of the resource management system, which cuts across multiple regulatory regimes, is often called “compliance monitoring and enforcement” (CME), to distinguish it from monitoring and enforcement undertaken for other reasons (eg state of the environment monitoring).

Monitoring and enforcement will be crucial to a future system, including to ensure that people are complying with their obligations under the RMA and other regulatory frameworks.

Previous work, including by EDS, has highlighted alarming shortcomings in a system that generally seems to place more emphasis on planning and consenting than compliance.¹⁵³ Inadequate oversight for the last 30 years by the Ministry for the Environment has allowed this failure to persist, and limited external evaluation of the effectiveness of CME has occurred.

The CME system also remains highly fragmented; it is reliant on marshalling the efforts of 78 different agencies with a slew of often competing priorities and often limited capacity and capability, and with little overarching national level or statutory guidance. Agencies undertake the role with varying degrees of capacity and enthusiasm, meaning the consequences of causing environmental harm are far from uniform nationally and do not necessarily reflect the strength of provisions in plans and consents. More specifically, key outstanding issues include:

- Some councils are reluctant to use (particularly punitive) enforcement mechanisms, leading to a very inconsistent pattern of enforcement activity across the country.¹⁵⁴
- Councils (particularly territorial authorities) appear to struggle to maintain core resourcing. For instance, the 2017/2018 National Monitoring System data set shows that 37 of 78 councils (approximately half) had one or fewer full-time equivalent staff for RMA compliance monitoring, and 13 of those (17 per cent of councils) have zero capacity at all (all of these are territorial authorities). This highlights that CME activity and capability is largely concentrated at the regional (and unitary) level. A lack of resourcing is aggravated by only weak provision for cost recovery for compliance related monitoring.
- Managing information on CME is generally poor, and there are insufficient tools to support effective prioritisation in the deployment of resources.

A failure to insist upon compliance, and to use the full range of tools available to do so, appears to have been material to significant environmental decline. The drivers for this are many, but low political priority and resource shortfalls (which in themselves are strongly correlated) are significant contributors. That said, recent years have seen an upsurge in recognition, effort and resourcing, and the increasing professionalisation of the discipline is likely to lead to improved environmental outcomes.¹⁵⁵ It should be noted that such improvements are mostly concentrated at the regional level.

We do not see a need to completely overhaul institutional arrangements relating to CME, at least in the short-term (eg transferring all RMA enforcement functions to a national agency). In other words, we see a strong case for the task of enforcement to be linked, within a single institution, to related regulatory (eg consenting) functions. The logic is that those who impose consent conditions are well placed to understand and manage the enforcement of them. This suggests that default CME responsibility under the RMA should remain with councils (or other agencies responsible for imposing consent conditions).¹⁵⁶

That said, other measures should be taken. For example, we see a case for amending the Criminal Procedure Act 2013 to specifically identify council prosecutions as “public”, thereby attracting the mandatory oversight of the Solicitor-General. A future system could also usefully increase and broaden the range of civil and criminal penalties available under the RMA, to provide flexibility and effective deterrence.¹⁵⁷ The introduction of a formal warning mechanism that can be issued without delay (onsite, like a parking ticket), the expansion of possibilities for financial penalties (eg a broader schedule of fines by activity, means-based sentencing, asset seizure, and the removal of fine limits etc) could help. This has been echoed by the government’s resource management system review group, which has pointed out that “Penalties imposed by the courts at sentence are often dwarfed by the commercial gain obtained by the offender”.¹⁵⁸

Strengthened provisions to revoke or refuse consent due to unlawful actions would also be desirable. Applications (including to re-consent a proposal) should be able to be declined where an applicant or associated party has a history of RMA offending. This would allow Councils to consider the likelihood that conditions of consent would be complied with when processing applications. It would also act as a deterrent for recidivist offenders, who would find themselves unable to obtain further consents should they intentionally and repetitively breach the RMA.

There should also be no political influence in enforcement decisions. There is an important distinction between the political (councillors) and operational (staff) components of councils. CME is a technical discipline, and needs to be formally separated from the value-based policy creation¹⁵⁹ task for which accountable councillors are elected. Previous work has highlighted issues in the current system with the politicisation of enforcement decisions, and mechanisms to avoid that should be formalised in legislation, rather than just good practice, informal protocols, or regulations.

Compliance monitoring and enforcement should be strengthened in a future system, including by broadening the range of penalties available under the RMA and strengthening the ability to decline or revoke consent in the event of persistent non-compliance. A future system should see no political influence in enforcement decision-making.

We also think that there should be a stronger, albeit not absolute, role for the EPA. In particular, the EPA should have strong originating enforcement powers (to take enforcement action itself), to be used in appropriate situations. Measures to that effect are already being proposed in the most recent RMA amendment bill.¹⁶⁰ There, the EPA would be able to take enforcement action in three cases: (1) where councils failed to do so; (2) to assist councils in doing so; and (3) to forcibly take over any action that had already been started by a council. Generally, these are positive measures in our view, in that they address issues with poor decision-making and capacity at a local level¹⁶¹ and provide a mechanism for a national level interest to be reflected in national level action. At the same time, they avoid the complete transfer of enforcement functions away from councils, which would fragment the close connection needed between consenting and compliance. It provides the nuanced approach that is needed. To assist in this function, the EPA should have substantial, centralised CME capacity and a hub of expertise, which relies on ongoing funding and resourcing.¹⁶²

That said, in line with a need for central and local government roles to be better defined more generally in a future system, we see merit in a clearer and more coherent interface as to when the EPA would get involved. We have said a similar thing in the context of giving the EPA a greater role in regulation-making and consenting. This could be done through a formal instrument (eg part of an NEP, or provisions defining “subsidiarity” in the RMA

itself). Alternatively, it could be a less formal mechanism. For example, on a broader scale than just CME, the Productivity Commission has suggested a “partners in regulation” protocol to operate between central and local government.¹⁶³ It could provide an understanding between councils and the EPA as to when the latter should intervene. The proposal in the latest RMA amendment bill for the EPA to be able to forcibly take over enforcement action already begun by a local authority could benefit from greater certainty.

For example, there may be a case for EPA involvement where industries, companies and individuals operate and breach at a national scale (eg across different council boundaries); or where there is a breach of national level restrictions (eg of permitted activity standards contained in an NEP, where consent conditions are triggered by the operation of an NEP, or where restrictions are linked to the Crown’s Treaty obligations).¹⁶⁴ Another trigger point could be where non-compliance was assessed to be of a nationally significant *scale* or *significance* (eg a breach would be “called in”),¹⁶⁵ or where councils lack the resource to take action (eg for significant prosecutions) and themselves request escalation. At present, the Bill provides that the EPA *may* assist councils, but there is no *obligation* to do so even if certain criteria are met. That may still allow things to fall through the cracks in a non-transparent way, especially if EPA activities are subject to politically driven funding constraints that we have seen influence the Department of Conservation’s RMA advocacy function.

The EPA should also provide national level, apolitical oversight over council enforcement activities.¹⁶⁶ In other words, it should have a role not just in taking on enforcement action itself (in appropriate circumstances), but also in enforcing enforcement by others (ie making sure it is happening properly). Part of this may be through providing incentives, including proactive capacity building, training and resourcing for councils (including those which were struggling). As discussed in a more general context in Chapter 13, the performance of councils for CME needs to be monitored and evaluated in a more structured way, and failures (including a failure to monitor, not just a failure to take enforcement action based on monitoring) need to trigger a concrete response. Therefore a future system could usefully *require* the EPA to take, or take over, enforcement action and related monitoring if that were needed to meet the purpose of the Act.

Persistent systemic failures by particular councils could also prompt the assumption of CME responsibilities by the EPA for a defined period of time¹⁶⁷ (which could be treated as a forced, time-bound transfer of powers between public authorities under section 33 of the RMA).¹⁶⁸ Such a role would be assisted by the more systematic nesting of CME data within council and national level environmental reporting,¹⁶⁹ because it would make persistent failings and their impact on environmental outcomes more obvious.¹⁷⁰ In Chapter 8, we discuss the use of a scorecard system that would, essentially, audit the performance of public authorities, including in relation to their CME responsibilities.

Finally, if things did not improve, a conditional reform may be that default enforcement responsibility under the RMA could simply be transferred to the EPA. That would be a “backstop” measure,¹⁷¹ and if it were seen as a realistic prospect (eg legislated for without coming into effect) could act as a powerful incentive for practice to improve.¹⁷² We note that this is not, however, an ideal scenario, given the strong links that need to be made between consenting decisions, monitoring of compliance with conditions,¹⁷³ and enforcement where there are failures to comply. Furthermore, local institutions are usually best placed to understand local conditions, including what works best for compliance, as long as they face the right incentives. In our view, strong incentives for improvements would already be offered by the ability for the EPA to take over enforcement actions.

We see a much stronger role for the EPA in enforcement, including powers to take over or commence enforcement action, and active oversight of council CME activities. There should be clear criteria for when the EPA would get involved in enforcement at an operational level.

Finally, it is worth emphasising that effective CME is not just about ensuring that the conditions of resource consents (or other specific authorisations like conservation concessions) are complied with. The monitoring and enforcement of permitted activity standards (where activities can occur without a consent) are also crucial, as this is where many cumulative effects are felt.¹⁷⁴ Policy makers will need to give careful thought to associated funding arrangements.

In particular, greater cost-recovery for permitted activity monitoring should be explored across the system. This would be fair, because it would impose the burden of monitoring on the regulated community in line with the polluter-/user-pays principle, rather than on the community as a whole. Recouping costs would also mean fewer financial barriers to councils performing this function. Recent efforts have been made, for example, to do this in the context of forestry, given the use of a rules framework that relies heavily on permitted activity standards.¹⁷⁵ Options here could include the use of targeted rates and levies,¹⁷⁶ but the RMA itself could also be firmer in setting general expectations around cost-recovery.

Greater cost recovery for monitoring and enforcing permitted activity standards should be sought in a future system.

Overall, we see a need for a future system to have greater standardisation of approaches to CME (potentially through national direction or other regulations), stronger resourcing, the provision of incentives to do it well (carrots and sticks), a stronger national role in both enforcement and oversight of CME undertaken by councils (through the EPA), and stronger requirements for integrated reporting and evaluation of CME activities. While the need is particularly important under the RMA, these features will also be important under other regulatory regimes in which CME occurs. For example, it may be possible for the EPA to act as a watchdog and take on enforcement functions under conservation legislation if there were failures to perform adequately.



7.12 Allocation

Above, we have talked about RMA “plans” and the “plan making process” largely in generalities. We have also looked at consenting under the Act in general terms. However, the concepts of planning and consenting hide a number of quite different roles that are being performed. In particular, plans and consents perform four of the seven key roles that we expect from the system as a whole: setting environmental bottom lines (and associated limits on human activities), facilitating trade-offs above bottom lines (including positive outcomes where synergies can be achieved), protecting Māori interests from harm, and allocating non-private resources covered by the Act.¹⁷⁷

The last of these roles – allocation – deserves a specific mention, because it is of quite a different character to other roles and driven by a wider range of goals. Resource allocation is also by no means just something that happens under the RMA, although that is where most attention is often focused, due to the contested nature of the resources that the Act manages (eg freshwater). Allocation is about how to apportion rights¹⁷⁸ to use a resource, usually under conditions of scarcity. Here, *someone* is allowed to use something, but not *everyone*. Who should get to do so?

This question is not about environmental protection per se. We have previously pointed out, for example, that being able to trade water (a market-based tool for reallocation) may make use more efficient, but is itself no guarantee of better environmental outcomes.¹⁷⁹ All allocative decisions therefore need to exist within a well-defined and defended envelope of regulatory environmental restrictions.¹⁸⁰ That envelope could, alternatively, be seen as a regulatory allocation to the environment itself (which is reflected in the idea of Te Mana o te Wai, or in the notion of vesting water rights in a publicly controlled and funded Environmental Water Holder).¹⁸¹ It is also worth noting that while some things are scarce by their very nature (eg there is only so much water in a river, or so many people we can squeeze onto the Tongariro Crossing), scarcity can be created or increased by imposing regulatory restrictions (eg if we impose a minimum water flow for ecological reasons, or cap entry to a national park).

All natural and physical resources need to be allocated *somehow*. Few resources are abundant to the extent of being inexhaustible and equally accessible to all.¹⁸² For some, we have fairly well-established mechanisms for doing so. For example, resources like land have been allocated largely by historical circumstance¹⁸³ and are transferred mainly through market transactions (I can buy your property, and you can sell yours).¹⁸⁴ That said, we have some more directive mechanisms for the redistribution of land, such as compulsory acquisition for public purposes,¹⁸⁵ frameworks for the disposal of Crown land,¹⁸⁶ or transfer to Māori as part of a Treaty settlement process. Some resources are publicly owned but require a system whereby they are redistributed into private ownership (eg Crown owned minerals like oil and gas are often subject to a bidding process). Other “resources” are

not specifically owned by anyone, but for some there are property rights to take a certain proportion that can then be transferred using market mechanisms (eg quota under fisheries legislation).

However, allocation is not just about who has “ownership” (essentially, a collection of property rights). It is also about how we apportion rights/privileges to use or develop a non-private resource. Some cases are obviously allocative in intent – for example, rights are allocated to abstract freshwater under the RMA (eg for irrigation purposes), or to occupy coastal space (eg for a jetty), even though the Act is adamant that there is no “property” in a consent.¹⁸⁷

Other cases are less intentionally “allocative” in nature. For example, a decision to impose an urban boundary effectively allocates rights to develop land in some ways (those on one side of the line can, while those on the other side cannot). There, an artificial category of “urban” land is created and treated as a scarce resource, with a regulatory limit that reflects the public interest in a compact urban form, the protection of rural land, and the efficient provision of public services.¹⁸⁸ That does not affect who “owns” the land, but it impacts on what owners (and anyone else) can do with it, and therefore how much it is worth.¹⁸⁹ This allocates a resource, although it occurs by a side wind and is generally not charged for or compensated. Overall, the benefits and burdens of public interest restrictions tend to lie where they fall (at least under the RMA).

Furthermore, allocation is not just about who has the right to “develop”, “take” or “occupy” a resource. As we pointed out in the Phase 1 report:¹⁹⁰

[A]llocation is not just about taking things. It is, more broadly, about using resources. For example, we need to allocate rights to use the limited assimilative capacity of receiving environments (like a waterway’s ability to deal with nutrients), not just rights to extract resources from them (freshwater). If a catchment can cope with only a certain nutrient load (before infringing a bottom line), we need somehow to allocate that load between different dischargers.

Overall, we note that allocation is a complex and fraught area of resource management. Tools and aims have developed in an ad hoc way, depending on the resource in play (eg the climate’s assimilative capacity, freshwater takes and wild fish are all allocated in very different ways), and different ways in which a resource is used (eg taking water, discharging into it, or using its surface). Some solutions have been largely based on using market tools within a regulatory envelope (eg the allocation and transfer of land, wild fish and Crown minerals). Other solutions have been regulatory (eg the distribution of “urban” land, or redress for Treaty settlements).

Allocation is a distinct role that the system has to play, and raises difficult questions around fairness. Different resources are allocated in different ways in the current system.

There are also different forms that allocative questions can take, and each poses its own set of challenges. We can allocate new rights where no rights have previously existed (or where existing rights have expired); we can reallocate rights in some way between people who have them and those who don't; and we can deallocate to reduce the overall rights in existence. In the latter case, we also need to speak of reallocating the proportion of *lost* rights between former rights holders (eg where rights to take water in a catchment have been overallocated and environmental bottom lines have been exceeded). We have pointed out that, where there are no specific property rights:¹⁹¹

Allocative issues are most intensely controversial and political if the question is not just allocation but reallocation.... Some may feel that an incumbent user should be favoured, others will not. Timeframes are important, too. Some rights have been granted for significant periods of time – would it be fair to derogate from those rights? Controversy can also arise if there has been over allocation beyond bottom lines already, and users have to determine the proportions in which allocations should be returned.

There are a number of "allocative" issues in the current system, and these play out not just under the RMA. For example, Treaty redress is an ongoing process, including in relation to the redistribution (or, more accurately, return) of land, but also other resources and taonga.¹⁹²

The fisheries quota system is also far from ideal, as explored in EDS's recent publication *Voices from the Sea*.¹⁹³ But the RMA has provided notable flashpoints for allocative issues, largely because it deals with contested rights to use common pool resources (those not privately owned) that people feel strongly, and have expectations, about. A prominent flashpoint has been freshwater: how rights to take water, discharge into it, and otherwise use it should be allocated, reallocated (if at all), and deallocated.

Freshwater has proved to be a particularly difficult area of allocation in recent times, as the resource becomes scarcer and questions around its ownership become more prominent. Allocative questions here take three key forms: (1) how to allocate new rights, (2) how (or if) to reallocate existing rights, and (3) how to allocate relative contributions to reducing existing rights (deallocation).

7.13 Allocation and legislative design

Allocation gives rise to a broad question of legislative design. Under what legal frameworks should we resolve allocative questions? At the moment, we have many different regimes that relate to particular resources (eg minerals, fisheries, freshwater). Is that appropriate?

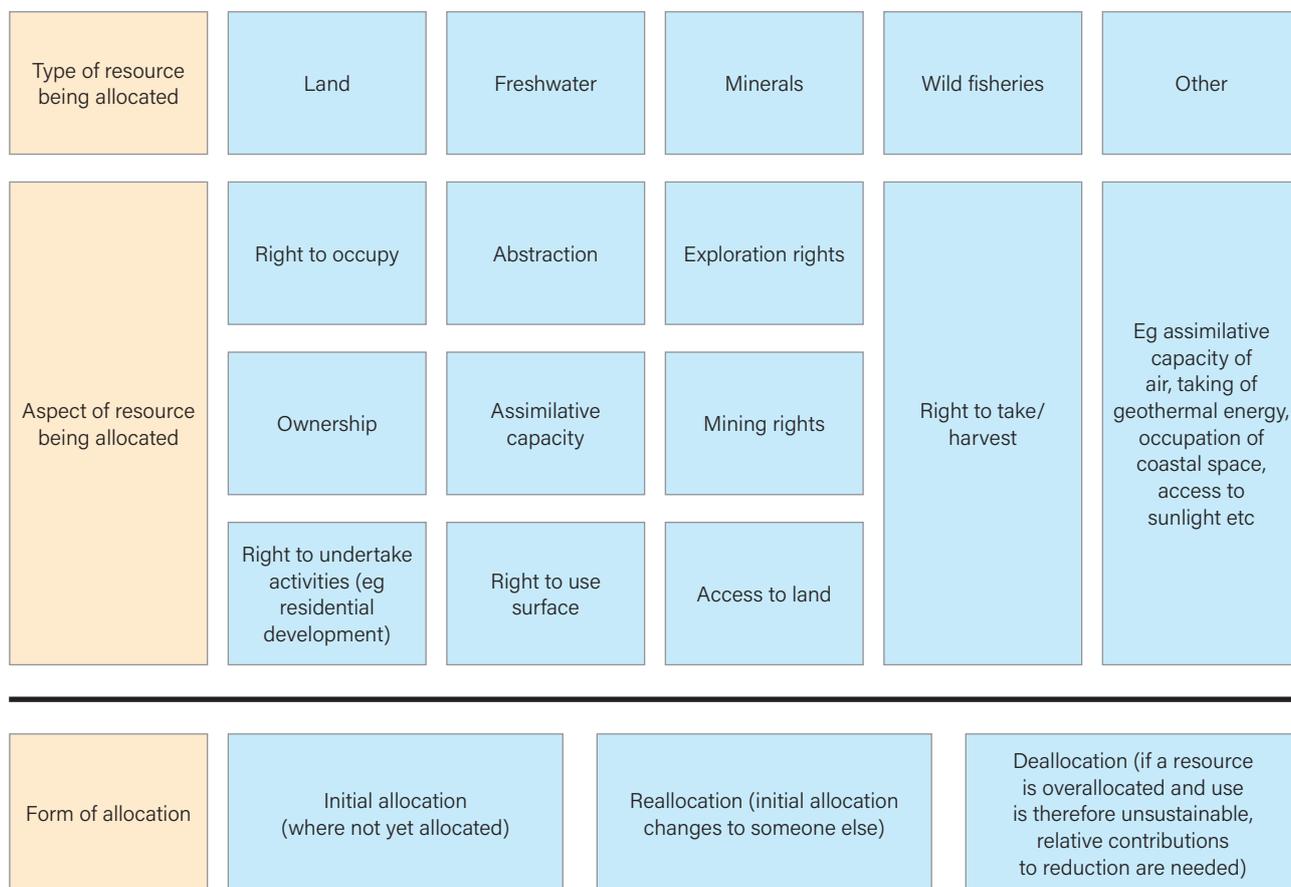


Figure 7.5: Different allocative issues to be addressed in a future system. For each aspect of a scarce resource, there is a need to consider how it is initially allocated, how it is reallocated, and (where it is overallocated) in what measure to reduce people's existing rights. Different approaches may be required for different things.

As a starting point, we see the RMA as the best place in which allocative issues should play out for resources being managed under it (eg coastal space, geothermal energy, freshwater). This is because there are close links between the protection (sustainable management) of such resources and how they are allocated. For example, some creative judicial decisions have considered that allocative decisions can – in the absence of any meaningful normative direction in the RMA – be made based on which use would *better* achieve the Act’s broad purpose of sustainable management.¹⁹⁴ We therefore hesitate to recommend the integration of all allocative questions (ie for all kinds of resources) within a single “Allocation Act” under a common purpose and principles, which was one option that was floated in the Phase 1 work.

We also see a good case for retaining a separate allocative regime for Crown owned minerals (eg oil and gas), under the Crown Minerals Act as there is much weaker link between their allocation and protection. This is because such minerals are non-renewable resources (ie we don’t protect them in order to be able to use them in perpetuity – they cannot be managed “sustainably”),¹⁹⁵ and because the question of whether they are there or not (as opposed to the method of their extraction) does not underpin environmental wellbeing.¹⁹⁶ For example, if all the silver under the ground were somehow to vanish tomorrow, the implications for the environment would likely be minimal: there is no environmental bottom line or moral expectation for how much of the mineral should remain in its natural state. The degree of connection between protective and allocative aspects of decision-making is therefore much weaker, justifying a targeted regime to fill the gap.

We can contrast the position of mineral allocation with the allocation of fish under the Fisheries Act. Protections for fish stocks – the presence or absence of fish, and their numbers and location – are intimately connected with the health of localised marine ecosystems. They form part of a complex ecological web, and are a renewable resource to be carefully managed rather than mined. There are strong links between an allocative framework where people’s rights to take are highly sensitive to ecological change (even one based on an economic tool like quota), sustainability measures, and the health of the broader marine ecosystem. In Chapter 11, we therefore explore the notion of greater integration of environmental and allocative roles in an Oceans Act, in much the same way that allocative and protective considerations are nested within the RMA for freshwater.

For different reasons, the allocative framework set up for trading greenhouse gas emissions rights under the Climate Change Response Act should, in our view, remain separate from environmental statutes like the RMA. There is a conceptual reason here: although emissions trading is closely connected to environmentally protective policies within the ambit of the RMA¹⁹⁷ (ie the reduction of emissions), the tool being used (a market-based one) does not require decision-makers to actually consider or weigh these protective policies when making allocative decisions. Within a clear regulatory envelope (in theory,

a cap on total emissions), the market is the sole arbiter of who gets to emit, not a policy-driven public authority. Legislative separation is not, therefore, overly significant. There is also a practical reason for this design choice: the RMA is long and complex enough without inserting a new part concerned with a complicated emissions trading framework, which does not really require cross-referencing to the rest of the Act and can therefore stand alone.

The emissions trading scheme holds some legislative design lessons for the allocation of resources protected under the RMA (especially freshwater). If the tools used to allocate resources did not require any discretion or consideration of policy (eg if we use purely market mechanisms like trading regimes or auctioning) then, as long as users complied with separate regulatory restrictions, they would not *need* to be linked to the purpose or processes of the RMA.¹⁹⁸ That might see a new, targeted statute for the auctioning, trading and buy-back of freshwater, or for the allocation of rights to occupy coastal space. As with Crown-owned minerals, or the emissions trading scheme, two processes would then be required: (1) an allocative one (who gets the right to use a scarce resource), and (2) a protective one (whether the impacts of an activity using that resource would be acceptable).

In fact, the RMA already makes such separate and sequential processes available to regional councils:¹⁹⁹ prospective users can first be required to compete with others for an exclusive right to apply for resource consent, which is then assessed in the normal way. If that competitive process were to be mandated in the form of auctioning or a strictly financial approach to tendering – who pays more – it would not need to be contained within the RMA. Indeed, for reasons of complexity, it might be better for it to be separate: we need only look at the tortuously complicated framework for water trading in Australia’s Murray Darling Basin to baulk at the prospect of an RMA perhaps twice as long as it is now.

On the other hand, the allocation of a resource like freshwater is closely connected to broader ecosystem health in the same way as the allocation of fish stocks, and would be subject to constantly changing environmental considerations (eg lower flows in dry periods). We also do not see allocative decisions being made solely through economic instruments. On balance, we think it would make sense for any allocative mechanism for water and coastal occupation (and other relevant resources) to continue to be integrated within a statute designed primarily to protect those aspects of the environment (ie the RMA).

On balance, we see the RMA as the appropriate location for addressing questions about how to allocate the non-private resources managed under it (eg freshwater and coastal marine resources). A separate Allocation Act is unlikely to be feasible unless we take a purely economic approach to allocation (eg auctioning and trading). As discussed below, we see merit in a more nuanced approach than that.

7.14 Allocation under the RMA

Generally speaking, the proactive allocation of resources remains an uncomfortable prospect for an effects-based act like the RMA (which was born at a time of great enthusiasm for market freedom) and which has also struggled to address aspects of the Treaty relationship. In practice, this has meant that allocative issues under it have not been resolved in the same way they have been for some other resources like minerals (considerable nationalisation)²⁰⁰ and fisheries (Treaty settlement and considerable privatisation). There is a need for the Act to grapple with such questions more proactively. As the government's resource management review group has pointed out:²⁰¹

Allocation under the RMA has generally been on a "first in first served" basis, with an expectation by users that access rights will extend over long periods and be renewed. This approach ... grew out of a situation where there was little resource scarcity. As we have approached environmental limits, it has led to issues with environmental quality, economic efficiency, and fairness. Extending access to a resource for long periods has limited the ability of the management system to respond to new environmental pressures. As resources have become scarcer and limits more stringent, new users have been excluded. The "first in first served" approach has not been an effective mechanism to achieve highest value use of resources. In some cases, Māori have been particularly disadvantaged, such as where they own under-developed land and cannot access water to improve production capacity.

We have previously pointed out that the purpose and principles of the Act need to be expanded to embrace the allocative role that the Act clearly performs. It is no use pretending that the Act does not grapple with allocative choices, or that the status quo is the result of a conscious policy choice. We consider that general allocative principles in the Act could usefully be expanded on in national direction (through an NEP). Even within the RMA, different approaches may be needed for different kinds of resources,²⁰² but we see merit in an overarching set of allocative principles to set general expectations.

The RMA should contain general or resource-specific allocative principles, which could be expanded upon in an NEP.

That would be a start. But the manner in which allocation should occur – the tools we use – is much less clear, and lawmakers will be required to tread carefully across a delicate political landscape. In particular, the allocation of freshwater (both water itself and its use as a receiving environment) poses enormous challenges in the short term, and we focus on that in the sections below.

Freshwater allocation must grapple with environmental limits, Treaty obligations, entrenched and existing interests, and pressure from new entrants. There are no

firm concepts like environmental bottom lines to provide the answers, and vaguer concepts like fairness will be prominent. We also need to recognise realities – a path forward will need to leave a fairly broad corridor for politically driven compromises, and provide a gradual rather than abrupt approach to change. Below, we offer what we see as a desirable direction of travel, while at the same time acknowledging that there is no obvious or simple solution here.

First, let us consider what we are trying to achieve through the allocation of freshwater. People may have different views, but there appear to us to be four key elements: (1) environmental sustainability, (2) resolution of Māori rights and interests, (3) fairness, and (4) efficiency. Points (2) and (3) are, of course, closely linked. A future system may look different depending on how one interprets these factors, and which ones receive more or less weight.

In our view, however, the overriding concern is for all allocative questions to be resolved within a firm envelope of regulatory environmental limits.²⁰³ That is now a fairly uncontroversial proposition, and accords with the Crown's obligations under the Treaty and the government's political mandate received at the 2017 general election.²⁰⁴ Progress is being made through the Essential Freshwater programme, and the proposed new NPS for Freshwater Management and related NESs.²⁰⁵ In our model, stronger bottom line outcomes for freshwater would be set at a high level in a revised Part 2 and elaborated on, with regulatory force, in an NEP and council plans.²⁰⁶ Those would have to be respected, including by imposing prohibited activity status to applications that exceed limits.

Limits would also need to drive the *improvement* of water quality and flows, according to an ambitious timeframe, where they have already been breached. In other words, where bottom lines have been overshot, the question is not *whether* deallocation of rights occurs, but *how*. Deallocation would, ideally, be a temporary feature of the system, given that the imposition of firm limits in the future should mean that overallocation never occurs.²⁰⁷ A process should remain as a backstop to deal with any future issues, too.

As a first step, we would envisage the use of facilitated collaborative processes to determine how existing users within a catchment are to reduce their rights to meet environmental limits (in terms of both ecological flows and nutrient/pollution runoff). That would encourage users to understand each other's perspectives and to come up with innovative and mutually beneficial solutions. It would require a clear set of principles around which discussions would revolve, and options for collaborative groups to consider.

However, collaboration is no guarantee of consensus, and there should be a backstop regulatory measure waiting in the wings if consensus could not be reached. Timeframes need to be ambitious, and in some cases the conversation has gone on long enough – in which case collaboration may not be an acceptable option.

Because significant aspects of natural justice would be involved, a regulatory backstop should involve the

Environment Court (or a focused division of the Futures Commission). We note that the new freshwater planning process proposed in the latest RMA amendment bill could be used for such purposes, and this is not too different from the processes we have outlined above for plan changes in a future system more generally. What that process lacks, however, are principles to address allocative questions (ie who should reduce rights, and in what measure). We do not seek to define what those should be, but note that earlier rights should not necessarily trump later ones, and that there is a case for heavier polluters within a catchment to give up some allocation.

A number of catchments are overallocated and the effects of existing uses must be reduced to meet environmental limits within a reasonable timeframe. The law must provide a framework by which the relative contributions of existing users to reducing total impacts can be determined and enforced. Collaborative processes would be a useful first step in some cases, but a strong regulatory backup, guided by statutory principles, is required.

In overallocated catchments, or those with very little headroom, there is also a need to reduce existing water rights further (for both the discharge of nutrients and abstraction). This is not just to achieve environmental limits, but also to allow new entrants in the interests of fairness. There will need to be a degree of reallocation to Māori, although the extent of that ultimately relies on both political negotiation and the resolution of difficult legal issues.²⁰⁸

This is a challenging prospect for a framework like the RMA, which has developed from firmly neo-liberal roots to focus mainly on environmental limits rather than how (or by whom) resources should be used. Rights have been allocated largely by accident rather than design, and there has been a reluctance to engage with issues of fairness. Instead, a significant body of case law has arisen over technical questions relating to exactly when an application has been lodged (and therefore which application has priority).

In our view there should be no expectation of grandfathering in perpetuity simply because an historical right has been enjoyed. A bias towards the status quo cannot continue.²⁰⁹ However, derogation from specific rights granted in a consent – eg to abstract water for up to 35 years – cannot simply be overridden in favour of giving rights to another user without compensation. Even if a decision to grant such a consent may seem unwise in hindsight, granted it was. Significant investment decisions have been made based on a legitimate expectation that such rights would be upheld.

At a minimum, we see merit in a more structured process for the reallocation of water abstraction rights when specific existing authorisations expire, and where there is new allocation within a catchment (where limits have not been reached).²¹⁰ A first in, first served approach is inappropriate where there is reasonably foreseeable

scarcity, and reallocation should not necessarily see an incumbent user favoured.

As rights expire, or where there is new allocation of rights within a catchment, there could be a tranche set aside for:

- (1) Regulatory allocation (eg through an attribute weighted tendering process guided by statutory principles; or to fulfil Treaty obligations; or for direct allocation to essential public services)
- (2) A purely “economic” approach to allocation above a regulatory allocation (eg through auctioning).

Within an attribute weighted tendering process, there could be *some* degree of recognition for existing users (eg considering fairness due to historical circumstances, environmental responsibility, compliance history, degree of investment,²¹¹ hardship etc). Reauctioning rights, above regulatory allocation, could also be introduced gradually over the medium term to soften its impacts.

A degree of regulatory allocation may also help to improve environmental outcomes, as well as contributing to fairness and efficiency. This is in two senses. First, a proportion of rights might be proactively retired upon their expiry to enhance environmental resilience – which may be necessary in some places as climate change impacts become more obvious. Secondly, the relative environmental benefits/costs of different proposals seeking to use a resource could be a factor to be weighed alongside others within a tendering process. Indeed, the courts have already made creative efforts to do this kind of thing within the RMA, despite its limitations (as explored in the spotlight below).

Rights granted through a regulatory framework rather than auctioning framework would not come “free”.²¹² As discussed in Chapter 13, they would still be subject to a resource rental, which would need to be fair, reflect the public interest, and be implemented gradually over time.

The duration of rights allocated through regulatory means would need to be considered very carefully, and may need to vary depending on the needs of the sector in question. For example, some publicly important activities like electricity generation require significant investments to be made on the assumption that the ability to use a resource will be secure over many decades. A maximum duration of 35 years under the RMA may not be sufficient.

While there are no obvious “answers” to freshwater allocative questions because the concept of fairness is inherently debatable, we see merit in approach whereby new rights, and existing rights when they expire, are subject to a more structured approach to allocation that reflects the public interest. This could involve the allocation of two tranches of rights: (1) a regulatory allocation (eg through competitive attribute weighted tendering) and (2) an “economic” allocation (eg through auctioning).

A spotlight on more proactive approaches to allocation

Both the Court of Appeal and Supreme Court have hinted in past years that, even in the absence of a structured allocative method under the RMA,²¹³ the merits of consent applications submitted within a short time of each other may sometimes be compared to determine who should get scarce rights to resources. This is on the understanding that one of them might *better* promote sustainable management, and therefore be preferred.²¹⁴ Furthermore, it has been held that using a resource in one way (eg land for commercial purposes) that could otherwise be used for other, more valuable, purposes (eg industrial use) can be regarded as having an “adverse effect” on the environment.²¹⁵

Foregoing the benefits of using a resource in an alternative way from what is proposed – the opportunity cost – is an interesting way to perceive an “adverse” effect under the RMA. It leaves the door open to a much less effects-based approach, and one that embraces allocative principles. Some have expressed a view that the RMA was always meant to be a place where allocation occurred in a more proactive manner,²¹⁶ but others have been of the view that the market was meant to be the driver for how resources are used.

So when should a foregone opportunity to use a resource in a particular way be seen as an “adverse effect” to be addressed through something like the RMA, rather than a choice to be driven by the market? We can think of the proposed NPS on Highly Productive Land in this way: we are preserving the potential *benefits* of using land in a particular way in the future (for growing food), not just addressing the adverse effects of urban development on soil, water, flora and fauna. The system is arguably making value judgements about what use is preferable in light of its benefits, not just managing the impacts of an “efficient” choice the market has made.

Some have therefore highlighted the “ingenuity” of using an effects-based, regulatory framework like the RMA, with no real allocative guidance in it, to “make the allocation of resources a necessary means of controlling effects”.²¹⁷ That is becoming increasingly necessary as greater pressures are being placed on New Zealand’s resources.

Environmental wellbeing could also be enhanced through the use of economic allocative tools, not just regulatory ones. For example, a publicly funded national Environmental Water Holder could usefully be established, which would provide a mechanism for rights to be purchased and sold at auction for reasons of public interest (eg buying rights for environmental enhancement purposes in some place, and selling them in others). That would not be a replacement for regulatory limits,

of course (there should be no obligation for the public purse to buy back water where bottom lines have been infringed). But it could encourage positive environmental outcomes associated with water to be managed more dynamically across catchments, and with potentially less opposition, than through the plan making process alone. It would, effectively, allow nature to become a participant in the market for water, with a water holder mandated to act on its behalf. A similar model, whereby the Crown purchases rights gradually over time, could also be used as a mechanism to implement any Treaty settlement that emerges from the ongoing debate over water ownership.

It is an open question as to whether regulatory mechanisms, or tools like auctioning, should be used simply to “reset” an unfair allocative system that has been created through the ad hoc granting of consents on a first in time basis. Some have suggested, for example, that after an initial allocation (or reallocation) of rights – whether based on grandparenting, regulation, compulsory acquisition, auctioning, or something else – we can then let the market do the reallocative work. In other words, some support the use of trading regimes or water markets, which allow rights to use resources to be bought and sold, as the way forward.²¹⁸ The two most prominent aspects of freshwater trading are the trading of rights to abstract water and rights to discharge nutrients into it.

Trading has a lot going for it, and we support its further deployment in a general sense (subject to strict regulatory environmental limits). Indeed, the RMA already allows for the transfer of water permits to occur, although its approach is not what would be called sophisticated when compared to international market models,²¹⁹ and it imposes many restrictions on transfers that mean it has rarely been used. The benefits of a more sophisticated trading regime for water have been described in many places, including by the New Zealand Initiative.²²⁰ If carefully designed, trading directs water to its highest value use and allocates it in a highly efficient manner. Leaving aside questions over the initial allocation of rights, it also alleviates fairness concerns by allowing new users to enter the market for water. That could allow, for example, the Crown to purchase water rights from willing sellers to fulfil its Treaty obligations, and could improve environmental outcomes if an Environmental Water Holder (or civil society initiatives) could purchase water rights and use them dynamically to target priority issues.

However, trading is not a silver bullet, even if the question of how to initially allocate tradeable rights were to be solved.²²¹ First, economic value is only one measure of the value of water to a community. For example, should the representatives of the public be powerless to choose whether or not its rivers or aquifers are exploited by multinational bottling corporations instead of other activities that benefit (or are perceived to benefit) communities more? Is that still the case even if a resource rental were to be charged and returned to the relevant community?

By relying solely on market mechanisms, we also lose the ability as a society to influence environmental outcomes through allocative decisions (eg by creating competition between users for non-financial aspects of resource use, by comparing the merits of different proposals and driving a race to the top). While it is not necessarily an argument against trading, we must also exercise caution when establishing the limits within which rights are granted. Existing rights are not necessarily a good indication of the rights that would be exercised if trading were to increase their value. In other words, not all current rights to use water are exercised to their fullest extent, but if any excess could be sold then overall use might increase significantly.

Furthermore, trading is not appropriate in all circumstances. This is partly because of environmental limits. Unlike trading in greenhouse gas emissions, the location where rights are exercised matters for freshwater. For example, we cannot allow one river to become degraded or depleted in favour of another. Even within a catchment, or parts of a catchment, there can be localised impacts. Trading therefore cannot be a complete substitute for regulatory mechanisms of allocation where environmental restrictions mean it cannot in practice occur. Another reason that trading does not always work is that there needs to be a sufficient number of active market participants to make the costs of a market worthwhile. That is one reason why trading is an attractive prospect in places like Australia's Murray Darling Basin, or Lake Taupō, but it is not the case in all catchments across New Zealand.

There is a broader ethical question here, too. We have previously legislated that no one owns the common marine and coastal area. Do we want to go in the opposite direction and create extensive private interests in water? Trading for nitrogen discharge rights has occurred to some extent in New Zealand already,²²² but the allocation of rights to take water is much more fraught because of the unresolved question of Māori interests. Yet the question is broader – whether water is our common heritage as a country rather than something to be corporatised. More tangibly, introducing trading could risk concentrating fewer and larger rights in the hands of corporate interests, which could have significant implications for community wellbeing. Some have expressed concerns over “water barons”, and similar issues have arisen in the context of fisheries quota.²²³

Overall, we see significant merit in trading being deployed more in a future system (including a role for an Environmental Water Holder in the market). The use to which our water is put needs to be fairer, more efficient and more responsive to change. However, we do not see it as a complete replacement for a more structured regulatory approach to allocation. Trading regimes would, where deployed, need to be closely monitored against a clear set of performance measures, including the public interest, and there should be a tranche of water rights not linked to trading.

We see significant merit in water trading being deployed more in a future system. The use to which our water is put needs to be fairer, more efficient and more responsive to change. However, we do not see it as a replacement for a more structured regulatory approach to allocation, and we need to be careful to counteract the potential social and environmental impacts of trading.

To the extent that economic tools were used to allocate or reallocate freshwater rights, we propose that a national Environmental Water Holder be established to operate within the market.

A gradual introduction of a suitable mix of regulatory and non-regulatory allocative mechanisms may be one way to strike a balance between fairness, efficiency, and Treaty obligations. It would allow fairness to existing uses to be considered, and a gradual transition to new uses to be made, while also allowing communities a degree of control over how their resources were used. It is plain that the existing approach, largely based on who it first to apply, is not suitable. We need more structured and transparent approaches, and the inclusion of allocative principles within the RMA and national direction (an NEP). The RMA will remain the most appropriate place for allocative decisions to be made concerning the resources managed under it, not least because we do not see potential for technocratic market mechanisms to completely replace public decision-making linked to environmental principles.

Within environmental limits, we also encourage lawmakers to grasp the nettle on Māori rights and interests in freshwater. That requires consideration of how to provide for Māori interests in the allocation of *new* rights as well as the progressive reallocation (or return) of *current* rights. In the Phase 1 report, we shone a spotlight on the case of Porotī Springs, and we repeat that below to emphasise the difficult real world context in which such issues will need to be resolved. In light of a recent Waitangi Tribunal decision, questions of ownership look set to be forced anyway through the Courts.²²⁴ Different historical circumstances may result in different outcomes, and cannot be easily predicted. A system will need to be able to accommodate any legal outcomes and political settlements that may arise as a result of Treaty processes.



A spotlight on Porotī Springs

Porotī Springs, west of Whāngarei, are in a block of Māori land which was given reserve status in 1895. In 1960, the Springs were formally gazetted by Order-in-Council as a water supply for the local hapū. However, in 1967, through the enactment of the Water and Soil Conservation Act, that newly affirmed authority of the hapū effectively disappeared with the power of decision-making on water takes being placed with local authorities. One consequence was that the hapū needed to apply for permission to use their own water.

From the late 1960s, council use of the water for public reticulation in Whāngarei, and then also for horticulture irrigation, greatly increased. In 1983 and 1987, during a time when council had no limits on the quantities of water extracted, and the hapū had little input into or influence over management, the headwaters of the Springs were run dry. This resulted in unacceptable ecological and cultural impacts.

With the enactment of the RMA came the potential for more effective tangata whenua input into decision making over management of the water of the Springs. In practice, however, this has not happened. Existing water rights for council and irrigation takes were renewed under the new law. More recently, a further water right for a water bottling operation was granted. While the hapū could argue cultural issues against these consents (eg that they would have adverse

effects on cultural wellbeing), their other rights and interests in the water, including any claim in the nature of a property right, could not be considered.

Recently, the government purchased the water bottler's consent so it could be part of a future Treaty settlement. This may be an indication of how the government will respond to Māori water rights issues in the future. However, at this time most of the hapū's concerns with the water takes from the Porotī Springs water remain unaddressed and unresolved.

In Chapter 13, we recommend the fair and gradual imposition of resource rentals. While these are not an "allocative" tool per se (simply making someone pay for something does not determine who, among many willing purchasers, gets a scarce right), it may in practice encourage resources to be directed to higher value uses. The revenue rentals generate could also, potentially, be partly used as a way to redirect value to Māori without (or as well as) the direct allocation of water rights themselves.

A future system will need to provide a space for issues around Māori rights and interests to play out, and to be incorporated. A mechanism may be needed by which new allocation can be provided to Māori over time, or whereby a rental for the use of freshwater is partly channelled to Māori.

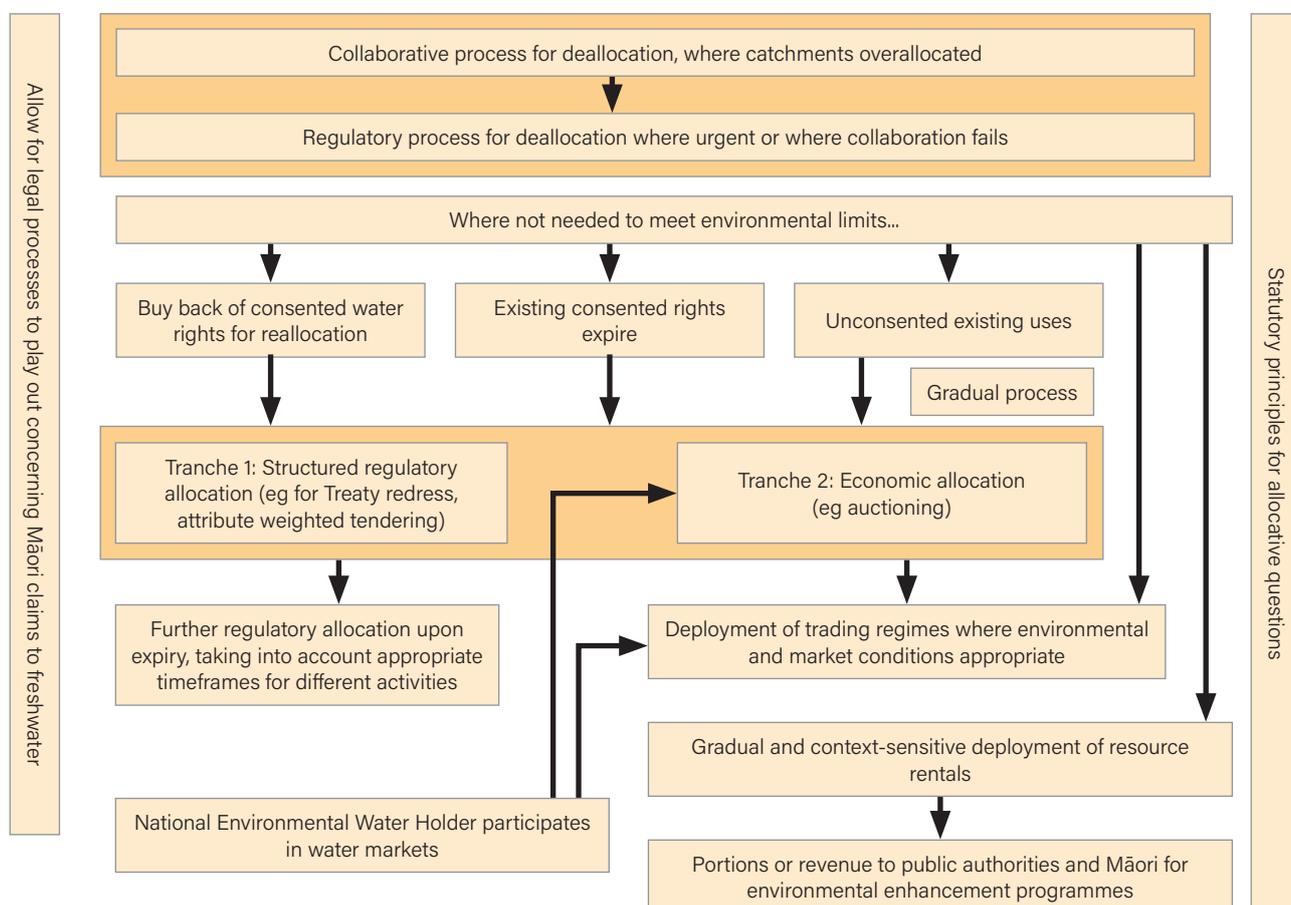


Figure 7.6: A potential way forward for freshwater allocation

7.15 Concluding comments

In this chapter, we have considered local government planning under a reformed RMA. We also explored consenting, CME and allocation under the Act. A significant role would remain for councils, and we are not envisaging widespread structural reform of local government in the short term. But we have also floated substantial changes. We have proposed a new approach to council plan making, seeking to avoid a full two-stage hearings process while at the same time integrating strong elements of community accountability and robust independent oversight. We have also sought to provide for greater regional level integration of planning through the production of a combined plan. Over time, we encourage a conversation to continue around local government structural reform, and greater regionalisation or unitisation of council boundaries would not be inconsistent with the model we are proposing. Further work is needed on that front, and any reforms will require extensive consultation with communities.

As with the NEP discussed in Chapter 6, transitional arrangements would be extremely important in the local planning context. Existing RMA plans would need to continue to operate, and we envisage that they would be integrated and reviewed using the new process(es) over the medium term, on a rolling basis and with close oversight by central government. Resourcing constraints on councils, iwi/hapū, Environment Court and commissioners would need to be considered closely when thinking about timeframes, and close consultation with those expected to be involved would be essential. Equity would be important too when considering the detail of transitional measures (eg for planning processes already underway, some in response to national direction).

Plans coming out of a reformed planning process would, in the proposed model, also be deemed both to reflect Part 2 and to give effect to the NEP once they were made operative. This means that there would be less (or no)²²⁵ need to relitigate the meaning of Part 2 through the consenting process.²²⁶ At the moment, there can still be considerable uncertainty as to whether a plan actually gives effect to national direction or not, especially if matters have not been litigated in the Environment Court.²²⁷

Contextualisation at the site- or project-specific level is important, and consenting will remain a feature of the system, but overall we have recommended placing greater emphasis on drafting clear provisions (including rules and standards) at the planning stage rather than relying on the discretionary weighing of general policies at the consenting stage.²²⁸ We have also recommended various changes to the consenting framework, including the introduction of limited appeal rights for notification decisions (to be exercised by a new Environmental Defender's Office), the removal of restrictions on considering impacts on climate change, and the removal of political decision-making on consent applications.

There could usefully be a nationally accredited pool of independent commissioners (under the auspices of the Futures Commission or EPA), to be deployed upon request by councils. However, despite many calls to the contrary, we are not persuaded that abandoning appeal rights in relation to consenting decisions is a smart idea. The Environment Court provides a robust oversight role for council decision-making, yet for obvious reasons cannot play a role in every single application. That suggests a continuation of the basic system we currently have, whereby matters can be appealed or directly referred to the Court in appropriate circumstances, but where the bulk of consents are processed by councils. That said, there may be a case for some consents to be heard at first instance by a national-level independent entity like the EPA (eg where a consent is triggered by a regulatory provision in national direction).

We also recommended changes in relation to CME functions (including expanding the range of tools available, facilitating greater cost recovery for permitted activity monitoring, and strengthening the enforcement role of the EPA). Finally, while acknowledging that there is no simple solution, we offered one way forward for allocative issues under the RMA for freshwater, involving the deployment of a mix of regulatory and "economic" tools.

We will conclude our discussion of the RMA with a higher level thought. The degree of change floated over the previous three chapters raises an interesting – albeit incidental – question: should we rename the RMA?

The idea of resource "management" is a fairly passive, weak and anthropocentric concept, and also one that does not recognise Māori ways of seeing the world. We said something along similar lines for the concept of the "resource management system". It is hardly inspiring language for a future that requires a generous helping of inspiration;²²⁹ the future system will need to promote change, pursue positive outcomes, and recognise that humans cannot manage everything. At the same time, the concept of "sustainable management" also carries a lot of legal and economic baggage with it.

To some, this question may be a matter of semantics only. Why does it matter what we call a statute? To others, it may even be desirable to keep the name to emphasise legal continuity. Indeed, we have heard some react with horror that first principles reform could deign to go so far as changing the name of the RMA.

The title of reformed legislation does, however, send a powerful signal, and indicates the extent to which it is envisaged as a reset or as just another round of tinkering. The name of a revised act will also be important in capturing the public imagination: what do we want people to think system reform is doing? We will leave the matter at that, but to avoid confusion will continue to refer to this new integrated statute as the "RMA", despite some misgivings.

ENDNOTES

- 1 Compare the current section 55 of the RMA. Regulatory provisions in an NEP would also have direct effect as regulations in their own right.
- 2 For example, environmental limits for urban development, and the necessity for densification of urban form.
- 3 That would not necessarily always be about ad hoc Crown grants, as some funding arrangements strike us as being much more systemic (eg the immense cost of upgrading wastewater treatment plants to achieve national freshwater quality standards).
- 4 On the expected costs of water infrastructure upgrades to meet stronger national standards, see Beca *Cost estimates for upgrading water treatment plants to meet potential changes to the New Zealand drinking water standards* (2018); GHD and Boffa Miskell *Cost estimates for upgrading wastewater treatment plants to meet objectives of the NPS Freshwater final report* (September 2018).
- 5 See New Zealand Council for Infrastructure Development (now Infrastructure New Zealand) *Integrated governance, planning and delivery: A proposal for local government and planning law reform in New Zealand* (2015); Infrastructure New Zealand *Building regions: A vision for local government, planning law and funding reform* (2019). See also G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 248.
- 6 Compare Infrastructure New Zealand *Building regions: A vision for local government, planning law and funding reform* (2019).
- 7 See New Zealand Council for Infrastructure Development (now Infrastructure New Zealand) *Integrated governance, planning and delivery: A proposal for local government and planning law reform in New Zealand* (2015) at 17.
- 8 M Doole *Conservation system reform: A proposed model to better protect and enhance species and ecosystems in New Zealand* (Unpublished commissioned paper, The Catalyst Group, 2019).
- 9 And unitary authorities.
- 10 New Zealand Council for Infrastructure Development (now Infrastructure New Zealand) *Integrated governance, planning and delivery: A proposal for local government and planning law reform in New Zealand* (2015) from 11.
- 11 See G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 167.
- 12 See generally New Zealand Council for Infrastructure Development (now Infrastructure New Zealand) *Integrated governance, planning and delivery: A proposal for local government and planning law reform in New Zealand* (2015) at 50-51.
- 13 Resource Management Act 1991, section 80.
- 14 *Ibid*, section 80.
- 15 Infrastructure New Zealand *Building regions: A vision for local government, planning law and funding reform* (2019).
- 16 The New Zealand Initiative *Go Swiss: Learnings from the New Zealand Initiative's visit to Switzerland* (2017).
- 17 For example, in providing escalation pathways for particularly complex or difficult regulatory functions (eg climate change adaptation measures). Compare Local Government New Zealand A "blue skies" discussion about New Zealand's resource management system (2015) at 39.
- 18 These could even continue to be called "councils" or "territorial authorities".
- 19 As in the Auckland Unitary Plan model.
- 20 See Resource Management Amendment Bill 2019.
- 21 Ministry for the Environment *Resource Management Act 1991 National Monitoring System selected findings 2014/15* (2016); New Zealand Productivity Commission *Better urban planning* (2017) at 216; B Devlin *Analysis of timeframes for the development of policy statements and plans under the Resource Management Act 1991* (Brown & Pemberton, 2008).
- 22 G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019), ch 10.
- 23 *Ibid* at 248, 272.
- 24 Compare G Palmer "Law-making in New Zealand: Is there a better way?" (2014) 22 *Wai L Rev* 1.
- 25 One example might be a simplification of activity statuses.
- 26 See generally B Devlin *Analysis of timeframes for the development of policy statements and plans under the Resource Management Act 1991* (Brown & Pemberton, 2008).
- 27 Acknowledgement: Aidan Cameron, barrister.
- 28 G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 226.
- 29 Extensive mediation and expert conferencing was held for each topic, facilitated by Panel members and other experienced practitioners, in an attempt to refine matters and/or resolve submission points prior to hearing.
- 30 The champion of the process was the Panel Administrator, who co-ordinated hearing time with numerous parties, juggled various and often difficult requests, and made the process run like clockwork.
- 31 Aided by legislative changes, the Panel met its brief by reducing its quorum from three to two for the final topics, allowing three additional members to be appointed, clarifying that it could hold concurrent sessions with alternative Chairs, and by enabling the delivery of its recommendations in stages.
- 32 Just weeks before the rezoning hearings were due to be held.
- 33 The Panel was required to give non-binding "interim guidance" to assist submitters in giving evidence on other topics of the Auckland Unitary Plan, which relied on higher-order direction.
- 34 See also the alternative proposed by the Productivity Commission: New Zealand Productivity Commission *Better urban planning* (2017) from 389.
- 35 Compare Ministry for the Environment *Improving our resource management system: A discussion document* (2013) at 42.
- 36 Resource Management Act 1991, section 80.
- 37 This would complement the idea of having an overarching spatial plan feeding down into multiple different plans (eg under the RMA and local government and infrastructure legislation). On spatial planning, see Chapter 8.
- 38 G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 168. Acknowledgement: Helen Marr, Perception Planning.
- 39 This would not be an alternative track to decision-making as in the current system, but rather a precursor to the more formal planning process. That approach would have many of the same advantages as outlined in G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019), ch 12.
- 40 Although for bottom lines, such as for freshwater, they will often need to be.
- 41 See G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 45. See also N Elmi and N Davis "How governance is changing in the 4IR" World Economic Forum (18 January 2018) <www.weforum.org>
- 42 Including potential to allow voting online, which may increase youth rates of voting.
- 43 B Craven, J Goldingham-Newsom and O Hartwich *#localismNZ: Bringing power to the people* (2019) at 53.
- 44 *Ibid*.
- 45 G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019), ch 10 and at 233.
- 46 See Ministry for the Environment *A draft guide to the collaborative planning process under the Resource Management Act 1991* (2017) at 11.
- 47 G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 187.
- 48 For example, in Canterbury, a collaborative process was used to develop the Canterbury Water Management Strategy, which was then implemented in the regional policy statement and land and water regional plan. See N Newman *The collaborative governance model: Implementation of the Canterbury Water Management Strategy in New Zealand* (Environment Canterbury, 2016) at 6.
- 49 G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 205.
- 50 *Ibid*. See also Resource Management Act 1991, sch 1, cl 40; Ministry for the Environment *A draft guide to the collaborative planning process under the Resource Management Act 1991* (2017) at 11.
- 51 Resource Management Amendment Bill 2019.
- 52 *Vancouver City Council Citizens' assembly on the Grandview-Woodland Community Plan: Final report* (2015).
- 53 See M Bennett and J Colón-Ríos "Public participation and regulation" in S Frankel (ed) *Learning from the past, adapting for the future: Regulatory reform in New Zealand* (LexisNexis, 2011) at 21.
- 54 Central government can create national direction, including a requirement to directly insert policies into a plan, and require a council to prepare a plan (or a plan change) or review a plan. If not satisfied with the result, it can require a council to vary the proposed plan. See Resource Management Act 1991, ss 25A and 25. However, this is a fairly reactive approach to ensuring national direction is implemented, in that there is no obligation to work with councils in plan development.
- 55 Currently, no government agency is required to comprehensively check as to whether plans give effect to national direction, with much being left to the courts if matters happen to be appealed. See G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 176. In California, non-voting members from government agencies are involved in the work of the Coastal Commission to ensure it links well to other initiatives.
- 56 *Ibid* at 185.
- 57 Along with a section 32 (or equivalent) report.
- 58 As in the Auckland Unitary Plan process, cross-examination should be available (acknowledging that the process effectively supplants the ability to appeal de novo to the Environment Court), but it should be the exception rather than the norm. Parties would not need to cross-examine witnesses in order to put their cases to the Panel.
- 59 Recommendations on the plan would be released after each stage, so that there is no need to give interim or non-binding guidance halfway through the planning process.
- 60 And a standing, independent institution not subject to ad hoc political appointments.

- 61 Compare G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 214, where we noted that the rationale for appeals to the Environment Court is partly to ensure a national level perspective is taken of local issues.
- 62 See P Nunns "The consultation problem: Who submits on the plan?" (2 March 2016) <www.greatauckland.org.nz; P Nunns "Zoning reform: Who submitted on the plan" (8 September 2016) <www.greatauckland.org.nz>; G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 204.
- 63 See D Sadlier "Problems with one-step RMA decision-making" (2014) <www.adls.org.nz>
- 64 G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 206–208. In particular, participation is useful for gathering information, encouraging community ownership and therefore durability, providing a safety valve for conflict, giving participants catharsis, promoting social learning, and reflecting a fair process.
- 65 G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 212. This model is already available for Environment Court litigation at the discretion of the Court under section 278 of the RMA.
- 66 G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 207, 212. Compare the Australian civil society model of an Environmental Defender's Office: Environmental Defenders Office NSW *Annual report 2016/17* (2017). The "public" interest would include the interests of nature itself, as well as future generations of people. The role could, however, be broader than the Department of Conservation's advocacy role, and there would be firmer independence and a sharper focus on litigation.
- 67 On issues with the fund, and its potential for politicisation, see <www.rmla.org.nz/2017/07/05/new-criteria-for-accessing-environmental-legal-assistance-fund/>
- 68 As opposed to on particular issues, where power can be delegated by councils (Resource Management Act 1991, section 34).
- 69 See *ibid*, ss 58O–58U.
- 70 Presently, agreements are reached between councils and iwi authorities/hapū.
- 71 Compare the role of Māori in the RMA's collaborative planning track, where iwi authorities select at least one member of a collaborative group (Resource Management Act 1991, sch 1, cl 40(1)(a)).
- 72 See G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 187.
- 73 On the nature of consultation, see *Wellington International Airport Ltd v Air New Zealand* [1993] 1 NZLR 671.
- 74 See G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 188.
- 75 Compare M Wright, S Gepp and D Hall *A Review of the Resource Management (National Environmental Standards for Plantation Forestry) Regulations 2017* (2019).
- 76 See R Joseph "The Treaty, tikanga Māori, ecosystem-based management, the RMA and power sharing for environmental integrity in Aotearoa New Zealand – possible ways forward" in G Severinsen and R Peart *Reform of the resource management system: The next generation - Working paper 3* (EDS, 2018) at 34; Waitangi Tribunal *The stage 2 report on the national freshwater and geothermal resources claims* (Wai 2358 report), 2019.
- 77 For example, it could develop through Mana Whakahono ā Rohe participation agreements on a council by council basis, which have been described as a promising way forward if resourced properly. Generally, see R Joseph "The Treaty, tikanga Māori, ecosystem-based management, the RMA and power sharing for environmental integrity in Aotearoa New Zealand – possible ways forward" in G Severinsen and R Peart *Reform of the resource management system: The next generation - Working paper 3* (EDS, 2018) at 35.
- 78 Compare Local Government Act 2002, ss 14(1)(d) and 81, which requires councils to foster the ability of Māori to contribute to local government processes. On the need for capacity building within iwi authorities and councils, see Waitangi Tribunal *The stage 2 report on the national freshwater and geothermal resources claims* (Wai 2358 report, 2019).
- 79 See R Joseph "The Treaty, tikanga Māori, ecosystem-based management, the RMA and power sharing for environmental integrity in Aotearoa New Zealand – possible ways forward" in G Severinsen and R Peart *Reform of the resource management system: The next generation - Working paper 3* (EDS, 2018) at 33.
- 80 This is a bespoke institution, with planning and consenting powers under the RMA, established under the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010. See the spotlight on the Authority in G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 189. On suggestions to roll out this model more broadly, see Office of the Auditor-General "Appendix 1: About the Waikato River Authority" <www.oag.govt.nz>
- 81 Compare Waitangi Tribunal *Ko Aotearoa Tenei* (Wai 262, 2011).
- 82 See Resource Management Act 1991, section 33; Resource Management Review Panel *Transforming the resource management system: Opportunities for change – Issues and options paper* (2019) at 17; J Williams "The Harkness Henry Lecture: Lex Aotearoa – an heroic attempt to map the Māori dimension in modern New Zealand law" (2013) 21 Wai L Rev.
- 83 Compare Resource Management Review Panel *Transforming the resource management system: Opportunities for change – Issues and options paper* (2019) at 26.
- 84 G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 191.
- 85 *Ibid* at 211. Of particular importance would be the retention of powers for protected customary rights/customary marine title holders to provide permission to RMA and other applications having more than minor adverse effects on the exercise of those rights, or that are within a title area (Resource Management Act 1991, ss 55, 66 and 71).
- 86 G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 166.
- 87 For example, see the Horizons Regional Council's One Plan, which combines regional policy statement and regional plans: <www.horizons.govt.nz/publications-feedback/one-plan>
- 88 Who have to have gone through the Ministry for the Environment's "Making Good Decisions" Programme.
- 89 Regional transport committees under the Land Transport Management Act are one example where different levels of government work together in a structured way. Similar cooperative arrangements can be seen in the boards of entities set up under Treaty settlements, such as the Waikato River Authority. Also compare the California Coastal Commission model, where half the members are elected and half are appointed.
- 90 Compare the proposed new freshwater planning process in the Resource Management Amendment Bill 2019.
- 91 However, at a minimum, there should be an expectation that parties will attend mediation and submit any experts who intend to give expert evidence on a particular topic to expert caucusing before any hearing.
- 92 Members may not necessarily need to hold warrants as Environment Court Commissioners and may have local experience in technical or other local government matters.
- 93 A Panel (not dissimilar to the Commercial Panel currently operated by the High Court) could be established to hear High Court appeals on plan reviews. Judges with a background in resource management and local government would be ideal candidates for appointment to a Resource Management Panel.
- 94 Although arguably no more complexity than the existing system, whereby separate plans in a region are developed/changed in isolation and with different timeframes, heard by different councils, then appealed separately to the Environment Court.
- 95 Although by no means all, given that any rejection of recommendations can lead to decision by another independent body (the Environment Court).
- 96 See G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 178, 214.
- 97 See Resource Management Act 1991, ss 79(1) and 79(4).
- 98 For example, where some relate to freshwater and others to a fairly simple rezoning of a small portion of land.
- 99 See <www.aucklandcouncil.govt.nz/plans-projects-policies-reports-bylaws/our-plans-strategies/unitary-plan/auckland-unitary-plan-modifications/proposed-plan-changes/Pages/default.aspx>
- 100 Compare Resource Management Act 1991, section 79(4) where whole of plan reviews are optional.
- 101 *Ibid*, section 268A.
- 102 For example, EDS takes court action on behalf of the environment and the public interest. On the difficult distinction between dispute resolution and planning, see G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019), ch 7.
- 103 Although some, like trade competition disputes, are effectively abuses of public process and are easier to ringfence. Recent decisions have helped in this regard, which may go some way to addressing delays in plan changes. See *Sheffield Properties v Kapiti Coast District Council* [2018] NZHC 3290, [2019] NZRMA 368; *Bunnings Ltd v Queenstown Lakes District Council* [2018] NZEnvC 135 (procedural) and [2019] NZEnvC 45.
- 104 For example, the Environment Court practice note requires the Court to be satisfied that consent orders (from agreement between the parties) still comply with Part 2.
- 105 Other than (from some perspectives) the presence of independent members. The point is that council representatives from one area/jurisdiction would not have influence over decision-making applying to a different area/jurisdiction.
- 106 For example, see the upcoming Plan Change 2 to the Hamilton City District Plan (Te Awa Lakes).
- 107 For example, Private Plan Change 84 to the Kāpiti Coast District Plan (Airport Zone).
- 108 Compare Resource Management Act 1991, section 55.
- 109 *Ibid*, section 60.
- 110 See <www.aucklandcouncil.govt.nz/plans-projects-policies-reports-bylaws/our-plans-strategies/unitary-plan/Pages/default.aspx>
- 111 Which is not the same thing as having final decision-making power; that would be a role for the more nuanced processes already described. On the tension between council and judicial roles in planning, see M Williams "Resource management system: Reform or transform?" (April 2018) Resource Management Journal 3 at 9.
- 112 To avoid the EPA taking over the making of regulations relating to local matters like detailed questions of zoning.
- 113 Although we note that the current proposal for an urban development authority, explored in Chapter 10, provides much *more* of a carte blanche for a government developer to override local planning provisions, including environmentally protective ones.

- 114 On the ability to transfer powers under the current Act, see Resource Management Act 1991, section 25.
- 115 Compare Local Government New Zealand A "blue skies" discussion about New Zealand's resource management system (2015) at 39; Resource Management Act 1991, section 33 (which allows for agreements to be reached on the transfer of functions and powers, including to "statutory authorities", but could not require the EPA to take on a function).
- 116 For example, in the concept of a project consent; see New Zealand Council for Infrastructure Development (now Infrastructure New Zealand) *Integrated governance, planning and delivery: A proposal for local government and planning law reform in New Zealand* (2015).
- 117 Compare Resource Management Review Panel *Transforming the resource management system: Opportunities for change – Issues and options paper* (2019) at 15: "Matters that should be addressed in plans are left to the resource consenting process to resolve, generating unnecessary uncertainty."
- 118 See G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 140, 213.
- 119 Ibid at 235.
- 120 Compare the proposal for an NES on freshwater relating to particular agricultural activities in New Zealand Government *Action for healthy waterways: A discussion document on national direction for our essential freshwater* (2019).
- 121 Compare the recommendation of the Land and Water Forum, that additional use above an allocated limit is to be a prohibited activity (Land and Water Forum *Advice on improving water quality: preventing degradation and addressing sediment and nitrogen* (May 2018) at 12). Compare A Aarnio "Taking rules seriously" (1990) 42 ARSP 180.
- 122 See G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 107; M Williams *Resource management system: Reform or transform?* (April 2018) *Resource Management Journal* 3 at 5.
- 123 For example, an expectation of clear-felling harvest methods, or an expectation that vulnerable areas will be harvested at all. We have previously proposed that the activity status for clear-felling in red-zoned areas should be non-complying. See M Wright, S Gepp and D Hall *A Review of the Resource Management (National Environmental Standards for Plantation Forestry) Regulations 2017* (2019).
- 124 See *ibid*.
- 125 Resource Management Act 1991, section 25.
- 126 These have developed largely around nutrient and water management, but could be extended to include other environmental impacts and enhancement opportunities on private land: see *Report of the Biodiversity Collaborative Group* (2018) at 101.
- 127 See G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 214-215.
- 128 Rates of non-notification are extremely high at present.
- 129 See G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 215.
- 130 Ibid at 212.
- 131 Reported for the 2017/18 year in the Ministry for the Environment's National Monitoring System: see Ministry for the Environment "Resource consents" <www.mfe.govt.nz>
- 132 Ibid.
- 133 On the implications of "efficiency" for access to justice, see L Newhook, D Kirkpatrick and J Hassan "Issues with access to justice in the Environment Court of New Zealand" (2017) *Resource Management Theory & Practice* at 52.
- 134 There would also be greater standardisation of digital information and a national consenting and compliance database, making this transmission of information simpler (see Chapter 13).
- 135 See G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 215; J Maassen "Legal report on Te Mata Peak east-face walking track issue" (undated) <www.craggyrange.com>
- 136 See Resource Management Amendment Bill 2019, for proposed changes to provisions concerning review of consent conditions.
- 137 G Severinsen and R Peart *Reform of the resource management System: The next generation* (EDS, 2019).
- 138 See New Zealand Council for Infrastructure Development (now Infrastructure New Zealand) *Integrated governance, planning and delivery: A proposal for local government and planning law reform in New Zealand* (2015) at 75.
- 139 The EPA already has a role in managing resource consent applications for nationally significant projects: see Resource Management Act 1991, section 145.
- 140 Although this has become more nuanced under the Court of Appeal decision in *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, [2018] 3 NZLR 283, there is still no clear directive to actually give effect to national direction (as there is with plans and plan changes). This distinction is quite odd, given that small-scale plan changes can effectively have the same effect as a land use consent.
- 141 The choice here may depend on whether we see the direction as being about its "strength" (eg giving effect to is "stronger" than being consistent with) or what the instrument is actually doing (eg plans actively implement national direction, but consents are reactive and are more about ensuring they don't infringe it).
- 142 There are nuances to this, admittedly. The intention is not to remove climate change considerations from the RMA per se, but rather to prevent inconsistent rules and policies being put in place by councils for something that requires a coherent national level approach. The problem is that a meaningful nationally consistent approach has not been implemented under the RMA to fill the gap.
- If that gap were to be filled (in the form of an NES and NPS (or NEP)), then councils would be obliged to give effect to them.
- 143 On reform options here, see G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 177.
- 144 See generally MA Brown "Compliance, monitoring, enforcement and evaluation" in G Severinsen and R Peart *Reform of the resource management system: The next generation - Working paper 3* (EDS, 2018).
- 145 G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 171. See also MA Brown *Last line of defence: Compliance, monitoring and enforcement of New Zealand's environmental law* (2017); MA Brown *Independent analysis of the 2017/2018 compliance monitoring and enforcement metrics for the regional sector* (The Catalyst Group, 2018).
- 146 New Zealand Council for Infrastructure Development (now Infrastructure New Zealand) *Integrated governance, planning and delivery: A proposal for local government and planning law reform in New Zealand* (2015) at 72, 74 and 7.
- 147 See the Ministry for the Environment's National Monitoring System, data for the year 2017/18.
- 148 See G Severinsen and R Peart *Reform of the resource management System: The next generation* (EDS, 2019), ch 9.
- 149 Grateful acknowledgement for much of the content on which this section is based goes to Dr Marie Doole of The Catalyst Group: M Doole *Enforcement and evaluation in the new regime* (unpublished commissioned paper, The Catalyst Group, 2019).
- 150 Of course, compliance is also important under other regulatory regimes, such as conservation, building, and hazardous substances legislation.
- 151 Which can be either related to consent conditions or the impacts of permitted activities.
- 152 See MA Brown "Compliance, monitoring, enforcement and evaluation" in G Severinsen and R Peart *Reform of the resource management system: The next generation - Working paper 3* (EDS, 2018).
- 153 Ibid; MA Brown *Last line of defence: Compliance monitoring and enforcement of New Zealand's environmental law* (EDS, 2017).
- 154 Ministry for the Environment *Compliance, monitoring and enforcement by local authorities under the Resource Management Act 1991* (2016).
- 155 See, for example, the development of the Ministry for the Environment's *Best practice guidelines for compliance monitoring and enforcement*; the development and review of the regional sector strategic compliance framework; and other initiatives including the fledgling CME Metrics reporting programme.
- 156 While that would not, of course, include the Environment Court (which is not an operational body), it may include the EPA if it were the relevant consenting authority. Similarly, in Chapter 11 we talk about an arm's length Oceans Agency having consenting functions under a new Oceans Act, in which case enforcement would also lie within that Agency.
- 157 Compare Resource Management Review Panel *Transforming the resource management system: Opportunities for change – Issues and options paper* (2019) at 18, where it is pointed out that penalties for non-compliance are weaker in New Zealand than in other countries.
- 158 Ibid at 18.
- 159 In the previous sections, we also considered whether rule-making and consenting are things that should also be apolitical, suggesting that there is a case for elected officials to be excluded from decision-making for consents. That fits well with enforcement decisions being apolitical, and taken by, or in close collaboration with, those responsible for consents (most often council staff).
- 160 Resource Management Amendment Bill, cl 66 (introducing a new Part 12A).
- 161 Compare Resource Management Review Panel *Transforming the resource management system: Opportunities for change – Issues and options paper* (2019) at 18.
- 162 Budget 2018 allocated 3.1 million to the establishment of a supplementary investigative resource within central government to assist in RMA enforcement.
- 163 See New Zealand Productivity Commission *Regulatory institutions and practices* (2014).
- 164 This would be a difficult distinction to draw where local plans gave effect to policies in an NEP, rather than being directly triggered by a regulatory provision in an NEP.
- 165 Powers to call in could be exercised by the Minister or a Futures Commission, as we are proposing for consents.
- 166 Compare *Report of the Biodiversity Collaborative Group* (2018) at 123.
- 167 Or until, for example, a council could show it had remedied the causes of systemic failings (eg a lack of resourcing). This could be prompted by, for example, a scorecard produced by the Futures Commission, which would include performance in relation to CME functions (see Chapter 8).
- 168 This would need to clarify that councils did not retain ultimate responsibility for the exercise of those powers, which is an issue with the current transfer provisions. There would be a need for caution here, though, in that councils should not be incentivised to avoid the task on the understanding it would simply be undertaken by someone else.
- 169 Currently CME data is included in the Ministry for the Environment's National Monitoring System, but not linked to environmental outcomes reporting under the Environmental Reporting Act, so the links between the two are sketchy.
- 170 Under the Environmental Reporting Act or the Future Generations Act. Councils would be required to submit and maintain records within a national consenting and compliance database (see Chapter 13), and to meet national scale requirements for CME reporting.

- 171 Conceptually this is comparable to the inclusion of agricultural emissions in the emissions trading scheme by 2025 if a farm-based pricing alternative did not make adequate progress (see Chapter 9).
- 172 As long as the resourcing for that to happen were available to councils.
- 173 As well as permitted activity standards.
- 174 *Report of the Biodiversity Collaborative Group* (2018) at 122.
- 175 Although that is not to suggest that permitted activity standards are, in all cases under the relevant NES, appropriate: see M Wright, S Gepp and D Hall *A Review of the Resource Management (National Environmental Standards for Plantation Forestry) Regulations 2017* (2019).
- 176 Compare generally Resource Management Review Panel *Transforming the resource management system: Opportunities for change – Issues and options paper* (2019) at 18.
- 177 Notably freshwater (both the taking of water and use of its assimilative capacity), coastal occupation, and geothermal energy.
- 178 We use the term “rights” for convenience, but it is much more apt to talk about “privileges” unless there is an actual property right attached (in most cases there is not).
- 179 In fact, it could arguably place *more* pressure on a resource if not designed well, as “sleeping” rights could be sold off and used where previously they were not. See generally G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019), ch 13.
- 180 See *ibid*, ch 12. For example, it is essential that greenhouse gas emissions trading occurs within a closed, or capped, system of tradable emissions units. This has not been the experience to date, although measures are underway to strengthen this (see Chapter 9).
- 181 Under the concept of Te Mana o Te Wai, which is central to the NPS for Freshwater Management, the first right to water goes to the river itself. See also New Zealand Government *Action for healthy waterways: A discussion document on national direction for our essential freshwater* (2019).
- 182 Even things like sunlight are, effectively, allocated when we consider the acceptability of the shading impacts of new developments, especially in urban areas.
- 183 Including via mechanisms that are now recognised as having been unacceptable in light of the Crown’s Treaty obligations.
- 184 In that sense, even the Land Transfer Act 2017 is a “resource management” statute that regulates market transactions and therefore rights to a valuable physical resource.
- 185 Public Works Act 1981.
- 186 For example, tenure review under the Crown Pastoral Land Act.
- 187 Resource Management Act 1991, section 122.
- 188 There is a school of thought that says urban limits should not contribute to the scarcity of developable urban land, and that scarcity should be constrained only by biophysical features (eg mountains and oceans) and risks like natural hazard areas. That approach is sometimes called one advocating for “competitive urban land markets”.
- 189 Urban land is generally more valuable than non-urban land, although there is some debate around how much of that is to do with an urban zoning and how much is due to services provided to urban land (eg infrastructure). See T Hazledine “Economics and the resource management system” in G Severinsen and R Peart *Reform of the resource management system: The next generation – Working paper 3* (EDS, 2018).
- 190 G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 111.
- 191 *Ibid*.
- 192 See Waitangi Tribunal *The stage 2 report on the national freshwater and geothermal resources claims* (Wai 2358 report, 2019).
- 193 For example, the social consequences of concentrating rights in fewer, commercialised, entities. There is also some controversy around the prospect of an urban development authority being able to compulsorily acquire private land, develop it, subdivide it, and on-sell it to other private (eg commercial) users. This is, effectively, a regulatory reallocation of property rights from one person to another, even if it may be justified in the public interest for some developments.
- 194 See the spotlight further below.
- 195 Minerals allocation was originally part of the bill that led to the RMA, but was separated partly for this reason.
- 196 This is why most environmental protections are contained within the RMA, rather than the Crown Minerals Act. That said, we consider that common principles should be inserted, recognising that proactive consideration of how we use resources has implications not just for economic indicators of wellbeing but also social and environmental wellbeing (eg the climate change implications of allocating rights to explore for and extract oil and gas should inform whether, and to whom, rights are given).
- 197 A consent could be required under an NES (although none has been promulgated), as well as an obligation for an emitter to surrender units under the emissions trading scheme.
- 198 In the same way that we consider that accounting and trading under the emissions trading scheme could operate under a separate statute from the strategic aspects of climate change (the latter of which would be inserted into a Future Generations Act).
- 199 See Resource Management Act 1991, pt 7A.
- 200 Although by no means all minerals are Crown owned.
- 201 Resource Management Review Panel *Transforming the resource management system: Opportunities for change – Issues and options paper* (2019) at 42-43.
- 202 Including uses involving the taking of a scarce resource, the occupation of a limited space, and the use of assimilative capacity. We have, for example, suggested that a more agile approach is required for the occupation of coastal space for aquaculture: see R Peart *Farming the sea: Marine aquaculture within resource management reform* (EDS, 2019).
- 203 Although that could still encompass reallocation – that is, an increase in rights for some as long as there is a decrease in rights for others.
- 204 Compare Waitangi Tribunal *Wai 2358: The stage 2 report on the national freshwater and geothermal resources claims* (2019).
- 205 New Zealand Government *Action for healthy waterways: A discussion document on national direction for our essential freshwater* (2019).
- 206 See Chapter 5.
- 207 Although, especially with climate change, it may be triggered where future environmental change is hard to predict and requires a response.
- 208 On such issues, see Waitangi Tribunal *The stage 2 report on the national freshwater and geothermal resources claims* (Wai 2358 report, 2019).
- 209 Compare Resource Management Review Panel *Transforming the resource management system: Opportunities for change – Issues and options paper* (2019) at 14.
- 210 Especially where there is reasonably foreseeable scarcity, but potentially even where there is not. Limits would take a strongly precautionary approach.
- 211 Compare Resource Management Act 1991, section 104(2A), where a consent authority must have regard to the value of investment of an existing consent holder when considering a renewal of consent. However, such considerations should not influence decisions to reduce allocation beyond limits.
- 212 Although more nuance may be required for Treaty obligations.
- 213 For example, exclusive rights can be sold to apply for coastal occupation permits where there is likely to be competition: Resource Management Act 1991, section 152(4); D Nolan “Coastal” in D Nolan (ed) *Environmental and resource management law* (6th ed, LexisNexis, 2018) at [5.61]. This approach has been used twice: see Resource Management (Marlborough Sounds Coastal Tendering – Marine Farming) Orders 1996 and 1998.
- 214 See *Central Plains Water Trust v Synlait Ltd* [2009] NZCA 609, [2010] 2 NZLR 363 (CA) at [89]; *Synlait Ltd v Central Plains Water Trust* [2010] NZSC 32, [2010] NZRMA 257; *Ngai Tahu Property Ltd v Central Plains Water Trust* [2009] NZSC 24; *Central Plains Water Trust v Ngai Tahu Properties Ltd* [2008] NZCA 71, [2008] NZRMA 200 (CA) at [90]–[91].
- 215 *Queenstown Central v Queenstown Lakes District Council* [2013] NZHC 815 at [91].
- 216 See D Sheppard *Reaching sustainable management of freshwater* (paper presented to RMLA Conference, Christchurch, September/October 2010) at 12.
- 217 New Zealand Productivity Commission *Better urban planning* (2017) at 107; compare G Severinsen “Variation 6: A fresh approach to water allocation” (April 2012) Resource Management Journal 17.
- 218 G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 258.
- 219 For example, highly complex water markets have been established in the Murray Darling Basin in Australia.
- 220 E Crampton *Refreshing water: Valuing the priceless* (The New Zealand Initiative, 2019).
- 221 On some issues with trading, see M Duhon, H McDonald and S Kerr *Nitrogen trading in Lake Taupō: An analysis and evaluation of an innovative water management policy* (Motu Economic and Public Policy Research, 2015).
- 222 *Ibid*.
- 223 See R Peart *Voices from the Sea: Managing New Zealand’s fisheries* (EDS, 2018).
- 224 Waitangi Tribunal *The stage 2 report on the national freshwater and geothermal resources claims* (Wai 2358 report, 2019). See also H Brown “MPs say Māori own water” Māori Television (23 August 2017). www.maoritelevision.com; *New Zealand Māori Council v Attorney-General* [2013] NZSC 6, [2013] 3 NZLR 31 at [113].
- 225 Unless there remained ambiguities or conflicts within the plan. See *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, [2018] 3 NZLR 283.
- 226 It would not, of course, be deemed to be the *only* way in which Part 2 and the NEP could be given effect to, as it does not preclude public or private plan changes.
- 227 See *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593; *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, [2018] 3 NZLR 283.
- 228 Compare Resource Management Review Panel *Transforming the resource management system: Opportunities for change – Issues and options paper* (2019) at 17, where it was pointed out that in the current system “both applicants and administrators must trawl through a multitude of policies to discern relevant direction”.
- 229 Contrast the wording of the Welsh Wellbeing of Future Generations Act 2015, section 4; see G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 105.

