

# REFORM OF THE RESOURCE MANAGEMENT SYSTEM

## The Next Generation Working Paper 2



**Greg Severinsen,  
Raewyn Peart & Brooke Cox**





# REFORM OF THE RESOURCE MANAGEMENT SYSTEM

## The Next Generation

Working Paper 2

**Greg Severinsen,  
Raewyn Peart & Brooke Cox**



Published with the assistance of the  
New Zealand Law Foundation



First published 2018

Published by:

Environmental Defence Society Incorporated  
P O Box 91736 Victoria St West  
Auckland 1142

Phone (09) 302 2972

[manager@eds.org.nz](mailto:manager@eds.org.nz)

[www.eds.org.nz](http://www.eds.org.nz)

[www.environmentguide.org.nz](http://www.environmentguide.org.nz)

© Environmental Defence Society Incorporated 2018

Design: Neale Wills, Wilsy Design & Production Ltd

Printing: Crucial Colour, Auckland.

Photographic images: Raewyn Peart unless otherwise indicated

Cover image: Supercharging electric cars, courtesy of Tesla Motors

Copies can be downloaded from [www.eds.org.nz](http://www.eds.org.nz)

## Acknowledgements

The Environmental Defence Society would like to give special thanks to the primary funder of this project, the New Zealand Law Foundation. Thanks also to the Property Council New Zealand, Infrastructure New Zealand, the Employers and Manufacturers Association and Watercare for providing financial support for the project. In addition, we would like to thank all the people who have contributed to the project so far including members of the Advisory Group, interviewees and those who attended our workshops on 27 November 2017 and 12 April 2018.

This document is printed on an environmentally responsible paper, produced using Elemental Chlorine Free (ECF), Third Party certified pulp from Responsible Sources, and manufactured under the strict ISO14001 Environmental Management System.



# CONTENTS

---

<b>Executive summary</b>	1
<b>1. Introduction: The project and the paper</b>	21
<b>2. Looking to the horizon: Futures scanning</b>	25
<b>3. Designing our legislation</b>	37
<b>4. Public participation in the resource management system</b>	93
<b>5. New Zealand's obligations under international law</b>	107
<b>6. Concluding comments</b>	119
<b>List of references</b>	121
<b>Appendix 1: A working definition of New Zealand's resource management system</b>	126
<b>Appendix 2: Legislative design, urban planning and allocation</b>	127
<b>Appendix 3: How current legislation provides for rights of public participation</b>	131
<b>Appendix 4: New Zealand's obligations under international environmental law</b>	137

## LIST OF ABBREVIATIONS

---

<b>BOI</b>	Board of Inquiry
<b>EDS</b>	Environmental Defence Society
<b>EEZ</b>	Exclusive Economic Zone
<b>EEZ Act</b>	Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012
<b>EPA</b>	Environmental Protection Authority
<b>GDP</b>	Gross Domestic Product
<b>HASHA Act</b>	Housing Accords and Special Housing Areas Act 2013
<b>IAP2</b>	International Association for Public Participation
<b>LGA</b>	Local Government Act 2002
<b>LTMA</b>	Land Transport Management Act 2003
<b>NES</b>	National Environmental Standard
<b>NPS</b>	National Policy Statement
<b>RMA</b>	Resource Management Act 1991
<b>UNCLOS</b>	United Nations Convention on the Law of the Sea
<b>UNFCCC</b>	United Nations Framework Convention on Climate Change

