National direction in a future resource management system

April 2021

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Purpose of the paper

The purpose of this paper is to provide an Environmental Defence Society (EDS) perspective on national direction in a reformed resource management system. It is designed to assist the Ministry for the Environment (Ministry) in its detailed policy work underpinning new legislation to replace the Resource Management Act (RMA) – notably the proposed Natural and Built Environments Act (NBA) and the Strategic Planning Act (SPA). The paper builds upon the model recommended by the Resource Management Review Panel (Randerson Panel). We provide recommendations that are intended to support drafting instructions for the NBA. We are happy to work further with the Ministry on options for the detail of drafting.

We broadly support the Randerson Panel's framing, and our further discussion below is located firmly within that context. Our intention is to refine that framing rather than replace it. Where there is any tension with the Panel's recommendations, we highlight this specifically.

We note that there is a close relationship between the topics of national direction and environmental limits, in that national direction is one key way in which limits are established and defended. We have previously provided a paper to the Ministry on limits, but also incorporate aspects here where it is relevant to national direction.

The structure of this paper

1. Summary of recommendations
2. What is national direction?
3. Summary of the Randerson Panel's report with respect to national direction
4. What should national direction be designed to do?
5. The structure of national direction
6. The legal effect of national direction
7. The process for creating national direction
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Summary of recommendations

What national direction should be designed to do

- The purpose of the NBA requires careful drafting, as that is ultimately the lodestar under which national direction will be set. It should be made clearer within the Act's purpose that environmental limits have primacy.

- The NBA requires a much more targeted normative basis under which the distinct function of limit setting through national direction is undertaken. We recommend that section 8 be revised so that the purpose of setting limits is "to avoid infringement of environmental bottom lines", not to achieve the Act's broader purpose. This would be achieved through a new legislated set of domain-specific unacceptable outcomes (environmental bottom lines) specifically described in the Act in narrative form (in a new section 7A), which limit setting would need to avoid.

- We recommend that "limits" be defined to include policies in NPSs. The policy intent of the Panel may be undermined if mandatory limits were only contained within NESs, because in most cases policy limits can only be translated to regulatory limits when applied through combined plans. The result would be a set of national environmental limits that is far from comprehensive.

- This has drafting implications for: (1) how limits are defined in section 8; (2) the drafting relevant to the creation of NPSs (in that the Minister should be required to create NPSs for the matters listed in section 8, and that NPSs *must* state limits to fulfil the Minister's obligations under s 9(3)); (3) any relevant cross-references that relate to limits (eg the impact of limits in consenting and creating spatial strategies).

- If an environmental limit has *already* been exceeded, it should require a binding target to be set within national direction. A clearer legal distinction should be made between binding targets that reflect limits and binding targets that are set to achieve positive outcomes. The former is a type of limit, whereas the latter is not.

- Legislation should require that limits contained in national direction (ie specific provisions within NESs and NPSs) are specifically flagged has having this status.

- Further consideration should be given to whether some legislated guidance is needed about how to balance particularly important outcomes (ie those that are not environmental limits) in draft section 7. This could be done through a firmer direction to recognise and provide for some things. This, along with a clear duty on the Minister to clarify any potential tensions between section 7 matters, should assist in providing a more coherent package of national direction.

- National direction may well need to play a role in supporting allocation decisions under the NBA, and that role should be reflected in the matters on which national direction can be made and the associated functions of the Minister. However, key questions about allocation (eg principles and processes) should be contained within the NBA, and not left to national direction.

- There is potential to simplify and remove duplication in drafting by cross-referencing the section outlining the Minister's functions to those outlining the content of national direction.

The structure of national direction

- We foresee issues with making joint NPS-NES documents mandatory. NPSs can legitimately operate without associated NESs (because their regulatory expression may need to be through council plans), while a single NES may need to be linked to more than one NPS (a single regulation may be justified by a number of different policies).

- However, there should be a legislative requirement added to the NBA that the Minister is obliged to clearly link NESs to relevant policies in NPSs, whether or not they are in the same instrument, and that the clear purpose of the former is to give effect to the latter.

- There are a number of gaps in the current framework of national direction, and these need to be filled. These are where matters of national significance exist but have no or little corresponding national policy guidance.

- Having a single instrument for national direction – a National Planning Framework – would have many benefits. It would promote (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); and (4) completeness (it would be an integrated instrument covering all matters of national importance).

- We recommend a four-part structure to a National Planning Framework. Part 1 would outline how the document as a whole would give effect to the NBA's purpose and principles (including Te Tiriti); Part 2 would provide a coherent and comprehensive set of domain-based chapters (including the setting of domain-based environmental limits) to which subsequent parts would be linked; Part 3 would provide any additional national direction on particular sectors, spaces or topics; and Part 4 would address any cross-cutting matters (including any provisions on allocation). National Planning Standards would exist alongside this instrument.

- While there are different options for how it could be structured, it would make most sense for objectives, policies, regulations and other directives to be linked tightly to each other within each chapter in a National Planning Framework, rather than separating policy provisions from regulatory provisions (eg by having all NPS provisions followed by all NES provisions).

- The structure of the National Planning Framework should be outlined in National Planning Standards alongside a model combined plan, to make it easier for councils to give effect to it.

- There should also, however, be a broad legislative outline in in the NBA itself as to how an NPF is structured (especially its domain-based Part 1).

- We agree with the Panel that regulations could be confined to administrative rather than substantive matters. Any substantive regulations already in existence (eg for marine pollution and dumping) should be brought within the fold of an NPF.

- A National Planning Framework should be accompanied by an implementation strategy. This could be contained within the NPF, but it makes most sense for it to exist in parallel. This strategy should be required by legislation.

- The Minister should be obliged in an implementation strategy to include a more substantive definition of what "nationally significant" means, giving councils a better sense of the grounds upon which national direction will be created.

- The wording in draft section 9(3) of the NBA should be changed from a requirement that the Minister "have regard to" whether a matter is nationally significant to a requirement that the Minister "be satisfied" that this is the case.

The legal effect of national direction

- As mentioned earlier, an environmental limit should be defined more broadly to include provisions in NPSs. That would ensure that consenting decisions could not be granted contrary to a policy limit, not just a regulatory limit.

- The consenting sections of the NBA should be amended so that a consent authority is obliged to place relatively *stronger* weight on relevant policies in national direction where they clash with policies in council plans.

- An implementation principle should be included either in section 9 or in provisions relating to the content of national direction, specifying that policies should be directive where possible and the relationship between different policies should be made as clear as possible.

- A specific *duty*, not just power, to review consents where new limits are imposed through national direction should be imposed. A clear process for de-allocating existing rights needs to be linked to this duty.

- Spatial strategies should be required to *give effect* to environmental limits contained in national direction, where relevant. That more active direction (ie more than just consistency with national direction) is appropriate because some objectives sought through national direction may require strategic spatial expression/translation at a regional level to be effective.

- Future development strategies currently prepared under RMA national direction should be subsumed in regional spatial strategies made under the SPA. National direction should be reviewed to consider which other elements may be more appropriately located under the SPA framework.

- Several relationships between national direction and the Climate Change Response Act need to be made clearer in drafting. In particular, it should be made clear that national direction must be consistent with emissions reduction plans and a national adaptation plan. A change to the latter instruments should trigger a review of relevant national direction.

- It should also be clarified that detailed land use change for climate change adaptation (eg managed retreat) is to be *driven* by national direction under the NBA (and the combined plans that give effect to it), but *supported* by tools provided for under separate adaptation legislation.

- The cross-cutting nature of climate change mitigation and adaptation, and the need for CCRA instruments to link closely to all aspects of national direction (not just dedicated "climate" parts), further supports the development of a single integrated instrument (an NPF).

- Consideration should be given to whether some provisions contained within existing or proposed NPSs – notably environmental limits – should instead be contained in the NBA itself.

The process for producing and changing national direction

- The Panel's recommended process for the development and amendment of national direction is broadly sound

- Members of an independent board of inquiry should be appointed by the independent judicial officer appointed by the Minister to chair the board

- Greater clarity is needed as to how Māori are to be involved in the development phase of national direction (this could involve an expansion of the role of the Panel's recommended National Māori Advisory Board, although that expert body does not resolve the question of how to engage with mana whenua at a national, representative, level)

- There should be specific provision for local government to play a role in co-developing national direction

- There should be explicit legislative recognition that, where regulatory provisions in national direction are being developed, it is important to outline the relevant policy framework first

- There should be a requirement that any new national direction be assessed against, and be well integrated within, the existing framework of national direction, particularly so that environmental limits are safeguarded

- Where national direction contains environmental limits, there should be an independent review/audit role for the Parliamentary Commissioner for the Environment (together with adequate resourcing to discharge this function)

- In addition, or alternatively, an independent panel of scientific experts (including members with expertise in mātauranga Māori) could be established by the Minister to provide recommendations as to what limits should be set and at what level

Transitional arrangements

- We broadly agree with the transitional arrangements proposed by the Panel

- Over the next three years there should be (1) a general review and alignment process for existing national direction; (2) a systematic assessment of which gaps in national direction need to be filled and how, starting with policy provisions and progressed according to transparent criteria (starting with limit setting); and (3) both of these things should be approached carefully so that each piece of national direction becomes oriented towards inclusion in a more coherent structure – a single, tiered National Planning Framework.

- Existing processes for national direction – particularly the NPS for Indigenous Biodiversity and the implementation of freshwater direction – should not be held up.

What is national direction?

National direction has a specific meaning within the current system, under the RMA.[1] It includes national policy statements (NPSs), the New Zealand Coastal Policy Statement (NZCPS), national environmental standards (NESs) and National Planning Standards. For convenience, general regulation making powers are also often included under the general umbrella of national direction, as additional tools that central government can use to influence the resource management system. The NZCPS is the only national direction instrument that is mandatory.

NPSs are instruments that are created by central government that contain objectives and policies.[2] They are non-regulatory (they cannot be directly enforced in the courts), but they must be given effect to in lower planning instruments (regional policy statements and council plans) and also have significant weight in consenting decisions (although the case law on this provides much more nuance than the RMA's basic direction suggests).[3] NPSs can be highly directive, and contain policies that, in effect, require quite specific regulatory provisions to *be* created in the form of standards or rules ("rule-like policies") in plans.

The line between an NPS and an NES is not always a clear cut one, in the sense that it is not always obvious whether a particular measure should be contained in one or the other document. That line has been blurred further since amendments in 2017, which clarified that NPSs can contain detailed methods for how objectives and policies are to be achieved (implementation), in addition to the objectives and policies themselves. However, the main difference is that NESs contain provisions that have direct regulatory force (they can be enforced against anyone who fails to comply with them). They operate as regulations in their own right, so do not need to be given effect to in lower-level instruments.

There is not necessarily a need for national direction to be defined in exactly the same way in a future system as it is under the RMA. For the purposes of this paper, it is more useful to think of such direction in a general and undifferentiated way, as the set of resource management planning instruments that can be created by central government.

In this paper we are mainly concerned with the framework of national direction provided for in new legislation rather than the detailed merits of particular pieces of national direction and their content. We now have quite a lot of national direction in existence covering multiple topics, and more waiting in the wings. Improvements can be made across many of these documents, and we have looked at that in some of our previous work on resource management reform, urban reform, and other topics. For present purposes, however, we have found it useful to look at the detail of particular instruments only where they illustrate a broader point about what a future system should look like in the context of the Randerson Panel's recommendations.

[1] Being the heading of Part 5 Subpart 1 of the RMA

[2] NPSs "may" also contain other supporting matters, like directions to councils as to how an NPS is to be implemented. They "must" contain objectives and policies,

[3] See in particular *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, [2018] 3 NZLR 283

Summary of the Randerson Panel's Report with respect to national direction

A number of problems with the current system have been identified in the Randerson Panel's Report *New Directions for Resource Management in New Zealand* (Panel Report) (and elsewhere). Many of these can be said to relate to failures of national direction. We do not reproduce them here in full, but it is useful to outline some of the Panel's key observations as context.