8. STRATEGIC LEGISLATION: A FUTURE GENERATIONS ACT

8.1 Introduction

In previous chapters, we put forward the idea of a “Futures Commission”. This independent, standing institution would have a significant role in planning processes under the RMA, at both the national and local level. We mentioned that the Commission would have important roles elsewhere, too (it would not just be a *Planning Commission*, as some have suggested), and that it would be created under a new strategic piece of legislation. We are calling that legislation the “Future Generations Act”, and – as we move on from the RMA – that statute is the specific concern of this chapter.

The basic point of the Future Generations Act would be to provide an overarching strategic framework for the whole resource management system, according to a common set of high level principles. It would do much more specific things too, but that is a good general starting point. As with the Futures Commission itself, the purpose of the Act would be focused firmly on the future – and the interests of future generations of both people and nature – which are often not well represented in either politics or economic transactions. While it would not necessarily be entrenched in a legal sense (although parts of it, like a general set of principles or general duties, really should be), it would be of constitutional importance in outlining what New Zealanders value. The Future Generations Act would enshrine in law the high level relationships between people and the environment in which they live.

A reformed RMA is not this kind of Act, despite a broad, revised Part 2 and the primacy given to bottom lines within it. The RMA would not do everything. For example, many regulatory environmental bottom lines will need be set in other legislation,¹ and other acts will also provide mechanisms for improving, enhancing, and responding to environmental change.²

What we require in a Future Generations Act is a unifying force in a system that needs strong normative connections between/across more targeted statutes. If we are to have separate legislative arrangements for related, often cross-cutting aspects (including climate change), we need a place where that comes together for consideration in a meaningful way. Therefore while we accept that silos are necessary in a complex system requiring focus (fragmentation is not uniformly “bad”),³ it can still be confusing when people talk about, for example, “environmental” reform, “water” reform “climate change” reform, and “urban” reform as different things. Even the government’s wider system review process is often characterised as “RMA reform”, reinforcing this siloed way of thinking based on existing legislative boundaries. Yet, on the other hand, we are also seeing a more holistic perspective emerging in other areas. For example, it is there in the concept of a wellbeing budget framework, the Treasury’s Living Standards Framework, climate

change adaptation plans, and in a “silo-busting” review of the state sector more broadly.⁴ In our suggested model, the Future Generations Act would sit above a number of “implementation” frameworks (including the RMA), driving both alignment between them and change under them.

It would fill what we see as significant gaps in New Zealand’s resource management system, in ways that could not easily be done in more targeted legal frameworks. In particular, it would be where spatial planning occurred. That would align the spatial components of other legislation through which, for example, urban growth and renewal are managed (land use under the RMA and infrastructure provision under a Local Government and Infrastructure Act). That said, it would be selling the Act short if we only saw it as a place to manage rapid urban growth. It would be much more fundamental than that.

In this chapter, we consider two key aspects of a Future Generations Act. The first is its role as a unifying, overarching framework for broader public decision-making – an environmental constitution of sorts. The second is its role as a framework for the production of subordinate instruments: in particular, futures strategies and associated spatial plans.

Overarching the RMA, and other resource management “implementation” statutes, we envisage the enactment of a Future Generations Act. It would do two key things: (1) provide for a broad, constitutionally important set of principles and duties to apply to public decision making, and (2) provide for a strategic spatial planning process that would flow down into more detailed decision-making frameworks (including to coordinate land use and infrastructure planning in the context of urban growth).

8.2 A broad purpose of constitutional significance

The Future Generations Act would have a broad purpose. We do not outline what that would look like specifically. In recognition of its own breadth, some have floated the idea of elevating or transferring Part 2 of the RMA itself to this “higher” status.⁵ Part 2 is often seen as a place where constitutionally important environmental bottom lines are enshrined (although to others, admittedly, that is less clear).⁶ We have also, earlier, recommended significant changes to Part 2 to further strengthen environmental bottom lines within it. It is therefore an attractive proposition to turn Part 2 into a higher form of law.

However, shifting Part 2 to an overarching act poses challenges. For one, would it mean that the RMA itself – a complex framework of institutional, procedural, and

regulatory matters that often refers directly to Part 2 – would be left devoid of its own purpose/principles? We could, instead, simply replicate Part 2 in a higher level act, but then why would we not just say the RMA itself was pre-eminent (arguably it already is)⁷ without going to the trouble of creating more legislation?

Furthermore, there are many legislative frameworks that this higher level purpose would need to apply to. The RMA has a broad purpose, but it is not all-encompassing. It is also not really targeted at mechanisms by which environmental improvements are required or funding is secured for public projects, or even at other frameworks where bottom lines are imposed (eg in the conservation estate, fisheries caps and sustainability measures, caps under the emissions trading scheme, and regulations under the EEZ Act). The interests of future generations are also not just about environmental protection – they are about ensuring that both society and nature are not made worse off than they are at the moment. That requires the active provision of things like energy generation and transmission, housing, food security and liveable environments. Equally, the system needs to contemplate risk and drive resilience at the highest levels, since “we cannot discount the possibility that one or more of the global social, economic or environmental systems will collapse, with devastating consequences”.⁸

This leads us to think that what we need is a higher level purpose describing the relationships between what more targeted parts of the system do. For example, rather than repeating the RMA’s (or other frameworks’) environmental bottom lines, a higher level purpose would make clear that the *concept* of environmental bottom lines and their associated limits on human behaviours – including in relation to climate change – are pre-eminent when it comes to ensuring the wellbeing of future generations.⁹ Bottom lines would then be more clearly defined in other acts (as in our proposed redrafting of Part 2 of the RMA).

We envisage that the Act’s purpose would more closely resemble a “preamble” or “declaration”, familiar to international treaties, than the more elaborate and legalistic purpose of a regulatory framework like the RMA. For example, the Canadian Environmental Protection Act 1999 begins with a declaration: “It is hereby declared that the protection of the environment is essential to the wellbeing of Canadians...”. It is followed by a powerful preamble in which the whole government commits itself to action. The Canadian Government, it states, “recognises the importance of endeavouring, in cooperation with provinces, territories and aboriginal peoples, to achieve the highest level of environmental quality for all Canadians” and “is committed to implementing pollution prevention as a national goal”.¹⁰ This reads more like a powerful cross-party manifesto for change when compared to the permissive and reactive approach of something like the RMA (in which the government has many powers and functions but few duties – attested to by the patchy promulgation of national direction over the last 28 years).

The Future Generation Act’s purpose could even be the place where nature as a whole is given “rights”, rather than trying to give specific personhood to a patchwork of natural features or areas.¹¹ These need not be specific legal rights; there could instead be a statement that the natural world as a whole has, for example, “the right to exist, persist, maintain and regenerate its vital cycles, structure, functions and its processes”.¹² It could usefully be worded in a way that reflected the intersection between Te Ao Māori and Western perspectives, building upon ideas like Te Mana o Te Wai. Such a right would be supported by a general mandate for the Futures Commission to defend the rights of both future generations of people and nature. This duty would be necessary to accompany rights for nature, as “rights alone are no use to a tree that cannot speak”.¹³ Furthermore, the Act could outline, at a high level, the nature of the Treaty relationship in relation to the use and protection of natural resources.¹⁴ Some have called for the promulgation of national direction on the Treaty under the RMA, but in our view this guidance really needs to be enshrined in a way that applies across multiple acts relevant to resource management.

Another way of looking at a purpose statement for a Future Generations Act would be a simplified, narrative version of the criteria for reform that we outlined in Chapter 2. It would describe what we wanted the system as a whole to achieve. In fact, a comparison with reform criteria is actually a significant observation, because part of its point would be to ensure that any *future* reforms to more targeted statutes did not undermine this higher purpose. In a way, this would embed a principle of coherence and non-regression at the highest level, such that once essential protections are in place they could not later be eroded.¹⁵ While the system will always need to evolve over time, this element would be durable, and suggests the desirability of some form of constitutional entrenchment.¹⁶

While constitutionally significant, the Act’s purpose would not be *binding* on particular decisions. For example, a subsequent reform bill could not be struck down by the courts for being inconsistent with it. That kind of measure would require a much more in-depth constitutional debate going well beyond the resource management context. However, the Act’s purpose would be a mandatory *consideration* for any legislative reform, providing pause for thought, and would need to be addressed in any regulatory impact statement. This obligation would not be limited just to reforms that directly weakened “environmentally focused” statutes (eg to expand mining on the conservation estate, or changes to Part 2 of the RMA). It would apply more broadly. For example, it would need to be considered closely in any reforms to the Building Act or the Education Act, or in the development of completely new legislation having implications for future generations.

More specifically, some have pointed out that in the absence of any overarching set of principles, a concerning normative disjunction has occurred between the RMA, Local Government Act and Land Transport Management

Act.¹⁷ There is a lack of common goals.¹⁸ In the Phase 1 report we also noted the potential for conflict between the purpose of the Crown Minerals Act (which actively encourages the exploitation of fossil fuels) and the purpose of climate change legislation.¹⁹ One can readily imagine other examples, including giving overriding powers to urban development authorities to achieve site-specific “strategic objectives”.²⁰ Under the umbrella of a system-wide purpose statement in a Future Generations Act, any such anomalies or conflicts would stand out and be subject to close scrutiny.

A Future Generations Act would have a broad, constitutionally significant purpose statement that would, among other things, recognise the pre-eminence of environmental bottom lines. It could also provide recognition of general moral rights for nature, and provide a degree of stability for future reforms to more targeted frameworks. There is a case for this purpose statement to be entrenched.

8.3 A framework for public decision-making

A Future Generations Act would not only have a stabilising, integrating effect on future governments’ legislative reform programmes. It would also provide a more in-depth set of decision-making principles that would apply to the day-to-day activities of public bodies. Many significant government decisions occur outside specific resource management statutory frameworks. For example, the budget process, investment and procurement decisions (such as investing in a fleet of electric vehicles) and non-statutory strategic documents and programmes (eg One Billion Trees) can all have

significant impact on resource management outcomes. As we said in the Phase 1 report:²¹

Money is an extremely important strategic driver of change... At the micro-level, [we might see] things like a council replacing petrol vehicles with electric ones, or choosing to lease energy efficient or green buildings ...

At a grander scale, this might be about how large public funds are invested (eg the New Zealand Superannuation Fund’s choice to divest from fossil fuels).²² At the grandest scale of all, the entire government budget process can be guided by the desire to achieve outcomes that take us towards the future we want – and not just in GDP or economic terms.²³

Such decisions could be guided, although not necessarily bound, by a common set of overarching principles. In Sweden, for example, the government’s Budget process is informed by a set of environmental targets. We are also seeing an informal move in New Zealand towards more holistic thinking in the concept of a wellbeing budget, which includes environmental considerations (natural capital). Some have pointed out that the Public Finance Act, governing the government’s Budget process, could already support strong consideration of inter-generational environmental wellbeing (not just fiscal considerations) and that this should be strengthened.²⁴ We agree, and think that the Public Finance Act could make more explicit links to environmental principles in a Future Generations Act. In a similar vein, the State Services Minister has said, “When it comes to the really big and complex challenges [eg climate change] it doesn’t work anymore to put a single agency on the job.”²⁵ In short, public decision-making needs to be aligned, and this can be encouraged by having a common set of considerations for all public bodies under a Future Generations Act.²⁶



A spotlight on the Canadian Environmental Protection Act 1999

Canada is a federal state, with many resource management powers lying with provinces rather than the central government. As with a number of federalised systems, this has led to fairly proactive formulations of what responsibilities lie where, as a matter of constitutional importance. In this context, the Canadian Environmental Protection Act imposes what it somewhat modestly describes as “administrative duties” on the federal government.

These include, for example, duties to “exercise its powers in a manner that protects the environment and human health”, to “take preventive and remedial measures to protect, enhance and restore the environment”, to “take the necessity of protecting the environment into account in making social and economic decisions” and to “implement an ecosystem approach that considers the unique and fundamental characteristics of ecosystems”. There are many other such duties listed. We might also compare the Welsh approach, where public bodies are obliged to improve wellbeing;²⁷ they must publish objectives, take all reasonable steps to achieve them, and report on progress.

While the RMA (and other legislation) assigns specific functions to Ministers under a fairly protective purpose and principles, those functions exist for the fairly narrow range of decisions taken under that Act. Furthermore, while the Environment Act establishes the Ministry for the Environment and provides it with functions relating to ministerial advice and information dissemination, it does not impose duties on Ministers (or even the Ministry) to act on it in a certain way. It also does not apply to wider government decision making (much of which occurs outside specific legislative frameworks).

We can contrast the broader duties that are expected of the Canadian government above. Those are much more geared towards change. They are also the kind of general principles that would find a good home within an overarching statute that is designed to influence government action within, and beyond, targeted legal frameworks for environmental “protection”. With suitable amendments, they could also be extended to local government decision-making and even arm’s-length public bodies (eg Crown entities, state-owned enterprises, CCOs).

We do not attempt to provide an exhaustive list of relevant principles or duties here, but at the forefront would need to be principles relating to the pre-eminence of environmental bottom lines, joined by the need to embrace synergies that would enhance both the environment and essential social wellbeing when a long-term view is taken.²⁸ The idea of *fairness* would be prominent,²⁹ as would *resilience*, and *intrinsic value*. It would be a logical place to flesh out a system-wide duty to give effect to the principles of the Treaty of Waitangi. The existential need for

climate action – both mitigation and adaptation – would also be spelled out. More specific duties could be included too, for example to ensure an increase or at least no reduction in the area of indigenous habitat.³⁰

While the Act may not itself outline specific targets for improvement, we envisage that it would provide a framework requiring them to be set,³¹ and an accountability framework around their achievement. The OECD has pointed out, for example, that the current system in New Zealand lacks a robust framework for objective setting (and associated reporting and accountability).³² We have been in reactive mode, and need to shift towards a system that outlines a clear vision for what we want the environment to look like, not just to maintain it or mitigate effects. In fact, our approach to the environment stands in sharp contrast to the well-developed system of targets and accountability mechanisms surrounding fiscal outcomes (eg under the Reserve Bank Act and Public Finance Act).³³ Again, we might look to Sweden for inspiration, where 16 environmental quality objectives are set by Parliament. These are accompanied by a series of interim targets.³⁴

Of course, care would need to be taken that principles and duties in a Future Generations Act did not override the more targeted, legally binding criteria applied by other frameworks for specific decisions (eg the grant of resource consents under the RMA, investment decisions under local government legislation). However, to the extent that such frameworks did not preclude the consideration of broader factors, they would need to be taken into account or had particular regard to. They would be legally influential, not just aims for the government to pursue. Regimes like the RMA generally provide for the “catch-all” consideration of other relevant matters already, so change should not be overly disruptive.³⁵

To complement the establishment of an overarching set of decision-making principles should be an ongoing programme to review the principles contained in more specific legislation. For example, firmer principles of sustainability and resilience could be built into frameworks for the management of Crown land generally (eg the Land Act).

Finally, while the decision-making principles in a Future Generations Act would not be directly enforceable through an appeal process, they would still be a useful hook for judicial review proceedings (eg if they were not considered, or if they were misinterpreted). It would be an important expansion of our system of administrative law to embrace environmental and inter-generational concerns.

We envisage the enactment of common decision-making principles or duties that would apply to all public decision-making, not just regulatory decisions made under protective frameworks like the RMA.

Robust institutional arrangements would be essential to how a Future Generations Act would operate. We suggest several things here. Because the Act’s focus would be

holistic and integrative (principles would apply to all public decision-makers, including the “government” rather than specific Ministers or departments), it would need to be accompanied by an equally wide-ranging system steward.³⁶ In other words, a future system will need to give careful thought to how the government arranges itself in resource management matters.

At present, different portfolios and departments (eg minerals, climate change, primary industries, economic development, conservation) can pull in different directions, with tensions resolved through ad hoc or semi-permanent working groups,³⁷ inter-departmental cooperation, or (ultimately) Cabinet. An MMP system can make such tensions more pronounced at a political level. Some have pointed to a lack of clear leadership across the system,³⁸ while others have noted the degree of institutional fragmentation affects the ability to deliver cross-cutting outcomes:³⁹

In theory, institutions are efficient. In practice they are silos. There is no process to integrate public services in pursuit of common objectives. ...

No one is overseeing the system to ensure it functions.

As with different legislative frameworks, institutional silos can never be removed entirely. A sharp institutional focus is also often a good thing, in that a clear mission is “critical to ... accountability and focus, for compliance by regulated parties, and the legitimacy of the regulatory regime”.⁴⁰ A specific focus is also important to prevent objective overload. However, that needs to be complemented by some integrative mechanism at the top of the system.⁴¹ Of course, the buck will always need to stop with groupings of relevant Ministers or, ultimately, Cabinet. But there should also be some means by which relevant Ministers receive integrated advice, especially if there is a common set of principles or duties imposed on the government as a whole under a Future Generations Act. Whole of system stewardship is essential.⁴²

We therefore suggest the formal creation of a standing body within government,⁴³ comprised of high level officials from relevant departments and Crown agents, and chaired by an official from the Department of the Prime Minister and Cabinet. It could be called a “Futures Group” to mirror the language of the independent Futures Commission.⁴⁴ A Futures Group would not be a replacement for targeted advice from specific ministries (especially where their work was highly technical in nature), but would be a durable forum for different departments to work together,⁴⁵ and a channel to provide common advice or (at least) to pinpoint and explain differences between agencies in a way that is both proactive and obvious to Ministers. It would not necessarily require its own secretariat, and could be supported through its respective existing departments.

This idea builds on, and institutionalises, related reforms being progressed through the review of the State Sector Act.⁴⁶ These reforms are much wider in scope than the resource management system, but strongly reflect a similar desire to break down silos within government, including for environmental matters (eg by making

department heads jointly responsible for cross-cutting outcomes like climate change mitigation).⁴⁷ A Futures Group could be a formally established example of an “interdepartmental executive board” already contemplated under a new Public Services Act.⁴⁸

We suggest the establishment of a truly whole of system steward within government (a Futures Group) comprised of high level officials from relevant departments and Crown agents, and chaired by a senior official from the Department of the Prime Minister and Cabinet.

There would also be an important role here for an independent Futures Commission, which would be established under the Act under a broad but powerful mandate focused firmly on the future (both people and nature). The Welsh approach is interesting as context for the discussion that follows.

A spotlight on the Future Generations Commissioner in Wales

In the Phase 1 report, we highlighted the role of the Welsh Future Generations Commissioner, saying:

In Wales, a “Future Generations Commissioner” has been appointed who acts as a guardian for the future generations in Wales and is also tasked with encouraging public bodies to take greater account of the long-term impact of the things they do. The Commissioner has advice, research and recommendatory roles not unlike that of the New Zealand Parliamentary Commissioner for the Environment. However, the Commissioner also has the power to review public bodies and they must take all reasonable steps to follow the course of action recommended by the Commissioner, unless there is a good reason not to do so. The Commissioner is also required to publish a “future generations report” before each general election.

We pointed out that this Welsh model represents a new generation of sustainability legislation and is something that New Zealand could take inspiration from.

The role of a Futures Commission in New Zealand would be as a system level watchdog, to hold the government to account for its actions (or lack of).⁴⁹ As we mentioned earlier, “elected institutions need to be held accountable to their promises, and constantly tested on their progress towards broad goals that transcend politics and the short-term concerns of elected bodies”⁵⁰ while others have lamented that the government is “the principal judge and jury for its own activities”⁵¹ and warned against “overdependency on a central government constrained by three-year election cycles.”⁵²

But how would a Futures Commission do this? We have, in previous chapters, proposed strong recommendatory functions for the Commission under the RMA in relation to national direction and council plans. But it would have

a more fundamental watchdog role across the system. In particular, while New Zealand government institutions have relatively high levels of transparency and audit in most areas, environmental governance has been a notable exception. It is rare to see any law hold agencies to account for the environmental outcomes their oversight allows. In fact, if financial capital had been managed in the same way as natural capital has been in New Zealand (ie systematically eroded over time), there is no doubt in our minds that much stronger action would have been taken in response a long time ago. Overall, our framework for environmental performance does not lay blame (or even require action); it simply points out facts and trends. In a way, that is a strength, because it increases transparency by reducing the incentive for government to hide inconvenient truths from the public.⁵³ Yet the step that is missing is a subsequent one: where accountability for outcomes (both good and bad), and a mandate for future change, is assigned.

In our proposed system, a Futures Commission would be required to issue a triennial report card (potentially aligned with the parliamentary cycle) assessing the government's (as a whole and/or particular departments') overall performance against the purpose and principles of the Future Generations Act, including Treaty principles and any more specific performance measures outlined in regulations (eg targets). That would include an assessment of whether any of the government's *legislative* reforms were consistent with the purpose of the Act (resulting in a declaration not dissimilar to that under the Bill of Rights Act).⁵⁴

This feature recognises that the focus of "success" should be much broader than just (or even) performance measures like the speed with which consents are processed, and that environmental performance is important across the whole of government, not just "protective" departments like the Ministry for the Environment.⁵⁵ A report card process could also be a place where overall performance was independently assessed for measures cutting across different statutes and institutions, including compliance monitoring and enforcement activities.⁵⁶ In other words, the process would not just be about holding agencies to account for environmental outcomes; it would also be about assessing the extent to which public authorities are actually undertaking the tasks expected of them.⁵⁷

As is the case in Sweden,⁵⁸ the government would be required to respond to a report card, outlining how it intended to rectify any shortcomings or implement the principles of the Future Generations Act over the following parliamentary term. And, as in the Welsh model, the government could even be compelled to take reasonable steps in response (unless there were good reason not to), or there could be a general duty imposed to take some corrective action in response to poor or declining indicators emerging from environmental reporting.⁵⁹ This framework would, ideally, provide an incentive for effective and timely internal evaluations to be undertaken within government, to avoid the ignominy of a poor scorecard.

It would, for example, address shortcomings that are prominent in the context of biodiversity, and which EDS has previously pointed out:⁶⁰

Consequences for responsible agencies and their executive leaders of failing to protect biodiversity are minor or absent. More meaningful measures of outcome (rather than outputs) and estimates of difference made are required.

In the medium term, a structured report card system could even be extended to other public bodies, including councils, if resourcing allowed. At the local government level, this approach could create a healthy competitive mindset, both between different councils and between different candidates come election time. It could encourage a race to the top for environmental outcomes.⁶¹

It would be important for this report card framework to be founded on robust evidence, but a poor score should not flow automatically from poor results of environmental monitoring (or other wellbeing indicators).⁶² This is because many environmental and other indicators can be slow to change (eg nutrients flowing into waterways), and poor outcomes measured at the end of a relatively short political cycle do not necessarily reflect the degree to which a problem is being addressed or duties being undertaken by a public authority. The framework would also need to be sensitive to what had been achieved by an organisation in light of the resources available, especially for councils. In other words, the system should not punish organisations for what they are fundamentally unable to do. This suggests a need to address funding constraints and incentives, which are addressed in Chapters 10 and 13.

There would be no automatic legal consequence for a poor scorecard. For example, we do not envisage that it would be enforceable in the courts in a blanket way (although for some things, like a failure to meet climate change targets, enforcement mechanisms should be stronger).⁶³ Instead, the idea is that any failings (or successes) of an accountable government would be highlighted in an evidence-based manner by a robustly independent institution, and New Zealanders could take that into account when going to the polls. In that way, an independent entity would enhance, rather than undermine, the democratic process. Because of growing environmental awareness and concern among the public, this would be a strong practical incentive for agencies to undertake (and Ministers to drive) robust evaluation and corrective action, alongside stronger legal duties to do so.

We acknowledge that there is potential overlap here with the role of the Parliamentary Commissioner for the Environment (in its general investigative and advisory function, and its review role).⁶⁴ Indeed, the new, more structured role outlined above could be given to that institution *instead* of a Futures Commission. We leave that as an open question, with a note that appropriate resourcing would need to be provided in either case.

As well as a retrospective scorecard for performance, councils could also be required to obtain accreditation from the Futures Commission, in advance, for the

discharge of their environmental functions (under the RMA and potentially other legislation). That could operate in a similar way to the Building Consent Authority model, where accreditation is required for what is a technical and essential regulatory service.⁶⁵ Councils would need to demonstrate capacity and capability to undertake their key functions, and would have access to support from central government (eg from the EPA)⁶⁶ where those resources were not sufficient due to legitimate funding or other constraints.⁶⁷ Financial assistance for smaller councils would be available to help fund their functions, through a similar model to the research-oriented EnviroLink.

The Futures Commission should act as an independent watchdog over the whole of the resource management system. It would have a structured role that would see it issue public authorities with a report card (including councils, if resourcing allowed). This would assess authorities' performance against the purpose and principles/duties in the Future Generations Act, alongside any other more specific metrics outlined in the Act (eg targets set under other legislation). Councils could also be required to obtain accreditation from the Futures Commission for the discharge of their environmental functions under other legislation (eg the RMA), akin to the Building Consent Authority model.

In the longer-term, as mentioned in Chapter 7, we see potential for a Futures Commission, the Parliamentary Commissioner for the Environment, the Climate Change Commission and any future Freshwater Commission being merged, and their functions integrated into a single, independent watchdog entity. The Energy Efficiency and Conservation Authority, which also has an arm's-length advocacy function, could fall into this camp as well. There would be a risk of over-fragmentation and complexity in institutional arrangements if we had a proliferation of small, targeted commissions.⁶⁸ One possible scenario might be that the existing Parliamentary Commissioner would be expanded into a Futures Commission and given additional roles.

We also see merit – although only in the longer term – in giving consideration to integrating other existing statutes of “system-wide” importance into a Future Generations Act. We consider these to be so linked as to (eventually) make sense to be within a single framework, and are encouraged by the directive in the Legislation Act 2012 to pursue “the progressive and systematic revision of the New Zealand statute book so that ... it is arranged more logically”. Such statutes could include:

- The Environment Act (establishing and providing functions for the Ministry for the Environment and Parliamentary Commissioner for the Environment)
- The Environmental Reporting Act (providing for a national system of environmental reporting)⁶⁹

- The Environmental Protection Authority Act (establishing the EPA and giving it a general mandate)
- The Energy Efficiency and Conservation Act (establishing the Energy Efficiency and Conservation Authority and providing for related strategies to be developed)
- The Climate Change Response (Zero Carbon) Amendment Act (which is discussed further in Chapter 9)
- The parts of the RMA establishing (or continuing) the Environment Court (which has roles not just confined to the RMA)

In the longer term, we see merit in further integrating existing legislation into a Future Generations Act to the extent that it is about the whole of the system (such as the establishment of cross-cutting institutions and system-wide strategic planning and reporting frameworks). Separate watchdog-type institutions could also be merged into a Futures Commission, or this could be seen as an expansion of the existing Parliamentary Commissioner for the Environment.

Alongside watchdog-type functions, a Future Generations Act would give the Futures Commission a general but structured “futures scanning role”. This means that the Commission would be charged with identifying threats and opportunities in the future, making recommendations for action in response, and reporting its findings to the government or to Parliament (which could coincide with, or follow, broader environmental reporting cycles).⁷⁰ The government would be required to outline how it intended to respond to address the threats, and respond to the Commission's recommendations.⁷¹ As mentioned earlier, this would be “a real, nationally-focused effort at looking ahead”.⁷²

Such a role is not in principle dissimilar to the narrower, subject-specific task proposed to be assigned to the Climate Change Commission (a risk assessment to inform climate change adaptation plans). It is also reminiscent of the Welsh approach, where the government is obliged to release a Future Trends report within one year of a general election.⁷³ While we think the Ministry for the Environment and Stats NZ should remain responsible for national level environmental reporting, this data would also be shared with the Commission to assist in its futures scanning function. A futures scanning role is a necessary complement to backwards looking environmental monitoring and reporting, because the significance of many environmental challenges cannot be fully appreciated without looking ahead.⁷⁴

The Futures Commission should be given a futures scanning function. It would look ahead to identify and report on potential threats and opportunities (particularly environmental ones), and the government would be compelled to respond.

Another key element of a Future Generations Act could be the imposition of a general duty on all persons to protect, or even enhance, the environment.⁷⁵ The idea is that all people should be held responsible for environmental wellbeing, not just the government. We heard from several people at workshops that such a measure would be a positive step, and that it would reflect the “emergency footing” that a future system will need. It would complement the general rights of nature enshrined in the Act’s purpose statement and the advocacy role of a Futures Commission, addressing the complaints of some that giving rights to nature without associated human responsibilities is greenwashing and window dressing.⁷⁶

Of course, we already have a general environmental duty contained in section 17 of the RMA. However, aside from the ability to issue enforcement orders and abatement notices, this is not enforceable, and liability does not follow. Furthermore, it is focused on the avoidance, remediation and mitigation of adverse effects rather than taking positive measures. As we have pointed out in the Phase 1 report, under the RMA “the trigger for action is still potential harm, not a drive for improvement”,⁷⁷ and the courts have said that activities with no significant adverse effects are not to be controlled by the RMA.⁷⁸ We see scope for a general duty to be strengthened and elevated to a Future Generations Act, including through the issuing of guidance as to what a general duty would entail in

specific sectors or for particular activities. It may also be useful to impose a specific duty on public authorities to enforce a general duty, addressing concerns that section 17 of the RMA is underutilised.

There are, of course, significant challenges here. Is it beyond the pale to require people to actively do things, rather than just preventing them from acting in harmful ways? We explored this question in the Phase 1 report, concluding that much more needs to be done in the non-regulatory space (eg economic instruments and behavioural incentives) to encourage environmental enhancement.⁷⁹ We need a system that drives as well as encourages positive outcomes.⁸⁰

But some regulatory options may also be possible. In particular, aspects of the system already contemplate that people can be actively compelled to do positive things, not just mitigate harm that they cause. For example, authorities under the Biosecurity Act can compel people to destroy pests on private property.⁸¹ Biodiversity offsetting using a biobank and a principle of net gain also has potential for making people enhance the environment overall (see further exploration in Chapter 12).⁸² And we already have the ability for esplanade reserves and strips to be set aside under the RMA in the event of subdivision – a profitable change in the use of private land leads to an expectation of public benefit, even if not directly linked to adverse effects.⁸³ Could we use such triggers to enhance the environment in other ways? For example, could urban development or the rezoning of land trigger the need to contribute to a national biobank rather than windfall profits going to private interests? Such mechanisms deserve further exploration.



Kenepuru Sound

A spotlight on a duty of care

Private law has long recognised the existence of a special relationship between different categories of people, where a duty of care is owed. For example, the tort of negligence recognises many such categories where compensation may be owed for a careless breach of a duty of care. In fact, the origins of public environmental law reach back to civil actions in tort, particularly nuisance and trespass, recognising that how one person uses land or environmental resources can cause harm to others and should be actionable. Even stronger duties of care, involving proactive obligations, can be seen in other legal contexts, notably the fiduciary obligations owed under trust law and the duties owed by guardians to children.

It does not seem unreasonable to extend this duty of care to the natural environment, to which humanity as a whole has an important relationship not unlike that of a trustee. The public trust doctrine essentially says this very thing, but is usually talked about in the context of an obligation of the state to maintain and preserve conservation land. The whole notion of inter-generational equity is premised on a moral duty that the current generation owes to future ones – to hold the environment in trust for others to come.

In more recent years, a special relationship and a duty of care has been recognised through bespoke frameworks establishing legal personhood for aspects of the natural world (like Te Urewera or Te Awa Tupua/ Whanganui River). While those have been created very much in the cultural context of the Māori world view and Treaty relationship, the more general concept of legal personhood has sought to fit nature within a legal system centred on the relationships between humans. In other words, by humanising nature as a person, we are accepting it as a participant in our community of justice and recognising specific duties towards it.

However, more broadly, rights enshrined in property ownership and consenting in New Zealand are very strong. Other than often weakly enforced and reactive restrictions on use, there is very little landowners are compelled to do to protect or enhance resources under their control (particularly biodiversity). In many cases, private incentives will exist that drive such behaviour anyway (eg a desire to pass down land to one's children, or social pressure from peer groups not to cause damage). However, that is not always the case, particularly where there is a tension between the economic benefit of using a resource (or a cultural/historical expectation around acceptable use)⁸⁴ on the one hand, and long-term environmental sustainability on the other. As we have pointed out previously, establishing private property rights ("enclosure") is therefore not a solution to all environmental problems.⁸⁵

We see potential in extending the scope of existing duties of care under New Zealand law. That could play out in different ways. For example, it could be a strengthening of the general duty in section 17 of

the RMA, and elevation to a Future Generations Act. Alternatively, it could be a statutory extension of a common law duty (eg under a tort of negligence), recognising that careless behaviour causing harm to the natural world is deserving of retribution or compensation as much as where harm is caused to another person. That would require nature as a whole to be defined, the nature of a duty to be developed in the courts, and for a spokesperson for nature to be recognised (eg a Futures Commission or an Environmental Defender's Office). Either way, close consideration would be needed as to on whom a duty would fall. For example, it could fall on all persons, or specifically on landowners or occupiers, and include duties to:

- Maintain threatened species and ecosystems
- Retain natural habitat
- Advise of the presence of threatened species and ecosystems when known
- Cooperate and provide access for the purpose of survey for threatened species and habitats
- Maintain connectivity of waterways
- Avoid excessive environmental impacts of routine activities (eg winter cropping, mob stocking etc, and many other activities that are presently permitted for the purposes of the RMA)

More broadly, advantages of having a statutory duty of care would be to provide a baseline to outline a reasonable use of a property and to impose a threshold for measuring positive measures that might be funded from the public purse (eg payment for providing additional ecosystem services, rather than expectation of regulatory compliance). We would expect this duty to be enforceable in law (including through civil action) and for penalties to be meaningful.

Associated with a strengthened general duty of care could be the imposition of a more specific duty on company directors. This could be done under the Future Generations Act, but it may make more sense to integrate it within the Companies Act 1993, alongside traditional directors' duties.⁸⁶ This would reflect that (especially large) corporations can often be better placed than individuals to make a real difference to environmental outcomes,⁸⁷ and create a more competitive environment in the private sector for the achievement of environmental improvements. It would give shareholders firmer grounds to take action against directors for a failure to recognise environmental risks.

A subtle expansion of directors' duties is already emerging in the context of climate change (as explored in the spotlight below), although under the current system that movement is still linked firmly to the need to address *financial* risks to shareholders (including reputational risks) rather than to directly address a company's impact on the public interest. We see potential for this duty to

be formalised and broadened through amendments to relevant sections of the Companies Act, where it could be made clear that a fiduciary duty to act in the best interests of the company is tempered (but not overridden) by a general environmental duty. As described in the spotlight below, there is likely to be considerable common ground between those two things as investors demand more environmental action and companies face more stringent regulation. Alternatively, the Act could be amended to include mandatory environmental and climate considerations in determining what the “best interests” of a company are.

Such reforms are not beyond the realms of possibility, given that there is ongoing debate in New Zealand about the extent to which a company’s interests should be narrowly equated to *shareholders’* interests. One commentator has noted that directors may already take into account the interests of “the community and the environment, provided that they do not pursue those interests without any regard to the company’s interests”⁸⁸ and that “there is a clear drift in New Zealand towards appreciating the impact of company actions on other stakeholders [including the public] that seems unlikely to be reversed”.⁸⁹ The United Kingdom’s Companies Act expressly provides that directors must take into account a company’s impacts on the environment (including communities).⁹⁰ We should look to do the same.



A spotlight on directors’ duties in the context of climate change⁹¹

Chapman Tripp⁹² has recently written a legal opinion for the Aotearoa Circle concerning the extent to which New Zealand company directors and fund managers are permitted or required to take account of climate change in decision-making. The opinion concludes that climate change has evolved from an environmental concern to a financial risk. While that does not mean it will pose a financial risk for every business or investment, it does mean that it needs to be taken into account in decision-making. Where the risk is material, one would expect directors to formulate appropriate strategies for addressing it, based on directors’ duty to act with reasonable care. Financial risk to business from climate change stems from both *physical risks* and *transition risks*:

- Physical risks include damage to assets and supply chain disruption
- Transition risks include regulatory risks, legal risks, technology risks, market risks and reputational risks

Many company boards will rightly conclude that their businesses are unlikely to be directly affected by physical risks caused by climate change. But transitional risks are likely to be of much broader application. For instance, even if you operate nowhere near a coastline, failing to respond to consumer demand for sustainable products might mean that the market shifts out from under you.

In principle, company directors should approach climate risk in the same way as any other financial risk. Among other things, they would be expected to seek independent expert advice on the climate risk faced by the company and options for addressing that risk, retain adequate expertise on the board, and to take concrete steps to address the company’s risk exposure.

For fund managers, the legal context has traditionally been less clear. This is because of the important rule that those who invest other people’s money are not entitled to indulge their own ethical or environmental scruples. This rule has sometimes been understood as requiring a blunt “profit maximisation” approach, whereby fund managers must by law invest in the highest-returning stocks. The legal opinion says that this was never true and is certainly not true today. In particular, the law does not require a focus on short-term non-risk-adjusted gain at the expense of longer-term financial considerations – including potentially significant climate related risks. These are no longer environmental “scruples”. While an overall investment approach will usually still be to enhance long-term financial return, climate risk will often be a relevant consideration in determining what that looks like.

While the Aotearoa Circle legal opinion was focused on climate risks, the same or similar logic can apply to other reasonably foreseeable existential environmental risks. In particular, one can readily appreciate how significant market, technological, regulatory and reputational risks arise from directors' approaches to freshwater and biodiversity decline.

Strengthening directors' duties in relation to climate and other environmental risks can be assisted by strengthening legal requirements for non-financial disclosures. Disclosing environmental risks forces firms to assess and understand their risks, and allows investors and shareholders to make decisions based on them. Recent years have seen significant international developments on this front,⁹³ and the New Zealand government is currently consulting on measures to make climate related disclosures mandatory for some entities (possibly under the Financial Reporting Act 2013).⁹⁴ Consideration should be given to how that can be broadened to encompass other forms of environmental risk, and to extend mandatory disclosures not just to risks faced, but also a description of company performance in meeting publicly important environmental goals (eg the targets set or referred to under a Future Generations Act).

A Future Generations Act should impose a stronger general duty on people to protect/enhance the environment. A stronger duty to consider environmental impacts should be inserted into the Companies Act, alongside strengthened obligations for non-financial disclosures.

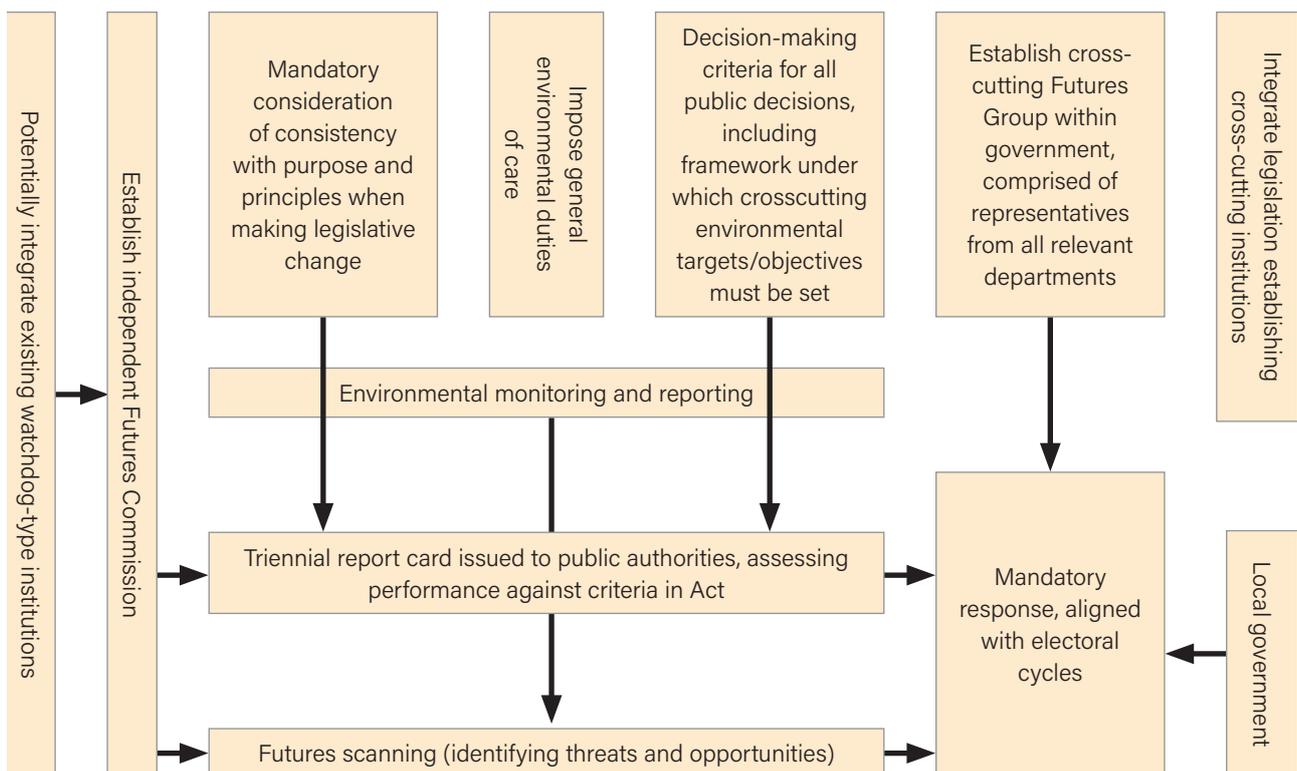
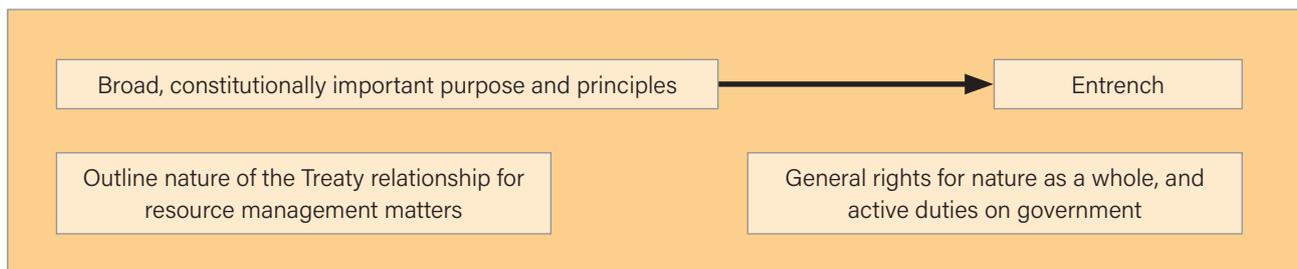


Figure 8.1: Decision-making principles and duties under a Future Generations Act

8.4 A framework for strategic and spatial planning

The Future Generations Act would not just be a framework for general, system-wide principles/duties and accountability/reporting mechanisms. It would also be a place where high level strategic plans were developed. Those plans would influence decision-making under more detailed “implementation” frameworks like the RMA. What we mean by strategic and spatial planning, and how this would work, is explored below. It would be a key mechanism by which urban growth would be managed in an integrated way (largely to ensure that land use decisions under the RMA married up with infrastructure planning and funding under a Local Government and Infrastructure Act).⁹⁵

A spotlight on strategic spatial planning

In the Phase 1 report, we pointed out that the current system lacks strong strategic planning. That means, essentially, that it is not firmly focused on the future or the need for change. Some have characterised this as a system that is reactive or (adverse) effects based, rather than one that is geared towards positive change and is outcomes focused. That is not uniformly the case (eg a lot of strategic planning already goes on in government departments and councils),⁹⁶ and it is sometimes a complaint about what RMA plans have done in practice rather than the wider system or what *could* be done under the RMA.⁹⁷ However, the key point is that strategic planning at a system-wide level can be patchy, overlapping, and not well integrated. We are used to operating in strategic silos. As such, we have previously said:⁹⁸

The current system is by no means devoid of strategy. For example, some have pointed out that the Local Government Act and the Land Transport Management Act are strongly future focused. Central and local government often produce strategies under more general (or no) statutory frameworks. The issue is more that, currently, strategy happens on an ad hoc and piecemeal basis, and that the links between strategic and other kinds of tools (eg regulation) are not always strong.

... [R]esource management strategy seldom get[s] looked at in a holistic way. It is more common to have strategies relating to economic development, energy, conservation, local and regional infrastructure, climate and so forth.

But what is a strategic *spatial* plan? Not all elements of a strategy are spatial (eg a strategy to reduce waste over time might involve the deployment of taxes, funding, or product stewardship schemes, none of which have real spatial aspects). But many aspects are. For example, an urban growth strategy is dependent on knowing what (infrastructure, houses, businesses, public services) goes where over time. Equally, not all

spatial plans are strategic. That is what Infrastructure New Zealand means when it points out:⁹⁹

Spatial planning differs from conventional land use planning as practiced in New Zealand. Land use planning under the RMA is not strategic. It is effects based and reactive. It is designed to minimise the impacts of physical development on other residents, activities and the environment. It is not designed or set up to proactively promote outcomes.

Thus complaints about RMA plans are usually not so much that they are not spatial (eg district plans are spatial almost by definition) or even that they *cannot* be strategic (there is nothing in the RMA that prevents an instrument being future focused), but rather that they do not *have* to be strategic (and in practice they tend *not* to be).¹⁰⁰ Under our reformed model for the RMA, that would no longer be the case. A new Part 2, and the use of targets, would be much firmer about driving positive social and environmental change.

However, there are other senses in which the system as a whole does not provide for adequate strategic spatial planning, and where a reformed RMA would not be enough. In short, we need:

- (1) Horizontal integration: the ability for one spatial planning framework (eg land use under the RMA) to influence or be aligned with another (eg infrastructure planning/funding under the Local Government Act).
- (2) Vertical integration: the ability for a higher level spatial plan to have influence on lower level decision-making (eg the Auckland Plan is not binding on the Auckland Unitary Plan)
- (3) A *requirement* to do it in a way that aligns other decisions: while many councils *have* engaged in cross-district spatial planning under the Local Government Act to manage urban growth, that is not mandatory. Such efforts also tend to be responsive to rather than pre-emptive of pressures.¹⁰¹
- (4) An integrated *national* effort at spatial planning.

We suggest that, under a Future Generations Act, two key subordinate instruments be developed to rationalise, integrate, align and fill gaps in this complex strategic landscape. They would be mandatory.

The first instrument would be a *national* strategy. This would take a holistic approach to all strategic planning that goes on within the bounds of the resource management system, and join it up. More targeted strategies (eg for tourism, biodiversity, minerals etc) could, of course, continue to be developed, but they would be done either to inform the wider strategy or as specific domain- or sector-based expressions of it. It would address concerns that a more joined up approach is needed to produce positive, efficient, and certain

outcomes.¹⁰² For example, the Biodiversity Collaborative Group has pointed out that “There are a plethora of documents which do not consider biodiversity in a holistic manner, and there is no clear mechanism to ensure alignment and compatibility between these documents”.¹⁰³

The idea is that there would be a formal and legally influential place where all relevant considerations would come together, and where tensions between them could be identified and resolved with reference to the higher level purpose and principles of a Future Generations Act. We have previously called this kind of thing a “resource management” strategy, but in recognition of (what we think is) the poor optics of that label, we suggest it be called a “National Futures Strategy”. That would also align with the name of the Act under which it would be developed, and with the Futures Commission.

A spotlight on forestry

We can consider the desirability of formalising a more integrated strategic approach to planning in the context of forestry. In Chapter 5, we pointed out that Part 2 of the RMA, including in its approach to managing land, needs to recognise better the importance of enhancing social, economic and ecological resilience alongside managing adverse effects. But aside from the general climate change and economic policy impetus to make it easier to deploy plantation forestry, the current NES on Plantation Forestry continues to take a traditional RMA approach focusing on addressing the adverse effects of a regulated activity.¹⁰⁴ There is a separate, non-statutory, workstream developing a forestry strategy, and a reluctance to treat the NES as a strategic instrument for addressing broader issues of land use change (eg as a spatial tool to determine where we might wish to encourage or discourage plantation trees, or to influence what kind of trees are appropriate).

We have previously recommended undertaking a national forestry strategy and/or a national land use strategy.¹⁰⁵ This would include, but not be limited to, instruments like NESs under the RMA. That strategy ought to take a much more holistic, interconnected view of the place of forestry in New Zealand’s future, not just assessing the effectiveness of regulatory instruments (eg NESs, NPSs, and rules under the emissions trading scheme) to address adverse effects. A strategic approach demands consideration of the interactions between statutes and instruments, market drivers and expectations, social concerns (eg disruptions for rural communities), inequities across sectors using land (eg disparities in setbacks from waterways for forestry and agriculture), and the enhancement of social, ecological and economic resilience. Such considerations could usefully play out in the context of a broad Futures Strategy at a national level, which would drive (rather than be driven by) piecemeal reviews of particular regulatory instruments.¹⁰⁶

The second kind of instrument to be developed under a Future Generations Act would be *regional* futures strategies.¹⁰⁷ This recognises that strategic spatial planning needs to happen at multiple scales.¹⁰⁸ National and regional strategies would be similar in nature, but would contain content relevant to the strategic functions of central and local government respectively. As an analogy for a regional futures strategy, one might like to think of the Auckland Plan (as opposed to the RMA’s Auckland Unitary Plan).

Associated with both national and regional futures strategies would be spatial plans, which would express strategies in spatial terms. As pointed out earlier, not all strategy can be expressed spatially, but some aspects (eg urban growth) can only become meaningful when they are. At a national level, this would be intended to translate general strategic aims (eg renewable energy aspirations, or the creation of biodiversity corridors) into how that would play out in spatial or physical terms. Ideally, such things would be mapped. They would also be based on robust evidence, including from a more active central government role in conducting strategic environmental assessments (eg for specific industries). Regional spatial plans – akin to the Productivity Commission’s concept of a regional spatial strategy – would address land release and infrastructure provision for urban growth, but would by no means be confined to that purpose. Spatial planning is much wider than that.¹⁰⁹

A Future Generations Act would provide a statutory basis for strategic and spatial planning at a national and regional level. This would take the form of “futures strategies” and associated spatial plans that would give effect to them in spatial terms.



8.5 The legal effect of futures strategies and spatial plans

Spatial plans would not have direct regulatory effect. As we have pointed out previously, “A strategic tool is an overarching instrument that guides the actions of public authorities over time without being binding on people as a matter of law”.¹¹⁰ However, we think that futures strategies and associated spatial plans would need to be *legally* meaningful (see Figure 8.2). By this we mean that they should not just be another level of wishful thinking or nice words on paper. If we bother to do this kind of thing – which we think is well worth the effort – it needs to have real influence on other legal frameworks by which more targeted decisions (including regulatory and funding decisions) are made. Strategy is worthless if it does not lead to action and, at present “the lack of legal weight and disconnection with RMA plans means that the full benefits of strategic planning are not being realised throughout the system.”¹¹¹

However, there is a significant tension to be resolved here. Implementation frameworks like the RMA, conservation legislation, transport legislation, and local government legislation all have their own, more targeted, purposes and processes. There are thus serious questions to be asked about the direction of influence here.

Should, for example, a National Futures Strategy have to give effect to an NEP developed under the RMA? Or should an NEP have to give effect to a National Futures Strategy? Perhaps even more significantly, should expenditure decisions under local government

legislation (eg through long-term plans and annual plans) be *required* to implement those things that cost money (eg infrastructure) under a regional futures strategy? Or should that strategy itself have to change based on the funding that councils and ultimately communities are willing to stump up in any given year?

How to spend ratepayer money goes to the heart of local democracy, even if there are concerns that too many candidates campaign myopically on a platform of lower rates.¹¹² It would also be beyond the pale for long-term central government funding decisions to be bound by a high level, long-term strategy. The budget process is the preserve of a democratically elected government (and, ultimately, Parliament), which can come into sharp relief when the makeup of the government changes.¹¹³

This is a question that played out in the context of the Auckland Plan, which can be seen as analogous to the kind of regional futures strategies we are talking about here. That was designed to provide a high level blueprint which other instruments – especially the subsequent Unitary Plan under the RMA – would achieve. But the legal direction was always weak; the latter was only obliged to have regard to the former.¹¹⁴ The unitary plan, where the rubber really hit the road for many things (including regulatory restrictions and zoning decisions affecting people’s property) had a robust process involving an accountable council, an independent panel, and the courts. It was important that this – and associated funding decisions under other legislation – could not be overridden by a more aspirational spatial plan created (in many ways) in a less formal manner.



However, a predictable, integrative approach remains important. We therefore think that influence would need to flow in both directions. The relationship would be reciprocal.

Because the purpose of the Future Generations Act would itself stress the primacy of environmental bottom lines, there should be no objection to strategies then *giving effect* to those bottom lines imposed under more specific frameworks (like the RMA, conservation legislation, or oceans legislation). Bottom lines in those acts would be more clearly articulated than they are presently,¹¹⁵ making that job easier.

The law could then require that futures strategies (including associated spatial plans) be given effect to, *unless there were good reason not to*, in instruments made under more targeted regimes. "Good reason" could be defined as, among other things, being inconsistent with the purpose and principles of the more specific act or where funding was unavailable. For example, if an NEP changed under the RMA to impose a stricter limit to achieve an environmental bottom line, an existing regional futures strategy could not be used as a reason to override it.

Alternatively, lower level instruments could be required to have "particular regard to" futures strategies. Some novel alternative could even be drafted (eg "be guided by" or "generally adhere to"). All of these options represent stronger relationships than those between the Auckland Plan and the Auckland Unitary Plan ("have regard to"), but none is absolute.¹¹⁶

Targeted instruments like those under the RMA, Local Government Act and Land Transport Management Act would therefore not just be about blindly implementing futures strategies – they would be primarily about implementing the purpose and principles of their particular act. Indeed, that is a key reason why a framework like the RMA that sets bottom lines needs to be separate from others concerned with development. But strategies would have significant legal weight or importance within those constraints. It would be a bit like having a strategic meeting in an office, where everyone meets to outline a shared vision and then different teams go away to achieve their part of it. The idea is that they should all adhere to the vision that was agreed, unless there were persuasive reasons not to. Predictability, rather than absolute certainty, is the aim.

Futures strategies and related spatial plans would not be directly binding in a regulatory sense. However, they should have real legal influence on decision-making under more targeted frameworks (eg the RMA and infrastructure related legislation). It would not be feasible for them to be *given effect to* in these other statutes, but a reasonably strong legal direction should be put in place to ensure strategic planning is worth doing.

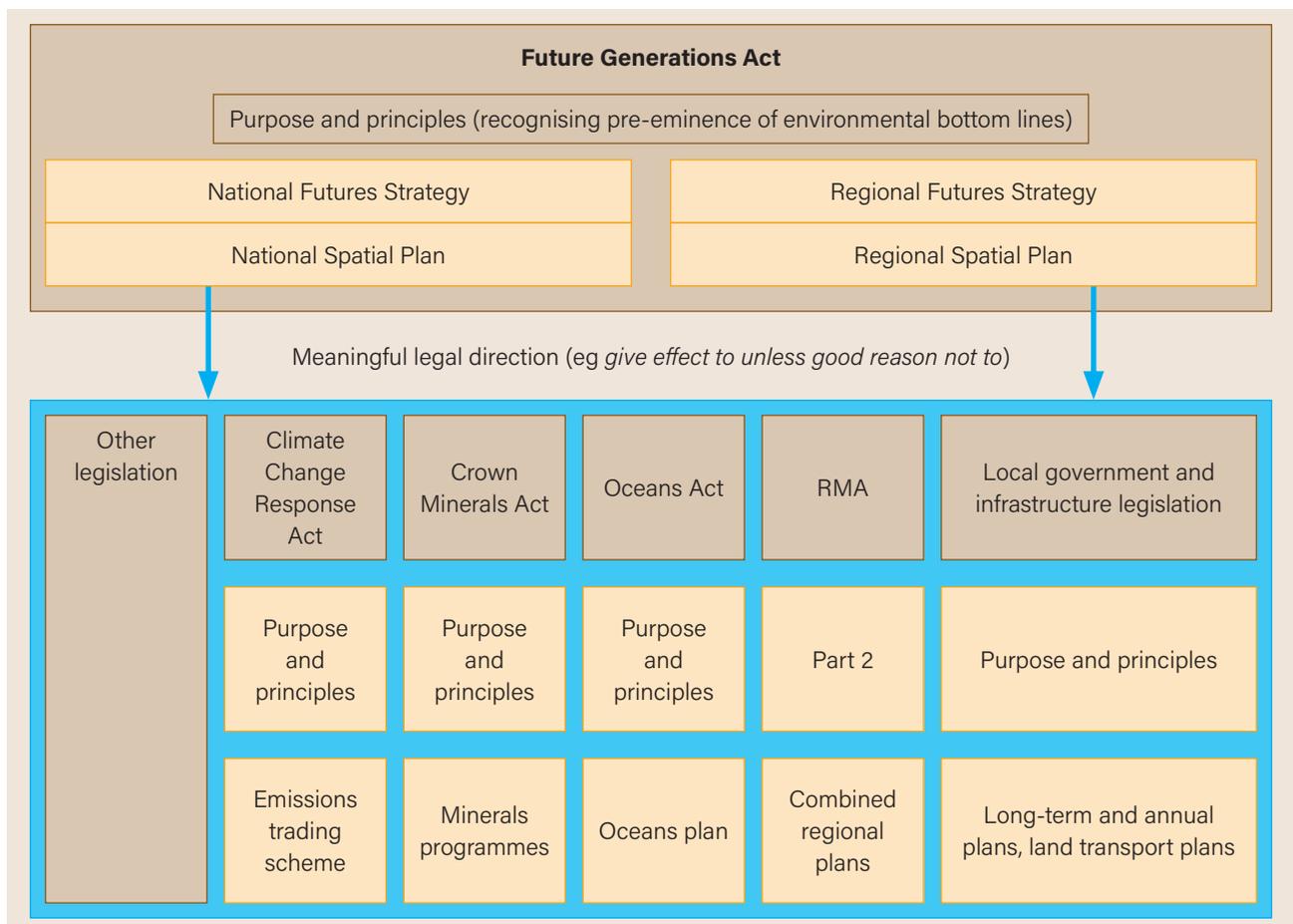


Figure 8.2: The relationships between strategic instruments under a Future Generations Act and other frameworks

8.6 How would strategies and spatial plans be developed?

If futures strategies and spatial plans are to have real legal influence (even if they are not absolutely binding), the process for creating them needs to be robust. It cannot simply be another round of strategising that emerges from locked rooms within government departments. How the purpose and principles of the Future Generations Act are drafted will also be significant, because those will be powerful drivers behind what strategies look like. We welcome suggestions for drafting.

A spotlight on the creation of futures strategies and spatial plans

We envisage that a National Futures Strategy, and its expression in a spatial plan, would be developed in a collaborative manner. It would be led by responsible Ministers (forming a Cabinet sub-committee). Departmental support and advice would be provided under the umbrella of the “Futures Group” mentioned earlier in this chapter. That would be a standing group of officials from various relevant government departments, chaired by a senior official from the Department of the Prime Minister and Cabinet. The point would be to break down institutional siloes at the highest level.¹¹⁷

Again, there would be no new functions given to central government here. It would simply be a way to ensure the vast amount of strategic planning already occurring came together in a coherent fashion, reflecting the “silo busting” intent behind wider state sector reforms.¹¹⁸ The first task here would be to ensure that environmental bottom lines were given effect to in the strategy, reflecting the purpose of both the Future Generations Act and implementation acts like the RMA.¹¹⁹

However, this would not be a closed-door government exercise. The strategy would be co-developed with Māori (while acknowledging the difficulties in determining what such a group would look like at the national level).¹²⁰ Advice would be proactively sought in that process from local government, the Infrastructure Commission, and infrastructure providers. We could look to Sweden for inspiration on this front. There, an All-Party Committee on Environmental Objectives has been established to pursue national environmental targets, which works with experts, stakeholders and local government.¹²¹

A National Futures Strategy would then be publicly notified, and submissions received. There would be an independent review under the auspices of the Futures Commission and Tikanga Commission/ commissioners, which would provide an assessment of consistency with the purpose and principles of the Act. In the short to medium term (prior to greater institutional integration), other independent institutions (the Parliamentary Commissioner for the Environment, Climate Change Commission, and potential Freshwater

Commission) would also feed into that review.¹²²

The government would be required to respond to recommendations made, and justify why they had been accepted or rejected. A final decision would be made by Cabinet, and the strategy would be promulgated by order in council.

Regional futures strategies and associated spatial plans would be developed in a conceptually similar manner, but with different actors involved. While it would not be the only thing they would do, such strategies and plans would be crucial for managing urban issues in an integrated way, especially in areas experiencing or expecting rapid growth (eg mapping strategic growth corridors and sequenced land release).

Councils within a region would lead the development of these instruments, but it would be a collaborative exercise alongside mana whenua and CCOs. Again, the first job would be to ensure that environmental bottom lines were given effect to. As at the national level, advice would be proactively provided by the Infrastructure Commission and infrastructure providers (including requiring authorities and Kāinga Ora – Homes and Communities). The Crown would also be actively involved, not least in its capacity as the partial funder for some measures (eg transport infrastructure) and the planning authority for others (eg new schools and hospitals). The instruments would then be publicly notified, and submissions received. Again, there would be an independent review under the auspices of the Futures Commission and Tikanga Commission/ commissioners, as outlined above. Final sign off would be by councils and mana whenua.¹²³ Both national and regional level instruments would need to be reviewed periodically, potentially to align with environmental reporting timeframes.¹²⁴

Strategies and spatial plans would have varying levels of detail, and this would not be prescribed. Some areas may require quite elaborate provisions (including detailed mapping), whereas others may not. A lot of conversations have focused on areas experiencing rapid urban growth, and the need to unlock land for development in an integrated and timely way. That is undoubtedly important.

But the trigger for spatial planning here would not just be about the pace of urban growth.¹²⁵ Many other kinds of pressures warrant a meaningful strategic and spatial assessment of how we are using and protecting resources, including slower urban creep, implications for productive (food producing) land, and active measures to address (and adapt to) climate change. In fact, some form of integrative strategy and spatial plan would be mandatory (rather than trigger-based), recognising two things: that we should not wait until issues are manifest before thinking about how to address them, and that we need to actively provide for positive change. It would recognise that all regions are different, and that strategic approaches and partnerships may differ too. As the New Zealand Initiative has pointed out, “A blanket policy set by the central government can never adequately cope with the specific requirements of the regions”.¹²⁶

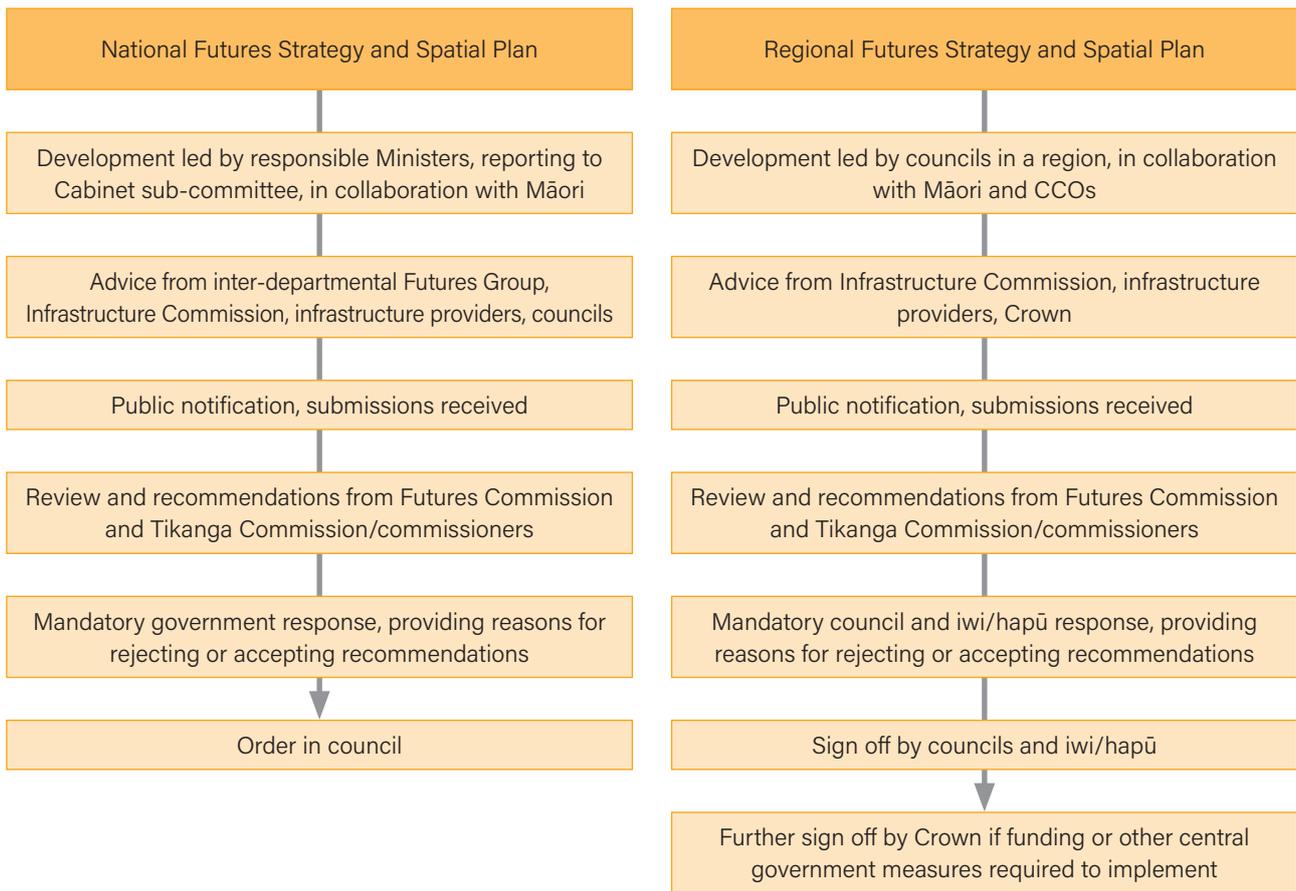


Figure 8.3: Process for creating futures strategies and spatial plans

8.7 Relationships between national and regional instruments

Regional strategies would not be required to give effect to a national strategy. The latter would influence/direct central government decision-making, and the former would influence/direct local government. In other words, national instruments would not be a “back door” for central government to influence local decision-making directly in ways it previously could not. For example, there would be no requirement for councils to directly give effect to a National Spatial Plan in their RMA plans or their long-term plans; the appropriate pathway would be for central government to reflect a national spatial plan within an NEP, and for councils to then give effect to the NEP. The purpose would be less about hierarchy and more about alignment within each level of government.

But what about the reverse? Should central government be bound to give effect to *regional* spatial plans? Certainly not as a blanket rule. Councils should not be able to bind the government within spheres of central government decision-making (especially funding decisions). However, if the government was involved in the regional spatial planning process, Crown funding was central to the success of the plan, and it was formally signed off by a responsible Minister,¹²⁷ there may be a case for the government to be obliged to follow through on an agreed regional spatial plan in the same way as councils would be. In reality, that may not be so different to a more structured, broader reaching and durable version of the Auckland

Transport Alignment Project, or a statutory concept of negotiated “city deals” between central and local government.¹²⁸ Some degree of long-term consistency and predictability is required over time, based on apolitical legislative principles, not sharp policy swings.¹²⁹

The same logic could apply to cross-regional spatial planning exercises, where an area’s values or features might be of national importance, but span multiple tenure types (eg Crown and private land), central and local jurisdictions, and different legislative frameworks. The Mackenzie Basin may be a good example of this (see spotlight below), where interests in land are private, public and pastoral leasehold; where many different government, council and other groups are involved; and where there are multiple legal frameworks to navigate and coordinate. A spatial planning regime might be a place where an overall integrated approach to managing such an area could be sketched out through agreement between partners, and then be directed by law (to some degree) to implement it using tools under other frameworks.¹³⁰ There is a pressing need for a framework to coordinate agency and community actions and resources, especially in the context of biodiversity.¹³¹ Similarly, the Crown may have a vital role in the success of inter-regional spatial planning in the context of urban growth. We consider this in the spotlight further below. More generally, there would be a strong case for national and regional strategies to have particular regard to each other.¹³²

A spotlight on the Mackenzie Basin: Spatial planning for a drylands protected area

The Mackenzie Basin is an expansive inter-montane basin in the central South Island. It has outstanding landscape and high ecological values. It is also an area with, among other things, a rich history of pastoral farming. The human interactions that have occurred on the land for generations have in part formed the landscape we see today; however land use is changing and is no longer compatible with that landscape. The RMA has not been able to pre-empt this change, and consequently has not been able to adequately protect the landscape from negative change.

An integrated approach is required to manage landscapes such as the Mackenzie Basin. The area is a patchwork of freehold, Crown pastoral lease and public conservation land that spans the jurisdiction of two territorial authorities, a regional council, and numerous central government agencies. The protection of such landscapes could be improved through a cross-jurisdictional spatial planning exercise – outlining a common vision – that is then implemented through the coherent deployment of tools in a number of “implementation” statutes. In the Mackenzie Basin, this would allow for activities that have shaped the landscape, such as pastoral farming, to occur in some areas while ensuring full ecological protection in others.

The overarching concept of a Heritage Area Order was briefly discussed in Chapter 6. That is one tool among many that could be deployed to realise a broader vision in a spatial plan. In short, Heritage Area Orders would be promulgated as a new tool under a revised RMA for landscapes of national significance (using a process similar to that for Water Conservation Orders). Once designated, the entire Heritage Area would be overlaid with a protective purpose that would guide decisions on both plans and consents under the RMA. The Order would specify values that need to be protected, and activities that must be restricted or prohibited to protect these values. Compliance with the Order would need to be demonstrated when granting resource consents for activities within the Heritage Area. However, the value of a spatial plan would be that it would flow through into other necessary mechanisms not contained in the RMA. For example, it would guide associated funding decisions made under local government legislation, as well as budget bids and financial planning by relevant central government agencies. It would influence connected decision-making under conservation legislation, given that public conservation land would comprise an important ecological core of a drylands heritage area. It would also influence decision-making under the Crown Pastoral Land Act, relating to permissions for activities on pastoral leasehold land (and any future replacement for tenure review).

A spatial plan would thus provide for areas of stricter control for areas of ecological, landscape or other national significance. The current government is

intending, for example, to create a Mackenzie drylands protected area to ensure protection of threatened dryland ecosystems across their full ecological sequence. This could be identified in the spatial plan as an area to be managed as public conservation land under dedicated (and more integrated) conservation legislation (discussed in Chapter 12).

A spatial planning exercise would prompt the supply of supportive measures from central and local government. This would include funding and resourcing commitments. For example, it is envisaged that there would be dedicated and integrated resource for monitoring and compliance across the different tenure types and jurisdictions in the area, to ensure both public and private land is being managed in accordance with the vision.

Management responsibilities (ie institutional responsibilities) for parts of the area would not change. Private land would still remain under the control of local authorities and landowners, and conservation land would be the responsibility of the Department. However, we consider that a single agency (a Trust or Forum with a representative Board) is required to coordinate action, identify where certain activities (such as farming) must be restricted, and provide strategic direction. The Trust/Forum would therefore be in charge of designing and implementing the spatial plan for the area as well as distributing funding. There could usefully be provision within a Future Generations Act for such cross-cutting institutional arrangements to be formalised and tailored to the needs of an area which merits spatial planning, although it would not be able to alter the ultimate institutional responsibilities enshrined in more specific legislation (eg functions under the RMA, Crown Pastoral Land Act, local government legislation or conservation legislation).

The conceptual role of a spatial plan here would be not dissimilar to that currently existing for the Waitākere Ranges as a result of bespoke legislation: the Waitākere Ranges Heritage Area Act 2008, although that is much wider in scope and effect. The legislation establishes the Waitākere Ranges Heritage Area, and sets out objectives for its management. These include the protection and enhancement of its features (such as its prominent indigenous character, and different classes of natural landforms) for present and future generations. It has links to the RMA: for example, councils must give effect to these objectives, and the purpose of the Act, when making planning or policy decisions under the RMA. The Act also provides provision for the development of Local Area Plans, which outline how the Act's objectives will be met. However, as the provisions contained in these Plans do not have to be implemented by either the Council or landowners, they lack teeth. Other statutory frameworks are therefore influenced by a broad set of purposes and principles in legislation, not more detailed spatial plans that outline, for example, where some things should and should not occur or where funding must be deployed to support regulatory measures.

The Waitākere experience provides an example that can be built on and improved in a new approach to cross-jurisdictional spatial planning. We consider that, in order to be effective, a spatial plan produced for the Mackenzie Basin and other similar areas should be a mandatory consideration in decision-making. Indeed, we have suggested that spatial plans under a Future Generations Act should be given effect to unless there were good reason not to, or at least be given particular regard to.

Overall, formalising a regional spatial planning framework provides a flexible and cohesive approach to managing landscapes across a range of tenures and jurisdictions (and not just in urban areas experiencing growth pressures) without upsetting the valuable focus provided by more targeted “implementation frameworks” like the RMA. It resonates with our previous work, where we have recommended the development of strategic plans for nationally important landscape areas, detailing clear responsibilities and funding sources for their implementation.¹³³

A national strategy and spatial plan would not be binding on regional ones as a matter of law – they would be integrative within each level of government, not hierarchical between levels of government. However, if all partners agreed, there would be a case for them to be obliged, to some degree, to follow through.

8.8 The importance of integrating planning and funding

Money would be a crucial consideration in developing strategies and spatial plans. These instruments (especially in some urban areas, but also in other areas like the Mackenzie Basin described above) would come with significant cost implications, including for infrastructure. Funding would be provided by different actors, too, and would need to be aligned. While the strategic planning process would not be *accompanied* by funds, nor could it realistically bind institutions to provide funds later, it would be important that it was at least *informed* by realistic propositions for later funding. Indicative funding sources should therefore be clearly indicated, including where costs are to be shared between agencies or between general populations and those who benefit or use services.¹³⁴ As we have previously said, “If the financial component of a plan falls through ... then the remaining regulatory component may not be enough to achieve the objective sought”,¹³⁵ and others have shared a similar sentiment in that “local organisations can plan, but with little funding have no certainty as to whether plans can be delivered”.¹³⁶ That is one reason why there would need to be involvement from key funders in the development of strategies and spatial plans. For example, the non-statutory Sea Change – Tai Timu Tai Pari Marine Spatial Plan provided for councils to

take direct measures like the construction of significant new wetland systems (to trap sediment in catchments).¹³⁷ For the plan to be successful, it therefore required a funding commitment, not just an agreement to regulate.

Ad hoc funding arrangements may always be needed for unanticipated events (or in a system that will inevitably require some political grandstanding from time to time), but this is becoming an increasingly concerning feature of the basic system.¹³⁸ Ad hoc funding is particularly acute in the urban context (eg for transport and water upgrades). Having indicative funding for public infrastructure contemplated in a spatial plan would at least give some predictability that land use change – or even maintaining a land use – would be supported by the physical “stuff” needed to realise it in practice.

Futures strategies and spatial plans should be accompanied by a description of anticipated costs, and where funding is envisaged to come from.

We would anticipate that most institutions’ strategic energy would go into this process, and be channelled away from separate, siloed strategic exercises (eg under local government legislation). However, those would by no means be precluded or replaced. They would remain valuable, including as inputs to the strategies and spatial plans envisaged here (and including proactive and creative forms of targeted community engagement).

It is worth making one more specific note about the relationship between regional futures strategies and regional policy statements under the RMA. We referred to this in the previous chapter, noting that regional policy statements form a crucial layer in the system. They are integrative (at least for policy matters governed by the RMA), and they provide stability by not being subject to private plan changes.¹³⁹ However, if we have a *more* integrative mechanism at a regional level (futures strategies and associated spatial plans), is there a need to retain this additional layer in the system? Arguably we could dispense with the regional policy statement and simply require unitary plans to give effect to a regional strategy/spatial plan. The two could be duplicatory.

In the context of the Auckland Plan, it was seen as important to retain the regional policy statement layer within a unitary plan, despite the existence of a higher level spatial plan. The Auckland Plan was not a meaningful substitute for an instrument made under the more focused and robust processes and purpose of the RMA. Similarly, in Christchurch, a voluntary urban development strategy formulated between multiple authorities (which can be seen as a spatial plan) then needed to be translated into a regional policy statement under the RMA (including urban limits).¹⁴⁰

It is open for debate whether that additional step would still be desirable or necessary if we were to place a more formal process around the development of the higher level strategy. That said, while having an additional layer

of planning may strike some as inefficient, the RMA would retain a more targeted purpose and principles than a Future Generations Act. The regional policy statement can be seen not just an integrative mechanism, but as a focused and ultimately protective set of policies that filter down into more specific rules and policies. One option would be for regional futures strategies to give effect to it rather than to replace it.¹⁴¹

It would be possible to replace regional policy statements under a revised RMA with regional futures strategies created under a Future Generations Act. This would be to address concerns that the two would be too duplicatory. Alternatively, a more focused regional policy statement could be required to be given effect to in regional future strategies.

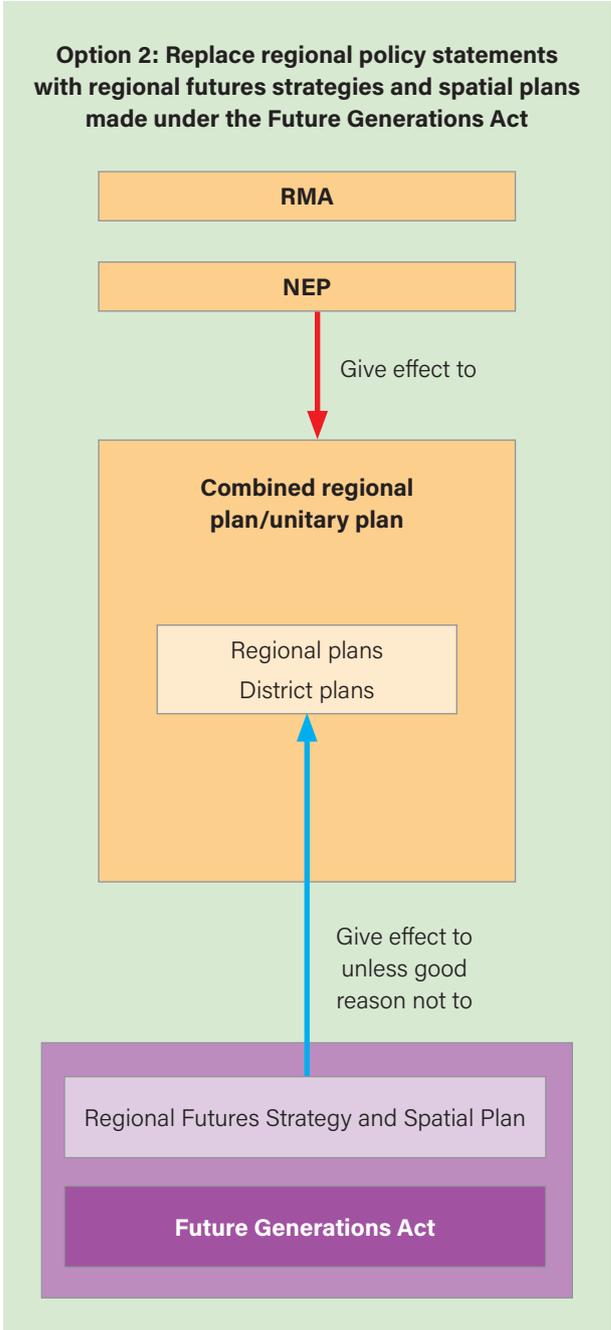
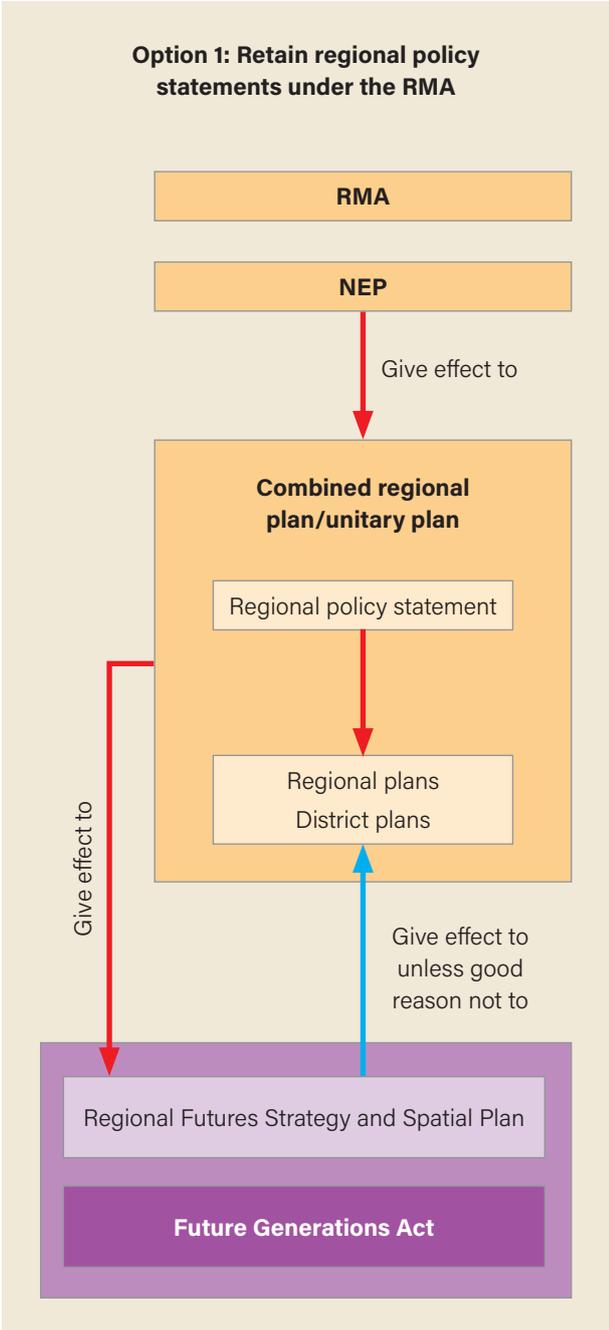


Figure 8.4: Two options for regional level strategy in a future system

A spotlight on spatial planning and urban growth

One of the key drivers for strategic spatial planning (as well as proposals for an integrated Planning Act)¹⁴² has been the desire to take an integrated approach to urban areas like Auckland, Hamilton, Tauranga, Queenstown and Wellington.¹⁴³ These metropolitan areas are growing rapidly, presenting a unique set of challenges as a result. One of the most concerning ways in which this has manifested is in increasing housing unaffordability, especially for vulnerable sectors of society. It has been pointed out, for example, that since the 1980s housing costs for low income New Zealanders have doubled as a proportion of their income.¹⁴⁴

In particular, there is a need to align the contributions of various institutions (councils and central government) across multiple statutory functions (eg land use change, housing provision, network infrastructure, related community services etc). One does not work without the others. Spatial planning within the Auckland region has already occurred under bespoke legislative arrangements, but the need does not stop there.

The most significant inter-regional spatial planning exercise New Zealand has seen is underway to manage growth and development along the corridor between Hamilton and Auckland. This is a partnership under the leadership of central government. There have also been agreements between local government and the Crown to align planning and funding responsibilities for key infrastructure (eg through the Auckland Transport Alignment Project), and more general ad hoc measures to fund infrastructure to support urban growth (eg through a competitive Housing Infrastructure Fund). Attempts have also been made to connect up decision-making through specific statutory frameworks (eg the NPS on Urban Development Capacity has talked about the need for coordination and to consider related decision-making processes), even though that has no real ability to require it.¹⁴⁵ Similarly, the Local Government Act requires councils within a region to agree to protocols for communication, co-ordination and dispute resolution (triennial agreements) to avoid duplication of services or functions.¹⁴⁶ But decisions under one act cannot bind decision-makers under another, and there is still a risk that:¹⁴⁷

a nationally significant project may be a priority in [a] spatial plan but have no recognition under the RMA or [the Land Transport Management Act]; [and] a regionally significant project may have priority in a [regional land transport plan] but not be funded in the local council's long-term plan.

The necessary alignment has therefore yet to be built into the fabric of the resource management system as a whole, and continues to be subject to ad hoc negotiations, partnerships, and the political prioritisations of different parties. This lack of

coordination can be seen in action in the context of mass transit proposals for Wellington City, where despite a promise of a Crown contribution and commitment to the project, it is still unclear where the council's side of the funding is to come from.¹⁴⁸ In relation to the Auckland to Hamilton spatial planning exercise, some have pointed out that it is "operating outside of planning and governance statute, leaving it heavily dependent upon commitment from the Government of the day".¹⁴⁹

A legislated process for regional (or even inter-regional) spatial planning under a Future Generations Act would provide a space for relevant decision-makers to come together under a common set of principles and develop a robust, integrated, legally meaningful and reasonably durable strategic plan for urban growth and development. Incidentally, there may, then, be no need for more siloed tools like future development strategies (required by RMA national direction), which would perform a similar function.