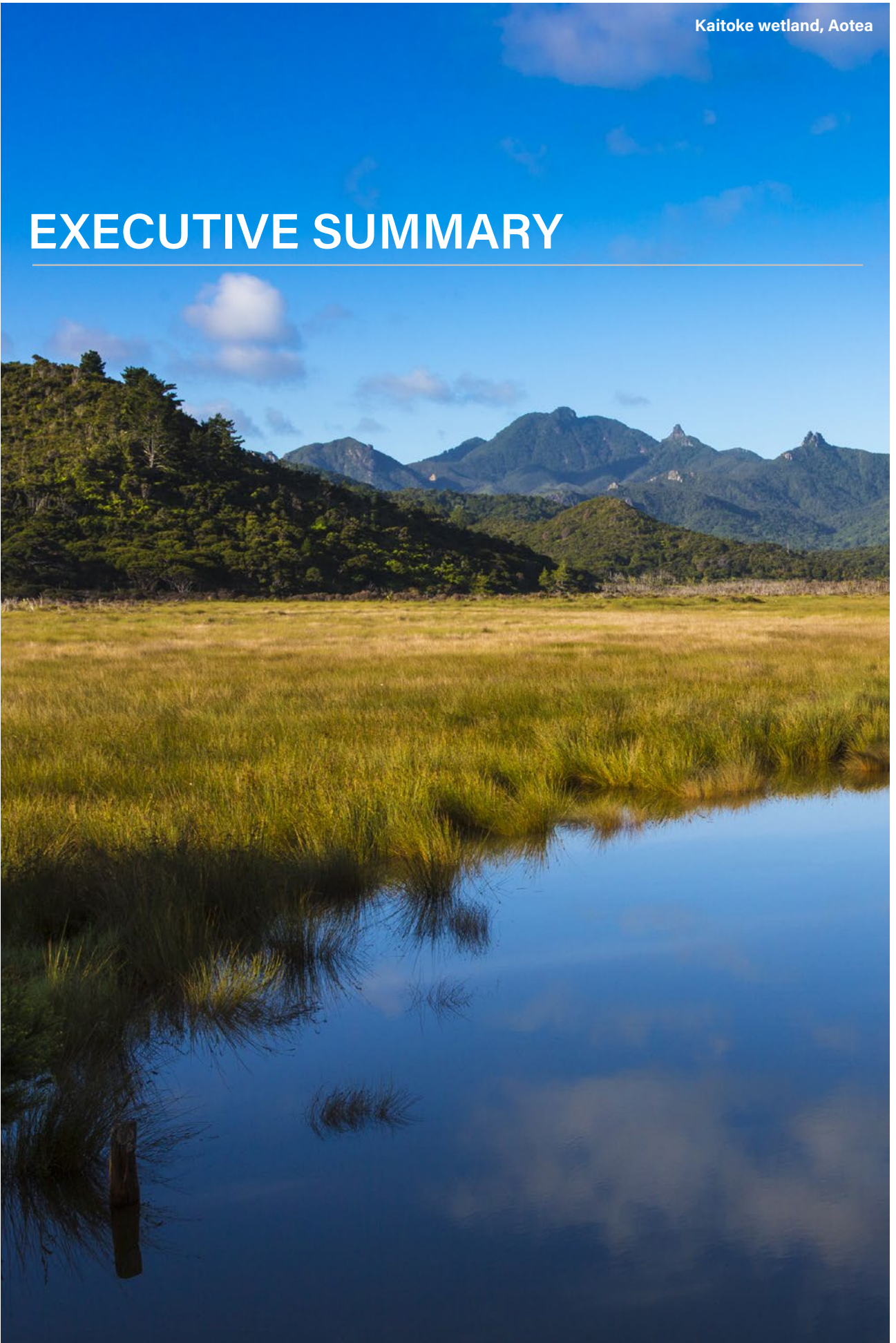
# LIST OF FIGURES

---

1	Proposed report structure for the project as a whole	24
2	Potential lenses through which we can look at designing legislation	50
3	An example of applying lenses	51
4	Part of a suite of legislation created using an outcomes lens	51
5	Part of a suite of legislation created using a sectoral lens	51
6	Possible statutes produced by looking through a location-based lens	52
7	Possible statutes produced by looking through a domain-based lens	52
8	A conceptual distinction between domains/resources and sectors	53
9	Possible statutes produced by looking through a sectoral lens	54
10	Possible statutes produced by looking through an institutional lens	54
11	Possible statutes produced by looking through an outcomes lens	55
12	How not to design legislation	55
13	Primary, secondary and tertiary lenses	56
14	Key statutes in the current resource management system, showing overlap with other possible systems	57
15	Key statutes in the current resource management system, and the lens through which each has been created	59
16	Domains form a secondary lens in the current system	60
17	Locations form a third lens in the current system	61
18	Sectors form a fourth lens in the current system	62
19	The hierarchy of lenses used in the current system	63
20	An alternative representation of lenses used in the current system	63
21	The normative relationship between protective, balancing, and exploitative legislation is generally hierarchical	64
22	The local funding and delivery of 'three waters' and transport infrastructure	68
23	Connections within and between the local government and transport systems	69
24	The structural relationship between local government, land transport, and resource management systems	70
25	Expanding our outcomes-based lens	72
26	A potential expansion of outcomes-based statutes	74
27	Outcomes-based statutes in the current system	75
28	A separation of 'protective' and 'balancing' legislation	77
29	Two roles of separate balancing legislation	80
30	A model in which domain-based statutes are more fully integrated into outcomes-based legislation	84
31	A model in which protective location-based statutes are rationalised	85
32	The potential place of an environmental constitution in the system	89
33	A summary of ideas for legislative design	90
34	The IAP2's public participation spectrum	96
35	Strengths and weaknesses of public participation	100
36	An assessment of the strength of participatory rights under different legislation	103