- There has been a reluctance (whether due to lack of political will, complex processes for promulgation, and/or a lack of resourcing) to establish non-mandatory national direction. This was not the intent of the RMA's drafters, who saw national direction as a vital part of the overall statutory framework. This has led to inefficiencies, duplication and inconsistencies across the country and a failure to safeguard the national interest in some environmental matters.
- Although we now have more national direction (especially since around 2013), there are legacy effects still being felt from a long absence of NPSs and NESs (eg for freshwater).
- There are still significant gaps in national direction for matters specifically identified as being nationally important (eg for biodiversity, landscape, climate change adaptation, and natural hazards) as well as how the Treaty of Waitangi/Te Tiriti o Waitangi (Te Tiriti) is to be provided for. Other gaps include urban form/design, infrastructure and noise.
- Pieces of national direction do not always work well together – the 21 pieces that exist now do not form a coherent whole, and there are unresolved tensions between them.[4] The more separate instruments that are promulgated, the more difficult achieving coherence across them becomes. That leaves councils and users the task of figuring out which policies should have priority on a case by case basis.
- National direction is not, as a whole, sufficiently directive. The statutory framework allows NPSs to do little more than parrot the general wording of the Act, which can exacerbate the coherence issue referred to above, because relationships and hierarchies between such generally worded instruments are unclear.
- National direction has been developed on an ad hoc basis and in a reactive way according to the policy priorities of the time, not according to what would best achieve the purpose of the Act. There is a degree of instability that results from constant changes to existing instruments across governments, and changes are sometimes made before a previous iteration can be implemented. Councils are left playing catch up in a somewhat confused and everchanging context.
- Processes to develop or change national direction can be slow and unresponsive, especially where the issues they address are urgent or emerge suddenly. In particular, environmental limits in national direction are not responsive to adverse environmental change – it can be challenging to ramp them up in a timely way.

[4] For example, there are real tensions between the NZCPS and NPS on Urban Development, and between the NPS on Urban Development and the proposed NPS for Highly Productive Land. It has been said that future development strategies required under the NPS on Urban Development are a way for councils to "identify areas where urban development may not be appropriate". But the links to, and relative weightings of (1) the protection of SNAs under the proposed NPS for Indigenous Biodiversity; (2) the protection of highly productive soils under the proposed NPS for Highly Productive Land; and (3) the need to mitigate greenhouse gas emissions under emissions reduction plans, are not made explicit.

- Implementation of national direction can take much longer still, because it usually relies on plan changes which themselves can take many years, and because there is limited ability to override existing land uses.
- It is difficult to measure the success of national direction instruments either individually or as a package. There is a lack of (1) specification of clear and measurable outcomes that are sought to be achieved by an instrument and (2) a lack of data to support evaluation of those outcomes.

We have in our previous work on resource management reform identified similar issues. In particular, we have diagnosed problems in how our framework of national direction approaches environmental limits:

- National direction is not mandatory (other than the NZCPS), and even when it is created it does not specifically need to contain environmental limits. Much of it does not, and topics have been addressed based on political will and prioritisation rather than a coherent approach to environmental safeguards.
- It is not always clear whether national direction (or a particular provision within it) is intended to impose firm environmental limits or instead to achieve broader outcomes. Limits are not differentiated from other types of restriction or outcome in terms of their *legal status*; it is not clear what a "limit" actually is or what its consequences are. Much depends on how "firm" and "directive" the wording of policies is relative to other relevant policies, which can require extensive litigation to resolve.

Many deficiencies in our system of national direction can be seen in action in the context of the *King Salmon* decision. This case (and the jurisprudence that followed) was a big step in the right direction, in that it overturned a "balancing" interpretation of the RMA that had persisted for two decades despite being manifestly wrong.[5] We have explored this in our resource management reform work and in our previous paper on limits, but because the Panel does not highlight this case in the context of national direction, we include a more tailored version of our analysis below. To us, it offers some important lessons for how a new system of national direction should be approached, because the case was ultimately concerned with the place of national direction within the system rather than environmental limits per se.

National direction and the *King Salmon* decision

The *King Salmon* jurisprudence made a significant positive contribution to the interpretation of the RMA. 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 on plans and consents. That meant that a decision-maker had recourse to Part 2 of the RMA in balancing the benefits and costs of a proposal, even if objectives and policies in NPSs were much more specific, directive and protective. As the Randerson Panel said, this approach "allowed environmental limits … to be set aside on the basis of advancing [the] social, economic and cultural wellbeing" reflected in Part 2.[6]

In *King Salmon*, the Supreme Court overturned that approach. It emphasised that, in certain circumstances, the RMA was about defending firm environmental bottom lines set under it, not weighing up many competing factors. Central to the decision was the fact that the NZCPS 2010

[5] See S Upton "RMA reform: Coming full circle" (RMLA Salmon Lecture, 2020).
[6] See Panel Report at 52.

contained directive and firm provisions concerning the protection of the coastal environment. The Supreme Court made it clear that national direction could impose firm, policy-based limits 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. 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. This will be where there are no firm and directive policies in policy or planning instruments (such as national direction) to point to, or where there are multiple provisions that conflict. This is a real issue, because environmental limits are scattered across instruments, including national direction. It is often not obvious, without extensive litigation, whether a provision in an NPS is "firm" enough relative to other policies to constitute a true, inflexible environmental limit. Much depends on the (sometime tortuous) unpicking of particular words in policies (like "avoid") and how dozens of provisions in different documents interact.

The Supreme Court also stressed that Part 2 is not an operative set of provisions; it sets an expectation that a cascade of subordinate instruments will impose strict protections. But it does not itself demand that firm limits *are* generated, including through national direction. In the RMA, Parliament has above all created a *framework* for limit setting, including through national direction, rather than directly creating limits itself.

The important lesson from the Supreme Court is, essentially, that the responsible Minister can impose environmental limits through national direction if he or she considers that Part 2 warrants it, and it is not then permissible for councils to undermine that decision by undertaking a more general balancing exercise under Part 2 when making plans. In other words, national direction means what it says. In the context of the coastal environment, that is a good thing. Reasonably firm environmental limits are imposed under the NZCPS. 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).

But outside of the coastal environment, the policy landscape under the RMA is much more varied, and there are fewer comparable limits to give effect to. Environmental limits at a national level are completely absent for some things that the RMA highlights as being extremely important, such as indigenous biodiversity and habitat, and there are large gaps in coverage.

Furthermore, as more national direction is produced, not all of it is about setting true "environmental" limits. A concerning trend has been for the RMA to be used to impose "top lines" or "social and economic ceilings" in the interests of wider policy agendas (eg regulatory consistency for an industry), even where corresponding national level environmental limits are not in place. For example, the new NPS on Urban Development specifically talks about bottom lines as minimum levels of development. 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. *King Salmon* is therefore a double-edged sword, and there are risks that recognising the primacy of firmly worded limits policies in national direction can swing both ways depending on what those instruments actually say.

King Salmon is therefore not a panacea for environmental protection under the RMA. It defends national level protections where they have been clearly and unambiguously put in place, but it does not require them to be there in the first place, it does not ensure that an overall package of national direction is coherent or complete, and it does not give primacy to "environmental" limits in an NPS vis à vis other types of firmly worded policy.

The Randerson Panel, EDS and others have identified a number of issues with the current system of national direction under the RMA. Among other things, non-mandatory national direction has been slow in coming, has been developed on a reactive and ad hoc basis, and has unclear relationships between its parts. There are still considerable gaps, and implementation can take a long time. *King Salmon* made improvements to how national direction is interpreted, but it illustrates that deeper change to the system itself is needed.

The Randerson Panel's recommendations

Below, we briefly paraphrase the core recommendations made by the Randerson Panel in response to the problems with national direction identified above. For the most part these are contained in Chapter 7 of the Panel's Report. This is a snapshot, and more detailed aspects of the Panel's recommendations appear throughout this paper. We agree with the broad thrust of these recommendations. In the sections that follow we recommend tweaking or building on them rather than overturning them.

The Randerson Panel's core recommendations relating to national direction

- Retain national direction as a core part of a future system. It would be created under the NBA (as the regulatory replacement for the RMA).
- Keep the separate categories of national direction currently in existence under the RMA (ie separate NPSs, NESs, regulations and National Planning Standards), but specifically allow for the development of joint NPS-NES instruments.
- Ensure that gaps in our suite of national direction are filled and that relationships between instruments are resolved.
- Retain the roles of the Minister for the Environment and Minister of Conservation with respect to the development and approval of national direction and limit the roles of other Ministers.
- National direction should give effect to the new purpose of the NBA and should be mandatory for some things (notably for the imposition of environmental limits through NESs, the NZCPS, and various other things to discharge the Minister's new duties, including the pursuit of targets for a wide variety of positive outcomes).
- NPSs and NESs should be subject to the same process for creation and substantive amendment, including a board of inquiry.
- General regulation-making powers should be retained but primarily just for administrative rather than substantive matters, and National Planning Standards should be constrained to non-substantive matters such as definitions and plan structures.
- Ensure national direction can be implemented in practice by strengthening the ability to trigger the review of consents and overriding existing uses.
- A stronger framework for monitoring, evaluating and changing national direction is needed.

The Panel also offered drafting relevant to national direction, which we reproduce below for context. In the final section of this report we offer some recommendations for drafting changes.

Indicative drafting for the purpose of national direction

Purpose of national direction

(1) In this Part, **national direction** means a national policy statement or a national environmental standard prepared under this Act.

(2) The purpose of national direction is to set objectives, policies, limits, targets, standards and methods in respect of matters of national significance in order to achieve the purpose of this Act and to give effect to the purpose and principles of this Act (the Natural and Built Environments Act).

Indicative drafting on matters to which Ministers must have regard

Matters to which the Minister must have regard to before issuing national direction

(1) The Minister must prepare and maintain, at all times, national directions necessary to give effect to the obligations in section 9(3).[473]

(2) There shall, at all times, be at least one New Zealand Coastal Policy Statement prepared and recommended by the Minister of Conservation in consultation with the Minister for the Environment.

(3) In deciding whether to proceed with any other national direction, the Minister must have regard to —

- (a) the nature, scale and significance of the matter at issue;
- (b) the potential to contribute to achieving nationally significant outcomes for the natural or built environments and the social, economic, environmental and cultural wellbeing of peoples and communities;
- (c) whether there is evidence of widespread public concern or interest regarding actual or potential effects of the matter on the natural or built environments;
- (d) whether there is the potential for significant or irreversible effects on the natural or built environments;
- (e) whether the matter affects the natural and built environments in more than one region;
- (f) whether the matter relates to a network utility operation affecting more than one district or region;
- (g) whether the matter relates to effects on a structure, feature, place or area of national significance including in the coastal marine area;
- (h) whether the matter involves technology, processes or methods that are new to New Zealand and may affect the natural or built environments;
- (i) whether the national direction would assist in fulfilling New Zealand's international obligations in relation to the global environment;
- (j) whether by reason of complexity or otherwise the matter is more appropriately dealt with under this Part rather than by other processes under this Act;
- (k) any other relevant matter.

Indicative drafting for the content of national policy statements and national environmental standards

Content of national policy statements

(1) National policy statements under this Act must—

- (a) state the matters that contribute to the quality of the natural and built environments;
- (b) set binding or non-binding targets to achieve continuing improvement in the outcomes specified in section 7;
- (c) state the objectives and policies to achieve the targets;
- (d) state how the principles of Te Tiriti will be given effect through functions exercised under this Act;
- (e) state which provisions are to be incorporated into plans without further formality or process, and which provisions are to be incorporated by way of a plan change process;
- (f) state how the national policy statement will be monitored, including the measures or indicators to be used and the frequency of monitoring and reporting.

(2) A national policy statement may—

- (a) state the matters that local authorities must consider and take into account in preparing policy statements and plans;
- (b) state matters or provisions to be included in policy statements or plans;
- (c) state constraints or limits on the content of policy statements or plans;
- (d) state methods or requirements to be included in plans, and any specifications about how local authorities must apply those methods or requirements;
- (e) include any other matter relating to the purpose or implementation of the national policy statement;
- (f) prescribe the information to supplied by local authorities required to support monitoring and reporting on the effectiveness of the national policy statement;
- (g) include directions to local authorities.

(3) A national policy statement may apply—

- (a) generally across New Zealand; or
- (b) to any specified region or district; or
- (c) to any specified part or parts of New Zealand.

(4) A national policy statement may express its provisions—

- (a) as a narrative for the purposes of providing guidance; or
- (b) as directions to be complied with; or
- (c) as a combination of narrative and directive provisions.

Indicative drafting for the content of national policy statements and national environmental standards

Content of national environmental standards

(1) National environmental standards under this Act must—

(a) state the limits to be set in order to fulfil the Minister's obligations under section 9(3);

(b) state the standards to be complied with to ensure environmental limits are not breached;

(c) state how the national environmental standard will be monitored, including the measures or indicators to be used and the frequency of monitoring and reporting.