The role of the Futures Commission, it is to be hoped, would also assist in depoliticising issues and providing a degree of stability around long-term planning and funding. On the other hand, it is worth noting that the potential for an urban development authority to be given wide powers to override spatial plans, as well as a raft of RMA instruments, has potential to undermine that stability. As discussed in Chapter 10, we have some serious misgivings about the extent of powers that have been proposed for them.

Regional spatial plans dealing with rapid growth would contemplate not just land use change (eg the release of land for development in specified growth corridors) and the infrastructure required to make that happen (eg water pipes to allow houses to be actually occupied), but also the need to make sure outcomes are being optimised. For example, plans may need to provide for public transport nodes (eg light rail) to be funded and delivered in a timely way around areas slated for residential density (which, for example, may not have requirements for car parking). One does not really work without the other. Thus considerations of good urban design and synergies (and, ultimately, the purpose of the Act) should drive urban spatial planning, not just the need to have separate decisions happening at the same time.¹⁵⁰

There are also more systemic questions to be considered, concerning how urban growth, notably enabling infrastructure, is to be funded, not just coordinated. More may be needed than futures strategies and spatial plans to ensure that the right things can be (and are) actually paid for in a timely way. This is in two senses: (1) that enough money is in the pot to fund what needs to be put in place and (2) that appropriate incentives are in place for funders to do so in practice.

A lot of this conversation revolves around how *councils* are funded, and whether a system largely dependent on local rates continues to be appropriate. Some (such as the Productivity Commission) have expressed an

initial view that only targeted changes are required on this front,¹⁵¹ while others have proposed a more far-reaching overhaul of how growth and development is paid for.¹⁵² For example, it has been alleged that a need to tax *existing* residents for the substantial costs of infrastructure for *new* residents leads to (understandable) resistance from councils to embrace urban growth, or an incentive to provide infrastructure on a “just in time” basis.¹⁵³ Many councillors campaign specifically to keep rates down.

Funding in this context is considered further in Chapter 10. But we emphasise that any effort to align planning and funding (eg through spatial planning) that is not itself binding as a matter of law will need to carefully consider the underlying incentives on actors to actually follow through and implement it in other frameworks. That is not just about the incentives provided by funding mechanisms (eg rates); it is also about incentives on local government to follow through on changes to RMA instruments (eg providing for urban growth through intensification of low density suburbs – the so called “nimby” issue).¹⁵⁴ Again, it is to be hoped that a role for the Futures Commission in RMA planning (akin to the role the Independent Hearings Panel played in Auckland), and a more nuanced set of matters in Part 2 of the RMA, will assist.

A spatial planning framework for urban growth could usefully be complemented by changes to more targeted frameworks like the RMA and local government and infrastructure legislation. A spatial plan can outline what should happen when, and indicate how it is to be paid for,

but cannot integrate the actual processes by which those things happen under other frameworks. For example, it has been pointed out that:¹⁵⁵

district plan processes can take years and in many cases up to a decade or more to complete. Meanwhile council annual and ten year plans [under the Local Government Act] run separately from three yearly National Land Transport Programme planning cycles [under the Land Transport Management Act].

While different processes for each are inevitable given the different nature of the roles, these should be aligned more closely in a future system as far as possible. As mentioned already, we also see merit in going further and integrating the Local Government Act with the Land Transport Management Act (and proposed Water Services Act), to form a single statute dealing with the infrastructure planning and funding issues relevant to urban growth. In that case, there would be fewer inter-statutory connections to be managed through a higher level spatial planning regime.¹⁵⁶

Alongside robust strategic and spatial planning, there would be a case for further aligning decision-making processes under more targeted statutes that would implement it. In particular, land use planning and infrastructure funding should occur in a more connected manner. It may make sense to integrate the Local Government Act with the Land Transport Management Act (and any separate water services legislation) in a Local Government and Infrastructure Act.



8.9 What are the limits of spatial planning?

It is worth re-emphasising at this point that spatial planning is not just about managing urban growth. One may be forgiven for thinking this is the case. For example, the government's work on spatial planning seems to be primarily located within its "urban growth agenda" work programme.¹⁵⁷ But many other issues and challenges are spatial in nature, and could benefit from greater joined up strategic planning at a high level. For one, climate change adaptation and managed retreat (for key industries, people in all areas, and infrastructure) will require this. So too will issues around how we manage all sorts of land uses at national and regional levels, including outside cities. Do we leave such choices only to the market?

That is still something of an uncomfortable topic compared to the narrower context of urban growth. It raises not just questions of how to align the well-settled roles of the public and private sectors (ie to *coordinate* land use, infrastructure and buildings), but also questions around what the role of public intervention is. *Should* public spatial planning be concerned with prioritising certain land uses irrespective of their adverse effects? To what extent does there need to be a national interest (eg an increase in economic or social resilience, or enhancement of a degraded environment) in order to do so?

For example, should spatial planning broadly identify suitable (or unsuitable) locations for new forestry, aquaculture¹⁵⁸ and agriculture, rather than saying "yes" or "no" based on the ability of proponents to address adverse effects? And what about energy and landscape concerns – where might we *want* to put wind farms to meet climate change and energy security aims (rather than just thinking about where we *don't* want them)?¹⁵⁹ Such ideas can grate with the largely neo-liberal ethos of the system we have, even if a spatial plan would not have regulatory effect..

Other people have seen the very concept of an overarching framework like this as an excuse for central planning, and a return to the days of the National Development Act 1989. National level spatial planning is sometimes in practice called something else (eg strategy or policy direction),¹⁶⁰ perhaps to avoid such uncomfortable allegations of an overpowering central authority. While we do see a greater, more coherent role for central government to do strategic (and spatial) planning under the Act, it is not the intention to expand the Crown's *powers* in any significant sense or to override more specific frameworks like the RMA, particularly where environmental bottom lines are at stake. In fact, the very opposite is the intention.

Real care needs to be taken in this model to ensure the development-oriented aspects of futures strategies (eg wind farms, transport networks, other infrastructure) do not override environmentally protective ones. We do not want a government prioritisation of, for example, mining, intensive road building, or agricultural expansion in a strategic document to override environmental concerns under, say, the RMA. We have had enough of that in the

past,¹⁶¹ and there would be little point in strengthening Part 2 of the RMA if that were the case. We cannot have a system-wide "overall judgement" approach (deferring to a more general, balanced set of concerns to override more specific bottom lines) to reappear at a system level after this was so deftly put to bed in *King Salmon*. Indeed, there is a real risk that this will happen with a proposed urban development authority model (see Chapter 10), and we do not want to open that up more broadly. Nor do we want urban planning to be driven solely by transport planning.

Safeguards would therefore need to be put in place. The clear articulation of the primacy of the environment in the purpose of a Future Generations Act is one way in which that would be ensured. Bottom lines would need to be given effect to in any futures strategies and spatial plans. The ability for more targeted frameworks like the RMA to depart from futures strategies, to the extent of any conflict, would be another safety valve. The role of the Futures Commission in the development of futures strategies, with an inter-generational environmental focus and independent voice, would be a third.

However, we also suggest that "development" and "environment" concerns should be considered alongside each other within a Future Generations Act, not just ringfenced as separate things. This would be to encourage mutual benefits in design (eg green infrastructure, energy sensitive buildings, climate sensitive energy options, where different forms of forestry are best located), rather than just providing a set of statements about protecting the environment *from* development. In the future, spatial planning will need to insert strong environmental



considerations (including opportunities for enhancement) into the earliest phases of project development, and many synergies are possible here.¹⁶² As we pointed out in Phase 1, environmental considerations “can usefully influence how a [public] proposal looks right from the start, to remove inappropriate features (eg culverting urban streams ...) and pursue synergies”.¹⁶³ This “greening” of our statutes could usefully filter down to other frameworks too – such as more directive provisions within, for example, local government, building and infrastructure legislation.¹⁶⁴

National level spatial planning would not be about giving central government greater powers. It would be about coordinating the use of existing powers, including under specific statutory frameworks, towards a more joined-up end point. It would certainly not be an opportunity for a development-minded government to override environmental considerations, and safeguards in the Act would make this clear.

8.10 Concluding comments

In this chapter we have considered the place of a Future Generations Act in a reformed system. We would envisage this having two roles. The first would be to provide an

overarching set of principles/duties to guide all forms of public decision-making, to ensure that cross-cutting environmental considerations are considered in all places where it counts. No longer can we afford to treat many environmental matters as the sole preserve of “environmental” (ie restrictive) frameworks like the RMA; they need to infuse all aspects of public (and corporate) decision-making if we are to make improvements and pursue synergies. Climate change is one key cross-cutting concern, and biodiversity is another. As the Biodiversity Collaborative Group has said, “Success in arresting biodiversity decline ... requires integrating and aligning wider government policy, institutional arrangements and regulations. Otherwise we run the risk of one initiative negating or impeding the other”.¹⁶⁵

The second role of the Act would be to establish a framework for strategic and spatial planning at national and regional (and potentially cross-regional) levels. These plans would percolate down into multiple layers of more targeted decision-making, such as the RMA and a Local Government and Infrastructure Act. In particular, regional spatial planning would be key to coordinating land use planning with infrastructure planning and funding, especially in areas experiencing rapid urban growth. We look at aspects of infrastructure – and the built environment more broadly – in the following chapter.



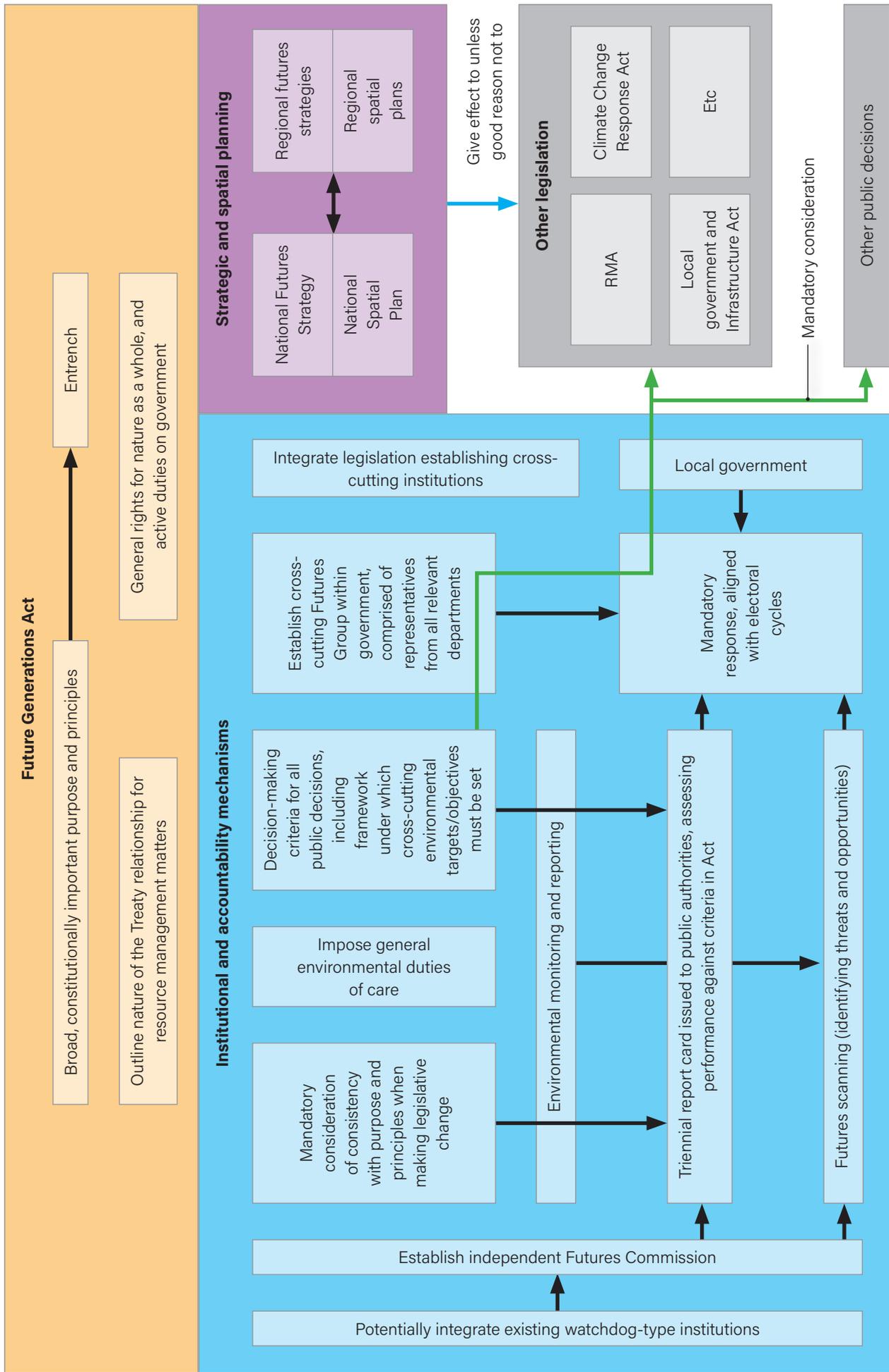


Figure 8.5: Key components of a Future Generations Act

ENDNOTES

- 1 For example, in legislation focused on waste, hazardous substances, biosecurity, conservation, oceans etc.
- 2 For example, separate legislation focused on infrastructure and urban development.
- 3 For example, focus can be provided by having targeted business units within wide ranging government departments.
- 4 See <<https://ssc.govt.nz/resources/changes-state-sector-act-1988/>>
- 5 See <www.mfe.govt.nz/rma/improving-our-resource-management-system>
- 6 See G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 97.
- 7 In that an authorisation obtained under other acts (eg conservation concessions, mining permits) does not usually remove the need to obtain RMA permissions.
- 8 G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 46; World Economic Forum *The global risks report 2018* (World Economic Forum, 2018); J Diamond *Collapse: How societies choose to fail or survive* (Penguin, 2011).
- 9 Future generations encompass both people and nature.
- 10 Canadian Environmental Protection Act 1999, preamble.
- 11 Although that is something that could develop in parallel.
- 12 Compare Ecuadorian Constitution, art 71.
- 13 See G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 231. See generally C Iorns Magallanes "From rights to responsibilities using legal personhood and guardianship for rivers" in B Martin, L Te Aho and M Humphries-Kil (eds) *ResponAbility: Law and governance for living well with the Earth* (Routledge, 2018).
- 14 The Act could, for example, provide mechanisms to clarify expectations of how Crown and Māori would work together under other frameworks.
- 15 See G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019), ch 5.
- 16 Ibid at 125. On the durability (or not) of legislative frameworks, see G Palmer "Law-making in New Zealand: Is there a better way?" (2014) 22 *Wai L Rev* 1 at 3.
- 17 See Simpson Grierson *The statutory framework of New Zealand's local government sector: Is the key legislation working properly?* (Simpson Grierson, 2016); New Zealand Productivity Commission *Better urban planning* (2017) at 93 and 94; New Zealand Council for Infrastructure Development (now Infrastructure New Zealand) *Integrated governance, planning and delivery: A proposal for local government and planning law reform in New Zealand* (2015) at 44; Legislative Design and Advisory Committee *Legislation guidelines: 2018 edition* (2018) at 10.
- 18 New Zealand Council for Infrastructure Development (now Infrastructure New Zealand) *Integrated governance, planning and delivery: A proposal for local government and planning law reform in New Zealand* (2015) at 34.
- 19 Ibid at 125, 224.
- 20 See Chapter 10.
- 21 G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 225. See also See also C Smith *Treasury living standards dashboard: Monitoring intergenerational wellbeing* (2018); Treasury and Statistics New Zealand *Indicators Aotearoa New Zealand* (2018).
- 22 See H Rutherford "NZ Super Fund to cut fossil fuels, makes 'fundamental shift' to prepare for climate change" *Stuff* (19 October 2016) <www.stuff.co.nz>
- 23 For example, in the concept of a wellbeing budget and associated living standards framework.
- 24 M Petrie "Reversing the degradation of New Zealand's environment through greater government transparency and accountability" (2018) 14(2) *Policy Quarterly* 32 at 37.
- 25 <www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=12244139>
- 26 Compare *Report of the Biodiversity Collaborative Group* (2018) at 90: "policy, investment, and development decisions should be required to consider impacts to determine consistency with objectives to maintain indigenous biodiversity".
- 27 Well-being of Future Generations (Wales) Act 2015 (UK), ss 2, 3(1).
- 28 For example, a decision to invest in electric vehicle infrastructure.
- 29 For example, this would be relevant in terms of allocative outcomes and who should bear the cost of restoration action.
- 30 Compare MA Brown and others *Vanishing nature: Facing New Zealand's biodiversity crisis* (EDS, 2015).
- 31 Which might cross-reference other legislation (eg the RMA), or might outline general targets to be fleshed out in more targeted statutes.
- 32 OECD *Environmental performance review – New Zealand* (2017).
- 33 See M Petrie "Reversing the degradation of New Zealand's environment through greater government transparency and accountability" (2018) 14(2) *Policy Quarterly* 32 at 35.
- 34 Ibid at 35.
- 35 For example, Resource Management Act 1991, s 104(1)(c).
- 36 Compare MA Brown *Evaluating the environmental outcomes of the RMA* (EDS, 2016), where we pointed out that a lack of effective strategy and oversight of decision-making has reduced the potential to protect environmental values, including the capacity to manage cumulative effects.
- 37 For example, the "Natural Resources Sector" grouping of agencies.
- 38 New Zealand Productivity Commission *Better urban planning* (2017) at 393.
- 39 See Infrastructure New Zealand *Building regions: A vision for local government, planning law and funding reform* (2019) at 3, 21. Compare *Report of the Biodiversity Collaborative Group* (2018) at 87.
- 40 New Zealand Productivity Commission *Better urban planning* (2017) at 51.
- 41 G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 169.
- 42 In the same spirit, but narrower application, some have suggested having a single government department responsible for the RMA, Local Government Act and Land Transport Management Act.
- 43 On the importance of formality of creation for durability, see G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 171.
- 44 A Futures Group would be given a statutorily defined mandate.
- 45 On the need to change how government agencies work together, compare *Report of the Biodiversity Collaborative Group* (2018) at 89, 91.
- 46 See <www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=12244139>
- 47 <<https://ssc.govt.nz/resources/changes-state-sector-act-1988/>>. For a focus on outcomes rather than "services", see Infrastructure New Zealand *Building regions: A vision for local government, planning law and funding reform* (2019) at 34.
- 48 Ibid.
- 49 On reasons for institutional independence (including to enhance accountability of other institutions), see G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 165. Compare New Zealand Productivity Commission *Better urban planning* (2017) at 51.
- 50 G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 175.
- 51 Infrastructure New Zealand *Building regions: A vision for local government, planning law and funding reform* (2019) at 32.
- 52 Ibid. Compare J Diamond *Collapse: How societies choose to fail or survive* (Penguin, 2011) at 434: governments "regularly operate on a short-term focus: they feel overwhelmed by imminent disasters and pay attention only to problems that are on the verge of explosion".
- 53 Although see Chapter 13 on issues with the adequacy of the information base on which our understanding of environmental issues and trends is based.
- 54 New Zealand Bill of Rights Act 1990.
- 55 See G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 286; Resource Management Act 1991, s 36AA.
- 56 On the need for more robust evaluation of public authorities' performance (including in relation to enforcement), see MA Brown "Compliance, monitoring, enforcement and evaluation" in G Severinsen and R Peart *Reform of the resource management system: The next generation – Working paper 3* (EDS, 2018) at 197.
- 57 G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 286. On shortcomings in enforcement, see MA Brown *Last line of defence: compliance monitoring and enforcement of New Zealand's environmental law* (EDS, 2017); MA Brown *Independent analysis of the 2017/2018 compliance monitoring and enforcement metrics for the regional sector* (The Catalyst Group, 2018).
- 58 M Petrie "Reversing the degradation of New Zealand's environment through greater government transparency and accountability" (2018) 14(2) *Policy Quarterly* 32 at 35.
- 59 See MA Brown "Compliance, monitoring, enforcement and evaluation" in G Severinsen and R Peart *Reform of the resource management system: The next generation – Working paper 3* (EDS, 2018) at 184; G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 237.
- 60 MA Brown and others *Vanishing nature: facing New Zealand's biodiversity crisis* (EDS, 2015).
- 61 However, much would depend on other incentives faced by councils in making decisions, including the particular concerns of their constituents and financial considerations.
- 62 See *Indicators Aotearoa New Zealand – Ngā Tūtohu Aotearoa* at <www.stats.govt.nz>
- 63 See Chapter 9.
- 64 See Environment Act 1986, s 16. The Commissioner also has a role in responding to environmental reporting.
- 65 Building Consent Authorities are accredited and overseen by the Ministry of Business, Innovation and Employment pursuant to the Building (Accreditation of Building Consent Authorities) Regulations 2006 which require, among other

- matters, for the authority to demonstrate they have adequate staff to carry out their functions.
- 66 That, for example, could be a trigger for the transfer of aspects of plan development from council to the EPA envisaged in the council RMA planning model described in Chapter 7.
- 67 Including where central government requirements were imposed.
- 68 See generally G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 170.
- 69 And potentially general duties on local authorities to monitor and report on the state of the environment under the RMA, as well as additional monitoring obligations imposed under national direction.
- 70 For example, it could form a compulsory final chapter within a synthesis report produced periodically under environmental reporting legislation, or be a separate report issued in response to it.
- 71 Compare MA Brown "Compliance, monitoring, enforcement and evaluation" in G Severinsen and R Peart *Reform of the resource management system: The next generation - Working paper 3* (EDS, 2018) at 196.
- 72 <www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11745529>
- 73 Well-being of Future Generations (Wales) Act 2015 (UK), s 4.
- 74 See Parliamentary Commissioner for the Environment *The state of New Zealand's environment: Commentary on Environment Aotearoa 2015* (2016) at 45.
- 75 Such a duty would apply to all people.
- 76 See generally C Iorns Magallanes "From rights to responsibilities using legal personhood and guardianship for rivers" in B Martin, L Te Aho and M Humphries-Kil (eds) *Responsibility: Law and governance for living well with the Earth* (Routledge, 2018).
- 77 G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 105.
- 78 *Queenstown Central v Queenstown Lakes District Council* [2013] NZHC 815, [2013] NZRMA 239 at [79].
- 79 See G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 107, ch 13.
- 80 Compare Local Government New Zealand A "blue skies" discussion about New Zealand's resource management system (2015) at 39; I Carlman "The Resource Management Act through external eyes" (2007) 11 NZJEL 181.
- 81 See Biosecurity Act 1993, s 73(5).
- 82 See also G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019), ch 12; MA Brown *Banking on biodiversity* (EDS, 2017); Local Government New Zealand *Biodiversity offsetting under the Resource Management Act* (2018).
- 83 Resource Management Act 1991, ss 229-230.
- 84 For example "we have farmed this land for generations" or "It's my land, I can do with it what I ... please": J Diamond *Collapse: How societies choose to fail or survive* (Penguin, 2011), ch 14.
- 85 See G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019), ch 12. It is also not a solution to concerns over equity, given that public resources will be privatised by those who have the ability to pay for them.
- 86 Companies Act 1993, pt 8.
- 87 See J Diamond *Collapse: How societies choose to fail or survive* (Penguin, 2011).
- 88 D Kalderimis and N Swan *Sustainable Finance Forum Legal Opinion 2019* (Chapman Tripp, 2019), citing P Watts "To whom should directors owe legal duties in exercising their discretion? — a response to Mr Rob Everett" [2019] CSLB 49; P Watts "Shareholder primacy in corporate law — a response to Professor Stout" (ch 2) in P Vasudev and S Watson (eds) *Corporate governance after the financial crisis* (Edward Elgar, England, 2012) at 43; P Watts *Directors' powers and duties* (2nd ed, LexisNexis, Wellington, 2015) at 137.
- 89 D Kalderimis and N Swan *Sustainable Finance Forum Legal Opinion 2019* (Chapman Tripp, 2019), citing R Everett "Thinking beyond shareholders" (presentation at the NZ Capital Markets Forum, Wellington, 21 March 2019) and Lord Sales JSC "Directors' duties in a post-Hayne world: 'the company' as more than the sum of its shareholders" (Lecture for the 36th Annual Conference of the Banking & Financial Services Law Association, Gold Coast, Australia, 31 August 2019).
- 90 Companies Act 2006 (UK), s 172(1).
- 91 Acknowledgement: Daniel Kalderimis, Partner, Chapman Tripp.
- 92 D Kalderimis and N Swan *Sustainable Finance Forum Legal Opinion 2019* (Chapman Tripp, 2019).
- 93 Ibid.
- 94 Ibid.
- 95 Compare the spatial planning regime envisaged in New Zealand Productivity Commission *Better urban planning* (2017).
- 96 Many strategic documents are produced under the current system in a fairly fragmented way. For example, we have a Biodiversity Strategy, Government Tourism Strategy, Energy Efficiency and Conservation Strategy and Energy Strategy, Waste Strategy, and so forth. Specific agencies also have multiple strategies (eg the Housing New Zealand Environment Strategy).
- 97 See Infrastructure New Zealand *Building regions: A vision for local government, planning law and funding reform* (2019) at 35.
- 98 G Severinsen and R Peart *Reform of the resource management System: The next generation* (EDS, 2019).
- 99 Ibid.
- 100 Ibid.
- 101 For example, in the "golden triangle" of growth between Auckland, Hamilton and Tauranga.
- 102 See MA Brown *Evaluating the environmental outcomes of the RMA* (EDS, 2016). Such frameworks include fisheries legislation, minerals legislation, climate change legislation, housing legislation, conservation legislation. On tensions between and within statutes, see G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019), chs 8 and 14.
- 103 *Report of the Biodiversity Collaborative Group* (2018) at 88.
- 104 Or arguably not even that, for example in its failure to address damaging clear-fell harvesting methods directly or addressing issues proactively at the afforestation and replanting stage.
- 105 See M Wright, S Gepp and D Hall *A Review of the Resource Management (National Environmental Standards for Plantation Forestry) Regulations 2017* (2019).
- 106 On the need for the One Billion Trees programme to deploy new plantings in a strategic manner embracing synergies with biodiversity, see *Report of the Biodiversity Collaborative Group* (2018) at 111.
- 107 Compare the regional spatial strategies envisaged for purely urban matters in New Zealand Productivity Commission *Better urban planning* (2017).
- 108 Infrastructure New Zealand *Building regions: A vision for local government, planning law and funding reform* (2019) at 37.
- 109 Ibid, at 35.
- 110 G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 222.
- 111 Resource Management Review Panel *Transforming the resource management system: Opportunities for change – Issues and options paper* (2019) at 14.
- 112 This goes to the broader question of how local government is funded, which we are continuing to give thought to.
- 113 For example, funding for the Department of Conservation, or funding for roads of national significance.
- 114 Local Government (Auckland Transitional Provisions) Act 2010, s 145(2). Compare also the Sea Change – Tai Timu Tai Pari Hauraki Gulf marine spatial plan (2017), where the relationship with more formal legal instruments was unclear; see G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 227.
- 115 For example, they would be specifically identified as bottom lines, rather than matters that could be traded off.
- 116 Contrast one suggestion that spatial plans would be given effect to: see Infrastructure New Zealand *Building regions: A vision for local government, planning law and funding reform* (2019) at 43.
- 117 Compare Infrastructure New Zealand *Building regions: A vision for local government, planning law and funding reform* (2019) at 35.
- 118 See <<https://ssc.govt.nz/resources/changes-state-sector-act-1988/>>
- 119 Including under an NEP.
- 120 Rather than a single standing group, it could be a matter of developing alongside iwi and hapū at a regional or sub-regional level.
- 121 M Petrie "Reversing the degradation of New Zealand's environment through greater government transparency and accountability" (2018) 14(2) Policy Quarterly 32 at 35.
- 122 Again, this kind of role highlights to us the eventual desirability of integrating various independent watchdog or advisory institutions (existing and proposed), including the Parliamentary Commissioner for the Environment, Climate Change Commission, and Chief Freshwater Commissioner.
- 123 There is a question here over what would happen if no agreement could be reached, and the potential role of central government or the courts.
- 124 Environmental Reporting Act 2015.
- 125 This has been the focus of the NPS on Urban Development Capacity under the RMA, which in turn has been driven primarily by concerns around housing supply (and therefore affordability).
- 126 B Craven, J Goldingham-Newsom and O Hartwich #localismNZ: *Bringing power to the people* (2019) at 38.
- 127 On the need for the government to sign off regional spatial plans, see Infrastructure New Zealand *Building regions: A vision for local government, planning law and funding reform* (2019).
- 128 On city deals, see <www.newsroom.co.nz/2018/03/06/94600/government-lukewarm-on-wellington-city-deal#>
- 129 Compare Infrastructure New Zealand *Building regions: A vision for local government, planning law and funding reform* (2019) at 32.
- 130 That may still require novel mechanisms to implement (eg the idea of a new legal category of a Heritage Area Order, discussed in Chapter 6).
- 131 See MA Brown and others *Vanishing nature: Facing New Zealand's biodiversity crisis* (EDS, 2015). There is fragmentation of biodiversity-related planning across the Department of Conservation, councils, landowners and community groups, and across multiple statutes relating to conservation as well as the RMA and non-statutory programmes.

- 132 Consistency is desirable, but one can also imagine conflicts that could arise (eg if the government wished to provide for more renewable generation in particular parts of the country, but local government preferred to maintain local landscape or amenity values). That may be resolved in part by providing a clearer definition of subsidiarity, and the appropriate roles of central and local government, as suggested earlier in the context of the RMA.
- 133 R Peart *A place to stand: The protection of New Zealand's natural and coastal landscapes* (EDS, 2004).
- 134 Who funds what, and how, is a more systemic question that is explored in Chapters 10 and 13. The point here is that respective funding commitments need to closely inform the development of spatial plans. On proposals to change the funding arrangements of local government, see New Zealand Productivity Commission *Local government funding and financing* (Draft report, 2019); Infrastructure New Zealand *Building regions: A vision for local government, planning law and funding reform* (2019) at 15; Local Government New Zealand *Reinvigorating local democracy: The case for localising power and decision-making to councils and communities* (2019).
- 135 G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 268.
- 136 Infrastructure New Zealand *Building regions: A vision for local government, planning law and funding reform* (2019) at 3.
- 137 G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 187.
- 138 For example, in relation to transport infrastructure funding in Auckland and Wellington, and projects funded by the Housing Infrastructure Fund and Provincial Growth Fund.
- 139 Resource Management Act 1991, s 60.
- 140 See <<http://greaterchristchurch.org.nz/projects/strategy/>>
- 141 This choice will need to be cognisant of impacts on Treaty settlement legislation. For example, the Vision and Strategy relating to the Waikato River under the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 is deemed to form part of the regional policy statement. If that were morphed into a wider ranging strategy with less direct legal influence on subordinate plans, it may cause problems. Treaty settlements must be upheld in a future system.
- 142 See Chapter 5.
- 143 See generally New Zealand Government *Planning for successful cities: A discussion document on a proposed National Policy Statement on Urban Development* (2019).
- 144 Resource Management Review Panel *Transforming the resource management system: Opportunities for change - Issues and options paper* (2019) at 12, citing Ministry of Social Development *Household incomes in New Zealand: Trends in indicators of inequality and hardship, 1982 to 2017* (2018).
- 145 One objective talks about the need for "coordinated and aligned planning decisions within and across local authority boundaries". The government has proposed to make that more explicit in terms of alignment with infrastructure, and for authorities to be "strongly encouraged to work together" (New Zealand Government *Planning for successful cities: A discussion document on a proposed National Policy Statement on Urban Development* [2019] at 52). We can compare the general (and somewhat hopeful) direction in the RMA itself to "take into account management plans and strategies prepared under other acts" (s 66).
- 146 Local Government Act 2002, s 15.
- 147 New Zealand Council for Infrastructure Development (now Infrastructure New Zealand) *Integrated governance, planning and delivery: A proposal for local government and planning law reform in New Zealand* (2015) 35, 9.
- 148 <www.stuff.co.nz/national/115277636/councillor-questions-city-councils-funding-streams-for-64-billion-transport-programme>
- 149 Infrastructure New Zealand *Building regions: A vision for local government, planning law and funding reform* (2019) at 36.
- 150 On attempts to define "quality urban environments", see New Zealand Government *Planning for successful cities: A discussion document on a proposed National Policy Statement on Urban Development* (2019).
- 151 New Zealand Productivity Commission *Local government funding and financing* (Draft report, 2019).
- 152 See Local Government New Zealand *Reinvigorating local democracy: The case for localising power and decision-making to councils and communities* (2019).
- 153 See generally Infrastructure New Zealand *Building regions: A vision for local government, planning law and funding reform* (2019) at 15-18.
- 154 Proposed national direction on urban development is designed to target good quality urban densification: see New Zealand Government *Planning for successful cities: A discussion document on a proposed National Policy Statement on Urban Development* (2019).
- 155 New Zealand Council for Infrastructure Development (now Infrastructure New Zealand) *Integrated governance, planning and delivery: A proposal for local government and planning law reform in New Zealand* (2015) at 34.
- 156 Compare G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 123.
- 157 <www.hud.govt.nz/urban-development/urban-growth-agenda/>
- 158 For example, whether aquaculture in Fiordland should be allowed.
- 159 See G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 178.
- 160 Infrastructure New Zealand *Building regions: A vision for local government, planning law and funding reform* (2019) at 37.
- 161 For example, in the Muldoon era of "think big" projects.
- 162 See G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 172-173, 180, 276.
- 163 Ibid at 276.
- 164 These acts already contain some general environmentally focused principles, but they could be more directive (see *ibid* at 180). For example, creating vertical and rooftop green areas, requiring solar panels or using wetlands to filter stormwater, providing benefits for biodiversity, water quality, amenity, open space, natural hazard resilience and other things. See generally City of Melbourne *Green our city strategic action plan 2017-2021* (2017).
- 165 *Report of the Biodiversity Collaborative Group* (2018) at 86.

9. CLIMATE CHANGE LEGISLATION

9.1 Introduction

In Chapter 4, we outlined broadly how climate change is addressed in the current system. Most mitigation measures are contained in the Climate Change Response Act and associated (and complex) emissions trading scheme regulations, with the RMA having very little to say or do about it. In a future system, we envisage that the Climate Change Response Act would remain separate, primarily as a vehicle for the continuation of the emissions trading scheme.¹ Keeping in mind the directive of the Legislation Act to tidy up our statute book, we consider that the Climate Change Response Act could usefully incorporate relevant aspects of the Forests Act concerned with the accounting side of managing carbon sinks, as well as new provisions needed to manage carbon capture and storage technology.²

While a project of this nature, concerned with the architecture of a future system, is not the place to delve into the detail of emissions trading reform, we do see the pricing of greenhouse gas emissions as a vital tool in achieving New Zealand's climate goals. If done well, economic instruments can drive real change in outcomes,³ while providing flexibility and encouraging innovation in how market participants achieve them.

The exclusion of biological emissions from agriculture has, thus far, proved a stumbling block to a comprehensive all-sectors approach to pricing emissions, and that will need to be addressed in a future system. So too will a meaningful cap on the supply of emissions units, a phasing down of industrial allocations, the removal of the option to pay a fixed price for emissions (ie removing a price ceiling), and more guidance around auctioning.⁴ However, we note that the government is poised to make considerable legislative changes to the scheme, which should address those concerns.⁵ In particular, proposals include a conditional measure, by which agricultural emissions would enter the scheme and be priced at the producer level by 2025 if sufficient progress is not made towards alternative solutions. That provides an incentive (a "stick") for more bespoke and collaborative mechanisms to be developed over the next few years, in what looks likely to be a farm-based levy. The crucial thing is for some form of pricing mechanism to be introduced to drive meaningful change within a reasonably short period of time.⁶

The emissions trading scheme will need to be strengthened in a future system to impose a cap on emissions, and remove a fixed price surrender option for emissions units. Agricultural emissions will need to be robustly priced using some mechanism in the short-term, but we see some flexibility as to exactly what that looks like.

The emissions trading scheme should not be our only focus, and our eggs need to be put in many different baskets. Climate change has implications for multiple (indeed, almost all) other statutory regimes, and cuts across the whole of the system in ways that no other aspect does, with the exception of the Treaty of Waitangi. As such, specific climate change legislation (the Climate Change Response Act) is not the be all and end all unless it has strong strategic and policy links to other parts of the system (including the RMA). That is certainly not the case at the moment. As we said in the Phase 1 report:⁷

New Zealand has clear climate change obligations under the Paris Agreement that will have to be met over the coming decades. In order to meet them, a future system will need to accommodate a great deal of change in a multipronged approach (not just an emissions trading scheme). It will need to be more directive, proactive, and contemplate land use change. Normative directions about climate change will need to be integrated across the whole system.

At the time of writing, the Climate Change Response (Zero Carbon) Amendment Act has just been passed. The purpose of the legislation now includes a framework by which New Zealand can develop and implement clear and stable climate change policies that contribute to the global effort under the Paris Agreement to limit the global average temperature increase to 1.5° Celsius above pre-industrial levels.⁸ We see that proposal as a positive, indeed breakthrough, step. In fact, the kinds of novel features defining that legislation (firm bottom lines, targets, independent review by a standing commission, plans as pathways to action rather than regulatory restrictions) closely resemble the kinds of thinking that are at the heart of our preferred model in a broader sense. At the core of the Amendment Act is a set of legislated targets (including net zero for carbon dioxide emissions by 2050),⁹ a Climate Change Commission that is tasked with holding the government accountable, and provision for the development of emissions reduction plans and adaptation plans (and related risk assessments). While we will not dwell on the specifics of the Amendment Act (eg the adequacy of its targets for carbon dioxide and methane),¹⁰ we will explore what we see as its structural place in a future system.

Presently, the Climate Change Response Act is largely (although by no means entirely) a framework for the operation of New Zealand's emissions trading scheme. It is, essentially, an "implementation" framework (one of the very few for climate change given the inadequacy of the RMA) for policy decided elsewhere, rather than a strategic framework for thinking about wider climate action. This gap – the strategic framework – is exactly what the Zero Carbon Act provides. Under current settings, it makes

sense to locate amendments within the Climate Change Response Act: it is our preeminent climate change statute.

However, we suggest that most of the Amendment Act's content would be a better fit within a more integrative Future Generations Act. The links between climate change action and almost all other aspects of the system need to be extremely strong. Thus while close connections are undoubtedly needed between climate strategy and the emissions trading scheme, equally close or even closer links are needed with many other legal frameworks in the system.¹¹

9.2 Emissions reduction plans and adaptation plans

In particular, emissions reduction plans and adaptation plans would be integrated into a single futures strategy. They would not *just* be about meeting targets or budgets; they would also be designed to reflect the wider range of matters contained in the Act's purpose and principles. Climate elements of a futures strategy would therefore need to take into account the risks and co-benefits of different approaches to climate change mitigation (eg the biosecurity risks of monoculture plantation forestry, the synergies of indigenous forest for other aspects of the environment, the need to consider the economic impacts of different land uses on rural communities, and the synergies between mitigation and adaptation outcomes that nature restoration can provide).

A spotlight on emissions reduction plans and adaptation plans within a futures strategy

Under the Climate Change Response (Zero Carbon) Amendment Act, the government is obliged to produce emissions reduction plans and adaptation plans. These will, respectively, outline how emissions are to be reduced to meet targets and carbon budgets, and how New Zealand is to respond to the effects of climate change.

However, the exact nature of these instruments remains unclear (eg it could be that they are simply a means for further discretionary government action, including plans for further legislative reform, rather than an actual instrument like an NPS). While the Amendment Act clarifies the relationship between emissions targets/budgets and other decision-making frameworks (they are permissive considerations only), it does not clarify the relationship between emissions reduction and adaptation plans and those frameworks. Some relationship is extremely important, as it will drive how a whole variety of agencies with impact on the ground (eg the Electricity Authority, Energy Efficiency and Conservation Authority, NZTA, councils and CCOs etc) respond to the climate change challenge.

As instruments that are embedded in a wider National Futures Strategy (and spatial plan), we see a future in which emissions reduction and adaptation measures – including in relation to particular sectors¹² – would be legally meaningful from the outset. This is because a futures strategy would need (as one option) to be “given effect” to in other decision-making frameworks (including under the RMA) unless there were “good reasons” not to. Alternatively, there could be a requirement for it to be given “particular regard” to, or some other wording.¹³

Either way, the need is urgent – we require something that will have real influence on the ground in implementation frameworks, not just another “plan to make a plan” that that might or might not eventually lead to action. In that vein, we have previously said that we need to specifically outline in a strategy “how or whether [other frameworks, like the RMA] are to be used to meet budgets and targets, and why/why not. Otherwise, the risk may be an undue focus ... on non-regulatory or soft approaches to reducing emissions.”¹⁴

Legal relationships are equally important for the climate change adaptation component of a futures strategy, especially with regard to how it flows through to regional policy statements¹⁵ and district plans under the RMA (which address land use planning) and infrastructure planning and funding under local government and infrastructure legislation. National influence here is important, given the potential for strong local opposition to (and therefore lack of a political stomach for) adaptation measures that can impact on property rights.¹⁶ Plans for mitigation and adaptation also need direct influence in broader public budgeting and investment processes. As we have already pointed out in the context of urban growth, a futures strategy needs to be accompanied by indicative sources of funding (who is going to pay and how) to make sure its approach to climate change adaptation is actually realistic. The costs involved in adapting to climate change will be substantial, because it will require proactive measures (not just stopping people doing things).

On balance, we would prefer a stronger relationship between futures strategies/spatial plans and other planning frameworks (eg to give effect to *unless there are good reasons not to*). Emissions reduction and adaptation plans within a futures strategy could not be *absolutely* binding, as that would run the risk of upsetting other carefully designed statutory schemes (such as the RMA, which also provide safeguards to protect local environments).¹⁷ In short, we cannot forget other aspects of the environment in the rush to address climate change. For example, it may be challenging to simply “deem” adaptation aspects of a futures strategy to be national direction under the RMA. Preferable would be a direction that an integrated NEP under the RMA had to give effect to the strategy as a whole, unless good reasons existed not to.

However, if a broader legislative reform programme took place (eg strengthening the RMA itself, including by requiring mitigation and adaptation measures as part of an NEP), then there may be a case for a weaker direction (“have particular regard to”). In that case, a futures strategy would be more about *aligning* other frameworks rather than trying to fill in gaps or inherent deficiencies in them (as would be the case under the present RMA).¹⁸ We leave that question open for now.

Something that is not currently provided for in the Climate Change Response (Zero Carbon) Amendment Act, but would in our minds be a useful addition, is for *regional* futures strategies to also subsume emissions reduction and adaptation elements. After all, communities and their representatives can make meaningful contributions alongside top down efforts. Some local efforts have already been made, and internationally this level of government tends to be leaders on climate action.¹⁹

As described earlier, national and regional futures strategies would be accompanied by spatial plans. While the current proposals for emissions reduction and adaptation plans are not explicitly spatial in nature, they will have significant spatial implications. For example, as a country we need to decide where different kinds of trees should and should not go, and where people can and cannot do different forms of development in light of sea level rise and climate-induced hazards. Rural land use change will be vital to achieving targets, but needs to be done in a way that embraces policy synergies rather than trade-offs (see spotlight later in this chapter).²⁰ This link between strategic planning and its spatial expression will therefore be critical.

We see potential for the “strategic” elements of climate change legislation, currently in the Climate Change Response (Zero Carbon) Amendment Act, to be integrated into a Future Generations Act. Emissions reduction plans and adaptation plans would be integrated into a National Futures Strategy and expressed in its associated spatial plan. Climate change should also be embedded in regional futures strategies and spatial plans. In this way, strategic climate change planning would have meaningful legal influence under other regimes like the RMA, because there would be an obligation to give effect to them unless there were good reason not to.

A Future Generations Act – having a system-spanning purpose embracing firm biophysical bottom lines (including principles/duties for government action), and under which integrated national and regional strategies and spatial plans are produced – provides a comfortable home for climate strategy to be developed and expressed. We therefore suggest several further measures to integrate the Zero Carbon Act into a Future Generations Act. First, a strengthened purpose we have previously

recommended for the Climate Change Response Act could be integrated into the purpose of this broader Act. As we have said previously:²¹

[The revised purpose] of the Climate Change Response Act lacks aspiration, and does not reflect the ambition inherent in the net zero target and the title of the [Zero Carbon Act] itself. We recommend that it be strengthened (eg that the purpose is to achieve a climate neutral society and economy by 2050, not just to implement New Zealand’s international obligations).

Furthermore, the general set of public decision-making principles that we have previously recommended be added to the Zero Carbon Act should instead be integrated into the wider set of principles and duties we talked about earlier for the Future Generations Act. In the climate context:²²

These would have to be taken into account in all public decision-making. This reflects that climate change is an important consideration in a wide range of other more specific statutory frameworks (eg transport, resource management, local government) and government decision-making more generally (eg investment choices, internal policies and procedures) even if there are no accompanying regulations to bind people directly. Principles could include the desirability of near zero gross carbon dioxide emissions, net zero biogenic methane emissions,²³ the importance of maintaining and enhancing other aspects of the natural environment at the same time as mitigating and adapting to climate change, environmental, economic and social resilience, and precaution. [To this list we would add the desirability of pursuing negative emissions technologies.]



In particular, a drive towards near zero gross carbon dioxide emissions will be important. This is because the law requires some mechanism to push society to low or zero-carbon *alternatives* through technological and social change, not just a net zero carbon economy characterised by endless tree planting. Forest carbon sinks are not a permanent solution, especially given other pressures on land use that may be required (such as for food production, landscape protection, and urban development) and even “permanent” forest sinks can disappear – they can burn down, or (especially if they are monoculture, as is often the case now) may be susceptible to disease. A specific aim of lowering gross carbon dioxide emissions would be important in driving public investment in technologies and infrastructure relating to electric vehicles and solar energy, not just embarking on extensive and narrowly focused programmes of offsetting that can have significant risks.²⁴ Below, we shine spotlights on electric vehicles and the desirability of a synergistic approach to forestry. We have also previously said that:²⁵

[The Climate Change Commission] could usefully be required to comment not just on progress against percentage targets and integrity of [carbon] budgets, but also on the extent to which government policies (across many different portfolios) are reflecting broader decision-making principles under the Act.

This reinforces the earlier (albeit wider) proposal for a Futures Commission to review government performance against a high level set of principles/duties, and provide a form of scorecard that would include consideration of climate change-focused principles and targets.

We also see a case for embedding the target and budget setting and review process within the framework of a broader National Futures Strategy, albeit along much the same lines that is currently proposed. The setting of a long-term target, and structured stepping-stones (budgets) for getting there, are crucial framework features for addressing New Zealand’s greenhouse gas emissions. Legislative targets help to outline clear end points in order to achieve a stable, predictable policy and therefore investment landscape for business, government, and the public.

A strengthened purpose and principles for climate change (including the desirability of reducing gross carbon dioxide emissions) and the target and budget setting/review process could be integrated into the Future Generations Act framework.

We consider that the government should retain the final decisions on carbon budgets, given that there are still many value-based judgements to be made about *how* we reach targets over time. That is what an elected government is for. However, we see a case for stronger enforcement mechanisms here. Currently, targets and budgets, and related duties (eg the duty of the Minister to ensure net budget emissions do not exceed the emissions budget) lack legal enforceability. There is no mechanism to enforce failures in court, only a declaratory jurisdiction. The only financial consequence provided in

the Amendment Act is the award of costs. We see room for that to change.

One option would be an appeal pathway whereby the courts cannot direct the government to act in a specific way, but where they are empowered to direct the government to put in place measures that would achieve the target or meet a budget. There is already a specific process provided for in the Amendment Act for targets to be amended and budgets to be borrowed and banked, and to us that provides a comprehensive list of reasons for when flexibility is acceptable. If none of those reasons applied, why would we *not* provide for meaningful enforcement action to be taken for failure to achieve an extremely clear and specific (even numerically measured) outcome?

Ultimately, climate change targets are specifically legislated by Parliament. As a matter of hard law, not quasi-legal policy or ministerial discretion, we can therefore expect the government to meet targets (and adhere to budgets). It is not a radical constitutional proposition to expect the Crown to comply with the law and for there to be meaningful consequences if it does not. The novel aspect is that targets would be legislated to begin with, and (despite ongoing disagreement about the specifics), that no longer appears a controversial approach.

Therefore while a review and scorecard role for the Futures Commission would be important to raise public awareness of the government’s performance so New Zealanders can take that to the polls, elections are not an effective means of enforcing a failure to meet environmental obligations of constitutional significance. Many different issues – health, education, welfare etc – need to be weighed at elections, and they will always be at risk of reflecting shorter-term priorities or fluctuating over time.

We see room for stronger enforcement mechanisms for a failure to achieve climate change targets and budgets.

9.3 Institutional change

In the short to medium term, we would not anticipate significant institutional change to what has recently been enacted. The Climate Change Commission would be maintained as an independent Crown entity and exercise its legislated functions. We do not wish to upset the apple cart too much as this valuable step forward beds in. There are significant benefits in having a robustly independent, science-focused institution to provide advice and act as a watchdog and accountability mechanism alongside an elected government making policy decisions. The model encourages transparency, is likely to provide greater stability in climate policy across governments, and helps to depoliticise climate change issues.

However, this logic applies across the whole resource management system, and is reflected in our proposal for a broader Futures Commission. In the longer-term, therefore, it would make some sense to integrate the Climate Change Commission in some way with a Futures Commission (eg as a branch) while retaining targeted

roles within it (eg in relation to carbon budgets and targets). Emissions reduction plans and adaptation plans, as part of a wider futures strategy, may well benefit from having a broader range of independent input from a Futures Commission (eg to embrace synergies between emissions reduction measures and the enhancement of indigenous biodiversity). While we understand that there are advantages and disadvantages of maximising independence (eg a parliamentary office) and keeping reasonably close connections with government (eg a Crown entity), we ultimately see an integrated Futures Commission as the former.

Irrespective of its institutional form, the Commission could also have a wider role than as just an independent advisor and watchdog. It could be tasked with advocacy (even initiating proceedings for a failure to achieve targets/budgets), as an institutional repository and public-facing source of information, and be a source of assistance and advice for other groups engaged in climate change mitigation and adaptation (eg community groups, or local government). That should involve hands on, locally targeted solutions, not just general guidance. Alternatively, this more operational role could be located within government (some have suggested a new agency), due to the close connections needed between this role and associated government funding.²⁶ As the Productivity Commission has noted:²⁷

Considerable guidance for councils on climate-change adaptation already exists. But more is needed, and providing it through central, specialised sources of knowledge will be more cost-effective than each council inventing its own solution. Most councils will welcome guidance and find it helpful not only as advice but as backing for taking the difficult and unpopular decisions that will sometimes be necessary.

In the longer term, we suggest giving close consideration to integrating the Climate Change Commission into a broader framework of a Futures Commission. The Commission, or a government agency, should be tasked with providing operational assistance to those undertaking tangible projects to reduce emissions or adapt to climate change.

Overall, the benefits of addressing climate change in a broad Future Generations Act would be threefold. First, it would ensure that climate change considerations permeate the highest levels of connected decision-making in the system (rather than being treated in a silo, which would be the case even if the currently vague connections between frameworks were to be strengthened).

Secondly, it would ensure that climate change strategy has reasonably clear pathways to implementation in other frameworks (eg the RMA and other statutes, as well as the Climate Change Response Act). There would be an express legal link between a futures strategy and implementation statutes. It would need to be

accompanied by a wider legislative reform programme (eg to fix the climate components of the RMA).

Thirdly, it would ensure that potential synergies between climate change outcomes and other outcomes are identified and pursued. Rather than pursuing climate change outcomes at the expense of wider environmental benefits, there may be ways in which they can mutually reinforce each other when a long-term view is taken. There are many potential synergies to embrace here. For example, as explored in the spotlight below, we could see the widespread regeneration of indigenous vegetation rather than carpeting the landscape with a monoculture of *Pinus radiata*.²⁸

A spotlight on a landscape approach²⁹

The idea of a “landscape approach” is gaining momentum in conversations about the future of New Zealand’s land sector.³⁰ But what does this phrase actually mean?

A landscape approach is a way of working *with*, rather than *against*, the particularities of the land and the communities that live there. It is about recognising what is unique about a place, what values are expressed or unrealised by the current form of the landscape, and what could be improved to create enduring social, environmental and economic prosperity. The approach tends to favour the diversification of land uses through decisions that are shaped by the unique constraints, opportunities and aspirations for a specific site.

More formally speaking, a landscape approach is defined as:³¹

a framework to integrate policy and practice for multiple land uses, within a given area, to ensure equitable and sustainable use of land while strengthening measures to mitigate and adapt to climate change. It also aims to balance competing demands on land through the implementation of adaptive and integrated management systems. These include not only the physical characteristic features of the landscape itself, but all of the internal and external socio-economic and socio-political drivers that affect land use, particularly related to conservation, forestry and agriculture.

Although a landscape approach is still an evolving concept, its underlying ideas and practices have a longer, deeper history.³² In particular, it is a vindication of many indigenous ways of thinking about land use, such as the Māori notion of *ki uta ki tai* (which recognises the intricate journey that water takes through the landscape and the various interactions it has as it makes its way to the sea).³³ This holistic view – which treats the landscape as multiple interrelated systems (biophysical, hydrological, climatic, and socioeconomic systems) – reflects the broader revival of “systems thinking” and how to govern for wicked problems like climate change, food security and sustainable development.³⁴

A landscape approach is already visible in certain parts of New Zealand, whether through the use of shelterbelts or hedgerows, riparian planting around rivers and waterways, poplar and willow pole planting on erosion-prone land, the retiring of marginal land or sensitive catchments for native regeneration, the protection of wāhi tapu and mahinga kai, or the retention of special ecosystems alongside more intensive land uses. These diverse land uses demonstrate a sensitivity to the needs and challenges of particular sites and the peoples attached to them.

The concept recognises that land can be used and managed in ways that have multiple benefits. For example, if land use decisions are driven solely by a drive towards short-term carbon sequestration, then dense plantings of fast-growing exotics, such as *Pinus radiata*, may be the rational choice. However, if we take a broader view of value – including, say, native biodiversity, climate adaptation, social licence from local communities, and so on – then it isn't at all obvious that we should blanket the landscape with *Pinus radiata*. From this perspective, biodiverse native forests are likely to perform better.³⁵ While native species tend to take longer to sequester equivalent volumes of carbon,³⁶ these diverse forests may ultimately form better long-term stores of carbon, given their ecological resilience and social licence.³⁷

A landscape approach carefully considers the diverse human values that rural communities hold, then recommends land uses that align with these. Aspects of recent policy are pointing in this direction. The mantra that guides the One Billion Trees programme, for example (“the right tree in the right place for the right purpose”), implies a commitment to the diversification of forest systems. Similarly, the primary sector's 2019 strategy for responding to climate change, He Waka Eke Noa – Our Future in Our Hands, emphasises on-farm mitigation opportunities (such as small scale carbon sequestration) and climate adaptation (through future-proofing strategies to enhance land resilience). Finally, a renewed focus on the hydrological catchment in recent years, which harks back to the days of the catchment boards in the mid-twentieth century, re-emphasises the important of landscape level analysis and intervention.³⁸

The challenges lie, as they always do, in implementation. While national level instruments, such as NESs and the emissions trading scheme, have a role to play, these instruments may lack the nuance and granularity for optimal outcomes at the landscape level. A lack of access to finance or funds can impede change, as can shortages of skills and trustworthy advice or expertise. Also, the transition to a low emissions landscape involves disruptions and redirections that can be threatening to those affected, even when the ultimate objective is desirable. Accordingly, issues of equity, inclusivity and due diligence also need play a role to ensure a “just

transition”, no less for the primary sector than the industrial sector.³⁹

However, a transition to a low emissions landscape also offers an extraordinary opportunity for “multi-solving” (addressing multiple overlapping challenges like water quality, biodiversity loss, climate mitigation and land resilience) through a single and coordinated investment of effort.⁴⁰

All of this points towards the importance of having a meaningful place where multiple strategic aims come together to be expressed spatially, across a scale that is appropriate. In particular, climate change is a concern that cuts across most other parts of the resource management system, and needs to play a central role in decision-making. Futures strategies and spatial plans would provide a useful tool to implement a landscape approach.

9.4 The importance of funding

How we fund climate change measures will be crucial, particularly in terms of our adaptation efforts. In short, we know that the costs of adapting to climate change will be enormous.⁴¹ Yet they are uncertain in their extent and location. We require integrated, and substantial, mechanisms for public funding that will span many parts of the system. Many of those relate to built aspects of the environment – the need to upgrade or shift (or remove) infrastructure, the management of coastal retreat involving the abandonment or movement of houses and other buildings. Others may be less tangible; compensation for lost property rights (eg through compulsory acquisition), measures to enhance social and ecological resilience, or support for vulnerable or transitioning industries. In short, we do not have a clear sense of the full impacts, so cannot have a clear sense of what may need funding. However, it is clear that new measures are required, and that they must operate at both a national and local level.

The most obvious measure, of course, is to closely integrate climate change within decision-making frameworks that require *new* funding decisions to be made. We will be locking in risk, or resilience, for decades to come, and it is far more expensive and disruptive to change things in the future than it will be to address them in advance.⁴² Most funding decisions by central and local government will need to be informed or even driven by a climate change risk assessment, required under the Zero Carbon Act, as well as the national adaptation plan that follows.

Funding required for other reasons – eg that infrastructure has reached the end of its useful lifespan and needs replacing – can be an opportunity to reduce future climate risk by choosing to, for example, reroute it away from at risk areas.⁴³ The system should not fund new infrastructure in vulnerable places (unless it can be easily relocated, and where that is an actively planned feature of its design), and we should not allow new activities to be established in places where there is any expectation of public support for compensation or relocation.

Some have suggested that people should be allowed to take informed risks, as long as they were clearly identified (eg through a covenant on the title of a property clarifying that the assumption of climate risk is entirely on the owner).⁴⁴ Careful consideration would also have to be given to the assumption of risk by those holding other interests in such land (eg long-term leaseholders), who would not necessarily pay close or any attention to covenants on a title). Furthermore, there is a political rather than legal question here: even if legal liability is clear, there is still a risk that the collective impact of people's choices may later, in practice, put significant political or moral pressure on public authorities to support people in making a transition.

All of this raises enormous political issues, because people are loath to suffer any diminution in private property values that come from legal recognition of climate risk, and (often irrationally) tend to favour cures over risk prevention.⁴⁵ We shone a spotlight on that in the Phase 1 report, in the context of hazard lines imposed on the Kapiti Coast.⁴⁶ However, the reality is that potentially unpopular measures will need to happen across the country to avoid longer-term pain, and that a role will be needed for central government or a national level independent agency to overcome local political pressures to continue to fund or otherwise support inappropriate development. This is ultimately also in the interests of councils themselves, because it shields them from future allegations that they are responsible for allowing development and therefore must compensate for people's losses.⁴⁷ We have seen this

risk play out in the context of leaky buildings, and to some extent in ongoing expectations about retaining (or being compensated for) water rights.

There is, for example, a compelling argument for translating an adaptation plan to a regulatory or strong policy instrument under the RMA through national direction (an NEP), or at least to make public funding conditional upon adherence to an adaptation plan. General public funding also needs to be directed strategically into programmes that will actively enhance resilience (for instance, by promoting the ecological resilience that comes from mixed forest systems described earlier).

Climate change adaptation needs to be a consideration that informs all relevant decision-making frameworks, particularly those concerned with funding. Strong central government support will be required.

Even more difficult will be addressing challenges that already exist. That may prove to be by far the most expensive and daunting element of adaptation. Some challenges are faced by central government (eg in the need to relocate nationally owned assets), while others are faced by councils (eg the need to strengthen flood protection measures or move three waters infrastructure). Others are shared (eg the need to reduce risks to the roading network).



Here, we will have to be extremely wary about trying to “fight” rather than “adapt” to climate change by funding expensive but ultimately futile measures like seawalls and hard flood protection structures. We are not the Netherlands, where it makes a great deal more sense to construct substantial hard infrastructure to keep the floodwaters out,⁴⁸ and risks are constantly changing and need to be managed adaptively.⁴⁹ If we lock in short-term, path dependent choices, we may then “feel reluctant to abandon a policy ... in which we have already invested heavily”.⁵⁰

There will be a role for protective measures to play in a transition, but a focus needs to be on measures that work flexibly with environmental change over the long term, like managed retreat and support for changing industries. For example, the Productivity Commission has suggested taking measures to “make room” for rivers rather than seeking to control them,⁵¹ and Judy Lawrence warns against creating public expectations of ongoing protection.⁵²

Furthermore, some issues of funding are novel, and will require public measures where private measures have sufficed in the past. For example, some people may find their properties uninsurable or prohibitively expensive to insure as risk increases.⁵³ Is there to be support for people who, without fault or willing blindness in the past, now face the prospect of losing their homes and livelihoods? We agree with others that the answer must be yes.⁵⁴ New Zealand has a proud history of social welfare and risk pooling,⁵⁵ although politicians love to argue around the margins. As a society we cannot tolerate the prospect of potentially thousands of people losing fundamental contributors to their wellbeing due to environmental risks that they could not, when they made the relevant decisions, predict or mitigate.

The overriding question for all of this, of course, is *how* we fund all the things we need to. Mechanisms need to be fair, efficient and effective. We also need to take a nationwide approach, as impacts will be connected and because – as with drinking water quality and public health issues – no New Zealander should be left behind based on where they happen to live. Yet many measures will need to be deployed locally, with sensitivity to local concerns and aspirations. We also need to think carefully about who should pay and in what measure, including across different geographical areas and generations. That is not a technical question, and requires ongoing debate, but it is clear that inter-generational equity demands that the current generation bears a significant amount of the burden despite not having yet felt the full effects of change, and that contributions come from both central and local levels.

In Chapter 13 we look at how economic instruments could be deployed with more vigour in a future system. These have two consequences – they raise money and they influence behaviour. Both could be used in the context of climate change, in that financial incentives to adapt and to mitigate could raise money to help fund adaptation measures. For example, some have suggested that revenue from auctioning units under the emissions trading

scheme could be directed to an adaptation fund.⁵⁶ There could also be risk-based contributions as conditions of resource consent allowing development in risky areas, or through the deployment of targeted rates (which would need to be directed to the fund rather than a general pot of council money).

Irrespective of who or what contributes, we see a strong case for the establishment of a national Climate Change Adaptation Fund as a core mechanism for funding necessary measures over a long period of time. That should happen as a matter of urgency in the short term.⁵⁷ It would make sense for this to be established and managed under the Future Generations Act, under which a holistic strategic approach is taken to resource management, and for funding to be deployed and prioritised in accordance with a spatial plan dealing with adaptation across New Zealand.⁵⁸ There would be common principles for apportioning support, not a competitive lolly scramble.⁵⁹ This could be similar to the Natural Disaster Fund administered by the Earthquake Commission, but would be deployed in a more pre-emptive way to promote resilience and avoid risk rather than respond to it.⁶⁰

One potential model could be akin to that under the Land Transport Management Act (where regional level plans prioritise projects, inform a national programme, and seek money from a national land transport fund in accordance with common criteria). In that model, the government (ie the Ministry/Minister) can set policy expectations, but is not directly involved in fund management (done at arms’ length by a Crown entity). Prioritisation of funding in this model is therefore both bottom up and top down, which is what is required in the context of climate change adaptation. Indeed, some have suggested that funds could actually be apportioned through this existing model for adaptation measures relating specifically land transport, together with (or having access to) a “Local Government Resilience Fund”.⁶¹ We tend towards a broader, more integrated fund where strategic prioritisations are made between many sectors, at arms’ length and in line with consistent criteria, and where the aim is supporting adaptation as a whole (including national and private initiatives) rather than being focused on supporting those matters within local government jurisdiction.

Active assistance in project planning and implementation will also be required by central government. This is more important for climate adaptation than, perhaps, for any other measure, but it reflects a more general expectation in our proposed model that central government will no longer be an aloof policy setting or money dispensing body for resource and land management issues. It will also get its hands dirty in undertaking, supporting and monitoring implementation. (By comparison, elsewhere we have proposed active funding and resourcing for councils for freshwater measures, to accompany new national direction, to be delivered through a new or strengthened arm’s length agency.)⁶² In other words, climate change funding is not just about parcelling out vast amounts of money to local government under general policy guidance. It is about central and local government

partnering, alongside Māori, to deploy funds for common goals that have both local and national implications.

Funding is also important for mitigating climate change. While the polluter pays principle must be implemented, we cannot rely solely on restricting people's future greenhouse gas emissions or putting a price on emissions that can then be redirected as credits to those providing offsets. As a country, we need to take a more active approach. Indeed, some mitigation measures can also enhance adaptation and other goals at the same time (we can think of the synergies for ecological resilience, biodiversity, landscape, and erosion control provided by indigenous planting), and deserve public support. Yet this is not simply a matter of government throwing money around. We need to deploy more nuanced tools that reflect a fair contribution for the public, and which also galvanise private contributions at the same time.

A spotlight on climate finance⁶³

A fertile area for further exploration is climate or sustainable finance. There are innovative mechanisms for funding and financing that could be developed to support climate change outcomes while at the same time delivering on broader environmental outcomes and relieving pressure on regulatory frameworks. One potential sector is sustainable forestry and land use more generally. A biobank shows potential – where offsets required under regulatory regimes like the RMA (where acceptable) would be deployed in a strategic manner across the country. Offsets would be valued, and therefore set, according to many public benefits, but climate change and indigenous biodiversity would be central. Thus acceptable harm caused to biodiversity in one area could result in a net benefit to biodiversity and climate (and other) outcomes elsewhere.

Other measures could include the deployment of novel financial products (eg loans with interest rates adjusted to reflect climate risk), the issuing of green bonds allowing people and firms to invest in certified projects having both climate and sustainability benefits,⁶⁴ and the creation of various funds (eg to purchase rights in conventionally clear-felled, monoculture forests at scale, and transition them towards support continuous cover and mixed forestry). Overall, these measures are about catalysing investment in synergistic forest projects that have not just economic value, but broader benefits for the public good. There is growing appetite for impact-oriented green investments among an environmentally conscious public, and robust certification and disclosure requirements can provide a competitive advantage to such funds. This redirection of capital flows can be harnessed by, and alongside, strategic public investments.

We recommend establishing a National Climate Change Adaptation Fund, and the development and deployment of novel financial tools.

9.5 Climate change and other frameworks

While it would not be the direct concern of the Future Generations Act itself, from a broader strategic perspective it would also be important for other "implementation" statutes to be reviewed as part of system reform. That would involve dozens if not hundreds of laws, and we do not attempt that exercise here. One important measure would be for the purposes and principles of a wide range of legislation to be brought into line with climate change imperatives. That is not as simplistic as simply saying that a Future Generations Act "overrides" another act, as targeted frameworks will have their own delicate balance of norms to be implemented. But climate change should be integrated into almost all of them in some shape or form.

Some of this is to do with climate change adaptation. For example, while the RMA already stresses the importance of addressing the effects of climate change (ie adaptation measures) in its principles,⁶⁵ its machinery is not particularly well-suited to the task.⁶⁶ As mentioned earlier, the link between adaptation plans and national direction under the RMA remains unclear, and needs to be strengthened. We need firm and coordinated national direction if we are to drive the hard, long-term decisions that devolved jurisdiction alone is ill-placed to make. Furthermore, we need to improve coordination between different implementation statutes. As the Productivity Commission has pointed out:⁶⁷

[W]hile the planning horizon of the NZCPS is 100 years, it is 50 years for assessments under the Building Act 2004, and 30 years for council infrastructure plans [under local government legislation]. No link is made in the RMA under matters of national importance between natural hazards and "the effects of climate change".

Climate change mitigation also needs to be much better embedded in other frameworks, particularly the RMA. We have touched on this already in Chapters 5–7. Since amendments in 2004, local government has been expressly prohibited from considering the effects of greenhouse gas discharges on climate change,⁶⁸ and the courts have interpreted this in an extremely (and, perhaps, surprisingly) expansive way.⁶⁹ However, the idea was that climate action would need to happen consistently at a national level – not that it would be excluded from the RMA entirely. As such, there remains potential in the Act for central government to promulgate national direction.⁷⁰ Unfortunately (like a lot of expected national direction), that has not been forthcoming, and since 2004 reliance has been placed almost exclusively on a carbon price through the emissions trading scheme.

We suggest that a reformed system would need to see the insertion of climate change mitigation into Part 2 of the RMA, an obligation for the government to provide for mitigation measures in an NEP (whether through regulatory standards or through firm policy),⁷¹ and the corresponding removal or heavy amendment of the Act's decision-making restrictions on local government.⁷² The Climate Change Response (Zero Carbon) Amendment Act provides generally that

targets and budgets are able to be considered under other frameworks, but under the RMA (for local government, at least) they explicitly *cannot* be considered.⁷³ This will create an anomalous situation that requires urgent reconsideration.

One of the key rationales for the RMA restrictions on local government jurisdiction was that there was no national level plan/policy in place to create consistency between regions or districts.⁷⁴ With targets, budgets, and emissions reduction plans (as part of a National Futures Strategy), that will no longer be the case. Furthermore, there has never been good justification for preventing consideration of climate change in matters of urban design and broader land use change (eg a compact urban form). The Productivity Commission has also pointed out that relying only on the emissions trading scheme does not reflect “the varying range of co-benefits and co-harms associated with different land uses” – which is firmly within the jurisdiction of the RMA.⁷⁵ Some industries may require closer management to achieve a transition than possible under a market-based mechanism.⁷⁶

It is also of concern that many decision-making frameworks that have potentially significant bearing on climate change do not require its consideration. We see potential in revamping the purpose, principles or decision-making criteria in a range of statutes, including the Environment Act, State Sector Act,⁷⁷ Land Transport Management Act, Local Government Act, Public Finance Act, various pieces of conservation legislation and others, to more strongly reflect climate change concerns. In Chapter 8, we also looked at strengthening directors’ duties and financial disclosures, including in relation to climate change.

Climate change considerations need to shape government policy beyond particular statutory frameworks. As discussed in Chapter 8, all public authorities should have general environmental duties, and climate change would be core to those. Such duties would influence decision-making in, for example, investment, procurement, and the development of non-statutory policies and programmes. But the duties would also encourage the pursuit of synergies where climate change measures would further other objectives at the same time. Investment in electric vehicles is a good example where a synergistic approach could be driven by strategic planning under a Future Generations Act, and where climate change considerations would be deeply embedded.



A spotlight on electric vehicles⁷⁸

A future resource management system is not just about legislation and regulatory restrictions. Complementary and ambitious policy measures, which not only prohibit environmentally poor outcomes but also actively promote positive ones, should be more common features of a reformed system. There are many tools available to do so. In particular, we pointed out in the Phase 1 report that where a behaviour is restricted or prohibited as harmful, the system should offer or pursue alternatives to reduce social and economic disruption. That often requires considerable investment of money and resources, and is why we have proposed that a Future Generations Act provide general duties and principles for public decision-making, not just under specific “environmental” (ie restrictive) legislation.

The relationship between climate change mitigation and transport policy is one area where the deployment of meaningful incentives is essential to shift the trajectory of New Zealand’s emissions profile with the urgency required. The transport sector presents a unique opportunity, since it produces around one-fifth of New Zealand’s total greenhouse gas emissions and almost half of our carbon dioxide emissions. In fact, as the Productivity Commission notes:⁷⁹

Transport has been by far the biggest contributor to the rise in New Zealand’s gross emissions since 1990. As a result, CO₂ emissions have risen much more than other gases. Between 1990 and 2016, transport emissions increased by about 70%. Over this period, New Zealand’s vehicle fleet increased in size by 1.5 million vehicles. New Zealand’s vehicle fleet is among the oldest (and lowest in terms of fuel efficiency) in the developed world, therefore exacerbating the emissions impact of having additional vehicles on the road.

Decarbonising the domestic transport system would result in significant emissions reductions. And this mitigation pathway is entirely achievable with appropriately calibrated incentives designed to accelerate the adoption of low emissions vehicles and transition to cleaner modes of transport.⁸⁰

The successful deployment of electric vehicles in Norway shows how a suite of supportive incentives – both carrots and sticks – is critical. Norway’s incentives are underpinned by the rationale that “it should always be economically beneficial to choose zero and low emission cars over high emission cars”.⁸¹ Thus, drivers of electric vehicles have enjoyed the following carrots:⁸²

- No purchase/import taxes (from 1990) and an exemption from the country’s 25 per cent VAT on purchase (from 2001)
- No annual road tax (since 1996) and no charges on toll roads or ferries (1997–2017)
- A maximum charge of 50 per cent of the total amount on ferry fares (from 2018) and on toll roads (2019)

- Free municipal parking (1999–2017)
- Parking fees were introduced locally, with an upper limit of a maximum 50 per cent of the full price (from 2018)
- Access to bus lanes (from 2005)
- New rules allowing local authorities to limit access to only include electric vehicles that carry one or more passengers (ie to address congestion)⁸³
- A 50 per cent reduction in company car tax (2000–2018), now 40 per cent (from 2018)
- Exemption from a 25 per cent VAT on leasing (2015)
- Fiscal compensation for the scrapping of fossil fuelled vans when converting to a zero-emission van (2018)

This is an extensive package of coordinated incentives, and it has met with considerable success. Battery electric and plug-in hybrid vehicles together now command a 50 per cent market share in Norway, and the government's goal is that all new cars sold by 2025 should be zero emission. Together with the range of carrots listed above, a progressive green tax system calculated according to vehicular weight and emissions profile (the stick) has also been instrumental in moving towards this goal. Indeed, "The progressive tax system makes most [electric vehicle] models cheaper to buy compared to a similar petrol model, even if the import price for [the former] are much higher. This is the main reason why the Norwegian ... market is so successful compared to any other country."⁸⁴

Investment in a well-organised charging infrastructure, including fast charging stations, has further supported the incentives package, with the government itself financing the establishment of at least two multi-standard fast charging stations every 50 kilometres on all main roads in Norway.

Current domestic rewards for electric vehicle ownership in New Zealand are weak by contrast. The government's electric vehicle programme, introduced in 2016, includes:

- Exempting such vehicles from road user charges (for which electric vehicle owners could reasonably be expected to pay)⁸⁵
- The availability of a Low Emission Vehicles Contestable Fund to encourage and support innovative low emission vehicle projects (which include a number of charging infrastructure projects)
- Empowering road controlling authorities to make bylaws that allow electric vehicle access to special vehicle lanes
- An information campaign

- A goal that all new vehicles entering the government fleet from mid-2025 will be emissions free

In light of the slow progress made to electrify the government fleet (only 78 of 15,473 vehicles as at 8 October 2019) and its revised procurement goal in this regard,⁸⁶ it is difficult to avoid the inference that moving to electric vehicles is seen as neither urgent nor easy. Yet ramping up the government fleet would both create a significant secondary market of used cars for purchase, and send a powerful signal to "do as I do, not as I say".

The main barriers to uptake, however, remain price disparity with conventional vehicles (though price parity is expected as early as 2022, according to Bloomberg New Energy Finance)⁸⁷, limited model variety, and (mis)perceptions around range and performance. There has also been an absence of policy pressure on the adverse effects of conventional vehicles.

The government is currently consulting on two additional measures that may provide more material influence. One is a feebate scheme that would discount the cost of "cleaner" vehicles and increase that of higher emission vehicles. The effectiveness of this measure will depend on whether the size of the rebate, and corresponding penalty, are set at a level to ensure that electric vehicles have a price advantage over others.⁸⁸ The other policy measure is a vehicle fuel efficiency (or "clean car") standard. As with the feebate option, the impact of the clean car standard is based on a target of falling emissions per kilometre. The uptake of electric vehicles in New Zealand seems likely to accelerate provided these measures are set at levels that reflect the ambition, leadership, and momentum required to rein in New Zealand's greenhouse gas emissions.

A vehicle scrappage scheme that encourages people to surrender old cars in favour of newer, low emissions vehicles could further support uptake. However, as Barton and Schutte have noted:⁸⁹

Policy for [electric vehicles] needs to be part of an overall mobility strategy that takes an "avoid, shift, improve" approach that includes urban and rural settlement form, public transport, enhanced pedestrian and cycle access, and emerging forms of "mobility services". [Electric vehicles] have roles to play in a sustainable society, even though they are not the "one big solution" to all transport issues.

Urban planning and design decisions, continued public promotion of electric vehicles, accelerating the deployment of charging infrastructure, more aggressive procurement of electric vehicles across government agencies, incentivising increased vehicle occupancy, and promoting public and active transport will all help foster the transition to a low emissions transport system. What we need is an integrated, strategic, forward-looking approach that encompasses a variety of regulatory and non-regulatory tools. This is a framework that can be provided by a futures strategy.

It is crucial that our whole statute book is reviewed to align it with climate change imperatives – both for mitigation and adaptation. Climate change considerations, and synergies with other environmental and inter-generational concerns, need to be embedded in the fabric of public decision-making more broadly.

9.6 Concluding comments

In this chapter, we have considered how climate change would be addressed in a future system, building on changes we have already floated for the RMA in Chapters 5–7. To date, measures to mitigate climate change have been focused on the Climate Change Response Act and the emissions trading scheme, alongside government support through programmes focused on electric vehicles and forestry. We see room for change on each of those fronts. However, more fundamentally, the existing legislative landscape on climate change has recently changed dramatically with the enactment of the Zero Carbon Act. This injects a much wider range of tools and strategic planning content into the Climate Change Response Act. It is a landmark moment.

We have proposed, however, that the strategic content of the Zero Carbon Act (a strengthened purpose and principles, targets and budgets, creation of the Climate Change Commission, and adaptation and emissions reduction plans) be integrated over time within a new Future Generations Act rather than in the Climate Change Response Act, to better integrate it with other elements of a holistic, strategic framework. It is crucial that emissions

reduction plans and adaptation plans have meaningful legal effect in other statutory frameworks; in particular, those plans need to be given effect to through the RMA and infrastructure-focused legislation, and integrating them into futures strategies and spatial plans under the Future Generations Act would provide a suitable pathway for that to happen in a way that embraces other synergies for environmental improvement. In particular, we have looked at a synergistic “landscape approach” to forestry. We have also proposed that there be stronger enforcement mechanisms for a failure to meet targets or adhere to carbon budgets, and that (in the longer term) the Climate Change Commission gets folded into an independent Futures Commission.

A broader review, well beyond the scope of this report, will be required to align all our legislation with the climate change imperatives in the Zero Carbon Act. We have considered the RMA specifically already, but alignment is also crucial under frameworks that provide for the funding of public goods that will face substantial climate risks (eg local government and infrastructure legislation). A new approach to funding will also be required to meet the enormous costs of climate change adaptation and increase our resilience. We support calls to establish a Climate Change Adaptation Fund, and see merit in the deployment of novel financial instruments and revised requirements for climate-related financial disclosures. Funding climate change adaptation will be particularly important in urban environments, where huge amounts of property and infrastructure are at risk and may need to be relocated. Yet the urban and built environments pose many other challenges, and it is to these that we turn our attention in the following chapter



ENDNOTES

- 1 That is not to say that no reforms would be desirable. For one, it may benefit from a stronger purpose statement.
- 2 Although that would also need to be provided for in many other legal frameworks, including the RMA and Crown Minerals Act. Substantial work on the regulatory aspects of this novel technology has been done: see B Barton, K Jordan and G Severinsen *Carbon capture and storage: Designing the legal and regulatory framework for New Zealand* (2013).
- 3 Especially if there is a meaningful regulatory envelope or cap, which provides certainty of outcome: see T Denne "Resource management law reform and economics" in G Severinsen and R Peart *Reform of the resource management system: The next generation - Working paper 3* (EDS, 2018).
- 4 See Tax Working Group *Future of tax: Final report volume 1 - recommendations* (2019); New Zealand Productivity Commission *Low emissions economy* (2018).
- 5 See Climate Change Response (Emissions Trading Reform) Amendment Bill 2019 (at select committee stage at the time of writing).
- 6 Although any such measure should not be conditional on new technology being available, and there is a case for more urgency (five years is fairly lenient).
- 7 G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 47.
- 8 As well as adapting to climate change.
- 9 The Act takes a "two baskets" approach (essentially, different targets for longer-lived carbon dioxide and shorter-lived biogenic methane). There is a net zero target (by 2050) provided for all greenhouse gases other than biogenic methane. For biogenic methane, the target is a gross one, and in two stages: 10 per cent less by 2030 (than a 2017 benchmark) and a range of 24 to 47 per cent less by 2050 (again, from a 2017 benchmark). The National Party has signalled it will change the methane targets if it were to get into power, although it voted for the Bill on its final reading.
- 10 Treating methane differently in targets is not necessarily a "free pass" for the agricultural sector. It depends on how the difference is expressed, and value judgements about what is fair. See generally <www.newsroom.co.nz/2019/07/05/667804/lighter-methane-target-for-farmers-a-question-of-equity-not-science-report>
- 11 Closer, arguably, because the emissions trading scheme can to some degree operate outside a broader strategic and policy framework (it involves primarily market transactions, not policy decisions), whereas frameworks like the RMA require strong normative direction provided by national level plans and policies.
- 12 There is provision in the Amendment Act to have sector-specific elements to emissions reduction plans.
- 13 For example, "take full and balanced account of" is the language used in the Environment Act 1986.
- 14 EDS submission on the Climate Change Response (Zero Carbon) Amendment Bill 2019.
- 15 To the extent that regional policy statements would remain separate to regional futures strategies and spatial plans.
- 16 See G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 109, where we shone a spotlight on the Kāpiti experience with coastal hazard lines. See also R Peart *Castles in the sand: What's happening to the New Zealand coast?* (Craig Potton Publishing, 2009) at 174; *Coastal Ratepayers United Inc v Kāpiti Coast District Council* [2017] NZHC 2933 at [8]; *Kāpiti Coast District Council v Coastal Ratepayers United Inc* [2013] NZHC 3516.
- 17 Under some quite targeted acts it may be necessary to specifically "give effect" to the climate-related elements of a futures strategy. A prime example would be the emissions trading scheme under the Climate Change Response Act.
- 18 Alignment between other frameworks would be a key reason for spatial planning in the context of urban growth.
- 19 For example, switching to electric buses in public transport systems. Many councils have climate change strategies developed under the Local Government Act despite limitations in the tools they can use (eg under the RMA).
- 20 For example, the co-benefits of having a sensible mix of indigenous and exotic planting (and appropriate harvesting techniques) include improved water quality, the stabilisation of riverbanks, improvement of soils, habitats and biodiversity and improved visual amenity.
- 21 EDS submission on the Climate Change Response (Zero Carbon) Amendment Bill 2019.
- 22 Ibid.
- 23 Generally compare the "landscape" scale approach to climate change mitigation, described by the Parliamentary Commissioner for the Environment in *Farms, forests and fossil fuels: The next great landscape transformation* (2019). If we relied only on the targets in the Amendment Act, there would in 2050 still be considerable climate risk from remaining methane emissions that were not required or even encouraged to be offset by equivalent removals of carbon dioxide.
- 24 For example, plantation forestry, or carbon capture and storage (geological sequestration).
- 25 EDS submission on the Climate Change Response (Zero Carbon) Amendment Bill 2019.
- 26 Although it would be possible for funding itself to be controlled by an independent entity like the Commission.
- 27 New Zealand Productivity Commission *Local government funding and financing* (Draft report, July 2019) at 267.
- 28 The benefit of pine trees for the climate is that they are extremely fast in taking up carbon dioxide in the short term (they grow rapidly), but if a longer-term view is taken of outcomes then indigenous species can be equally effective.
- 29 Acknowledgement: Dr David Hall, Senior Researcher, The Policy Observatory, Auckland University of Technology.
- 30 D Hall *The Interwoven World | Te Ao i Whiria: Toward an integrated landscape approach in Aotearoa New Zealand* (Discussion paper, The Policy Observatory, AUT, 2018); C Perley "Reimagining landscapes as socio- and agro-ecosystems" in *Mountains to sea: Solving New Zealand's freshwater crisis* (BWB Texts, 2018); Parliamentary Commissioner for the Environment in *Farms, forests and fossil fuels: The next great landscape transformation* (2019).
- 31 J Reed and others "What are 'integrated landscape approaches' and how effectively have they been implemented in the tropics: A systematic map protocol" (2014) 4(2) *Environmental evidence*; J Sayer and others *Ten principles for a landscape approach to reconciling agriculture, conservation, and other competing land uses* (2013) 110(21) *Proceedings of the National Academy of Sciences of the United States of America* 8349; JC Milder and others "Integrated landscape initiatives for African agriculture, development, and conservation: A region-wide assessment" (2014) 54 *World Development* 68.
- 32 Ecoagriculture Partners *Defining integrated landscape management for policy makers* (Ecoagriculture Policy Focus, no 10, 2013); OE Freeman, LA Duguma and PA Minang "Operationalizing the integrated landscape approach in practice" (2015) 20(1) *Ecology and Society* 24.
- 33 G Tipa and others "Integrating mātauranga Māori into freshwater management, planning and decision making" in P Jellyman and others (eds) *Advances in New Zealand Freshwater Science* (New Zealand Freshwater Sciences Society & New Zealand Hydrological Society, 2016); V Smith and D Norton "Māori perspectives of agroecosystems" (Paper presented to 8th International Indigenous Research Conference, 2018).
- 34 *Systemic thinking for policy making - The potential of systems analysis for addressing global policy challenges in the 21st Century* (IIASA & OECD, 2019).
- 35 S Lewis and others "Restoring natural forests is the best way to remove atmospheric carbon" (2019) 568 *Nature* 25.
- 36 D Bergin (ed) *Planting and managing native trees: Technical manual* (Tāne's Tree Trust, 2011).
- 37 Compare *Report of the Biodiversity Collaborative Group* (2018) at 112.
- 38 Land and Water Forum *The fourth report of the Land and Water Forum* (2015).
- 39 D Hall (ed) *A careful revolution: Towards a low-emissions future* (BWB Texts, 2019).
- 40 E Sawin "The magic of 'multisolving'" (2018) *Stanford Social Innovation Review*.
- 41 See Ministry for the Environment and Statistics New Zealand *New Zealand's environmental reporting series: Environment Aotearoa 2019* (2019).
- 42 See New Zealand Productivity Commission *Local government funding and financing* (Draft report, July 2019) at 231; J Boston and J Lawrence "Funding climate change adaptation" (2018) 14(2) *Policy Quarterly* 10.
- 43 See New Zealand Productivity Commission *Local government funding and financing* (Draft report, July 2019) at 228.
- 44 See New Zealand Productivity Commission *Local government funding and financing* (Draft report, July 2019) at 221.
- 45 See *ibid* at 231; J Boston and J Lawrence "Funding climate change adaptation" (2018) 14(2) *Policy Quarterly* 10 at 24.
- 46 Compare New Zealand Productivity Commission *Local government funding and financing* (Draft report, July 2019) at 220, which notes that "[M]ost regional councils have been reluctant to use their statutory powers for constraining land use, and district plans that have attempted to change hazard zones to prepare for climate change have been successfully challenged in the courts".
- 47 *Ibid* at 221.
- 48 There, the need is existential, given the amount of land that is below sea level.
- 49 See New Zealand Productivity Commission *Local government funding and financing* (Draft report, July 2019) at 267.
- 50 J Diamond *Collapse: How societies choose to fail or survive* (Penguin, 2011) at 432.
- 51 New Zealand Productivity Commission *Local government funding and financing* (Draft report, July 2019) at 227, 229.
- 52 *Ibid* at 221; J Lawrence "Implications of climate change for New Zealand's natural hazards risk management" (2016) 12(3) *Policy Quarterly* 10.
- 53 New Zealand Productivity Commission *Local government funding and financing* (Draft report, July 2019) at 268.
- 54 *Ibid*.