# EXECUTIVE SUMMARY

---



The purpose of this project is to take a first-principles look at the resource management system in New Zealand and to outline options for reform. This is the second in a series of working papers generated by the project.

The first working paper considered the project’s conceptual framework, the context for reform, ethics and principles, and some key findings from the Environmental Defence Society’s international study tour. This paper – Working Paper 2 – addresses a variety of further matters: (1) what the future could look like, and its implications for the resource management system; (2) legislative design; (3) public participation; and (4) New Zealand’s obligations under international law. Because this is a working paper, it is intended primarily as a primer for discussion and feedback; it does not offer a specific set of recommendations. We are, above all, seeking to construct a coherent framework for thinking about relevant questions, rather than driving a particular set of answers. To this end, we pose key questions throughout the paper (which are also reproduced throughout this executive summary).

How the topics addressed in Working Paper 2 fit into the overall conceptual framework of the project is shown in the table below. Topics addressed in Working Paper 1 are

shown in blue, and those addressed in Working Paper 2 are shown in orange. The working papers are not intended to be the final word on these topics. They will be subject to continual revision and addition as the project progresses.

## 1. Looking to the horizon: Futures scanning

This chapter considers what the future will, or could, look like. It is essential that any reform of New Zealand’s resource management system thinks about tomorrow, not just today. The country faces a dynamic and unpredictable future. That there will be significant change in some areas, such as demographics, climate change and technology, is certain. In other areas, such as global markets and politics, there are considerable risks, but the extent of change is less clear.

### Population and economic change

New Zealand’s total population is projected to grow from 4.4 million in 2013 to 5.8 million in 2038, with an annual average increase of 1.1 per cent.<sup>1</sup> The country’s level of migration has a large impact on these figures. Our demographic and ethnic

<b>Part 1</b>	<b>Setting the scene</b>
Ch 1	Defining the resource management system: Scope and components
Ch 2	The New Zealand context: Biophysical, socioeconomic and legal
	The future context in which the system will have to operate
Ch 3	The overseas context: Comparators
<b>Part 2</b>	<b>Normative: What do we want?</b>
Ch 4	Worldviews and ethics: How do we see the world and humanity’s place within it?
Ch 5	Functions of the system: What is its proper role?
Ch 6	International law obligations
Ch 7	Legal and ethical principles (including under the Treaty of Waitangi)
Ch 8	From principles to rules
<b>Part 3</b>	<b>System: The architecture to enable our aims to be achieved</b>
Ch 9	Structural concerns: Legislative design
Ch 10	Institutional concerns: The question of governance and decision-making
Ch 11	Participation: The role of the public in the system
Ch 12	Flows of knowledge and information within the system
<b>Part 4</b>	<b>Operational: The tools to achieve our aims in practice</b>
Ch 13	The architecture of intervention: Designing plans
Ch 14	The machinery of intervention: Permissions, funding and incentives
Ch 15	The feedback loop: Compliance, enforcement, and self-evaluation
<b>Part 5</b>	<b>Drawing the threads together</b>
Ch 16	Synthesis

<sup>1</sup> Using Statistics New Zealand medium projections. See Statistics New Zealand, ‘Estimates and Projections’ (February 2018), [http://archive.stats.govt.nz/browse\\_for\\_stats/population/estimates\\_and\\_projections.aspx](http://archive.stats.govt.nz/browse_for_stats/population/estimates_and_projections.aspx)



makeup will also change with the population becoming older and more ethnically diverse. Because different age groups and cultures have different lifestyles, values and aspirations, changing demographics will have planning implications for housing, transport, recreation and work.