(2) A national environmental standard may—

(a) state binding targets to be complied with in order to fulfil the obligations of the Minister under section 9(3);

(b) state the matters that local authorities must consider and take into account in preparing policy statements and plans;

(c) state matters or provisions to be included in policy statements or plans;

(d) state constraints or limits on the content of policy statements or plans;

(e) describe methods to be used to achieve compliance with a standard (including rules);

(f) prescribe the information to be supplied by local authorities required to support monitoring and reporting on the effectiveness of the environmental standard;

(g) include any other matter relating to the purpose or implementation of the national environmental standard.

(3) A national environmental standard may apply—

(a) generally across New Zealand; or

(b) to any specified region or district; or

(c) to any specified part or parts of New Zealand.

Combined national policy statement and national environmental standard

(1) The Governor-General may, by Order in Council, make regulations combining a national policy statement and a national environmental standard in a single instrument.

(2) A national policy statement and a national environmental standard in any such regulations must have the same purpose, function and content as if they had been issued separately.

(3) The making of a regulation under this section must follow the same public participation and board of inquiry processes as a national policy statement, with all necessary modifications, as though it were a national policy statement.

(4) A regulation made under this section is a legislative instrument.

The Panel's draft provisions on the duties of the Minister (in its section 9(3)) are also relevant.

Finally, we note that a more recent Cabinet paper and Cabinet minute describe a future system for national direction as a "National Planning Framework" (NPF) rather than "national direction". At the

time of writing, we are not aware the extent to which this change in terminology foreshadows any policy differences to what the Panel proposed.

The Randerson Panel made a number of recommendations with respect to the system of national direction that should exist under the NBA. We broadly agree with those recommendations, but we offer further refinements below.

What should national direction be designed to do?

The Randerson Panel contemplates that central government will play a much stronger role in a future resource management system than at present. We strongly agree with that sentiment to the extent nationally significant issues are in play. A big part of that role is foreseen to be played through the creation and implementation of a wider and more coherent suite of national direction (both NPSs and NESs). In this section we consider what this national direction should be designed to do – the roles it needs to perform – and what refinements to the Panel's proposals are required to optimise the system's ability to do that.

Most importantly, national direction needs to impose and maintain environmental limits. We consider that aspect first. But it also needs to provide guidance as to how competing priorities are to be balanced, and its allocative role also needs to be thought through carefully.

Ultimately, all these things are about achieving the Act's purpose, and that therefore needs to be drafted with utmost care. We have previously recommended amendments to the Panel's draft purpose to ensure environmental limits have clearer primacy within it, and we reiterate the importance of this again.

In particular, we note that the three ways listed to achieve the Act's purpose (all of which can be pursued through national direction) are not, as currently drafted, expressed in a clearly hierarchical way. Human activity being within environmental limits is listed alongside promoting "positive" outcomes (presumably linked to the long list of undifferentiated outcomes in draft section 7) and a general mitigation hierarchy. A clear hierarchy is particularly important, because a package of national direction under the NBA will remain an integrated framework for resource management; in other words, it will deal with both the natural environment and land use/development planning. We have made other recommendations in our limits paper about the purpose and principles of the NBA and refer you to that work.

The purpose of the NBA requires careful drafting, as that is ultimately the lodestar under which national direction will be set. It should be clarified within the Act's purpose that environmental limits have primacy.

National direction and environmental limits

There is a close relationship between national direction and environmental limits, because the former is a crucial way in which limits can be imposed at a national level.[7] We refer to our previous report on environmental limits for a fuller account of limits within the system and as a concept, but we incorporate some material here and tailor it to the topic of national direction.

As a concept, environmental limits describe the lowest boundary of an environmental domain (a minimum measure of its health) and must always be set above a biophysical bottom line, including a **precautionary** buffer between them. The Panel sees these biophysical bottom lines as "boundaries

[7] Limits can also be imposed through other means, including council plans: see our previous paper on limits in a future resource management system.

or points at which significant and potentially irreversible harm to the environment and associated human health and wellbeing occurs".

Although it is talked about often in general terms, an environmental limit under the proposed NBA is a new legal concept that is not present in the RMA. It is defined specifically (albeit, in some senses, broadly) by the Panel as:

> the minimum standards prescribed **through national directions** by the responsible Minister to achieve the purpose of the Act.

In other words, limits are seen as being the sole responsibility of national direction to deliver. In the Panel's proposal, the Minister must establish environmental limits for particular domains (which are specified in section 8) through mandatory NESs, as well as the standards (ie restrictions) needed to achieve them.[8]

We think there are a number of ways in which the framework of national direction should be refined to better provide for environmental limits.

To support the setting of limits through national direction there needs to be a stronger normative foundation in the NBA

When setting limits in national direction, it will be important that the Minister has a clear normative lodestar in the Act for exactly *where* those limits should be set. It is not good enough to simply establish limits in any old place.

The Panel envisages in its *discussion* that the normative basis for limit setting will be preventing the infringement of "boundaries or points at which significant and potentially irreversible harm to the environment and associated human health and wellbeing occurs". In other words, limits are set in places where they will prevent ecological tipping points.

This approach presents difficulties. Although the Panel clearly *views* some form of biophysical bottom lines as being the normative foundation of limit-setting,[9] it is not clear that this is reflected in the actual drafting of the NBA itself. The result is that its proposed section 8 does not in our view clearly require bottom lines to be the sole factor guiding where limits are set. In other words, there is a risk that balancing and trade-offs will still occur when or changing setting limits. This is because:[10]

- Limit setting under section 8 is defined as being "to achieve the purpose of this Act"
- The purpose of the Act is "to enhance the quality of the environment to support the wellbeing of present and future generations and to recognise the concept of Te Mana o te Taiao"
- While the concept of Te Mana o te Taiao is biophysically focused and may provide a sound high level basis for limit setting, it exists alongside more general and undefined objectives like the "quality of the environment" and "the wellbeing of present and future generations" that would support consideration of multiple objectives (including development in built environments)

[8] Panel Report, ch 2, Appendix 1.
[9] Panel Report at 64-67.
[10] Compare the concerns of the Parliamentary Commissioner for the Environment in S Upton "RMA reform: Coming full circle" (RMLA Salmon Lecture, 2020).

- While section 5(2)(b) does highlight that the purpose of the Act is to be achieved (among other things) by ensuring that use and development is "within environmental limits", this creates a degree of circularity: under section 8, limits must be set to achieve the purpose of the Act contained in section 5, and under section 5 the purpose is to be achieved by setting limits under section 8. In other words, while it rightly singles out limit setting as an important function that is separate to other functions, it does not provide guidance as to *where* limits should be set other than by referring to the general purpose of the Act.[11]
- Furthermore, proposed section 7 imposes a duty on all those exercising functions and powers under the NBA (presumably capturing the Minister's limit setting function) to "provide for" the large range of undifferentiated outcomes in that section. A handful of these arguably support the responsible setting of environmental limits (although they are all very high level), but the majority would not be appropriate as a normative basis for doing so. It is unclear which ones are or are not intended to apply to limit setting and which ones apply to other functions.

That said, there is also a direction in section 8 that there be a "margin of safety above irreversible damage" when the Minister is setting limits. It may be that the Panel's intent was for *this* to be the primary normative basis for where limits are set, not the general purpose of the Act. However, section 8 does not make this clear, because (as mentioned above), limit setting is specifically required to be done "to achieve the purpose of the Act".

This direction is sub-optimal in other ways too. First, it is not specific enough; it is not targeted to each domain for which limits must be set (eg safe drinking water, preventing extinctions). Secondly, it does not express itself in terms of the actual bottom line *outcomes* that limits are meant to achieve. Terms like "damage", "irreversibility" and "significance" are general words that can be interpreted in vastly different ways; they are not proper descriptions of outcomes. What these terms mean will presumably need to be interpreted by referring back to the general purpose of the Act or the undifferentiated set of outcomes in section 7.[12] The generality and discretion provided for here is incongruent with the much more wide-ranging and specific set of positive outcomes listed in section 7, which are designed to guide decision making above environmental limits and not where limits themselves are set.

Aside from issues with the specific drafting (how sections relate to and cross-reference each other), the Panel's *conceptual* basis for limit setting in national direction is also too low. For many domains, the aim of limits should be more than just preventing ecological tipping points or irreversible damage to that domain. The Parliamentary Commissioner for the Environment has also questioned whether this is the right place to set the foundation for a limit.[13] Ecological tipping points are thresholds that are so obviously undesirable that there is unlikely to be room for meaningful debate about their acceptability. But in many situations (such as water that is clean enough to drink or swim in), people rely on minimum outcomes that far exceed ecological tipping points. They need to be more specific and targeted at the minimum outcomes we expect for particular domains or they leave too much room for interpretation.

[11] Cross-reference to the Act's purpose is fine if it is descriptive (ie that the Act's purpose requires environmental limits in order to be achieved, and it won't be achieved without them), but it is problematic if it is normative (ie that limits are to be set in places that achieve the Act's purpose, which is about more than protection of the natural environment).
[12] For example: what if something is significant but reversible over long periods of time?
[13] S Upton "RMA reform: Coming full circle" (RMLA Salmon Lecture, 2020).

Overall, we are not convinced that the Panel's indicative drafting would achieve its clear intent of imposing true environmental limits through national direction, since the normative basis of limit setting remains (1) a purpose statement in which bottom line outcomes are not clearly recognised or distinguished from other outcomes,[14] and (2) the prevention of "irreversible damage" that sets the bar extremely low and is also not specific to the domain-based outcomes we want limits to achieve. It is not enough for limits to be defended *once* they are set; they must also be set in the right place to start with.

We recommend that more specific bottom line outcomes be *legislated* in some shape or form for all the domains listed in section 8 (ie in a targeted way), giving a stronger basis for decision making. What those outcomes should/could be is touched upon in our limits paper. But they would be best contained within a separate section (eg a new s 7A), cross-referenced by the sections concerned with limits (s 8) and sections outlining the content of national direction and the Minister's duties.

A new s 7A would clearly distinguish the normative basis for limit setting from the wider range of positive outcomes sought in section 7, and not overload a general purpose and principles section. An alternative would be for bottom lines to be contained in a schedule to the NBA. That way, they would have legislative backing but could be more extensive and detailed.[15] Bottom lines may contain complexity that cannot easily be expressed through a few words in the body of a statute or through statutory definitions. A schedule could also be amended if really needed in a "cleaner" way than if they were woven into a statute's purpose and principles.

A clearer definition of limits that is linked to the domain-specific biophysical outcomes for which they are imposed, would be crucial to ensure the Minister does not have power to promulgate national direction imposing "limits" relating to completely different things like housing and development, that could clash with the true biophysical limits specified in section 8.[16] At present, limits *can* be imposed for open-ended things, which is potentially concerning given that all other decisions must, under draft section 9(5), strictly comply with them.

The NBA requires a much more targeted normative basis under which the distinct function of limit setting through national direction is undertaken. We recommend that section 8 be revised so that the purpose of setting limits is "to avoid infringement of environmental bottom lines", not to achieve the Act's broader purpose. This would be achieved through a new legislated set of domain-specific unacceptable outcomes (environmental bottom lines) specifically described in the Act in narrative form (in a new section 7A), which limit setting would need to avoid.

"Limits" need to be set through NPS provisions as well as NES regulations

National direction has two key aspects: policy and regulation. According to the Panel, a limit includes only regulatory "standards" in NESs. It does not obviously include policies or objectives (which is supported by the lack of reference to environmental limits in the Minister's powers to promulgate NPSs).

[14] What it does do is (1) codify *King Salmon*, in that it prevents national direction (which sets limits) to be undermined later in plan making and consenting; and (2) remedies one of the deficiencies that *King Salmon* was unable to fix by *requiring* limits to be set in national direction for some things.
[15] Including the current section 7 outcomes in a schedule could also provide a cleaner approach to drafting.
[16] The Minister has the specific power to prescribe limits for things other than those domains listed.

In a way this is curious, given that a limit is defined in section 8 as standards prescribed through national *directions*, rather than through *NESs* specifically. Furthermore, separate references to "limits" and "NESs" with which consents need to comply, implies that there may be some kinds of limits that are not contained within NESs. One can foresee litigation to clarify such fundamental questions. Yet the overall architecture strongly suggests to us that limits are intended to be regulatory provisions only.