- 55 Ibid.
- 56 Ibid at 232.
- 57 Ibid at 233.
- 58 The scale of investment that will be required will be enormous, given that billions of dollars of assets and tens of thousands of people are at risk. New funding mechanisms will likely be needed: see J Boston and J Lawrence *The case for new climate change adaptation funding instruments* (Institute for Governance and Policy Studies and New Zealand Climate Change Research Institute, 2017).
- 59 Compare New Zealand Productivity Commission *Local government funding and financing* (Draft report, July 2019) at 268: "Formulating a set of principles about funding the costs of adaptation to climate change is a helpful place to start." These could be based on need, ability to pay, and ambition.
- 60 Questions would need to be answered as to what it would cover: for example, would it be used to compensate landowners for reduction in property values due to the identification of hazard zones?
- 61 New Zealand Productivity Commission *Local government funding and financing* (Draft report, July 2019) at 227, 270, 268.
- 62 In other work, we have called that a Freshwater Commission. Here, we do not give it a label, to avoid confusion with a Futures Commission.
- 63 See generally Aotearoa Circle *Sustainable Finance Forum: Interim report* (2019).
- 64 See generally *Native forest bond scheme: Indicative business case* (Mohio Research Ltd).
- 65 Resource Management Act 1991, s 7(i).
- 66 See New Zealand Productivity Commission *Local government funding and financing* (Draft report, July 2019) at 231; J Boston and J Lawrence "Funding climate change adaptation" (2018) 14(2) *Policy Quarterly* 10 at 24.
- 67 See New Zealand Productivity Commission *Local government funding and financing* (Draft report, July 2019) at 220.
- 68 Resource Management (Energy and Climate Change) Amendment Act 2004, pt 2.
- 69 See *Greenpeace New Zealand Inc v Genesis Power Ltd* [2008] NZSC 112, [2009] 1 NZLR 730 at [49]; *West Coast ENT Inc v Buller Coal Ltd* [2013] NZSC 87, [2014] 1 NZLR 32.
- 70 In the form of an NES (the ability to promulgate an NPS is less clear, although arguably implicit given the policy intent of the 2004 amendments). See generally G Severinsen "Climate change considerations under the Resource Management Act: A barrier to carbon capture and storage deployment in New Zealand?" (2014) 22 *Wai L Rev* 117.
- 71 That need not be just through a dedicated section on climate change. For example, it could usefully be embedded in other domain-based or sectoral provisions imposing performance standards (eg for industrial emissions) or policy support (eg for renewable electricity or some forms of forestry).
- 72 For example, provisions could still include reference to the desirability of taking a nationally consistent approach to mitigation measures.
- 73 Resource Management Act 1991, ss 70A and 104E.
- 74 See generally *Environmental Defence Soc Inc v Auckland Regional Council* [2002] NZRMA 492 (EnvC); *Environmental Defence Society Inc v Taranaki Regional Council* EnvC Auckland A184/02, 6 September 2002.
- 75 New Zealand Productivity Commission *Low emissions economy* (Final report, 2018) at 284.
- 76 Compare Resource Management Review Panel *Transforming the resource management system: Opportunities for change – Issues and options paper* (2019) at 31.
- 77 And any new successor act (eg a proposed Public Service Act).
- 78 Acknowledgement: Olivia Grainger, EDS.
- 79 New Zealand Productivity Commission *Low-emissions economy* (2018) at 32.
- 80 Ibid at 340.
- 81 See <<https://elbil.no/english/norwegian-ev-policy/>>
- 82 Ibid.
- 83 Congestion is still a potential issue, especially if electric vehicles are autonomous (people may be less inclined to resent sitting in cars if they can do other things at the same time and save money on fuel). Electrification of the fleet is therefore not a substitute for congestion pricing.
- 84 See <<https://elbil.no/english/norwegian-ev-policy/>>
- 85 B Barton and P Schütte "Electric vehicle policy: New Zealand in a comparative context" (Centre for Environmental, Resources and Energy Law, University of Waikato, 2015) at 26.
- 86 <www.stuff.co.nz/motoring/news/116395302/government-abandons-electric-vehicle-target-for-public-service-fleet>
- 87 <www.newsroom.co.nz/2019/07/12/677947/paul-winton-decarbonising-transport>
- 88 B Barton and P Schütte "Electric vehicle policy: New Zealand in a comparative context" (Centre for Environmental, Resources and Energy Law, University of Waikato, 2015) at iii.
- 89 Ibid at 38.

10. OTHER LEGISLATION FOR THE “BUILT” OR “URBAN” ENVIRONMENT

10.1 Introduction: Built, urban and natural environments

This chapter explores legislation in a future system that would relate to the built or urban environment. At the outset, we should point out that the notion of a “built environment” is a somewhat misleading one. No environment – in the sense of a space in which we live, work and play – is entirely “built”. Even inside a house, we still breathe air and drink water. By “built environment” we therefore mean the built *elements* of our surroundings – the things we create.

That is not always an easy thing to define, because we heavily modify many aspects of our environment without “building” things in the traditional sense of the word. For example, we undertake earthworks, we create pasture by cutting down forest, we grow plantation trees where there were none, and we create many different kinds of parks. Thus there is a large grey area when we think of the management of “built” components in contradistinction to “natural” components. The “natural” environment is clearly not limited to places that are “untouched” by humans (eg a wilderness area), but nor is it the same thing as the “living” aspects of the environment (eg no one would call an intensive chicken or pig farm *natural*). The Productivity Commission, for example, did not recommend splitting the RMA into separate acts based on the built and natural environments, and we agree it is not an easy distinction to make.

What the Commission did recommend was using the RMA to embrace proactive urban planning principles more, alongside environmentally protective ones.¹ Indeed, there are many synergies here – one might think, for example, of using wetlands for stormwater management. We have said a similar (albeit broader) thing in Chapter 5: the RMA should recognise the value of environmentally sustainable development and good urban design as long as it is done a way that is more explicitly subject to environmental bottom lines. It is our urban planning statute, and should behave like one.

An “urban environment” is a bit easier to define than a “built environment”, because it is ultimately a spatial category. For example, we can simply draw lines on a map and call it a city.² Or we can define it by its features (eg its population density). However, there can still be difficulties in defining what is urban and not urban for the purposes of managing it differently (eg peri-urban lifestyle blocks), and such spatial categories can also change over time (eg as cities grow or contract). Such difficulties have led to suggestions for other kinds of distinction to be the basis for separate legislation – eg “planning” and “environment” – that essentially seek to remove the management of one domain (land) from other domains (eg water, air, soil etc).

However, as explored in Chapter 5, this distinction has risks for integrated environmental management.³

It should also be noted that an urban space is by no means the same thing as a built environment. The flipside of this is that a non-urban space is not always a natural one. For example, we have infrastructure in rural areas, and we have buildings and coal mines in the conservation estate. Farming landscapes themselves are heavily modified, and while perhaps not “built”, are far from “natural” in the sense of being “untouched”. Indeed, it is arguable that an irrigated pasture in a rural area is no more “natural” than a city park, while a quarry in the countryside is certainly no less manmade than a high density residential area. We also have trees, water and biodiversity – more obviously “natural” things – in cities. That said, built elements of the environment have a greater intensity within urban areas, where humans construct and fashion their surroundings in a much more obvious and active way. It is also where the proximity of many people to each other makes the *public* provision of built elements – like water pipes, libraries, roads and footpaths – more important and efficient.⁴

In Chapter 5 we recommended retaining the basic framework of the RMA at the core of a future system. We would not have separate statutes for land use and other domains, for the urban and non-urban environments, or for the built and natural environments. There is simply too much overlap (see Figure 10.1 below). However, we recognised that the RMA is not currently fit for purpose in addressing resource management issues that arise in urban areas, especially where they are fast growing.

It is difficult to draw a clear distinction between “urban”, “built” and “natural” environments. Environments can be comprised of elements of each.



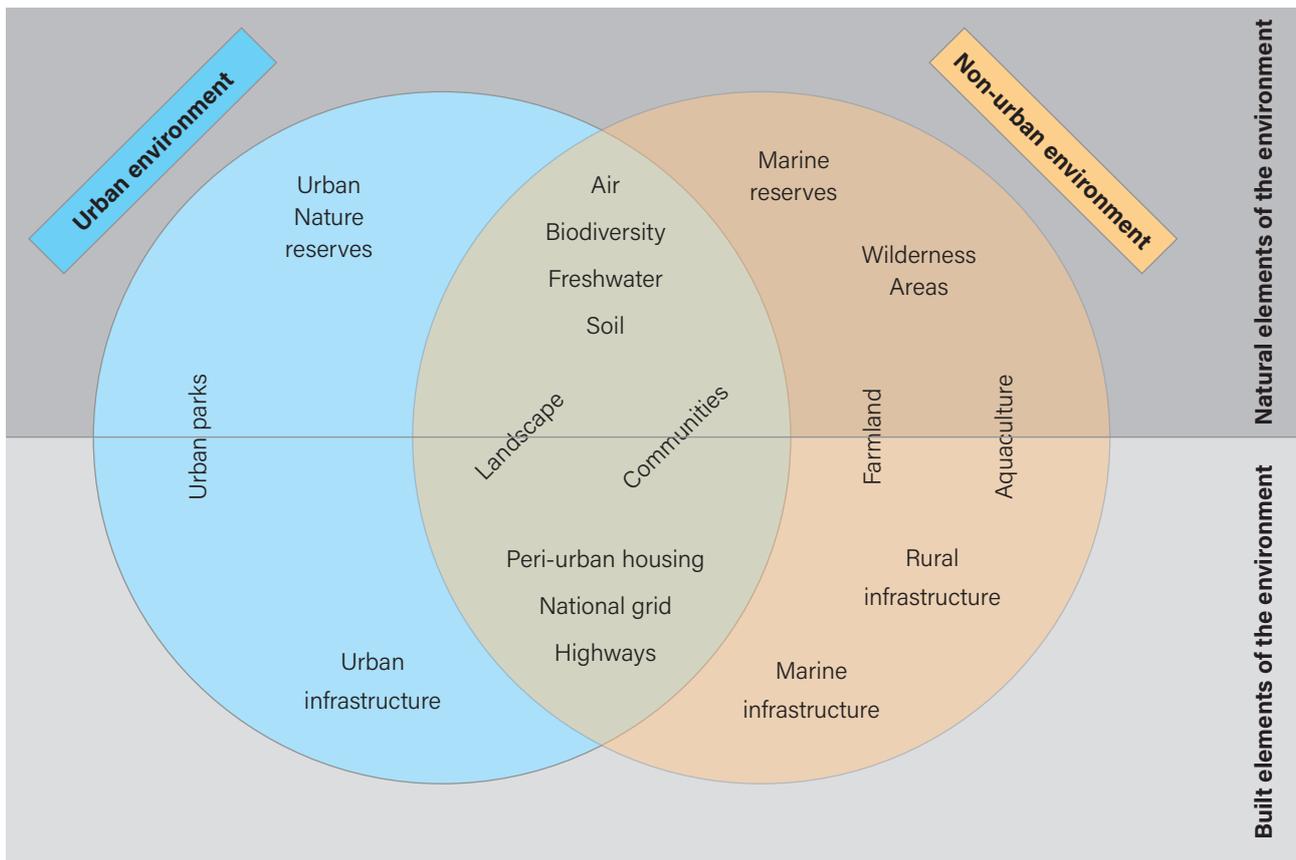


Figure 10.1: Difficulties in distinguishing between built, natural, urban and non-urban environments

10.2 Aspects of the built environment already covered

So what does all this mean for the content of this chapter? Given that the report is structured around the different statutes we envisage operating in future, we need to consider what is still missing in the context of the urban or built environment. It is worth briefly recapping things from a purely urban/built perspective. The contribution of the RMA and the spatial planning aspects of managing urban growth under a new Future Generations Act have been covered in previous chapters. Much of that has been about ensuring that built elements do not have unacceptable adverse effects on the environment (eg the impacts of urban sprawl on the climate or productive soils),⁵ and that the provision of built aspects like roads are well aligned with choices about how land is used.

In particular, we have pointed out that there is a lack of coordination between frameworks for land use and infrastructure provision; the RMA planning framework is not agile enough; there are insufficient independent checks and balances on democratic decision-making (which can favour existing residents over future ones); and there are few normative “hooks” in the RMA’s purpose and principles for good urban planning and design. We have addressed some of these things through proposed reforms to the RMA itself (Part 2, the planning process, and institutional changes) and the introduction of regional level spatial planning under a Future Generations Act.

In previous chapters we have considered a number of aspects of resource management system reform relevant to the built environment. In particular, we have proposed changes to the RMA, and the deployment of regional spatial plans under a new Future Generations Act.

10.3 The focus of this chapter

What we have not yet explored, and the main concern of this chapter, is the layer of additional legislation required to ensure that some built elements of the environment are actually *provided*.

At the most fundamental level, there is a legitimate conversation to be had about what things should be provided through the system (ie publicly funded or supported) and why. For example, drinking water infrastructure is currently largely provided by councils, but there is a much greater role for the private sector (albeit subject to close regulatory oversight) in providing electricity and telecommunications. Other publicly important resources, like food, have very little public intervention in production, distribution and consumption, despite some compelling arguments to do more.⁶ We do not delve down that particular rabbit hole, and overall do not see a pressing need to revisit such arrangements (eg for electricity, communications, ports, gas, food) in a fundamental way as part of resource management system reform.⁷ Nor do we extend our analysis to questions of

how social infrastructure (eg schools, hospitals, libraries etc) are provided, although we do see a case for either the Futures Commission or Infrastructure Commission to provide independent oversight of government decision-making with an eye to the interests of future generations.

What is reasonably clear to us is that a number of built components should continue to be publicly provided, in some shape or form, and that these require a fresh approach to ensure that is done more effectively. Generally speaking, for example, we see a shift towards a more proactive role for government in providing housing as a positive thing (as long as it is done, as with other development activities, within environmental limits).⁸ Housing is publicly important and inter-generational infrastructure, not just another investment to be the subject of financial speculation (even if we still expect the market to play the dominant role).

Our focus in this chapter, however, is on the “three waters” (drinking water, wastewater and stormwater) and transport, which are forms of network infrastructure intimately related to land use planning, and where most issues have been identified. Such infrastructure is essential for improving social and economic indicators of wellbeing, including for general reasons (eg access to roads and cycle lanes for mobility, or clean drinking water) and more specifically to facilitate the rapid deployment of new housing (if we are to address the housing crisis, for example, there is no use building new houses without running water).

How we fund the activities of public authorities is a significant question that cuts across almost all statutory frameworks and all roles the system must play. We apply a broader lens to such questions in Chapter 13. But funding questions are of particular importance in the context of the built environment, especially when providing public goods like transport and three waters infrastructure. This is because such hard “stuff” costs enormous amounts of money, and if it is to be provided by public authorities there needs to be effective frameworks for it to be paid for. A reformed statutory framework will need to integrate both planning for those things and how they are funded. We therefore deal with the funding aspects of the built environment in this chapter.

The focus of this chapter is on the additional legislation for the built or urban environment required to fill gaps in those frameworks already covered. In particular, we require legislation that governs how essential public goods, notably water and transport infrastructure, are actively planned for and funded.

10.4 Legislative design

Let us start with the broad question of legislative design. First, we think that the environment is best defended under separate legislation (the RMA) that stands aloof from frameworks concerned with the planning, funding and delivery of transport and “three waters” infrastructure and services. The latter currently occurs through

decision-making under the Local Government Act and Land Transport Management Act (see Chapter 4). In Chapter 5, we mentioned the potential of integrating those two statutes to form a single Local Government and Infrastructure Act, within which any future changes to three waters service delivery could then comfortably be incorporated (instead of having, for example, a further bespoke Water Services Act).⁹ That would make for fewer inter-statutory connections between frameworks that need to be closely linked.

It would clearly not be desirable to divorce the *planning* of infrastructure (in an Infrastructure Act) from the frameworks under which it would be *funded* (a Local Government Act).¹⁰ It makes no sense to treat those things separately. However, it does not seem beyond the pale to have a broader purpose and principles, for a more integrated act, that would encompass both (1) the more general role of councils in community wellbeing and (2) the infrastructure provision intimately connected to how local communities function, even if there were to be stronger roles for central government than at present.¹¹ In other words, a new Local Government and Infrastructure Act would encompass closely linked processes for infrastructure funding in which both local *and* central government would be involved (including land transport, as is the case now, and three waters, which may see a greater central government role in future). The broader focus of councils on community wellbeing (recently inserted back into the Local Government Act) – not just core infrastructure – would remain central to an integrated Act.¹²

Of course, reorganising things into one statute does not resolve the question of how to integrate or connect what may remain quite separate *processes* (eg for long-term plans and regional land transport plans). There is still a need to align different infrastructure funding processes and decision-making timeframes more closely with each other, as well as with those relating to land use in the RMA. Furthermore, there is a need to take a more aligned and integrated approach to community consultation under different regimes (consulting on different plans at the same time in a way that makes the connections between them clear).¹³

A need for greater process alignment poses some significant challenges, however. Regulatory processes under the RMA (which include some scope for appeals in relation to plans and consents) will always need to look fundamentally different to the funding processes under infrastructure focused legislation (eg plans for funding a new wastewater treatment plant). These processes perform fundamentally different roles and involve different actors (albeit with some crossover).¹⁴ Because of tailored checks and balances on each kind of decision we cannot simply prescribe that all processes reach decisions at exactly the same time. Planning appeals under the RMA, for example, may or may not occur, depending on whether disputes arise.¹⁵ Timeframes for resolving appeals may be uncertain, even if they have a maximum time limit, and different provisions may need to become operative at different times. Similarly, infrastructure funding decisions

may or may not need to be revisited (eg based on the conclusions of an economic regulator,¹⁶ or simply because an annual plan needs to differ from a long-term plan due to the availability of funds in any given year). We cannot just artificially declare that one process will do everything, because different decisions need to be designed in different ways.

Similarly, the process for funding and planning some infrastructure and services (eg three waters) may need to look quite different from the process for funding and planning other kinds of infrastructure (eg transport), because institutional settings are different for each. For example, we cannot have a single process for funding and planning wastewater infrastructure and local roads if the former requires only council funding (through long-term and annual plans), but the latter requires a more complex process by which the NZTA apportions funds from a national fund alongside local council contributions.

While this is not the appropriate place to provide a detailed redrafting of procedural provisions, we think that there are two key things to consider here to encourage alignment of processes within a new Local Government and Infrastructure Act. The first is for different processes to occur within a reasonable temporal envelope, so that they combine to produce outcomes in a timely way. This does not mean that there needs to be a single decision, or that outcomes must be reached on exactly the same day. It is simply to say that the effectiveness of one decision (eg rezoning land as residential) should not be stymied by the need to wait interminably for a different decision (eg funding the infrastructure needed to service it). That is partly what a revised planning process under the RMA would be designed to achieve, as that is where planning delays are most noticeable.

The second thing would be for separate processes to be driven by a common vision in a higher level strategic spatial plan, so that they did not pull in different directions. For example, funding for roads to service an area zoned for greenfields growth under the RMA should not be diverted to other priorities in an annual plan unless there were very good reasons to do so.¹⁷ We have discussed this coordinating role for regional spatial planning in Chapter 8.

At a bigger picture level, it would also be desirable to revisit the purposes and principles of “development” focused legislation – particularly a Local Government and Infrastructure Act – to strengthen environmental considerations within them. For example, when Auckland’s freight is projected to increase by 78 per cent over the next 30 years,¹⁸ it highlights the importance of making smart decisions about what kinds of public infrastructure we will be locking in for years to come (eg road vs rail, the location or relocation of ports etc). While considerations of sustainability are already present in the Local Government Act and Land Transport Management Act, we see potential for them to be made much stronger

and more detailed in terms of our aims,¹⁹ especially with regards to climate change.

Overall, we consider this package of reforms would go some way to addressing concerns that “there is poor alignment between land use and infrastructure plans, processes (including public participation) and funding” in the present system, without creating legislative fragmentation between land use and other aspects of “environmental” planning.²⁰

We see merit in integrating the Local Government Act, Land Transport Management Act, and other infrastructure-focused legislation into a single Local Government and Infrastructure Act. Different infrastructure planning and funding processes need to be better aligned, including with processes under the RMA, although it will be difficult to pigeon hole them into a single process. Environmental considerations within development-focused legislation should be strengthened and aligned with imperatives in a new Future Generations Act.

10.5 Institutional reform

In the sections that follow, we consider the key aspects of the “built” environment that would be tackled within (or closely connected to) a Local Government and Infrastructure Act. In particular, system reform needs to contemplate two types of measures that can be used to improve three waters and transport services: (1) institutional reform and (2) funding reform. The two are closely related, and can be alternative or complementary measures. For example, if we are faced with a need to upgrade water infrastructure, we could overhaul local government funding arrangements to increase revenue, in which case there may be less or no need to transfer local government functions (ie the supply of drinking water) to a central government agency. Alternatively, we could do the opposite – transferring a function elsewhere may mean it is no longer necessary to rethink how councils are funded. Or we could do a mix of both – for example, introducing new funding mechanisms (eg a system of centralised grants) may bring with it an expectation of institutional reform (eg a degree of central government control). We present our thinking on institutional reform first. Those arrangements then provide an envelope within which broader funding arrangements can be explored.

Let us consider the three waters.²¹ The government is currently undertaking a review into the sector, both in terms of (1) how it is regulated for its health and environmental risks²² and (2) how services are delivered to people (including related infrastructure such as pipes, pumping stations and treatment plants). It has signalled its intentions in relation to the first (regulatory) aspect, and thinking is ongoing for the second (service delivery) aspect at the time of writing.

Various proposals have been put forward by the government for more effective regulatory arrangements for the three waters sector, to improve health and environmental outcomes (to the extent a distinction can be drawn between those things).²³ Broadly speaking, we think that those are positive measures and should be incorporated into a future system. Many of these aspects are the concern of the RMA (dealing with the adverse effects of the sector, rather than the provision of services), and therefore need to be placed in the context of the broader discussion in Chapters 6 and 7 about how we reform that Act. In particular, we suggest that:

- The environmental impacts of all water discharges should continue to be managed under a reformed RMA, and that there is a strong case for standardisation through regulatory provisions in national direction (an integrated NEP).²⁴ That is already being progressed through proposals for a new NPS and NES for freshwater, which impose common standards (including for specific sectoral activities).
- In particular, we should not expect wildly different approaches to wastewater discharges in different parts of the country, in the same way that minimum drinking water standards need to be consistent.²⁵ There is also a case for some consistency in the quality of stormwater runoff, and performance based measures to ensure minimum standards are met (particularly in cities).²⁶
- The RMA should continue to apply to the protection of sources of drinking water, under strengthened provisions in an NEP.²⁷
- A stronger approach to enforcement is needed. In particular, in line with suggestions in Chapter 7, there would be a case for the EPA to take on primary enforcement of nationally consistent wastewater discharge standards, and for strict penalties to be imposed for non-compliance (coupled with a “carrot” approach where adequate funding was provided to remedy any funding deficits – see below).²⁸
- There should be a dedicated drinking water regulator with active oversight, robust funding, and clear mandate, with all drinking water suppliers covered by nationally consistent drinking water standards.²⁹ That regulator could be a bespoke entity, or it could be nested within a thoroughly independent organisation like a Futures Commission.

The regulation of three waters for health and environmental reasons – in particular, wastewater and drinking water – needs to be strengthened. There are already proposals underway to do so, and they represent a positive direction of travel for a future system.

A spotlight on matters of public health within the resource management system

It is interesting to note the (quite deserved) attention that the three waters sector has received over the past few years. In the wake of the Havelock North incident, and the subsequent revelation about the state of our drinking water system, issues with the sector have been cast firmly as ones of direct threats to public health – which, of course, they are – and they received intense focus because of it. It is absolutely unacceptable that people are dying and suffering health effects as a result of an underperforming sector. Highly visible impacts from sudden urban wastewater overflows highlight the risk of serious illness, as well as fostering resentment about the lack of access to amenities. They spur public pressure in the same way that the “environmental” issue of air quality has done in the past.

A direct risk to public health instils a strong sense of fear. Other environmental problems – especially the loss of biodiversity, and a slow decline in rural water quality – can be slower burning, and have less directly appreciable impacts on people. This holds a lesson for how the system could usefully approach slow-burning problems, by making clear that they do, in fact, have equally significant and direct risks to humans, even if they may not result in the mass hospitalisation of people through a single incident. For example, the loss of species integral to our systems of food production (eg a decline in pollinating insects), land-based pollution impacting our marine areas, and the paving over of productive soils, pose real threats to our future health and wellbeing, even if they are not as spectacular as a pileup of raw sewage on an urban beach. Even if they are not approached as “emergencies”, such issues could usefully be recast as pressing issues of environmental “security” rather than nice to have “green” outcomes.

Here, we are primarily concerned not with regulatory settings themselves, but with the framework within which services and infrastructure would be funded and delivered. That said, there is a close connection between those two things. Institutional and funding settings are crucial not just for *providing* public services (eg getting water where it needs to go in a form in which it can be consumed or used), but also for ensuring those services will actually be *able* to comply with environmental and health standards (eg making sure infrastructure will not fail, or cause sewage overflow on our beaches). Indeed, simply imposing regulation is unlikely to ensure compliance with it, since meeting regulatory standards will in reality require proactive measures that cost significant sums of money (building and maintaining infrastructure), and institutional settings that encourage adequate investment, not just stopping people doing things. After all, one cannot simply stop people producing wastewater in the same way that one can stop the discharge of an industrial contaminant. Enormous sums are required to

replace ageing infrastructure, to accommodate urban growth, and to increase resilience to climate change.

So what should institutional arrangements for three waters look like in a future system? Various suggestions have been put forward, and options canvassed. Should we have national, regional or local providers of water services? Should there be a separation of regulatory, funding and operational tasks? What degree of subject focus is appropriate (an institution for all three waters or just drinking water and/or waste-water)? And how independently should they operate from accountable institutions like councils or ministers?

We shone a spotlight on institutional arrangements for three waters in the Phase 1 report, and will not cover that ground again here.³⁰ In short, there are compelling reasons for institutional change, which have been traversed by a number of reports already. For example, the Productivity Commission has pointed out that independence and expert management is necessary, noting that:³¹

Except for Watercare and Wellington Water, the governance of drinking water and wastewater suppliers is carried out directly by elected councillors and their officials. In many instances, this will be compromising supplier performance and muddying their accountability to councils.

The sector also lends itself to economies of scale and coordinated investment that have not been realised across most of New Zealand.³² A fragmented system has meant the dilution of a limited pool of technical expertise. As Infrastructure New Zealand has pointed out, "Larger

organisations can employ, diversify and develop deeper expertise across everything from technical proficiency to project procurement, financial management and environmental mitigation."³³

Of even greater concern has been the institutional incentives to underfund core inter-generational water infrastructure (including spending less than the money specifically budgeted for the purpose), which is now at risk of failure and requires significant sums to replace or upgrade. Part of the reason has been a lack of capacity and capability, but a lack of accountability has also been highlighted.³⁴

There have been suggestions that a lack of enforcement of environmental standards has been down to regulatory capture by local government suppliers – a "fox guarding the henhouse" argument.³⁵ And more conceptually, we can genuinely ask whether there is a truly *local* community of interest in the quality and delivery of water services to the public. It is a core part of what councils have always done, but is there a compelling reason for that to be the case in a future beset with different challenges?

In our view, we need to rethink our approach to managing service delivery in the three waters sector.

Below, we provide a short proposition for reform. We also note that, irrespective of their institutional form, public providers of three waters infrastructure should be required to implement a regional spatial plan in the same way as other entities, as described in Chapter 8 (eg to ensure that the provision of infrastructure aligns with land use in the context of urban growth).³⁶



A spotlight on reforms to three waters service delivery arrangements

In the future, we could usefully see a model for three waters service delivery based on jointly owned, regional level council/Crown controlled organisations.³⁷ In some ways, this would be broadly reflective of the existing Wellington Water model (where councils jointly own a CCO), although it could be compulsory rather than voluntary.³⁸

We do not comment on whether such entities would be asset owning or only asset managing,³⁹ or whether they would encompass the management of stormwater as well as drinking water and wastewater. That question of scope might be something that requires further discussion on a region by region basis, although on balance we suggest that stormwater management and flood control would be more suited to remain with councils.⁴⁰ Furthermore, “regional” water entities would not necessarily have to align with the catchment-based jurisdictions of existing regional *councils*. They could, instead, be focused on the boundaries that made sense in the context of service delivery, which may be broader than regional council boundaries or cut across them.⁴¹

These regional entities would still have a significant degree of accountability to the communities which they served. They would be publicly owned, and continue to respect the role of local government in the three waters sector.⁴² However, they would be able to achieve efficiencies through economies of scale, would be able to socialise costs across a reasonably wide area,⁴³ would have a commercial footing (albeit constrained by elements of the public interest),⁴⁴ and would have operational independence. They would recognise that there is not *just* a local community of interest in drinking water and wastewater services, but also a regional and national one (highlighted by the imposition of national standards for both).

A balance between independence and accountability would be crucial.⁴⁵ Water services are public goods (even if users are charged, or partially charged, for them) so decision-makers ultimately need to be answerable to users and communities. The expenditure of public funds also requires strong accountability to those who pay – potentially taxpayers and ratepayers, if CCOs were to be funded in this way (rather than just reliant on user-charging).⁴⁶

However, on the other hand, water utilities require significant independence. This is because, in our view, there are relatively few value judgements here to be made on behalf of communities.⁴⁷ The relevant value judgements really occur when water quality bottom lines are set at the national level.⁴⁸ We should not allow drinking or wastewater standards to imperil people’s health just because they are in one part of the country rather than another, and levels of service should also not vary wildly. The point of water providers is then to meet those standards and service expectations, not to revisit

questions about community values and trade-offs. As pointed out in the Phase 1 report, greater independence is valuable where an institution is implementing values rather than setting them.⁴⁹ Provisions relating to CCOs in reformed local government legislation could usefully be amended to provide a more specific set of objectives for these institutions.

A key difference with a pure CCO model, however, would be direct involvement by the Crown, as a partner alongside councils. We see value in hybrid institutions where different levels of government come together in formal partnership, rather than in entirely separate institutions that interact (and can conflict) with each other.⁵⁰ For example, the government could have a right to appoint members to the board. Furthermore, the model should in one sense reflect the Watercare approach, in that a regional CCO’s statement of intent would outline how its activities would contribute to the government’s objectives for water services, not just those of council owners.

Alongside the creation of regional CCOs could usefully be the introduction of an economic regulator. Although CCOs are ultimately accountable to councils (and, in this model, also the Crown), and there is an “Essential Services Benchmark” that must be reported against under local government legislation, that has not prevented underinvestment in infrastructure.⁵¹ A more robust economic oversight role would still be useful to ensure that (1) an adequate⁵² level of investment was being put into the maintenance and development of three waters infrastructure and (2) that any user charges imposed were both fair and sufficient when taking a long-term view.⁵³ A similar model has been set up in Melbourne, where pricing and investment by multiple state-owned but arm’s-length utilities is overseen by an Essential Industries Commission. In the same spirit, the Productivity Commission has said that a regulatory regime should be:⁵⁴

administered by an existing, credible and independent regulator such as the Commerce Commission, which already regulates similar activities, has a credible “industry watchdog” reputation and has significant experience applying light-handed regulation to some suppliers and stronger forms of control to other suppliers.

We agree. Alternatively, the role of an economic watchdog could be performed by the newly established Infrastructure Commission (if it had capacity), or even a focused branch of the Futures Commission.⁵⁵

At the same time, as with Watercare, the law should prevent the pursuit of profit or the payment of dividends.⁵⁶ The aim should be to achieve and maintain the safe, reliable and environmentally sustainable provision of water services and, within those constraints, to make services as efficient and affordable for users as possible.

One might hope that this proposition represents something of a middle ground for reform that local government could be happy with. For example, the Productivity Commission has pointed out that “some councils appear to be reticent about losing control of their water functions as it is regarded ... to a certain extent ... as justifying their ‘existence’”.⁵⁷ Communities would retain a degree of control through a CCO model, especially when compared with alternatives (eg transferring functions to Crown-owned utilities or a single national water service provider, as in Scotland).

That said, the regional provision of water services through a jointly-owned CCO model would be broadly compatible with the regional unitisation of councils themselves (shareholders would simply change from existing territorial authorities to one or more regional authorities).⁵⁸ Especially for smaller councils where infrastructure comprises a significant part of what the institution does, serious questions will need to be asked about whether removing key infrastructure responsibilities from direct council control would really require some form of local government structural reform in parallel. However, as discussed earlier, we find it best not to talk about “amalgamation” here. It is more appropriate to talk about which functions should lie where. Local autonomy is essential for truly local matters, and the shifting of some functions to a regional level should not mean that councils with sub-regional boundaries simply “disappear” or that everything suddenly becomes the responsibility of regional unitary authorities.

There is a sub option to consider here, too. Regional CCOs (with Crown involvement) could be a conditional measure, deployed where there were a demonstrative need for them (eg proven or persistent underperformance by councils). The provision of central government funding could even be conditional on the voluntary use of a regional CCO structure, providing a carrot rather than a stick.⁵⁹ Not all districts are facing the same challenges, nor have they had the same record of non-compliance and under-investment. Do we wish to colour them with the same brush? A conditional reform here would reflect similar measures we have suggested in the context of the RMA, where a transfer of regulatory powers to the EPA could be a conditional measure for poor outcomes or performance.⁶⁰

We see merit in deploying jointly owned CCOs at a regional level for the planning, funding and delivery of drinking water and wastewater infrastructure and services. A CCO model could be tweaked by allowing for the Crown to be a partner in these organisations alongside local government. At the same time, there would be an economic regulator with responsibility to ensure that investment levels and pricing were sufficient and fair.

Similar arrangements (a regionalised CCO model) could be made for the provision of land transport infrastructure in a future system, for similar (albeit, in our view, less pressing)⁶¹ reasons. Some have suggested a model similar to that in Auckland, where a single regional CCO (Auckland Transport) operates at arm’s length from council and takes on the planning role of a regional council under land transport legislation. We see merit in investigating that possibility further over the medium term, noting that arm’s-length decision-making has, at the national level, been carefully formalised through the separation of the NZTA from the Ministry of Transport (subject to general direction in a government policy statement), yet that separation has not been seen as necessary at a local level.

The use of a CCO model for land transport would not mean that a CCO would need to be financially self-supporting (as is Watercare), or act entirely independently. Councils would likely still be required to fund it,⁶² alongside contributions from the NZTA through the national Land Transport Fund, and would have the corresponding ability to appoint and remove directors, issue statements of expectation, and review performance.

However, as with water services, institutional change on this front could be a conditional measure dependent on council performance or need. Not all areas face the same challenges. And while it certainly makes sense to manage transport at a regional level, that already occurs in a structured, albeit complex, way through regional transport committees.

We also consider that it is appropriate for central government, through the NZTA,⁶³ to continue to have a role in transport infrastructure planning, irrespective of how local government is organised. As the Productivity Commission has explained:⁶⁴

The rationale [for central government involvement] is that the state highway network interconnects with local roads to form a secondary part of the national roading system. While most use of local roads is by local people, out-of-district people and businesses also use them.

Oversight by central government is important, and (in contrast to the three waters experience) is encouraged in the transport sector through a model that requires the NZTA to pay close attention to the details of investment choices.⁶⁵ That said, the relative *degree* to which effective control is exercised by central and local levels of government should, we think, be revisited in light of a clearer definition of subsidiarity in a future system.⁶⁶ For example, there could usefully be a review of which revenue raising tools should feed into the Land Transport Fund or, instead, go directly to councils (or jointly owned regional CCOs, if that were the preferred option).⁶⁷

Reform should also revisit the potentially perverse incentives provided by excessively linking NZTA revenue with the use of *roads*;⁶⁸ a more balanced set of revenue sources (eg through value uplift capture) could do more to make the development of environmentally friendly transport choices (eg mass transit, active transport

infrastructure) a desirable choice from a cashflow perspective as well as an urban planning perspective.

The future might also usefully see the continuation of more bespoke institutional partnerships to deal with exceptional circumstances. For example, while fraught in some ways, the Auckland Transport Alignment Project has been positive in bringing together various arms of central and local government to create a forum for the long-term planning and funding of Auckland's transport needs.⁶⁹ That does beg the question, however, whether broader frameworks like this should be formalised for deployment elsewhere, implementing lessons learnt from the Auckland experience. A strategic spatial planning framework, discussed in Chapter 8, could fulfil this role.

We see a continued role for central government, through the NZTA, in co-funding local transport infrastructure through the Land Transport Fund. A conditional reform could be the deployment of regional CCOs alongside the NZTA, although such CCOs would continue to require council funding.

10.6 Funding

A degree of institutional reform is, in our view, desirable, but it will not be enough to meet future challenges. Many underlying issues appear to be not with institutional form per se, but with the incentives provided by funding and financing tools available to those institutions. Two things stand out as important: (1) a lack of funds or finance leads to an inability to deliver what is required in some situations; and (2) there are incentives against investing in necessary infrastructure even if the ability to raise adequate funds exists.

Institutional change, in the form of a regionalised CCO model for infrastructure and service provision, may

itself relieve some funding pressures. There would be potential efficiencies from using a business focused governance model (eg with independent directors),⁷⁰ the economies of scale to be gained from managing a network across a larger pool of customers and assets,⁷¹ the concentration of a limited pool of expertise,⁷² and the ability to cross-subsidise some users (eg those with failing legacy infrastructure) from others to achieve a consistent standard of service to all. The Productivity Commission has pointed out, for example, the desirability of a model that is "capable of applying efficient scale and specialisation to help small communities meet the challenges of maintaining and upgrading their water, wastewater and stormwater infrastructures".⁷³

Some of the same arguments – notably around economies of scale – can be deployed in favour of regionalising local government itself.⁷⁴ However, the scale of the costs faced by the three waters sector in particular, including in the near future, means that much more will be required than just efficiency gains and economies of scale in ongoing management.⁷⁵ For example, we have previously pointed out:⁷⁶

[W]astewater upgrades needed to give effect to the NPS for Freshwater Management have been estimated to cost \$1.4–\$2.1 billion, with ongoing operating costs at \$60–\$90 million.⁷⁷ Measures to ensure compliance with drinking water standards have been predicted to be \$305–\$567 million.⁷⁸ In 2014, the Auditor General pointed out that by 2022 the gap between local government expenditure on the renewal of assets and depreciation could be between \$6 billion and \$7 billion.

These costs will only grow larger as environmental and health standards increase.⁷⁹ As discussed in Chapter 9, they are dramatically increased by the need to adapt to climate change. In light of the institutional arrangements outlined above, we can now revisit the kinds of funding mechanisms that would be needed to make that model effective.



A spotlight on funding three waters

Above, we have suggested rolling out a model that would see three waters service delivery performed by regional CCOs. But the funding model associated with these entities could also usefully be reformed. That would be in three key senses. First, user-charging would be embraced more, including through encouraging the use of volumetric charging and fully internalising the cost of trunk infrastructure upgrades on new developers (through development contributions and connection charges). For one, that would have the effect of driving the efficient use of what can often be a scarce resource.⁸⁰ For example, one reason for the underperformance of the three waters sector has been “poor financing, funding and pricing arrangements, due to under-recovery of costs and funding from council rates rather than water service charges and development fees”. Others have observed that “those who benefit from, or cause the need for, a service should pay for its costs”.⁸¹

However, user-charging should not be excessive or unduly burdensome. After all, water is still a public good. Thus despite concerns from some about a lack of full cost recovery and therefore efficiency,⁸² we still see a case for services to be subsidised, where necessary,⁸³ in a transparent manner by more general sources of revenue like rates and central government grants. That reflects a broader community (or national) responsibility to provide essential services.⁸⁴

But existing residents should not be expected to bear the burden of funding growth-related infrastructure through rates. Indeed, such incentives would be important in practice to prevent resistance to the implementation of a spatial plan in high growth areas (and a greater ability to raise debt would be appropriate here). An economic regulator would also play an important role in ensuring that user charges were fair, the use of more general sources were transparent and justified, and overall investment would be sufficient for achieving inter-generational outcomes.

Secondly, the Crown would be expected to contribute, recognising a national community of interest in the environmental and health outcomes that are influenced by funding and investment in water services and the enormity of the costs faced.⁸⁵ As in other areas of the resource management system (eg freshwater quality), this recognises that national level standards need to be met by a corresponding commitment by central government to implementation. Local government is not just a dumping ground for additional functions without the means to implement them.

A central government funding contribution could be linked to, and be proportionate with, representation on the board of a CCO, and targeted to the needs of particular regions. An interesting parallel here can be drawn with membership of catchment boards prior to the local government reforms of the late 1980s, in that these had both locally elected members and appointees of the Crown, and received significant

central funding for erosion and flood control works. We should not, however, treat central government funding in an ad hoc way through the creation of specific funds (eg a Housing Infrastructure Fund), or only for particular purposes (eg supporting urban growth in favour of renewal of failing assets). The need is more systemic and ongoing, and funding needs to be linked clearly to prioritisations needed to achieve health and environmental outcomes (targets) as well as the need to deliver more housing. For example, the Productivity Commission has suggested that central government funding for water be deployed in a comparable way to transport – including criteria based on need and the ability to fund in other ways (eg through rates).⁸⁶

Alternatively, Crown involvement could be treated as a stopgap measure until legacy issues (eg failing pipes) or current challenges (eg urban growth or the need for treatment plant upgrades) have been resolved.⁸⁷ How long the resolution of such issues would take may vary by region, but they could be significant and ongoing (especially in light of increasing climate change challenges).⁸⁸ All indications are that costs will be formidable.⁸⁹ It might be that, as a country, we simply need to recognise the importance of central government involvement in essential services like water.

Thirdly, the ways in which local government is funded, and therefore how it could fund these regional entities, could be reformed. That is a much broader topic, and is explored below. The effectiveness of local government funding reform and regionalisation through a CCO model *might* mean, however, that the need for direct central government involvement and funding became less important over time.

Aside from institutional change, we see merit in revisiting how the provision of water services is funded. In particular, there should be greater deployment of user-charging (including volumetric charging) and predictable, need-based central government contributions where required. Because in our model councils would ultimately be responsible for the operation of CCOs and may be required to fund them (in part), we also see a need to revisit how local government itself is funded.

Some aspects of local (and, indeed, central) government funding are not specifically to do with the built environment (eg the funding of compliance monitoring, general planning functions, and the subsidisation of beneficial activities like community restoration projects and electric vehicles). Some revenue can also be obtained as a byproduct of economic instruments designed primarily to influence people's behaviour (eg a green tax).⁹⁰ These broader aspects of funding and economic incentives in the resource management system are considered further in Chapter 13.⁹¹

However, a significant proportion of the costs facing councils relate in some way to infrastructure or related aspects of the built environment, and go to the heart of how they obtain core revenue. Reform on this front is not so much to do with the financial planning *process* (eg the production of long-term and annual plans, infrastructure strategies, and regional land transport programmes).⁹² Rather, the key question here is to do with the underlying kinds of funding and financing tools that can be drawn upon through those processes to ensure that adequate infrastructure is delivered in a timely way.

As pointed out in Chapter 8, adequate funding will be crucial to the success of strategic spatial planning under a Future Generations Act, especially in situations of rapid urban growth that require infrastructure. Indeed, a key purpose of having such a spatial plan would be to guide the sequenced release of land for development in a way that makes the timely provision of associated public infrastructure most efficient. However, that still does not answer the question of *how* it would be funded.⁹³

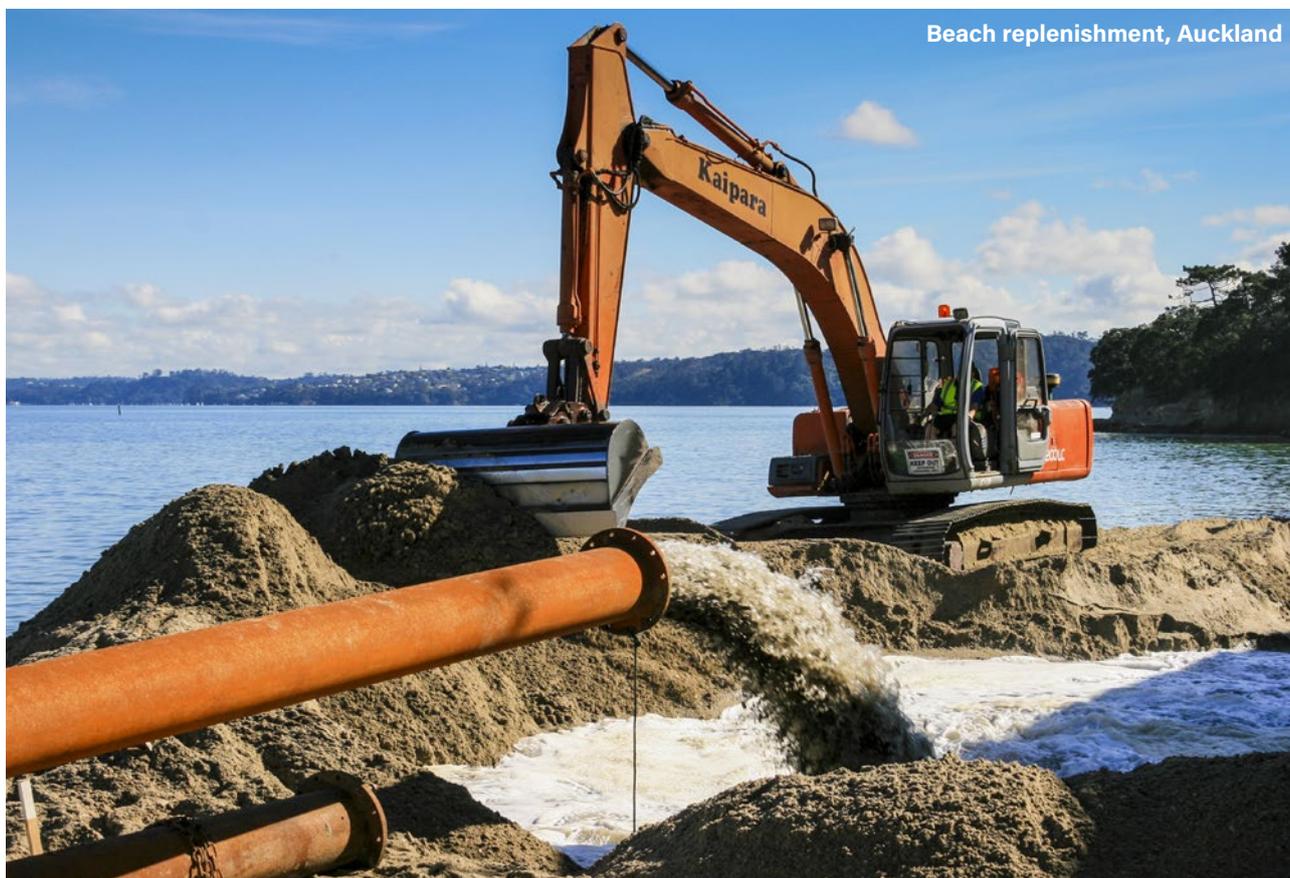
The Productivity Commission has persuasively argued that the core of the system by which we fund and finance councils' functions remains appropriate:⁹⁴

The current main funding tools of local government in New Zealand measure up well against the principles of appropriateness for local government use, coherence within national policies and institutions, efficiency, enforceability, and the stability and predictability of revenue. The current framework provides councils with considerable flexibility in how they raise revenue, and this is reflected in the diversity of ways in which they do so.

Funds can be raised through, for example, rates, fees, user charges, and development contributions.⁹⁵ The Commission has showed that rates have remained relatively stable when compared to per capita and household income,⁹⁶ and they provide a reasonably fair and easily administered system for raising core revenue for council functions (especially infrastructure and related services).⁹⁷ It has previously pointed out the desirability of removing exemptions for Crown land, which in effect results in local communities subsidising central government despite the need for funding flows to be moving in the opposite direction.⁹⁸

Similarly, despite some public perceptions to the contrary, council debt remains a desirable mechanism to spread substantial capital investment across generations of people who benefit from it.⁹⁹ Growing debt levels, say the Commission, are not of concern given corresponding population growth (and therefore the ability for the debt to be serviced over time). In fact, the concern (see below) is quite the opposite: in some cases there are constraints on raising further necessary finance through debt.¹⁰⁰

However, the Commission also suggests that we will need to expand the toolkit to target particular problems where there are acute funding pressures and constraints.¹⁰¹ The use of tools in an expanded toolkit also needs to reflect what is fair, in that those benefiting from a measure should generally be expected to pay for it (if they can). We find this reasoning compelling (see Figure 10.2 below), subject to environmental considerations described further below.



Type of funding or financing pressure	Issues to be addressed	Tool(s) required to respond
Rapid urban growth requiring timely provision of new, or upgrading of existing, infrastructure	Some councils are approaching their debt ceilings, ¹⁰² so cannot use this to finance infrastructure in order to spread its costs over future residents/generations ¹⁰³ Councils take significant risks in making large capital investments up front based on growth forecasts that may underestimate or overestimate actual growth ¹⁰⁴	Use of "special purpose vehicles" to remove debt from the balance sheets of debt constrained councils
		Greater use of user-charging (eg volumetric charging for wastewater) and targeted rates to reflect that those who benefit should be those who pay ¹⁰⁵
		The ability to capture value uplift (increased property values resulting from public investment in infrastructure or services, eg a new mass transit system) ¹⁰⁶
		Structured contributions from central government transparently linked to demand or need
		An urban development authority could play a greater role in funding and financing new developments, ¹⁰⁷ de-risking large scale developments for councils
The renewal and replacement of ageing or failing infrastructure	Significant (and ultimately unknown) amounts of infrastructure are ageing and at risk of failure	Use of "special purpose vehicles" to remove debt from the balance sheets of debt constrained councils ¹⁰⁸
		Greater use of targeted rates to reflect that those who benefit should be those who pay. ¹⁰⁹ Some have suggested that legislation should specifically require the process for setting rates to match the burden of rates to the benefits obtained from related services, and only then consider people's ability to pay (ie distributional mechanisms). ¹¹⁰
		Contributions from central government
The need to maintain infrastructure used by tourists/visitors	Increasing visitor numbers in parts of the country impose pressures on infrastructure that cannot, or should not, be met by local communities. This poses risks to social licence and community support for tourism, potentially threatening national level benefits.	Greater user-charging for services where feasible
		Allow councils to charge an accommodation levy (bed tax) as a proxy for charging for the use of services ¹¹¹
		Direct government assistance (through the international visitor levy) for councils with tourist hotspots that cannot reasonably recover costs in other ways ¹¹²

Figure 10.2: New funding and financing measures suggested by the Productivity Commission for the "built" elements of a future system. Note that other funding challenges – relating to climate change and new or strengthened expectations on councils – are explored in Chapters 9 and 13.

We agree with the Productivity Commission that more needs to be done to expand the funding and financing tools available to local government, particularly to support its functions relating to the built environment, as outlined in Figure 10.2 above.

As illustrated above, tools need to be adequate to raise enough funds for the purposes required. However, other commentators, like Infrastructure New Zealand, have pointed out the need to go further, and revisit the broader incentives that are created for public authorities by existing funding tools. In other words, the question is not just about how we ensure that *enough* money can be raised (ie that the tools, like debt, are available), or even that the cost of doing so is shared more fairly between central and local communities of interest (ie that central government contributes where appropriate). It is also about the need to provide an *incentive* to both raise money and to spend it appropriately, particularly for councils.

There are several contexts in which this plays out, and these overlap with the situations in which there are funding constraints. That is because (the argument goes) such constraints arise because of a systemic unwillingness, rather than inability, to raise sufficient money.

Perhaps the most alarming is underinvestment in the maintenance and renewal of some inter-generational goods like water infrastructure. Echoing similar sentiments by Infrastructure New Zealand, we have pointed out previously that:¹¹³

Due to political constraints on rates increases and constraints on borrowing, there may be a temptation for some councils to prioritise spending on things the community wants at the expense of the renewal of some kinds of essential infrastructure – notably water infrastructure. Some councils have adopted a “run to fail” approach for underground assets, not investing in upgrades until there are problems (such as sewage overflows or public health problems such as with inadequate treatment of potable water).¹¹⁴

This is particularly troubling and may seem puzzling because here, communities have failed to invest in assets that directly benefit themselves; they are not just reluctant to fund assets that will benefit others (eg future residents or tourists). It is hardly a glowing endorsement for a blanket embracing of localism (or even regionalism). That said, if there are constraints on total funding, strong political opposition to rates increases,¹¹⁵ and increasing costs that have to be met (eg to meet wastewater standards), hard choices have to be made. And if they are made by politicians, they will be informed by political considerations. Although the issue is by no means ubiquitous throughout the country, it highlights the risks of leaving decision-making and prioritisations on inter-generational issues by those accountable through three yearly election cycles, especially if failures only become visible to the public years after they should have been pre-empted (as with many underground and unmonitored assets like water).¹¹⁶ As such, we have suggested a degree

of institutional reform above (through a regionalised CCO model and close independent oversight) as well as funding reform.

Institutional reform is vital, alongside funding reform, for the provision of drinking water and wastewater.

Another – albeit more understandable – case where councils lack adequate incentives is where there is a need to pay for the infrastructure required to service urban growth. Here, there is an argument that they have incentives to provide it on a “just in time” (or, indeed, too late) basis. The failure to provide such infrastructure has been described as a “serious social and economic problem” and a significant contributor to the housing crisis.¹¹⁷ (Incidentally, this quite rightly reminds us not to lay blame squarely at the feet of restrictive provisions in the RMA,¹¹⁸ and we should be extremely wary about throwing out important environmental bottom lines in that Act on the assumption that it is fundamentally opposed to urban growth – as explained later in the context of a proposed urban development authority model). In a similar spirit we pointed out in the Phase 1 report that:¹¹⁹

there can be strong political incentives on councils not to increase rates, especially if they are being used to service new development and the benefits are not apparent to existing residents who are paying for it (and who are the ones voting in local elections).¹²⁰ This is not necessarily an inappropriate incentive; it is arguably unfair to expect existing residents to pay a huge amount more in the short term to benefit new residents. But it can lead to an institutional bias in councils against growth, and therefore resistance to the timely and proactive provision of serviced land for residential development. It can be a disincentive to supply the development capacity that in high growth areas is needed to support affordable urban housing.¹²¹

A similar logic applies to pressures created by tourism. Visitors – often in high numbers and having substantial impacts – do not pay rates, and are often not charged directly for the services they use within a district. Other than a general desire to be hospitable hosts, why would residents be enthusiastic about that?

According to Infrastructure New Zealand, the same basic problem underpins all of these phenomena: there is misalignment as to where the benefits and costs of investments fall. That may still be the case even if users were able to be charged fully for the services they use (ie if the costs were internalised), because there would still be little prospect of *benefit* and therefore weak incentives. For example, it is understandable that existing residents are reluctant to pay for rapid urban growth, because the benefits (in the form of increased economic activity) accrue mainly to central government via income tax and GST. The same is true for tourist spending, where financial benefits for the public are captured primarily through GST, but where the costs (eg infrastructure) are borne by councils.¹²² For example, Infrastructure New Zealand has pointed out that:¹²³

the major issue facing councils is that their primary source of revenue – rates – is detached from council or area performance and instead linked to constituent perceptions of need and affordability. Rates must be approved each year by local residents and public opposition to higher charges has contributed to a severe funding deficit across many areas.

Without a financial benefit from decisions which improve welfare, the dominant priority for councils is minimising rates increases for existing residents. [While] the government benefits directly from improved economic performance via growth in income, corporate and sales taxes... local government expenditure which improves economic performance requires an increase in rates with the tax windfall returned to central government.

Local councils, who carry the majority of responsibility for infrastructure for new development, have resisted large investments which would have improved developable land supply and accelerated the provision of affordable housing.

The Productivity Commission has agreed that incentives to raise and spend money need to be corrected, alongside measures to increase total money available. However, the Commission suggests fairly targeted or surgical measures to do so, and supports the ongoing use of rates to fund most council activities. Many of these surgical measures are about ensuring that the costs are borne by those who enjoy associated benefits (eg by charging specific users or groups of users, or by requiring funding from central government). Solutions include allowing councils to charge users for services more directly, where feasible, or through broader proxy measures, for instance through imposing a hotel bed tax or through value uplift capture, where:¹²⁴

owners who enjoy “windfall gains” in their property value as a result of nearby infrastructure investment that is publicly funded [would be required] to pay a portion of this gain to the council. In turn, revenue raised would help the council fund future growth.

The Commission also envisages greater need-based or performance-based assistance from central government where there is a national interest, thereby relieving pressures by constituents that are unwilling to fund measures that they do not benefit from. As such, in the context of urban growth, it agrees that there is at least a perception among ratepayers/voters that the community as a whole does not obtain net benefit from growth and yet feels as if it is expected to subsidise it through general rates.¹²⁵ It describes this as an issue of political economy (as opposed to an economic reality), but it is the perception among constituents that ultimately matters in council decisions, because those people are the ones that create political incentives for councillors.

However, others have gone further, arguing that instead of just shifting costs onto those who benefit, we should embrace the other side of that coin: by instead shifting the benefit to those who bear the costs. Some have therefore suggested allowing local government itself to

collect income tax, providing an incentive for investing in measures that would enhance people's incomes. That particular measure may be difficult to implement at a local level, given the complexity of the system required and challenges with tying people's incomes to particular geographical areas within New Zealand.¹²⁶ Others have suggested returning funds to local government based on their proportionate generation of GDP.

Another potential solution floated by the Productivity Commission has been a system of central government grants to councils, proportionate to new building work (eg based on the value of building consents issued).¹²⁷ The idea is that this would be a carrot for councils to increase the supply of serviced land, but through a mechanism that may be more easily and efficiently administered than others (eg a local income tax). That more systemic approach would, in our view, be a much better method for government assistance than a continuation of using ad hoc, competitive and constrained funds that are parcelled out on a discretionary basis and can be vulnerable to politics.¹²⁸ As Infrastructure New Zealand has observed, “Infrastructure funding and financing solutions for one council area risk opening an argument for similar assistance elsewhere, disincentivising central government from intervening”.¹²⁹ Revenue flows need to be predictable for core funding responsibilities, not based on handouts.

An alternative that we see considerable merit in is deploying a form of local GST (as long as it were met by a corresponding reduction in national GST), rather than relying on an extensive system of government grants to facilitate urban growth.¹³⁰ There are many challenges and benefits of using GST,¹³¹ and further investigation should be undertaken on their relative strength, but the benefit we find most compelling is not a particularly technical one: it would provide communities with greater control of their own destinies and better reflect subsidiarity. As Infrastructure New Zealand has pointed out, regional development is currently, counterintuitively, a central activity: “Successive Governments have sought to lift regional economic performance, but with little demonstrable success. Major central investments risk the appearance of backing winners”.¹³² Similarly, another commentator has pointed out the OECD's view that:¹³³

local governments need greater incentives to promote and accommodate economic development and growth in a way that best suits their region, not the current one-size-fits-all approach.

““

[O]nce local governments in New Zealand are given more autonomy and incentives, they will offer a package of goods and services that meets the needs and demands of the residents of that region.

That assumption clearly does not hold for all cases – we might think of the inter-generational outcomes produced by regulatory “services” protecting the environment (eg freshwater). Even for more tangible public goods, we can be forgiven for not always trusting the wisdom of the short-term “demands” of residents (we can think of the

concerning pattern of underinvestment in three waters infrastructure). But overall it does suggest the desirability of putting greater fiscal control in the hands of local government for local matters (again, subject to strict environmental limits and national oversight). It would also continue the tradition New Zealand has of recognising the fiscal autonomy of local government,¹³⁴ which in turn reflects its position as a constitutional partner in government rather than a subsidiary of the Crown to be handed money.¹³⁵

In other words, a local form of GST would shift some of the benefits of investment (currently reaped by central government) to where its costs are currently felt (by councils), rather than shifting the costs of investment to where the benefits are currently felt (ie simply making the Crown pay). The choice is significant, because the question of *who* makes decisions – fundamental to democracy – is as important as the question of who ends up paying for them.

Introducing a local GST, for example, could encourage the funding of growth, because it would be seen as a profitable thing for councils to do (population growth is, or is often perceived as, a proxy for economic growth).¹³⁶ But it may also encourage the funding of broader social and economic development measures that a focus on building activities, funded directly by the Crown, may not. Some have pointed out, for example, that “without a revenue stream linked to value creation, councils are ... disincentivised from investing in [economically] productive activities” more generally.¹³⁷

Alongside a bed tax, support from an international visitor levy, and some government assistance in exceptional circumstances,¹³⁸ GST could be used to fund and enhance tourist infrastructure where user-charging is not an option. Local spending by tourists (including domestic visitors, who are not subject to the visitors’ levy) would be captured through this tool, incentivising the maintenance and development of infrastructure (to increase the tax take) while providing a more equitable distribution of its costs and benefits between central and local government. Arguably it would be a fairer tool than a targeted rate, because the latter imposes costs on a particular section of the community deemed to benefit from an investment (eg public transport infrastructure), even if it fails and no benefit materialises.¹³⁹ And some have said that if it were linked directly to new revenue (and therefore obvious improvements in public services), such funding tools may reduce Nimby opposition to intensification.¹⁴⁰ That, however, requires a slight leap of faith.

That said, we do not see a local GST as a viable replacement for rates as a core funding tool. While spending on goods and services can be a useful proxy for some things (eg high spending would generally correlate with high growth and with increased visitor numbers, and could therefore be used to partly fund them), it would not correlate with the need to fund all public goods and services. In particular, we need to remember that funding is also about ensuring a sustainable standard of living for communities declining in population or economic activity.

While declining areas are to be commended for efforts to attract more residents and visitors, a decline is often due to factors beyond the control of communities (eg the attractions of a larger city), and a managed decline may be needed in many cases to adapt to change rather than fight it.¹⁴¹ Yet the basic health and wellbeing of those in a community, dependent on the funding of water and transport infrastructure, should not depend only on the strength of a highly localised economy (what people spend). That can also vary considerably from year to year, and make long-term planning challenging.

The answer here may, as times change, need to be council amalgamation. We cannot have a council managing 1000 people. It may also be about direct government assistance where there is an issue of hardship or to support a transition to a more sustainable institutional structure. However, it also cautions us against relying only on GST or income tax (or a tax based only on property value)¹⁴² as a way to support essential services in a community. Rates, fixed to an unchanging amount of land in a district or region, provide a predictable and consistent source of revenue based on an assessment of what needs to be funded rather than what is available, which can supplement user-charging and debt in a way that is equitable across current and future communities. The Productivity Commission has pointed out that “[c]ompared to alternatives, property taxes are simple and efficient to administer, and wholesale change to a radically different model would be highly costly, disruptive and uncertain”.¹⁴³

Overall we agree that the way forward is to expand our toolbox, not replace it. We see merit in including a local GST within that toolbox, among other things that spread costs more equitably, raise sufficient revenue in a timely way, address pressing short-term deficits, and provide systemic incentives to invest appropriately. While it is how the Commission’s terms of reference have been defined, such questions are not just about local government funding at all – they are about how we fund both councils *and* central government to provide public goods and services that are, currently, the responsibility of councils. Many of those relate to infrastructure. Putting more tools in the toolbox should help councils meet the challenges they face in discharging their functions, including funding urban growth and renewal.

However, it is also worth noting that central government also plays a vital, but sometimes less structured, role in infrastructure provision. Some projects may fall beyond the scope of business as usual funding mechanisms, even in a reformed system, and require bespoke arrangements. The short-term upgrade and renewal of three waters infrastructure due to historic underinvestment is a case in point, as are measures to adapt to and increase resilience to climate change (see Chapter 9).

Other needs may emerge from time to time and central government has a significant pot of general revenue that it can direct towards particular projects. For example, while the Auckland Transport Alignment Project can be seen as the product of a system that is not clear enough about where transport funding responsibilities lie, it can also be

seen as a bespoke and positive partnership designed to deliver a particular outcome for Auckland.

Innovative experiments require funding, too, beyond the normal state of play. Some, for example, have put forward the idea of a satellite city to address Auckland's population challenges; rather than growth happening slowly and incrementally, we could create a new, compact urban hub (eg potentially through a government developer)¹⁴⁴ in an area of low land productivity and low environmental value, and link it into plans for wider mass transit. If we are resigned to rapid urban growth, that may not be such a bad idea for environmental, efficiency and overall affordability reasons. On a less ambitious scale, efforts could be made to turn Auckland into more of a multi-nodal city (with several equally important centres and hubs of employment).

Whatever they look like, special partnership arrangements with shared funding highlight the need for a coherent plan to be made, and for there to be reasonable certainty it will be followed through with.¹⁴⁵ We see an important role here for spatial planning, which would have legal influence over both regulatory and financial decision making under other frameworks (see Chapter 8).

The incentives provided by the current system of funding infrastructure in the context of urban growth and tourism pressures require correction. Targeted measures to shift the costs of infrastructure onto those who benefit will help (eg a bed tax and grants from central government). However, we also see merit in allowing councils to levy a local form of GST, which provides incentives for funding growth while allowing communities more control. That cannot be a complete replacement for rates, but would be a useful addition to the toolbox. More bespoke funding arrangements may be required for particular projects over time, but ad hoc agreements should not form the basis of funding for essential services.



10.7 The bigger picture

At this point, we wish to take a step back to take a bigger picture view. There is clearly a need for incentives to increase housing supply and provide for tourist infrastructure while also providing minimum service levels for declining communities. (Climate change adaptation funding, and funding of other public functions, is significant as well, but is not just about the built environment and is therefore explored in Chapters 9 and 13.) Cities need to be allowed to grow, because more people are demanding to live there.

But we need to be cautious that powerful financial motivations for councils to grow and develop – to build – do not in practice lead to perverse incentives for environmental outcomes. For example, while unconstrained Nimbyism and funding constraints are not among them, there are good reasons to resist some forms of urban growth: they can be unsustainable. One can think of the paving over of productive soils, the climate implications of dispersed urban form, and pressures on infrastructure leading to congestion and pollution. Similarly, tourism has immediate impacts not only on councils' balance sheets, but also on the environment. Indeed, this is a current focus area for the Parliamentary Commissioner for the Environment.

Councils' roles in good urban planning and environmental management under the RMA – a very different hat that they wear – should therefore not be undermined by the incentives placed on them through changes to their funding models. For example, we would need to be very careful about exacerbating conflicts within a regional level of government that is mandated with crucial aspects of environmental regulation as well as economic development. Funding linked to economic activity should not drive the environmentally inappropriate deployment of, for example, irrigation.¹⁴⁶

Such risks might be addressed through the more active and clear use of national direction (eg requirements for densification, preservation of productive soils), as well as the role of central government in creating spatial plans and the role of an environmentally focused Futures Commission in RMA plan-making. As discussed in Chapter 13, it may also be addressed by introducing an environmental footprint tax to supplement more general forms of revenue. This would not discourage growth, but (if able to be levied by councils) would provide a powerful economic incentive for *ecologically sustainable* growth rather than financial incentives butting heads against regulatory restrictions.

At an even higher level, it is timely to reiterate another observation we have made already. There is often an important underlying assumption in the context of discussions about urban growth: we have little ability to control demand through the resource management system, and we simply have to respond to accommodate population pressures.¹⁴⁷ But do we want growth? How much? And in what areas?

Even for overseas tourism it is a policy question that has not progressed very far (eg how many visitors we should allow, and how we can meaningfully distribute them). But it is a far more uncomfortable question, and one that is even harder to answer, when we think about New Zealand's population more generally. Tourists are temporary, but residents are not. We cannot, obviously, tell people where to live. Auckland is seen as a particularly attractive place, despite its drawbacks. And we cannot tell people how many children to have. Natural population increase is, indeed, much less of a concern in New Zealand than elsewhere in the world, where living standards are lower and family planning practices are less developed.

However, we observe that it is far from ideal that human population growth is a topic that is often brushed under the carpet in the context of a system that is required to respond to enormous pressures created by it. Thus, how big do we really want Auckland to get? Should we *have* to choose between productive land and housing? Would we want a New Zealand of 10 million people?¹⁴⁸

As a society, we need an honest conversation about long-term immigration that is independent of moral and economic perspectives on it. And we need a mature discussion about the resource and environmental implications of human population more broadly, which does not descend into arguments about race and is not limited to a discussion of short-term economic needs (eg that we need more kiwifruit pickers). Simply because technology has overcome problems of food supply and population growth in the past does not mean technology will solve all our problems in the future (indeed, it has already produced many undesirable side effects – we might think of insecticides and synthetic fertilisers). We think this conversation could be carefully framed within the development of a population policy by an independent Futures Commission, which would be tasked with the related task of futures scanning (see Chapter 8).¹⁴⁹

We need to be cautious that providing strong financial incentives to our institutions for growth and development does not put pressure on environmental considerations. In a future system, councils will continue to wear different hats, and environmental limits will need to stand firm. Safeguards are required.

10.8 Construction legislation

Before turning more specifically to the concept of an urban development authority, we wish to touch on the place of the Building Act in a future system. When it comes to discussions about resource management (often code for “the RMA”) this Act is often considered only in the context of aligning or streamlining processes to obtain different consents (often land use consent under the RMA and building consent under the Building Act) to facilitate development. That is a sensible idea, and solutions should be progressed through the government's overlapping processes for system reform and Building Act review.

There is also a complex boundary relationship between the RMA and Building Act, and there can be uncertainty as to what each is really intended to do. For, example, in the Phase 1 report we noted that:¹⁵⁰

the RMA is also concerned with the potential impacts of activities on people's health and safety, and restricts the use of land (including for building) partly for this purpose. Local government plays a significant role in decision-making and implementation under both. Sustainable development is also one component of the Building Act's purpose. This, as well as the preservation of heritage, are key principles of the Act. In short, the conceptual distinction between the acts is by no means a clear-cut one... [and] attempts by local councils to control the design of building interiors under the RMA has been seen by some to be crossing a firm philosophical line.

Managing questions of aesthetics – how interiors look and feel – are one thing. But far more important are the potential environmental impacts that stem from building design choices. In particular, there is room for debate as to whether the RMA can or should be used to require stronger “green” measures than under the Building Act.¹⁵¹ The latter specifically states that building work is not required to achieve performance beyond compliance with the Building Code, in the absence of any express provision to the contrary.¹⁵² The Code applies nationally, but regional or local differences may prove significant (eg water scarcity may drive the need for water sensitive design in some places more than others). Yet if the RMA has a legitimate role to play here, its purpose, principles and plan provisions do not really target that kind of thing and are currently ill suited to the task.¹⁵³ The frameworks are meant to complement each other, not fill gaps where the other has failed.

It would be possible, but ultimately (we think) undesirable, for the two frameworks to be merged. The RMA is about urban design and form (inherently spatial), and about the impacts of buildings on the environment, not about the construction standards needed to make buildings safe and healthy. The hook of managing “land”, which some see as being about internalising externalities, does not easily extend to managing the design of buildings themselves or their effects within their own envelope.

In our view, the Building Act is the more appropriate place to tackle such questions, and could be much better utilised to provide for positive environmental outcomes.¹⁵⁴ That would prevent the need for a strengthened RMA to step into the breach, and both would be driven by general and consistent principles contained in a Future Generations Act.¹⁵⁵ They need to complement each other.¹⁵⁶ As we have previously noted, “[C]onstruction standards relating to energy efficiency, carbon neutrality, recycled materials, green infrastructure and living rooftops are crucial to the pursuit of environmental enhancement rather than just the mitigation of adverse effects.”¹⁵⁷ Instead of asking how we prevent buildings creating harm, we really need to be asking how the built environment can be contributing to addressing problems we are already

facing. Failing to do so not only locks in risks for decades or even longer (the lifespan of buildings), but also locks in foregone opportunities we may later regret (as we are forced to retrofit green measures, which may not always be straightforward). That is firmly in the realm of the public interest, not just something for architects and their clients to ponder.

Of course, the Building Act is not inherently deficient. It already provides a clear purpose on this front: that buildings are designed, constructed and able to be used in ways that promote sustainable development.¹⁵⁸ There are several relevant principles, too, relating to energy and water efficiency and conservation, the efficient and sustainable use of building materials, and the reduction of waste. This is a big improvement on the Act's predecessor (even if embracing green principles have given rise to questions about the ability of the RMA to require stronger measures to be taken).¹⁵⁹

In practice, however, this has led to "a delineated range of acceptable solutions, or processes, to achieve [standards] ... [M]any developers adopt the specified 'acceptable solutions' to achieve compliance with the Code, as this is an easy route to take".¹⁶⁰ The New Zealand Green Building Council has also observed that "the energy requirements of New Zealand's woefully inadequate Building Code have not been substantially updated since 2007".¹⁶¹ More broadly, the OECD's 2017 Environmental Performance Review of New Zealand called on the government to modernise and strengthen the Building Code.

In most cases, further "greening" of the Act should not be prescriptive, in keeping with the performance-based ethos of the Building Act. We do not want to stifle innovation, a lot of which is happening anyway. However, the outcomes being sought could be much clearer and specific, especially in urban contexts. Climate resilience needs to be much more prominent in our decision-making criteria (eg to address flooding and urban heating), as do biodiversity outcomes. Furthermore, recognising that people often take the easiest option, there should be active effort to develop more "acceptable solutions" (ie measures that are deemed to comply with the Building Code) that embrace new green technology. That could drive voluntary uptake of such measures. More generally, there should be an effort to make the regulatory pathway easier (where appropriate) for green innovation. Some commentators have pointed out that the consenting process can be a barrier to better outcomes,¹⁶² and have persuasively called for fast-track consenting measures and the implementation of stronger financial incentives (eg tax rebates, reduced development contributions).¹⁶³ While we need to take care that the matter does not turn into sectoral propaganda (eg a competition between forestry vs concrete to see who can shout the loudest), there are also bigger questions to consider here about what materials we should be using, and why.

Furthermore, while the RMA would remain separate (and could not directly require higher standards than the Building Code), there could usefully be a stronger link to the Building Act within planning policies. It would be

important for green building measures within a building's envelope to be considered as part of an overall package with measures surrounding it (eg density, links to public transport). Green building is not just about construction; it is also about how a building interacts with surrounding elements of the built and natural environment.

For example, policies made under the RMA could expressly recognise the benefit of complying with stronger green construction standards, thereby making higher performance a positive consideration (to which weight needs to be given) in consenting decisions about associated land use. There is an opportunity for this to be contained within national direction (as part of the current process to develop an NPS for Urban Development, which would be incorporated into an NEP). Indeed, the RMA is no stranger to this approach to boundary issues (ie where jurisdiction is split across statutes), where the positive impacts of an activity (eg renewable electricity benefits for climate change) can be considered, but the negative impacts of an alternative (eg climate impacts of fossil fuels) cannot. Recognising green construction in RMA policies would not *require* a higher level of compliance than the Building Code as a matter of law, but it would provide a tangible reward for those that who adopted it and a lever for planners to influence outcomes in a more holistic way. More generally, one commentator has pointed out that:¹⁶⁴

Ideally, all local authorities should implement practices that will promote sustainable construction and the interface between the [RMA and Building Act] in order to magnify the level of sustainability that might be achieved. There are no specific or clear statutory criteria presently in existence to achieve this aim.

...

Issues of design and spatial planning, water management, community heating systems such as local combined heat and power generation, waste management and so on, all fall within the remit of the local authority. It seems clear that the synergies between the two acts, and indeed the overarching authority of the Local Government Act, must be exploited to achieve truly sustainable construction and buildings.

To us, such suggestions reinforce a bigger picture point: while legislative silos are required for targeted action and accessibility, they need to be directed towards common ends. Cross-cutting strategic and spatial planning under a Future Generations Act again puts its hand up for a powerful role.

At the more ambitious end of the scale, however, close consideration should be given to strengthening performance standards themselves within the Code. While voluntary certification schemes are valuable in themselves for driving performance improvements (see Chapter 13), formal performance standards under the Building Act could also be linked to, or gradually adopt, the more stringent certification requirements of the Green Building Council (eg in its Homestar or Green Star rating).¹⁶⁵ As discussed in Chapter 13, subsidies

could usefully be deployed in a more systematic way as a “carrot” to support regulatory “sticks” for green building technologies, as they have been for other building performance measures.¹⁶⁶

A spotlight on building certification

The Homestar rating tool was developed by the New Zealand Green Building Council in conjunction with BRANZ, and allows certification of residential dwellings (including detached dwellings, terraced housing and apartments). To rate a home’s performance and environmental impact, Homestar awards points across seven categories: energy, health and comfort; water; waste; materials; site; home management; and an optional innovation category. The rating thus certifies the health, efficiency and sustainability of New Zealand homes. The Green Building Council explains that “most new homes built to the substandard Building Code will only achieve a 3–4 Homestar rating... [out of 10] ... and most existing New Zealand homes only achieve a 2–3 Homestar rating”.¹⁶⁷ It considers that homes should achieve a minimum 6 star rating to be warm, healthy and efficient.

The Green Star rating measures buildings’ environmental attributes, and can be applied to the design and as-built phases of non-residential construction projects as well. More specifically, the NABERSNZ tool (supported by the Energy Efficiency and Conservation Authority) benchmarks the energy performance of commercial offices.

We also see a case for the use of more directive measures. Some design options are being deployed overseas on a mandatory basis, and should be closely considered in a future system. For example, France has enacted legislation making it mandatory for new buildings in

commercial areas to have a certain proportion of green roof or solar panel coverage, and Dallas has enacted a plan that requires certain types of buildings to install cool or green roofs.

There should also be a parallel set of reforms – perhaps within an integrated Local Government and Infrastructure Act – promoting or requiring green infrastructure rather than just buildings.¹⁶⁸ That would be important to achieve various environmental goals (eg water sensitive infrastructure, carbon neutral design, circular economy principles, energy efficiency etc). There is a growing body of evidence around the synergistic benefits of working with nature in built environments, for example through design choices that use wetlands, indigenous planting and on-site water management rather than hard infrastructure. Such measures will be vital to respond to a changing climate. That could be formalised more in a future system.

The government itself, as it moves into more active forms of urban development (as discussed below), should have an even stronger legislative mandate for new developments to be resilient, efficient, and eco-friendly. That should apply also to public social infrastructure (eg eco-schools), and be a contractual prerequisite to the deployment of public private partnerships. An active programme for retrofitting green measures to existing housing stock – for environmental and resilience reasons as well as health reasons – should be planned for.¹⁶⁹

Construction standards should remain in a separate Building Act and Code. However, these (and infrastructure standards) should be strengthened to recognise the essential contribution that “green” construction will make to environmental outcomes in a future system.



10.9 An urban development authority: Kāinga Ora – Homes and Communities

One final aspect of the built or urban environment that we wish to touch on in this chapter is the concept of an urban development authority. The idea is that a single institution (an arm's-length public entity) is empowered to master plan, fund and lead development of a whole area (eg suburb or neighbourhood) in an integrated way. It would, essentially, take on many powers of local government. Once development had been completed, an area would revert to normal settings. Such a measure would usually reflect an urgent need (eg to provide housing), particular physical challenges (eg amalgamating fragmented land ownership), or a desire to de-risk large scale development for the private sector (by providing a government role in funding and development).

The previous government released a paper proposing bespoke legislation for urban development authorities, under which these institutions would be given significant powers to override RMA instruments, fund and deliver infrastructure, compulsorily acquire land, and deliver development. The current government has gone further and enacted legislation establishing the entity itself, and expanding its role (to include a role as a government landlord as well as a government developer).¹⁷⁰ However, while a separate bill is expected to actually confer powers on the entity, all indications are (from Cabinet decisions) that those powers will be substantial.¹⁷¹

A spotlight on Kāinga Ora – Homes and Communities

Following attempts under the Housing Accords and Special Housing Areas Act 2013 to speed up the release of land and increase supply of residential housing to address affordability issues (through the deployment of housing accords and special housing areas), the government has established an urban development authority (Kāinga Ora—Homes and Communities) under bespoke legislation.¹⁷² An independent Crown entity, Kāinga Ora is tasked with delivering urban development and infrastructure projects, particularly the supply of affordable homes.

Further legislation (an "Urban Development Bill") is expected to be introduced later in 2019 which will set out Kāinga Ora's statutory powers. These are expected to cut across a swathe of RMA processes. Among them will be powers to fast track urban development for large-scale and complex projects, called "specified development projects". Once a specified development project is established, Kāinga Ora will have wide ranging planning and consenting powers in order to achieve pace and scale. Cabinet papers released by the Ministry of Housing and Urban Development¹⁷³ suggest that Kāinga Ora's powers will include the ability to:

- Produce a development plan for each specified development project that outlines how the development will be undertaken and set out resource management planning rules
- Override, add to, or suspend land use provisions in the district plan, regional plan and regional policy statement
- Issue resource consents, and undertake compliance monitoring and enforcement of consents
- Remove, change or replace, or put in place designations for infrastructure
- Act as a heritage protection authority
- Plan and fund associated infrastructure

Those Cabinet papers also suggest that Kāinga Ora will have the power to access funding for infrastructure and development activities, reconfigure reserves (certain types, with approval of the Minister of Conservation), acquire private land under the Public Works Act 1981, and suspend, make or amend bylaws.

These are sweeping powers. To some extent, the proposed urban development authority model reflects deficiencies in a broader resource management system that has not provided for timely planning or funding outcomes to facilitate urban growth. It is, in a way, an ambulance at the bottom of the cliff, designed to address the same kinds of housing supply issues that the NPS on Urban Development Capacity and the Auckland Unitary Plan seek to do in a more proactive, systemic – but ultimately slower – way.¹⁷⁴ However, it is something of a nuclear option, potentially providing an arm's-length public institution wide-ranging powers to override other legislation in pursuing ad hoc strategic development objectives for urban development in a defined area. It will be bound to give effect to a Government Policy Statement on Housing and Urban Development.