There is currently no long-term policy on how population growth will be managed in New Zealand. Significant population increase means that any new resource management system needs to be able to deal with fast-growing urban areas and significant additional housing and infrastructure provision. It also needs to be robust enough to manage growing population pressures on natural resources. This raises the issue of whether the system should contemplate an explicit population policy.

Population growth is not going to be even across the country. Most will be concentrated in the top part of the North Island. Dense populations can create the opportunity to provide efficient and environmentally friendly mass transport systems as well as intensive housing and cost-effective infrastructure. But if not well managed, population growth can result in costly urban sprawl and environmental degradation. Dense urban areas require careful planning in order to maintain natural systems and to design in nature as part of the fabric of the city. Locations such as the Queenstown-Lakes District, which are experiencing strong growth in areas with very high natural values, will likely require careful proactive planning and strong protective rules to ensure that such natural values can be retained.

Economic change also looks certain. In particular, the growing economic strength of Māori and their large stake in the primary production sector may create opportunities to integrate environmental considerations more holistically into natural resource use in line with Te Ao Māori.

#### Questions for discussion:

- **What other implications are there for resource management law reform from future projected population increases?**
- **Given the significant implications of population growth for management of natural and physical resources, should provision be made for the development of a national population policy?**
- **What mechanisms can we deploy to better manage the challenges of strong growth in sensitive areas?**
- **How do we accommodate a broader range of needs and aspirations, from demographic and ethnic change, within our resource management system?**
- **Can we continue to grow our primary sector exports whilst protecting and restoring natural systems?**
- **How can planning help maximise agglomeration benefits within Auckland and other urban areas?**
- **What are the implications of the growing Māori stake in New Zealand's primary sectors for resource management law?**
- **What opportunities are there to integrate environmental considerations more holistically into natural resource use in accordance with Te Ao Māori?**



## Infrastructure and visitor pressures

Population increase is likely to further strain current infrastructure and bring into starker relief the current investment lag, exacerbating the challenge of funding infrastructure for growth. For example, the need for large-scale replacement of water assets around the country is most likely to occur between 2040 and 2060, at the very time that population increases will be peaking.<sup>2</sup> Future population growth, coupled with current underinvestment, indicates that new funding models may be required for infrastructure provision in the future.

Increases in overseas visitor numbers are likely to place strong and increasing pressures on New Zealand's conservation land and natural systems as well as built tourism infrastructure.<sup>3</sup> This will likely require a more sophisticated resource management regime for this sector than is currently in place. It also raises the need for new revenue streams to fund the required infrastructure through such mechanisms as imposing a tourist tax at the border or instituting differential charging for access to national parks.

### Questions for discussion:

- **How can a resource management law framework better support adequate infrastructure investment?**
- **Do we need new approaches/tools to better manage tourism pressures on natural resources?**
- **Do we need a different approach to managing tourism pressures on conservation land versus other natural resources?**
- **Do we need new funding mechanisms to better provide for and manage tourism impacts?**

## Climate change

Under the Paris Agreement, New Zealand has signed up to a series of national emissions reduction targets. This will influence many sectors: agriculture, forestry, heavy industry, transport, electricity generation, and construction, among others. Importantly, achieving substantial reductions in net greenhouse gas emissions in New Zealand is likely to require significant land use change away from dairy and sheep and towards horticulture and forestry.<sup>4</sup> A resource management system regime will need to be flexible enough to accommodate large-scale rural land use change and should seek to maximise the co-benefits of afforestation and effectively manage dis-benefits (such as the impacts of clear felling harvested forests).