We see potential issues if "limits" only include regulatory standards contained in NESs. In our view, limits need to form a cascade flowing from legislated bottom lines, through to national policies, through to regulations in NESs.[17] Limits include all the provisions necessary to achieve bottom line outcomes, not just the regulations to be complied with. The need for multiple "policy limits" to achieve bottom line outcomes[18] is also endorsed by Cawthron,[19] and the courts have confirmed that instruments can contain detailed "rule like" policies that directly require regulatory instruments to implement or comply with them.

The main reason that limits should be required to be set through NPSs as well as NESs is that the types of minimum outcomes to be defended by limits may not always be easily translated to specific regulatory standards at a national level. Many regulatory limits will be specific to particular places (eg catchments) and need to be tailored to that context through rules and standards in combined plans. It may prove difficult to do that through NESs,[20] so this could result in a selective suite of national "limits" that is in practice incomplete, too general, or an uneasy fit for some places.

For example, the NPS for Freshwater Management 2020 and NZCPS express a number of policies that can be said to describe "limits". These are much more complete in coverage than the much narrower range of regulatory limits that have been included in new national standards for freshwater. Similarly, it is hard to imagine an NES on biodiversity that adequately mirrors the breadth of policy limits contained in the draft NPS for Indigenous Biodiversity. Just because policies need to find specific regulatory expression through location-specific regional plans, this does not make the firm and directive policy provisions in the NPS any less of a limit.

Of course, in the Panel's model NPSs themselves (eg on freshwater) would still *exist* and have to be *given effect* to. However, that is not the same thing as some NPS policies being included within the definition of "limits". Under the Panel's proposed drafting, because the content of NPS are not limits, they are to be guided by the broad purpose of the Act and the wide-ranging and undifferentiated matters in section 7 (which include, for example, urban development outcomes).[21] In other words, all types of outcomes – including any that envisage the setting of limits at a local scale – are put on an equal footing with each other in terms of weight when an NPS is being created.[22] It is only limits in an NES that are treated differently.

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[17] Compare the Panel's conception in ch 8 of its report.
[18] What Cawthron calls "narrative objectives".
[19] Although it is unclear whether this term is being used in its legal sense: see Cawthron *Environmental Limits – A proposed framework for Aotearoa New Zealand* (Report no 3530, 2020) at 131.
[20] Unless there is an NES that has appendices setting separate standards for each waterway in the country.
[21] The draft section concerning the content of NPSs states that NPSs *must* set targets to achieve section 7 outcomes.
[22] That is not to say that a Minister could not choose to impose uncompromising restrictions in an NPS – we effectively see policy limits in the NPS for Freshwater Management 2020. It simply means that the Act would

Moreover, central government would be actively invited by s 9(6) of the NBA to use its discretion to specify how tensions between any section 7 matters are to be resolved across NPSs.[23] This means that policy limits in NPSs – as we have now with freshwater – could effectively be subject to a balancing exercise when they are created. There is a risk that, for example, an NPS could specify that the directive provisions for development under an urban-focused NPS are to be "complied with", whereas the provisions in an NPS on freshwater or biodiversity are provided as "guidance".[24] That would be the antithesis of limit setting and go against the intention of the Panel, and perpetuate the issue we see at the moment where an NPS on urban development can set "bottom lines" for development while having softer worded or aspirational protections for biodiversity. It is therefore vital that the latter type of policies are treated specifically as limits under section 8 rather than mechanisms to achieve the outcomes in section 7.

Furthermore, if provisions in NPSs could not have status as limits:

1. unlike NESs, they would not *have* to be created for things requiring limits (eg soil, air, water quality), meaning the NESs that are *required* to set regulatory limits would lack a policy context for what they were trying to achieve
2. even if they *were* created, limits in NPSs would not be created under the more specific purpose of defending legislated bottom lines (which we propose to add in a new section 7A)
3. consents would not have to "comply" with the provisions in an NPS, even if they clearly expressed environmental limits (they will only have to have regard to them). This could undermine the careful development of *King Salmon* jurisprudence in cases like *Davidson*.

We recommend that "limits" be defined to include policies in NPSs. The policy intent of the Panel may be undermined if mandatory limits were only contained within NESs, because in most cases policy limits can only be translated to regulatory limits when applied through combined plans. The result would be a set of national environmental limits that is far from comprehensive.

This has drafting implications for:

1. how limits are defined in section 8
2. the drafting relevant to the creation of NPSs (in that the Minister should be required to create NPSs for the matters listed in section 8, and that NPSs *must* state limits to fulfil the Minister's obligations under s 9(3))
3. any relevant cross-references that relate to limits (eg the impact of limits in consenting and creating spatial strategies)

NPSs expressing limits should be required to be expressed in as much specificity as possible, so the outcome expected is clear when it comes to implementation through combined plans and

not *require* provisions in an NPS to be created with reference to environmental bottom lines. Instead, it would allow much broader things to be considered.

[23] The direction is still to achieve the purpose of the Act rather than wholesale discretion, but this is relatively broad and is not specifically about limit setting (see discussion above).

[24] See the Panel's draft section on content of NPSs, (4)(a) and (b), which allows NPSs to be guidance or directions to be complied with.

assessment of consents. That requirement should be contained in legislation (eg as an implementation principle, or in provisions governing the content of NPSs).[25]

The relationship between limits and binding targets in national direction needs to be clarified

Sometimes, limits have already been exceeded (as with some freshwater catchments), and the challenge is to return (at a minimum) to the safe space above them**.** If a limit contained in national direction is not *currently* being met – in that an aspect of the environment is below its minimum measure of health – that limit should automatically be categorised as a binding target. In other words, these targets *are* a type of limit, and not a fundamentally different concept. This needs to be reflected in the drafting on national direction.

If an environmental limit has *already* been exceeded, it should require a binding target to be set within national direction. A clearer legal distinction should be made between binding targets that reflect limits and binding targets that are set to achieve positive outcomes. The former is a type of limit, whereas the latter is not.

Provisions in national direction need to be specifically flagged with the status of limits

It will be important for a future system to specifically identify the distinction between restrictions that are regarded as limits and those that are not. Otherwise it will be unclear whether a provision – especially a policy – needs to be inflexible or whether it needs to be weighed up against other considerations. It is crucial that in the future we avoid complex interpretive arguments about whether or not a generally worded policy (eg one requiring "avoidance" of some effects as in the NZCPS, as discussed in *King Salmon*), requires strict compliance or not. Identifying provisions that constitute limits will also make it more transparent as to whether the Minister has discharged his or her statutory duty to impose them.

Legislation should require that limits contained in national direction (ie specific provisions within NESs and NPSs) are specifically flagged as having this status. That is particularly important because these are likely to be domain-based or sector-based instruments, and not (for example) a single NPS on "environmental limits", so they need to stand out.

National direction and balancing

National direction is not *just* about setting environmental limits. That would invite a race to the bottom. Positive environmental, social, economic and cultural outcomes are crucial too. Recognising a separate envelope of limits does not mean we give up on housing affordability, natural landscapes, or any of the other outcomes such as food security, energy security, climate change adaptation or biosecurity. It simply means we direct our methods and energy into *ways* of achieving those things that do not infringe environmental limits where potential tensions arise.

As such, the Panel has included a long list of positive outcomes to be pursued in its draft section 7. In itself, that is a good step (as long as that set of outcomes is not used as the basis for setting limits, as

[25] This is not a drawback of using NPSs specifically, as NESs can also be worded in qualitative terms. The distinction, even with the improvements proposed by the Panel, still leaves much room for interpretation as to what should be in an NPS vis a vis an NES.

discussed above), because the RMA has been geared towards reactive effects-based management rather than the pursuit of positive goals.

Under section 9(3)(b) the Minister has a specific duty to set targets to ensure progress is made towards achieving those outcomes. The Panel's draft sections on national direction make clear that targets are to be contained within NPSs, and that NPSs must provide a suite of objectives and policies to support progress towards the targets. More broadly, all those exercising functions under the Act, including the Minister, are obliged to provide for section 7 outcomes.

However, section 7 matters present potential conflicts and tensions. That is inevitable, and part of the role of the system is to sort out and balance such things. That said, our view is that there needs to be some degree of hierarchical relationship between section 7 outcomes to support a coherent suite of national direction. For example:

- food security needs to be achieved within our envelope of environmental limits (it should not be an excuse for intensifying agriculture or horticulture at the expense of freshwater quality or flows), but it also needs to stand firm in the face of pressure to expand cities outwards in all directions across productive soils.
- Climate change adaptation measures (eg shifting the location of aquaculture areas) cannot be allowed to infringe environmental limits, but the provision of residential development capacity should also not be done in a way that undermines climate change adaptation plans.
- The values of outstanding natural landscapes, even if not themselves articulated as environmental limits, should have robust protections in the face of human activities like urban expansion.

As presently drafted, those tensions are expected to be resolved in an ad hoc and discretionary way through national direction and plans, and the Panel has specifically declined to impose any kind of hierarchy between section 7 outcomes in legislation. **We think that further consideration should be given to whether some legislated guidance is needed about particularly important outcomes.** This could be in a manner akin to sections 6 and 7 of the RMA (a firmer direction to recognise and provide for some things, such as climate change adaptation). Alternatively, it could be through a set of general principles to guide the development of national direction to resolve tensions. At present, the list of outcomes to be achieved in the Panel Report seems long and subject to negotiation where there are tensions, which arguably should not be left *entirely* to political prioritisation.

Furthermore, one lesson from the RMA has been that where central government can leave politically sensitive tensions to be resolved by councils, it often will. Decisions on how to reconcile nationally important interests are being made at the local level, often in an ad hoc way and certainly with no view to a strategic national outcome. The risk is that the present drafting will not actually force coherent relationships to be forged between different pieces of national direction, because it will continue to be expedient to pass that decision to local government.

That said, the Panel includes a provision that where any tensions arise between section 7 matters, they "must" be reconciled or clarified by the Minister through national direction or, in the absence of national direction, by council instruments. However, the meaning here is ambiguous – is it (1) that *when* tensions arise (eg in the consenting context), the decision maker *must* reconcile them by looking first to any national direction that might exist on the matter; or is it (2) there is an active

duty on the Minister to reconcile any foreseeable tensions in section 7 through national direction. The fact that recourse can be had to council plans (ie national direction on such questions might not exist) suggests that the first interpretation is the correct one. That ambiguity needs to be resolved by specifying a duty on the Minister to clarify any foreseeable tensions or relationships between policies and objectives in national direction.

As a transitional measure, the Panel recommends that all existing national direction be reviewed to resolve all potential conflicts or provide guidance as to their resolution. We agree but emphasise again that this should involve specific identification of provisions that reflect "limits" (including policies) and flagging them as such so that all other provisions are subject to them as a matter of law.

Further consideration should be given to whether some legislated guidance is needed about how to balance particularly important outcomes (ie those that are not environmental limits) in draft section 7. This could be done through a firmer direction to recognise and provide for some things. This, along with a clear duty on the Minister to clarify any potential tensions between section 7 matters, should assist in providing a more coherent package of national direction.

National direction and allocation

In our limits paper we pointed out that where a limit is clearly set, that can force the issue of how a scarce resource is to be allocated among different users (including existing and new users). Environmental harm above limits becomes a scarce commodity for which there is competition. The point is that if a robust system of environmental limits is established, that will require an equally robust system dealing with allocation.

National direction may well need to play a supporting role in facilitating decisions about allocation of resources (whether initial allocations, reallocations, or deallocations where limits have been infringed). However, we cannot leave substantive policy decisions about how to allocate resources up to political decisions through NPSs and NESs (or to council plans). The NBA itself must outline (1) substantive principles around what allocative decisions are to achieve within the purpose of the Act (including relating to Te Tiriti); and (2) specific processes by which allocative decisions are made.

Such questions are beyond the scope of this paper, and we simply note that once such questions are addressed there may well be a role for mandatory national direction to be created to flesh out exactly how the allocative framework will operate across various non-private resources. It should be listed as one function of the Minister, and there should be a clear link to this function in provisions concerning the non-mandatory content of national direction.

National direction may well need to play a role in supporting allocation decisions under the NBA, and that role should be reflected in the matters on which national direction can be made and the associated functions of the Minister. However, key questions about allocation (eg principles and processes) should be contained within the NBA, and not left to national direction.

A general comment on drafting

There may be more efficient and less duplicative ways to approach drafting with respect to the Minister's duties under the NBA. Presently, these duties are outlined in draft s 9(3), and to some extent describe matters that are then replicated in the indicative drafting for the content of NPSs and NESs. It is not clear why some matters are listed as ministerial duties and others are listed as mandatory content of NPSs and NESs, and why some appear in both places.