We see a role for a spatially targeted urban development authority in a future system,¹⁷⁵ but subject to robust constraints. Its value is, to us, primarily in land aggregation powers, the ability to make decisions under different statutes concurrently rather than sequentially, and as a way for the government to get its hands dirty in the actual development (and funding) of urban areas for public benefit.¹⁷⁶ As with other parts of the system in which government has been reluctant to get involved directly over the past few decades (eg freshwater implementation), that is a very good thing. But its purpose should categorically not be to weaken environmental protections.

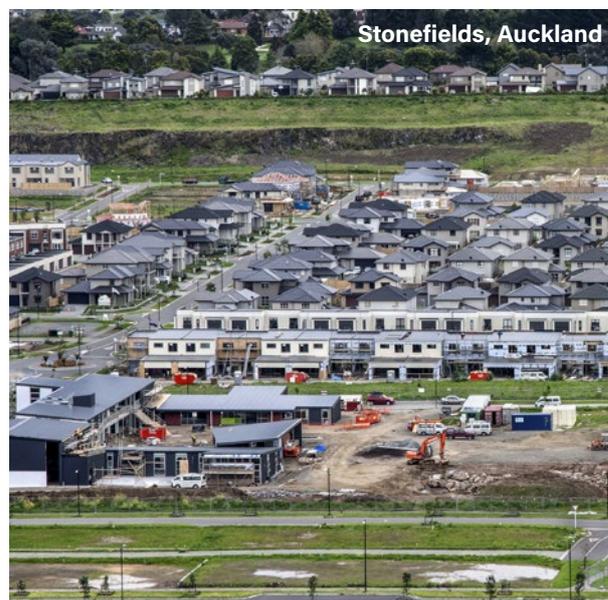
Furthermore, we would envisage that this would be largely a sleeping framework, only being used in exceptional circumstances. Other reforms, including a legally meaningful spatial planning framework and more agile planning mechanisms under the RMA, would mean that such measures would – hopefully – seldom

be needed.¹⁷⁷ Suggestions for reform here are, therefore, less about proposing something novel than they are about curtailing an existing proposal in light of other reforms. That would be necessary to integrate it into our preferred model.

An urban development authority is an arm’s-length public entity that would be responsible for planning, funding and delivering urban development within a spatially defined area. The government has now enacted a bespoke legislative framework to create this entity (Kāinga Ora – Homes and Communities) and define its general roles, but has yet to legislate its specific powers to override other statutes. We see a role for this entity in a future system, but subject to robust constraints.

Below, in Figure 10.3, we outline key concerns we have, which relate primarily to proposed powers to override the RMA. The most significant is the power to override regional plans and a weaker obligation in relation to national direction, combined with different decision-making criteria where Part 2 of the RMA would be subordinate to the strategic objectives

of a particular project. That poses significant risks to the environmental bottom lines that would be strengthened in a revised Part 2, and which would be recognised as pre-eminent under an overarching Future Generations Act.¹⁷⁸



Application of Part 2 of the RMA ¹⁷⁹	It appears that the current proposal is intended to demote Part 2 of the RMA. The strategic objectives of a particular project – to be set under the broad purpose of the Act on a case by case basis and likely to be development oriented ¹⁸⁰ – are envisaged to be elevated above the biophysical protections contained in the purpose and principles of the Act. This raises substantial environmental concerns, despite Kāinga Ora itself having general operating principles referring to environmental values and climate change, and objectives referring to improving the “total economic, social, environmental and cultural wellbeing of current and future generations.”
Application of powers to regional plans ¹⁸¹	Proposed powers to override RMA instruments include both district and regional plans, which contain important bottom lines. That the latter would be overridden is particularly concerning, because the proposal is to require the agreement of territorial authorities to the establishment of an area, but that no regional council agreement would be required. Regional councils are the guardians of many of the environmental values of urban areas, and have a region (and catchment)-wide geographical focus, not just a focus on a development area. An associated regulatory impact statement recommends that “territorial authority planning and consenting functions and powers be available within the urban development project area, but not those of regional councils”.
Application of national direction ¹⁸²	The proposal is for a development plan (which can override regional and district level RMA instruments) to be “not inconsistent with” national direction. This is a weaker direction than for other plans under the RMA (which must give effect to national direction). It could dilute key environmental bottom lines, especially through an integrated NEP created under a strengthened Part 2. Of particular concern would be dilution of the requirements of national direction concerning the protection of productive land and freshwater. ¹⁸³ In contrast, Kāinga Ora would be compelled to “give effect to” a Government Policy Statement on development, effectively elevating that instrument above environmentally-focused national direction for decision-making under the RMA.
Thresholds for establishment	In our view, there should be reasonably clear criteria for when Kāinga Ora could be granted powers and for when a project could be established. An urban development authority model should not become the default mechanism for urban planning, or be able to ride roughshod over the carefully developed regional spatial plan contemplated in Chapter 8. The associated regulatory impact statement states that there is “a risk of undermining the coherence of the overall planning regime by ‘tinkering’ with overarching purpose and principles in only specific areas and/or contexts”. ¹⁸⁴

Figure 10.3: Concerns with the current Kāinga Ora – Homes and Communities model in the context of system reform

The concerns outlined above are not, however, fatal to the use of an urban development authority model. In short, we propose that, in a future system, targeted legislation would:

- Clarify that a strengthened Part 2 in the RMA remains the primary test for decision-making (although strategic objectives could be highlighted as one of the relevant and reasonably necessary matters to consider)
- Not include powers to override provisions of council plans which do not relate to territorial authority land use functions¹⁸⁵ or subdivision
- Treat regional councils more like territorial authorities and require their agreement up front to establish a project¹⁸⁶
- Build key environmental protections into the strategic objectives when a project is established
- Emphasise that national direction (an NEP) needs to be given effect to, and that a Government Policy Statement on Housing and Urban Development is not to be elevated above it. Alternatively, this Government Policy Statement could be required to be incorporated into an NEP in a way that

implemented a reformed Part 2 of the RMA. It could also have strategic elements incorporated into a National Futures Strategy under the Future Generations Act, to ensure that it informed and aligned other decision-making processes (eg Crown investment in infrastructure)

- Clarify that a project is a way to implement a regional spatial plan under the Future Generations Act, not an excuse to override it for a narrower purpose¹⁸⁷

While more direct government involvement in development through an urban development authority is a good idea, and a bespoke statute is required due to its cross-cutting and spatially focused nature, the current proposal would be significantly amended in a future system. In particular, it would be made plain that it does not influence the hierarchy of matters in a revised Part 2 of the RMA or weaken national direction under that Act.



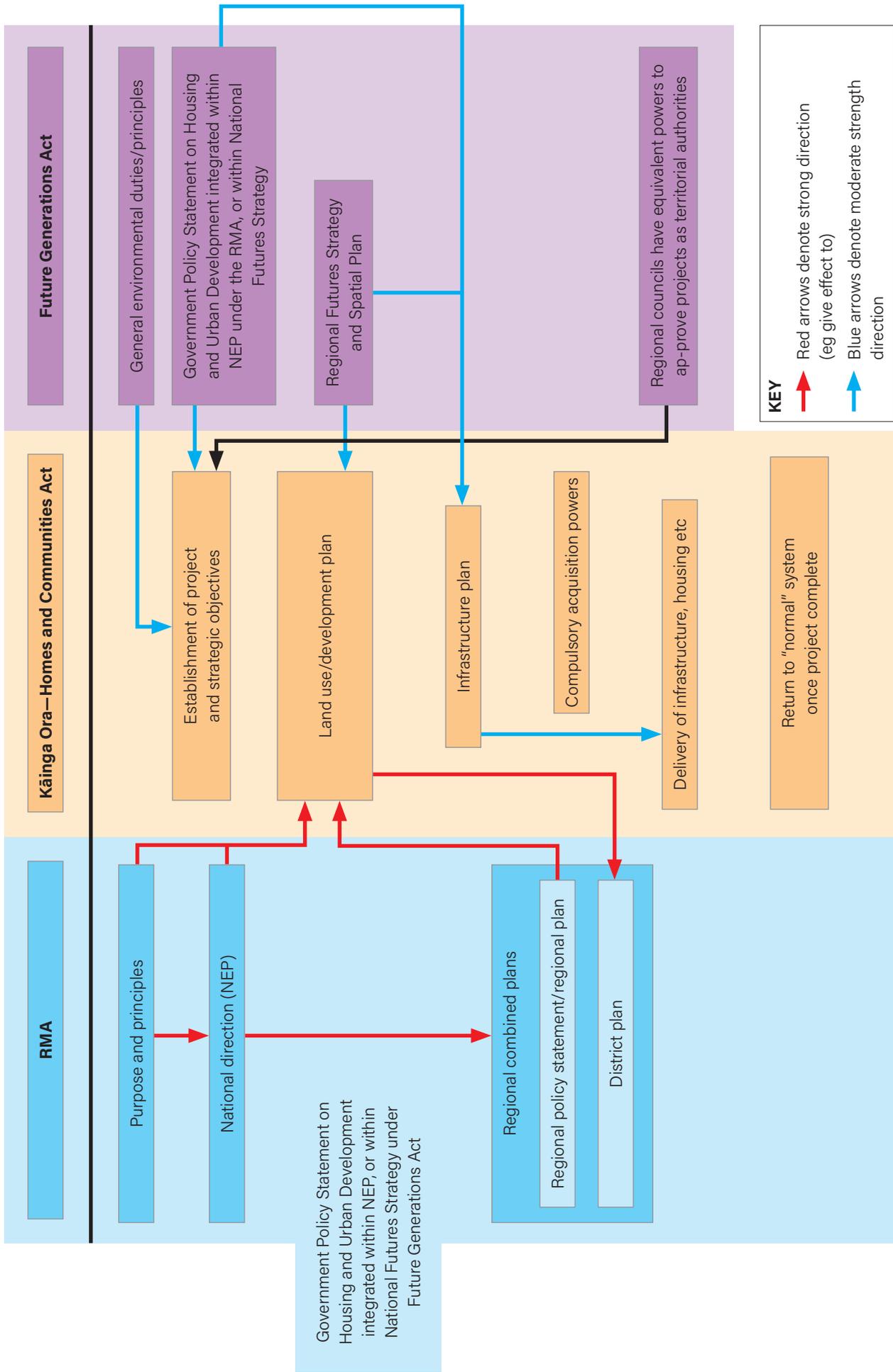


Figure 10.4: An urban development authority (government developer) within a reformed system. Environmental safeguards under the RMA would remain paramount.

10.10 Other legislation for the built environment

Other resource management legislation also exists that shapes or influences the urban or built environment. For example, there is the Heritage New Zealand Pouhere Taonga Act (although that is not just about “built” aspects of heritage). Heritage protection deserves further attention, and we do not make specific recommendations here. Our general sense is that more could be done to integrate or rationalise various heritage protection measures and processes under the RMA (eg district plans and heritage protection orders) and dedicated heritage legislation (heritage listing and archaeological sites). There may also be merit in more formal input from Heritage New Zealand Pouhere Taonga in the development of council plans under the RMA, which would be consistent with more proactive central government involvement in shaping plans.¹⁸⁸ And the protection of archaeological sites would not seem out of place in Part 3 of a reformed RMA, although we do not take that thought any further for now. We have a work programme planned for 2020 to apply the findings of broader system reform to the built and urban environments specifically, where we will look at built heritage in more depth.

To complete the legislative picture, we also now have separate legislation that sets up an arm’s-length Infrastructure Commission, which is charged with strategising and advising government on infrastructure issues.¹⁸⁹ Such a Commission makes a great deal of sense, and is consistent with a general theme in this report of ensuring there is strong independent advice and accountability for government. Purely in terms of a rational approach to legislative design, we see merit in folding this into an integrated Local Government and Infrastructure Act. At present, bespoke legislation makes sense (it is not a comfortable fit within the Local Government Act, Land Transport Management Act, or proposed Water Services Act), but it would be a better fit within a more integrated act that focuses on many aspects of publicly provided inter-generational infrastructure. However, while it is unquestionably valuable, we do not consider it appropriate for a predominantly development-oriented institution like the Infrastructure Commission to be folded into the more environmentally-oriented Futures Commission.

10.11 Concluding comments

In this chapter, we have considered various elements of the system relating to the built or urban environment. In particular, we have suggested the integration of (and process alignment for) local government legislation and infrastructure legislation within a single Local Government and Infrastructure Act. But the built environment is a context in which legislative rearrangement will not be enough. We need to think about institutional

arrangements, and have suggested the regionalisation of drinking water and wastewater services within arm’s-length CCOs, and the possibility of taking similar measures for land transport. Funding will also be crucial for the effective delivery of services vital to people’s essential social wellbeing, and to ensure that those services actually comply with strengthened environmental and health standards. In many cases, government assistance will be required. However, we need to move towards a more sustainable long-term model for funding, and address misaligned incentives that exist in the current system.

We have agreed with the Productivity Commission’s preliminary findings that targeted measures are required to correct incentives for raising and spending money, as well as deploying a wider range of tools to ensure enough money is raised in timely ways to deal with pressures like urban growth, tourism, and the renewal and upgrade of infrastructure. But we also see a need for local government to remain in control of its own destiny and not be dependent on central government assistance, and thus see merit in the deployment of a local GST. Of course, funding related to climate change measures is crucial as well, and has been looked at in Chapter 9.

We also considered the place of the Building Act, concluding that while it should remain a standalone framework, its links to other frameworks like the RMA should be stronger and it has potential to contribute more to environmental outcomes. So too do green infrastructure standards.

Finally, we recognised a need for the kind of integrated spatial focus that an urban development authority model provides, and that this realistically needs to occur through bespoke legislation (given the number of connections that would need to be made with many other statutes). As of 2019, we already have an urban development authority: Kāinga Ora – Homes and Communities. But this has yet to be endowed with development powers. We have outlined changes that would, in our view, need to be made to the current proposal to make it align with wider system reform measures. Central to those would be the need for environmental limits to hold firm in the face of development pressures, including those under the RMA.

An additional layer of legislation relating to the built/urban environment would operate under the umbrella of a Future Generations Act. For example, alongside the RMA, it would be important for the planning and funding of infrastructure under a Local Government and Infrastructure Act to adhere to a regional spatial plan developed under the Future Generations Act. Urban growth and renewal requires this coordination. In the following chapter, we turn our attention to quite a different context, one where far fewer people are found and where there is much less infrastructure, but where system wide strategy is equally important: our oceans.

Local Government and Infrastructure Act	RMA
Integrate Local Government Act, Land Transport Management Act and other relevant legislation into a Local Government and Infrastructure Act	Revised purpose and principles giving recognition to good urban planning principles and the benefits of environmentally sustainable urban development
More closely align infrastructure planning and funding processes with each other and with planning under the RMA	Creation of integrated NEP addressing all matters of national importance, including urban issues (eg compact urban form)
Provide for the regionalisation of drinking water and wastewater services through a CCO model	Provide for a more agile council planning process
Revise funding settings for local government to provide appropriate incentives and ability to fund urban growth and renewal	Building Act
Future Generations Act	Strengthen the Building Act to improve its contribution to environmental wellbeing
Provide for a Government Policy Statement for Housing and Urban Development to be integrated within a National Futures Strategy, subject to environmental bottom lines	Kāinga Ora—Homes and Communities Act
Provide for the development of regional and cross-regional spatial plans, which would have meaningful legal influence over other decisions and would align various components necessary for urban growth	Provide powers to a government developer to progress urban development projects, subject to environmental constraints

Figure 10.5: Key reforms addressing issues in the built or urban environment

ENDNOTES

- 1 See New Zealand Productivity Commission *Better urban planning* (2017) at 5.
- 2 Despite the fact that a "city" council does not always contain just urban areas (one might think of the fairly broad boundaries of Palmerston North City).
- 3 Centred on the complex interactions between land use and other environmental outcomes.
- 4 Although not entirely; for example, public infrastructure (eg for flood protection) can also be supported in non-urban areas.
- 5 This is not just about the adverse impacts of the built environment on the "natural" elements of the environment (eg water, soil, air etc). It is also about the adverse impacts of built components on other built components (eg heritage), or on people directly (eg amenity concerns).
- 6 For example, a sugar tax or removing GST on healthy food. More recently, there have been moves to protect soils for food production.
- 7 For example, under the Electricity Act (and related legislation), Gas Act, Telecommunications Act, etc. Infrastructure New Zealand has pointed out that telecommunications and electricity infrastructure is performing reasonably well in New Zealand; see Infrastructure New Zealand *Building regions: A vision for local government, planning law and funding reform* (2019) at 19.
- 8 Highly politicised debate goes on as to how best to provide for this, including through a government developer (urban development authority) discussed later in this chapter.
- 9 See *Strengthening the regulation of drinking water wastewater and stormwater* (Cabinet minute CAB-19-MIN-0332, 1 July 2019).
- 10 For example, infrastructure strategies need to be closely associated with Long-Term Plans.
- 11 On the legislative design implications of integrating or splitting the RMA, Local Government Act and Land Transport Management Act, see G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 140-141.
- 12 See Local Government Act 2002, s 10(1); Local Government (Community Well-being) Amendment Act 2019, s 6.
- 13 See also Local Government New Zealand *"blue skies" discussion about New Zealand's resource management system* (2015) at 40; Resource Management Act 1991, sch 1, cl 3C (which makes aligned consultation possible, but does not require it).
- 14 In that they both involve councils – although there can, of course, be silos within councils dealing with different things.
- 15 In a future model, appeals would still be possible on points of law in the "hybrid" model, and merits appeals would be possible in the Auckland Unitary Plan-style model to the extent that councils rejected the recommendations of a Futures Commission.
- 16 Later in this chapter we suggest the use of an economic regulator to oversee adequate investment and fair charging for three waters services.
- 17 See Chapter 8 on the role of spatial planning.
- 18 G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 45; Treasury *He tirohanga mokopuna: 2016 statement in the long-term fiscal position, New Zealand* (2016).
- 19 Compare *Report of the Biodiversity Collaborative Group* (2018) at 110.
- 20 Resource Management Review Panel *Transforming the resource management system: Opportunities for change – Issues and options paper* (2019) at 15.
- 21 Other important uses are, for example, irrigation, water storage, and hydro-electric generation.
- 22 See *Strengthening the regulation of drinking water wastewater and stormwater* (Cabinet minute CAB-19-MIN-0332, 1 July 2019).
- 23 See <www.dia.govt.nz/Three-Waters-Review>
- 24 See Chapter 6. A new NES on wastewater has been proposed by the government: see New Zealand Government *Action for healthy waterways* (2019) at 58.
- 25 See *Drinking Water Standards for New Zealand 2005 (revised 2018); Strengthening the regulation of drinking water wastewater and stormwater* (Cabinet minute CAB-19-MIN-0332, 1 July 2019).
- 26 For example, through requirements for green infrastructure and water sensitive design.
- 27 See New Zealand Government *Action for healthy waterways* (2019) at 54-56.
- 28 Compare New Zealand Productivity Commission *Local government funding and financing* (Draft report, July 2019) at 270 and 245, where poor enforcement has been pointed out as a key reason for failings in the sector (eg for wastewater discharges). It is pointed out that no prosecutions have been pursued for breaches of health standards and too many suppliers of wastewater are allowed to continue operating with expired consents.
- 29 See *Strengthening the regulation of drinking water wastewater and stormwater* (Cabinet minute CAB-19-MIN-0332, 1 July 2019). See also Local Government New Zealand *Water 2050: Governance – a better framework for drinking water regulation* (2018); L Stevens, K Poutasi and A Wilson *Report of the Havelock North drinking water inquiry: Stage 2* (2017).
- 30 See also the model floated in New Zealand Council for Infrastructure Development (now Infrastructure New Zealand) *Integrated governance, planning and delivery: A proposal for local government and planning law reform in New Zealand* (2015) from 56.
- 31 New Zealand Productivity Commission *Local government funding and financing* (July 2019) at 243.
- 32 Ibid at 242.
- 33 Infrastructure New Zealand *Building regions: A vision for local government, planning law and funding reform* (2019) at 23.
- 34 Office of the Auditor-General *Managing the supply of and demand for drinking water* (2018) at 11.
- 35 New Zealand Productivity Commission *Local government funding and financing* (July 2019) at 245. However, we note that in most places there is institutional separation between territorial authorities having operational responsibility, and regional councils having environmental enforcement functions for water quality.
- 36 Which could be something along the lines of "give effect to unless there were good reason not to" or "have particular regard to"; see Chapter 8.
- 37 Compare New Zealand Council for Infrastructure Development (now Infrastructure New Zealand) *Integrated governance, planning and delivery: A proposal for local government and planning law reform in New Zealand* (2015) at 5, 57.
- 38 Although there could be a tailored process for different regions according to different timeframes, depending on complexity and particular issues arising.
- 39 For example, the assets managed by Wellington Water are owned by several different councils at both regional and local levels. Watercare in Auckland owns water assets. Part of this question is about who we wish to have the ability to borrow against those assets (local government, for a variety of purposes, or a water utility for a narrower range of purposes). At least in some cases, the latter may be preferable to ensure that money raised is earmarked for the renewal and maintenance of essential water infrastructure.
- 40 It might make sense for stormwater systems, so intertwined with land use planning and related flood control measures, to remain with councils.
- 41 Including the ability to cross-subsidise, an equitable distribution of population (and therefore funding), connection of infrastructure networks, fair distribution of legacy issues (eg historic underinvestment or significant upgrade costs), and growth pressures etc.
- 42 For example, Watercare as a CCO acts independently of Auckland Council, but has responsibilities to give effect to relevant aspects of a long-term plan. It must also act consistently with relevant aspects of any other plan or strategy of the Auckland Council to the extent specified in writing by Council's governing body. Furthermore, it must provide a statement of intent, including a narrative on how the organisation will contribute to Auckland Council's and (where appropriate) the government's objectives and priorities for Auckland.
- 43 In the Phase 1 report, we pointed out that Watercare, as a regional water entity, has been able to socialise costs effectively and cause investments to be made in areas that otherwise may not have been. See G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 184.
- 44 For example, an obligation not to make a profit, to be guided by a statement of expectation and council/Crown policy, and considerations of fairness and public interest.
- 45 A balance would be struck through the internal design features of the institutions (elements of independence and accountability), rather than having separate institutions with different features (one accountable, one independent). See G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 164.
- 46 Although Watercare, as an asset owning CCO, is not dependent on funding from Auckland Council.
- 47 See G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 165, 183.
- 48 For example, reflected in a proposed NES on wastewater discharges and overflows; see New Zealand Government *Action for healthy waterways* (2019) at 54-56.
- 49 G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019), ch 9.
- 50 One can compare the Productivity Commission's concept of a "partners in regulation" protocol, where expectations are clearer about engagement and cooperation between levels of government, although that does not go as far as suggesting hybrid local-central entities.
- 51 See Local Government (Financial Reporting and Prudence) Regulations 2014, reg 20 (1). The Productivity Commission has pointed out that the Auditor-General has expressed concern that councils appear not to be meeting the benchmark for their core assets: New Zealand Productivity Commission *Local government funding and financing* (July 2019).
- 52 To achieve the purposes of the legislation.
- 53 See G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 252-253. Compare the availability of objection and reconsideration rights for development contributions under the Local Government Act, and similar rights in relation to infrastructure growth charges imposed by Watercare (using independent commissioners) under the Local Government (Auckland Council) Act 2009.
- 54 New Zealand Productivity Commission *Local government funding and financing* (July 2019) at [271].

- 55 See New Zealand Infrastructure Commission/Te Waihanga Act 2019.
- 56 See Local Government (Auckland Council) Act 2009, s 57(1)(a)-(b). See also Watercare Services Limited "Our commitment to you" <www.watercare.co.nz>
- 57 New Zealand Productivity Commission *Local government funding and financing* (July 2019) at 242, citing the submission of the Hamilton City Council.
- 58 The geographical boundaries of a regional water services provider should not necessarily be constrained to the catchment-based boundaries of existing "regions", and they may be significantly broader or cut across regional boundaries. For environmental reasons, it would be important for a catchment-based jurisdiction to remain for regional councils. This would mean that a water CCO may well require multiple council shareholders even in the event of local government restructuring.
- 59 Compare New Zealand Productivity Commission *Local government funding and financing* (July 2019) at 11.
- 60 See Chapter 7.
- 61 Land transport has tended to receive greater investment, and not operated on a run to fail basis – perhaps due to its higher visibility to users and the oversight role of the NZTA.
- 62 See Infrastructure New Zealand *Building regions: A vision for local government, planning law and funding reform* (2019) at 44.
- 63 And through the Ministry of Transport in the development of a Government Policy Statement on Transport.
- 64 New Zealand Productivity Commission *Local government funding and financing* (July 2019) at 178.
- 65 Note the alternative proposal of Infrastructure New Zealand, which advocates for the regionalisation of transport (including the state highway network): Infrastructure New Zealand *Building regions: A vision for local government, planning law and funding reform* (2019) at 48.
- 66 See Chapters 6 and 8.
- 67 Infrastructure New Zealand has also suggested giving funding powers to the NZTA that are linked to use or demand: Infrastructure New Zealand *Building regions: A vision for local government, planning law and funding reform* (2019) at 27.
- 68 Ibid.
- 69 The Ministry of Transport, NZTA, Treasury, State Services Commission, Auckland Council and Auckland Transport.
- 70 Compare New Zealand Productivity Commission *Local government funding and financing* (July 2019) at 270.
- 71 Ibid at 243, 270.
- 72 See *ibid* at 242: "Currently, the scale of water suppliers matches the size of each local council's jurisdiction – which is often very small. This leaves some local councils with inadequate in-house specialisation and expertise".
- 73 Ibid at 265.
- 74 See Chapter 7. However, it is also important to note that there can be *diseconomies* of scale where local matters are more efficiently decided at the local level.
- 75 New Zealand Productivity Commission *Local government funding and financing* (July 2019) at 271.
- 76 G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 248.
- 77 R Ward "Three waters review" (Paper presented to the New Zealand Building Nations Conference, 2018). See also New Zealand Council for Infrastructure Development (now Infrastructure New Zealand) *Integrated governance, planning and delivery: A proposal for local government and planning law reform in New Zealand* (2015) at 9.
- 78 H Wyn "Funding pressures affecting three waters infrastructure" (Paper presented to the Local Government New Zealand Water Summit, 30 May 2018).
- 79 For example, under the proposed new NPS for Freshwater Management, and a potential NES for wastewater discharges.
- 80 See Chapter 13 on economic instruments and incentives.
- 81 New Zealand Productivity Commission *Local government funding and financing* (July 2019) at 270, 4, 154. An independent and ringfenced source of revenue has been said to lead to more sustainable business decisions being made.
- 82 Ibid at 244; Infrastructure New Zealand *Building regions: A vision for local government, planning law and funding reform* (2019) at 4.
- 83 With oversight by an economic regulator.
- 84 The Productivity Commission has suggested the use of separate redistribution policies be used to make it more transparent (a national scheme of rates postponement, rather than rates rebates).
- 85 Compare New Zealand Productivity Commission *Local government funding and financing* (July 2019) at 4.
- 86 Ibid at 10. Whether that would require a separate government agency to determine such questions in an arm's-length way – like the NZTA – is an open question.
- 87 See *ibid* at 270, concerning the need for assistance to make a transition to meeting new more stringent standards.
- 88 On cost challenges, see Beca *Cost estimates for upgrading water treatment plants to meet potential changes to the New Zealand drinking water standards* (2018); GHD and Boffa Miskell *Cost estimates for upgrading wastewater treatment plants to meet objectives of the NPS Freshwater final report* (September 2018).
- 89 See G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 44: "[T]he need for large scale replacement of water assets around the country is most likely to occur between 2040 and 2060, at the very time that population increases will be peaking". See also Office of the Auditor General *Water and roads: Funding and management challenges* (2014).
- 90 For example, revenue raised through the waste disposal levy.
- 91 Electric vehicles have been considered in Chapter 9 in the context of climate change.
- 92 As well as a direction for funding decision-making to support spatial plans, as discussed in Chapter 8.
- 93 Compare New Zealand Productivity Commission *Local government funding and financing* (July 2019) at 169, citing the submission of the Property Council at 4.
- 94 New Zealand Productivity Commission *Local government funding and financing* (July 2019).
- 95 As well as many other mechanisms: see G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 249-251.
- 96 New Zealand Productivity Commission *Local government funding and financing* (July 2019) at 2.
- 97 Ibid.
- 98 Ibid at 6.
- 99 Ibid at 2.
- 100 Ibid.
- 101 Ibid at 6.
- 102 For example, to preserve their credit rating and comply with binding debt to revenue ratios: see *ibid* at 161. The independent nature of credit rating means one cannot simply regulate all constraints out of existence.
- 103 Ibid at 154.
- 104 Ibid at 161.
- 105 Ibid at 266.
- 106 Which could be achieved by expanding the concept of a targeted rate to link it to increases in property value.
- 107 In our view, only where needed to give effect to a spatial plan, not as a central government planning override.
- 108 As the Productivity Commission points out, there may also be a related need to enable, through legislation, the placement of debt-servicing obligations on existing residents if this mechanism is to be used for brownfields or intensification of existing residential areas; see New Zealand Productivity Commission *Local government funding and financing* (July 2019) at 264. That would need careful thought for reasons of equity, as existing residents would not have signed up to the provision of infrastructure when they purchased a property.
- 109 Ibid at 266.
- 110 Ibid at 267.
- 111 Ibid at 265. Legislation does not currently allow targeted rates to be used in this manner.
- 112 Ibid.
- 113 G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 251; see also New Zealand Council for Infrastructure Development (now Infrastructure New Zealand) *Integrated governance, planning and delivery: A proposal for local government and planning law reform in New Zealand* (2015) at 19.
- 114 New Zealand Council for Infrastructure Development (now Infrastructure New Zealand) *Integrated governance, planning and delivery: A proposal for local government and planning law reform in New Zealand* (2015) at 17.
- 115 Ibid at 265.
- 116 Compare Infrastructure New Zealand *Building regions: A vision for local government, planning law and funding reform* (2019) at 32.
- 117 New Zealand Productivity Commission *Local government funding and financing* (July 2019) at 6.
- 118 For example, Professor Tim Hazledine has pointed out that it is often serviced land that provides the value difference, not an urban boundary; see T Hazledine "Economics and the Resource Management System" in G Severinsen and R Peart *Reform of the resource management system: The next generation – Working paper 3* (EDS, 2018) at 158. That is, of course, not to say that planning restrictions do not contribute at all, and densification particularly needs to be pursued through national direction to overcome Nimby objections.
- 119 G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019). Compare Resource Management Review Panel *Transforming the resource management system: Opportunities for change – Issues and options paper* (2019) at 13.
- 120 Instead, it benefits prospective residents from elsewhere.
- 121 G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 249.
- 122 Although now also through an international visitor levy. However, this does not encompass domestic visitors, which can also have significant pressures on local infrastructure and services.
- 123 Infrastructure New Zealand *Building regions: A vision for local government, planning law and funding reform* (2019) at 15.
- 124 New Zealand Productivity Commission *Local government funding and financing* (July 2019) at 6. Compare Infrastructure New Zealand *Building regions: A vision for local government, planning law and funding reform* (2019) at 26, concerning

- tax increment financing. This could be done through a new tax, or by changing targeted rates to allow them to be levied on changes in land value; see New Zealand Productivity Commission *Better urban planning* (2017) at 334.
- 125 New Zealand Productivity Commission *Local government funding and financing* (Draft report, July 2019) at 6, 161.
- 126 Ibid.
- 127 Ibid at 264. Compare B Craven, J Goldingham-Newsom and O Hartwich #localismNZ: *Bringing power to the people* (2019) at 42.
- 128 For example, the Provincial Growth Fund or Housing Infrastructure Fund.
- 129 Infrastructure New Zealand *Building regions: A vision for local government, planning law and funding reform* (2019) at 30.
- 130 Although government grants seem necessary for some things, such as correcting historical underinvestment deficit in three waters infrastructure and the need to meet strengthened national standards.
- 131 For example, the Productivity Commission has pointed out that GST and some forms of income tax (eg pay as you earn) are less painful than mechanisms like rates, because they are less visible and people are not faced with a standalone bill. However, they are also complex to design, implement and enforce.
- 132 Infrastructure New Zealand *Building regions: A vision for local government, planning law and funding reform* (2019) at 25.
- 133 B Craven, J Goldingham-Newsom and O Hartwich #localismNZ: *Bringing power to the people* (2019) at 40, citing OECD *Economic Surveys: New Zealand* (2017).
- 134 New Zealand Productivity Commission *Local government funding and financing* (Draft report, July 2019) at 2.
- 135 Compare *ibid* at 265: "Central government should not expect local government to act simply as its regulatory agent. Rather, the two levels of government should seek a regulatory partnership based on mutual respect and an agreed protocol."
- 136 *Ibid* at 165.
- 137 Infrastructure New Zealand *Building regions: A vision for local government, planning law and funding reform* (2019) at 26.
- 138 For example, direct assistance may still be needed where tourist spending, captured through GST, does not correlate to pressures on infrastructure that also cannot be charged for (eg where people take day trips from a neighbouring district to visit natural attractions that do not have nearby shops, hotels etc).
- 139 Infrastructure New Zealand *Building regions: A vision for local government, planning law and funding reform* (2019) at 27.
- 140 B Craven, J Goldingham-Newsom and O Hartwich #localismNZ: *Bringing power to the people* (2019) at 43.
- 141 Compare New Zealand Productivity Commission *Local government funding and financing* (Draft report, July 2019) at 172; citing J Hollander and others *Planning shrinking cities* (2009) 72(4) *Progress in Planning* 223. Contrast the more optimistic view of the New Zealand Initiative in B Craven, J Goldingham-Newsom and O Hartwich #localismNZ: *Bringing power to the people* (2019) at 40.
- 142 See New Zealand Productivity Commission *Local government funding and financing* (Draft report, July 2019) at 65.
- 143 *Ibid*.
- 144 For example, Kāinga Ora – Homes and Communities. On the idea of a satellite city, see Infrastructure New Zealand *Meeting Auckland's growth challenge: The innovation city* (2017).
- 145 Subject, of course, to environmental considerations protected in legislation.
- 146 Note that Infrastructure New Zealand's model would see a strong economic development function within regional government safeguarded by shifting environmental regulation to central government; see Infrastructure New Zealand *Building regions: A vision for local government, planning law and funding reform* (2019) at 48.
- 147 There are other ways to control demand, of course, such as through the immigration system, but that is not generally considered in an integrated way with strategic questions of resource management.
- 148 New Zealand's total population is projected to reach 5.8 million in 2038, with an average increase of 1.1 per cent per annum (using Statistics New Zealand medium projections). See Statistics New Zealand *Estimates and projections* (February 2018).
- 149 On population policy, see N Jackson "Does New Zealand need a population policy" (Plenary presentation to the Biennial Population Association of New Zealand Conference, Wellington, June 2013).
- 150 G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 151.
- 151 See for example C Warnock "Sustainable Construction in New Zealand" (2005) 9 *New Zealand Journal of Environmental Law* 337, at 356, summarising the effect of *Christchurch International Airport Ltd v Christchurch City Council* [1997] 1 NZLR 573 at 579 (per Tipping J) and 594 (per Chisholm J).
- 152 Building Act 2004, s 18.
- 153 The notion of a "quality urban environment" in the proposed NPS on Urban Development goes further, but still does not really delve into questions of building standards. It is primarily about managing the spatial aspects of land use, not buildings themselves.
- 154 G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 151.
- 155 Which should defuse legal questions about, for example, any differences between sustainable management and sustainable development.
- 156 C Warnock "Sustainable Construction in New Zealand" (2005) 9 *New Zealand Journal of Environmental Law* 337 at 376.
- 157 G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 151.
- 158 Building Act 2004, s 3(a)(iv).
- 159 In other words, the Building Code truly becomes a code, including in terms of sustainability (not just health and safety) measures. This is because specifically including green performance measures in the Act suggests there are no longer any sustainability "gaps" to be filled by other frameworks. See C Warnock "Sustainable Construction in New Zealand" (2005) 9 *New Zealand Journal of Environmental Law* 337 at 360.
- 160 *Ibid* at 348.
- 161 New Zealand Green Building Council *A policy plan for the built environment* (2017) at 3.
- 162 H Kirpensteijn "Planning for green building design and technology in New Zealand" (Masters Dissertation, Lincoln University, 2017) at 14.
- 163 New Zealand Business Council for Sustainable Development *Better performing homes for New Zealanders: Making it happen* (November 2008); M Howell *Local Government Incentives to promote Sustainable Building* (SB10 New Zealand Paper 478) at 1; <www.branz.co.nz>
- 164 C Warnock "Sustainable Construction in New Zealand" (2005) 9 *New Zealand Journal of Environmental Law* 337 at 354.
- 165 European Union regulations require every new building or major renovation to have an energy performance certificate.
- 166 For example, supporting insulation for warmer homes.
- 167 <www.nzgbc.org.nz>
- 168 Compare New Zealand Business Council for Sustainable Development *Better performing homes for New Zealanders: Making it happen* (2008).
- 169 *Ibid*.
- 170 See Kāinga Ora – Homes and Communities Act 2019, s 13.
- 171 See Cabinet papers and minutes at <www.hud.govt.nz/urban-development/kainga-ora-homes-and-communities/related-documents/>
- 172 Kāinga Ora – Homes and Communities Act 2019.
- 173 <www.hud.govt.nz/urban-development/kainga-ora-homes-and-communities/related-documents/>
- 174 As well as through previous housing accords legislation (Housing Accords and Special Housing Areas Act 2013).
- 175 Softening the view expressed in the Phase 1 report (at 150) that the trend of making carve outs should be halted and reversed, but still embracing the underlying idea that such carve outs should not be able to override the fundamental tenets of more general protective legislation.
- 176 <www.hud.govt.nz/urban-development/kainga-ora-homes-and-communities/related-documents/>
- 177 It should not be an alternative to the normal planning process, or it will risk creating incoherence. Compare S Berry, H Andrews and J Vella "The death of the RMA by a thousand cuts: The next two incisions" (2017) *Resource Management Journal* 3; S Berry and H Andrews "The final straw for the RMA? Some shortcomings of the Resource Legislation Amendment Bill 2015" (September 2016) *Resource Management Journal* 1.
- 178 As identified at paragraphs 547 and 593 of the proposal's regulatory impact statement, "[R]isks may arise in relation to environmental quality particularly if a completely different balance of considerations relate to regional council functions."
- 179 See DEV-18-MIN-0170, para 10; CAB-19-MIN-0168.01, para 44.
- 180 See CAB-18-MIN-0243, paras 24-26 on the Act's purpose and principles and strategic objectives: "[T]he intention is to give weight and priority to urban development, so that there is a presumption in favour of urban development in each project area."
- 181 See DEV-18-MIN-0170, para 11.
- 182 See DEV-18-MIN-0170, para 18; CAB-19-MIN-0168.01.
- 183 Which is already fairly vague at national level under the proposed NPS, and requires firm translation at local level.
- 184 See the proposal's regulatory impact statement, para 548.
- 185 Which, as described in Chapter 7, would no longer include responsibility for biodiversity.
- 186 Recognising that regional councils have strategic oversight over the whole region and are not just "environmental" regulators as some like to believe. Note that territorial authorities are not proposed to have an *absolute* right of veto; see CAB-18-MIN-0243, para 34.
- 187 Although that might still possibly allow for out of *sequence* development if infrastructure could be fully funded and financed (ie bringing forward development that was already anticipated in a spatial plan).
- 188 See Chapter 7.
- 189 See also the discussion of the current system in Chapter 4.

11. OCEANS LEGISLATION

11.1 Introduction and context

Our discussion of the RMA and other frameworks in previous chapters has not specifically focused on the marine area. For example, planning (in an NEP and combined council plans) has been discussed largely in the abstract, as has the application of futures strategies and spatial plans. Nor have we mentioned the EEZ Act, or the potential for that to be integrated into the RMA to form a single, core framework for the management of land and sea.

This has been deliberate. The reason is that, in this chapter, we are floating the idea of a separate, targeted framework for oceans management. This would be a single statute – an “Oceans Act” – which would apply from 3 nautical miles (from the coast)¹ to the boundaries of New Zealand’s EEZ and extended continental shelf. It would be fragmentary in a spatial sense (a different Act would apply depending on where one was doing an activity)² but integrative in other senses (it would subsume a wide variety of existing marine legislation, and fill gaps). It would recognise that “integration” looks different in the deep-sea environment because of its quite different biophysical and social characteristics. We are putting this concept forward for discussion, and welcome feedback on both its potential benefits and risks.

We are floating the idea of a separate legislative framework for oceans management – an Oceans Act. This would replace the RMA beyond a line drawn 3 nautical miles from the coast, and integrate a variety of existing oceans-related legislation.

We mentioned the idea of an Oceans Act in the Phase 1 report.³ But the need to provide a more integrated framework for managing New Zealand’s marine estate has long been recognised by the government and others.⁴ The current legal framework has developed over more than 50 years into an uneven patchwork of provisions (see Figure 11.1 below). We now have multiple pieces of overlapping marine legislation, but still some glaring gaps in coverage (including no marine protected area legislation applying outside the territorial sea).⁵ Some of the legislation is outdated and no longer fit for purpose including, most notably, the Wildlife Act 1953, the Marine Reserves Act 1971⁶ and the Marine Mammals Protection Act 1978.⁷ There is no overarching mechanism to help ensure that all legislation and decisions that are impacting on the marine environment are interacting coherently.

Such issues resulted in the government establishing an oceans policy process in the early 2000s to “identify clear goals and principles and provide an integrated framework for managing the oceans”.⁸ The process was disbanded in late 2003, before it could deliver tangible outcomes (due to controversy over Māori customary claims to the

foreshore and seabed). The controversy resulted from a Court of Appeal decision that found customary rights over the foreshore and seabed could be recognised through private title⁹ and the subsequent passing of the Foreshore and Seabed Act 2004 which overturned the Court’s decision and declared the area to be owned by the Crown. A tangible outcome of the oceans policy initiative was the later passage of the EEZ Act, which was designed to address a lack of environmental legislation applying outside the territorial sea. However, that measure fell far short of an integrated approach to oceans management.

A new, National-led government replaced the foreshore and seabed legislation with the Marine and Coastal Area (Takutai Moana) Act in 2011, which enabled formal recognition of customary rights in the area.¹⁰ Specific Treaty settlements for fisheries and aquaculture have also been provided for in the Māori Fisheries Act 2004, Māori Commercial Aquaculture Claims Settlement Act 2004, and related statutory provisions. Other Treaty claims over the marine area, such as harbours, have yet to be settled.

There has also been a plethora of bespoke regional legislation applying to marine management in New Zealand, including the Hauraki Gulf Marine Park Act 2000, Fiordland (Te Moana o Atawhenua) Marine Management Act 2005 and the Kaikōura (Te Tai o Marokura) Marine Management Act 2014. These are all responses to failings in the broader system.



Land	Territorial sea (out to 12 nautical miles)	Exclusive economic zone (12 to 200 nautical miles)
Resource Management Act 1991		
		Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012
	Fisheries Act 1996	
	Marine and Coastal Area (Takutai Moana) Act 2011	
Conservation Act 1987		
	Marine Reserves Act 1971	
	Marine Mammals Protection Act 1978	
Wildlife Act 1953		
	Maritime Transport Act 1994	
Biosecurity Act 1993		

Figure 11.1: Spatial coverage of the main pieces of New Zealand marine legislation

The lack of effectiveness of the current marine management regime is reflected in poor environmental outcomes. A joint report by the Ministry for the Environment and Statistics New Zealand, *Our Marine Environment 2016*, reported concern over the potential impacts of ocean acidification and warming; that most marine bird species are threatened or at risk of extinction as well as more than one quarter of New Zealand's marine mammal species; and that coastal marine habitats and ecosystems are degraded.¹¹ One of the biggest failings has been in addressing cumulative effects. Reasons posited for this, in the context of the RMA at least, have included a lack of strategic oversight of decision-making often coupled with a lack of political will and low agency capacity to undertake necessary tasks.¹²

The need for reform is clear, and this has been underscored by the recent Cabinet paper setting out the parameters for the government's review of the resource management system. This refers to overlapping marine legislative frameworks being addressed through "a subsequent review of the marine system".¹³ For this project, however, all of this is in the mix for wider resource management system reform.

The key question here is what form such a reform should take in the spatial context of the ocean. Before delving into this issue, however, it is useful to review how management

of the sea is different from managing land, because the nature of the management challenges influence the legislative and institutional design measures needed to address them.

There has been a complex history of oceans management in New Zealand, resulting in a patchwork of legislation targeting different things. Much is no longer fit for purpose, and a more integrated approach to oceans management is needed.

11.2 The unique nature of the marine environment

The sea is a very fluid environment, with tides, wind and ocean currents moving seawater vast distances around the New Zealand coast and into deep ocean areas. The chemistry of seawater underpins the basis of the marine food chain (phytoplankton production), and this is variously influenced by inputs from land (such as sediment and nitrogen runoff) and upwellings of nutrient-rich deep seawater when warmer surface water is blown away from the coast. The sea is affected more than any other domain by climate change-driven effects, with the sea absorbing around a third of global carbon emissions¹⁴ and 90 per cent of excess heat trapped by atmospheric

carbon dioxide.¹⁵ This is leading to seawater warming and ocean acidification.

Weather patterns have a strong influence on these broader seawater and nutrient flows, which can vary significantly from year to year. They impact on the productivity of marine life, with many species having complex life-cycles and episodic recruitment patterns. For example, young crayfish go through at least 11 different lifecycle stages while floating along the edge of the continental shelf in ocean currents (for around 18 months), before swimming back to the coast and settling on a reef to grow into maturity.¹⁶

The fundamentally interconnected nature of the marine environment means that it can be virtually impossible to confine the impacts of an activity to its immediate site. Flow-on effects often spread over much wider areas and cumulate with multiple impacts from other places. This means that case-by-case consenting and site-specific monitoring is unlikely to be an effective management approach on its own, and that robust integrated planning is important.¹⁷ Of course, that is not untrue in the terrestrial context (one of the reasons we are proposing an integrated Future Generations Act), but it tends to be exacerbated in the marine area.

The marine environment is comprised of a rich mosaic of different seabed habitats built through tectonic and volcanic activity, the deposition of different types of sediments, the exposure of rocky structures, and the presence of both living and dead marine organisms. Just like an indigenous forest creates habitat for a wide range of forest-dwelling species, so do marine species such as mangroves, seaweeds, seagrass, shellfish, bryozoans, corals and sponges create complex three-dimensional structures on the seafloor that provide habitat for numerous species (including settlement areas for larvae and nursery areas for juvenile fish).¹⁸

Benthic habitats are particularly vulnerable to damage from seabed-disturbing activities such as bottom trawling and dredging, as well sediment discharges from land. The marine environment is also the ultimate “sink” for discharges from many land-based activities. These cumulative pressures, ostensibly managed under different regimes (the Fisheries Act and RMA) have resulted in wide-scale degradation of benthic habitats around New Zealand coasts and deep-sea areas. In some cases, such as the destruction of deep sea coral communities on seamounts from trawling and the destruction of mussel reefs from dredging, the effects are largely irreversible. In some coastal areas, they have likely produced “habitat bottlenecks” where there is insufficient habitat to support the number of juvenile fish produced, thereby reducing the number that recruit into the adult population.¹⁹

This very complex and interconnected system likely supports the largest number of indigenous species in New Zealand, most which have yet to be discovered. In *Our Marine Environment 2016*, it was reported that “most of our marine environment has never been surveyed, and while scientists have identified more than 17,000 marine species

in our EEZ, experts estimate as many as 65,000 species are still unidentified”.²⁰ In fisheries, less than half of the managed fish stocks have their status regularly assessed²¹ and little is known about many of the species which are regularly harvested.²²

This lack of knowledge about the marine environment is linked to the difficulty and cost of studying it. Changes to the marine environment cannot easily be observed in the same way that the cutting down of a stand of pōhutukawa or the pollution of a river can be easily seen by members of the public. It is a carpet under which much can be brushed. Thus, to a much greater extent, marine management is reliant on science rather than lay observation to both identify problems and provide solutions to them. It is becoming increasingly apparent that some marine ecosystems are approaching or have exceeded tipping points at which irreversible change occurs,²³ and science is critical to identifying when such tipping points are being approached.

Marine research often requires the deployment of expensive vessels, undertaking time-consuming sampling and analysis and complex computer modelling. In addition, the area to be researched is vast – New Zealand’s marine estate covers an area 20 times greater than the size of the country’s land area.²⁴ Modern technology, including the growing availability of underwater video cameras, drones and multi-beam sonar, is reducing some of these costs and revealing much more about the underwater world, but the research challenges are still substantial. The cost and technical difficulty of undertaking marine science, and its critical role in informing management, has implications for the institutional and funding arrangements for marine management, as discussed below.

The arrangement of property rights in the marine area is also substantially different than for those on land. There are few freehold land titles that extend under the territorial sea and most of the area is designated “common marine and coastal area”, which means it cannot be owned by the Crown or any person.²⁵ Public rights of access to this area have been enshrined in law²⁶ and, as mentioned above, there is provision for customary marine titles and protected customary rights within the area. Individual transferable quota has been allocated for most commercially harvested fish stocks within the territorial sea and EEZ, and this provides the holder a perpetual right to harvest a proportion of the total allowable commercial catch for the fish stock concerned (through the provision of an annual catch entitlement).²⁷ Fish stocks to which the quota attaches are defined spatially by the delineation of quota management areas.²⁸ There is a patchwork of other rights in the marine area, including over structures such as wharves, jetties and marinas and for activities such as aquaculture (which are authorised under fixed-term coastal permits under the RMA).²⁹

As most of the marine area is effectively a “commons” not owned by any party, greater public interest considerations come into play than when managing activities undertaken on privately held land. For example, the Marine and Coastal Area (Takutai Moana) Act recognises the

importance of the marine and coastal area, for “its intrinsic worth” and “for the benefit, use and enjoyment of the public of New Zealand”.³⁰ The RMA also recognises the greater public interest in managing the coastal marine area by providing for the Minister of Conservation to approve regional coastal plans (rather than leaving that role to regional councils)³¹ and also requiring the Minister to promulgate the NZCPS (which is the only mandatory national instrument under the RMA).³² For oceans, our starting point for public management is quite different.³³

The marine environment is quite different in character from the terrestrial environment and needs to be managed in different ways.

11.3 Jurisdictional boundaries for marine management

New Zealand’s jurisdiction over the marine area is determined by the United Nations Convention on the Law of the Sea (UNCLOS).³⁴ Under this convention, New Zealand’s sovereignty only extends out to the edge of the territorial sea, which is 12 nautical miles from the line of low water. Within the EEZ (which extends seawards from the outer edge of the territorial sea to 200 nautical miles from the low water mark), New Zealand only has limited sovereign rights and the area is not part of New Zealand’s territory. These rights include the ability to explore, exploit, conserve and manage natural resources, including marine life, oil, gas and minerals as well as the ability to economically exploit the zone for activities such as energy production. Other countries retain the freedom of navigation and overflight within New Zealand’s EEZ and can lay submarine pipes and cables within it. Where the outer edge of the continental shelf extends beyond the EEZ, New Zealand has even more limited rights, which only encompass the exploitation of minerals, gas and other non-living resources within the seabed and subsoil as well as sedentary species on the seabed (but exclude harvesting of mobile fish).³⁵

Because of the fundamentally interconnected nature of the marine environment, it is difficult to draw hard jurisdictional lines that align management effort with ecological systems, in the same way that freshwater catchments can be defined on land.³⁶ As described above, coastal management under the RMA extends only to the territorial sea, and there is a different legal regime which applies to the EEZ and continental shelf. There is no scientific or ecological basis for this division. It was based on the political compromises honed through the multi-national deliberations leading up to UNCLOS.

For management under the RMA, the territorial sea has been further divided up into regional council management areas, usually based on a simple extension of the land-based council boundaries out to the 12-nautical-mile limit. Such boundaries are typically based on water catchments and fail to reflect the biophysical realities of the sea. This has resulted in some notable anomalies where

the Kaipara Harbour is divided between two regional councils (Northland and Auckland) as is the Hauraki Gulf (Auckland and Waikato). Horizons Regional Council manages only a small sliver of the south-east coast of the North Island. Where smaller unitary councils have been established, the fragmentation has been even greater. In Tasman Bay, Nelson City Council manages a narrow strip through the middle of the bay, with Marlborough District Council managing the eastern side and Tasman District Council the western side. These arrangements contrast starkly with those for the EEZ and extended continental shelf, which are managed as one enormous, undelineated spatial unit by the EPA under the EEZ Act.

Fisheries management is also largely blind to the territorial sea/EEZ division, but spatially divides the sea up into differently configured administrative units (called “fisheries management” areas). Most of these extend from the shore out to the edge of the EEZ. Seven areas are adjacent to the mainland coast and another four cover offshore areas surrounding island groups. Quota management areas for fish stocks have largely been defined on the basis of these fisheries management areas for administrative efficiency. These areas were largely developed for administrative efficiency and do not coincide with many biological fish stocks, even though such stocks have been the main focus of fisheries management effort.³⁷

There have been some efforts to spatially divide the coast up into ecological units based on biophysical characteristics. For example, biogeographic regions have been identified for coastal areas based on visible ecological patterns and the physical characteristics of the areas. For the territorial sea, 14 areas have been identified of which 9 surround the mainland coast and 5 cover different offshore island areas.³⁸ These biogeographic areas do not currently coincide with jurisdictional and management boundaries, but they have been used by the Department of Conservation as a basis for identifying marine protected areas (see Figure 11.2).³⁹

Jurisdiction boundaries do not always reflect the interconnected nature of the marine environment.



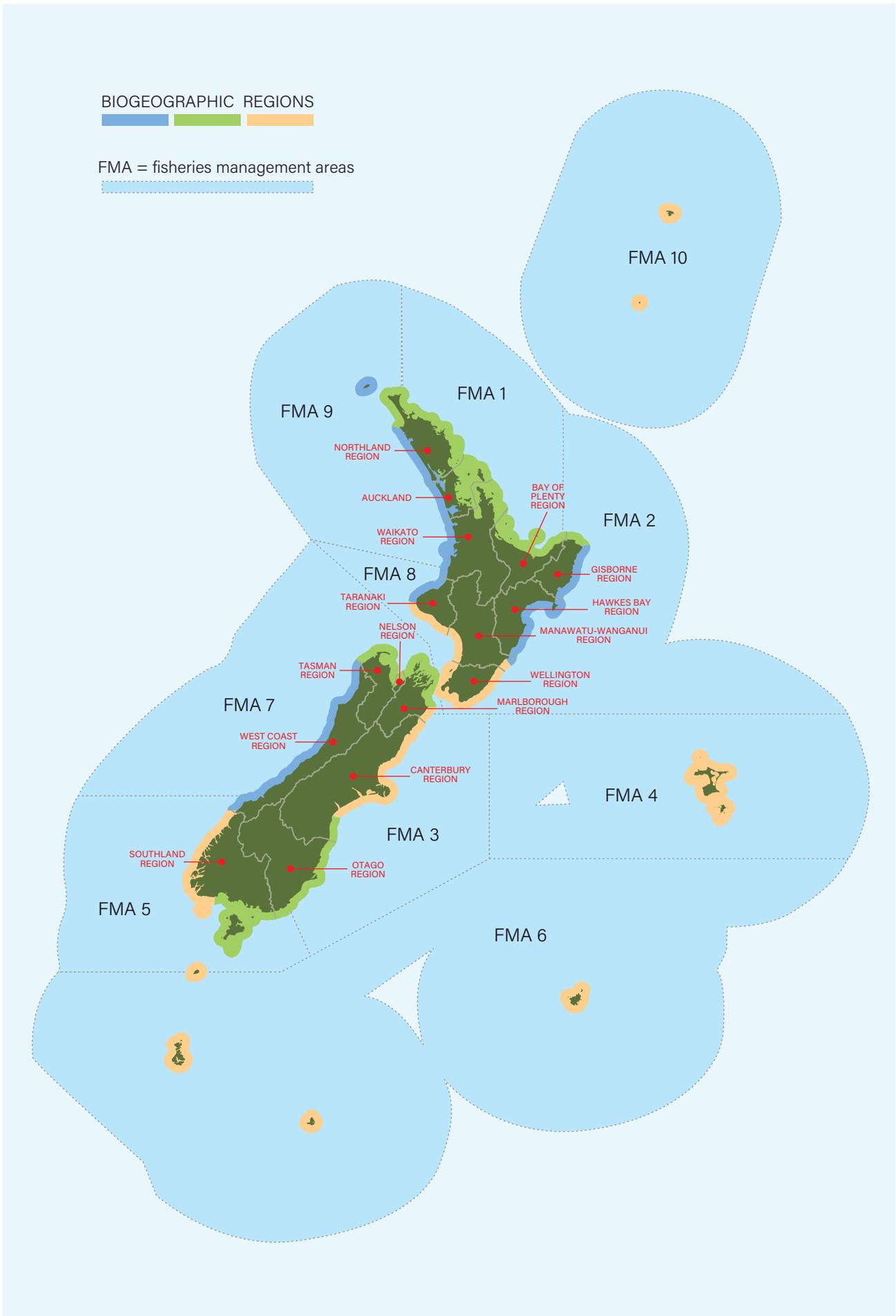


Figure 11.2: Jurisdictional and biogeographic boundaries in the current system

11.4 Institutional responsibilities in a future system

There appears to be good reason for regional councils to have a role in marine management, particularly because what happens on land (and in water catchments in particular) impacts on nearshore areas, including sedimentation, nutrient runoff, contaminated stormwater flows and point source pollution (such as from wastewater treatment plants).. Regional councils should be well placed to manage this land-sea interface and can deploy regional level strategy (eg regional policy statements, which have as their purpose to provide “an overview of the resource management issues of the region and policies and methods to achieve integrated management of the natural and physical resources of the whole region”).⁴⁰ Ideally, management targets and objectives set for the marine area could drive management effort further up the catchment. Integrated management across the land-sea interface is also important when it comes to sea level rise and coastal hazards. In short, it makes a great deal of sense for regional councils, responsible for and aligned according to freshwater catchments, to manage the coastal environment under a framework like the RMA.

But should regional councils be tasked with managing out to 12 nautical miles? Such a distance from shore raises practical issues. Marine management is a specialised and expensive task, requiring the deployment of marine scientists and significant investment in marine science. Research and enforcement at sea requires operating costly vessels. Councils have, as yet, no direct source of funding for this work, apart from when they can piggyback on science undertaken by resource consent applicants and monitoring undertaken by consent holders. Although there has been the ability to impose coastal occupation charges or tender aquaculture space to raise funds, these tools have not generally been deployed by councils (which have largely relied on a general pool land-based rates to fund whatever work is undertaken). Consistent national charging for occupation of the seabed, as part of a revamped allocation regime more generally (which we are continuing to give thought to), could help to address this gap.



Coromandel Coast

As a result, not many councils have sea-going vessels and have largely left the bulk of their vast marine environments to look after themselves. Even where a marine scientist is employed by a council, this does not enable the build-up of a critical mass of expertise within the organisation. When someone wants to do something new in the marine area, applications are largely considered on a case-by-case basis on the scientific information provided by the applicant.

The main exception is in areas where a significant aquaculture industry has established, and so the focus of the councils has been drawn into the marine space. Both the Marlborough District Council and Waikato Regional Council have invested in modelling in order to better understand the cumulative effects of aquaculture, and in the Marlborough Sounds the council has also undertaken work to identify important biogenic habitats and to protect them from further degradation.⁴¹ In Auckland, despite the large size and capacity of the unitary council (6120 employees and a rates revenue of \$1.8 billion),⁴² the bulk of its marine area is yet to be mapped and many significant ecological areas in need of protection are yet to be identified. Such designations outside harbours are largely confined to inshore areas within a few of kilometres of land. This begs the question: if Auckland Council has been unable to effectively map and manage its extended marine domain, what hope is there for other much smaller and less well-resourced councils?

The recent proposal to establish salmon farms in open ocean areas around the north and east coast of the South Island also highlights the difficulties faced by councils in effectively managing such activities. New Zealand King Salmon Limited made applications to four different regional councils, none of which have particular expertise in this kind of activity. Does it make sense for each council to try to come up to speed on the impacts of deep-sea salmon farming for just one application? And what about other activities like minerals mining, were an application to be made?⁴³

Overall, we think there is a strong case in a future system for reducing the jurisdiction of regional councils to the marine area that is affected by land and runoff from it. The extent of this will differ in different places, but would likely include harbours and embayments and open coast out to around the 3-nautical-mile mark (the line could be drawn around the country based on scientific evidence, rather than the kind of coarse jurisdictional declaration we have now). The balance of the marine area could be managed by a better equipped and resourced Oceans Agency which can build up a critical mass of expertise in marine management (see below).

In a future system, regional councils could continue to have jurisdiction over truly coastal matters, out to (generally) a 3-nautical-mile boundary. This would reflect the need to have integrated management of catchments and coasts. Other parts of the marine area could be managed by a well-resourced Oceans Agency.

11.5 Legislative arrangements in a future system: A focus on environmental effects

We think that the current degree of fragmentation in marine legislation is detrimental to effective management and that at least some integration is merited. The key question is what should be integrated, and along which lines we should make statutory divisions.⁴⁴

As outlined above, we currently have separate legislation for the management of the territorial sea (RMA) and EEZ (EEZ Act). We also have separate legislation for marine reserves in the territorial sea, and a gap for this function in the EEZ. Alongside this, there is separate legislation for marine mammals (Marine Mammals Protection Act) and other protected marine species such as seabirds, some corals and sharks etc (Wildlife Act). Fisheries is managed separately (under the Fisheries Act), as is shipping (Maritime Transport Act). Even the specific case of marine pollution spans several regimes (RMA, EEZ Act and Maritime Transport Act). So too does marine biosecurity (Biosecurity Act and RMA).

There is a strong argument that all activities should be subject to the same scrutiny when it comes to the management of environmental effects, irrespective of the type of activity or its location. Currently, we have an artificial spatial distinction between the RMA and EEZ Act. There is also a tenuous distinction made between those two pieces of legislation and fisheries activity (the last major marine activity still escaping robust environmental scrutiny). As we mentioned in the Phase 1 report:⁴⁵

The Fisheries Act's role in managing fishing impacts on marine biodiversity can ... be seen as a subset of that undertaken by the RMA. This does beg the question as to whether the Fisheries Act should play a role in this area at all. If the RMA already provides a regime for managing the impacts of activities on marine biodiversity, why is there a need for sectoral legislation to do the same thing for a specific activity? It creates an awkward carve out. Interestingly, the Fisheries Act is the only piece of sectoral legislation that creates such a carve out. It can be contrasted with the Crown Minerals Act which creates an allocation regime for minerals, but leaves the management of the environmental effects of the activity to the RMA and the EEZ Act.

We have also pointed out in *Voices from the Sea* that:⁴⁶

There is a serious lack of connection between management under the RMA and the protection of important fish habitat, with consequent impacts on the productivity of fish stocks, highlighted by the lax controls on forestry harvesting in the Marlborough Sounds with likely consequential effects on struggling blue cod and paua stocks.

A more integrated future system could bring together the RMA (in its application beyond the rough 3-nautical-mile limit referred to above) and EEZ Act (in its entirety) into one piece of legislation, which we call here an

“Oceans Act”. The environmental impacts of fishing activity would also be addressed under this Act, which would have a robust purpose statement resembling that of a reformed RMA. Alignment in purpose would be important even if they were focused on different spatial areas.⁴⁷ Other elements of fisheries management *could* still be undertaken under a revised Fisheries Act, focusing on the administration of the quota system and fish stock management within the ambit of this broader piece of environmentally focused legislation. But there is equally a case for integrating those too, given the highly interconnected nature of marine habitats. Arguably, the RMA is a better-developed regime for the management of broader ecosystem impacts of fishing within 3 nautical miles of the coast than the Fisheries Act. While there would remain a separation between fisheries management in that area (under an Oceans Act) and its impacts on the marine environment (under the RMA), the latter could be strengthened to provide sharper focus and responsibility for the protection of fish habitats. As explained further below, integrated marine spatial planning could assist.

11.6 Marine conservation: A proactive role

Management of the environmental effects of human activity (stopping people doing things, or telling them how to do it) is not the only consideration in marine management. As on land, there are also compelling marine conservation imperatives which require proactive action to protect and enhance important marine habitats and indigenous species, including very mobile seabirds and marine mammals. As outlined above, these functions are currently fragmented, and there is also a major gap for marine protected areas within the EEZ. These need to be managed under a more specific statutory purpose focused on protection and enhancement of what is usually a common-pool domain.

A key legislative design question here is whether it makes sense to divide marine conservation from conservation more generally (where it applies to land and freshwater habitats and species). Many species cross the marine divide with, for example, the wrybill breeding in braided rivers of the South Island but then migrating to northern marine areas such as the Firth of Thames and Manukau Harbour to feed during winter.⁴⁸ Many of our freshwater fish species are diadromous and either grow to adulthood in freshwater then breed in seawater (such as eels) or breed in freshwater and grow to adulthood in the sea (such as galaxiids).⁴⁹ Seabirds breed on land, and so what happens at their breeding sites (such as human disturbance and predator activity) can have as much impact on their survival as what happens at sea (in terms of harvesting impacts on food supply and capture in fishing gear). This cross-over between domains suggests that integrated conservation legislation may make the most sense, and how this might look is shown in Figure 11.3 below. The idea is pursued further in Chapter 12.

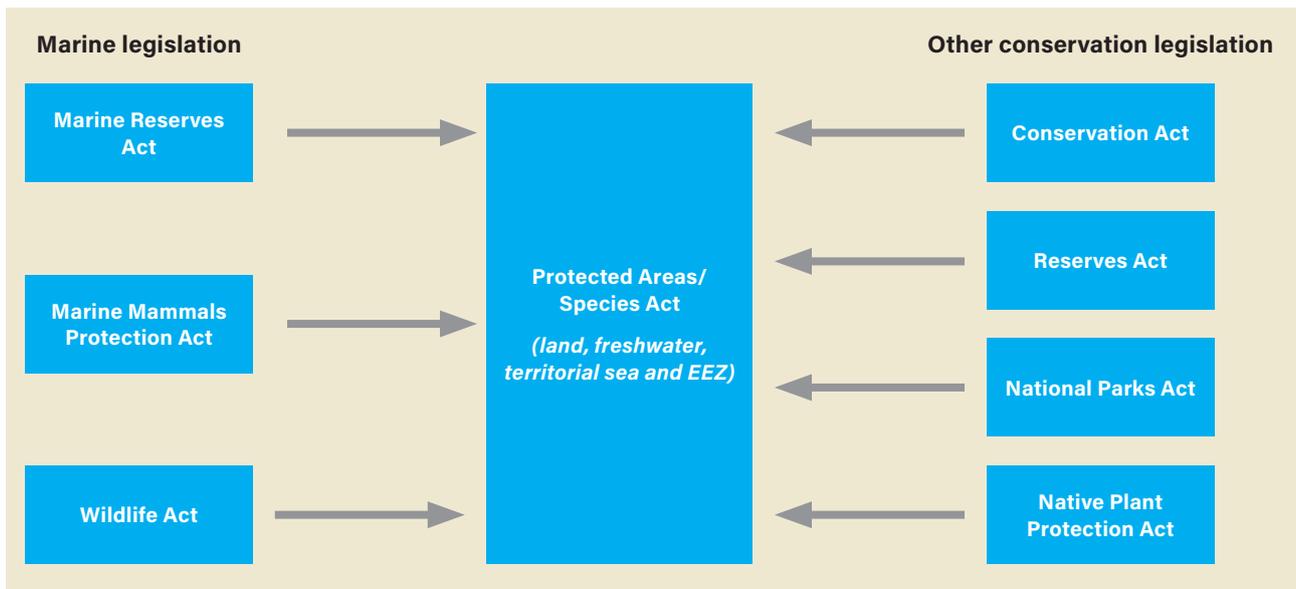


Figure 11.3: One option for integrating conservation-focused marine legislation into more integrated conservation legislation

Another option could be to amalgamate all marine legislation (apart from the RMA), including conservation-focused aspects, into one integrated Oceans Act. The reason would be that the interlinkages between marine management regimes (a domain-based or spatial approach) are stronger than links between marine conservation measures and those relating to freshwater and land. This is the approach that has been taken in the United Kingdom (see spotlight). Again, we need to consider where the stronger, intra-statutory, connections are needed. Integration in one sense will cause fragmentation in another, and either way strong links will need to be made across statutory frameworks.

A spotlight on integrated marine management in the United Kingdom

The United Kingdom took an integrated approach to its marine management a decade ago with the passage of the Marine and Coastal Access Act 2009. The legislation incorporates strategic marine planning (marine spatial planning), the regulation of fisheries, a marine conservation regime (including marine mammal protection and marine protected areas), marine pollution, a licensing system for activities within the marine area and public access. It applies to the territorial sea and the EEZ. The functions under the Act are undertaken by the Marine Management Organisation, a non-departmental public body which is also responsible for monitoring and enforcement.

11.7 Biosecurity

Another consideration here is whether marine biosecurity is better placed with other marine matters (including shipping) than left in a separate Act with other biosecurity matters (which apply across the country). This matter will need closer investigation. The main way that invasive marine organisms enter New Zealand is attached to the hulls of vessels entering the country (or other equipment

like oil rigs) or through the exchange of ballast water by overseas ships. Spread is most commonly through the movement of vessels around the coast (both commercial and recreational) and through the movement of equipment and live marine organisms in the aquaculture industry. Surveillance is focused on the main ports and marinas around the coast. We are therefore attracted to the view that marine biosecurity is more closely related to shipping (and the movement of vessels and equipment around the coast) than other elements of biosecurity (which are more focused on air and shipborne cargo as entry points), and therefore could fit better within an integrated oceans regime.

11.8 An Oceans Act

Overall, we think that there is a good argument for bringing together most marine legislation within an integrated, spatially defined, Oceans Act. This would be a potentially complex transition, and may require time. It would be quite a different way of arranging our laws. Thus the timeline for a new Act could focus on the medium term, but with preparatory policy work starting immediately. The management of the inshore coastal area would remain in the RMA (excluding wild fisheries, maritime transport and biosecurity, which would come under the Oceans Act). But an Oceans Act should have a purpose and principles resembling (or at least well aligned with) a revised Part 2 of the RMA. It would need to recognise the marine environment's intrinsic worth, a notable omission from the EEZ Act.⁵⁰ It could even provide more targeted principles applying to different types of decisions made within the integrated framework (eg to reflect the different roles, like wild fisheries management, compared to the RMA), but they would be under the umbrella of a holistic purpose statement applying to the marine area as a whole. This would be focused strongly on ecosystem-based management.

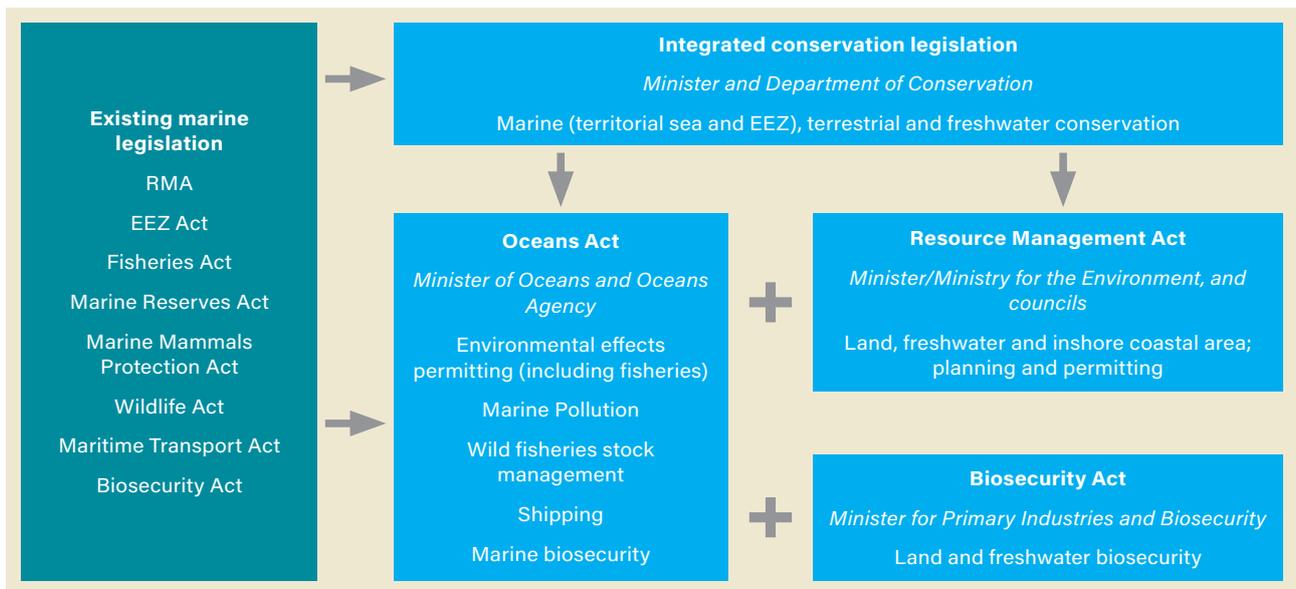


Figure 11.4: Integration of marine-focused legislation

Furthermore, on balance we are attracted to the idea of marine conservation being incorporated into separate integrated conservation legislation, which would apply across the whole of New Zealand. This is because marine conservation efforts, which apply to highly mobile species and their habitats, need to be undertaken within the ambit of a wider integrated conservation statute. Conservation legislation is explored further in Chapter 12, where we see considerable room for rationalising and aligning the multiplicity of statutes we currently have.⁵¹ While the statutes would do different things, there would need to be close connections between them.

The approach to legislative design described above is represented in Figure 11.4. We do not see a need to revisit the Marine and Coastal Area (Takutai Moana) Act, for pragmatic political reasons as much as conceptual ones,⁵² aside from any consequential amendments needed.

We see a case for integrating existing legislation relevant to the marine area into a single Oceans Act. That would not, however, include coastal management (including out to 3 nautical miles), which would remain under the RMA.

11.9 Institutional arrangements

Earlier in this chapter, we suggested that regional councils should remain responsible for coastal marine management within a 3-nautical-mile limit, and that a dedicated Oceans Agency should be responsible for management beyond that. We can now revisit that in light of the legislative arrangements suggested above.

In Figure 11.4 above we have indicated tasks for various existing agencies, with the notable addition being a dedicated Oceans Agency, operating under the auspices of a Minister for Oceans. This ministerial portfolio could be established in the short term to provide a broader stewardship function over marine management, with

an Oceans Agency appearing soon after (perhaps in the medium term, to align with the introduction of an Oceans Act).⁵³

An Oceans Agency would be the operational agency for the Oceans Act and operate at arm's length from government to ensure that the Agency is seen as politically independent and that it retains high public regard.⁵⁴ Government entities tasked with environmental management have often struggled with such matters, with a public perception that the Ministry of Fisheries was captured by the industry it was charged with regulating⁵⁵ and the Department of Conservation resiling from its statutory advocacy role under political duress and budget cuts.⁵⁶ We have also seen the EPA stripped of a key decision-making role under the EEZ Act in favour of ministerially appointed Boards of Inquiry after declining two consent applications for marine mining.⁵⁷ Although the Fisheries Act enables action in relation to environmental and ecosystem issues, the relevant provisions (including the Act's purpose and environmental principles) remain underutilised.⁵⁸ A stronger agency mandate is required.

We think it is important that a new Oceans Agency gains high public credibility and is seen as beyond reproach. Such independence can be achieved through establishing it as a statutory Crown entity, as well as providing oversight of its decision-making by the Futures Commission (eg in reviewing key planning instruments and in providing a scorecard for performance alongside other agencies and government as a whole).⁵⁹ There are three types of such entities which are legally separate from the Crown and operate at arm's length from the responsible Minister, each with a different level of independence:⁶⁰

- *Crown agents*, which must give effect to government policy when directed by the responsible Minister. They include the Energy Efficiency and Conservation Authority, the EPA and Maritime New Zealand.

- *Autonomous crown entities*, which must have regard to government policy when directed by the responsible Minister. They include Heritage New Zealand Pouhere Taonga.
- *Independent crown entities*, which are generally independent of government policy. They include the Health and Disability Commissioner and the Human Rights Commission (and the proposed Climate Change Commission).

In this model, a dedicated Oceans Agency would subsume all of the activities of Fisheries New Zealand (a business unit of the Ministry for Primary Industries) and Maritime New Zealand (a Crown agent), as well as part of the activities of the EPA (a Crown agent) and Biosecurity New Zealand (a business unit of the Ministry for Primary Industries). Alternatively, a dedicated “Oceans Unit” could be established within a strengthened EPA, which would have the advantage of building on an existing institution of a roughly appropriate character. Developing capacity within the EPA could even be an interim step to carving off a dedicated Oceans Agency in the medium term. But if the EPA were to remain an operational agency for oceans, we would need to revisit both its weak mandate under the EPA Act and its institutional character.

In either case, we suggest that the most appropriate institutional choice would eventually be an autonomous Crown entity, rather than a Crown agent. This means that an Oceans Agency (or the EPA, if that were preferred)⁶¹ would only have to *have regard* to government policy. However, “policy” here simply means the policy priorities of the government of the day. As under the RMA, there would also be a robust legal framework in the Oceans Act within which different institutions, including the Minister, could exercise influence through due process (see below).

Māori input into decision-making by the Agency could be supported through a strengthened Ngā Kaihautū Tikanga Taiao model (building on the EPA’s statutory Māori Advisory Committee). The Agency could build on the expertise in these existing agencies, but would need to develop specialist marine science, marine spatial planning and environmental assessment capacity.

A dedicated Oceans Agency could be the operational agency for the Oceans Act and operate at arm’s length from government. Alternatively, a strengthened EPA could take on this role. Māori input into decision-making by the Agency would be strengthened.

11.10 Oceans strategy and planning

The NZCPS is the most comprehensive statutory policy document that currently applies to the marine space, but it is confined to the territorial sea and functions under the RMA. No policy or plans have emerged under the EEZ Act, even though there is now legislative provision for them.⁶² There is no statutory provision for the development of policy under the Fisheries Act (concerning the management of environmental effects of fishing on

the marine environment), and only a poorly developed planning system with a focus on producing high level fish stock plans. More broadly, there is no statutory provision for integrated marine spatial planning that spans all of these (and other) frameworks.

We think there is strong case for rationalising and strengthening this policy and planning framework under a new Oceans Act. At the top of the planning hierarchy in the Act would be an “Oceans Plan” prepared by the Minister for Oceans under a roughly comparable process (and holding a broadly analogous place) as an NEP under the RMA.⁶³ The former would, in content, be quite different. In one sense it would be narrower (applying only to the marine domain) but in another it would be wider (to encompass other oceans management roles not in a framework like the RMA – such as fisheries, maritime transport, and potentially biosecurity).

An Oceans Plan would contain both policy (in the sense of an NPS) and regulatory provisions (in the sense of an NES). It would set out New Zealand’s key priorities for oceans management, and more detailed guidance on the implementation of the purpose and principles of the Oceans Act. It would, of course, need to link to, and take cognisance of, the NEP produced under the revamped RMA (which would, in turn, integrate the NZCPS). The plan – including fisheries components – would also need to be consistent with the marine elements of plans produced under conservation legislation (eg relating to marine mammals protection).⁶⁴ Fishing activity could, for example, be subject to restrictions on the area and method of fishing and bycatch, to be approved by the Minister of Oceans (having a broader mandate) or potentially the Department of Conservation.⁶⁵

Previously, we have also raised concerns about the social impacts of the fisheries’ allocative framework that would find a new home within an Oceans Act. For example, the aggregation of quota, market domination by a few entities, and poor market operation are impeding new entrants and the ongoing participation of existing harvesters.⁶⁶ We have suggested that different models (eg more rigorous non-aggregation clauses, government buyback of quota and support for coastal fishing fleets) could be considered, and that should take place within a broader oceans policy project. Similarly, the effective management of recreational fishing is a significant outstanding issue which needs to be progressed through system reform,⁶⁷ and we have previously outlined a number of further issues that need to be addressed in relation to fisheries:⁶⁸

- Marine reserves have significant potential to contribute to good fisheries management outcomes, in multiple ways, but are not well integrated with fisheries management legislation and regulations. They have also been sparsely used. Habitats of importance to fisheries need to be identified and protected.
- The fisheries management system is largely reactive, and government intervention typically only occurs once serious problems arise. As in our proposal

for an outcomes-based and proactive RMA, an Oceans Act should inject these pre-emptive and precautionary characteristics into fisheries management.

- Although existing legislation provides for a wide range of fisheries management tools to be used, only a narrow range has been adapted in practice. A stronger mandate is needed for these to be deployed.
- Fisheries decision-making processes within an Oceans Act would need to be fairer, more transparent and inclusive, and timely (for example, it should not take eight years to change a total allowable catch).
- The currently weak policy and planning framework guiding fisheries decision-making should be strengthened. The legislative framework only provides for fisheries plans (not policy or standards), and the provisions are sketchy as to purpose, content and preparation process for the plans.
- Quota management areas need to be better aligned with biological fish stocks, as well as the marine ecosystems within which they exist.
- There is an urgent need to address the impacts of fishing activity on benthic habitats. Close consideration should be given to freezing current dredging/trawling footprints, deploying innovations in fishing gear, and establishing marine protected areas to protect benthic habitats.

Work could usefully begin on an Oceans Plan framework in the short term – perhaps as an integrative, non-statutory instrument building on the oceans policy work that has already been done – before the introduction of the Oceans Act itself in the medium term. This less formal plan could influence the development of policy under the EEZ Act, which would be a stepping stone to a more integrated policy framework for oceans.

An Oceans Act would also provide for a permitting process. We envisage that consenting would be roughly comparable to the RMA framework, and that there would be the ability for joint processes to occur where cross-boundary effects would be felt.

In the interim, before a formal Oceans Plan was prepared, the NZCPS would continue to apply. Once the Oceans Plan was in place, the NZCPS (as incorporated into the NEP) would be confined to the truly “coastal” areas of New Zealand in line with the reduced spatial jurisdiction of regional councils (and the RMA) outlined above.

We think there is a strong case under a new Oceans Act for rationalising and strengthening the currently fragmented policy and planning framework for oceans. At the top of the planning hierarchy would be an integrated Oceans Plan.

11.11 Marine spatial planning

All of the above would be complemented by higher level marine spatial planning. A recurring theme throughout our proposed model is the need to have a place where system-wide integration occurs, alongside more targeted frameworks. We have proposed a Future Generations Act to fill this role.

The upshot here is that, standing above an Oceans Plan (as with an NEP under the RMA), there would be a “National Futures Strategy”, expressed in a “National Spatial Plan”. Both of these would include elements relating to the marine environment. Integrated spatial planning would need to influence an Oceans Plan on an ongoing basis.

That said, the nature of marine spatial planning is quite different to the terrestrial context. In the latter, attention is often focused on coordinating the spatial aspects of urban growth. Spatial planning in the marine area has a different purpose, more strongly embedded in the concept of ecosystem-based management. The marine environment, as described above, is extremely fluid, and sparsely populated by people. In *Healthy Seas*, we therefore proposed a definition for marine spatial planning in New Zealand:⁶⁹

an integrated, strategic planning approach which guides the management of activities that cumulatively impact on the marine environment in order to maintain and restore healthy ecosystems while providing for kaitiakitanga and current and future uses.

There is a question of design here. Should spatial planning for the oceans be treated as separate from spatial planning on land? If it should, does it not follow that marine spatial planning should occur in an Oceans Act rather than under the broader auspices of a Future Generations Act?

Ultimately, we think they are too connected to be done separately. For one, even under an Oceans Act, there would not be total spatial integration. Meaningful marine spatial planning would need to be able to cut across the geographical boundary between RMA and Oceans Act jurisdiction (at 3 nautical miles), and also span both the Oceans Act and the marine elements of an integrated Protected Areas and Species Act (eg in relation to marine protected areas and protection for marine mammals). In the Phase 1 report, we highlighted issues with Bryde’s whale shipstrike in the Hauraki Gulf, concluding that while multiple overlapping tools can be used under different legislation, the very fact of having many options can lead to regulatory paralysis.⁷⁰ A strategic and spatial planning exercise can clearly outline which tools are envisaged to be used, and who will have responsibility for using them.

At the same time, there are important links to be made between spatial planning on land (which activities occur where) and their impacts on the sea (eg through waterways and coastal development). They cannot be done in isolation of one another. We therefore see potential issues in providing for marine spatial planning

to be done under an Oceans Act when we have a more integrative (and quasi-constitutional) framework under a Future Generations Act.

At the highest level, a National Futures Strategy under this Act should therefore have a strong oceans component *within* it, and marine spatial planning needs to be integrated into a wider national spatial planning exercise. We envisage that an Oceans Agency would contribute to the production of a National Futures Strategy and National Spatial Plan (that process is described in Chapter 8), with the EPA taking on this role as an interim measure prior to the establishment of the Agency (or if, indeed, the EPA were to become such an agency). A National Spatial Plan could identify, among other things, locations for new marine protected areas (including marine national parks) to be established, to create a representative and ecologically connected network of protections.

A National Futures Strategy and National Spatial Plan, described in Chapter 8, should have a strong oceans component within it.

A Future Generations Act also provides for the development of *regional* futures strategies and spatial plans. Alongside regional spatial plans, we see potential for a parallel process for more targeted marine spatial planning where required. This would reflect that the marine context is quite different to the terrestrial.

These plans could cut across both regional council coastal-marine boundaries and the (roughly) 3-nautical-mile boundary. They could also encompass specified areas within the rest of the territorial sea or EEZ (eg where pressures were apparent or foreseeable).⁷¹ As mentioned earlier (in relation to the Hauraki Gulf), many marine areas that need to be spatially planned cut across jurisdictional boundaries (which have been based regionally on catchments and territorially on communities of people). Marine regions would be a way to address issues of institutional fragmentation when developing regional spatial plans.⁷²

As with spatial planning on land, not all parts of the ocean would require the same degree of effort and attention. Preparation of regional marine spatial plans would therefore necessitate a strategic look at which parts of the marine environment should be targeted, and in what order, allowing prioritisation of effort. There would be a programme established for marine spatial planning to be developed as part of this process over the next 10 years, based on transparent a set of statutory criteria. There would, however, also be automatic triggers for detailed marine regional spatial planning to occur, such as where there was serious ecological decline.⁷³ Iwi/hapū and councils would be able to apply to the Minister of Oceans to have this more in-depth process initiated in their area.⁷⁴

There would be high level objectives for marine spatial plans in the identified areas, akin to high level terms of reference. There could even be a different, more

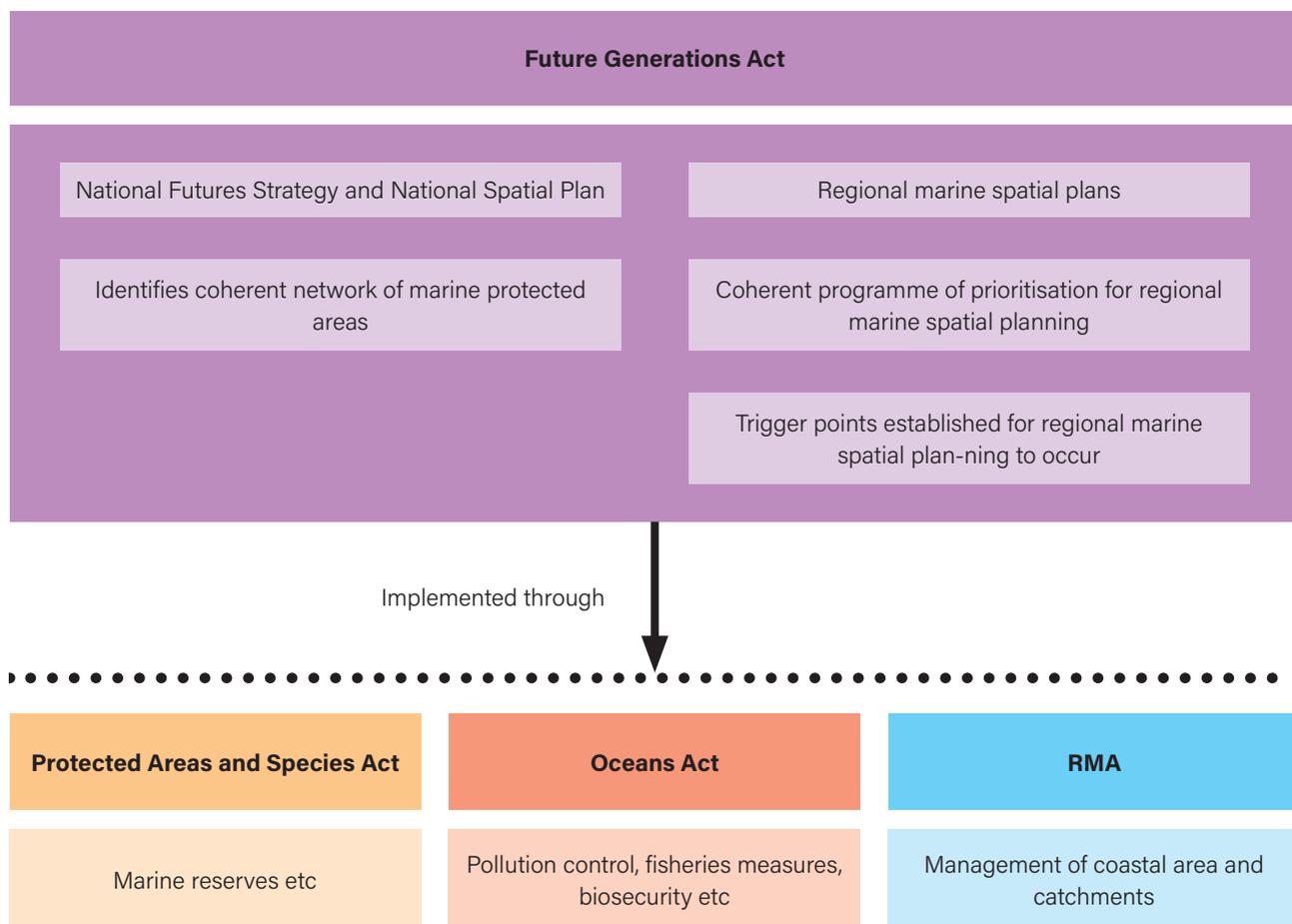


Figure 11.5: Marine spatial planning and instruments under other frameworks



Figure 11.6: An alternative process for marine spatial planning

collaborative, process to develop these marine regional spatial plans under a Future Generations Act, including a more direct route for their regulatory components to be given effect to in the RMA and/or Oceans Act, as outlined in the spotlight below. Alternatively, the normal process for developing regional futures strategies/spatial plans could

apply, with one key change: sign-off would be required by the Crown through the Minister of Oceans and Minister of Conservation, and the Oceans Agency would be involved in co-production. This reflects the idea that even in the coastal environment, there is a strong national community of interest in marine planning.⁷⁵



A spotlight on the preparation of marine spatial plans under the Future Generations Act

In EDS's recent publication *Healthy Seas* we outlined a potential new framework for marine spatial planning in New Zealand. Within the auspices of a broader strategy, "marine planning partnerships" would be established to oversee the planning process for a particular marine area. The partnerships would be established between iwi/hapū and relevant agencies. There could also be provision for public funds to be set aside for spatial plan development and implementation, and a direction that the partnership agencies involved consider aligning other planning and funding processes with it.

The plan itself would be developed by a Collaborative Working Group comprised of iwi/hapū and stakeholder representatives. Senior agency staff would be non-voting members of the Group. This Group would be supported by a Project Team built on a core of MSP-trained staff in a dedicated Oceans Agency (or, alternatively an expanded EPA).

Once the Collaborative Working Group had agreed on a draft marine spatial plan it would be submitted to a Marine Planning Partnership for approval. Following approval by the Partnership, the plan would be publicly notified by the Oceans Agency (or, alternatively, the EPA) and public submissions invited. The Futures Commission would provide a review. The non-regulatory elements of the plan would be considered by the Collaborative Working Group and any adjustments made before forwarding onto the Partnership for final approval.

The regulatory component of the plan could be heard directly by the Environment Court. For RMA matters, the Court could make directions to councils to amend their plans directly (to the extent that the plan reflected the purpose and principles of the RMA itself), with appeals on matters of law allowed. For regulatory matters under other legislation (eg the Oceans Act, once in existence), the Court could make recommendations to the Minister of Oceans, similar to the process for Water Conservation Orders.⁷⁶

Alongside regional futures strategies and spatial plans could be a more targeted process for regional marine spatial planning. This would occur under the Future Generations Act. Marine spatial plans would then flow through into decision-making under "implementation" frameworks, including an Oceans Act, the RMA, and integrated conservation legislation. There could even be a more direct process for marine spatial plans to be implemented in such frameworks, involving the Environment Court.

11.12 Concluding comments

In this chapter we have considered the framework for marine management in a future system. The overall proposition can be seen in Figure 11.7 below. A lot of the questions we face here are, as with the RMA, about what we integrate and what we fragment. Presently, the system is fragmented in a number of ways, and we see room for tighter integration along spatial or domain-based lines. In other words, things that are done in and affect the oceans should be managed more closely together. This creates inevitable fragmentation, too (eg between the marine and terrestrial environment, or between the coastal and deep sea environments). There are pros and cons.

On balance, however, we have suggested the creation of an integrated Oceans Act, which would apply on the seaward side of a boundary 3 nautical miles from the coast. That could come to fruition in the medium term. The model would recognise that a close connection within the RMA is needed for decisions concerning land and catchments and decisions concerning the coastal environment (including its marine components). What happens in one can impact significantly on the other. While not a perfect boundary (no boundary is), it also recognises that the management of the deep sea needs to occur in a much more integrated way. This is at an operational, not just strategic, level.

Therefore, while we suggest that marine matters should be prominent in strategies and spatial plans at a nationwide level (under a Future Generations Act), it is also desirable to have greater connections between things like pollution control, shipping, biosecurity, fisheries, and environmental impacts at an operational level. Hence the proposition for a dedicated Oceans Act as one implementation framework for oceans management. Alongside that Act would be more tightly integrated conservation legislation that would span land and sea, an RMA that would apply to coastal management, and the Marine and Coastal Area (Takutai Moana) Act. Treaty settlement legislation would also continue to be upheld.

Accompanying legislative change would be institutional change. In particular, there would be a Minister of Oceans (a portfolio to be established in the short term) and a dedicated Oceans Agency. That could be a standalone institution, or folded into a strengthened EPA. As a transitional measure, the EPA could be built up over time and then separated into a dedicated Oceans Agency.

KEY for Figure 11.7 on page 239

Arrows indicate different relationships between elements of the system

➔ Red arrows: a strong direction (eg "give effect to", "directly insert" or equivalent)

➔ Blue arrows: a medium strength direction

➔ Black arrows simply indicate the direction of a process without a particular normative instruction

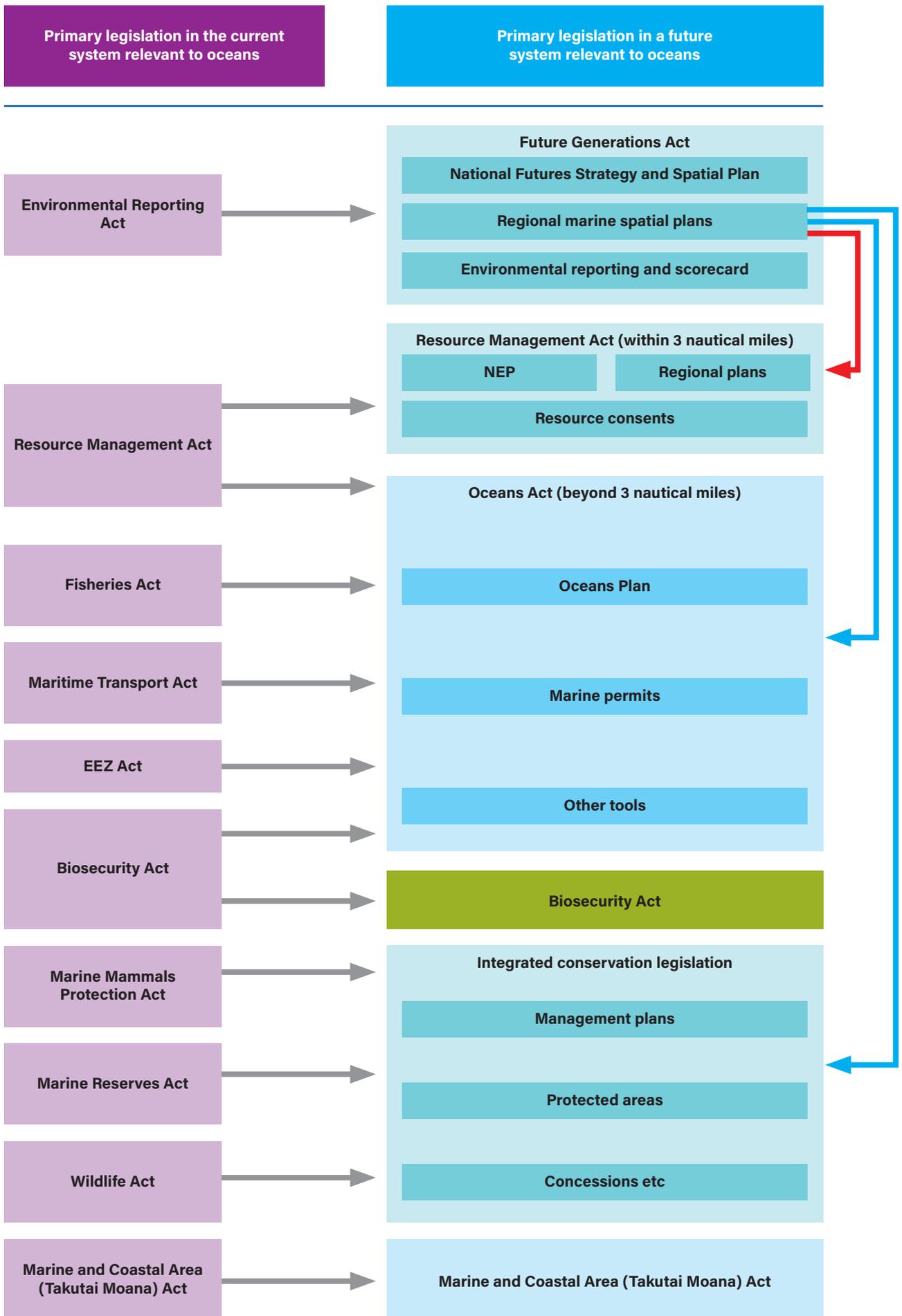


Figure 11.7: A proposition for oceans legislation

ENDNOTES

- 1 Alternatively, it could be based on a mapping exercise based on biophysical characteristics of different areas.
- 2 As is the case now under the RMA and EEZ Act.
- 3 See G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 128.
- 4 R Peart *Looking out to sea: New Zealand as a model for ocean governance* (EDS, 2005) at 183.
- 5 Except for location specific legislation (eg relating to sub-Antarctic islands).
- 6 K Mulcahy, R Peart and A Bull *Safeguarding our oceans: Strengthening marine protection in New Zealand* (EDS, 2012) at 92-114.
- 7 K Mulcahy and R Peart *Wonders of the sea: The protection of New Zealand's marine mammals* (EDS, 2012).
- 8 R Peart *Looking out to sea: New Zealand as a model for ocean governance* (EDS, 2005) at 184.
- 9 *Ngāti Apa v Attorney-General* [2003] 3 NZLR 643.
- 10 Ngāti Porou is the first iwi to be granted customary title under the provisions through the Ngā Rohe Moana o Ngā Hapū o Ngāti Porou Act 2019.
- 11 Ministry for the Environment and Statistics New Zealand *New Zealand's Environmental Reporting Series: Our marine environment 2016* (2016) at 7.
- 12 M Brown, R Peart and M Wright *Evaluating the environmental outcomes of the RMA* (EDS, 2016) at 55.
- 13 Office of the Minister for the Environment *Comprehensive review of the resource management system: Scope and process* (2019) at 10.
- 14 O Rosane "Oceans absorb almost 1/3 of global CO2 emissions, but at what cost?" (World Economic Forum, 2019) <www.weforum.org/agenda/2019/03/oceans-do-us-a-huge-service-by-absorbing-nearly-a-third-of-global-co2-emissions-but-at-what-cost>
- 15 A Borunda "Ocean warming, explained" *National Geographic* <www.nationalgeographic.com/environment/oceans/critical-issues-sea-temperature-rise/>
- 16 R Peart *Voices from the sea: Managing New Zealand's fisheries* (EDS, 2018) at 5.
- 17 R Peart *Farming the sea: Marine aquaculture within resource management reform* (EDS, 2019) at 28.
- 18 MA Morrison, E Jones, M Consalvey and K Berkenbusch "Linking marine fisheries species to biogenic habitats in New Zealand: A review and synthesis of knowledge" *New Zealand Aquatic Environment and Biodiversity Report No 130* (2014).
- 19 R Peart *Voices from the Sea: Managing New Zealand's fisheries* (EDS, 2018) at 64.
- 20 Ministry for the Environment and Statistics New Zealand *New Zealand's Environmental Reporting Series: Our marine environment 2016* (2016) at 19.
- 21 Fisheries New Zealand *The status of New Zealand Fisheries 2018* (2019) <www.mpi.govt.nz/dmsdocument/34419-the-status-of-new-zealand-fisheries-report-2018-final>
- 22 For example, the status of finfish stocks in the Hauraki Gulf; see R Peart *Voices from the sea: Managing New Zealand's fisheries* (EDS, 2018) at 40.
- 23 See, for example, the collapse of the Challenger scallop "enhancement" fishery and failure to recover: *ibid* at 75.
- 24 R Peart, K Serjeant and K Mulcahy *Governing our oceans: Environmental reform for the exclusive economic zone* (EDS, 2011) at 3.
- 25 Marine and Coastal Area (Takutai Moana) Act 2011, s 11(2).
- 26 *Ibid*, s 26.
- 27 Fisheries Act 1996, s 67.
- 28 *Ibid*, s 24(1).
- 29 See Resource Management Act 1991, s 12.
- 30 Marine and Coastal Area (Takutai Moana) Act 2011, s 4(2)(e).
- 31 Resource Management Act 1991, sch 1, cl 19.
- 32 *Ibid*, s 57(1).
- 33 See G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019), ch 6.
- 34 On international law obligations more generally, see G Severinsen and R Peart *Reform of the resource management system: The next generation - Working paper 2* (EDS, 2018), appendix 4.
- 35 R Peart, K Serjeant and K Mulcahy *Governing our oceans: Environmental reform for the exclusive economic zone* (EDS, 2011) at 7.
- 36 Noting that catchments are not the only meaningful way to divide land-based jurisdictions.
- 37 For example, in the Hauraki Gulf none of the quota management areas coincided with known biological fish stocks. See R Peart *Voices from the sea: Managing New Zealand's fisheries* (EDS, 2018) at 14.
- 38 <www.mfe.govt.nz/more/science-and-data/classification-systems/marine-classification-systems>
- 39 See Department of Conservation and Ministry of Fisheries *Marine protected areas policy and implementation plan* (2005).
- 40 Resource Management Act 1991, s 59. See also Chapter 8, where we leave it as an open question whether regional policy statements should remain, or whether they would be replaced by more integrative regional futures strategies made under a Future Generations Act.
- 41 R Peart *Farming the sea: Marine aquaculture within resource management reform* (EDS, 2019).
- 42 <www.localcouncils.govt.nz/lqip.nsf/wpg_URL/Profiles-Councils-Auckland-Council-Main?OpenDocument>
- 43 There has been greater interest in deep sea mining in recent times, including in the EEZ.
- 44 See G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 123-124.
- 45 *Ibid* at 137.
- 46 R Peart *Voices from the Sea: Managing New Zealand's fisheries* (EDS, 2018).
- 47 The differences in purpose between RMA and EEZ Act are confusing, and there is little reason for most of them.
- 48 <<http://nzbirdsonline.org.nz/species/wrybill>>
- 49 <www.niwa.co.nz/freshwater-and-estuaries/nz-freshwater-fish-database/niwa-atlas-of-nz-freshwater-fishes/an-overview-of-new-zealands-freshwater-fish>
- 50 See G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 61.
- 51 Compare New Zealand Council for Infrastructure Development (now Infrastructure New Zealand) *Integrated governance, planning and delivery: A proposal for local government and planning law reform in New Zealand* (2015) at 7.
- 52 Especially in relation to additional permissions required from rights and title holders for consents under the RMA, the influence of planning documents on RMA plans, and the furnishing of advice to the Director-General of Conservation for various proposals. See Resource Management Act 1991, ss 48 and 49.
- 53 Which could be the place in which it was created, if the Agency were not to be part of the EPA. See also G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 176.
- 54 Public confidence in impartiality drives the need for independent institutions; see New Zealand Productivity Commission *Better urban planning* (2017) at 240.
- 55 R Peart *Voices from the sea: Managing New Zealand's fisheries* (EDS, 2018) at 116.
- 56 N Blake-Persen "DOC 'nobbled' by previous govt - environmental lawyer" (Radio New Zealand, 8 November 2017) at <www.rnz.co.nz/news/national/343368/doc-nobbled-by-previous-govt-environmental-lawyer>
- 57 Resource Legislation Amendment Act 2017, s 227 (which replaced s 52 of the EEZ Act).
- 58 Compare R Peart *Voices from the sea: Managing New Zealand's fisheries* (EDS, 2018).
- 59 See Chapter 8.
- 60 Crown Entities Act 2004, s 7.
- 61 Including in its other roles - for example, under the RMA and Hazardous Substances and New Organisms Act.
- 62 Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012, ss 37A-37G.
- 63 Including a review role for the Futures Commission and Tikanga Commission/ commissioners (rather than appeals to the Environment Court), the latter of which would subsume the existing Māori Advisory Committee under the EEZ Act. As with an NEP, there are challenges in terms of institutional arrangements for co-creation of oceans plans by Māori at a national level.
- 64 Including driving a precautionary approach to fisheries bycatch. In the Phase 1 report, we shone a spotlight on issues with judicial review under the Fisheries Act, noting that it has caused unacceptable delays in introducing measures to protect critically endangered species like the Māui dolphin.
- 65 Acknowledgement: Dr Marie Doole of the Catalyst Group (M Doole *Conservation system reform: A proposed model to better protect and enhance species and ecosystems in New Zealand* (Unpublished commissioned paper, The Catalyst Group, 2019)).
- 66 R Peart *Voices from the sea: Managing New Zealand's fisheries* (EDS, 2018).
- 67 *Ibid*.
- 68 *Ibid*.
- 69 K Serjeant and R Peart *Healthy Seas: Implementing marine spatial planning in New Zealand* (EDS, 2019) at 4.
- 70 G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 138. See also R Peart *Bryde's whale voluntary protocol case study* (Unpublished report prepared for the Sustainable Seas National Science Challenge, EDS, 2017).
- 71 For example, where ecologically fragile or where there are growing or competing uses.
- 72 Based mainly on catchment boundaries and regional infrastructure networks (eg transport).
- 73 See G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019).
- 74 K Serjeant and R Peart *Healthy Seas: Implementing marine spatial planning in New Zealand* (EDS, 2019) at 85.
- 75 Already recognised under the RMA, in the strong role for the Minister of Conservation.
- 76 K Serjeant and R Peart *Healthy Seas: Implementing marine spatial planning in New Zealand* (EDS, 2019) at 87-90.

12. CONSERVATION LEGISLATION¹

12.1 Introduction

The structure of this report is based on the core legislative frameworks that we envisage operating in a future system. A chapter devoted to “conservation” therefore anticipates that there will be particular statutes focused purely on that topic, beyond more general frameworks like the RMA, a new Oceans Act, and statutes concerned with the built environment. In Chapter 4, we described a large number of statutes that fit that bill in the current system, including the Conservation Act, National Parks Act, Reserves Act, Marine Reserves Act and Marine Mammals Protection Act. There are many others. Some of these are place based (applying to specific locations across the country, like reserves, or particular parts of the country, like the Waitākere Ranges), while others are species based (applying to specific living things, like indigenous plants). In terms of institutions, the Department of Conservation has the primary role in implementing the large suite of legislation currently guiding conservation in New Zealand, across both land and sea (although local government plays a significant role too). In Chapter 11 we also briefly considered the place of marine conservation legislation, and concluded that it should not be integrated into an Oceans Act. Instead, we suggested that conservation legislation be integrated in a smaller range of statutes that span both land and sea, to complement a separate RMA and Oceans Act.

However, it is not easy to define what “conservation” is, and therefore what defines a “conservation statute”. In this chapter we are thinking of it primarily in the sense of nature conservation. It is about protecting and enhancing ecosystems and species. We do that for many different reasons (eg to reflect the intrinsic or moral worth of some species, to support ecosystem services or amenity value for humans, to respect Māori values,

to provide wilderness areas, and to foster educational, scientific and recreational pursuits). And we can use many different mechanisms to do so (eg preventing activities in protected areas, enhancing or restricting access, actively planting or purchasing land etc). But the subject of nature conservation is the living components of the natural world and the habitats they rely on to survive and thrive.

Nature conservation cuts across multiple statutes in the current system, and would continue to do so in our proposed model. In particular, the RMA (and comparable elements of an Oceans Act beyond roughly 3 nautical miles) would have a lot to do with achieving conservation outcomes, framed largely in the language of protecting and enhancing biodiversity.² Higher level strategy for conservation (eg the New Zealand Biodiversity Strategy currently under development)³ would also occur within the auspices of integrated futures strategies created under a Future Generations Act. Futures strategies would then be implemented through multiple regimes (including the RMA).⁴

The RMA, in particular, has presided over an alarming decline in biodiversity values.⁵ Examples include poor provision for wetland protection in plans and consenting⁶ and loss of terrestrial cover.⁷ Even where rules do exist, non-compliance has led to significant loss.⁸ We have therefore recommended, in Chapters 5 to 7, that the RMA be strengthened in this regard. Among other things, we proposed:

- Reforming Part 2 of the Act to provide clearer bottom lines around biodiversity and habitat protection (in the concept of “natural heritage”)
- Requiring regulation, including permitted activities, to be linked firmly to a clear policy direction in an integrated NEP (including for indigenous biodiversity)



- The mandatory setting of targets for environmental improvement, including for biodiversity
- Clarifying that council responsibility for biodiversity outcomes lies at the regional, not district, level
- Improving compliance monitoring and enforcement, including in relation to biodiversity
- A stronger involvement by central government (eg the Department of Conservation) in the development of council plans having biodiversity implications
- An independent review of national direction by a new Futures Commission

The concept of nature conservation is broad, and requires multiple statutes to implement (including the RMA). We have recommended significant changes to the RMA to strengthen its role in safeguarding biodiversity. Many of those should also be reflected in the design of an Oceans Act described in Chapter 11.

12.2 The importance of a separate layer of conservation legislation

Nature conservation efforts are equally important on private land (and in the ocean) as they are on public land (eg the conservation estate), and are closely linked. Successfully and sustainably managing, protecting and restoring species and ecosystems demands the curtailment of threats across the landscape, regardless of who owns the land. Conservation is not something that happens just “over there” (eg ringfencing protected areas in public ownership and abandoning meaningful

protections in other areas.⁹ For biodiversity outcomes on private land, the RMA is crucial.¹⁰

However, there are several good reasons for having an additional layer of legislation on top of broader frameworks like the RMA. Some of the reasons for dedicated conservation statutes have been explored in Chapter 8 of the Phase 1 report (concerned with legislative design), and include:

- 1 To establish targeted management frameworks, principles and restrictions for particular areas having unique characteristics. For example, restrictions on activities in protected areas look quite different to restrictions on activities in cities or on farms; we would not expect concessions to be granted in national parks for extensive clearing of indigenous vegetation.
- 2 To implement bespoke Treaty settlements. For example, legislation is required for the creation of legal personhood for Te Urewera, and associated governance and management frameworks.¹¹
- 3 To compel the Crown and local government and other administrators of public land to actively manage their property in a way that reflects the public interest. Crown owned or public land can be managed quite differently from private land, and it is appropriate for legislation to outline how authorities are to do so in a more detailed manner than the more permissive approach for private land.¹²
- 4 To impose different kinds of restrictions or obligations (ie use different tools or trigger points for action). For example, general frameworks like RMA do not encompass restrictions on the direct taking or killing of wildlife.¹³



Abel Tasman National Park



Figure 12.1: Conservation legislation in the current system

The reasons for legislative separation outlined above do, however, raise some interesting questions about what separate conservation legislation *should* be used for in the future. Historically, those frameworks have been largely focused on four things, which tend not to stray into the territory of more general regimes like the RMA:¹⁴

- (1) The creation of general, non-regulatory strategies (eg the New Zealand Biodiversity Strategy, or plans in relation to particular threatened species). These are relevant to, but not directly determinative of, decisions under frameworks like the RMA.
- (2) The establishment of frameworks imposing duties on public authorities to act in a positive manner, including funding those activities (eg the Department of Conservation has an advocacy role that can see it litigate on issues under the RMA, and a duty to actively manage the conservation estate for particular nature conservation purposes). Again, this does not encroach on what the RMA does.
- (3) Imposing an additional layer of regulatory restrictions in relation to activities in particular areas that are not privately owned (eg national parks, marine reserves, and pastoral leasehold land). These restrictions apply in addition to general RMA restrictions, and are generally more protective in nature.
- (4) Imposing an additional layer of protections in relation to direct interactions with flora and fauna that is not privately owned (eg restrictions on taking or interfering

with wildlife under the Wildlife Act, Native Plant Protection Act, or Marine Mammals Protection Act).

A key theme here, and a strong basis for coherent legislative design, is a distinction between public and private ownership. Conservation legislation has, for the most part, tended not to prevent private persons doing things with their own property (notably land). That is what the RMA, with its generally more permissive approach, is for.¹⁵ After all, we use land for economically productive activities, and do not live in one big national park.

To complement this, the RMA has not been the place under which publicly owned protected areas (eg reserves) are managed in any detail.¹⁶ In short, dedicated conservation legislation has historically been more about ringfencing and managing particular public areas, preventing people's direct interactions with vulnerable species, and mandating the operational and strategic work of public authorities.

We find this rationale for legislative design compelling, as long as nature conservation is also strengthened considerably in broader regimes like the RMA (in the ways outlined previously). In the Phase 1 report, we noted that it is appropriate for location-specific or domain-specific legislation to fill gaps in wider outcome-based frameworks. That logic applies well to the notion of having dedicated conservation legislation that would *do* quite different things, even if its *aims* overlapped with other frameworks.

Dedicated nature conservation legislation will continue to be necessary in a future system. This is because particular areas (especially the conservation estate and the commons) require an additional layer of active public management under a more targeted and protective purpose and principles, and because particular species require protections, restrictions and strategies not provided for in more general legislation like the RMA.

In this chapter, we consider what such legislation should look like in the future. Questions of legislative design – what should go where – will re-emerge later in the chapter when we consider novel tools that could apply to conservation on private land as well as public land.

12.3 Issues to be addressed in a future system

In a future system, we propose to address a number of issues with current arrangements for conservation legislation. This is in the context of the alarming decline in biodiversity indicators mentioned in Chapter 4.

A spotlight on issues in current conservation legislation¹⁷

Conservation legislation in the current system is, generally speaking, fairly messy and outdated. Statutes are disjointed and do not work together well. For example, the recent discussion document of the upcoming refresh of the New Zealand Biodiversity Strategy noted that:¹⁸

[t]here are often numerous pieces of legislation governing a particular environment, and sometimes these legislative regimes are overlapping, contradictory, contested, ineffective (allowing activities that cause biodiversity loss) or slow. Some of the legislative regimes are outdated and not able to adapt well to the current and future pressures they need to respond to.

We see an obvious need to revisit how we arrange legislation, and to develop a more coherent framework. This should involve rationalising the many pieces and parts of legislation that canvass the same ground, and to putting in place stronger bottom lines and statutory consequences for failures to meet them.

There are also important questions around how to embrace Māori as genuine partners in the implementation of the principles of the Treaty of Waitangi.¹⁹ Māori perspectives are still underrepresented in conservation norms, even more so than in broader frameworks like the RMA. The Western notion of preservation does not generally provide for Te Ao Māori or expressions of protection embedded in mātauranga Māori and tikanga-based management.

New Zealand is also a signatory to several important international treaties, which recognise some of our wild places as being globally significant. Recognition of international designations placed over many of our wild places could be strengthened, as the management of these sites does not always reflect their international significance.²⁰ Furthermore, the general principles of such instruments sometimes give way to a narrow interpretation of their obligations (eg the Ramsar Convention's core principle of "wise use" of wetlands is not reflected in the management of wetlands across New Zealand).

Perhaps most significantly, there has been chronic underfunding of conservation functions at all levels of government. In particular, insufficient advocacy and energy has been applied to securing marine conservation outcomes. More generally, a failure to halt ecological decline is concerning in the marine environment, where conservation is generally relegated to a very small area geographically. As discussed in Chapter 11, the absence of a protected areas framework beyond the territorial sea is alarming.²¹

Decision-making has also sometimes been driven by economic imperatives, deviating from principled guidance. For example, concessions outcomes can diverge markedly from conservation management plans.

The coming decades will see New Zealand face substantial environmental challenges, many of which will impact on biodiversity. Overall, the present suite of conservation legislation and our institutional arrangements, norms and tools are unlikely to be adequate. Crises of biodiversity loss, depletion of natural capital, and climate change loom large. In the following sections, we put forward suggestions for how we see the system addressing these problems and challenges and providing a framework that is fit for purpose for the future. However, that is just a starting point for what will need to be a much wider review of the conservation system.

We face a number of issues with nature conservation, and conservation legislation specifically, that need to be addressed in a future system.

12.4 Legislative design: A Protected Areas and Species Act

Aside from strengthening conservation elements within the RMA and a new integrated Oceans Act, we propose rationalising and simplifying core conservation legislation. Over time (perhaps coming to fruition in the longer term), this would see the review and integration of a number of existing statutes into two acts, or one act with two substantive parts. These would focus on (1) creating and

managing specifically protected areas; and (2) protecting and enhancing species and habitats.

On balance, we are inclined towards a single act with two parts, given the holistic character of nature conservation. For example, it may often be the case that publicly owned protected areas need to form the core of a wider strategy to improve species persistence and biodiversity on a wider spatial scale (one might think of the positive spillover effects on biodiversity from marine reserves), and the two must be managed in close connection with each other. This can be seen in the spotlight shone on the Mackenzie Basin in Chapter 8, where a core of conservation land would be surrounded by an area of private land subject to a Heritage Area Order.

Cross-cutting matters, relevant to both specific areas and broader species and habitat measures, would also need to be provided for, suggesting a single piece of legislation. For example, the Act would need to outline the duties and functions of institutions like the Department of Conservation (as the Conservation Act – a kind of umbrella framework – does now).²² While the machinery of a new integrated Act – which we are calling, for convenience, a “Protected Areas and Species Act” – would not overlap with the RMA (they would do different things, as in the current system),²³ the Act would continue to direct the Department to advocate for nature conservation values in RMA processes.²⁴ It would also have considerable influence over decision-making under the RMA and could even specifically have pre-eminence in the event of conflict.

We do not provide an exhaustive account of which statutes could be integrated into a Protected Areas and Species Act, but overall envisage a review that would seek to rationalise many statutes, including the:

- Conservation Act (including Freshwater Fisheries Regulations 1983)
- National Parks Act
- Reserves Act
- Native Plant Protection Act
- Wildlife Act
- Marine Reserves Act
- Marine Mammals Protection Act
- The Wild Animal Control Act

It would also be possible for the Queen Elizabeth II National Trust Act to be included, although there may be merit in that more targeted, institutionally defined framework to remain separate. Similarly, the Crown Pastoral Land Act and Land Act have significant conservation content, but are not purely about conservation. There is a strong case for keeping those Crown land management frameworks separate (as their content would not entirely align with the purpose of a Protected Areas and Species Act). However, there

could usefully be a stronger role for the Department of Conservation (eg a mandatory review or even joint decision-making role in relation to permissions for intensification for Crown Pastoral Land). And we see a case for reviewing and strengthening conservation (and other environmental) imperatives within the Land Act, which applies to the management of a wide range of Crown land.

More broadly, we see potential for several area-specific acts to be rolled into a single integrated act. These were generally conceived because more general legislation was not sufficiently flexible, and might include the Sugar Loaf Islands Marine Protected Area Act 1991, the Fiordland (Te Moana o Atawhenua) Marine Management Act 2005, and the Hauraki Gulf Marine Park Act 2000.

A spotlight on the Waitākere Ranges

The bespoke arrangements for the Waitākere Ranges are interesting, as the Waitakere Ranges Heritage Area Act is arguably not a “conservation” statute envisaged in this chapter. It is geographically-focused legislation, but encompasses significant areas of private and public land. It also directly influences decision-making under the RMA, rather than providing its own regulatory restrictions. There are therefore questions about (1) whether it should remain separate, (2) whether it should find a home within the RMA, or (3) whether it would be a better fit integrated into an overarching spatial plan (under the Future Generations Act). The latter option may be most appropriate, as it would filter down (eg be given effect to unless good reason not to) into other implementation frameworks like the RMA.²⁵



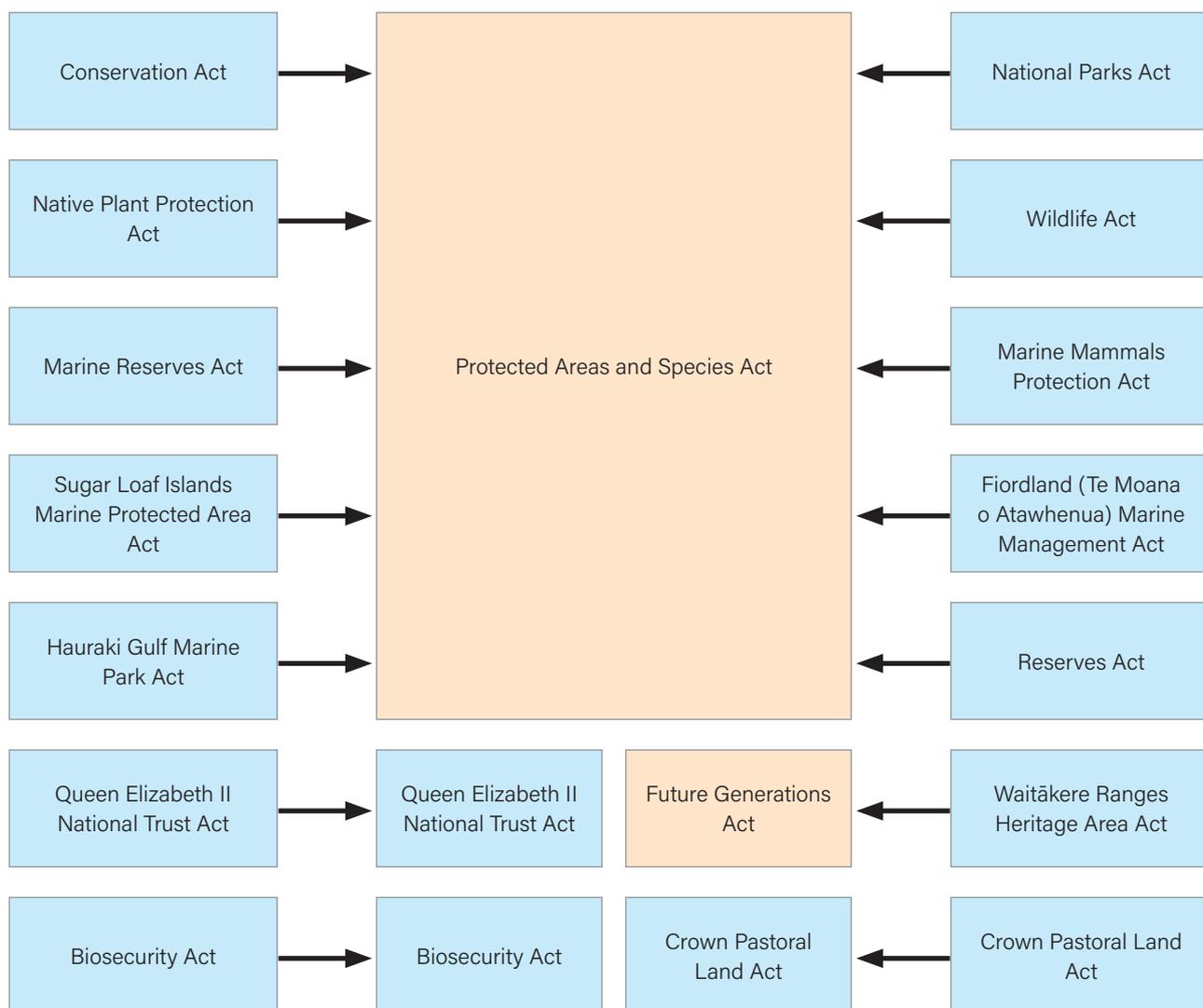


Figure 12.2: Statutes relating to conservation in the current system and proposed future system

We envisage the eventual enactment, over the longer term, of an integrated Protected Areas and Species Act. That would incorporate and simplify the multiplicity of conservation-related legislation we have in the current system.

Critical to the new regime would be a powerful core suite of purposes and principles. That would more strongly recognise the Māori world view, and unabashedly allocate responsibility and accountability to implementing agencies. The Department of Conservation would explicitly have overall oversight responsibility for nature conservation,²⁶ while regional councils would have regional responsibility. The Futures Commission would be expected to vet the performance of the Department through the report card system described in Chapter 8, including in its progress towards meeting specific nature conservation targets required to be set under the legislation.

This sharpened responsibility would necessitate the Department having more levers to pull under the RMA, where many conservation outcomes are driven. It would need to have meaningful input or potentially even an approval role for council planning that is not limited to the

coastal environment. The weak mandate for biodiversity protection in the current system is well acknowledged, and the buck needs to stop with central government.²⁷

Overall responsibility for nature conservation outcomes in a future system should more clearly rest with the Department of Conservation. The Futures Commission would hold the government to account for outcomes through the report card system described in Chapter 8.

12.5 Protected areas

The protected areas component of a new integrated Act would take a holistic approach to managing specific areas both on land and at sea (including to the edge of the EEZ and extended continental shelf). It would focus specifically on areas set aside for conservation purposes, and managing the activities that could and could not occur within them. It would provide a more proactive mechanism and direction for the creation of an ecologically representative network of protected areas, not just focus on the the management of existing ones. Having one act covering all spaces would ensure that

marine areas are treated with the appropriate level of respect commensurate with their terrestrial equivalents.

A new Protected Areas and Species Act would be one key mechanism (alongside the RMA and Oceans Act) to implement conservation elements of broader marine spatial plans created under a Future Generations Act (see Chapter 8). We would envisage, according to an ambitious timeframe focused on the medium term, that marine protected areas would be proactively identified based on scientific criteria in a similar way to Natura 2000 areas in Europe, and progressed through the marine spatial planning process outlined in Chapter 11.²⁸ Similarly, a Protected Areas and Species Act could be one key mechanism to realise aspirations for ecological or landscape areas like the Mackenzie Basin, where part of the vision for a drylands area outlined in a cross-regional spatial plan – in particular, a publicly owned core of conservation land – would be given effect to (see spotlight in Chapter 8).

We envisage a proactive programme to identify and protect an ecologically coherent network of marine protected areas.

We also see room for the rationalisation of conservation land categories under an integrated act (see Figure 12.3 below). For example, reserve categories currently number more than 30 and are speckled through a range of legislation, including the National Parks Act, the Reserves Act, the Conservation Act and several other acts. There are extensive cross references, and considerable complexity exists (see Chapter 4). It would seem quite plausible to rationalise those many categories in a way that would still adequately provide for the areas they intend to protect.

The most important thing would be for each level of protected area to have clear legal principles that *must* be at the forefront of decision-making (including when considering the activities that are appropriate in that place). Both councils and the Department should be bound by this framework. For administrative purposes, some area categories may have subcategories (eg local parks for different purposes). While we understand some concerns expressed about the need to retain the management of national parks under its own, highly protective statute, on balance we consider that this can be provided for equally in a dedicated part within a statute that broadly seeks strongly protective conservation



outcomes. We are not at all suggesting eroding our system of existing national parks, which need to be preserved at all costs for a diverse range of reasons.

As such, a rationalised list of protected area categories would be hierarchical, and range from the highest levels of protection (as warranted for areas of international value), to the level of protection warranted for areas of local conservation importance. The international recognition of a site gives New Zealand a global responsibility to manage that area sustainably and - there is considerable room for improvement, especially for our Ramsar sites. Conservation covenants on private land could also usefully be included within this hierarchy of protected areas, as well as any new protected area categories that recognise the protection of a space for cultural reasons (eg wāhi tapu) as well as purely biophysical reasons under a genuine joint management approach with iwi/hapū. Protected area categories would thus be based on a fusion of traditional ecological knowledge and Western thought. Protective measures should be taken where an area is considered tapu, or to reflect concepts like rāhui. These may not necessarily relate directly to the biophysical status or features of stewardship land. For example, there may be a site of very high cultural status (at a wide geographical scale or specific site), but it may sit on land of very low ecological value. The site assessment and plan-making processes of a new Act should provide a

means by which these values are identified for registration and protection.

In short, we propose that protected area categories should be rationalised into a single framework that achieves the following:

- It does not lead to regression of existing protected status²⁹
- It respects mātauranga Māori, including expressions of kaitiakitanga and concepts such as tapu, wāhi tapu, rāhui, and sustainable customary harvest by hapū and iwi
- It is hierarchical, in that it recognises that all areas have value but that some are specifically recognised for having higher value than others
- It reflects international instruments (eg the Ramsar Convention) and the conservation values they recognise

A streamlined management regime should remove duplication or very similar categories of protection. One option would be to base them upon, or partly mirror, the existing International Union for Conservation of Nature (IUCN) protected area categories (Categories Ia–VI) for international consistency, but must specifically include mātauranga Māori as a basis for protection. The model could also usefully carve out a general space for novel categorisations of protected areas relating to

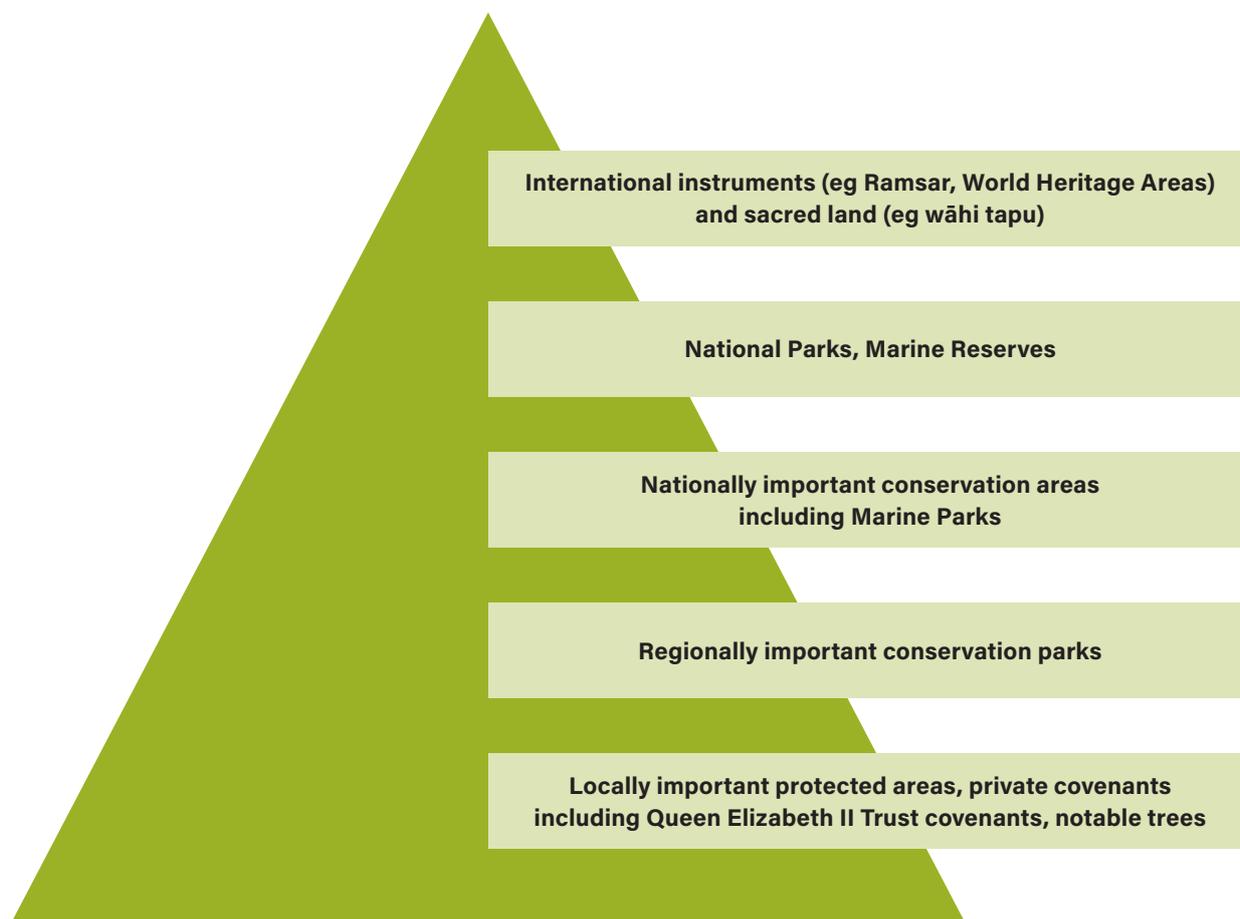


Figure 12.3: A potential hierarchy of protected areas under a Protected Areas and Species Act. There would be a number of sub-categories.

Treaty settlements, such as where legal personhood is conferred, as in the case of Te Awa Tupua/Whanganui River or Te Urewera.³⁰ The rationalisation of various categories and sub-categories of conservation land will require further detailed exploration, and should not be an opportunity to weaken existing protections.

We see room for rationalising the complex array of protected areas in the current system into a more coherent hierarchy in an integrated Protected Areas and Species Act. This should provide more explicit and active protection to areas of international importance, and to sites of cultural significance to Māori.

12.6 Subordinate instruments

Protected areas are, of course, not managed just by classifying them and providing principles for decision-making, but also by producing more detailed strategies and plans. In particular, general policy, conservation management strategies, national park management plans and other conservation management plans flesh out the requirements of legislation and help to clarify their interplay with related statutes. However, the current suite of plans are routinely out of date. For example, the Whanganui Conservation Management Strategy (a 10-year document) was released in 1997 and, according to the Department of Conservation's website, a review is not yet scheduled.

We consider that conservation plans and strategies must be developed and maintained as current guides to decision-making. The process for developing and reviewing them would, however, remain generally unchanged.

That said, the natural comparator for the approval of plans for protected areas is the statutory framework of the RMA. This framework contains a relatively sophisticated range of mechanisms to ensure independent expert input and impartial decision making alongside accountability for New Zealanders and local communities. We have, in previous chapters, proposed a strengthening of independent input into planning and consenting (such as a role for an independent Futures Commission) as well as revisions to the purpose and principles of the Act. We can consider conservation legislation in the same light.

We consider that, in any future legislation, there should be a prominent role for the Conservation Authority, and that regional Boards should be maintained. This is to ensure that appropriate expertise and community representation are sustained in decision making. They also need to be funded and resourced appropriately, and their role respected more strongly. Conservation Boards (and, to a lesser extent, the Conservation Authority), have generally been under-resourced. These statutory bodies exercise key powers in relation to monitoring, recommending and approving conservation management strategies and plans.

Furthermore, the quasi-judicial roles undertaken by these members (appointed by a ministerial approvals process) are sometimes not given effect to. For example, clear

directions in relation to visitor caps in high use areas, and unfettered direction to address effects at high value sites (consistent with statutory direction), are sometimes disregarded. Weak requirements for monitoring and reporting such decisions against plan provisions may contribute to such issues. There may be a stronger review role warranted for a standing, independent Futures Commission in high-level conservation decision-making.³¹

In addition, it is appropriate that mātauranga Māori is reflected in institutional arrangements. We note that there has been substantial work undertaken in this regard over the past 15 years, including a statutory direction relating to iwi representation on Conservation Boards. It is also clear that the appointments process has consciously driven towards increased representation from tangata whenua. However, there may be a need for more widespread assessment of opportunities for tangata whenua involvement in light of broader co-governance and shared decision-making arrangements emerging in Aotearoa (including under the RMA). This is particularly evident at sites including Aoraki, Whanganui and Te Urewera. The appropriate response would need to be developed on a bespoke basis, recognising the particular biophysical context and tangata whenua relationships to the space in question, but should be driven by a common set of principles and based on Treaty obligations. For example, where areas are identified for protection or management based on cultural considerations rather than purely biophysical reasons, there would be grounds for a stronger role for Māori in governance and management.

The Conservation Authority and Conservation Boards should be strengthened in a future system, as should Māori involvement. For high level decision-making (eg strategies and management plans for protected areas) there should be a role for a Futures Commission to have an input or review role, comparable to its role in reviewing national direction under the RMA.

12.7 Protected species and habitats

The second key component of a new Protected Areas and Species Act would be the protection of species and habitats. This would need to be closely connected to a protected areas framework, but is much broader in scope (ie it would apply across New Zealand, including in relation to private and non-conservation land).

The revised law would operate in a similar way to provisions in the current Wildlife Act, which is concerned primarily with managing direct human interactions with wildlife.³² Species would be automatically included (not specifically listed) for protection, and listed only when exempt from some or all of the provisions (eg a pest plant, or a game animal). Current legislation provides little recognition for ecosystems (assemblages of species). That would need to change.³³

However, species protection is not just about preventing specific instances of harm by humans (eg killing, taking, or disrupting). It also requires proactive measures to be taken to counteract the impact of more systemic drivers of decline (eg pests, habitat loss, climate change), especially in relation to threatened plants and animals.

Management plans here are not like many of those produced under the RMA – they are *action* plans. Yet the current regime for the interventionist³⁴ management of threatened indigenous species and habitats in New Zealand is primarily voluntary and non-statutory. Species and habitats can be identified as threatened but receive no automatic additional management or statutory protection. For an international biodiversity hotspot like New Zealand, this is non-sensical and has allowed the rapid (but strangely quiet) decline of some of our most important species to occur with little acknowledgement and accountability.

More specifically, under current conservation legislation, a species can decline and the only legal requirement is to measure the change in threat status. There is no statutory consequence or trigger point for tangible action if a species becomes increasingly threatened with extinction, and there is no requirement for any additional conservation management actions to be targeted at already threatened species, or their habitats.³⁵

We are proposing a model that includes an independent process for identifying threatened species and habitats, as well as clear statutory consequences for listing. Species that fall below a certain threat classification (under the existing New Zealand Threat Classification System) would have a compulsory management plan produced based on the best available evidence on what works. Such plans

need not be arduously long-winded and need to be agile, and could be produced via a “quickfire” method (a short plan covering off key actions based on current expert knowledge). Before compiling adequate knowledge to determine management approaches, there would be a strong presumption of protection.

Threat status would be determined by an independent expert group convened in a similar way to now, but with additional status and a direct link to Parliament. For example, it could sit within or be appointed by the Futures Commission or the Parliamentary Commissioner for the Environment. The state and trend of species and ecosystems listed would also be a compulsory reporting matter for the Department of Conservation. Comprehensive and consistent monitoring and reporting requirements (including in relation to covenanted private land)³⁶ could also be integrated into the broader framework for environmental reporting under a Future Generations Act (or in the existing Environmental Reporting Act if it were not merged). The importance of environmental monitoring, reporting and evaluation more broadly is explored in Chapter 13.

The species protection component of a new Protected Areas and Species Act would be based on a strengthened Wildlife Act. It would recognise ecosystems, not just species. A change in threat status would require corrective action to be taken, not just changes to be measured. The state and trend of species and ecosystems, and action taken in response, would be integrated into a broader environmental reporting regime.

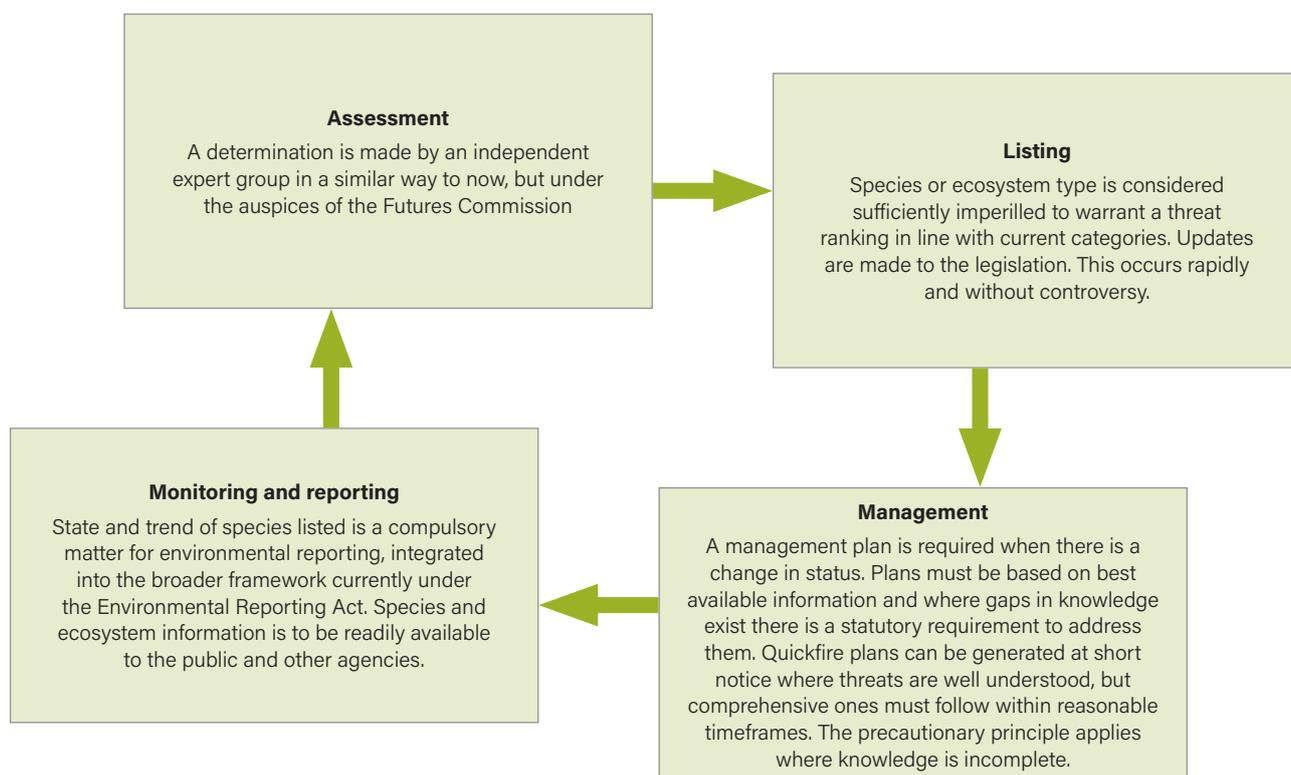


Figure 12.4: Management of threatened species and ecosystems under a Protected Areas and Species Act

A reformed species protection framework would need to be careful not to unduly overlap with the RMA (including in relation to controls on land for reasons of biodiversity and habitat protection). However, provisions could usefully be strengthened in terms of the influence that threatened species management plans would have in RMA decision-making. For example, they could be deemed to form part of an NEP. Alternatively, lower level planning and consenting decision could be required to give effect or have particular regard to them alongside other matters.

The latter is probably more realistic, given that the nature of the instruments may be quite different to provisions in an NEP.³⁷ It has previously been recommended, for example, that plantation forest harvest management plans (required under the RMA) include conservation measures for all indigenous species that use plantation forests as habitat. Plans would be verified by councils (or, alternatively, by the Department of Conservation).³⁸ The more general point here is that such a measure could usefully be supported by a specific requirement in the RMA to give effect to, or have particular regard to, threatened species management plans produced under conservation legislation. Furthermore, there could be a requirement on consent authorities under the RMA, before considering a consent application, to be satisfied that obligations under conservation legislation have been separately fulfilled.³⁹

Either way, a revised Part 2 of the RMA should specifically refer, in strong and directive terms, to the need to protect and enhance threatened species identified under a Protected Areas and Species Act.⁴⁰ We reinforce what was said in a previous EDS report:⁴¹

In a ... development context, biodiversity is commonly failed by non-integrated processes. The interface between the RMA and the Wildlife Act [now a Protected Areas and Species Act] urgently requires review and integration if the extinction of listed threatened species is to be avoided. Many permitted activities in regional and district plans entail risks to the wildlife listed on the Wildlife Act schedules, as well as to wildlife separately classified as being at risk of extinction. Even when resource consent is required [under the RMA], there is no "trigger" to remind applicants to seek additional approval under the Wildlife Act if any of these species are present.

The Biosecurity Act is also a critical part of the puzzle for protecting threatened species, given that key drivers for indigenous species' decline (including on private land) are predators and weeds. Although the Act allows for highly directive responses to be taken,⁴² pest management plans are not *required* to stem the tide of biodiversity loss and the inclusion of a pest in a plan is heavily influenced by the costs of taking action.⁴³ It is possible to say that the legislation lacks true bottom lines. As the Biodiversity Collaborative Group has said, "if rules or public funding are required to secure long-term sustainable outcomes

then [provisions in the Biosecurity Act] currently act more like a barrier than an enabler."⁴⁴

A future system should make much clearer links between the threat status of species under a Protected Areas and Species Act and an obligation to take action – with associated funding – under the Biosecurity Act. As under a reformed RMA, there could be an obligation in the Biosecurity Act to give effect to or have particular regard to threatened species management plans made under conservation legislation.

Because of the close relationship between species protection and more systemic drivers of habitat and ecosystem degradation, there should be stronger connections between conservation legislation, the RMA and the Biosecurity Act. Specifically, management plans for threatened species should be highlighted as a matter to at least have particular regard to in planning and consenting decisions under the RMA and in decision-making on regional pest management plans. The Department or Minister of Conservation should have a stronger approval role in relation to biodiversity elements of plans under the RMA.



12.8 The nature of bottom lines under a Protected Areas and Species Act

An integrated Protected Areas and Species Act would be a key place in which environmental bottom lines were imposed. Those would look different to the kinds of bottom line outcomes envisaged in the RMA, partly because they would represent much more strongly protective and specific outcomes in particular areas (eg no mining in national parks). The notion of bottom lines would also be accompanied by ambitious targets in relation to species and habitats (as well as accountability mechanisms for meeting them). That recognises that the conservation framework would be geared towards the enhancement of threatened species (where bottom lines have, by definition, already been breached), including through active intervention and funding from public authorities (including the Department of Conservation).

The nature of conservation bottom lines would therefore be closely linked to the outcomes sought in different areas and for different species, and we do not seek to define those outcomes exhaustively here.⁴⁵ However, their strongly protective nature and the general nature of the outcomes sought (including intrinsic value) would be embedded within a single purpose and principles.⁴⁶ Examples of hard limits could be zero loss of critical habitat for species, or zero bycatch of vulnerable species in fishing. A clear objective of maintenance, restoration and enhancement of ecosystems would be contained in the principles of both conservation legislation and the RMA (see Chapter 5), as well as the Biosecurity Act, although those frameworks would use different tools to achieve the same overarching goals.

However, there is a broader point here, which mirrors the debate that has already occurred in relation to the RMA under the *King Salmon* jurisprudence. In short, decision-making criteria under conservation legislation will need to be focused on holding bottom lines and associated specific limits on human activities firm, not allowing trade-offs to be made.

A spotlight on Tongariro National Park

The implementation of some conservation plans has seen evidence-based limits negotiated down and exceptions and exemptions allowed in the name of compromise and balance (for economic reasons). This can be seen at sites like Whakapapa and Iwikau Villages in Tongariro National Park, where visitor numbers are consistently exceeded by 5,000-7,000 people per day. The literature identifies the very high economic value generated by this visitor activity, and the physical evidence of impact (on culture and landscape) is plain to see and goes unresolved.

While outcomes have still been far more protective under conservation legislation than the RMA,⁴⁷ the bar is – for good reason – set higher under the former, and a balancing approach is equally unacceptable. This approach contrasts with other regimes such as the NPS for Freshwater Management under the RMA, which now contains bottom lines in relation to freshwater (and these are set to be strengthened further in a new NPS and NESs). The NZCPS also contains meaningful bottom lines. The concept is simple: where environmental quality is poor it is improved, and where it is good it is maintained. The idea is that protective instruments actually mean what they say, and must be implemented rather than considered.

We suggest making this approach explicit under reformed conservation legislation. Permissions under existing conservation legislation are primarily issued by the Department of Conservation. The main type of permission issued is called a concession, which is an authorisation to undertake a restricted activity on public conservation land. The decision-making within the Department of Conservation for concessions and other permission documents has been criticised in the past for not aligning with the Department's own documents designed to influence those decisions. We see this an area where greater transparency and accountability, and less discretion, is desirable to improve conservation outcomes.



A spotlight on bottom lines under conservation legislation

There have been instances where decision-making on concessions has deviated from the core principles and policies contained in planning documents. Often this is about how many people can access protected areas, and gives rise to a tension between environmental limits and economic value. For instance, in reviewing the renewal of the concession for Routeburn Walkers Ltd to nearly double the guided overnight trapper numbers, the Ombudsman noted:

In my opinion the decision in 2013 of a Department of Conservation delegate of the Minister of Conservation – to grant a new concession to Routeburn Walks Ltd, on terms permitting the concessionaire to increase from 24 to 40 the number of its overnight guided walkers entering the Routeburn Track each day – was unreasonable. The decision flew in the face of the limits set in the newly promulgated Mt Aspiring Plan. There had been a careful and extensive public consultative process and general endorsement of the provisions of the new Plan. As the complainant states, the decision to approve the increase in overnight guided walker numbers makes a “mockery” of the process of public consultation in the development of the Plan and undermines public participation.

It was equally the case in Southland in 2016–2018, with the Department “tripling” increased flights to protected areas for tourism purposes. The scale of these

flights far exceeded the plan provisions, which were developed over a long period (through a contentious plan process), was contrary to the direction of the Conservation Board, and occurred in an environment where government direction for enhanced economic activity on conservation land was the norm. Of even greater concern was the fact that the Department opposed the EDS appeal to the Supreme Court in the *King Salmon* litigation, and ended up on the losing side of an argument designed to strengthen interpretation of its own NZCPS.

Where damaging activities have been proposed on conservation land, the Department has also from time to time agreed to compensatory environmental activities as conditions of concessions. Many such ad hoc “deals” are made. And while the Department led the development of the *Guidance on Good Practice Biodiversity Offsetting in New Zealand*,⁴⁸ it appears it does not always follow it other than in its RMA advocacy for activities not on conservation land. This is another reason why greater transparency in decision-making is required through environmental reporting, and why rolling out a nationwide, systemic biobank may be a useful initiative (see further below).⁴⁹

The concept of a bottom line will need to be strengthened in conservation legislation. In particular, the law must make clear, as is now the case under the RMA, that directive requirements in plans actually mean what they say.

Enhanced compliance monitoring and enforcement will also be crucial under revised conservation laws. There is little point in taking a firm approach to bottom lines in statutory decision-making if they are then flouted by people in practice. In 2017, an analysis of compliance monitoring and enforcement of environmental law demonstrated that efforts by the Department of Conservation to follow-up on users’ legal requirements were limited.⁵⁰ Issues included the lack of a compliance strategy, weak information collection and a lack of reporting and frontline resources to monitor and enforce requirements (eg grazing concession conditions).

Although the Department has retained some excellent professionals skilled in enforcement, they are constrained by a system that does not support a coherent or comprehensive approach, delegating responsibilities to local offices having multiple functions (of which compliance has ranked relatively low). The actual monitoring of compliance also tends to fall to local rangers, who may not have an appropriate skillset. There is ample scope to improve practice here specifically in relation to conservation, as well as more broadly across the resource management system (see, for example, Chapter 7 in relation to the RMA).

A new Protected Areas and Species Act requires a modernised and more coherent approach to enforcement, including sanctions that are flexible and appropriate. Those would include heightened penalties and a full range of enforcement tools, including statutory warnings, infringement fines and prosecutions. They should also include regular reporting requirements that at least mirror those in the RMA. For example, we should expect to see the same depth and degree of data on environmental outcomes and enforcement from the Department of Conservation as from councils, and for that data to be integrated and presented in a coherent way in our national environmental reporting framework. External auditing of the effectiveness of enforcement would also be desirable in a future system.⁵¹ That could be done by the Office of the Auditor-General or another agency (eg the EPA) skilled in evaluating the effectiveness of regulatory compliance programmes.

A new Protected Areas and Species Act would have a more coherent approach to enforcement, including sanctions that are flexible and appropriate (eg penalties and a full range of enforcement tools, including statutory warnings, infringement fines and prosecutions). There would be ongoing improvements in enforcement practice, assisted by greater resourcing. Stronger evaluation and transparency would be provided through mandatory monitoring and reporting of enforcement activity, integrated into a broader environmental reporting framework (see Chapter 13).

A spotlight on the Environment Court under reformed conservation legislation

At present, challenges to plan making processes or outcomes under conservation legislation are tested through the High Court judicial review process. This is not ideal, given that the judges hearing these matters are often skilled in areas other than conservation and resource management. The specialist expertise of the judges and commissioners of the Environment Court may be a helpful addition within the conservation system. The expertise of that Court in respect of natural resource conflicts, support through mediation and expert conferencing is unparalleled.

Should appeals in relation to conservation strategies and plans be available, as they are under the RMA for council plans?⁵² Or should independent input be provided only on a recommendatory basis (eg by the proposed Futures Commission), as it is for national direction under the RMA? In Chapter 6 we considered, on balance, that merits appeal rights should not be available in relation to national level planning under the RMA. A similar logic arguably applies to central government decision-making for conservation. That said, a sub-option would be for appeals to be available only on points of law, and/or only open to an independent, statutory Environmental Defender's Office.

Consideration could also be given to introducing appeals for concession decisions, although we note that the nature of those permissions is quite different to consents under the RMA. We should not be too quick to create yet another forum for litigation. That said, there may be merit in a middle ground: providing appeal rights only to an Environmental Defender's Office, which would have a mandate directing it to take legal action only where decisions were clearly inconsistent with conservation management plans.

A future system could see a stronger role for independent institutions under conservation legislation. In particular, there could be a review role for the Futures Commission in relation to conservation strategies and management plans, and constrained appeal rights for an Environmental Defender's Office in relation to plans and concessions.

Finally, we note that bottom lines for pest and weed management are needed to ensure that current trade-offs (ie the cost of measures) do not continue to allow biodiversity to decline. Both local and national governments should be directed to set ambitious pest and weed management goals and targets for the land and waters that they manage. This should occur through strengthened directions in a Protected Areas and Species Act and the Biosecurity Act, and be firmly linked to adequate funding (including from central government).

12.9 Novel tools

Above, we have talked largely about improving the current system. While proposals involve significant legislative change (eg substantial statutory integration, a shift in norms, and some institutional change), the basic kinds of tools being used would be not that different. There would be a classification of protected areas and species alongside strategies, management plans, and a framework for permissions. Thus far there is little that is *conceptually* novel.

However, we also see room for the use of different kinds of tools, including the deployment of a nationwide biobank, the use of bottom-up application-based orders to protect conservation values, and more systemic use of economic incentives.

We shone a spotlight on biobanking (in the context of biodiversity offsetting) in the Phase 1 report,⁵³ and its key features are described below. We see it as a positive step that should be developed in the short term and rolled out in the medium term.

A spotlight on biobanking

Environmental offsetting, generally speaking, allows a person to cause harm in one area or context in exchange for improvements in another. The original harm remains, so it is not the same thing as mitigation. In New Zealand, biodiversity offsets have been those discussed most. Commentators have discussed the utility of offsets under the RMA, the Crown Minerals Act and the Conservation Act.

Offsetting can be a disastrous road to environmental degradation if offsets are not proportionate to the harm caused. Local Government New Zealand has supported the tool but only where no viable alternatives are available, and subject to careful constraints.⁵⁴ We agree. Offsetting is not an excuse to "purchase" rights to cause environmental harm, and must be subservient to regulatory limits. Case law has provided useful constraints on the use of offsets under the RMA (eg the extent to which we compensate like for like),⁵⁵ and valuable work has been done as part of the collaborative development of an NPS for Indigenous Biodiversity.⁵⁶ Local Government New Zealand has also released guidance on offsetting under the RMA.⁵⁷

Offsetting remains a controversial topic, because it can allow the degradation of one area in favour of another. It is difficult to know how much value we should assign to site or location-specific indicators versus regional or national level indicators. Some forms of harm can never be offset.⁵⁸ Some have seen offsets as potentially inconsistent with strong ecocentrism, as trading off the wellbeing of one ecological system for that of another has ethical implications.⁵⁹

However, using the principle of net gain when offsetting would mean that, in theory, harm in one place can be more than compensated for in another. Subject to careful constraints, this could therefore be an extremely useful tool, as potential harm can be used as a trigger for overall enhancement. A positive example on this front can be seen in the United Kingdom's Environment Bill, where planning permissions are proposed to be conditional on a net gain in biodiversity.⁶⁰

There remain issues with offsetting in the current system. For example, it has been pointed out that:

[p]rovision of ecological compensation is highly variable across the country. Limits of offsetting biodiversity harm are not well-recognised. Policy developments on mitigating ecological harm have been confined to regional levels (eg offset policies within second generation regional policy statements) leading to a proliferation of inconsistent approaches across regions to what is essentially the same concept.⁶¹

... [A]t present biodiversity exchanges in New Zealand are generally ad hoc, and ... quality control and consistency is virtually absent. Many regions have limited to no mandatory quality control of exchanges, and a large envelope of permitted activities that could harm significant ecosystems. A murky context for biodiversity exchanges generates the most risk to nature.⁶²

In our view, a future system should take a more strategic and integrated approach to offsetting by further exploring a national biobanking framework.⁶³ A biobank is a scheme that, effectively, allows the measurement and trading of biodiversity values. Enhancement projects are purchased from a biobank by those who are required to provide compensation for biodiversity loss elsewhere. Under a biobank, offsetting requirements could be deployed in a more coordinated way to create, for example, functional ecological corridors rather than random islands of improvement. These could be used to supplement, or support, corresponding public funding for ecological enhancement – combining public and private resources to common aims in a coordinated way that maximises their overall positive impact. This will require legislative change. As Dr Marie Brown has previously pointed out, the system must include:⁶⁴

clear and nationally agreed terminology surrounding ecological exchanges... [and] the ability to secure conservation gains in advance of development impacts and the ability to transfer liability to a third party for delivery of those gains.

There would also need to be close further consideration of the role of biobanking in a conservation setting, particularly where the impact or offset site is public conservation land. There are wide-ranging public policy implications of how the system interfaces with protected area frameworks. Is it acceptable to exacerbate the decline of biodiversity in private land by providing offsets in the conservation estate? And is it acceptable to allow harm in the conservation estate to improve outcomes on private land?

Overall, we see considerable merit in creating a cross-statutory framework for biobanking in New Zealand. However, the system should ensure that offsets are used in an environmentally responsible way and only as a last resort. In particular, they would not be acceptable where impacts are on threatened species and ecosystems, and used only to address residual adverse effects on common and widespread species, thereby reducing environmental risk overall.

A biobanking framework should be developed in a future system, through which biodiversity offsets under multiple other regimes (eg the RMA) would be deployed, alongside central government and community resources, in a coherent and strategic way to maximise biodiversity outcomes. Robust safeguards would need to be imposed.

We also see merit in the deployment of bottom-up, application-based tools like Heritage Area Orders, which were explored in Chapter 6 in the context of the RMA. A Heritage Area Order would be a way to bridge the gap between strong conservation outcomes on public land and much weaker outcomes on private land, and is the kind of “third way” envisaged in Category V of the IUCN’s landscape protection model.⁶⁵ In short, a layer of protections would be imposed on private land in a way that recognises a much more nuanced character of an area (eg embracing particular cultural and economic uses of land while protecting conservation values). Not all conservation efforts are about purchasing or ring-fencing public land; they are also about imposing reasonable obligations on private landowners while working with them and assisting them.

We also suggested deploying other similar tools, such as habitat protection orders or other “emergency” orders. In appropriate cases, restrictions or obligations contained in such orders could be accompanied by assistance or compensation, in a similar way that we approach biosecurity incursions. They could be temporary or permanent.

We see merit in strengthening the statutory mandate of the Department of Conservation so that it is actively encouraged to make such applications to improve biodiversity outcomes on private land. If we look at the experience of water conservation orders (a conceptually similar concept), they have been enduring once successfully imposed but, overall, they have been underutilised and only weakly implemented.⁶⁶ An active programme for the deployment of such tools could be something specifically encouraged under separate conservation legislation (eg as one method to implement management plans for threatened species and ecosystems created under a Protected Areas and Species Act).

But where should the tools described above – biobanks and bottom-up “orders” – be located? We raised this question earlier, and return to it here: what should the

role of conservation legislation be, vis-a-vis frameworks like the RMA? We do not want duplication, overlap or confusion. Thus a Protected Areas and Species Act could limit its scope to managing protected areas (eg publicly owned land), general strategies, and restrictions on direct interactions with (eg taking and releasing) protected species. This focus would, essentially, accept that regulatory restrictions imposed on private land – including for nature conservation reasons – are appropriately deployed in a framework like the RMA, where there are robust procedural and institutional checks and balances (eg public participation and strong oversight by an independent Environment Court).

The concept of a biobank would be a strategic one, rather than a regulatory one. Contributions to a biobank would flow from both the RMA (through compensatory conditions of resource consent) and conservation legislation (concession conditions). It could also usefully be deployed at a national level, and link spatially to an ecological “spine” provided by a network of public conservation areas. As such, it would need to be closely linked to the management of those protected areas. It would also be overseen by the Department of Conservation, which would continue to have roles under both the RMA⁶⁷ and conservation legislation.

As such, we think that it could be appropriately provided for in either framework. Alternatively, given its strategic and cross-cutting nature, it could be provided for in an overarching Future Generations Act. Indeed, that may be the most appropriate option, given that there may even be several further frameworks that could result in contributions to a cross-cutting biobank (eg through offsetting requirements under an Oceans Act, the Crown Minerals Act, or urban development authority legislation). The deployment of a biobank would also be intimately linked to national and cross-regional spatial planning, which would occur under a Future Generations Act.

The most appropriate legislative home for the development of a biobank would be the Future Generations Act discussed in Chapter 8.

The best location for a Heritage Area Order, or any similar kind of application-based order, is also not immediately obvious. We raised this question at the end of Chapter 6, and we can revisit it now in light of the discussion above.

It is interesting, in this context, to compare the place of broadly similar water conservation orders, which are imposed under the RMA. They are focused firmly on conservation outcomes (under their own highly protective purpose, not Part 2) yet have some potential to impact on activities on surrounding private land.⁶⁸ This suggests that the RMA may be a more appropriate location for the formal development of similar, bottom-up tools (like a Heritage Area Order or habitat protection order), even if they were to be subject to their own, more protective, conservation-based purpose and principles. The reason

is that such orders, focused on landscapes and habitats rather than just waterways, would have potentially significant implications for private property rights. They would stray beyond what conservation legislation has traditionally done, into territory that the RMA is better equipped to deal with.⁶⁹

The most appropriate legislative home for new nature conservation-focused tools like Heritage Area Orders or habitat protection orders would be the RMA. These are discussed in Chapter 6.

12.10 The importance of funding and incentives in nature conservation

The regulatory and policy roles of public authorities can be expensive, but adequate funding is particularly crucial for the proactive measures that conservation-focused institutions need to take to protect and enhance particular areas (eg national parks) and species (eg threatened animals). That includes research and operational programmes. Central to that is funding for the Department of Conservation, which we see as continuing to fulfil a central role in a future system. In particular, we recommend that:

- Good existing work should continue on how to fund and support non-statutory efforts to restore and enhance biodiversity, including in urban areas.⁷⁰
- More research should be conducted into fundamental science, including in relation to the life histories of vulnerable flora and fauna. That has been underfunded for many years in New Zealand, and must change for us to have the knowledge to turn the tide of biodiversity decline. Stronger statutory drivers to develop that knowledge and use it to inform critical management would be useful. It may also be worth revisiting the competitive funding model for our science institutions, to ensure the basics are covered. A new Futures Commission could potentially have a role here in making non-binding recommendations about conservation research priorities.
- Science capacity and capability needs to be maintained where it exists, and re-established where it has dissipated. This may demand more than a recruitment process, and require a more sustained investment in capacity building and the development of career pathways. Resourcing will also be required to increase capacity within hapū and whānau and incorporate traditional ecological knowledge into decision-making.

We have previously recommended that more could be achieved with a collaborative partnerships approach to how we deploy resources. Partnerships could be between core conservation agencies (eg the Department of Conservation and regional councils)

and other stakeholders (including through the systemic establishment of community conservation hubs).⁷¹ Corporate sponsors could also contribute to a national endowment fund⁷² (or even a physical biobank), which could be matched to conservation priorities through a meaningful national spatial planning exercise.

Adequate funding is crucial to understand and respond to nature conservation challenges. More could be done to leverage the resources of communities and the private sector alongside strengthened funding for public action.

But we need to think more broadly than just complaining, come Budget time, when conservation receives less money than (for example) health or education. We will always be fighting against the tide if we fail to consider ways of altering the systemic drivers of harm in the first place. Why should we rely on the public management of species, once they become threatened, as an ambulance

at the bottom of the cliff? As in the public health system, pre-emptive action (eg a sugar tax) can be much more effective than treatment after threats have appeared.

As such, we are suggesting the deployment of progressive economic instruments – pricing negative impacts and subsidising positive ones – in a predictable and consistent way across the system. These would be vital to achieving nature conservation outcomes, but are broader in ambit than *just* conservation. More systemic measures like this are therefore addressed in Chapter 13, which puts forward a proposition based on the earlier work of Dr Theo Stephens, Professor Tim Hazledine, and Dr Tim Denne.

The deployment of progressive economic instruments, discussed in Chapter 13, will be crucial in achieving conservation outcomes, alongside adequate funding for the activities of public authorities like regional councils and the Department of Conservation.



12.11 Concluding comments

In this chapter we have considered conservation legislation in a future system and recommended considerable changes to the current situation. Central to that would be the integration, over time, of our fragmented array of existing conservation legislation into a single Protected Areas and Species Act. Within that, there would be a rationalisation (while being careful not to reduce the level of existing protections) of protected area categories, and a strengthening of the protected species element founded on the Wildlife Act. Clear requirements for corrective action would be included, based on pre-set trigger points (eg a change in the threat status of a protected species), and a broadening of the environmental reporting framework to include state and trends of species and ecosystems, as well as relevant actions taken in response (including enforcement). There would be stronger recognition and protection for sites of cultural significance, not just ecological or historical importance. Links to the RMA and Biosecurity Act frameworks would be improved, including explicit recognition in Part 2 of the RMA of the need to support threatened species measures taken under separate legislation. There would also be a greater role for independent institutions, including a review role for a new Futures Commission. Whether limited appeal rights for conservation plans and/or concessions should be available deserves further attention, with one possibility being standing only for an Environmental Defender's Office.

A biobanking framework would be introduced, through which biodiversity offsets under multiple other regimes (eg the RMA) would be deployed, alongside central government and community resources, in a coherent and strategic way to maximise overall biodiversity outcomes.

However, the most appropriate home for that cross-cutting tool would be a Future Generations Act, not dedicated conservation legislation. Similarly, while we envisage the development and active deployment of new tools like Heritage Area Orders and habitat protection orders, the best place for those (given their potential impacts on private property interests) would be within the RMA.

At a broader level, we would envisage placing a clearer overall stewardship responsibility for biodiversity on central government, which would be reflected in stronger influence for the Department of Conservation in regional planning under the RMA. As in most other parts of the system, funding will also be crucial if we are to improve nature conservation outcomes. That must involve significant sums from public authorities for activities like pest management and proactive restoration, investment in fundamental science, and advocacy.

However, we note that much of the harm to species and habitats – particularly threatened indigenous ones – actually occurs under other regimes, including through decision-making frameworks like the RMA that enable use and development. Dedicated conservation legislation has limitations in terms of what it can achieve. That is why, in previous chapters, we have recommended strengthening such regimes considerably and adding new tools to the toolbox. Furthermore, while safeguarding and enhancing protected areas and regulating direct impacts of humans on threatened species are crucial to conservation efforts, at present these activities are a bit like a bucket that bails water out of a leaky boat. Alongside such measures, we also need to focus on changing people's incentives in relation to the environment, especially to improve nature conservation outcomes. In the following chapter, we explore more systemic changes, including the use of progressive economic instruments and behavioural change.