We suggest that this be simplified so that there is a general duty in section 9 for the Minister to produce national direction in accordance with the national direction sections. Those sections would then specify what must be contained within NES, NPSs and both NPSs and NESs.

There is potential to simplify and remove duplication in drafting by cross-referencing the section outlining the Minister's functions to those outlining the content of national direction.

The structure of national direction

How national direction is structured is significant, and there are a number of aspects to this. At the moment, under the RMA, national direction has no standardised format and structure (despite, ironically, a big push for councils to standardise terminology and formatting through National Planning Standards).

The Panel proposes that national direction must be created for various things (eg NESs must impose limits for some domains, NPSs must set targets to achieve section 7 outcomes and a policy framework to support them, and national direction must identify things like nationally significant features). Furthermore, there is wide ranging discretion to create national direction for other things. This substantial broadening of mandatory national direction is a good thing, but it risks creating tensions and uncertain interfaces between many different instruments. We have seen that already in the uncertain relationships between NPSs we have at the moment (eg for urban development and productive land).

To that end, the Panel has envisaged in its section 9(6) that any conflicts will be able to be clarified through national direction itself. It is unclear whether this is intended to be a separate piece of national direction concerned specifically with relationships between different instruments (an NPS on the interpretation of a package of national direction), or whether it is meant to be in the form of cross-references integrated within multiple substantive NPSs/NESs.

In short, the proposal does not include any provision for how national direction is to be structured, other than a recommendation that NESs and NPSs are to remain separate instruments, the NZCPS must remain in existence, and that joint NPS-NES documents can be used where appropriate. We see room for refinement here and think there are various ways in which a clearer structure for NPSs and NESs will be important. We explore these below.

The Panel has not proposed any particular structure for a package of national direction, other than the continued separate existence of the NZCPS. We see benefit in a more structured approach.

Should combined NPS-NES instruments be mandatory?

The Panel recommends that there be a specific ability to promulgate national direction that has both NPS and NES components. That is a positive step, and has echoes of the freshwater reform process that saw joint development of NPS, NES and regulations as part of a single policy package. The question is whether those combined instruments should be mandatory, or whether NPSs and NESs should be allowed to lead an independent existence from each other.

First, as we have discussed in our resource management reform work, regulatory provisions in NESs should never be divorced from their policy context. Policies explain why regulatory standards are set where they are, aid in their interpretation, and assist any exercise of discretion where regulations require resource consents to be obtained. As highlighted by the Panel, the previous Parliamentary Commission for the Environment has also said that “NPSs and NESs should not be separate documents. Objectives, policies and if needed, technical rules should be fully integrated in one

document. A rule should be linked directly to the reason for its existence, that is, the objectives and policies it serves".[26]

Currently, for example, it is 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). The reasons driving the content of the NES are not obvious on the face of the instrument.

The creation of an NES without associated policies can cause inconsistencies in the broader planning landscape. NESs operate as regulations and override council plan rules.[27] So if an NES provides for a consenting pathway, but the relevant policies against which consent applications are assessed are only contained in the council plan, then there is potential for inconsistency between the intent of the NES and the policies in the plan. As the Panel points out, an NES does not override objectives and policies in a plan, meaning that a council's policies may only align with an NES once a plan is changed. If there is no associated NPS then it may not be immediately obvious how those should change.

Furthermore, the lack of express hierarchy between NPSs and NESs under the RMA have led to situations where NESs do not implement policy direction even where relevant NPSs do exist. For example, we have previously pointed out that the proposed NES on Marine Aquaculture does not enable effects on marine species' habitat to be considered when reconsenting existing marine farms, despite the NZCPS requiring that adverse effects on threatened and at-risk species are avoided. We should also keep in mind lessons from the Auckland Unitary Plan process; it is important to get the broader policy landscape right before thinking about more detailed questions of rules and standards.

Similar reasons have been given by the Panel to justify the *ability* to create joint NPS-NES instruments, but in our view these also support a *requirement* that NESs be clearly linked to relevant policies and that their purpose is to implement them.[28] This could be contained within the drafting for the content of NESs.

NPSs, on the other hand, may well be able to exist without NESs, so it would be premature to say that they must always be combined documents. This is because national level objectives, policies and implementation provisions may not always require accompanying regulations to be set at the national level. A fundamental part of how the system works is that national level policy framework often needs to be translated to rules and standards through regional combined plans, because they need to be tailored to local biophysical realities. In short, all NESs need associated NPSs, but not all NPSs need associated NESs.

To say that regulatory provisions in NESs must be clearly linked to NPSs is not to say that NESs should always be nested *within* an NPS (ie contained in the same document). That is because national direction instruments are – at least at the moment – often created along completely different lines. We can have NPSs and NESs targeted at domains (eg freshwater, biodiversity), spaces (eg urban areas, areas of productive land) or sectors (eg electricity transmission, forestry, aquaculture). Rules and standards in an NES that are targeted at a sector would often need to be linked to policies and objectives across multiple NPSs that were created along completely different

[26] Panel Report at 211.
[27] Although an NES *can* provide that council rules can be more stringent.
[28] Panel Report at 212.

lines. For example, if one were to create a sectoral NES for agriculture, that would need to refer to NPSs managing multiple domains like freshwater, air quality, climate change and the coastal environment.

Similarly, a single NPS may need to be implemented through rules made under multiple NESs. In particular, one can foresee that a cross-cutting NPS on Te Tiriti would need to be supported by regulatory provisions under many different NESs.

In other words, it would be unduly simplistic to require a combined NES and NPS on a single "topic" unless there is much more discipline and consistency around how a package of national direction is structured as a whole; a single NPS would need to have the same scope as a single NES, meaning that a single lens would need to be used to create all of them rather than the Minister targeting an NES or NPS to a particular sector, domain or space.

As an aside, more integrated instruments at a regional level can get around this by having a single instrument where regulatory rules cross-reference to multiple policies, and where single policies are implemented through multiple rules. This idea of a more integrated piece of national direction is returned to below. The point for now is that, irrespective of how a package of NPSs and NESs is structured, the NBA should require that NESs be clearly linked to and justified with reference to NPS objectives and policies (and a requirement that NESs must give effect to NPSs).

We foresee issues with making joint NPS-NES documents mandatory. NPSs can legitimately operate without associated NESs (because their regulatory expression may need to be through council plans), while a single NES may need to be linked to more than one NPS (a single regulation may be justified by a number of different policies).

However, there should be a legislative requirement added to the NBA that the Minister is obliged to clearly link NESs to relevant policies in NPSs (a regulation should never exist in a policy vacuum), and that the clear purpose of the former is to give effect to the latter.[29]

Should there be a single national direction document?

The Panel does not recommend that a package of national direction be structured in any particular way; it simply envisages that NESs and NPSs can remain separate, unless the Minister decides to integrate them. The result is that NPSs and NESs under the NBA could be as targeted as the Minister wishes (as is the case under the RMA), and could be created through any lens (eg a separate instrument for a particular domain, sector, space, human activity, issue or cross-cutting theme).

To ensure they are reasonably well integrated as a package, the Panel instead recommends that (1) they should all be located in the same place (presumably a reference to a common government website rather than separate "lead" ministries hosting them); (2) gaps should be filled by making some national direction mandatory (those things in s 9(3)); and (3) an expectation that conflicts between outcomes in section 7 will be resolved through national direction (as mentioned above, that should be changed to a specific *duty* on the Minister to do so).

[29] This wording is subtly different to NESs having to *give effect to* NPSs. That could be interpreted as an active obligation on the Minister to always create NESs in order to give effect to an NPS, whereas it may be more appropriate for an NPS to be given effect to instead through regional combined plans.

In terms of (2), we agree with the Panel that gaps exist in the current suite of national direction that need to be filled. Current NPSs and NESs have a patchy coverage of issues of national importance, and do not represent a sensible approach to prioritisation given the purpose of the RMA, let alone a new NBA. Key gaps rightly identified by the Panel include biodiversity (forthcoming), landscape protection, historic heritage, climate change mitigation, the effects of climate change, the management of significant risks from natural hazards, and Te Tiriti. To that list we would add policy for forestry, urban design,[30] and national standards for wastewater and stormwater. The Panel has also correctly identified that gaps exist with respect to the kinds of things within these that need to be done – eg the setting of targets, the identification of nationally significant features, and how the principles of Te Tiriti are to be implemented. That these are made mandatory is a good step.

There are a number of gaps in the current framework of national direction, and these need to be filled. These are where matters of national significance exist but have no or little corresponding national policy guidance.

However, our view is that a coherent package of national direction should be more structured than that recommended by the Panel. Gaps should not just be filled in an ad hoc way through multiple different lenses.

There are different ways in which this could be done. For example, there could be a single NPS-NES outlining all environmental limits to which all other NPSs and NESs are then subject. There could be a series of national direction instruments that reflect the structure of outcomes in section 7 for which targets (and objectives and policies) must be set – natural environment, built environment, tikanga Māori, rural environment, historic heritage and natural hazards and climate change. Alternatively, national direction could be structured around the things it must do (the 10 things listed in section 9(3)). Or we could introduce a national level version of a regional policy statement, within which all high-level policy matters relating to central government's functions could be dealt with in an integrated way and be supported by a suite of lower level NPSs and NESs.

There are different ways in which a coherent package of national direction could be structured.

Ultimately, however, we see most merit in national direction being integrated into a single instrument. We are not convinced that "many of the benefits of a single document could be replicated through having all NPSs and NESs in the same place". For example, a single integrated instrument would:

- Encourage a greater rigour in the logic of where new national direction should fit in, and force the issue of clarifying its relationship with other parts of the document.[31]

[30] There is a much stronger national interest in urban design than is currently recognised under the RMA. This can be seen in the nationally important implications that urban land use decisions have for housing, infrastructure, energy efficiency, climate change, economic performance and social welfare alongside problems of environmental degradation and opportunities that design choices provide for environmental improvement (eg urban greening and water quality). For more, see our recent work on resource management reform in the urban context.

[31] A "non-regulatory commentary" is instead proposed by the Panel to address relationships between instruments. However, our view is that reliance on this this would add complexity rather than reduce it; vague legal relationships supported by non-legal guidance is a recipe for litigation and uncertainty, because the non-

- Encourage greater discipline in terms of the use of common language across all parts of national direction
- Make cross-referencing easier (between different policies and between policies and regulations), in the same manner that provisions in regional and district plans cross-reference each other
- Avoid unnecessary duplication across national direction instruments that overlap. The Panel has identified that councils can be faced with "multiple, overlapping national direction instruments on the same subject matter" but that risk is not removed by its proposed drafting.
- Encourage any amendments to one part of the instrument to be considered in relation to the broader whole. At present, changes to NPSs under the RMA can be pursued largely independently of changes to others (or the development of others).
- Make the existence of any gaps and inconsistencies more obvious (eg regulatory provisions that do not clearly give effect to existing policies), encouraging the government to look at the bigger picture rather than bite sized pieces
- Reflect the shift in stance under the NBA from a reactive one (creating a new bespoke NPS or NES when an issue arises) to a proactive and strategic one (central government has a vital role in creating comprehensive and coherent directions for all matters of national significance)
- Guard against the endless creation of new NPSs and NESs targeted at specific issues as they arise (conceivably we could end up with dozens if not hundreds, many of which would need to be linked to each other). The more separate pieces of national direction that are promulgated along different lines, the more complicated the relationships and cross-referencing between them (if any) become.
- Encourage brevity and consistency in style and content of preliminary explanatory material, and allow for general objectives to be couched in ways that span multiple domains (eg principles of Te Tiriti, ecosystem based management, provisions related to implementation etc)
- Provide a structure that would be more easily understood by a reader (eg why chapters are arranged the way they are, which parts are relevant to a person wanting to undertake a particular proposal)
- Make it easier to identify synergies between policies concerned with different things
- Provide a logical framework within which the NBA's new mandatory elements of national direction (in section 9) could be deployed (rather than risking separate national direction for each of those things – eg an NPS identifying nationally significant natural features and another one imposing limits).[32]
- Make it easier for councils to translate national direction into regional combined plans, not just because internal relationships between national policies would be clearer but also because National Planning Standards could impose or encourage similar structural features for both national direction and council plans.[33] At the moment, the format and structure of different pieces of national direction can look very different, adding to confusion for councils expected to give effect to them across different timeframes.