ENDNOTES

- 1 Much of the content of this chapter is based on an unpublished paper commissioned from Dr Marie Doole of The Catalyst Group, to whom grateful acknowledgement is made: M Doole *Conservation system reform: A proposed model to better protect and enhance species and ecosystems in New Zealand* (Unpublished commissioned paper, The Catalyst Group, 2019).
- 2 Including the management of fisheries and biosecurity (eg pest threats) within an integrated Oceans Act.
- 3 See Department of Conservation *Te Kōiroa o Te Kōiōra: A discussion document on proposals for a biodiversity strategy for Aotearoa New Zealand* (2019).
- 4 For example, to "give effect to it unless there is good reason not to".
- 5 See MA Brown, R Peart and M Wright *Evaluating the environmental outcomes of the RMA* (EDS, 2016).
- 6 SC Myers and others "Wetland management in New Zealand: are current approaches and policies sustaining wetland ecosystems in agricultural landscapes?" (2013) 56 *Ecological Engineering* 107.
- 7 S Walke and others "Halting indigenous biodiversity decline: Ambiguity, equity, and outcomes in RMA assessment of significance" (2008) 32(2) *New Zealand Journal of Ecology* 225.
- 8 M Pompei and P Grove *Historic and current extent of Canterbury freshwater wetlands, and recent trends in remaining wetland area* (Report No R10/119, Environment Canterbury, 2010).
- 9 See FJF Maseyk, EJ Dominati and AD Mackay "More than a 'nice to have': integrating indigenous biodiversity into agroecosystems in New Zealand" (2019) 43(2) *New Zealand Journal of Ecology* 3372; J Craig J and others "Enhancing our heritage: Conservation for 21st century New Zealanders: Ways forward from the Tahī Group of Concerned Scientists" (2013) 19 *Pacific Conservation Biology* 256; D Norton and N Reid *Nature and farming. Sustaining native biodiversity in agricultural landscapes* (CSIRO, 2013).
- 10 For example, the RMA restricts how private land is used, if vegetation is cleared, how (or if) cities grow, and whether discharges are acceptable (which have strong implications for conservation).
- 11 Although such statutes are by no means only about conservation outcomes.
- 12 These require different approaches to that of the RMA, particularly in relation to the active mandates and funding of central government institutions. This is not to say that all areas managed for conservation purposes are Crown or publicly owned. For example, protected areas in the EEZ cannot be "owned" at all, and concepts of ownership break down in areas like Te Urewera.
- 13 Although, in theory, the RMA could do so if we were to expand Part 3 of the Act.
- 14 As well as setting up institutional and process architecture (eg establishing the Department of Conservation, Conservation Authority and Conservation Boards).
- 15 There is a presumption under the RMA that people can use land however they wish unless expressly restricted, which is not the case with common pool resources. That said, parts of the Forests Act are more restrictive when it comes to the use of private property (eg restrictions on processing and exporting indigenous timber).
- 16 Although there is nothing stopping them being subject to detailed planning through district and regional plans.
- 17 Acknowledgement: M Doole *Conservation system reform: A proposed model to better protect and enhance species and ecosystems in New Zealand* (Unpublished commissioned paper, The Catalyst Group, 2019).
- 18 Department of Conservation *Te Kōiroa o Te Kōiōra: A discussion document on proposals for a biodiversity strategy for Aotearoa New Zealand* (2019).
- 19 See further J Ruru and others "Reversing the decline in New Zealand's biodiversity: Empowering Māori within reformed conservation law" (2017) 13(2) *Policy Quarterly* 65.
- 20 SC Myers and others "Wetland management in New Zealand: are current approaches and policies sustaining wetland ecosystems in agricultural landscapes?" (2013) 56 *Ecological Engineering* 107; MA Brown and others *Vanishing nature: facing New Zealand's biodiversity crisis* (EDS, 2015).
- 21 Some might see this as dependent on resolution of issues with protection around the Kermadec Islands.
- 22 As well as other institutions, like Fish & Game.
- 23 Even though they would have overlapping purposes, given the broad biodiversity components of the RMA.
- 24 There may be a degree of overlap between the advocacy functions of the Department of Conservation and the Public Defender's Office floated in Chapter 7.
- 25 That is essentially how the Waitākere Ranges legislation operates in relation to the RMA, although it is its general purpose and principles that must be given effect to, rather than any specific plan made under the Act.
- 26 Compare *Report of the Biodiversity Collaborative Group* (2018) at 87.
- 27 Department of Conservation *Te Kōiroa o Te Kōiōra: A discussion document on proposals for a biodiversity strategy for Aotearoa New Zealand* (2019).
- 28 There could be different categories of marine protected areas, ranging from a marine national park to areas where some sustainable extractive activities are permitted. Protected areas would need to recognise that Māori customary fishing may be included, and this should be given statutory recognition; see generally A Bull, K Mulcahy and R Peart *Safeguarding Our Oceans: Strengthening Marine Protection in New Zealand* (2012).
- 29 With the possible exception of stewardship land where degazetting or downgrading is justified following a robust, systematic process that is planned, resourced and funded (and which is likely to take a number of years).
- 30 Although noting that these frameworks are not just about protected areas in the sense of public stewardship land, but also about how Māori interact with more general frameworks relating to private land and other resources/aspects of the environment (especially freshwater under the RMA).
- 31 There would already be a role for the Commission in reviewing futures strategies and associated spatial plans, which would have significant conservation content (eg incorporating New Zealand's Biodiversity Strategy).
- 32 Although important aspects of it are also about protected areas (eg wildlife sanctuaries, refuges and management reserves).
- 33 At present, the Wildlife Act's definition of "animal" does not apply to all indigenous fauna, and precludes plants, fungi, freshwater fish and most invertebrates from protection; see MA Brown and others *Vanishing nature: Facing New Zealand's biodiversity crisis* (EDS, 2015).
- 34 As opposed to reactive management under frameworks like the RMA, which primarily consider and manage the adverse impacts of particular human activities on biodiversity.
- 35 See further M Seabrook-Davidson *An evaluation of the conservation of New Zealand's threatened biodiversity: Management, species recovery and legislation* (A thesis presented in partial fulfilment of the requirements for the degree of Doctor of Philosophy in Ecology at Massey University, 2010).
- 36 See MA Brown and others *Vanishing nature: Facing New Zealand's biodiversity crisis* (EDS, 2015).
- 37 In that it would not necessarily have a structure based around objectives, policies, rules and standards and other methods that are familiar to the RMA planning structure.
- 38 See M Wright, S Gepp and D Hall *A Review of the Resource Management (National Environmental Standards for Plantation Forestry) Regulations 2017* (2019).
- 39 See MA Brown and others *Vanishing nature: Facing New Zealand's biodiversity crisis* (EDS, 2015).
- 40 See Chapter 5, where a proposed new section 6(b) of the RMA would cross reference "threatened species" to this framework.
- 41 See MA Brown and others *Vanishing nature: Facing New Zealand's biodiversity crisis* (EDS, 2015).
- 42 Biosecurity Act 1993, s 73(5).
- 43 For a pest to be included in a plan, it must first meet the tests in the Act, which focus on cost-benefit analysis rather than biodiversity bottom lines. See *Report of the Biodiversity Collaborative Group* (2018) at 116; Biosecurity Act 1993, ss 70-71.
- 44 *Report of the Biodiversity Collaborative Group* (2018) at 116.
- 45 For example, protected areas need to be managed for the values associated with them (eg scientific, historic, scenic, recreational, ecological, wilderness etc).
- 46 At present, some conservation statutes do not have dedicated purpose statements, and have long titles that lack a clear vision.
- 47 Which can be seen, for example, in differences in water quality in the conservation estate when compared with rural or urban areas.
- 48 New Zealand Government *Guidance on good practice biodiversity offsetting in New Zealand* (2014).
- 49 MA Brown *Banking on biodiversity: The feasibility of biobanking in New Zealand* (EDS, 2017).
- 50 MA Brown *Last line of defence: Compliance, monitoring and enforcement of New Zealand's environmental law* (EDS, 2017).
- 51 See *Report of the Biodiversity Collaborative Group* (2018) at 123.
- 52 Even in a reformed model, some plan appeal rights would exist (on points of law in the hybrid model, or constrained merits appeal rights in the Auckland Unitary Plan-style model).
- 53 G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 238.
- 54 Local Government New Zealand *A "blue skies" discussion about New Zealand's resource management system* (2015) at 39. Compare *Report of the Biodiversity Collaborative Group* (2018) at 99.
- 55 *JF Investments v Queenstown Lakes District Council* EnvC Christchurch C48/2006, 27 April 2006 at [42]; *Royal Forest and Bird Protection Society of New Zealand Inc v Buller District Council (No 2)* [2013] NZHC 1346, [2013] NZRMA 293 at [54], [72], [122].
- 56 See Biodiversity Collaborative Group <www.biodiversitynz.org>
- 57 Local Government New Zealand *Biodiversity offsetting under the Resource Management Act* (2018).
- 58 For example, the destruction of a locally significant wilderness area or virgin forest.

- 59 See T Denne "Resource management law reform and economics" in G Severinsen and R Peart *Reform of the resource management system: The next generation - Working paper 3* (EDS, 2018). See also J Martinez-Alier and R Muradian "Taking stock: The keystones of ecological economics" in J Martinez-Alier and R Muradian (eds) *Handbook of ecological economics* (Edward Elgar, 2015) at 1-25.
- 60 Environment Bill 2019-2020 (UK).
- 61 MA Brown and others *Vanishing nature: Facing New Zealand's biodiversity crisis* (EDS, 2015).
- 62 MA Brown *Banking on biodiversity: The feasibility of biodiversity banking in NZ* (EDS, 2017).
- 63 Ibid.
- 64 Ibid.
- 65 This concept has been embraced overseas, for example in the concept of national parks in England (which are working landscapes rather than wilderness, and where there is significant private ownership of land).
- 66 See Chapter 6 concerning RMA national direction.
- 67 A role that would also be strengthened in a revised model.
- 68 Although not as much as needed, as discussed in Chapter 6. For example, they do not influence land use consents (only discharge, water, and coastal permits).
- 69 There would be similarities with the Biosecurity Act framework, but that Act would not itself be an appropriate location given it is focused on incursions and pests rather than direct threats from human activities to the environment.
- 70 Including by the Department of Conservation (see M Peters *Understanding the context of community conservation hubs* [Report prepared for the Department of Conservation, 2019] and Auckland Council (see C Feeney and A Lees *Pest Free Auckland: Enhancing conservation knowledge and capability. A strategy, implementation and evaluation plan* [Report prepared for the Auckland Council, 2019]).
- 71 MA Brown and others *Vanishing nature: Facing New Zealand's biodiversity crisis* (EDS, 2015).
- 72 Ibid.

13. WIDER SYSTEM CHANGE

13.1 Introduction

This project is concerned with the framework level of reform, and must necessarily focus on the core of a future system. We cannot afford to lose the forest for the trees or delve down too many rabbit holes. The reader will have observed that most attention has been paid to the RMA, local government and infrastructure frameworks (including construction), new strategic legislation, climate change, conservation legislation and a new Oceans Act. We are also aware of the need to feed into the government's resource management system review process, which is focused on high level reform to the RMA, related "urban" components, and climate change. In this penultimate chapter, we briefly look at the place of legislation of a more targeted nature, before considering more systemic aspects of change that either cut across legislative frameworks or are not directly linked to legislation per se.

13.2 Other statutory frameworks

Part of the reason we have adopted a focus on the "core" statutes described above is that we see the most urgency, and the strongest need for connection and integrated thinking, across those frameworks. They are collectively the first cab off the rank. For example, fisheries management is strongly linked to the health of the marine environment, which is linked to land based activities in catchments and on the coast, which is in turn linked to freshwater quality, which is connected to urban design and growth, which is linked to the funding and delivery of infrastructure, and so on. Climate change, Treaty issues and biodiversity span almost all frameworks. Many other statutes – although also important – we see as more targeted, fairly self-contained regimes that would dovetail well with the future core we have proposed.

In terms of legislative design, we therefore see merit in a number of frameworks remaining separate (with some rationalisations), as long as strong links are made between them. Indeed, legislative and institutional design principles suggest that targeted frameworks, purposes, and mandates are important in focusing effort and driving particularly urgent aspects of change. We also need to remain pragmatic – the overhaul of all statutes for the sake of design perfection may make any reform exercise impractical. We are not starting from a blank slate.

That said, we are also of the view that all frameworks should eventually be reviewed over the longer-term on a first principles basis, in light of the direction of travel provided by a reformed system's new core. That would be especially important to make them consistent with an overarching Future Generations Act and the system's new imperatives for climate change action. For example, targeted reforms may be needed to align statutes'

purposes and principles,¹ institutional arrangements and processes.² There may well be potential for a standing Futures Commission to have an important role under a number of statutes.

Such a review could even be legislated for (eg under the Future Generations Act) as a mandatory transitional measure, and may well result in considerable further changes. Thus, while here we are outlining a vision for how we see the core of a future system looking in the longer term (up to a decade away), that will not be the end of the reform story. Sir Geoffrey Palmer reminds us that no legislative framework lasts forever.³ What we need through system reform is a stable core, fit for a future beset with challenges and opportunities, around which a wider and ongoing reform effort can be aligned in light of common goals.

A more comprehensive and detailed review will need to be undertaken, following framework level reforms, to align various resource management statutes with a new system's core.

There are several important statutes that we see retaining their broad structural place in a future system. For one, although there are some jurisdictional boundary issues with the RMA and very real questions to be asked about the management of substances like pesticides and antibiotics, as well as genetic modification,⁴ we see potential for such questions to be addressed adequately through the existing framework of the Hazardous Substances and New Organisms Act. The kinds of restrictions imposed for hazardous substances (eg packaging, transport) are quite different in nature from those imposed under the RMA (eg the use of land, discharge of contaminants). And while we have suggested that the marine elements of the Biosecurity Act are better placed within integrated oceans legislation, and stronger connections should be made between pest management and other legislation (including through the creation of more strategic, integrative national and regional spatial plans),⁵ there will still be a clear need for a targeted Biosecurity Act. The adequacy of that framework for pest management should be subject to further review in light of the nature conservation imperatives outlined in Chapter 12.

Similarly, while the Crown Minerals Act should really be rationalised by integrating into it the separate and somewhat skeletal Continental Shelf Act,⁶ it would remain a necessary and targeted allocative and access framework for some minerals. It would not unduly interfere with quite separate protections imposed under other legislation like the RMA.⁷ We also recommend that a close look be taken at whether the existing Forests Act, now denuded of much content and concerned primarily with carbon accounting and restrictions on the felling, processing and export of indigenous trees, could be more

logically incorporated into other legislation. Its provisions relating to emissions trading could be provided for in the Climate Change Response Act, while its protections on processing, felling and export of indigenous timber (and forest certification)⁸ could find a comfortable home in a broader outcomes-focused Act like the RMA.⁹ There may even be a case for revisiting the restrictive provisions in the Forests Act and asking whether we can do more to increase the commercial incentives to plant and harvest indigenous species in a sustainable way.

Dedicated heritage legislation also performs a vital function that needs to be retained (eg the protection of archaeological sites, heritage listing, and related institutional arrangements). However, as mentioned in Chapter 10, it would be worth exploring further whether there is room for greater integration or alignment between the Heritage New Zealand (Pouhere Taonga) Act and the RMA, where most regulatory protections for heritage are contained.

We have touched on the Crown Pastoral Land Act in Chapter 12, where we mentioned that it is not comfortably described as a “conservation statute” (despite having strong conservation elements), and therefore would be an ill fit within an integrated Protected Areas and Species Act. As with the Land Act, it makes sense to keep this as a standalone framework for managing a particular type of Crown land.¹⁰ We have also suggested that there should be a greater role for the Department of Conservation in decision-making or oversight where nature conservation matters are at stake. Yet a lot of the Crown Pastoral Land Act is devoted to outlining the process for tenure review, which has now been put on hold by the Minister of Conservation.¹¹ The tenure review process was beset by issues and controversy, but its removal does raise important questions about what should replace it and how we strengthen the protection of conservation values on Crown land under pastoral lease.

Further rationalisation seems desirable in other areas too. For example, the confusing ways in which older legislation like the Land Drainage Act 1908 and Soil Conservation and Rivers Control Act 1941 (much of which has been repealed) continue to apply make them contenders for integration into other frameworks concerned with local government, infrastructure, and control of hazards.¹²

While an overall theme of this report is one of legislative rationalisation and simplification, we envisage that many targeted resource management statutes will continue to operate. These include statutes relating to hazardous substance and genetic modification, biosecurity, heritage, and the management of Crown land. However, most will require close attention following framework level reforms, and we have suggested some areas ripe for exploration. A degree of rationalisation may be possible for legislation relating to forests, minerals and flood and erosion control.

It is particularly intriguing that we have bespoke statutes for waste minimisation and litter, and we will linger on this topic for a moment. A move towards a circular economy will be a crucial part of New Zealand’s future. From a purely legislative design viewpoint, we see potential for the Litter Act to be merged into broader local government legislation and linked more closely to the Waste Minimisation Act, but for the latter to remain a standalone statute. The quite unique tools used in that Act, including provision for a levy, product stewardship schemes and other economic tools, form a relatively targeted and self-contained framework that does not intrude on the “planning and consenting” territory of the RMA.¹³ That said, this framework has not lived up to its full potential and much more use could be made of its proactive tools. It is well placed to form the centrepiece of a system that drives towards a circular economy, not just to reduce the environmental footprint of landfills but also to encourage the recovery of useful resources. For example, one commentator has said that the Act:¹⁴

was a watershed moment. This ambitious legislation endowed the Minister for the Environment with multiple policy levers for reducing waste ... The Act generated hope that change was finally afoot after decades of legal uncertainty and deregulation in the waste sector. Regrettably, ten years on, [its] “implementation has been disappointingly lacklustre, its regulatory provisions mostly languishing unutilised.”¹⁵

For example, charging under the waste disposal levy has been too low to make a real difference to behaviour,¹⁶ and it has not been applied to all landfills despite clear powers to do so.¹⁷ Presently, only a small fraction of New Zealand’s landfills and small proportion of its waste stream are covered.¹⁸ This has meant that much material that ends up as waste could have been recovered, but the economic incentive to do so is not present.¹⁹ We agree with the Tax Working Group that more should be done on this front.²⁰ The government’s recent signal to expand the levy is a positive step.

The flipside of the behaviour change driven by a meaningful charge for waste disposal is that part of the revenue generated is used to fund projects that reduce waste (through the Waste Minimisation Fund). While there have been criticisms that the fund is used on a largely reactive rather than strategic approach²¹ (not dissimilar to criticisms of biodiversity offsetting), steps have been taken recently to address this issue.²² However, more needs to be done to direct funding to where it really matters – for example, in enhancing recycling and resource recovery infrastructure, and investing in research and development for alternatives to particularly harmful products that cannot be recovered or biodegrade (eg disposable nappies).

Promisingly, the government has become much more active on this front, starting with a ban on single use plastic bags and signalling an increase in landfill levies, the creation of a deposit refund scheme,²³ and a broadening of product stewardship schemes.²⁴ All of those tools need to be used more in a future system, including more rigorous use of cradle to grave product management

and regulatory restrictions on harmful waste that cannot be repurposed, recycled or recovered. We need political courage to tackle waste issues beyond the “easy wins”.

A spotlight on deposit refund schemes

Deposit refund schemes involve the payment of a deposit when a product is purchased, which is repaid when the product is returned after use.²⁵ They can provide a strong financial incentive for returning products to a centralised facility to better ensure product reuse, safe disposal or recycling, and incentivise manufacturers to use more recycled goods as inputs. They deal with “waste” in both senses of the word – reducing material destined for landfill and preventing wasteful behaviour (failing to make use of valuable resources).²⁶ That is the essence of a circular economy.

As under the RMA, however, we do wonder whether a more directive approach needs to be embedded in legislation. Is it enough to provide the government with an extensive toolbox? Should we leave it up to political will as to whether available tools are utilised or not? Should, instead, legislation be more directive in setting targets (or at least requiring them to be set in light of a firm outcome)²⁷ and requiring progress to be made and audited as a legal obligation rather than political consideration? That is the direction in which we are heading for pressing issues like climate change, which may hold a lesson for other environmental challenges. Central government cannot be allowed to pass the buck to local government, either. As one commentator has pointed out (with the final sentence showing a particularly perverse outcome):²⁸

Central government holds the powers to reform waste policy, but local government is charged with day-to-day management of rubbish and recycling and setting objectives and methods for local waste management and minimisation... Arguably, central government’s practical detachment from these tasks has shielded it from a sense of urgency regarding policy reform and the deleterious impacts of reform not being implemented ... [M]any councils list lobbying central government to implement the [Act] as an action under their waste management and minimisation plans.

Greater top-down guidance and intervention is required to make the Act realise its potential. A framework for voluntary measures (eg accreditation of voluntary stewardship schemes) is a good thing, but (as with voluntary conservation covenants) will not be enough.²⁹ A legal duty to set targets and take action to achieve them – including mandatory identification of priority products to be subject to product stewardship – would be a positive step, and progress towards targets should be one element on which the government is audited by a Futures Commission (see Chapter 8).

We see a standalone Waste Minimisation Act as a valuable feature of a future system, and considerable room for it to be strengthened and for its tools (eg product stewardship schemes, product restrictions, the Waste Minimisation Fund and the waste disposal levy) to be deployed more actively and strategically.

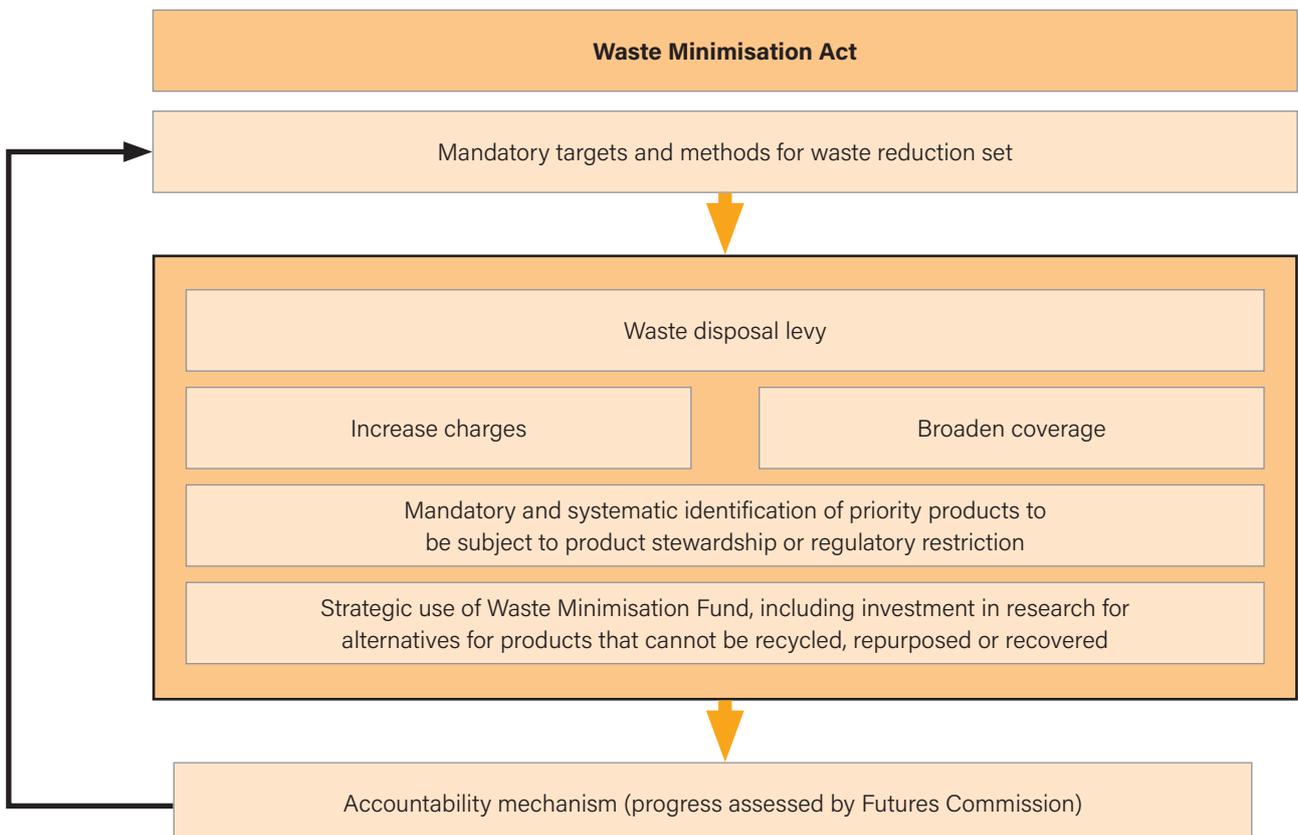


Figure 13.1: Towards a circular economy

13.3 From resource management legislation to wider system change

Some aspects of the resource management system do not fall comfortably within the boundaries of any existing legislative framework. Some of these have been mentioned in the context of a new, cross-cutting Future Generations Act (eg the imposition of general duties on public authorities, and strategic and spatial planning). Other cross-cutting issues have risen to the surface as examples in chapters concerning more specific frameworks. For example, the ways in which public goods like infrastructure are planned and delivered raises more systemic issues over how those things are *funded* (eg through rates, user-charges or something else), which we considered in Chapter 10.

However, it is worth reflecting in this penultimate chapter on the fact that a lot of meaningful change in a future system will not be about specific frameworks that prevent negative activities, or even ones that require positive action by public bodies. It will also be about influencing fundamental drivers (both financial and social) that push firms and individuals to behave in certain ways.

In particular, regulatory tools have severe limitations in terms of how much they can drive positive change,³⁰ and (aside from strengthening regulatory bottom lines) we need to start speaking much more in the language of incentives than coercion. Statutes like the RMA are, unfortunately, often forced to respond to enormous social and economic pressures that work against their goals, and have had to fight rear-guard actions (and not always successfully). As Dr Theo Stephens pointed out, for example, New Zealand's tax system:³¹

charges very little for depletion of natural capital (royalties on oil and minerals only), and allows deductions for expenses incurred in achieving its depletion while much of the economic benefit is captured in non-taxable capital gains. This creates irresistible economic incentives for private interests to undermine the protection functions of plans and rules.

How much better would it be if positive outcomes were built into incentives that shaped what people sought to do in the first place? And if we thought about "not just whether we are doing the project right, but also whether we are doing the right project"?³² That will be essential as we move from a system based primarily on the management of effects towards something that is about a vision of health, wellbeing and resilience for the future. As we pointed out in the Phase 1 report:³³

Potential harm should not be the only trigger for improvement. In some cases this may mean our institutions simply need to be well funded and resourced to pursue firm mandates themselves (eg the Department of Conservation's advocacy role, and its and regional councils' pest management functions). However, there are ... other ways by which active steps can be taken.

Below, we explore ways in which non-regulatory approaches to improvement could be pursued in a future system.

Regulatory tools are essential in defending environmental bottom lines and preventing further harm, but have severe limitations in terms of how much they can drive positive change. In a future system, we need to start speaking much more in the language of incentives than coercion.

13.4 Economic incentives: Funding

At the risk of stating the obvious, people value money. The prospect of gaining more, or losing it, can therefore have powerful influence over how they behave. Public authorities are not immune from such incentives. Above all, there needs to be sufficient money available to *enable* public authorities to discharge their functions effectively, be they regulatory, policy, or operational. We have touched upon issues of funding throughout this report where they have been relevant to the operation of particular statutory frameworks, but here we draw this together to take a more holistic view.

In some cases, funding pressures within the resource management system have become acute.³⁴ There is either not enough money available, or it is not being deployed in effective or timely ways. That is particularly the case for local government, and has prompted an inquiry by the Productivity Commission (with a final report pending at the time of writing).³⁵ Councils are responsible for performing many of the functions required by the resource management system, and how they fund those functions is therefore of central importance to system reform. But because many questions of council funding are so connected to the need to fund urban growth and the provision of expensive infrastructure, we considered them in our discussion of the built environment in Chapter 10.

There, we expressed support for institutional change: a greater regionalisation of some council functions (eg the provision of drinking water and wastewater infrastructure), to pave the way for a conversation about regionalisation or unitisation of councils themselves. Yet it is clear that the efficiencies and economies of scale to be achieved through institutional reforms will not be enough to address funding difficulties in the built environment. We need to make a wider range of funding and financing tools available, particularly for councils, to fulfil operational functions (especially infrastructure provision). We therefore suggested the investigation and deployment of a locally-levied GST (with a corresponding reduction in national GST), value uplift capture mechanisms, and the use of special purpose vehicles and local-central partnerships in financing urban growth (especially for debt constrained councils). Both Infrastructure New Zealand and the Productivity Commission (among others) have made a persuasive case for adding more funding and financing tools to the toolbox. However, we also reiterate that those tools should be deployed in a way that supports

broader strategic goals for environmental wellbeing, not just incentivise economic or population growth.³⁶

However, adequate funding is important for much broader reasons than those applying in the built environment (eg funding for urban growth or infrastructure renewal). And funding arrangements in the resource management system are as important for central government as they are for local government.

In short, almost everything costs money. But some things require different approaches to others. How to fund the substantial climate change adaptation measures that will be required in the future is a particularly pressing question that requires attention now, before the bills start rolling in. That will be partly about infrastructure relocation and strengthening, but it could potentially cover many other things. In fact, the sky seems the limit when we think about what might need to be funded to adapt to a changing climate. For example, would we need to provide compensation for the loss of uninsurable houses? Or to pay people to incentivise or compensate for changes in land use? What will the cost of public health impacts be? What about particularly exposed or vulnerable industries – do we need to support those? That requires an ongoing conversation about fairness and risk. But we have supported the rapid development of a dedicated Climate Change Adaptation Fund to be deployed strategically at a national level (see Chapter 9).³⁷ That fund will be needed to support the climate change adaptation plan required under the Climate Change Response (Zero Carbon) Amendment Act (which, in our model, would be subsumed within a broader National Futures Strategy described in Chapter 8).

New approaches to funding will be required to address issues in the built and urban environments, and to address climate change. We discussed these aspects of funding in Chapters 8 and 9.

Commentators have also pointed out that the regulatory responsibilities of local government have generally increased over the years, and that greater financial assistance to fulfil them should be required from central government.³⁸ In the Phase 1 work we said, in a similar spirit, that:³⁹

it does not seem unreasonable for central government to fund local planning to the extent needed to implement national level instruments ..., where control is already present but without corresponding funding.

While councils are best placed to implement many measures under central oversight (eg under the RMA), they should not be treated as a branch of central government. For example, the cost of undertaking general planning functions can now be considerable, especially for small councils where core funding relies on a relatively small (and sometimes shrinking) rating base and where the environment to be managed can be geographically large (one might think of Northland compared to Auckland). These councils have the same

basic planning responsibilities as large urban authorities, including in relation to complex environmental issues and a legislative framework and landscape of national direction that is much more difficult to navigate than 20 years ago. And while the costs of compliance monitoring (see Chapter 7) should rightly be recovered from the regulated section of the community,⁴⁰ effective state of the environment monitoring (ie broader monitoring of pressures and indicators) can be an expensive prospect for cash-strapped councils, and must be met through general funding channels reflecting the whole community (eg rates).

For these reasons, we have proposed that an NEP under the RMA, and spatial plans under a Future Generations Act, should outline indicative sources of funding in line with a more explicit definition of subsidiarity (what is the proper role of central and local government). There should be some predictability as to how measures envisaged in plans are to be funded. Of course, that does not resolve the question of exactly how they would be funded, but it at least gets policy makers – especially at the central government level – to turn their minds to the practicalities of achieving a vision imposed from above.

In our minds, at a general level, this would need to see greater use of need-based, demand-based or performance-based⁴¹ grants from central government to local government – particularly where there is a national interest in local actions – alongside a wider range of other mechanisms for councils to raise funds directly from their communities. For example, the Biodiversity Collaborative Group has recommended that central government provide assistance for the proactive mapping of significant indigenous vegetation required by a proposed NPS for Indigenous Biodiversity.⁴² There would also be financial or resourcing assistance from the Crown for state of the environment monitoring,⁴³ a stronger ability and clearer pathway for councils to escalate difficult or complex RMA planning matters to the EPA (thus relieving resourcing pressures), and the ability for the EPA to step into a council's shoes for enforcement purposes.⁴⁴ The simple fact also remains that more (and more secure) funding needs to be provided to the Department of Conservation to carry out its considerable biodiversity protection functions, including for pest control.⁴⁵

In a future system, central government should provide more financial assistance to local government to undertake functions in which there is a national community of interest (eg state of the environment monitoring and implementing national direction under the RMA). Such funding should be deployed on a predictable and principled basis depending on need, performance, or demand.

As well as there being enough money available (and at the right times) to perform their functions, there also needs to be appropriate incentives for authorities to raise and spend money in the ways intended. In Chapter 10, for example, we talked about the incentives that our mix

of funding mechanisms (eg reliance on rates) can have on local government institutions making decisions about urban growth and infrastructure investment.⁴⁶ There is a perception that growth does not pay, which can lead to resistance within existing communities to fund the upfront costs of infrastructure investments, through rates, that will benefit future residents but not themselves.⁴⁷ Thus while councils might be able to raise enough rates to fund their functions adequately, and many can borrow more money to finance them (which spreads the costs of services across generations), there are powerful – and understandable – political incentives not to. Many councillors campaign successfully on a political platform of no rates increases, and there can be resistance to increases in debt.

Of particular concern has been, overall, a chronic underinvestment in three waters infrastructure. There is an urgent need for this to be addressed. On that front, in Chapter 10 we suggested a degree of institutional reform: a shared services model based on service delivery by regional CCOs, alongside independent environmental and economic regulators.⁴⁸ But there is still a need to think about how those institutions would be funded, especially to address enormous short-term costs (eg to replace ageing infrastructure and upgrades to meet strengthened environmental and health standards). Three waters providers (irrespective of who they are) may well need assistance from central government (eg for the replacement or upgrade of infrastructure).⁴⁹

Outside the context of the built environment, there have also been barriers to councils deploying economic instruments like green taxes under the RMA, which could be used to raise revenue (as explored further below).⁵⁰ Central government has also had its issues when it comes to funding environmental mandates. For example, there have been substantial concerns with the extent to which key advocacy functions for the Department of Conservation have been underfunded, and we have previously said that:⁵¹

fluctuating political priorities and pork-barrel politics mean that flows of money through the budget process can be haphazard. The influence of this on the Department of Conservation's advocacy role is a case in point ... It is to be hoped that a living standards budget may provide greater stability [in the budgeting process for such critical roles], but that may be overly optimistic.

To address such issues, we see a case for greater hypothecation of funding (linking particular sources of revenue to the funding of particular institutions or activities) to ensure that political will does not unduly constrain publicly important, and often legislated, institutional mandates. That could be achieved, for example, by requiring revenue generated by some tools (eg green taxes, see below) to be managed and deployed for specific purposes (eg restoration, environmental

advocacy).⁵² Some economists may disagree with this proposition, on the grounds that financial resources would not go to their most efficient use if the law takes a directive approach to how money is spent. However:⁵³

a future system would ... have to be aware of the tension between efficient outcomes and the public interest. Much may depend on who has the power to spend the money, and the risk of politicisation. For example, if we did not link funding sources with particular uses, would we continue to underinvest in crucial public goods like waste-water infrastructure? Or would we underfund measures to improve freshwater quality? Some hypothecation already occurs in the system, whether due to institutional boundaries (Watercare cannot use its revenues to fund roads, for example) or because of intentional earmarking of funds (eg a levy on waste is used for waste reduction measures).

While it is a complex area that requires more detailed exploration in specific contexts, the importance of funding in system reform should not be underestimated. Almost all reform measures will come at a cost – not just the effort of making changes on paper, but the ongoing costs of delivering them. It is crucial that there is enough money, that it appears at times when it needs to be spent, and that there are appropriate incentives to spend it in ways that will secure desirable outcomes.

How public authorities are funded will be a crucial element in a future system. We have touched on many aspects of funding where they arose in the context of previous chapters (especially in the context of legislation for urban and built environments, climate change, and spatial planning). Overall, we see merit in expanding the funding and financing tools available, providing a more active and strategic deployment of central government funds, and protecting vulnerable but essential public functions through greater hypothecation (requiring defined sources of revenue to be used for particular purposes).

The incentives arising from how we fund the activities of public authorities, while extremely important, are largely side effects of a tool designed primarily to raise enough money to fund and finance public goods and services. For example, it is unsurprising that relying on existing residents to fund rapid growth or subsidise expensive infrastructure for tourists leads to a reluctance or inability to do so in a timely way. Its purpose is to raise money, but it also creates incentives.

Yet economic tools can be used in a much more deliberate manner to shape people's behaviour in a positive way. They can provide incentives for people to find innovative solutions that regulations may not. Raising revenue is a side effect of such measures, which can then be used to contribute to solutions for the funding difficulties identified above.

13.5 Economic instruments

Generally speaking, we consider that economic instruments could be deployed with more vigour in a future system. Because they provide people with freedom of choice (unlike regulation), they are a vital tool for incentivising people to improve environmental outcomes rather than just preventing further harm. For example, we have previously pointed out that “the use of market-based instruments could create opportunities for additional biodiversity protection, and could be implemented for a range of purposes (eg habitat protection and nutrient control)”.⁵⁴ This echoes the findings of the Biodiversity Collaborative Group: “While law and regulation set important boundaries for human actions ... other initiatives are equally important. Complementary and supporting measures are required”.⁵⁵

We touched on some examples of economic instruments earlier in this chapter, in the context of the Waste Minimisation Act (eg the need for a waste disposal levy that is significant enough to influence behaviour, and a Waste Minimisation Fund that is deployed more strategically). Emissions trading has been touched on Chapter 9, and economic methods for allocation and trading (ie reallocation) of freshwater rights were mentioned in Chapter 7. Here, we consider economic instruments from a more holistic perspective, rather than under the umbrella of specific statutes.

In short, economic instruments are about sending price signals that people respond to. They can do two things: encourage behaviour by making it less costly (eg subsidies or tax breaks for producing positive outcomes), or discourage behaviour by making it more costly (charging or taxing). They are not substitutes for regulatory limits that prevent people causing harm, because the influence of prices on behaviour can be uncertain and unpredictable (and therefore no guarantee of achieving a particular desired outcome).⁵⁶ Many bottom line outcomes – eg the extinction of species – have a strong moral and inter-generational component, and therefore should not be determined by market forces alone. Dr Tim Denne investigated economic instruments as part of our Phase 1 work. There, we said that:⁵⁷

There are several reasons that a resource management system can impose charges for the use of resources[.] ... to fund public goods and services (eg volumetric charging for water); to facilitate trading and therefore efficient use (eg the holder of a discharge permit can sell it); to change behaviour (eg a tax on carbon or a levy on waste); ... to allocate resources (eg rights to use a resource goes to the highest bidder); [and] to ensure that some of the benefit obtained from using a non-private resource returns to the public.

Below, we set out what we think is a desirable direction of travel in a future system.

13.6 User charging

First, we see potential in deploying greater user-charging, which is intimately related to the discussion about funding above and in Chapter 10.⁵⁸ Charging people directly for goods and services can be an equitable way to fund the goods and services being provided (and is consistent with the user-pays or beneficiary-pays principle).⁵⁹ That applies not just to tangible services provided by public authorities (eg paying for connection to water pipes),⁶⁰ but also regulatory services (eg charging for consent processing, or permitted activity monitoring) and benefits provided by nature (eg requiring people to pay for residual adverse effects through contributions to a biobank).⁶¹

But making people pay for something also generally causes them to use it less (only as much as they really need) or to find alternatives. It is therefore a powerful influence on behaviour (an economic incentive) as well as a funding tool. For example, volumetric charging for water services allows providers to manage demand through economic levers which are not available to those who charge a fixed price per year (and revenue raised can be fed back into maintenance of the network). It has been very effective in driving more efficient use of potable water,⁶² and there is a case for allowing volumetric charging for wastewater outside of Auckland as well as congestion charging.⁶³

That said, we do not see unlimited scope for user-charging, even if separate redistributive mechanisms exist (eg rates rebates or postponements for those who struggle to pay for water). Some things are provided free of charge as a matter of public interest or cultural expectation, including New Zealanders' access to the conservation estate, green space, and lakes and rivers. While we want to send incentives for responsible and efficient use, we do not want to commoditise all public goods.

User-charging should be deployed more in a future system both to provide a fair way to fund related services and to incentivise the efficient use of resources. However, it cannot be absolute and must carefully consider how impacts on the poor or vulnerable are to be addressed.

13.7 Resource rentals

Secondly, and in the same basic spirit of user-charging, we see merit in introducing (over time) a nationally consistent system of resource rentals. A resource rental is different from a volumetric charge for water,⁶⁴ for example, as the latter is payment for a service (it costs money to treat and deliver water through pipes), whereas the former is payment for the use of a non-private resource itself (eg freshwater, fisheries, geothermal energy or the occupation of coastal space).⁶⁵ We have previously observed that a resource rental is:⁶⁶

not necessarily linked to the need to fund something (although it can be), or designed to change behaviour

(although a charge can discourage inefficient uses and change demand). It is also not designed to allocate (since imposing a charge for something does not in itself determine who gets to pay that charge if many are still willing to pay it). Charging for resources ... can simply reflect that private use of a public resource should come with an expectation of some public benefit.

A resource rental's primary purpose is to provide a return to the community, by extracting some of the value conferred on users by granting exclusive access to a community resource. It ensures that the value of what may be a scarce resource is reflected in decisions on its use. Charging can also influence behaviour,⁶⁷ with even a modest rental charge encouraging efficient use; unlike completely free provision, it at least triggers people to *think* about how they are using a resource and how much they really need. How strong such incentives for efficiency are in reality may depend on how users respond to a price signal, which can be difficult to predict. But, if nothing else, a charge may send a subtle moral signal – that a resource is valuable and should not be wasted.⁶⁸

Furthermore, requiring the payment of a resource rental may, in practice, make it more palatable for communities to grant private (sometimes exclusive) access to their common resources. For example, even if bottling freshwater were not a community's preferred use of the resource,⁶⁹ at least the community would get a return from it. It may relieve pressure on a user's social licence, which is bound to grow stronger as resources become scarcer.

However, the imposition of resource rentals would be (and has been) a controversial prospect, especially for freshwater.⁷⁰ Indeed, the debate is not a new one, and was played out again at the time of the 2017 general election. Reform on this front would require careful transitional measures. In particular, as with user charging for public services, we need to think about fairness in the context of what we have now, not what we would do with a blank slate.

For example, we cannot simply charge a uniform price across all users. A charge on water bottling would need to look quite different from a charge for irrigation. In 2017, then Labour Environment spokesperson Hon David Parker suggested that bottling plants be charged one cent for every litre of water extracted, and that farmers and other irrigators be charged one or two cents per 1000 litres of water extracted. Some uses would also need to be exempt. For example, we would not expect a charge for gathering rainwater, or for going for a swim in the local river. A robust conversation is needed on whether other uses should be excluded, and on what grounds.⁷¹ One possible distinction would be between consumptive uses (eg bottling, irrigation) and non-consumptive uses (eg navigation, bathing). However, in our view there should be a presumption that commercial activities would be charged in some way.

Historical circumstances are also important for a fair transition towards a nationally consistent system of

resource rentals. The value of some non-private resources like water have, given a long tradition and expectation of free provision, been effectively incorporated into the price of associated private resources, notably land.⁷² That contrasts with a resource like oil and gas, where it has for a long time been clear that, even with resource consent, a landowner does not have rights to extract the resource for free (or at all).

In the case of freshwater, the loser would therefore be a landowner who has paid for the value of the land and, while being expected to pay a resource rental, would not be compensated for the comparable diminution in land value. The landowner who received the true value may have been lost in the sands of time. That may prove significant especially for heavily indebted rural landowners with low profit margins, and has led to suggestions that only new users be charged. As we pointed out in the Phase 1 report, such questions of fairness are difficult, and how we transition depends on how we see our starting point:⁷³

The reason for using a subsidy [or compensation] rather than a charge [or penalty] might be based on some assessment of the existing nature of rights. If it is perceived that firms have a right to [use a resource or] pollute, then [subsidising them] might be appropriate. However, if firms do not have such a right – rather the community has a right ... – then using a charge [or penalty] is more appropriate. This raises difficult ethical issues over when something (be it a specific authorisation, established practice, or implicit encouragement) should be treated as a "right", a "privilege" or as simply an existing state of affairs.

In our view, an existing state of affairs should not prevent a slow, fair and planned increase in resource rentals over the longer term, just as historical "rights" to pollute should not prevent a reduction in such rights occurring for reasons of public interest. No one would expect to receive a private good for no charge, and the public should also expect a fair return for the exclusive private use of a non-private resource.⁷⁴ That has long been recognised in the context of oil and gas (where royalties are owed), and is conceptually no different in the case of other non-private resources. Although some may point out that the case of oil and gas is different, given that its ownership is clearer (it is Crown property, even under private land), it is worth noting that this is not uniformly the case. For example, the Crown does not (and cannot, under international law) "own" minerals in New Zealand's exclusive economic zone.⁷⁵ Yet does not prevent it imposing charges on its extraction in the nature of royalties.⁷⁶ At the very least, a fair and predictable level of resource rentals should be imposed at the point that existing rights come up for renewal (eg upon the expiry or renewal of resource consent), with any subsidies being made separately and transparently.

In the Phase 1 report, we shone a spotlight on coastal occupation charges (a form of resource rental), which have been available under the RMA since 1997. Different charges for using the coastal environment have a long

history prior to that, too. While regional councils must now include statements in their regional coastal plans as to whether charging will be employed,⁷⁷ we noted that there has been extremely limited uptake of this mechanism. Many reasons have been given for this,⁷⁸ but in our view may be assisted by national direction requiring, encouraging or clarifying the use of charges in appropriate circumstances.⁷⁹

For completeness, another case in which charging would be inappropriate is where a resource is already privately owned. That is not the case with freshwater, despite the de facto value that resource consents often have, but it is true of private title in the coastal marine area. It may also be the case if property rights in some resources were to be recognised in the future. For example, if we were to implement greater trading for water rights (considered in Chapter 7), we would need to carefully consider whether that created a property right for which it would then be inappropriate to charge a rental. For example, a resource rental for wild fisheries was abolished in 1994, although that would not in our view prevent the revival of some form of charge.

There is an important question here about who should receive a rental, or how it should be split (eg between councils, Crown and iwi/hapū). The answer may depend on the resource in question. The problem, especially for freshwater, is that the prospect of a “rental” (as with a trading regime) immediately gives rise to questions of ownership (a rent is generally owed to an “owner”). Such issues have thus far have proved politically intractable, and the resource management system will need to provide a comfortable space for them to play out through the courts and the political system.

Irrespective of legal ownership, however, it is our view that resource rentals should not just be another revenue gathering tool to fill general government coffers. The revenue generated should be hypothecated – channelled back into related environmental enhancement mechanisms, on a strategic basis (eg to fund advocacy,⁸⁰ state of the environment monitoring, or community restoration projects).⁸¹ In other words, a rental would do several things: provide a fair return to the public; influence private behaviour; and provide earmarked funding for vulnerable but essential environmental functions.

A future system could see separate funds established for different resources. For example, freshwater rental income could go towards subsidising projects to improve the quality of freshwater, while coastal occupation charges could support marine restoration and research efforts. That would operate in a similar manner to the waste disposal levy, which is (in part) directed into the Waste Minimisation Fund for a particular purpose. Alternatively, all resource rentals could go into a more general fund having clear and strategic environmental aims across multiple domains, including, for example, contributing to a nationally deployed biobank.⁸² Careful thought would need to be given to what those aims were. For example, funding the enhancement or resilience of a resource like freshwater is not necessarily an “environmental” project

(eg one may think of some water storage proposals, like the Ruataniwha dam), and clear criteria and oversight would be required to deploy funds in a consistent and strategic manner.

We would also envisage that a proportion of revenue from resource rentals would go to Māori as kaitiaki, to manage within funds for environmental purposes. The exact proportion would need to be a negotiated, and ultimately political, decision. Alternatively, a single integrated fund could have a co-governance framework similar to that applying to the Waikato River,⁸³ with kaitiakitanga as a firm guiding principle. In the context of freshwater, it may be hoped that such measures could defuse concerns over the specific question of “ownership” of the resource itself. Instead, there would be payment for its use and management of a resulting fund, rather than an extensive reallocation of existing rights. However, equally it may not. In particular, the Māori world view does not make a clear distinction between environmentally protective measures and the use of resources for human wellbeing, and Māori concerns over water ownership are not just about control, governance and protection; they also relate to the ability to use the resource to unlock land and businesses for the purposes of economic and cultural development.⁸⁴

As such, earmarking revenue from resource rentals to a narrow concept of environmental protection and enhancement may not go far enough, and a space will most likely still need to be made for broader questions of ownership to be worked through. Furthermore, the issue of reallocating existing rights is not just about recognising the rights and interests of Māori; provision also needs to be made for other new entrants. That has been discussed in Chapter 7.

We see merit in a gradual, and fair, transition towards imposing a coherent and consistent approach to rentals for non-private resources. These should reflect a fair return to the public and Māori, and be used for related measures to enhance or protect the environment.



13.8 Green taxes

The third category of economic instrument we propose for a future system is green taxes.⁸⁵ These are different in nature to both user charges and resource rentals, because they are not associated with the provision of goods or services (eg the delivery of water or the water itself). Instead, they are designed to financially penalise “undesirable” behaviour. That is not to say the behaviour we are seeking to penalise is always morally reprehensible. For example, congestion charging would be a form of “green” tax, designed to reduce the number of cars on the road at busy times, but it is not a signal that driving is “wrong” (even at busy times). In contrast, increasing import taxes on polluting vehicles sends more of a moral signal about environmental action.

In Chapter 9, we encouraged a number of measures that can be categorised as green taxes in the context of encouraging the uptake of electric vehicles. For example, a feebate involves people being charged a fee if their behaviour or performance falls below a set level, or being provided a reward if they exceed it. This highlighted that green taxes should be used as part of a broader package of complementary measures, comprising both carrots and sticks and regulatory and non-regulatory elements. Again, we see the value of having an integrated, cross-cutting strategy under the auspices of a new Future Generations Act – including the proactive deployment of economic instruments – rather than ad hoc and siloed policy responses.

The polluter-pays principle demands that the cost of environmental harm be borne by (internalised to) a polluter. However, green taxes should not be limited to simply charging for pollution in the same way that someone pays for a service. The idea is to set a tax at a level that will meaningfully influence behaviour designed to meet a specified policy objective, not raise revenue (in fact, we would expect revenue to decline as a measure of success). They require constant monitoring and evaluation to determine if they are doing their job. Dr Tim Denne pointed out that:

The environmental outcome [of a green tax] is uncertain as it is not known in advance whether the economically optimal position for a firm is found by reducing waste or emissions significantly or if the economic activity is sufficiently valuable, or control measures sufficiently costly, that emissions will continue.

We do not attempt to outline a comprehensive range of green taxes (they can be used in many situations, and may change over time).⁸⁶ Further policy work should continue. Yet a future resource management system should deploy green taxes with more enthusiasm. This echoes the Tax Working Group, which has said:⁸⁷

there is significant scope for the tax system to play a greater role in sustaining and enhancing New Zealand's natural capital. New Zealand faces significant

environmental challenges that require profound change to existing patterns of economic activity. Taxation is one tool - alongside regulation and spending measures - that can support and guide this transition.

The Tax Working Group also recommended the greater use of tax instruments to address water pollution (if Māori rights and interests can be addressed), including the potential for taxes on inputs that can lead to pollution (eg fertilisers) if outputs cannot adequately be measured.⁸⁸ That would be a sensible measure.

But what about more general legislation like the RMA and Local Government Act? We have pointed out previously that the RMA allows the use of economic instruments (a concept that encompasses levies, charges and taxes), and lists the investigation of such things as a specific function of the Minister for the Environment.⁸⁹ However, it does not particularly encourage or facilitate their use. In practice, few councils have imposed pricing as a demand management tool, and the Minister has not intervened to impose any.⁹⁰ More broadly, taxes and financial tools aimed at environmental behaviour change are rare in New Zealand,⁹¹ with the tax system viewed more as a way to raise revenue in a fair and predictable way. Fiscal neutrality – where tax does not influence demand – has been seen as a generally desirable thing.

That leaves a vast area of untapped potential for environmental improvement. Part of the issue may be that the authorising environment for green taxes is not clear enough under existing environmental laws. For very good reasons that go to the heart of our democratic system, taxes require specific enabling legislation.⁹² We have, for example, clear provisions for green measures like the waste disposal levy.

Other provisions are less clear, and more constrained. For example, differential and targeted rates can be imposed by councils, under local government legislation, to reflect that some groups benefit or cost more than others when receiving services, but not to reflect the wider cost of the environmental outcomes they cause.⁹³ And although the RMA has encouraged the use of economic instruments, the specific tools (or legal ability) to implement them have not been forthcoming.⁹⁴ It is an area ripe for exploration. The Productivity Commission has pointed out that:⁹⁵

local authorities are not legally able to use taxes to discourage environmental “bads” such as discharging pollutants into the air or water bodies or onto land. Such taxes can be an efficient means to modify behaviour and improve environmental quality. ... Regional councils in particular could be well placed to make use of environmental taxes to help carry out their environmental stewardship responsibilities.

We agree. A clearer authorising (and more directive) environment for councils to deploy green taxes could be contained in a new part of the RMA (in the same way that bespoke tools like water conservation orders and heritage orders have their own part), and national direction on

green taxes could be contained within part of an NEP. Alongside a clearer authorising environment, there is a need to strengthen the tax capacity within institutions.⁹⁶ This could see, for example, tax expertise built up within an independent Futures Commission or EPA, and deployed to assist councils in introducing green taxes at a regional scale.

However, as with other economic instruments like resource rentals and user charges, we reiterate that care needs to be taken in a future system to make sure that regressivity – meaning disproportionate impact on the poor or vulnerable – is clearly corrected in separate distributional policies. Some people, especially the poor, may be less able to change their behaviours when faced with an economic incentive like a tax (eg a tax on older, more polluting cars, which tend to be cheaper and therefore more affordable). Similarly, the use of congestion pricing, or other demand-management tool, should not unduly affect people's access to mobility or the use of a public service, especially if they are actually partly funding it through other means (eg rates or income tax).⁹⁷ Yet such concerns can be addressed through separate distributive mechanisms based on hardship, and should not be used to undermine the overall incentive effects of green taxes for those who are able to change their behaviour.

As with resource rentals, it would be important for revenue raised from green taxes to be directed back to the pursuit of related environmental outcomes.

We see significant potential for green taxes to be deployed more in future, and policy work should continue on that front in line with the framework developed by the Tax Working Group. A clearer authorising environment will be needed in a new Part of the RMA and/or local government legislation, and national direction should be introduced. As part of such measures, congestion pricing should be deployed where it would be beneficial and where disproportionate impacts on the poor and vulnerable can be properly addressed.

13.9 From green taxes to an environmental footprint tax

In the Phase 1 work, we explored the concept of an environmental footprint tax. This is much more than just a targeted green tax. Instead, it marries up the two key roles that we see for the tax system:⁹⁸ (1) to raise general revenue for funding public goods and services, and (2) to influence private behaviour in a positive way. An environmental footprint tax was explored more fully by Dr Theo Stephens as part of Phase 1 of the project, and we provide a summary below.⁹⁹ In short, we see this as a desirable feature of a future system, ramping up over the longer term. That said, as we explore below, there are some important caveats, and there is a need to develop the concept further before rolling it out.

A spotlight on an environmental footprint tax

The resource management system has failed to maintain natural capital because its regulatory tools put environmental protection in direct conflict with vested interests that seek economic benefits – gained by activities that deplete natural capital.¹⁰⁰ It also distorts investment away from human capital and towards environmentally damaging, high volume, and low value-added production that results in capital gains, high levels of pollution and biodiversity loss. In short, the system encourages us to exploit our riches without replenishing them, and leads to constant pressure on (and complaints about) a regulatory regime that seeks to push back against these enormous forces. As a society, we need to think about changing those forces, not just strengthening the system that needs to respond. Many commentators have highlighted the opportunities for changing underlying financial signals in a future system rather than just dealing with its symptoms.¹⁰¹

An environmental footprint tax is a form of land tax, spatially defined. The idea is that this would determine tax liability based on the environmental footprint of a land use: a measure of what natural capital is present on a parcel of land. The tax levied on a property would be calculated as footprint depth (expressed in dollars) multiplied by the land area. Tax rates would increase with uses that were more depleting of natural capital, and could even provide rebates for net positive ecological outcomes.

The Tax Working Group has also recommended close consideration, in the longer term, of a tax framework based on environmental footprint or natural capital.¹⁰² It has pointed out that this tax:¹⁰³

aims to recognise that natural capital produces valuable ecosystem services. It provides incentives for the conservation, restoration and regeneration of high-value natural capital, going beyond more narrowly targeted negative externality taxes.

A footprint tax could enable improved environmental outcomes by implementing the polluter-pays principle, while allowing a shift away from traditional sources of revenue like income tax and GST. This would, in a sense, be fairer than the status quo, since the tax system would penalise environmental harm rather than impose a cost on positive activities (like spending and obtaining income).

An environmental footprint tax could be treated as a completely new tool, created under bespoke legislation. It would certainly need a clear legislative authorising environment, and could not be implemented under current settings (eg under the general provisions in the RMA). However, depending on the scale at which we wanted it to operate (ie central or local), it could be treated as a form of targeted rate (based on type of land use). That would require amendment to local government legislation. It could also be introduced as another tool to put in the toolbox where considered appropriate (like development

contributions), or it could be rolled out on a more directive basis (like income tax or GST). We face many specific design choices.

The idea, however, would not be to raise *more* revenue or impose another tax, but rather to replace a portion of revenue raised from more fiscally neutral mechanisms (eg income tax or rates) to a mechanism that was self-consciously about changing behaviour. As strange as it may sound, people would be encouraged to engage in tax avoidance measures. Those having tax liability would therefore need to be those with the legal power to improve outcomes. This raises complex questions concerning the tax liability of, for example, landowners, occupiers, leaseholders, and the holders of other interests in land.¹⁰⁴

Furthermore, we do not see an environmental footprint tax as a complete replacement for other more general taxes, even if it could form a much more significant part of the tax base. This is partly for the same reason that a tax on cigarettes cannot be relied upon to raise core revenue, or that the role of fuel levies in funding transport infrastructure will need to be revisited as we move to an electric fleet: if a tax is designed to change behaviour, then the prospect of people actually doing so has implications for the quantum and predictability of revenue raised. In other words, if the tax is successful then it would raise less money.

That is fine when we think about targeted green taxes, where revenue raising is a useful byproduct that can be channelled back into related environmental enhancement measures, or where the penalty in a feebate can be used to subsidise others who exceed a standard. But if we make a broad green tax part of the broader framework – eg to raise revenue for infrastructure, health services, education etc – then we need to be reasonably confident

that people will not be able to avoid it *too* much. We need to be careful of institutional incentives here too, in that the prospect of raising general funds from undesirable behaviour may lead to a reluctance for such behaviour, in practice, to change.¹⁰⁵ There would need to be independent oversight of a tax, transparency about its effectiveness, and a strong legislative mandate for using it primarily to drive behaviour change.

We would also need to be careful not to crowd out voluntary action. There can sometimes be unintended and unexpected consequences from introducing economic incentives, because people are complex individuals motivated by many things. For example, in the Phase 1 report, we pointed out that imposing a modest charge for parents who were late in picking up their child from daycare provided a moral signal that to do so was acceptable, as long as a payment was made. It actually led to the *worsening* of behaviour, because a financial signal crowded out a moral one. In a similar way, we would not want to reduce the valuable voluntary action being taken by community groups and others by, effectively, telling them “thanks for your efforts, but don’t worry, the tax system will take over from here”. On the other hand, formalising incentives within the tax system could encourage behaviour to become durable societal norms, not just a regulatory obligation. In short, people’s motivations and moral responses are hard to predict and must be approached with caution.

The level of a footprint tax would be significant to incentivise the right outcomes, and would need to be closely monitored. That may prove challenging for reasons of predictability and stability (eg the stability of a flat 15 per cent rate of GST provides certainty for business



planning, even if it may change occasionally). A quantum or rate would need to be closely considered up front.

Of equal importance would be how to define the thresholds at which a tax became payable or rebates were due. This poses a dilemma similar to a feebate scheme, where those exceeding a performance measure are rewarded and those infringing it are penalised. We therefore need a reasonably clear sense of what we are aiming for, not just a general desire for “environmental enhancement”.

Defining a threshold also raises significant questions about equity, which have also arisen elsewhere in this report (eg whether the system should compensate people when imposing new regulatory restrictions).¹⁰⁶ Thus, we can ask: what should our baseline be for deciding whether to reward or penalise people through the tax system? Should it be a parcel of land’s stock of natural capital measured at some arbitrary future “ecological valuation day”? Should it be some notion of the “ideal” state of the land? Or something in between? Moreover, should tax rates be different depending on the historical use of the land? It is fairly easy to value property values, where there are clearly defined private property rights and a large market. But it has proved much more challenging to value public interest services like those provided by nature on private land. Of course, this is not a challenge we should shy away from, and valuable work on natural capital valuation should continue.

Policy makers would also need to consider closely whether there should be any exceptions to a tax. Tax rates may need to be tweaked to provide appropriate financial incentives. What about people already living, for example, in an apartment in the middle of an urban area? Or on land where natural capital cannot realistically be enhanced, through no fault of the landowner? Or where the continuing loss of ecological value is due to forces beyond a person’s control (eg climate change or pests)? There is the question, too, of whether people should be able to average (or offset) their tax liability across a portfolio of properties (eg reducing natural capital on one, while enhancing it on another).¹⁰⁷ These may be political, rather than purely economic or environmental, questions. However, to be effective, the tax envisages that people will be *able* to change their behaviour. In other words, the tax is effective when there is “high behavioural responsiveness”.¹⁰⁸ Where people in practice cannot minimise their tax liability, issues of fairness may arise.¹⁰⁹

One significant advantage of the tax could, however, be improved monitoring for environmental wellbeing more generally (see further below on the importance of state of the environment monitoring in a future system). History has shown us that there are few incentives more powerful for government monitoring and enforcement than the prospect of collecting revenue, and the prospect of tax breaks or refunds provides an equally powerful incentive for landowners and occupiers to take meaningful and verifiable measures. Of course, investment would be needed in spatial and remote sensing tools designed to measure an environmental footprint, but that seems

feasible.¹¹⁰ It could lead to a reduction in the environmental monitoring burden currently placed on councils.

People would still be able to apply for consent to undertake activities that reduced overall natural capital, subject to environmental bottom lines. There would still, under the RMA, be a presumption that people could use land how they wished in the absence of specific restrictions.¹¹¹ In other words, the firm regulatory system sketched out in this report would need to apply in parallel to a tax. But the idea is that private decisions about whether (and how) to undertake an activity would be influenced by environmental considerations from the outset, reducing the economic pressures that constantly seek to erode regulatory environmental limits through the political system.

Overall, the concept of an environmental footprint tax merits further exploration and deployment in a cautious and staggered, but ambitious, manner over the longer-term. One way forward could be to experiment with and monitor the effectiveness of the concept on a small scale through special tax zones. A “zone” requires spatial delineation, so one option may be to replace other spatially defined forms of tax (eg land based council rates), in which case the revenue raised could be directed to councils. This could provide a proving ground to test appropriate tax rates, in different biophysical and social contexts, that would both drive behaviour and generate sufficient revenue. However, the need for a standardised and consistent approach across the country (to avoid perverse incentives and free riders),¹¹² and resourcing by appropriately equipped agencies like Land Information New Zealand and the Department of Conservation, may necessitate such a tax being rolled out at a national level.

Targeted green taxes have a side effect of raising money (although not enough for general funding), while general taxes like rates or a capital gains tax have a side effect of driving behaviour (although not always in desirable ways). A future system could marry those two roles together more coherently, by deploying an environmental footprint tax. Here, tax liability would be based on the environmental footprint of a land use: a measure of what natural capital is present on a parcel of land. This would require further development and the resolution of challenging questions. However, if carefully designed, it would be a positive step when rolled out over the longer term.

13.10 Subsidies

The flipside of using financial signals to penalise behaviour (eg a tax) is to use them to reward good behaviour. The system can subsidise people to undertake beneficial activities. As we have seen in the context of the waste disposal levy, a feebate for polluting motor vehicles, and the notion of rebates under an environmental footprint

tax, the two can work together to incentive people to both reduce harm and provide benefits.

We can also make certain measures tax deductible, to encourage positive behaviour relative to negative behaviour. For example, the Tax Working Group has recommended making costs associated with managing land subject to conservation covenants tax deductible,¹¹³ and for employer contributions to public transport to be exempt from fringe benefit tax.¹¹⁴ More generally, it has also recommended a thorough review of forms of tax that incentivise the depletion of natural capital, and for the introduction of tax concessions for activities that enhance it. We agree with all of that.

However, we also suggest that a future system should be more coherent in its deployment of subsidies. Earlier, we pointed out that the Waste Minimisation Fund has lacked a strategic framework for how it is to be used (although that is being remedied), and this complaint applies across the system as a whole. We have had many funds over the years,¹¹⁵ but many have been transient, undercapitalised and responsive to particular problems, and used in an ad hoc way. In particular, while it can be necessary as part of a wider strategic plan (eg subsidies for electric vehicles) there can be concerns over efficiency and tunnel vision when particular *activities* rather than *outcomes* are subsidised.¹¹⁶ A system of consistent, outcome-based rebates under an environmental footprint tax would in part address this, but we reiterate that opportunities for central government to provide financial and logistical support for outcomes sought under the RMA have generally not been taken in a systemic way, and need improvement.¹¹⁷

Subsidies, through long-term and independently managed funds (potentially contributed to by resource rentals and green taxes), could therefore be used to reward outcomes themselves in a longer-term and more consistent way, in pursuit of clear targets set under a Future Generations Act. That could usefully happen in a similar way to how funding is deployed from the Land Transport Fund (to reflect priority areas and outcomes),¹¹⁸ rather than through the discretionary deployment of small, separate pools of government money. This would encourage a “race to the top” if implemented through a competitive approach (eg grants to those who cause most improvement per dollar).¹¹⁹ We can look overseas for inspiration here – for example, to the concept of Bush Tenders in Australia or the Conservation Reserve Program in the United States, where landowners tender for environmental improvement projects (eg water improvement or land use change) and indicate a price at which they are willing to do it. Bids are then assessed against a list of public interest objectives to determine value for money.

However, subsidies are not just about dishing out public money. Authorities can play an important role in coordinating the resources of others (alongside public resources) who may have a desire and means to contribute, but lack the connections or frameworks to deploy their resources.¹²⁰ For example, we have pointed out that:¹²¹

some may wish to address climate change, but not know how, or think that their contribution will not make a difference. A person might want to help plant trees, but not have the actual saplings. Some people may have great ideas but no money. An institution working with – and not just funding – communities can make that kind of thing easier.

A future system should formalise more programmes that catalyse private action through the deployment of public effort, in much the same way that public building projects can catalyse private urban regeneration.¹²² The development of a coherent network of community conservation hubs shows real promise in marrying up volunteer effort and passion with public coordination, resourcing and expertise.¹²³ The recent establishment of New Zealand Green Investment Finance (a \$100 million green investment fund tasked with co-investing in projects or companies providing a pathway to a lower emissions economy) is a positive move and could be expanded, both in terms of its size and its environmental aims. Such measures are not just about subsidisation in the traditional sense. They are about catalysing a change in investment patterns that is happening anyway as businesses increasingly appreciate that environmental risks (especially climate change) pose considerable long-term financial risks (see Chapter 9). Thus what may look like subsidies are more accurately characterised as investments from which the public purse can expect a solid return in the long run. As legal advice to the Aotearoa Circle has pointed out:¹²⁴

[T]he New Zealand Super Fund (NZSF) released its “climate change investment strategy” White Paper in March 2019. The White Paper ... concludes that ignoring climate change would be an “undue risk”. NZSF’s climate strategy includes divesting from assets exposed to climate policy through their emissions or fossil fuel reserves, implementing climate change considerations into its asset valuations and identifying climate friendly investments.¹²⁵ NZSF completed the process of divesting from its most carbon intensive equity holdings in July 2017, selling investments worth \$950m (representing 2.7% of its \$35bn portfolio).

Subsidies, and public investment in positive private sector initiatives, should be deployed in a more strategic, long-term and coherent manner in a future system, to support environmental targets set under a Future Generations Act.

13.11 Other “economic” incentives

Two other kinds of economic incentives that we see operating or changing in a future system can be traversed more briefly. First, national guidance on natural capital or ecosystem valuation should continue to be developed further as an input into decisions. Giving nature a monetary value means it cannot be ignored in economic decision-making tools like cost-benefit analyses.¹²⁶ Some consistent way of measuring natural capital would also

be useful to determine developers' contributions to a national biobank where biodiversity offsetting is required, and to help determine tax rates under an environmental footprint tax.

However, giving the natural world an economic value should not be a replacement for morally charged bottom lines expressed in law, or for strong policy directions concerning environmental enhancement.¹²⁷ As Dr Tim Denne has noted, "[E]cosystem services analysis is regarded as not having progressed to a stage where there is an accepted framework for analysis",¹²⁸ and cost-benefit analysis only in economic terms is inappropriate for decision-making where moral issues are in play. Furthermore, a narrow accounting approach to natural capital may not comfortably gel with tikanga.

While natural capital or ecosystem services valuation is not a silver bullet to better environmental outcomes, work should continue to improve this as an input to cost-benefit analyses and other economic tools designed to improve environmental outcomes.

Secondly, we see a need to tackle head on the perverse incentives provided by "discounting" the services provided by the natural world in the future. Using a higher discount rate means that effects further in the future are devalued relative to those felt in the present. As one commentator has observed:¹²⁹

Economists rationally attempt to justify ... irrational focuses on short-term profits by "discounting" future profits... on the grounds that the profits from today's harvest could be invested, and that the investment interested thereby accumulated between now and some

alternative future ... time would tend to make today's [exploitation] more valuable than a future [exploitation].

For many things discounting is appropriate (eg I value receiving \$100 today this year more than next year, because I can invest it and obtain interest in the meantime). Using a zero or negative discount rate, however, increases the value of future costs and benefits relative to the present, potentially better reflecting intergenerational equity and the need for environmental enhancement. Local Government New Zealand has, for example, suggested that a discount rate be negative where natural ecosystems are rare or irreplaceable (effectively, priceless).¹³⁰ Dr Tim Denne has also pointed out that discounting is potentially inconsistent with intergenerational equity.¹³¹ And the Stern Review has recommended that a very low discount rate be applied in the context of climate change.¹³²

We would agree with all of that, and go further: there is no compelling reason to treat the exploitation and conversion of natural capital to other forms of capital (eg financial capital) today as more valuable, in a blanket way, to the retention of natural capital on which we know people will depend for their survival and wellbeing in the future. A robust approach to intergenerational equity – to protect the moral rights of those who "cannot vote or complain today"¹³³ – requires us to protect their ability to choose how they use resources vital to their survival.¹³⁴ Thus we must preserve natural capital itself, not simply exploit it and invest its proceeds. Different forms of capital are not always interchangeable (or, in economics jargon, fungible).

A future system should clarify when it is appropriate to use positive, zero or negative discount rates in the context of future environmental outcomes.



13.12 Non-economic incentives

Humans respond to many kinds of incentives. Money is a powerful one, but by no means the only one. As we mentioned in the Phase 1 report:¹³⁵

People are complex beings, and their behaviour is governed by many different things. Economic incentives “rely on the ‘extrinsic’ motivation of people wishing to be financially rewarded or not punished for their actions”.¹³⁶ But money is not the only thing, or sometimes even the main thing, that matters, because people are not just (or even) rational economic actors. We also want to be “(or to be seen as) good citizens and nice human beings”.¹³⁷ People’s ethics, for example, are important not just as the underpinnings of a top-down, formal system that influences them (eg through regulation), but also as an intrinsic motivator.

Most policy effort has historically been directed towards influencing people through economic incentives, and it is difficult for a formal system to tackle issues of morality and private action outside those tools or regulatory restrictions. For example, there would be little point in a statute like the RMA telling people that they “should” look after the natural environment.¹³⁸ We have previously said, for example, that:¹³⁹

The use of behavioural incentives is not easily expressed through the overarching formal structures of a system comprised of laws and institutions. Taxes, regulations and trading require legal frameworks to implement, but many behavioural insights are about encouraging public authorities to be creative in their approaches. We cannot legislate for that. It is a matter of leadership and practice.

However, there are some ways in which a future system could more formally recognise the value of behavioural or moral incentives. A lot of this is about mandating or encouraging public institutions to take measures, rather than the system directly creating incentives for firms and individuals. For example, the RMA currently provides that one function of the Minister for the Environment is to explore the use of economic instruments¹⁴⁰ (and that could usefully be strengthened to be a *duty*, given the general lack of progress on that front, and the benefits that green taxes would provide). However, it could also be expanded to include behavioural, not just economic, incentives.¹⁴¹ Furthermore, we see merit in the creation of a public, cross-cutting behavioural incentives group (perhaps within a Futures Commission or under the auspices of a government Futures Group) tasked with thinking about and funding behavioural change, and providing operational assistance to government departments, councils and community groups to conduct small scale experiments. As we pointed out previously, this is fertile ground for encouraging bottom up change, because:¹⁴²

more prosaic considerations than ethics [or regulations] often govern how people behave. For example, when choosing whether to drive or bike to work, ethics may be less important to some than the impact a helmet can have on one’s hair. In a future system, we need to

be conscious of the limitations of lofty principles and aware of the opportunities to shape behaviour change through more modest means.

Not everything needs to be a grand solution.

The concept of “nudging”, often referred to as a subdiscipline of behavioural economics, has grown in popularity in recent years, led by work by US academics Richard Thaler and Cass Sunstein.¹⁴³ It is based on the idea of “libertarian paternalism”; where possible, people should retain freedom of choice, but should be encouraged to behave in ways that furthers their own (and the public) good. For example, Dr Tim Denne has pointed to an experiment in Norwegian hotels that reduced food waste by 20 per cent simply by providing smaller plates to guests.¹⁴⁴ Recycling can be encouraged by providing larger bins relative to bins going to landfill. A picture of a pair of eyes above an honesty box increases the likelihood people will pay. Resource management is one area in which nudging has great potential, as intrinsic motivation is crucial where private persons are those who need to take action on the ground.

A future system should see the formal creation of a cross-agency behavioural nudging unit, and a more active mandate to investigate and deploy behavioural incentives to improve environmental outcomes.

We do not outline all possible behavioural nudges that would be useful. They are potentially limitless, and can rest on very different aspects of human psychology. For example, public institutions can:

- Make people more aware of information that could influence their choices¹⁴⁵ (eg that the range on electric vehicles is more than they might have thought, or their costs are less)
- Make positive private choices easier to make than negative ones, recognising that people often take the simpler route (eg making a default setting the more beneficial one, as in having to opt out of a measure rather than opt in, or designing buildings that require a card to be inserted for the lights to turn on)
- Provide visual cues to influence people subconsciously (eg painting footprints on the ground leading to rubbish bins)
- Coordinate activities, and the resources of others, that might otherwise not be deployed (making it simple to take positive action)
- Make positive actions enjoyable, other than a way to make money (eg providing preferential parking to those with electric vehicles, providing barriers to make cycle lanes safer)
- Highlighting inconsistencies between people’s morals and their actions, to force them to reconsider
- Make the consequences of people’s actions highly visible in a way that might not otherwise be obvious

(eg installing real time power usage meters that show how much you are paying)

- Making express comparisons – either positive or negative – between a person’s behaviours and those of his or her peer group (eg in terms of compliance with regulatory requirements, water use or energy use)

These are all small scale nudges, but while they would not be sufficient to overcome powerful economic incentives driving wider elements of environmental decline, they can still have a cumulatively significant impact. If people are prompted into behaving positively, and seeing the results, that can also instil a sense of pride and civic responsibility for tackling other, larger scale issues. The broader point is that we need a system that requires all forms of behavioural incentives to be considered, and encourages them to be deployed at both a national and local level.

Aside from requiring *public* institutions to investigate measures to influence people, there are particularly important sections of society that the system can target directly to incentivise behavioural change. Business is one of them. Corporates should be seen not as part of the problem, but a part of society uniquely positioned to deliver solutions. We have pointed out elsewhere that the most effective long-term solutions will be ones that see the agendas of commercial and private interests, public agencies and the general public being broadly aligned.¹⁴⁶

For example, the government is currently consulting on a proposal to strengthen climate related financial disclosures (see Chapter 8).¹⁴⁷ In our view this is a positive measure, both for reasons of improved transparency for investors and consumers, and for driving environmental change. As discussed in Chapter 8, it could be broadened to include the mandatory disclosure of other forms of environmental risk. It would complement an expansion of directors’ duties towards the environment. Data from corporate disclosures could usefully be integrated into the broader system of environmental reporting that we are proposing further below, enhancing the transparency and accountability of the private sector further.

Certification is another mechanism that shows promise in driving positive corporate behaviour. This involves a company or a product being independently verified as meeting robust environmental standards. It is a voluntary measure. The overall idea is that businesses will choose to be bound by higher standards and pursue them rigorously, because consumers are becoming more environmentally discerning. There is now significant reputational risk, as well as financial risk, for businesses that fail to deal with environmental issues.¹⁴⁸ Certification therefore opens business opportunities, where potential profit and competitive advantage outweigh the costs of improving environmental performance.¹⁴⁹ It encourages a race to the top without coercive regulation.

A lot of private certification already goes on, under a number of trusted brands.¹⁵⁰ But greater government involvement in certifying businesses and products as meeting a certain “desirable” level of performance (eg carbon neutrality, water sensitivity, or zero waste)

could usefully be pursued in a future system, to avoid greenwashing (making claims to environmental sustainability that may not hold up to scrutiny) and the confusing emergence of multiple private certification schemes (some stronger, and more independent, than others).¹⁵¹ The ability to take civil action (under the Fair Trading Act) against manufacturers and retailers for misleading environmental claims is not an adequate safeguard, in our view. Government certification could also be linked to New Zealand-specific environmental targets (eg set under a Future Generations Act), rather than generic international standards.

Certification would often require close oversight of a complex supply chain, and an onus of proof on those seeking certification that standards have been met all the way along it. It could generate a domino effect of environmental improvement through corporate peer pressure. Large, publicly facing companies, like those directly selling products and services, would have an incentive to put pressure on their less publicly accountable suppliers, like manufacturers or primary producers, so that they could obtain certification. Experience has shown that business is generally willing to bear the cost of obtaining meaningful certification,¹⁵² and the government (or Futures Commission) could play the role of accrediting certifying institutions rather than performing the role directly.

Business should be actively incentivised to improve environmental outcomes, including through a strengthening of corporate disclosures, broadening statutory directors’ duties under the Companies Act, and a greater government role in green certification.

Central to improving corporate incentives in the ways described above is public education. Consumers and investors need to have motivation to demand higher standards, and to vote using their wallets (and shareholder rights) where there is disparity in environmental performance between firms. A lot of this relies on requirements for transparency of information to both shareholders and consumers (eg corporate disclosures,¹⁵³ robust criteria for certification), but it also requires a public that cares about the story that such information is telling. Environmental awareness is increasing anyway, but there is still much misinformation in the public arena. We see potential in the government becoming much more active in matters of public education, which is supported already by the existing mandates of various public institutions.¹⁵⁴ This could take various forms:

- A review of the school curriculum, including considering the mandatory teaching of civics, environmental sustainability, and climate change, and enshrining more specific environmental principles within the Education Act itself (in line with those in a Future Generations Act). For example, in Italy the government is implementing mandatory teaching of sustainable development and climate change in all public schools from 2020. Now is a suitable time to explore such changes in New

Zealand, given related changes occurring (eg the compulsory teaching of New Zealand history)

- A review of tertiary programmes, including the core requirements of vocational qualifications leading to careers in jobs central to environmental management (eg planning, engineering etc)
- A more proactive mandate to pursue public service messaging on environmental issues. As we have asked previously:¹⁵⁵

[C]an we go further – highlighting to New Zealanders ... that we can all do our part to improve our environment? Should we embrace public service messaging about “100% Pure New Zealand” at home as much as we do overseas?

Education, training and capacity building is also important for those exercising public functions. For example, the slow uptake of qualifications for compliance monitoring and enforcement staff in councils, and the informal nature of the key education pathway (the Basic Investigative Skills course), reflect underinvestment and poor prioritisation of capacity building when compared with other public functions (planning, engineering etc). Greater investment in training, and recognition of experience, is likely to improve recruitment and retention rates in environmental enforcement by establishing a clear career pathway.¹⁵⁶ Again, this requires us to think carefully about incentives, not just strengthen regulations. For example, a building consent authority-style framework for formal accreditation of enforcement staff, run through the Ministry for the Environment (or other agency), may assist in establishing and maintaining capability.

A future system should strengthen public education relating to the environment, including through a review of the school curriculum (and amendments to the Education Act), a more vigorous approach to public service messaging, and support for publicly important career pathways.

It must be conceded, however, that there are broader societal and cultural pressures to contend with here. Education and capacity improvements will only go so far, and regulation is not a silver bullet either. Our values as New Zealanders may be harder to change through a formal system. We live in a society that constantly tells us to want more, that we deserve the latest shiny thing, and that often remains sceptical of environmental warnings until it is too late to prevent them. The desirability of “growth” is instilled into our daily lives, as if endless increases in resource exploitation and consumption are both possible and necessary if we are to avoid collapse. We may find, to our surprise and collective pain, that the very opposite is true, and that we are reaching the limits of our model for economic growth.¹⁵⁷ We tend to have blind faith in the ability of technology to solve our problems, ignoring the fact that humanity’s history of technological innovation has tended to create larger problems while solving others. And there is extreme reluctance to even mention the phrase *population policy*, despite the fact that

population growth is a significant driver of environmental pressures.¹⁵⁸

The reality is that more people, and constant expectations for higher standards of living, is putting increasing strain both on the resources we need and the environment that must receive our waste. While New Zealanders are generally more aware than those in some other countries, there is still a lingering perception among some that environmental issues are the preserve of “greenies” or a particular ethical niche, in contrast to the challenging reality that such issues have existential implications for our society, economy, and children. As the Tax Working Group has said, echoing Kate Raworth’s powerful message in *Doughnut Economics*,¹⁵⁹ “environmental challenges call for profound changes to the structure of economic activity.”¹⁶⁰ But when we are confronted by an advertisement urging us to address climate change, sandwiched between advertisements for diesel guzzling SUVs and the latest meat-based BBQ restaurant, which will win out? And when we face the prospect of not being able to do something we did yesterday, in the interests of future generations, what message will we send our politicians at the polling booths? There are limits to what a formal system can do, and people will need to do a lot of soul searching alongside a reform of our laws, institutions and tools.

Alongside reforms to a formal system, New Zealanders will need to do a significant amount of soul searching and test their collective behaviour and outcomes against their ethics.

13.13 A self-evaluative system

The final cross-cutting element of reform we deal with in this chapter is the need for meaningful, system-wide, evaluation.¹⁶¹ In other words, the system needs an inbuilt mechanism for reviewing the effectiveness of everything we are doing as a society. That sounds like a fairly obvious thing to do, but we have a system that, presently, fails to do so properly. In fact, there has been an abject failure to properly track the effectiveness of public interventions and to alter them in response.¹⁶²

There are four key components of a self-evaluative system:

- (1) Gathering robust information
- (2) Synthesising and reporting information in a meaningful, integrated and accessible way
- (3) Evaluating the system’s performance in light of that information
- (4) Taking corrective action in response

We have already touched upon several aspects of system-wide evaluation in the context of particular statutes. For example, we highlighted the importance of requiring clear targets and triggers for action to be set, and for corrective action (eg plan or consent reviews, or threatened species management plans) to be automatically undertaken in response to those triggers.¹⁶³ We also outlined a role for a Futures Commission in evaluating the performance of

public authorities (issuing a report card), and requiring the government to respond.¹⁶⁴ Another example was where we recommended that compliance monitoring and enforcement information be included in a broadened system of environmental reporting.¹⁶⁵ In this chapter, we take a broader view and consider how all this would contribute to a system that is responsive, and constantly striving for improvement, in a future that will be defined by rapid change and uncertainty.¹⁶⁶

13.14 The importance of information

First, we need robust and useful information, through monitoring and research. This is to understand:

- (1) What outcomes are being realised (eg by measuring indicators of freshwater quality)
- (2) How outcomes are changing over time (using comparable datasets over meaningful timeframes, including baseline data)
- (3) What is causing outcomes or trends (eg what human activities are taking place)¹⁶⁷
- (4) How outcomes are changing in response to interventions (eg regulatory restrictions or pricing mechanisms)

Monitoring people's compliance with consents and permitted activity standards can yield quite detailed information that can be used not only for the purpose of enforcing compliance (eg through prosecutions) but also for understanding environmental indicators and pressures in particular areas. But the need for information goes well beyond that needed for compliance purposes, which is neither strategic nor comprehensive. We need effective monitoring of the general state of the environment.

It is essential that state of the environment monitoring is adequately funded. In some cases, that should be contributed to by central government (where not related to impacts from a particular section of the regulated community that can be charged directly).¹⁶⁸ There should also be an explicit statutory duty for public authorities to collect, store and analyse environmental data in a manner that is sufficient to track trends over time.¹⁶⁹ This statutory direction is currently missing.¹⁷⁰ Furthermore, as part of New Zealand's environmental reporting regime, central government should be specifically obliged to analyse information available, clearly identify any gaps, and make a plan (and investment case) to address them over time.¹⁷¹

At the moment, there are significant gaps in our information base. These exist across the board. One example in urgent need of attention is in relation to waste streams. Outside of the small proportion of landfills subject to a disposal levy, we simply do not know how much waste is being disposed of or its composition.¹⁷² That makes it extremely difficult to measure progress towards the stated goal of a circular economy,¹⁷³ and needs to be required.¹⁷⁴ But other examples abound. The Parliamentary Commissioner for the Environment has recently pointed out, for instance, that we lack reliable information on

land cover and a map of how we are using land. More fundamentally, we lack a core, agreed set of environmental indicators and consistent time series data.¹⁷⁵

All of this suggests an urgent need for a more systematic national approach to funding and collecting environmental data based on prioritisation, not (as it has been described) the "passive harvesting" of information we happen to have.¹⁷⁶ We do not comment on what those priorities should be specifically, but effort should be aligned with the imperatives outlined in the principles of a Future Generations Act. Crucial to that would be the collection of information relevant to Māori interests, in order to support Treaty obligations. A national monitoring programme should be designed in a way that would support the eventual deployment of an environmental footprint tax described earlier in this chapter.

That said, good information is not just about monitoring in the narrow sense of recording particular environmental indicators. We don't just lack data, we also lack understanding. Applied scientific research is therefore vital. Information on state and trend of species and ecosystems is inadequate due to the chronic underfunding of fundamental science, most particularly in the marine area.¹⁷⁷ Also crucial will be understanding what the future may bring. Emerging issues may require focused attention,¹⁷⁸ and should be anticipated rather than responded to. In our model a Futures Commission would have a futures scanning role (see Chapter 8), and the government would be required to respond to its reports on looming threats and opportunities.

Managing complex decision-making in a context of high levels of uncertainty will always be challenging (a reason why the precautionary principle is vital), but the lack of fundamental data exacerbates this and limits the potential for effective interventions. There has not been enough effort to close the gaps in data over the past decade, if not much longer, and a strategic focus on doing so is long overdue.



A spotlight on integrated data management

A future system needs to do much more than just collect information. How it *flows* through the system is also crucial for reasons of efficiency and accessibility. Regular, integrated environmental reporting, culminating in periodic glossy publications, is a key aspect of this. It means that meaningful information reaches all New Zealanders in accessible form.

However, underlying approaches to how raw data is managed are also important. Numerous reviews have raised concerns about the management of environmental information, from consent level compliance records through to the management of environmental data that feeds from a regional level to a national level. There is ample scope to make improvements in the way information is collected and stored at a regional level, the standardisation of how it is treated and the extent to which it can be pooled at a national level (and the ease of doing so).¹⁷⁹ The Parliamentary Commissioner for the Environment has recently released a persuasive report outlining improvements needed in our system of environmental reporting, highlighting among other things that there are “inconsistencies galore” in how, by whom and for what reasons we collect and analyse data.¹⁸⁰

Doubtless a significant part of the solution is a greater investment in common software, integrated databases, and intelligence tools that simplify the processes used to transfer and aggregate information that originates from many different places (in terms of physical locations, institutions, tools, and legislation).¹⁸¹ For example, councils could usefully be required to submit and maintain records and monitoring data, in a common format, within a single national consenting and compliance database. There could be common requirements, possibly contained within National Planning Standards under the RMA or (given it would not be just about the RMA) within regulations under an environmental reporting regime.¹⁸² That would ease the process for national level environmental reporting and make comparisons (and identification of failings and successes) easier.

In a future system, central government should be specifically obliged to analyse existing environmental monitoring data, clearly identify any gaps, and make a plan to address them over time. Information and data should be managed in a more integrated and standardised manner in a national database, or at least in a form that makes aggregation of data easy at national and cross-regional levels.



13.15 Reporting

The second key component of an effective system for evaluation is reporting. Information needs not just to be collected, but to be integrated and presented in a way that provides both transparency (people can access it and understand it) and usefulness (it is interrogated in a way that links causes and effects). Most councils report in some way, but a general RMA duty to monitor is not accompanied by an obligation to provide regular reporting of that information.¹⁸³ That should be introduced, and accompanied by a direction that it occur in a consistent way across the country.¹⁸⁴ Data could also usefully be subject to audit by Stats NZ or an independent qualified panel (or experts within an independent Futures Commission), and synthesised at a regional level every three years to be published prior to local government elections.

It was only in 2015 that New Zealand obtained a *national* framework for environmental outcomes reporting. That was a positive, and overdue, step. However, the framework is focused primarily on reporting biophysical outcomes (and, as such, is split into a cycle of domain-based reports – eg the state of our freshwater, our land, our oceans etc). It does not include reporting on public interventions or on any responses to those outcomes (eg the number of consents issued, the instances of non-compliance and enforcement action, or the use of economic instruments),¹⁸⁵ let alone link those measures in a meaningful way to the environmental outcomes that are being reported on. For example, we may legitimately wonder: what difference does it actually make to nationally important indicators when there is a systemic failure to enforce consent conditions?¹⁸⁶ Or when we introduce a new NPS? Or when we amend the RMA?

Furthermore, while environmental reporting does talk about the human activities putting immediate pressure on the environment (eg agriculture, fisheries etc), it does not make obvious the links between them or clearly attribute causation for poor outcomes. Nor is it required to consider the raft of voluntary or “soft” measures being taken (eg the use of covenants, community restoration work, education). These can significantly impact on environmental indicators in a positive way, or hide the damage being done by other things (eg enforcement failures, damaging industries).

Much monitoring and dissemination of information also currently occurs under different statutory frameworks in a fragmented way. While that may be appropriate – monitoring needs to be linked to statutes with particular purposes (eg pest management, waste minimisation, pollution control, threatened species), in the future we need our reporting framework to tell a wider ranging, integrated, story about our environment. That will need to incorporate Māori perspectives on the environment, including traditional knowledge and wisdom (mātauranga Māori).

Overall, we have an environmental reporting framework focused on describing immediate environmental

pressures, the resulting state of the environment, and the impacts or threats that this causes for people (a “pressure, state, impact” model). It fails to tell a story about two other crucial things: drivers (underlying causes of degradation) and responses (what we are doing to make things better or worse).¹⁸⁷ That needs to change. Australia offers a model whereby those things are more closely integrated, and we could usefully follow suit.¹⁸⁸ Reporting should also be more closely aligned with the electoral cycle, to allow informed debate about environmental issues prior to a general election.¹⁸⁹

A spotlight on reporting: Compliance monitoring and enforcement¹⁹⁰

Reporting on compliance monitoring and enforcement activities by councils is an area that has had significant progress made in recent years. The regional sector has introduced a bespoke reporting framework that all regional councils and unitary authorities have contributed to for two successive years: the Regional CME Metrics project. The first report was released in May of 2019.

There are opportunities to learn from this project in designing an integrated reporting framework that draws on a range of council functions (not just planning and CME) to link policy interventions and environmental outcomes more clearly. For example, a fully integrated model of system performance monitoring and reporting should have CME nested within it as a subsection, with clear and obvious links to the wider system (eg linking CME activities to the outcomes that are actually being seen in biophysical monitoring).

A future system should see a more integrated and wide-ranging system of environmental reporting. Reporting should include not just the results of state of the environment monitoring, but also tell a story about underlying causes as well as related measures taken by public authorities and others (eg compliance activities). Stronger links need to be made between outcomes and human actions to make reporting effective.

13.16 Evaluation

Once we have information in a useful form, we need to consider what that means. We don't monitor for the sake of it, or just out of scientific curiosity. We do so in order to *do something in response*. As Dr Marie Doole has pointed out:¹⁹¹

It is critical to consider what becomes of information once it is pooled and available for extraction and use. A systematic review of the reporting obligations across the European Commission found a plethora of reporting obligations (181 across 58 statutes) but limited requirements for dissemination and use of that information.¹⁹² Ensuring that we have high quality data is one challenge, but a coherent framework that draws

it together, uses it for decision-making and responds to it effectively are also important or we risk monitoring for the sake of it.

Therefore, we need to ask: have recorded public interventions been successful (eg positive incentives for regulatory compliance, product stewardship schemes)? Have they failed (eg a lack of enforcement, or underfunding)? Or have they even *exacerbated* poor outcomes (eg consenting inappropriate dairy conversions, or encouraging urban sprawl)?

This step relies on having not just data, but also clear statements of outcomes sought – including in the form of targets and bottom lines – against which concepts like “success” and “failure” can be measured. At present, we lack targets and clear objectives (except for climate change). As such, environmental reporting is for the most part reduced to general statements about positive and negative trends rather than “achievement” or “failure” of a system within which those trends are occurring.¹⁹³ This clouds a sense of accountability for the very real problems we are seeing.

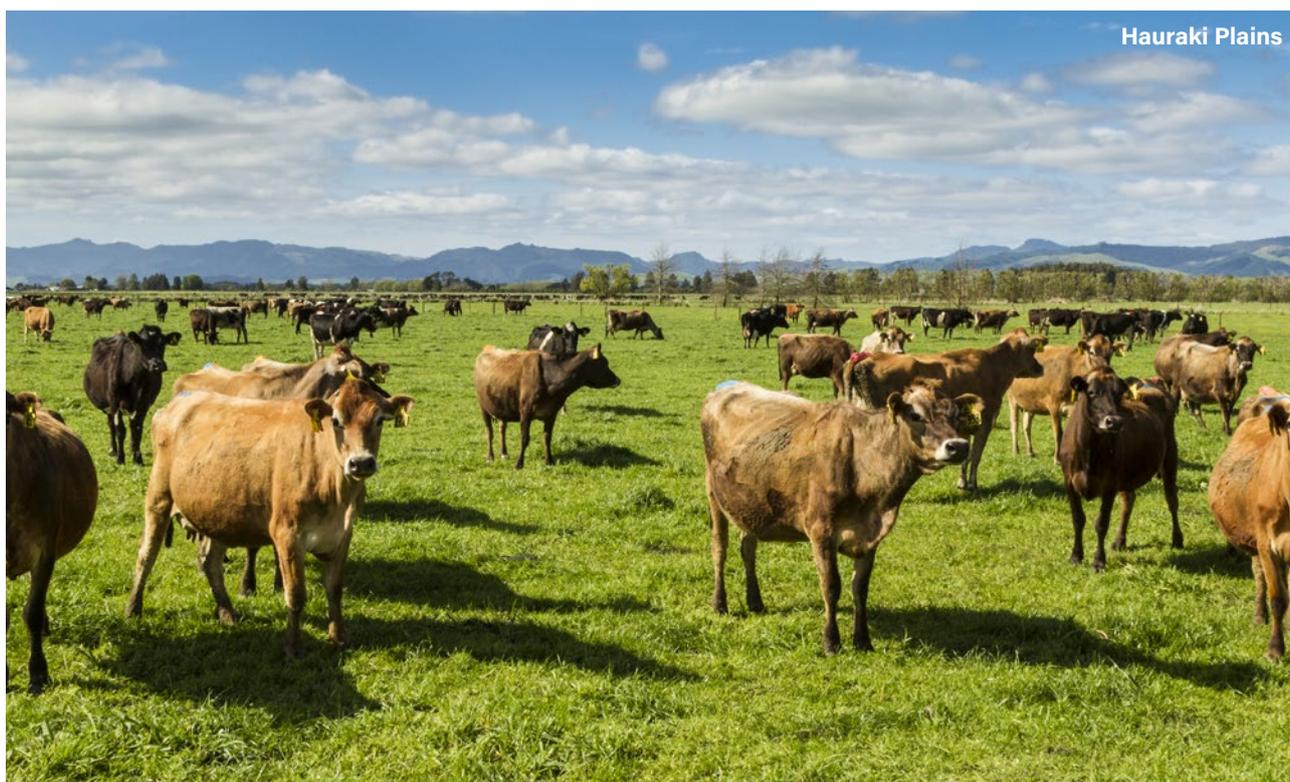
Admittedly, evaluation does already happen in more specific contexts – for example, in the review of consent conditions, proposed reviews of emissions targets for climate change, and in rolling whole of plan reviews – but seldom at a broader level. In our laws, there are few outcome-based triggers set in advance for when review must occur. In Chapter 12, for example, we highlighted that the classification of a threatened species does not automatically mean anything for its management or funding under conservation legislation. Under the RMA, councils are required only to take “appropriate action” where “necessary” in light of monitoring results, with no real clarification about when (or what) measures are

necessary. And the RMA itself seems to be reviewed more often in response to political priorities (resulting in endless amendment Acts that are enacted and then undone) than pre-set trigger points based on the consistent monitoring of declining biophysical outcomes.

To address such issues, we have suggested that a future system should require system-wide targets to be set for environmental outcomes (eg under a Future Generations Act, the RMA and other relevant legislation), and that progress towards them should be closely monitored and assessed through periodic scorecards issued by a Futures Commission. This should provide powerful incentives for agencies themselves to self-evaluate (to avoid a poor scorecard).¹⁹⁴ The approach aligns with the type of accountability mechanism we have recently seen put in place for climate change, whereby progress towards clear targets is evaluated by a Climate Change Commission. Yet climate change is not unique in this sense, and other environmental issues require a robust accountability framework too. Biodiversity is a clear example.

Robust independence will be vital here. The political implications of a poor scorecard (issued before a general election) suggests that evaluation should not be the role of officials, who may in practice face difficulties when providing free and frank advice, despite a degree of independence.¹⁹⁵ We therefore see robust evaluation as a role for the Futures Commission.

A future system will need to be more self-evaluative. The need for review or other measures should be triggered by pre-set indicators. An independent Futures Commission would play a significant role in evaluating outcomes and agency performance.



13.17 Corrective action

The fourth and final component of a self-evaluative system is a firm requirement for corrective action. If poor outcomes are identified and reported on, then something concrete needs to happen in response. What a particular action looks like could vary, depending on the context. Sometimes corrective action may need to be triggered directly by a poor outcome, without the need for an additional step of a review or extensive evaluation. In that case, the system can be described as self-corrective, not just self-evaluative. It would actively consider potential futures in advance, and plans for responses to be rolled out if certain things occurred.

At central government level, pre-planned responses might even include a conditional programme of legislative change. For example, the “backstop” measure of including biological emissions in the emissions trading scheme, if an on farm levy system makes insufficient progress, is a pre-planned corrective measure. So too are triggers contained in the NPS on Urban Development Capacity, where sufficient developable land needs to be released in the event of seeing certain economic indicators emerge. Similarly, a voluntary and publicly assisted riparian planting plan in Taranaki has proceeded with the understanding that, after a certain period of grace, such measures would become mandatory (essentially, a regulatory “Plan B”).

This general type of approach is a positive one, in our view. It is precautionary, recognising that there is sometimes not enough time to go back to the policy drawing board (for a review) once negative indicators are obvious. It provides a cascade of carefully considered backup plans – comparable, in a sense, to the way we deal with civil defence emergencies and biosecurity incursions. In fact, that “emergency” analogy is increasingly appropriate to aspects of environmental decline, and is reflected in the various conditional reforms we have included in this report (eg removing rule making functions and CME responsibility to an arm’s length EPA with a strongly protective mandate, if things did not improve). The creation of such “backup plans” would be supported by a Future Commission’s role in scanning for future threats, and an obligation for the government to respond to those in some way.

In other cases, corrective action may follow a robust review (rather than being an automatic, pre-planned response to triggers). A requirement for action following a review is generally not well provided for in the current system. For example, national direction under the RMA is created, reviewed and changed in an ad hoc way, and there is no requirement for prioritisation based on the results of environmental monitoring and reporting. We can see this in the fact that biodiversity has been in decline for a long time, but we are still awaiting national policy on it.¹⁹⁶ Again, there is only a weak requirement for “appropriate” action to be taken by local authorities under the RMA, despite an obligation to monitor plan effectiveness.¹⁹⁷ And we have already mentioned the inadequacy of a framework that does not require a

review, let alone a policy response (eg a management plan or increased funding), where there is an elevation in threat status for indigenous species. As Dr Marie Doole has put it:¹⁹⁸

Once it is established that a species or ecosystem is imperilled or an emerging environmental pressure is causing significant impacts, there are no further consequences in law. This is a stark example of a system that lacks triggers and action points where environmental consequences have policy responses.

There is no point in conducting a review if nothing comes of it other than a report to sit on a shelf. Where a need for evaluation is triggered in a future system – either on a regular basis (ie when reporting occurs) or when the alarm bells go off in response to trigger points – we envisage that public authorities would be required by law to outline how they intend to respond. In particular, we have pointed out in previous chapters that the government (and possibly councils) would be required to respond to a scorecard issued by the Futures Commission, outlining what corrective measures would be taken.¹⁹⁹ This is conceptually similar to what happens in the Welsh system.²⁰⁰ Accreditation requirements could also be introduced for councils exercising environmental functions.²⁰¹ And the government would be required to review and amend national direction under the RMA in response to pre-set trigger points based on environmental indicators.²⁰²

A future system should have clearer triggers requiring some form of policy or regulatory action to be taken in response to the measurement of unacceptable environmental indicators (or in response to a review that is triggered by those indicators). Government and councils would be required to respond to both the results of environmental reporting and an independent report card issued by a Futures Commission.

In Figure 13.2, we outline key differences between the current system and a future system, in terms of monitoring, reporting and evaluation.



Type of monitoring and reporting	Current situation	New framework
Monitoring of public interventions	Councils monitor the effectiveness of plans and other methods under section 35 of the RMA to a variable standard, but there is limited oversight and often significant data gaps.	Mandatory reporting on the effectiveness of a wider range of public and private interventions within an integrated state of the environment monitoring framework (ie linking interventions to more clearly defined outcomes, eg targets)
Monitoring of overall agency effectiveness	Extremely limited, other than voluntary participation by regional sector in CME audits and overarching accountability for financial management (eg to the Office of the Auditor-General)	Accreditation requirements could be introduced for councils exercising environmental functions (eg under the RMA) Review and oversight through regular reporting and assessment (eg a scorecard) by an independent Futures Commission, following regular reporting
Monitoring of compliance and enforcement more specifically	Ad hoc and discretionary monitoring and reporting occurs at a council level. Annual reporting occurs via the government's National Monitoring System, although questions are inconsistent and there are limited details. The Compliance and Enforcement Special Interest Group (CESIG) metrics programme has limited integration with broader state of the environment monitoring and reporting (ie the outcomes being seen). There is limited monitoring of the effectiveness of informal, education-based CME measures). There is also limited monitoring of permitted activity standards.	Mandatory CME reporting within an integrated framework for state of the environment reporting. Integration of CESIG metrics into the government's National Monitoring System and a CME specific national report produced, subject to independent review. A clear link drawn between CME activities and the environmental outcomes being measured. Greater monitoring and reporting of permitted activities (including funding).

Figure 13.2: Monitoring and reporting requirements needed to ensure the effective evaluation of council performance in a future system.



13.18 Concluding comments

In this penultimate chapter, we have explored two kinds of matters. First, we looked at a range of separate statutes that we generally see continuing to operate in a future system. These include statutes relating to hazardous substance and genetic modification, biosecurity, heritage, the management of Crown land, and flood and erosion control. Almost all existing statutes will require close attention following framework level reforms, and we have suggested some areas ripe for exploration.

We looked at waste minimisation more closely, concluding that the Waste Minimisation Act should remain the cornerstone of New Zealand's efforts to move towards a circular economy. Yet it needs to be strengthened, and its tools (eg product stewardship schemes, product restrictions, the Waste Minimisation Fund and the waste disposal levy) need to be used with more vigour.

Secondly, we considered more systemic, cross-cutting kinds of reforms that would not comfortably fall within any given statutory framework, or which require a more holistic perspective. Central to that was funding. We see merit in expanding the funding and financing tools available to public authorities (including local government), providing a more active and strategic deployment of central government funds, and protecting vulnerable but essential public functions through greater hypothecation (requiring defined sources of revenue to be used for particular purposes).

Money also has powerful incentive effects, and economic instruments should be used in a more deliberate manner to improve environmental outcomes. Poor environmental outcomes seem almost inevitable in the current economic context, which generally enables harm and renders environmental efforts costly. Unchecked economic drivers risk a race towards regulatory bottom lines, which will then inevitably face mounting pressures to be weakened.

If we wish reform to alter outcomes significantly, we will need to adjust broad underlying economic settings as well as regulatory, policy and funding settings. The system will need to influence people's behaviour, not just seek to stop people doing things.²⁰³ We particularly acknowledge the power of economic instruments, such as taxes and charges, to help change the way people behave in relation to the environment.

We echo the findings of the Tax Working Group that we need to deploy green taxes with more vigour in New Zealand. We also need more strategic deployment of subsidies, and public co-investment, to drive environmental enhancement. Over the longer-term, we support further investigation and transition towards measures that will transform our tax base, by embedding positive incentives into the way we raise revenue. That would be in the form of an environmental footprint tax (and rebate) system.²⁰⁴ While this could be fiscally neutral (and recycle any revenue into payments for positive

effects, as with targeted green taxes), it could instead be designed to generate funds for broader, albeit compatible, purposes. There will be a number of challenges to work through, but we do not see those as insurmountable.

It is important to remember also that people respond to incentives other than financial ones. In fact, the interplay between economic and moral signals is a complex and unpredictable one, and needs to be approached with caution. As such, we have suggested that a future system engage much more strongly with people's underlying behavioural drivers alongside economic ones. We have recommended the creation of a cross-agency behavioural nudging unit, and a more active mandate to investigate and deploy behavioural incentives to improve environmental outcomes. We also supported measures to strengthen financial disclosures and to impose firmer environmental duties on company directors, and proposed a more active role for the government in green certification.

Education is also key, and we have proposed a future system in which environmental and climate issues are embedded in the Education Act and school curriculum, where there is a more vigorous approach to public service messaging, and where there is greater support for publicly important career pathways. We need to think about how the attitudes of future generations can be influenced in a way that prevents the mistakes of the past being repeated.

Finally, we explored the importance of a system that is self-evaluative. In a way, this brings us full circle. Since describing the current system in Chapter 4, we have outlined a series of changes we think would be desirable in light of our reform criteria. But a system is never static, and needs the agility to respond to challenges and opportunities that are difficult to predict.

Information and monitoring is crucial here. Information must also be synthesised to tell a story that the public and policy-makers can engage with, and where observed outcomes link much better to an explanation of what is causing them and how effective public interventions have been in influencing them. Finally, the system requires a much stronger approach to evaluation and corrective action. It is no use observing and reporting on negative trends if there is no meaningful obligation to do anything about it. In particular, more effort needs to go into establishing trigger points, in advance, for when reviews and pre-planned responses get deployed. The Biodiversity Collaborative Group has summed up the need for a self-evaluative system nicely, in that it is crucial to take:²⁰⁵

a comprehensive approach to understanding [what] is improving or declining. It is not sufficient to simply encourage actions without knowing what the results are. It requires nationally consistent monitoring and reporting in a way that is accessible to everyone. It also means being prepared to act when things are clearly declining...

ENDNOTES

- 1 For example, in the varying expressions of "sustainability" across legislation. See G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 137.
- 2 For example, aligning permitting processes under multiple statutes needed to progress a single type of activity (eg urban development).
- 3 G Palmer "Law-making in New Zealand: Is there a better way?" (2014) 22 Wai L Rev 1.
- 4 In particular, whether genetic technology should be deployed more to enhance food production and manage pests in light of pressures on resources and indigenous species.
- 5 See Chapter 8.
- 6 The Continental Shelf Act 1964 is little more than a shell for key elements of the Crown Minerals Act framework to operate beyond the territorial sea.
- 7 That said, climate change would need to be much better integrated, including in relation to oil and gas exploration. This would be partly addressed through broader government decision making criteria under a Future Generations Act (see Chapter 8), but a specific legislative alignment programme would also be desirable. We note that the government is now pursuing a review of the Act, which should progress in tight connection with wider system reform.
- 8 See Forests Act 1949, pt 3A.
- 9 As do other tools like water conservation orders, which do not rely on more general restrictions in Part 3 of the Act to operate. There is a scattering of other administrative provisions in the Forests Act that would need to be considered.
- 10 Although they could conceivably be merged together, that question would require further investigation.
- 11 See <www.nzherald.co.nz/the-country/news/article.cfm?c_id=16&objectid=12206896>
- 12 See Chapter 5. See also Ministry for the Environment *Report of the Minister for the Environment's Resource Management Act 1991 Principles Technical Advisory Group* (2012); *Report of the Environmental Defence Society Technical Advisory Group on the review of sections 6 and 7 of the Resource Management Act 1991* (April 2012). These statutes are primarily about local government powers and obligations that have been inherited to proactively manage land and waterways, and should not alter the protective provisions of the RMA. They seem a better fit for integration into local government and infrastructure legislation.
- 13 The RMA does not restrict the generation of material likely to become waste.
- 14 H Blumhardt "Trashing waste: Unlocking the wasted potential of New Zealand's Waste Minimisation Act" (2018) 14(4) Policy Quarterly 14.
- 15 J Hannon (*Un*) *changing behaviour: (New Zealand's delay and dysfunction in utilising) economic instruments in the management of waste?* (submission to the Parliamentary Commissioner for the Environment, prepared on behalf of the New Zealand Product Stewardship Council, 2018).
- 16 *Ibid.* See also Wilson and others *The New Zealand waste disposal levy: Potential impacts of adjustments to the current levy rate and structure* (Eunomia Research and Consulting, 2017); OECD *Environmental performance review - New Zealand* (2017) at 73.
- 17 Waste Minimisation Act 2008, s 41(a).
- 18 H Blumhardt "Trashing waste: Unlocking the wasted potential of New Zealand's Waste Minimisation Act" (2018) 14(4) Policy Quarterly 14 at 21; Tax Working Group *Future of tax: Final report volume 1 - recommendations* (2019).
- 19 Wilson and others *The New Zealand waste disposal levy: Potential impacts of adjustments to the current levy rate and structure* (Eunomia Research and Consulting, 2017) at 9.
- 20 Tax Working Group *Future of tax: Final report volume 1 - recommendations* (2019).
- 21 Ministry for the Environment *Review of the Effectiveness of the Waste Disposal Levy* (2017).
- 22 Wilson and others *The New Zealand waste disposal levy: Potential impacts of adjustments to the current levy rate and structure* (Eunomia Research and Consulting, 2017) at 17; <<https://gazette.govt.nz/notice/id/2019-go1460>>; <www.beehive.govt.nz/release/fresh-funding-reduce-waste>
- 23 Waste Minimisation Act 2008, s 23.
- 24 To include e-waste, tyres, refrigerants, agrichemicals, plastics and packaging.
- 25 See generally T Denne and L Wright *Evaluating the costs and benefits of introducing a container deposit system for New Zealand: Summary of analysis* (Covec, 2016).
- 26 For example, food waste – which can be used to benefit those in need as well as reducing waste streams to landfill.
- 27 Targets can be set under the Waste Minimisation Act.
- 28 H Blumhardt "Trashing waste: Unlocking the wasted potential of New Zealand's Waste Minimisation Act" (2018) 14(4) Policy Quarterly 14 at 19.
- 29 For example, as of 2014, voluntary schemes had diverted 1.4 per cent of New Zealand's total waste from landfill; see H Blumhardt "Trashing waste: Unlocking the wasted potential of New Zealand's Waste Minimisation Act" (2018) 14(4) Policy Quarterly 14.
- 30 See R Thaler and C Sunstein *Nudge: Improving decisions about health, wealth and happiness* (Penguin, 2009); C Sunstein *Why nudge: the politics of libertarian paternalism* (Yale, 2014).
- 31 RTT Stephens "Economic instruments for environmental management" in G Severinsen and R Peart *Reform of the resource management system: The next generation - Working paper 3* (2018) at 185.
- 32 See G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 255; oral statement of Professor Spiro Pollalis, 2018 United Nations Sustainable Infrastructure Conference, October 2018. Compare R Joseph "The Treaty, tikanga Māori, ecosystem-based management, the RMA and power sharing for environmental integrity in Aotearoa New Zealand – possible ways forward" in G Severinsen and R Peart *Reform of the resource management system: The next generation - Working paper 3* (EDS, 2018) at 23.
- 33 G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 186.
- 34 See Chapters 9 and 10; New Zealand Productivity Commission *Local government funding and financing* (Draft report, July 2019).
- 35 This is due to be provided to the government on 30 November 2019.
- 36 For example, measures to support compact urban form, infrastructure for active transport and mass transit, meeting environmental standards for freshwater, implementing water sensitive urban design etc.
- 37 Compare J Boston and J Lawrence *The case for new climate change adaptation funding instruments* (Institute for Governance and Policy Studies and New Zealand Climate Change Research Institute, 2017).
- 38 See New Zealand Productivity Commission *Local government funding and financing* (Draft report, July 2019); Infrastructure New Zealand *Building regions: A vision for local government, planning law and funding reform* (2019) at 18.
- 39 G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019).
- 40 Including costs of permitted activity monitoring. Generally, see MA Brown "Compliance, monitoring, enforcement and evaluation" in G Severinsen and R Peart *Reform of the resource management system: The next generation - Working paper 3* (EDS, 2018).
- 41 Linking government funding to council performance has risks, and requires caution; it should not be used as a back door to push political agendas, to blur the line between "good" planning practice and the expression of local values, or as an alternative to the use of due process through national direction under the RMA.
- 42 *Report of the Biodiversity Collaborative Group* (2018) at 92.
- 43 See also further below, where we note that some aspects of monitoring would be a core element of a new environmental footprint tax, and could be undertaken by central government for the purposes of establishing tax liability. On the need for central government support for biodiversity monitoring, see *Report of the Biodiversity Collaborative Group* (2018) at 105.
- 44 See Chapter 7. Compare proposals under the Resource Management Amendment Bill 2019.
- 45 See *Report of the Biodiversity Collaborative Group* (2018) at 94.
- 46 We generally echoed the sentiments of the Productivity Commission and Infrastructure New Zealand, suggesting that we need to revisit our current arrangements to ensure the right incentives are in place, that enough money can be raised, and that the right institutions are making decisions.
- 47 See New Zealand Productivity Commission *Local government funding and financing* (Draft report, July 2019).
- 48 Which could be achieved through a variety of institutional forms. A dedicated drinking water regulator is a good idea, and economic regulation may be best achieved through expanding the role of the Commerce Commission.
- 49 That would include assistance to public providers – councils and CCOs – as well as to private providers facing stricter regulation.
- 50 But they do not necessarily do so (eg with a feebate scheme, where revenue raised subsidises associated rebates).
- 51 G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 249.
- 52 For example, to fund a new Environmental Defender's Office, a Futures Commission, an Environmental Water Holder, or a Climate Change Adaptation Fund.
- 53 G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019).
- 54 MA Brown and others *Vanishing nature: Facing New Zealand's biodiversity crisis* (EDS, 2015).
- 55 *Report of the Biodiversity Collaborative Group* (2018) at 86.
- 56 See T Denne "Resource management law reform and economics" in G Severinsen and R Peart *Reform of the resource management system: The next generation - Working paper 3* (EDS, 2018) at 173.
- 57 G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 272.

- 58 Compare also New Zealand Productivity Commission *Local government funding and financing* (Draft report, July 2019); Infrastructure New Zealand *Building regions: A vision for local government, planning law and funding reform* (2019).
- 59 As long as there were robust use of redistributive mechanisms to address regressivity (disproportionate impacts on the poor, who value a dollar at the margin more than wealthier people).
- 60 For example, through targeted rates, direct user-charging, or other proxy user-charging measures (eg a bed tax for accommodation providers).
- 61 Subject to careful regulatory constraints.
- 62 The Productivity Commission has pointed out that “where applied, volumetric metering and pricing appears to have reduced peak water consumption and waste by up to 30%... [and] peak daily water use decreased by about 25% in the two years after universal metering was put in place”; see New Zealand Productivity Commission *Local government funding and financing* (Draft report, July 2019) at 238.
- 63 See *ibid* at 154, 162.
- 64 Or other services like access to huts in the conservation estate.
- 65 Separate to any fees needed to cover the administrative costs of processing regulatory measures like resource consents.
- 66 G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 259.
- 67 Collecting resource rent helps to protect against an inefficient allocation of the resource. The theory goes that the resource should be allocated to those uses that create the most value (including intangible value), thereby maximising net benefit. See generally J Scherzer and J Sinner *Resource rent: Have you paid any lately?* (Ecologic Research Report No 8, December 2006) at 9; Ministry for the Environment *Water programme of action: Water allocation and use* (December 2004) at 24.
- 68 See T Hazledine “Economics and the resource management system” in G Severinsen and R Peart *Reform of the resource management system: The next generation - Working paper 3* (EDS, 2018) at 152. Water is different from waste, however. We are not aiming for a constant reduction in water use (only where there is over-allocation) in the same way that we are aiming for zero waste.
- 69 We have said in Chapter 7 that the insertion of allocative principles should allow such decisions to be made in a more balanced manner than under a market-led approach.
- 70 Resource rentals can be imposed under the RMA already for many things, including coastal space, geothermal energy, sand, and shingle, but this has not been done in a systematic way.
- 71 For example, some activities may be argued to provide significant public benefits already, and therefore no need for a charge (eg water for fire fighting).
- 72 That is not just the expectation that water rights (ie resource consent) will continue to be granted. It is also that water abstraction would attract no charge.
- 73 G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 257.
- 74 There is a difference between the exclusive private use of a resource (eg a private jetty in the common marine and coastal area, or using the surface of lakes and rivers) and a public use. For example, a resource rental should not be imposed for going to the beach or river for a swim.
- 75 A fact recognised in the Continental Shelf Act and its cross-referencing to the Crown Minerals Act.
- 76 Continental Shelf Act 1964, s 5A.
- 77 Resource Management Act 1991, s 64A(1).
- 78 See, for example, Gisborne District Council Proposed Variation 15 to the Proposed Regional Coastal Environment Plan at 9; Tasman District Council Section 32 report on Draft Plan Change 56 at 14. Reasons offered include a low level of coastal occupation in a district; uncertainty over future ownership and management of the foreshore and seabed; and the likelihood of a lengthy plan change process holding up other priorities.
- 79 For example, where others are excluded from an occupied area. See also MA Brown and others *Vanishing nature: Facing New Zealand’s biodiversity crisis* (EDS, 2015) on the need for a coherent charging regime for coastal occupation and use.
- 80 For example, to fund the activities of a new Environmental Defender’s Office.
- 81 On hypothecation of revenue, see G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 272. Rentals could even be viewed as a payment to the natural world for its own resources, especially if nature were to be given general rights (and humans corresponding duties) under a Future Generations Act (see Chapter 8).
- 82 Discussed in Chapter 12.
- 83 See Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010.
- 84 Compare R Joseph “The Treaty, tikanga Māori, ecosystem-based management, the RMA and power sharing for environmental integrity in Aotearoa New Zealand – possible ways forward” in G Severinsen and R Peart *Reform of the resource management system: The next generation - Working paper 3* (EDS, 2018).
- 85 Sometimes described as “Pigouvian”.
- 86 Taxes could include those on inputs that cause pollution (eg fertilisers) or on outputs (eg nitrogen).
- 87 Tax Working Group *Future of tax: Final report volume 1 - recommendations* (2019). Compare OECD *Environmental performance review - New Zealand* (2017).
- 88 Tax Working Group *Future of tax: Final report volume 1 - recommendations* (2019).
- 89 Resource Management Act 1991, s 24(h).
- 90 New Zealand Council for Infrastructure Development (now Infrastructure New Zealand) *Integrated governance, planning and delivery: A proposal for local government and planning law reform in New Zealand* (2015) at 23.
- 91 Tax Working Group *Future of tax: Submissions background paper* (2018). Contrast Waste Minimisation Act 2008, s 46(2).
- 92 T Denne “Resource management law reform and economics” in G Severinsen and R Peart *Reform of the resource management system: The next generation - Working paper 3* (EDS, 2018); S Bullen and others *The use of economic instruments for the control of air quality in Auckland: A scoping study* (Report prepared for the Auckland Regional Council, 2000).
- 93 See New Zealand Society of Local Government Managers *Rating knowhow: A guide to the Local Government (Rating) Act 2002* (2013).
- 94 S Bullen and others *The use of economic instruments for the control of air quality in Auckland: A scoping study* (Report prepared for the Auckland Regional Council, 2000).
- 95 New Zealand Productivity Commission *Local government funding and financing* (Draft report, July 2019) at 160.
- 96 *Ibid*.
- 97 See E Rose, W Witten and T McCreanor “Transport related social exclusion in New Zealand: Evidence and challenges, Kōtuitui” (2009) 4(3) *New Zealand Journal of Social Sciences Online* 191.
- 98 Alongside the more general role of the tax system in redistributing wealth.
- 99 RTT Stephens “Economic instruments for environmental management” in G Severinsen and R Peart *Reform of the resource management system: The next generation: Working paper 3* (2018).
- 100 RTT Stephens, S Greenhalgh, M Brown and A Daigneault “Enhancing the tax system to halt the decline of nature in New Zealand” (2016) 12(1) *Policy Quarterly* 26.
- 101 Local Government New Zealand A “blue skies” discussion about New Zealand’s resource management system (2015) at 41; T Denne “Resource management law reform and economics” in G Severinsen and R Peart *Reform of the resource management system: The next generation - Working paper 3* (EDS, 2018) at 173.
- 102 Tax Working Group *Future of tax: Final report volume 1 - recommendations* (2019).
- 103 *Ibid*.
- 104 For example, easements and beneficial interests.
- 105 The risks have been minimal for the taxation of cigarettes, for example, but that may be in part driven by the obvious financial costs of smoking (ie the burden on the public health system) that are in general more obvious and quantifiable than the inter-generational costs of depleting natural capital.
- 106 See G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 257. For example, should we subsidise riparian planting on farms, or charge farmers for nutrient runoff?
- 107 Or even, potentially, reducing tax liability by instead purchasing biodiversity values from a national biobank (see Chapter 12).
- 108 Tax Working Group *Future of tax: Final report volume 1 - recommendations* (2019).
- 109 For example, there are many reasons why a compact urban form is, from an overall perspective, better for the environment (including the climate). So should an urban dweller, even if he or she has little ability to increase natural capital (other than a few pot plants) on his or her own property, continue to bear a greater tax burden than someone who owns a lifestyle block or lives in suburban sprawl? What would be the incentives?
- 110 See generally RTT Stephens “Economic instruments for environmental management” in G Severinsen and R Peart *Reform of the resource management system: The next generation - Working paper 3* (2018).
- 111 Resource Management Act 1991, s 9.
- 112 We would not want to incentivise businesses to move districts or regions to avoid paying the tax, and that may prove an irresistible incentive for local government to avoid imposing it without a nationally consistent approach.
- 113 Or to provide rates relief: see *Report of the Biodiversity Collaborative Group* (2018) at 98.
- 114 Tax Working Group *Future of tax: Final report volume 1 - recommendations* (2019).
- 115 See, for example, Ministry for the Environment “Our funds” (2017) <www.mfe.govt.nz>
- 116 For example, subsidies through the Provincial Growth Fund for planting trees, in order to assist in meeting the Billion Trees target, in the absence of a robust integrative strategy for forests, land use or climate change. See <www.radionz.co.nz/news/political/377172/government-to-invest-118m-in-tree-planting>. Compare the discussion on a “landscape approach” in Chapter 9.
- 117 MA Brown and others *Evaluating the environmental outcomes of the RMA* (EDS, 2016).
- 118 Compare *Report of the Biodiversity Collaborative Group* (2018) at 97.
- 119 T Denne “Resource management law reform and economics” in G Severinsen and R Peart *Reform of the resource management system: The next generation - Working paper 3* (EDS, 2018).
- 120 Compare generally *Report of the Biodiversity Collaborative Group* (2018) at 89.

- 121 G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 186.
- 122 For example, on community conservation hubs, see *Report of the Biodiversity Collaborative Group* (2018) at 89.
- 123 *Ibid* at 95; Parliamentary Commissioner for the Environment *Taonga of an island nation: Saving New Zealand's birds* (2017).
- 124 D Kalderimis and N Swan *Sustainable Finance Forum Legal Opinion 2019* (Chapman Tripp, 2019) at 11.
- 125 M Whineray and A O'Connor *How we invest* (White paper: Climate change investment strategy, NZSF, March 2019).
- 126 On the benefits of ecosystem valuation, see *Report of the Biodiversity Collaborative Group* (2018) at 99.
- 127 See generally *Millennium Ecosystem Assessment Ecosystems and human well-being: A framework for assessment* (Island Press, 2005); UR Pascual and others "The economics of valuing ecosystem services and biodiversity" in P Kumar (ed) *The economics of ecosystems and biodiversity: Ecological and economic foundations* (Earthscan, 2010); SF Thrush and others "The many uses and values of estuarine ecosystems" in JR Dymon (ed) *Ecosystem services in New Zealand – conditions and trends* (Manaaki Whenua Press, 2013) at 226-237.
- 128 T Denne "Resource management law reform and economics" in G Severinsen and R Peart *Reform of the resource management system: The next generation - Working paper 3* (EDS, 2018). See also L Roberts and others *The nature of well-being: How nature's ecosystem services contribute to the well-being of New Zealand and New Zealanders* (Department of Conservation, 2015).
- 129 J Diamond *Collapse: How societies choose to fail or survive* (Penguin, 2011) at 435.
- 130 See Local Government New Zealand *"blue skies" discussion about New Zealand's resource management system* (2015) at 39.
- 131 T Denne "Resource management law reform and economics" in G Severinsen and R Peart *Reform of the resource management system: The next generation - Working paper 3* (EDS, 2018) at 168.
- 132 N Stern *The economics of climate change* (Treasury, 2006).
- 133 J Diamond *Collapse: How societies choose to fail or survive* (Penguin, 2011) at 435.
- 134 Compare EB Weiss *In fairness to future generations* (United Nations University Press, 1989).
- 135 G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 261.
- 136 T Hazledine "Economics and the resource management system" in G Severinsen and R Peart *Reform of the resource management system: The next generation - Working paper 3* (EDS, 2018) at 152.
- 137 *Ibid* at 152.
- 138 Although it can make some things *relatively* easy compared to others (eg through controlled or permitted activity status, or through express policy support – as with forestry and renewable electricity generation respectively) thereby encouraging them.
- 139 G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 262.
- 140 Resource Management Act 1991, s 24(h).
- 141 If nothing else, the complex behavioural consequences of using economic instruments (eg crowding out moral responses) needs to be explicitly factored in.
- 142 G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 261.
- 143 R Thaler and C Sunstein *Nudge: Improving decisions about health, wealth and happiness* (Penguin, 2009); C Sunstein *Why nudge: the politics of libertarian paternalism* (Yale, 2014).
- 144 T Denne "Resource management law reform and economics" in G Severinsen and R Peart *Reform of the resource management system: The next generation - Working paper 3* (EDS, 2018) at 181 (endnote 99).
- 145 Referred to as knowledge asymmetry.
- 146 MA Brown and others *Vanishing nature: Facing New Zealand's biodiversity crisis* (EDS, 2015).
- 147 See also New Zealand Productivity Commission *Low emissions economy* (2018), recommendation 7.3.
- 148 See D Kalderimis and N Swan *Sustainable Finance Forum Legal Opinion 2019* (Chapman Tripp, 2019).
- 149 See J Diamond *Collapse: How societies choose to fail or survive* (Penguin, 2011).
- 150 For example, Forestry Sustainability Council (FSC) certification.
- 151 See J Diamond *Collapse: How societies choose to fail or survive* (Penguin, 2011). Some government backed certification already exists, notably for energy efficiency (eg through mandatory vehicle fuel economy labels and the energy star rating for domestic appliances).
- 152 *Ibid*.
- 153 See Chapter 8.
- 154 For example, the Ministry for the Environment under the Environment Act 1986.
- 155 G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 186.
- 156 See *Report of the Biodiversity Collaborative Group* (2018) at 123.
- 157 See OECD *Environmental performance reviews: New Zealand* (2017); compare K Raworth *Doughnut economics* (Random House, 2017).
- 158 See, for example N Jackson "Does New Zealand need a population policy" (Plenary presentation to the Biennial Population Association of New Zealand Conference, Wellington, June 2013).
- 159 K Raworth *Doughnut economics: Seven ways to think like a 21st-century economist* (2017).
- 160 Tax Working Group *Future of tax: Final report volume 1 - recommendations* (2019).
- 161 Compare G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 285-287.
- 162 Compare Resource Management Review Panel *Transforming the resource management system: Opportunities for change – Issues and options paper* (2019) at 19; OECD *Environmental performance review – New Zealand* (2017); Parliamentary Commissioner for the Environment *Focusing Aotearoa New Zealand's environmental reporting system* (2019).
- 163 See Chapters 6, 7 and 12. See also G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 287.
- 164 See Chapter 8.
- 165 See Chapter 7.
- 166 See G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019), ch 3.
- 167 On the duty to keep records, see Resource Management Act 1991, s 35.
- 168 For example, when needed to implement national direction.
- 169 That could be located in the RMA, bespoke environmental reporting legislation, or – most logically – in a new Future Generations Act.
- 170 M Doole *Enforcement and evaluation in the new regime* (unpublished commissioned paper, The Catalyst Group, 2019).
- 171 Compare Parliamentary Commissioner for the Environment *Focusing Aotearoa New Zealand's environmental reporting system* (2019).
- 172 Tax Working Group *Future of tax: Final report volume 1 - recommendations* (2019) at 69.
- 173 See <www.beehive.govt.nz/release/fresh-funding-reduce-waste>
- 174 Which is entirely possible under section 86 of the Waste Minimisation Act.
- 175 Parliamentary Commissioner for the Environment *Focusing Aotearoa New Zealand's environmental reporting system* (2019) at 4.
- 176 *Ibid* at 7.
- 177 Ministry for the Environment and Statistics New Zealand *New Zealand's environmental reporting series: Environment Aotearoa 2019* (2019).
- 178 Parliamentary Commissioner for the Environment *Focusing Aotearoa New Zealand's environmental reporting system* (2019) at 4.
- 179 For example, in integrating state of the environment monitoring under the RMA with waste disposal volumes, compositions, and resource recovery information under the Waste Minimisation Act. See generally H Blumhardt "Trashing Waste: unlocking the wasted potential of New Zealand's Waste Minimisation Act" (2018) 14(4) *Policy Quarterly* at 15.
- 180 Parliamentary Commissioner for the Environment *Focusing Aotearoa New Zealand's environmental reporting system* (2019) from 89.
- 181 Compare *Report of the Biodiversity Collaborative Group* (2018) at 105: "Change is urgently required to move to a system where data collected by one entity is comparable to data collected by another entity, and which is then able to be exchanged and collated to provide a national picture".
- 182 Including under a new Future Generations Act, if reporting were integrated into this alongside state of the environment monitoring requirements currently under the RMA.
- 183 Section 35(2A) of the RMA is narrower.
- 184 For example, through National Planning Standards, or regulations under a Future Generations Act.
- 185 Aspects of this are contained within the National Monitoring System, but are not reported on in a way that is integrated with outcomes reporting.
- 186 On the lack of link between state of the environment reporting and CME activities, see MA Brown *Independent analysis of the 2017/2018 compliance monitoring and enforcement metrics for the regional sector* (The Catalyst Group, 2018).
- 187 A model that incorporates those things is known as a "DPSIR" model (drivers, pressures, state, impact, response). Compare Parliamentary Commissioner for the Environment *Focusing Aotearoa New Zealand's environmental reporting system* (2019) at 83.
- 188 M Petrie "Reversing the degradation of New Zealand's environment through greater government transparency and accountability" (2018) 14(2) *Policy Quarterly* 32 at 34.
- 189 *Ibid* at 36.
- 190 M Doole *Enforcement and evaluation in the new regime* (unpublished commissioned paper, The Catalyst Group, 2019).
- 191 *Ibid*.
- 192 European Commission *Fitness Check on Reporting and Monitoring* (2017) <https://ec.europa.eu/environment/legal/reporting/fc_overview_en.htm>

- 193 Compare M Petrie "Reversing the degradation of New Zealand's environment through greater government transparency and accountability" (2018) 14(2) *Policy Quarterly* 32 at 35.
- 194 Or for Ministers to ensure that agencies are evaluated, since consequences of poor performance will be political as well as reputational.
- 195 Compare M Petrie "Reversing the degradation of New Zealand's environment through greater government transparency and accountability" (2018) 14(2) *Policy Quarterly* 32 at 33-34; Ministry for the Environment *A framework for environmental reporting in New Zealand* (2014) at 20.
- 196 In contrast, we have, for the last 15 years, enjoyed a firm policy response to climate change mitigation under the RMA – unfortunately, this has been in the form of a near complete prohibition on considering it. At the time of writing, a discussion document on a proposed NPS for Indigenous Biodiversity has just been released after many years of gestation.
- 197 Resource Management Act 1991, s 35(2).
- 198 M Doole *Enforcement and evaluation in the new regime* (unpublished commissioned paper, The Catalyst Group, 2019).
- 199 As discussed in Chapter 8, the government could be required to adopt recommendations unless there were good reasons not to.
- 200 See G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019) at 175.
- 201 See Chapter 8.
- 202 See Chapter 6.
- 203 See MA Brown and others *Vanishing nature: Facing New Zealand's biodiversity crisis* (EDS, 2015);
- 204 RTT Stephens "Economic instruments for environmental management" in G Severinsen and R Peart *Reform of the resource management system: The next generation: Working paper 3* (2018).
- 205 *Report of the Biodiversity Collaborative Group* (2018) at 86.

14. CONCLUDING COMMENTS: A PATHWAY TO REFORM

In this report, we have proposed the bones for a future resource management system in Aotearoa New Zealand. A wide range of issues have been traversed, but they are by no means comprehensive. A great deal of work remains to be done if we are to see meaningful change to the way we manage our natural and physical environment. We hope that this report progresses a much needed conversation and we welcome constructive debate, especially in light of the substantial and growing political appetite for change we are seeing. In particular, we look forward to engaging with the ideas being progressed by the government's independent review group on resource management system reform.

For ease of presentation, our proposed model has been described in terms of the key legislative frameworks that we see operating in the future. How our legislative landscape would change is shown in Figure 14.1. How the system as a whole would operate is outlined, in simplified form, in Figure 14.2. Alongside legal change, institutional design is crucial. So too is funding. Economic and behavioural incentives need to play a larger role in driving change. And New Zealanders have a great deal of soul searching to do about how we behave in our daily lives. We need strong social norms and expectations about environmental wellbeing.

A significant focus of the report has been on the future of the RMA, to which we have devoted three chapters. We

have covered a number of aspects of the Act: whether to split it or make changes to its purpose and principles, what to do with planning processes, and how to reform associated institutional settings. We have also explored the idea of an overarching layer of strategic legislation – a new Future Generations Act – under which we would see an integrative layer of strategic and spatial planning. We have considered where climate change – a defining issue of our generation – fits in, and aspects of the built/urban environment. On that front, how we plan and fund infrastructure, and our associated institutions, are particularly important, and we acknowledge the important work that has been undertaken by Infrastructure New Zealand, the Productivity Commission and others. We have also floated a new framework for oceans management – an Oceans Act – and a more integrated approach to conservation legislation via a Protected Areas and Species Act.

Underpinning all of this has been our criteria for reform, and an understanding that different worldviews – whether we describe them as ecocentric, anthropocentric, tikanga-based or something else – need to work together. At root, we are all New Zealanders concerned for our future and the future of our children. We favour significant reform, not a continuation of the “tinkering” that has defined recent times. Below, we outline some of the key themes of our model.



Ahuahu

We need to inject greater **independence** and **objectivity** in decision-making, to both offset and enhance accountability of elected bodies

Introduce an independent Futures Commission, which would hold the government to account

We need stronger **oversight** and **system stewardship**

Introduce a Futures Group within government, to align policy across many different departments

We need **central government to be more involved** in setting parameters, but simultaneously to **strengthen bottom up initiatives** in how action occurs

Require central government to develop a single piece of national direction under the RMA for all matters of national importance, and provide for novel engagement mechanisms like citizens' assemblies

We need to **define outcomes** more strongly, especially in relation to the natural environment

Reform Part 2 of the RMA, and provide for duties in a new Future Generations Act

We need to **drive positive change**, not just respond to it or react to future harm

Require targets to be set, and hold public authorities accountable for meeting them

We need to hold firm to existential **environmental limits**

Revise Part 2 of the RMA

We need to take a **long-term view** of long-term issues

Inject more independence in decision-making to overcome short-term decision making based on election cycles

We need to **rationalise fragmentation** in legislation and institutions

Integrate conservation legislation into a single Protected Areas and Species Act

We need to focus more on a **regional level** of planning

Require the development of a single combined plan at a regional level under the RMA, and regionalise the provision of three waters services, with a movement towards greater regionalisation of local government

We need to improve **cooperation and coordination** between institutions and legislation

Provide for a level of spatial planning that brings together different institutions with mandates under different legislation, and review the purposes and principles of separate legislative frameworks

We need to **align funding, regulation and institutional incentives**

Provide for the development of regional spatial plans that address regulatory and funding matters, and expand the funding and financing tools available

We need greater **predictability and stability** in outcomes sought, but **agility** in how they are reached

Provide for high level principles in a new Future Generations Act to provide policy stability, and a more agile process for planning under the RMA

We need to address people's and firms' **incentives** and motivations to prevent harm and take positive action, not just prevent things happening

Introduce more economic instruments and behavioural nudging, and investigate the deployment of an environmental footprint tax

We need to **understand how we are tracking**, and to change things if we're not tracking well

Strengthen environmental monitoring requirements, and require action to be taken based on predetermined trigger points

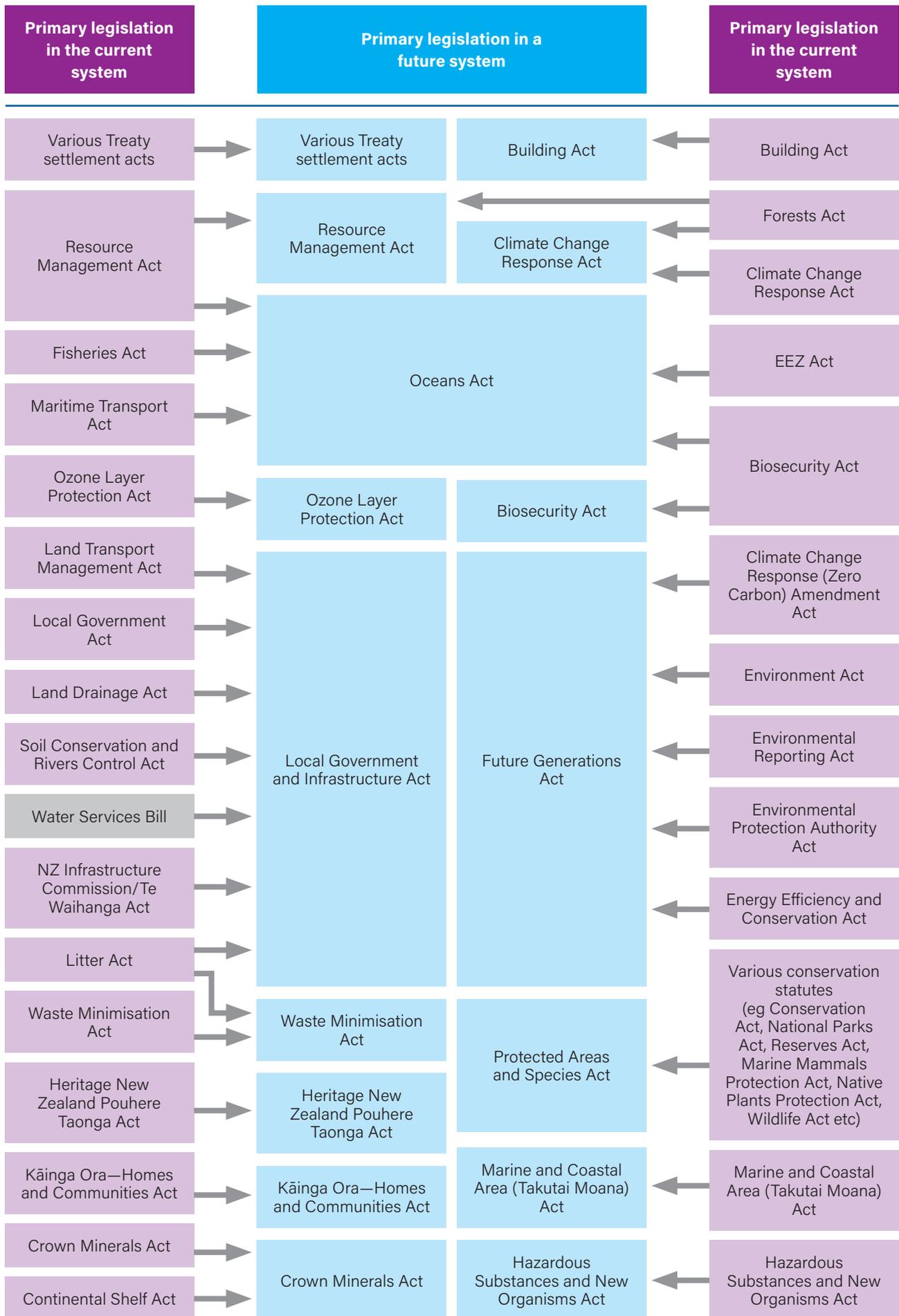


Figure 14.1: Legislative design: Statutes in the current and future system



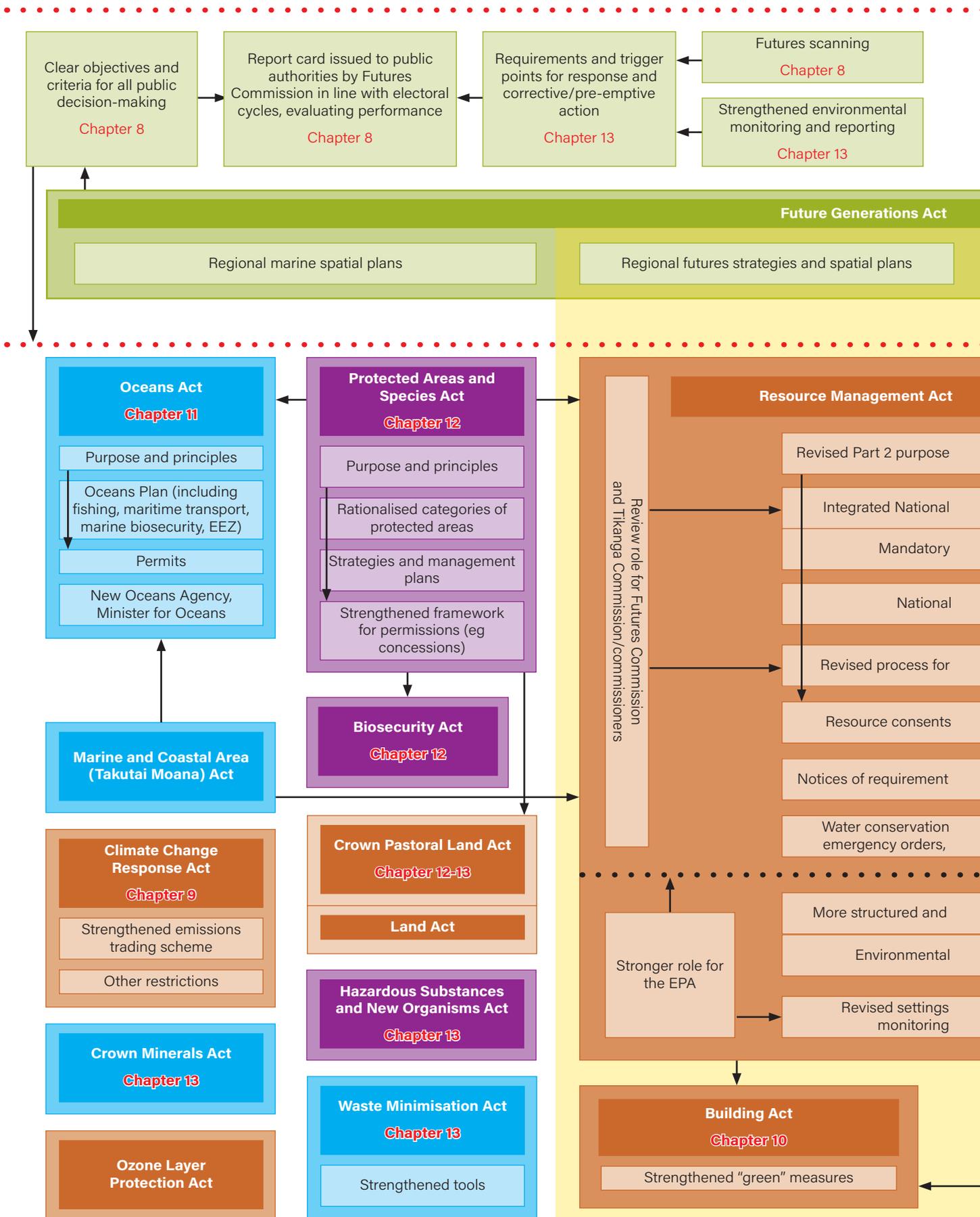
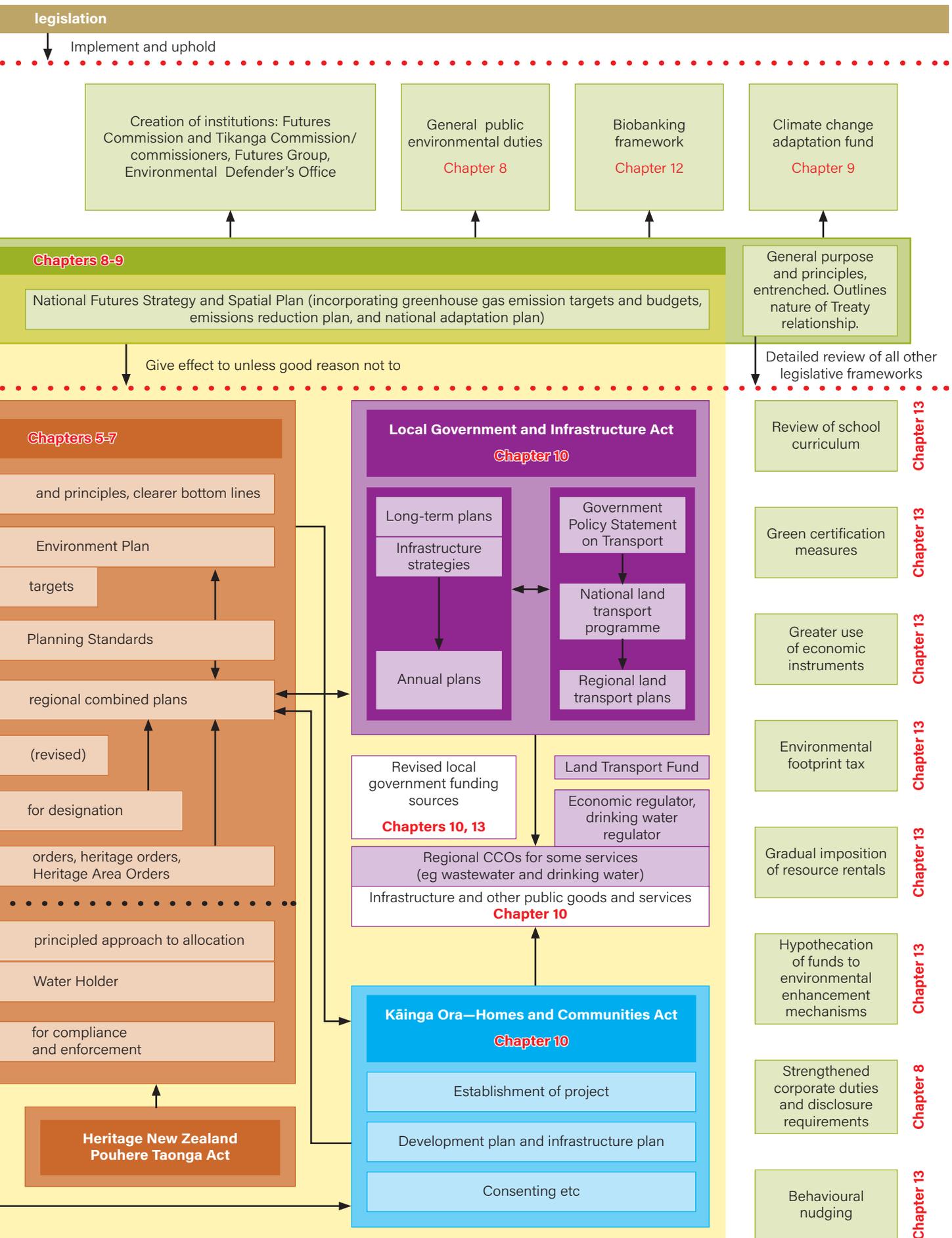


Figure 14.2: Key elements of a proposed future system. Yellow shading indicates frameworks particularly important for managing



urban issues. Arrows indicate key connections, although they are not exhaustive.

Overall, we envisage a resource management system that is quite different from what we have now, but one that is not completely alien. The RMA would still be central, although it would share the stage with a Future Generations Act. Most of the institutions we already have would remain, although the short-term democratic accountability of councils and Ministers would be matched by the longer-term independence of a Futures Commission. And regulation would still be pivotal, but at the same time there would be a greater focus on economic and behavioural drivers. Most (although not all) of the key building blocks are already present, but significant recalibration is needed.

We do not intend to delve into all of the report's proposals in this chapter. That has been done in the overview of our model presented in the Executive Summary. Instead, below, we present our model from a different angle: a purely temporal one. What does our pathway to reform look like? What should happen when? We have, throughout our discussion, talked about various short-term, medium-term and longer-term measures, but in Figure 14.3 we bring that together to outline how we see change happening over time.



Category of reform	Short-term	Medium-term	Longer-term	Conditional reforms ("Plan B" measures)	
RMA norms and planning	Institutional design generally	Establish an independent Futures Commission and Tikanga Commission (or tikanga commissioners within a Futures Commission)	Strengthen capacity and capabilities of a Futures Commission, and expand its functions (as outlined further below)	Integrate existing or proposed independent watchdog institutions under the umbrella of a Futures Commission (eg Parliamentary Commissioner for the Environment, Climate Change Commission, Freshwater Commission)	
		Establish an independent Environmental Defender's Office, charged with undertaking public interest litigation	Strengthen capacity and capabilities of Environmental Defender's Office		
		Amalgamate councils where no longer viable economic units in light of challenges they face	Continued conversation around local government restructuring, with an eye towards greater regionalisation of functions or boundaries where scale matters		
		Establish a true whole of system steward within government (a Futures Group) comprised of high level officials from relevant departments and Crown agents	Establish a national Environmental Water Holder to operate in water markets (ie trading or auctioning mechanisms)		
		Establish a cross-agency behavioural insights group	Implement a revised Part 2 through national direction, council plans and other tools		
		Rewrite Part 2 of the Act (its purpose and principles) to recognise the pre-eminence of environmental bottom lines, the need to give effect to the principles of the Treaty, the importance of good urban planning, and the need to resolve allocative issues			
		Define a principle of "subsidiarity" in Part 4 of the RMA to give clearer expectations about the relative roles of central and local government under the Act			
		Require central government to produce a single, integrated and coherent piece of national direction (a National Environment Plan) addressing all matters of national importance and relationships between them. Deem existing NPSs and NESs to be part of this NEP.	Review existing national direction in order to give effect to a revised Part 2, to align them with each other, and to fill gaps (especially in relation to climate change). Set clear trigger points for further review.	Continually review and update NEP in light of clear, pre-identified trigger points for action.	Provide greater role for arm's length EPA in creating regulatory components of national direction
		Require the establishment of environmental targets in national direction, and put in place timeframes and an accountability framework around them			
		Extend National Planning Standards to apply to national direction			
Central government	Establish a stronger role for the EPA to set regulatory provisions for some aspects of an NEP, such as limits for freshwater quality and flows				
	Establish a revised process for changing an NEP, including a co-creation/cooperative role for Māori and local government and a review role for an independent Futures Commission	Implement an integrated NEP through council plans		Introduce appeal rights to the Environment Court in relation to some aspects of national direction	
	Strengthen framework for water conservation orders	Introduce other "order-based" tools akin to water conservation orders (eg Heritage Area Orders)			
	Provide direct assistance (financial and otherwise) from a national level body to councils to implement national direction				

Category of reform	Short-term	Medium-term	Longer-term	Conditional reforms ("Plan B" measures)	
RMA norms and planning (continued)	Local government	"Reset" existing regional, district and unitary plans using a process akin to the Auckland Unitary Plan process/proposed Freshwater Planning Process (planning process 1). Process 1 includes a greater role in co-creation for Māori, and input by central government. Integrate separate plans into a single combined plan at a regional level.	Undertake periodic whole of plan resets, at a regional level, using planning process 1.	Provide greater role for arm's length EPA in creating regulatory components of council plans	
		Establish a separate process for plan changes (planning process 2) involving a single stage hybrid panel, except where called in by the Minister or Futures Commission (in which case use planning process 1). Process 2 includes a greater role in co-creation for Māori, and input by central government.			
		Provide for a more direct role for a strengthened EPA in determining the regulatory components of council plans for some matters of national importance (eg freshwater quality and flow limits)			
		Establish a review role for the Futures Commission and Tikanga Commission/ commissioners under planning process 1 (akin to the role of the Auckland Independent Hearings Panel in the Unitary Plan process).			
		Amend Part 4 of the RMA to clarify that planning, consenting and enforcement responsibility for biodiversity lies with regional councils			
		Implement stronger bottom-up measures in planning, including citizens' assemblies and informal collaborative processes. Remove a separate formal collaborative planning process in the RMA.			
		Empower and fund the Environmental Defender's Office to take on public interest litigation under the RMA, including judicial review.			
		Retain appeal rights for consents under the RMA			
		Allow appeal rights to the Environment Court to be exercised by the Environmental Defender's Office in relation to council notification decisions			
		Introduce a new notification status, whereby a proposal is publicly notified and submissions invited, but no appeal rights follow (or they follow only for an Environmental Defender's Office)			
RMA consenting and compliance monitoring and enforcement	Consenting	Introduce a mechanism for lodging a "project consent" application directly with the EPA for nationally significant proposals, which would then coordinate decision-making processes under multiple statutory frameworks			
		Amend section 104 of the RMA so that it requires consent decisions to give effect to or be consistent with an NEP			
		Remove or amend the prohibition on councils considering the impacts of activities on climate change			
		Consider removing consenting jurisdiction from elected councillors			
		Establish a pool of nationally accredited independent consenting commissioners under the auspices of the Futures Commission or the EPA, to be deployed upon council request			
		Empower the Futures Commission (alongside the Minister) to call in nationally important matters			

Category of reform	Short-term	Medium-term	Longer-term	Conditional reforms ("Plan B" measures)	
RMA consenting and compliance monitoring and enforcement (continued)	Remove the ability for Boards of Inquiry to consider consent applications				
	Strengthen the role of the EPA in making first instance decisions on some consent applications (eg for freshwater), and provide clear criteria as to when powers would be transferred to the EPA				
Compliance monitoring and enforcement	Amend the Criminal Procedure Act to specifically identify council prosecutions as "public", attracting mandatory oversight from the Solicitor-General				
	Broaden the range of criminal and civil penalties available under the RMA				
	Strengthen provisions allowing consent to be refused or revoked for repeated non-compliance				
	Clarify in legislation that enforcement decisions are not to be made or influenced by elected members				
	Provide strong originating jurisdiction for the EPA for enforcement, and the power (and a duty) to take over or assist in enforcement action taken by councils. Provide clear guidance in legislation or national direction as to when the EPA would be required to or be able to intervene.				Persistent failures by councils in enforcement should trigger temporary or permanent transfer of enforcement powers to EPA
	Integrate compliance monitoring and enforcement data in a broadened environmental reporting regime				
	Implement greater cost recovery for permitted activity monitoring				
	Retain allocative functions within the RMA for those resources managed under the Act (including freshwater)				
	Introduce new statutory principles within the RMA to guide a regulatory process for allocation (including reallocation and deallocation)				
	Deploy collaborative processes as a first step to deallocate existing rights within overallocated catchments				
RMA allocation	Progress a regulatory process for reducing existing rights in overallocated catchments (broadly reflective of the proposed freshwater planning process) where collaborative process fails or is inappropriate due to challenges or urgency				
	Establish a structured process for allocating/reallocating freshwater abstraction rights (1) in the event of the expiry of existing specifically consented rights and (2) where there is new allocation. Establish two tranches of water rights: (1) a tranche allocated by regulatory means, such as attribute weighted tendering (or to meet Treaty obligations); and (2) a tranche allocated by economic means, such as auctioning.	Further investigate the deployment of water trading regimes where appropriate in light of environmental and market conditions		Respond to ongoing legal and political developments concerning Maori rights and interests in freshwater	
	Establish a national Environmental Water Holder. Confer on this entity a mandate to operate in any future water markets (auctioning and trading mechanisms) to enhance public interest outcomes				
	Gradually deploy fair, and tailored, resource rentals to be directed back to public interest purposes, including a degree of control by Maori				

Category of reform	Short-term	Medium-term	Longer-term	Conditional reforms ("Plan B" measures)	
Future Generations Act	Enact a new Future Generations Act with a general, overarching purpose statement	Establish a process for reviewing all other relevant legislation, including their purposes and principles, to align them with new imperatives in a Future Generations Act	Integrate other legislation of a systemic nature into the Future Generations Act (including those establishing cross-cutting institutions like the EPA, and the framework for general environmental monitoring and reporting)		
	Establish a new Futures Commission, an independent, standing watchdog body having roles under various other statutes (including in the review of instruments under the RMA). Alongside, or within, this Commission, establish a Tikanga Commission (or commissioners) having a comparable watchdog and review role, but from a Māori perspective.	Integrate other independent watchdog institutions (eg the Climate Change Commission and Parliamentary Commissioner for the Environment)			
	Provide a set of general duties and criteria that would apply to all public decision-making (including non-statutory decisions like investment and procurement)	Provide for the Futures Commission to evaluate the performance of public authorities, including assessing progress towards mandatory targets, by issuing a scorecard. Require the government to respond and/or take corrective measures.			Require councils to obtain accreditation from the Futures Commission for the discharge of their environmental functions (eg under the RMA)
	Establish a true whole of system steward within government (a Futures Group) comprised of senior officials from relevant departments and Crown agents				
	Confer on the Futures Commission a futures scanning role, looking ahead to identify threats and opportunities. Integrate or align futures scanning with broader environmental reporting cycles.	Require a government response to futures scanning reports tabled in Parliament			
	Strengthen a general public duty to protect the environment	Development of guidance as to what duties mean in particular contexts			
	Establish a framework for creating a National Futures Strategy and associated National Spatial Plan, including a co-creation role for Māori.	Deploy futures strategies and spatial plans to align and coordinate regulatory, funding and other measures across multiple statutory frameworks and institutions towards common goals. Require these plans to be accompanied by indicative sources of funding.		Facilitate an ongoing conversation around a national population policy	
	Establish a framework for creating regional (or cross-regional) futures strategies and spatial plans, including in relation to planning for rapid urban growth, including a co-creation role for Māori.				
	Establish policy programme to investigate and develop a biobanking framework within a set timeframe	Implement a biobanking framework, where biodiversity offsets required under multiple frameworks are deployed in a coherent manner to maximise overall benefits			
	Integrate the strategic elements of climate change response, presently in the Climate Change Response (Zero Carbon) Amendment Act, into the Future Generations Act, including targets and budgets	Integrate emissions reduction plans and adaptation plans into national and regional futures strategies			
Strengthen the emissions trading scheme and price agricultural emissions in some form	Review all relevant legislation with a view to aligning it with climate change mitigation and adaptation imperatives				
Introduce stronger enforcement mechanisms for a failure to meet targets or carbon budgets					
Establish a national Climate Change Adaptation Fund	Build up, strengthen and deploy a Climate Change Adaptation Fund using partnership approach between central government, local government and Māori				
Integrate climate change adaptation considerations in frameworks concerned with funding measures (eg infrastructure) that will be impacted by climate change					
Climate change legislation					

Category of reform	Short-term	Medium-term	Longer-term	Conditional reforms ("Plan B" measures)
Legislation for the built/urban environment	More closely align decision-making processes and timeframes under the Local Government Act and Land Transport Management Act			
	Integrate the Local Government Act, Land Transport Management Act, Infrastructure Commission legislation and proposed Water Services Bill into a single Local Government and Infrastructure Act			
	Establish a dedicated drinking water regulator, and expand strengthened standards to all providers			
	Establish a national level economic regulator to oversee adequacy and fairness of investment and pricing for drinking water and wastewater services			
	Impose consistent national standards for wastewater discharges as part of an NEP under the RMA	Establish minimum stormwater discharge standards as part of an NEP under the RMA		
	Encourage regionalisation of drinking water and wastewater service delivery through the use of CCOs, including central government contributions	Provide for the regionalisation of water services through a CCO model, including central government contributions	Revisit the necessity of central government contributions to water services	
	Investigate further the advantages and disadvantages of regionalising local transport infrastructure through a CCO model, alongside continued national involvement via the NZTA			
	Expand the funding and financing tools available to local government, including value uplift capture mechanisms, direct subsidisation by central government according to need or demand, and the ability to levy a bed tax	Investigate and deploy a locally levied GST (although not as a replacement for rates), with corresponding reduction in nationally-levied GST		
	Strengthen the Building Act and Building Code (and infrastructure standards) to facilitate stronger green outcomes in construction and urban development	Consider whether more can be done to align or integrate heritage protection under the RMA and the Heritage New Zealand Pouhere Taonga Act		
	Legislate development powers to an urban development authority (Kāinga Ora – Homes and Communities) but in a way that is strictly subject to environmental limits contained in other legislation			
Oceans legislation	Establish a new ministerial portfolio for oceans, to lead policy development on an integrated approach to oceans management	Establish a dedicated Oceans Agency (or as part of a strengthened EPA). Strengthen Māori input into decision-making by the Agency.		
	Strengthen marine management capability within the EPA	Enact a dedicated Oceans Act, subsuming a number of existing statutes relevant to the marine environment (including the Fisheries Act, the RMA in its operation beyond 3 nautical miles, the EEZ Act, aspects of the Biosecurity Act and the Maritime Transport Act), but excluding conservation focused statutes (eg the Marine Mammals Protection Act).		
	Develop a framework for marine spatial planning under the Future Generations Act, to flow through into other "implementation" frameworks like the RMA	Remove jurisdiction from the RMA (and regional councils) for oceans management beyond 3 nautical miles, and give them to an Oceans Act and Oceans Agency		
	Commence work on an integrated Oceans Plan to be promulgated under an Oceans Act	Finalise an integrated Oceans Plan		

Category of reform	Short-term	Medium-term	Longer-term	Conditional reforms ("Plan B" measures)
Conservation legislation	Commence preparatory policy work on first principles review of the "conservation" elements of the resource management system	Rationalise conservation legislation into an integrated Protected Areas and Species Act, applying to both land and sea, and having two substantive parts: one focused on protected areas, and one focused on species protection		
	Strengthen connections between plans under the RMA and species management plans made under conservation legislation			
	Rationalise and strengthen protections for different categories of protected areas, including recognising internationally significant areas more strongly and providing for Māori concepts and practices in the management of protected areas			
	Provide stronger recognition for ecosystems within the Wildlife Act, and expand its coverage	Provide a clear mandate for the proactive identification, assessment and protection of a coherent network of marine protected areas		
	Provide for a mandatory response when a species' threat classification changes, such as a compulsory management plan			
	Require authorisation under the Wildlife Act to be obtained prior to resource consent under the RMA			
	Provide legal clarification that conservation management plans must be given effect to in the same way that national direction must be given effect to under the RMA			
	Integrate the Litter Act into local government legislation	Consider feasibility of integrating parts of the Forests Act into the Climate Change Response Act and the RMA		
	Strengthen a government duty to establish priority products for mandatory product stewardship schemes	Further regulatory restrictions on products not able to be recycled or recovered		
	Increase the waste disposal levy and expand its coverage			
Other legislative frameworks and wider system change	Facilitate a mature ongoing conversation about the risks and opportunities of genetic technology for improving biodiversity outcomes			
	Deploy more targeted economic instruments, including novel financial tools, green taxes, deposit-refund schemes, feebates, and greater (although not absolute) deployment of user-charging mechanisms	Implement a framework for congestion charging and deploy where required	Carry out further investigation, and deployment, of an environmental footprint tax	
	Hypothecate revenue raised through green taxes and resource rentals by channelling it back into environmental restoration measures			
	Make the RMA and local government legislation clearer to allow for, and encourage, charges to be imposed on people or landowners on the basis of the environmental effects they generate	Deploy national direction (through an NEP) on green taxes		

Category of reform	Short-term	Medium-term	Longer-term	Conditional reforms ("Plan B" measures)
Other legislative frameworks and wider system change (continued)	Expand the functions of the Minister for the Environment to include the investigation of behavioural incentives			
	Establish a cross-agency behavioural insights group	Work with councils to develop programmes for behavioural nudging to improve environmental outcomes		
	Introduce tax concessions for environmentally desirable activities			
	Continue work on natural capital valuation			
	Develop national direction or guidance for the appropriate use of discount rates in the context of cost-benefit analyses of future environmental impacts			
	Deploy subsidies for environmentally beneficial activities in a more strategic, less ad hoc, manner, including payment for the active provision of ecosystem services on private land			
	Strengthen the framework for corporate disclosures to embrace climate and environmental risks, and feed this information into a broadened environmental reporting framework	Greater involvement of the government in "green" certification of private sector initiatives		
	Strengthen directors' duties in relation to climate and other environmental risks			
	Provide for greater central government financial and other support for local government functions where they are imposed by central government (eg when imposed through national direction)			
	Review the school curriculum to make climate change and environmental sustainability mandatory elements	Conduct a review of core elements of key tertiary programmes		
Monitoring, reporting and evaluation	Introduce stronger, government branded public messaging around environmental issues			
	Develop a more integrated and comprehensive approach to environmental monitoring and reporting at regional and national levels, and one that links outcomes to causes (eg sectors) and to public interventions (eg compliance and enforcement activities)	Establish a single, national-level consenting and compliance database		
	Establish a clear mandate, funding and pathway for public authorities to fill gaps in state of the environment monitoring data			
	Require the establishment of pre-set indicators requiring corrective action to be taken if triggered	Ongoing reviews and corrective action		

Figure 14.3: A rough timeline for system reform

Having sketched out a rough timeline for reform, we would like to conclude the report by returning to a bigger picture view. It strikes us that resource management system reform might seem like an endless cycle of arguing about the same things. Upon digging out the various papers produced as part of the fundamental reforms of the late 1980s, one is struck by how much the challenges and hopes identified by the authors correspond with those identified in this report. Some of their analysis would not be out of place and could be copied almost verbatim. Furthermore, there are some eerie parallels. The chair of the present government's independent review group on system reform (the Hon Tony Randerson QC) was, in a previous life, the chair of the then Minister for the Environment's review group tasked with recommending changes to the Resource Management Bill before it was enacted in 1991. And the above-mentioned Minister for the Environment is now New Zealand's Parliamentary Commissioner for the Environment.

But the many similarities hide significant differences in context. We are not just relitigating the same old things. Environmental indicators have continued to decline since 1991, many now to alarming levels. There is talk of climate and ecological emergencies, not just sustainability or protection. We have a larger population. We are a more diverse society. We have much greater technological prowess – for both better and worse. We are more digitally connected. We appreciate much better the importance

of issues like climate change. We are more focused on restoring past ecological damage. And we have a new generation of engaged young people who have their own expectations and priorities.

So as we find ourselves heading into a new decade, we also find ourselves at a crossroads. And despite the importance of things like legislative boundaries, institutional settings, purposes and principles, and regulatory and economic tools, we need to be mindful of the moral and emotional importance of what as a society we are trying to do here. The aim should be for people to look after their environment – indeed, their *habitat* – in the same way they look after their children. In fact, there is a strong connection between the two, and there should be a similar degree of social abhorrence if there is a failure to do either. There is an increasingly noticeable social shift occurring at the moment, and we should harness its momentum through the reform effort. In doing so, we can serve as a beacon for a world that is crying out for hope and example.

And we must remember that while reform can be hard, and it has costs, significant biophysical, technological and social change is coming whether we like it or not. Ultimately, we need to make a positive change now to safeguard the future of our children, so that they won't have to deal with the consequences if we don't.



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EDS is leading a project which is taking a first principles look at the resource management system in New Zealand. This synthesis report outlines the bones of what an ambitious future system could look like, and how we might get there.