We are also not convinced by the Panel's reasons for rejecting a single instrument:

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regulatory commentary would only be one factor in interpreting the meaning of the instruments. The discussion documents outlining relationships between different instruments have hardly been edifying in the past (containing phrases such as they "are intended to be compatible" and "should be complementary").

[32] The Panel envisages that national direction will do a lot more things, but it is not made clear how that is to be achieved in terms of the overall structure of NPSs and NESs. That could lead to considerable complexity.

[33] Regional councils are already expected to have an integrated approach to policy through an RPS, and regional combined plans and district plans are already much more integrated than national direction. A more structured approach to national direction could assist in translation.

It would be a more high level document that would lose its purpose and value	That would not need to be the case. Under the NBA it would contain mandatory content (eg limits and targets are required for a much wider range of domains and issues). If anything, it would have a stronger purpose and value because it would outline relationships between its parts and be more logically structured. Furthermore, while they have their problems, one cannot really say that integrated council plans risk losing their purpose and value simply because they form a single document (imagine if we allowed RPSs and council plans to be as fragmented as national direction!). In fact, the Panel specifically endorses the benefits of combined regional plans elsewhere in its discussion.
It would be unwieldy, lengthy and complex	A suite of national direction is always going to be complex and long, but having separate instruments is likely to make the package as a whole longer and more complex (it is simply easier to ignore that reality if one is only reading a single instrument at a time). An integrated document is likely to be *more* user friendly, because it will be clearer to readers which parts have an impact on them (rather than having to consult multiple instruments with quite different structures and ways of operating). Again, that is part of the logic of endorsing combined regional plans, and national direction is no different.
It would undermine environmental standards if they were contained in a single document	This is not persuasive, since environmental limits are already contained alongside other provisions in existing national direction like the NZCPS. A requirement that limits be imposed through national direction and specifically flagged as such will make relationships clear. If there is a risk that the simple act of creating a single document could undermine environmental limits, there is an urgent need to strengthen the limit-setting provisions of the Act itself (see our paper on limits).
An integrated approach in the United Kingdom has led to a document that is unduly focused on housing at the expense of other matters	This is not an issue that is caused by having a single instrument; for example, we have previously pointed out that a *separate* NPS on urban development presents a similar risk because it does not integrate well with domain-based national direction and operates as a development-focused silo.[34] Being forced to integrate these things into a single document that is *required* to contain domain-based limits, targets and objectives/policies will, if anything, ensure that housing development is done in a more sustainable manner.

[34] We have previously said that "one gets the sense that synergies are being retrofitted, where possible, into a model where urban development capacity is still the main concern. The reality remains that the NPS on Urban Development provides for "bottom line" levels of housing development, and such directions are strongly worded relative to others. If other things fit that narrative, they are welcomed into the fold."

A single instrument would delay some provisions from coming into effect	This would not need to be the case; council plans under the RMA have grappled with this issue for many years and there is provision for some provisions to become operative or have legal weight while others remain outstanding. Furthermore, an NPF would not be subject to appeal and there would presumably be timeframes around delivery, meaning that the time lag with council plans would be less comparable. Existing national direction would still exist as well and existing processes would continue, meaning that an NPF would not create a vacuum of national direction.

We are encouraged by Cabinet's decision to characterise national direction as an NPF, although it remains unclear to us whether this is intended to support a single instrument or not. We recommend that it does, and from this point on we refer to the NPF as if it is a single instrument.

We think that a single instrument for national direction – a National Planning Framework – would have many benefits. It would promote (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); and (4) completeness (it would be an integrated instrument covering all matters of national importance).

How should a single national instrument be structured?

As will be clear from the benefits described above, an integrated NPF will be useful only if careful thought is given to how it is structured. Simply recommending an integrated document is not really a solution. There is little point in having a single instrument that just artificially mashes together a series of NPSs and NESs on various topics for the sake of creating one large document. It needs to be internally coherent.

Careful thought needs to be given to how an integrated National Planning Framework would be structured.

To us, the structure of the NPF should be designed to support the purpose of the Act. That suggests to us a four-part structure.

1. Part 1 would explain how the NPF is structured and how it gives effect to the purpose of the Act (including Te Mana o te Taiao) and the principles of Te Tiriti.[35]

2. Part 2 would contain domain-based chapters,[36] based on the sequence of domains for which environmental limits must be set under section 8, plus additional chapters on climate and

[35] Having a separate NPS for Te Tiriti risks it becoming a tick box exercise; it should be well integrated across the spectrum of national direction and that could be enhanced by it forming a cross-cutting matter in an integrated NPF.

[36] The Panel rightly provides that NPSs and NESs *could* be set at multiple scales and for particular parts of New Zealand, but our view is that this should be done in a structured way (within a broader national level policy framing) rather than producing a plethora of completely separate instruments relating to particular places. Appendices could contain regionally-specific domain-based provisions where of national significance. For

landscape. Each chapter would (1) specifically flag for each domain what the policy and regulatory limits are; (2) set domain-specific targets and related policies; (3) outline how the principles of Te Tiriti are to be implemented with respect to that domain; and (4) as relevant, provide for the other mandatory content of national direction under s 9(3) (which are generally domain-focused). The idea is that there would be a comprehensive national policy framework for all environmental domains. There would need to be clear cross references between these domain-based chapters, recognising the interconnected nature of the natural environment (eg biodiversity, freshwater, the marine environment and climate change).

3. Part 3 would contain a series of sector, space or issue-based chapters. These would have to cross-reference, support and work within the parameters of the domain-based chapters in Part 2 (particularly their objectives and policy frameworks),[37] but could provide for matters beyond them (just as the purpose of the Act goes beyond natural environment outcomes). For example, there could be a chapter on urban matters (eg development capacity, rules around density, urban design considerations) that are not already covered by the domain based chapters (eg biodiversity and freshwater in cities).

4. Part 4 would be about cross-cutting matters that may appear within Parts 2 and 3 but which warrant focused attention. If necessary (ie to the extent to which the NBA itself does not provide principles and processes), this could be an appropriate place for allocative questions to be dealt with.[38]

A further Part 5 may be desirable, to include any general regulations made for administrative matters.[39] Alternatively, these could continue to operate outside the NPF, because they would not contain substantive policy matters; we agree with the Panel's recommendation that a general regulation making power be much more tightly constrained and that the proper process for creating NPSs and NESs be used to effect any substantive change, as "regulations are generally intended to be for matters of detail and the implementation of policy, and not the means of making policy itself".[40] Any substantive regulations already in existence (eg for marine pollution and dumping) should be brought within the fold of an NPF.

National Planning Standards should also form a separate document, and we agree with the Panel that these should be more tightly constrained to things like structure and definitions so that they

example, national direction could provide a useful integrative policy environment under the NBA for an area like the Mackenzie Basin, 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). In this way, the system would recognise that "regional differences need to be incorporated into any national direction approach" (Panel at 203) but that this needs to be nested within a higher-level national policy context.

[37] For example, any additional sectoral regulations in Part 3 (eg for forestry) would be expected cross-reference the policies in Part 2 of the NPF (eg biodiversity) and set standards that would achieve any policy limits (eg freshwater health).

[38] For example, for the relative weighting of matters in an attribute weighted tendering process to be described, or for the framing of a cap and trade system.

[39] For example, consistent approaches for measurement, compliance and enforcement.

[40] The Panel allows for a situation in which regulations may be used to provide temporary management of environmental matters (including where limits are threatened) while more appropriate management tools are put in place. We have previously recommended that a more targeted "emergency order" tool be used for that purpose rather than use of general regulation making power, which has few safeguards.

cannot contain substantive matters. However, like the Panel, we see merit in a "model plan" being developed by central government to aid councils in their first generation combined plans under the NBA, and this development of a model plan could potentially occur in a formal – albeit non binding – manner through National Planning Standards.

We recommend a four-part structure to a National Planning Framework. Part 1 would outline how the document as a whole would give effect to the NBA's purpose and principles (including Te Tiriti); Part 2 would provide a coherent and comprehensive set of domain-based chapters (including the setting of domain-based environmental limits) to which subsequent parts would be linked; Part 3 would provide any additional national direction on particular sectors, spaces or topics; and Part 4 would address any cross-cutting matters (including any provisions on allocation). The point of this structure would be to ensure that all national direction was clearly nested within a framework that had environmental domains at its heart, just as all human activity ultimately operates within the natural environment.

There are options for how policies and regulations could be structured across chapters within an NPF. Each chapter could provide for both relevant objectives and policies as well as any associated regulations. Alternatively, all objectives and policies could come first, followed by an integrated set of regulations (as many council plans do).

The former approach would make more sense, given that (unlike council plans) regulations in the NPF would not be comprehensive and would not form a complete planning framework that resource users are expected to navigate. In other words, the value of structuring council plans by having integrated "rules" tables separate to policies is that a person proposing to do something can look at the activity in question, see what status it has and what consents are required, and follow the links to relevant policy provisions to determine if consent is likely to be granted. National direction is not an operative framework in this sense – many rules are not likely to be there at all (they may instead be in council plans), and there would be more value in tightly linking any regulations to the policy context that has given rise to them. To us, that suggests that both NPS and NES type provisions are best contained, for the most part, within each chapter. That said, to ensure proper connections, there will likely need to be extensive cross-referencing between rules in some chapters and policies in others. For example, sectoral regulations (eg for aquaculture) in Part 3 of an NPF may need to link to domain-based policies (for the coastal marine environment) in Part 2, and policies for freshwater will need to link to other policies concerned with indigenous biodiversity (different chapters in Part 2).

While there are different options for how it could be structured, it would make most sense for objectives, policies, regulations and other directives to be linked tightly to each other within each chapter in a National Planning Framework, rather than separating policy provisions from regulatory provisions (eg by having all NPS provisions followed by all NES provisions).

Overall, this structure would ensure that all sector or issue focused national direction chapters were linked to and influenced by a coherent domain-based set of national direction. To illustrate this point, one can look at the current NPS on Renewable Electricity Generation. This 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"). It does not fit well within the broader policy framework of national direction.

Similarly, the NPS on Urban Development is concerned primarily with making more land available for urban development, with little 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 urban expansion. The quality of the natural environment within cities is given only cursory attention because that is expected to be dealt with elsewhere, although there are few cross-references to the other instruments that might be expected to do so.

A national direction implementation plan

Each chapter of the NPF should also be required to outline how the NPF is to be implemented. There is a pressing need for central government to get more involved in the implementation of national direction, not just in creating it, and there have been legitimate complaints that its approach to "considering new interventions is ad hoc and lacks a structured, transparent approach to forward planning on current Government priorities and emerging issues".[41] In other words, national direction is not strategic, future-focused or pre-emptive. The Panel has identified this as a problem, and its requirement for national direction to contain some mandatory matters, including targets and supporting policies in NPSs, will assist. The NPF would need be an "action plan" (a way to get from A to B) as well as a "regulatory" plan (a framework for making decisions about what is and is not allowed).

However, in addition to the inclusion of targets, we think that a national direction "implementation strategy" would be useful as a formal part of the system. Since 2017 amendments to the RMA, NPSs *can* have specific sections on how they are to be implemented by councils (and this has been embraced in the NPS for Freshwater Management), and the Panel has continued this approach in its drafting for the content of NPSs.[42] But this is not the same thing as (1) outlining what the *government* intends to do to implement national direction; (2) anticipating what *new* national direction may be needed in response to continual monitoring and futures scanning; (3) outlining an overall implementation strategy across a broader package of multiple pieces of national direction (the parts of which are closely linked), and (4) setting clear national level biophysical thresholds or indicators that, if breached, automatically trigger an obligation for the government to investigate and take corrective action through reviews or through new national direction.

Subsidiarity and an implementation strategy

With respect to point (2) above, an implementation strategy could also usefully include a more substantive definition of what "nationally significant" means, giving councils a better sense of the grounds upon which national direction will be created. On the Panel's drafting, it is left relatively open ended as to the extent to which the Minister can intervene in matters that many may regard as

[41] See M Foster and others Report of the Minister for the Environment's Infrastructure Technical Advisory Group (2010) at 37.
[42] Subsection 2.

"local" rather than "national".[43] There is no clear delineation between central and local/regional responsibilities by topic or domain.

The failure of the RMA to identify clear principles around subsidiarity – what is local and what is national – can be 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." 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". 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.

NPSs under the RMA have also tended to be high level and not really targeted to particular areas in need of intervention. For example, the protection of horticultural land in South Auckland may be much more significant from a national perspective than the protection of pasture in Taranaki. There has been reluctance to include any specific spatial element in national direction, which risks being less effective because of it (ie expressed only in high level objectives and policies that need to be weighed up with others).[44]

Greater clarity than is provided for in section 9(3) 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 beyond mandatory national direction. There may, for example, be tensions that arise with respect to any urban design considerations in national direction, which communities may see as an unjustified intrusion into local governance but which may actually have implications for nationally significant outcomes (eg climate change and biodiversity). There may also be national interests in particular places and not others, and what those are (and why) should be signalled clearly.

While some flexibility is needed to allow the Minister to create new national direction when something *becomes* nationally significant (one example could be land supply and its impacts on the housing market), effort should go into defining in advance how the government sees the meaning of subsidiarity. This would provide safeguards against the ad hoc and small-scale intervention of Ministers into local matters, as well as providing a degree of predictability to councils about what will need to be implemented through any upcoming plan reviews. It would add rigour to the decision as to why national direction covers what it does as a whole package, not just the list of considerations the Minister must think about when promulgating a particular *piece* of national direction. The constitutional position of local government in New Zealand is unclear and tenuous, and should be defined more specifically to prevent councils (1) being a dumping ground for things that should really be dealt with at a national level and (2) to prevent things that are really local from being determined at the national level.

[43] Under draft section 9(3) the Minister must have regard to various matters before issuing national direction, but that includes (1) "any other relevant matter", (2) terms like "significance" that are open to interpretation, and (3) a weak direction to consider rather than any constraint on the exercise of ministerial powers.
[44] Earlier, we suggested that appendices to an NPF could outline regionally specific elements of national direction so that they fit within a broader national level policy framing.

The simplest approach in legislative terms would be to change the wording in section 9(3) from a requirement that the Minister "have regard to" whether a matter is nationally significant to a requirement that the Minister "be satisfied" that this is the case. That accords with the Panel's intention that national direction should be "confined to matters of national significance" and "where "a need has been demonstrated",[45] as well as the stated purpose of national direction. While the ultimate decision as to whether something is or is not nationally significant would still be the Minister's, it would provide a stronger hook for judicial review action.

In addition, principles around what is nationally significant could be within the implementation strategy described above, or it could be contained within the NBA itself (eg by refining the outcomes in section 7, or adding a new implementation principle on subsidiarity in section 9).

Putting aside the question of subsidiarity, there are different ways in which an implementation strategy could be structured. It could be distributed across different chapters within an NPF itself. That would closely link implementation to domain-based objectives and policies, as has been the case with freshwater in the NPS for Freshwater Management.

Alternatively, it could be a separate non-binding document that runs in parallel to a formal NPF. This would recognise that there are conceptual differences between a legal requirement for councils to give effect to an NPF (where implementation provisions need to be in the NPF itself) and a non-binding strategic plan for how central government intends to support its implementation and future development, including through funding support (which could therefore be separate).

On balance, we would suggest a separate, mandatory but non-binding instrument that deals with central government implementation, but one that is structured along the same lines as the NPF itself (so that it is clear how national direction for each domain is to be implemented).[46]

A National Planning Framework should be accompanied by an implementation strategy. This could be contained within the NPF, but it makes most sense for it to exist in parallel. This strategy should be required by legislation. Among other things, the Minister should be obliged in an implementation strategy to include a more substantive definition of what "nationally significant" means, giving councils a better sense of the grounds upon which national direction will be created.

The wording in draft section 9(3) of the NBA should be changed from a requirement that the Minister "have regard to" whether a matter is nationally significant to a requirement that the Minister "be satisfied" that this is the case.

A more structured approach to national direction outlined above would not require a huge amount of legislative change. This is because the NBA itself – in its provisions on the content of national direction – could outline a basic tiered structure of chapters in the NPF and leave the detail to be determined through National Planning Standards.[47] In other words, National Planning Standards are

[45] Panel Report at 208.
[46] This could be integrated into the national priorities statement produced under the SPA, but that would be an awkward fit for an implementation plan targeted at national direction made under the NBA that is much more specific and directive.
[47] For example, there would be a need to characterise the NZCPS as a domain-based chapter rather than a separate instrument (see drafting on matters to which Ministers must have regard, subsection (2)).

useful not just to ensure consistency across different councils, but also to (1) ensure that multiple pieces of national direction are well integrated amongst themselves and (2) to ensure that national direction connects seamlessly (eg in terms of structure and terminology) with combined plans so that implementation by councils is as straightforward as possible.

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. The broad structure of the National Planning Framework should be outlined in National Planning Standards alongside a model combined plan, to make it easier for councils to give effect to it and to give predictability for the future. There should, however, be a broad legislative framing for an integrated NPF in the NBA itself.

Of course, there will need to be transitional arrangements in terms of how existing national direction is morphed into this new structure. To start with, existing national direction should be deemed to form chapters in either Part 1 or Part 2 of an NPF and be reviewed to ensure consistency both with the purpose of the NBA and to clarify relationships between them.

However, we do not think that moving towards a new structure would require unduly disruptive change to the content of our current suite of national direction. It requires primarily a reshuffling of existing[48] national direction and making better connections between its pieces, rather than complete rewriting. There has for a while now been an implicit understanding that we need a comprehensive suite of national direction (at least NPSs) covering the core environmental domains at the heart of the RMA (freshwater, air, soil, the coastal and marine environment, biodiversity, landscape and climate change), and there has been a slow but steady trend towards grappling with those at a national level and filling gaps. In other words, we are not too far off a domain-based framework of policy that would form chapters in Part 1 of an NPF. There are gaps to filled (eg estuaries, landscape), content to be debated (eg biodiversity), and better links to be made with sectoral or spatial NPSs/NESs (eg urban development), but it is fairly obvious where those things would lie in the overall structure of domain-based chapters, and they are things envisaged to be needed anyway, irrespective of how an NPF is structured.

[48] Within which we include those pieces of national direction proposed, such as the NPS for Indigenous Biodiversity.

The legal effect of national direction

We generally agree with the Panel's recommendations concerning the legal effect of national direction. In short, this means NESs would continue to operate directly as regulations, and combined plans must not be inconsistent with them. NESs could also be directly enforced. NPSs would have to be given effect to in combined plans. National direction itself would specify which provisions are to be directly inserted into plans and which will need to be given effect to through plan changes or reviews, and would contain provisions about implementation by councils.

National direction and consents

The impact of an NES on the determination of consents is reasonably clear in the Panel's proposal: NESs operate as regulations (eg they can trigger an obligation to apply for consent and dictate activity status and any standards that must be complied with), and a consent cannot be granted contrary to an NES. However, the impact of NPS provisions on consents is less clear and could benefit from more drafting nuance.

Consistent with our previous advice, we recommend that environmental "limits" be contained not just in regulatory form in NES provisions but also in policy form through NPS provisions. This means that a consent authority will not be able to grant a resource consent that is "contrary to" a policy limit in an NPS. That will to some extent address concerns that there is a time lag between the issuing of an NPS and consequent changes to policies in a plan (perhaps years later) that give effect to those limits in regulatory form.[49]

The risk under present drafting is that NPSs – including any limits described in them that are not translated to national level regulation under an NES – will simply be had "regard to" by a consent authority. While this retains the current drafting of the RMA, and by implication the more nuanced approach developed through case law like *Davidson*, there is an opportunity here to make this more transparent through legislation. If the real intended meaning of the section, when interpreted in light of case law, is that any firm and directive policy limits should be complied with rather than had regard to, that should be made clear on the face of the NBA. That would require only a simple drafting change that has already been mentioned earlier – that an "environmental limit" be defined to encompass policy provisions contained in an NPS. This would then mean that subsection 3(a)(i) of the indicative drafting for consent applications (that consent cannot be granted contrary to an environmental limit) would apply also to policies flagged as environmental limits in NPSs.

An environmental limit should be defined more broadly to include provisions in NPSs. That would ensure that consenting decisions could not be granted contrary to a policy limit, not just a regulatory limit.

[49] Although the detail of what that NPS means at a local level may not be obvious until a plan change is made, it may still be obvious whether a consent should or should not be granted based on the wording of the NPS. In any case, the Panel's drafting already envisages that consent cannot be granted contrary to "binding targets", which are designed to be included in NPSs; thus there is no conceptual problem with requiring consents to be "not contrary" with policy provisions in an NPS. Indeed, the concept of consents not infringing firmly worded policy limits is already in existence under jurisprudence like *Davidson.*

The consenting sections of the NBA could also be amended so that a consent authority is obliged to place relatively *stronger* weight on relevant policies in national direction (eg have particular regard to them), not *just* those that set limits.[50] Under current drafting, there is no hierarchy of weight between (1) policies in newer NPSs and (2) older policies in council plans/RPSs that may not yet give effect to that NPS. That may weaken the impact of the NPS and the national interest. Again, we recognise that case law has added nuance here, but recommend in the interests of certainty and transparency that the NBA itself makes the impact of NPSs on consent decisions clearer.

The consenting sections of the NBA should be amended so that a consent authority is obliged to place relatively *stronger* weight on relevant policies in national direction where they clash with policies in council plans.

We also agree with the Panel that the balance should be shifted away from relying on consents as the main place where environmental safeguards "bite". Making it clearer in advance – including through how national direction is drafted– whether a particular proposal will be allowed (and what conditions it will be subject to) would reduce cumulative impacts as well as provide greater certainty for industry. In other words, it should be clearer in the language of an NPS what "giving effect to" an NPS actually means, not just in the context of plan development but also for the determination of consents.

This will be hard to legislate for, because the content of each policy will be different. However, it could usefully be included as an implementation principle either in section 9 or in provisions relating to the content of national direction. That could specify that policies should be directive where possible and the relationship between different policies should be made clear through the use of terminology that has a clear meaning. Under the RMA, many NPSs are characterised by fairly general (and sometimes novel) wording, requiring extensive interpretation and mental gymnastics (and often litigation) to figure out relationships and hierarchies.[51]

An implementation principle should be included either in section 9 or in provisions relating to the content of national direction, specifying that policies should be directive where possible and the relationship between different policies should be made as clear as possible.

Finally, we agree with the Panel that there needs to be a requirement to review existing regional consent conditions (and potentially land use consents/existing uses)[52] when new national direction is issued. We note that there needs to be appropriate resourcing of that, as it could be a significant task. This should also be phrased as a *duty* (not just a power) to review relevant resource consents where limits are threatened or infringed.

We also flag that a requirement to review consents and existing uses may impact on allocative issues (particularly if new limits outlined in national direction are overshot already). There needs to be thought given to an effective "deallocative" framework that is closely linked to the review of consents (eg who in a catchment needs to give up rights, and in what relative measures, if there are

[50] Although that additional weight would be subject to compliance *with* any environmental limits.
[51] 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.
[52] For some matters – eg where environmental limits are threatened or where needed to adapt to climate change.

multiple consents or existing uses).[53] If there is no clear process for this, political opposition to national direction will be immense, and limits set through national direction may not be achieved in practice.

A clear process for de-allocating rights needs to be linked to a duty to review consents where new limits are imposed through national direction.

National direction and regional spatial strategies

The legal effect of national direction on other legal frameworks is also important. The relationship with regional spatial strategies under the SPA is particularly significant.

We agree with the Panel that spatial strategies should be required to be consistent with national direction. National direction will be where crucial environmental safeguards are contained – including limits – that need to be reflected in spatial strategies. This relationship reinforces the importance of there being clear links between different components of national direction – and, ultimately, the benefits of having a single coherent and integrated document (an NPF) against which the consistency of a spatial strategy can be easily assessed.

As recommended in our limits paper, we also think it is important that spatial strategies be obliged to *give effect* to environmental limits contained in NPSs. That is because some objectives sought through national direction (including some environmental limits - eg the extent of indigenous habitat) may require strategic spatial expression or translation (eg a plan for how habitat is to be increased or connected over time in relation to roads and urban growth).[54] In particular, strategic plans for the *creation*, over time, of a network of area-based protections could be provided for to give effect to biodiversity limits set under the NBA, in the same spirit as Natura 2000 areas established under the European Union Habitats Directive.[55]

Spatial strategies should be required to *give effect* to environmental limits contained in national direction, where relevant. That is because some objectives sought through national direction may require strategic spatial expression at a regional level to be effective.

The creation of a proper spatial planning process under the SPA is a very good step. However, its relationship with national direction gives rise to questions about the kind of things national direction should and shouldn't contain, and what should instead be contained in regional spatial strategies and the SPA.

In recent years, the national direction framework under the RMA has been used in ways that are a questionable fit for the Act. In particular, national direction has required or is proposed to require the creation of completely new "quasi-RMA" documents like future development strategies and

[53] That will be an issue with freshwater discharges and potentially with the protection of biodiversity on private land.
[54] Compare Cawthron *Environmental Limits – A proposed framework for Aotearoa New Zealand* (Report no 3530, 2020) at 143-144, where it is suggested that limits for various things require land use change and vegetative cover, which is inherently spatial.
[55] For more on Natura 2000 and how that could look in the New Zealand context, we refer you to our resource management reform reports at www.eds.org.nz/our-work.

biodiversity strategies. Although they are created under the broad remit of national direction, these can and are designed to influence multiple statutory frameworks beyond the RMA.

A future development strategy, for instance, is expressly able to be subsumed within non-statutory documents made by councils, or within instruments prepared under other legislation. Its tendrils try to extend well beyond the RMA (eg attempts to influence infrastructure funding decisions under the Local Government Act). But future development strategies do not themselves have the weight of the NPS that required their creation – in other words, they do not have to be given effect to in regulatory RMA instruments like district plans. There is only an obligation to have regard to them. Nor, being a product of an RMA instrument, do they have to be given effect to under other statutory frameworks like the Local Government Act and Land Transport Management Act. Instead, councils are "strongly encouraged" to use them to inform things like infrastructure strategies and regional land transport plans. The point is that the NPS framework is being used to create an entirely new quasi legal structure for strategic planning, creating additional complexity.

Similarly, the Biodiversity Collaborative Group has recommended that the proposed NPS for Indigenous Biodiversity requires biodiversity strategies to be made, which would link together instruments under multiple legislative frameworks as well as linking to other NPSs under the RMA. This more holistic and strategic view of biodiversity is a much-needed step. However, these strategic instruments introduce more and more things to which councils must have regard in making decisions under the RMA, alongside the policies contained in national direction itself. Again, it would be creating a new system within a system.

Not only is national direction seeking to extend its reach to other statutes; other statutes are also increasingly trying to influence national direction. For example, adaptation plans and emissions reduction plans made under the Climate Change Response Act have a crucial but unclear relationship with national direction (as explored in our RM reform work). It is also unclear how a government policy statement on housing and urban development (mandated under the Kāinga Ora – Homes and Communities Act) fits in with RMA national direction concerning urban development.

National direction under the RMA is not the right place for this wider kind of strategic planning to occur. Future development strategies in particular should be subsumed in regional spatial strategies made under the SPA. This would simplify the role of an NPF to be an integrated national framework of objectives, policies and regulatory provisions that focuses on achieving the purpose of the NBA, rather than trying to knit together multiple frameworks. That would necessitate changes to the NPS on Urban Development and potentially other NPSs.[56]

Future development strategies currently prepared under RMA national direction should be subsumed in regional spatial strategies made under the SPA.

National direction and climate change

The Panel has recommended that a new piece of legislation be enacted to deal with climate change adaptation and managed retreat, alongside the NBA and Climate Change Response Act (CCRA). The logic is that no existing framework is sufficiently targeted or cross-cutting to deal with the sorts of

[56] There is a stronger case for housing and business development capacity assessments to remain under the NBA's framework for national direction, as it is about gathering information to inform decisions on land supply, which forms a core outcome under draft section 7 of the NBA.

things this legislation would be designed to do. Such questions are beyond the remit of this paper. However, the relationship between national direction under the NBA and this new Act remains vague and will need to be clarified. In particular, it is unclear whether there is a hierarchical relationship envisaged between the Act and the NBA, or whether it is mainly designed to fill non-policy gaps – ie tools that will exist in parallel (eg the creation of a fund for adaptation and revised powers for the acquisition of land). The Panel's key points with respect to national direction seem to be that:

- national direction under the NBA should have the power to modify or extinguish consented and existing uses for climate change adaptation purposes (although it is unclear whether this is to be achieved through the NBA or through a different set of provisions under the Adaptation Act)
- NPSs are to be mandatory for climate change mitigation (presumably achieved through the drafting that requires all section 7 outcomes, including the reduction of greenhouse gases, to have targets and supporting policies created through NPSs)
- these NPSs must be consistent with the emissions reduction plans prepared under the CCRA
- NPSs are to be mandatory for climate change adaptation (again, presumably to be achieved through the drafting requiring all section 7 outcomes, including the reduction of risk from natural hazards, to have targets and supporting policies created through NPSs)
- these NPSs must be consistent with the national risk assessment and adaptation plan.

While there are many uncertainties about relationships that must be worked through in developing the Managed Retreat and Climate Change Adaptation Act (Adaptation Act), there are four key points to make here.

- The relationship between national direction and emissions reduction plans under the CCRA (that national direction on climate change mitigation must be consistent with emissions reduction plans) is not actually specified in the Panel's drafting
- The relationship between national direction and risk assessments and adaptation plans under the CCRA (that national direction on adaptation must be consistent with them) is also not specified in the Panel's drafting
- It is not clear whether specific substantive decisions about land use change in particular places (eg red zoning at-risk land) are to be triggered through criteria under the NBA (eg through mandatory national direction), or whether such decisions are to be made under the Adaptation Act and then implemented through national direction (or directly through council plans). Either way, it seems likely that such detailed decisions will not be made under the CCRA's national adaptation plan.
- The scope of national direction under the NBA to deal with climate change mitigation is left vague. The Panel in its discussion expresses misgivings about an unconstrained ability for national direction to address mitigation issues, given the pricing signals under the Emissions Trading Scheme (ETS). In drafting, however, there is no reference to the Panel's intention of national direction having to "align with" and "support" emissions pricing rather than undermining or overlapping with it. This could be added to the matters the Minister must consider when deciding to issue national direction, although that is a poor fit given that section is designed to apply when optional national direction is being considered, not when the scope of mandatory national direction is being considered. A new provision may be needed if overlap with the ETS is a concern.

Because climate change mitigation and adaptation are nationally important issues and require land use change that local political dynamics may push back strongly against, national direction under the NBA will be a crucial tool in achieving climate objectives. The Panel's proposal for mandatory national direction is positive, as non-mandatory direction under the RMA has not been forthcoming.

In particular, our view is that substantive land use change decisions demanded by the CCRA's more general adaptation plan should be driven through firm national direction under the NBA. This is because of its close intra-statutory connections with regional combined plans where detailed zoning decisions about land use change will need to occur. The separate Adaptation Act should provide a suite of tools that will support such decisions (eg funding support) rather than drive them. A central role for national direction under the NBA is particularly important if, as the Panel suggests, an Adaptation Act is enacted *later* than the NBA and SPA.

Several relationships between national direction and the CCRA need to be made clearer in drafting. In particular, it should be made clear that national direction must be consistent with emissions reduction plans and a national adaptation plan. A change to the latter instruments should trigger a review of relevant national direction. It should also be clarified that detailed land use change for climate change adaptation (eg managed retreat) is to be *driven* by national direction under the NBA (and the combined plans that give effect to it), but *supported* by tools provided for under separate adaptation legislation.

Furthermore, the cross-cutting nature of climate change mitigation and adaptation lends support to the idea of a highly coherent and integrated NPF rather than a series of disparate instruments. Climate change needs to be woven into many different components of national direction (eg for coastal environments, urban development, urban form and design, biodiversity etc), rather than just being a standalone instrument dealing with point source emissions. For example, climate imperatives support quite specific policy directions around enhancing urban biodiversity (planting), compact urban form (densification), coastal retreat, and protecting productive soils for horticultural use. In other words, climate change is not just something for which national direction must be made; it is also a consideration when creating *any* national direction. That broad view is best achieved by having a single instrument.

The cross-cutting nature of climate change mitigation and adaptation, and the need for CCRA instruments to link closely to all aspects of national direction (not just dedicated "climate" parts), further supports the development of a single integrated instrument (an NPF).

A final note on the effect of national direction

One final note on the legal effect of national direction is that some content of current national direction (eg limits expressed as policies in the NPS for Freshwater Management, NZCPS or draft NPS Indigenous Biodiversity) may benefit from being elevated to legislation. Statutory expression would provide extra certainty and durability for national level environmental policy limits that are fully in keeping with the intent of the NBA. We recommend that policy-makers closely look at limits contained within national direction and consider whether those could be specified in primary legislation.

Consideration should be given to whether some provisions contained within existing or proposed NPSs – notably environmental limits – should instead be contained in the NBA itself.

The process for creating national direction

The Panel has described the process by which national direction would be created under the NBA but has not provided specific drafting. We support that general process, including:

- that the development of national direction and any substantive changes to it should go through a single process involving recommendations by an independent board of inquiry
- preparation by the Minister for Environment (or jointly with the Minister of Conservation), with the roles of other Ministers curtailed
- various matters that must be considered before any non-mandatory national direction is issued
- the use of a section 32 type analysis justifying the use of national direction
- involvement of Māori in the development of national direction
- the setting of trigger points for review in advance, and a minimum review timeframe of nine years

We note that the Panel also proposes that there be an alternative process for changing national direction for "minor" things. While this may be useful in some cases, it should be clearly defined as not including changes that would weaken provisions classified as environmental limits (whether in NES or NPS components of national direction).

We also recommend some further refinements, in keeping with the spirit of the Panel's proposal.

- As discussed earlier, there should be more clarity as to what "national significance" means, in order to maintain subsidiarity. The statutory language should be changed so that the Minister not only *considers* a series of matters before issuing non-mandatory national direction, but that he or she *is satisfied* that a matter is of national significance (which would support the purpose of national direction outlined in subsection (2)).
- Members of an independent board of inquiry should be appointed by the independent judicial officer appointed by the Minister to chair the board (as per the freshwater planning process under the RMA).
- Greater clarity is needed as to how Māori are to be involved in the development phase of national direction (this could involve an expansion of the role of the Panel's recommended National Māori Advisory Board, although that expert body does not resolve the question of how to engage with mana whenua at a national, representative, level).
- Provision for local government to play a role in co-developing national direction (which 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).
- There should be recognition that, where regulatory provisions are being developed, it is important to outline the policy framework first.
- There should be a requirement that any new national direction be assessed against, and be well integrated within, the existing framework of national direction (ie the NPF), particularly environmental limits
- Where national direction contains environmental limits, there should be an independent review/audit role for the Parliamentary Commissioner for the Environment (together with adequate resourcing to discharge this function). In addition, or alternatively, an independent panel of scientific experts (including members with expertise in mātauranga Māori) could be established by the Minister to provide recommendations as to what limits should be set and at what level

We support the general process outlined by the Randerson Panel for the creation of national direction, but suggest some refinements.

Transitional arrangements

Transitional arrangements are crucial when it comes to national direction. 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) would need to be deemed to be incorporated into a single NPF and added to and reviewed. Existing processes for national direction – particularly the NPS for Indigenous Biodiversity and the implementation of freshwater direction – should not be held up.

We generally agree with the Panel's approach to transitional arrangements. As we move towards an integrated NPF over the next three years, prioritisations should be made according to a coherent set of criteria. We would envisage this starting with a general review and 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. Relationships between national direction should be made clearer during this process, in light of the new purpose and principles of the NBA.

In parallel, there should be a systematic assessment of which gaps in national direction need to be filled (including mandatory national direction), and how they will be filled. Policy gaps – including in relation to Te Tiriti – should be filled before regulatory ones.

It is important that national direction transitions carefully alongside spatial planning, especially because some aspects of national direction will need to shift to regional spatial strategies under the SPA framework (eg future development strategies).

As that happens, existing and new national direction should be shifted carefully so that it forms part of – or at least becomes oriented towards – a more coherent structure in a single NPF instrument as described above. Different instruments should form a comprehensive whole, be well aligned with each other and with other frameworks (eg under the CCRA), have meaningful cross-references, and be well positioned to form chapters in a coherent document. We should not see a proliferation of new national direction targeted at very specific things demanded by provisions in the NBA (eg an NPS on limits, another one identifying nationally significant features etc) – these requirements need to be thought of, from the outset, in the context of an integrated document that has a coherent set of domain-based policies (and limits) at its heart.

Over the next three years there should be (1) a general review and alignment process for existing national direction; (2) a systematic assessment of which gaps in national direction need to be filled and how, starting with policy provisions and progressed according to transparent criteria (starting with limit setting); and (3) both of these things should be approached carefully so that each piece of national direction becomes oriented towards inclusion in a more coherent structure – a single, tiered National Planning Framework. Existing processes for national direction – particularly the NPS for Indigenous Biodiversity and the implementation of freshwater direction – should not be held up.