### Questions for discussion:

- **Are there other climate change mitigation matters that should be considered?**
- **How can a resource management system accommodate large-scale rural land use change? Should it incentivise such change?**
- **Do we need stronger mechanisms and/or new tools to manage the environmental impacts of clear-fell rotation forestry? Are new forestry models possible?**
- **How can environmental co-benefits from afforestation be maximised?**
- **How can we support the growth of renewables while effectively managing the environmental effects (such as landscape impacts of wind farms, ecological impacts of hydro, etc.)?**
- **How could a resource management system support low emission urban and building design?**
- **Do we need tailored transition mechanisms to better manage change (such as moving space from roads to cycleways, changing land use from pasture to forest, and transitioning to a fully electric fleet)?**

The future will also see dramatic changes caused by climate change. Temperature changes, ocean warming and acidification, sea-level rise, and changing storm and rainfall patterns are all challenges to which we will need to adapt.<sup>5</sup> They will impact widely on biodiversity; freshwater, marine and coastal environments; physical infrastructure; and primary industries.<sup>6</sup> In light of these projected climate change risks, a resource management system needs to be future looking, flexible and responsive. The system will need to anticipate that structures, buildings, activities and species will be impacted over time and many will need to relocate. It will need to facilitate and effectively manage such spatial changes and their impacts, and provide certainty and clear direction where possible for investors. Local government will almost certainly be unable to manage such risks on its own and greater central government involvement will likely be required. The scale of investment needed to respond to climate risks is large, given that billions of dollars of assets and tens of thousands of people are at risk. New funding mechanisms may be needed. Threats to biodiversity are likely to significantly increase through changes to habitat and increased risk of pests. Consideration will need to be given to greater protection for threatened species and habitats, and the system will need to contemplate and enable them to shift locations.

<sup>2</sup> Controller and Auditor General, *Water and roads: Funding and management challenges* (Office of the Auditor General, 2014).

<sup>3</sup> Treasury, *He tirohanga mokopuna: 2016 statement in the long-term fiscal position*, New Zealand (Treasury, Wellington, 2016).

<sup>4</sup> See New Zealand Productivity Commission, *Low emissions economy: Issues paper* (New Zealand Productivity Commission, Issues Paper, 2017); Royal Society of New Zealand, *Climate change implications for New Zealand* (Royal Society for New Zealand, Wellington, 2016); and Royal Society of New Zealand, *Transition to a low-carbon economy for New Zealand* (Royal Society for New Zealand, Wellington, 2016).

<sup>5</sup> Climate Change Adaptation Technical Working Group, *Adapting to climate change: Stocktake report* (Ministry for the Environment, Wellington, 2017).

<sup>6</sup> Royal Society of New Zealand, *Climate change implications for New Zealand* (Royal Society for New Zealand, Wellington, 2016).



### Questions for discussion:

- **Are there other implications of climate change adaptation that we need to consider?**
- **How can a resource management system accommodate, and potentially incentivise, the movement of physical infrastructure away from risk areas (and associated people/communities)? How could such movement be funded?**
- **How do we protect biodiversity whilst providing for habitat and species to physically move? Does this require new mechanisms as opposed to spatially fixed reserves?**
- **How could a regime governing water rights accommodate marked changes in flows over time?**
- **How can a fisheries management regime accommodate decreasing productivity and increasing vulnerability (e.g., through acidification, increased pests) of marine species?**

### Technological change

Advances in technology are driving profound change in the way people live their lives, in employment and in the production and distribution of goods and services. The accelerating pace of change is so great that it has been termed the Fourth Industrial Revolution.<sup>7</sup> It is being driven by rapid advances in mobile and interconnected computing power, artificial intelligence and genetic sequencing. Other important areas of technological change are in energy generation, transportation infrastructure (including self-driving cars), the way we farm, and disruptive substances (such as plastics and pharmaceuticals). A future resource management system needs to be strategic and agile enough to actively respond to such changes, which can be both threats (e.g., microbeads) and opportunities (such as using technology for more effective pest management).

The rapidly escalating pace of change indicates that new governance models may be required because current models are typically slow and cumbersome. Jonathan Boston has suggested we need to be moving towards an 'Anticipatory Governance' model that is proactive and forward looking, cognisant of risks, recognises interconnections and favours prevention over cure.<sup>8</sup> Such an approach is better configured to address the country's environmental and social 'creeping problems', which are those that develop gradually (with a long time lag between cause and effect), often have multiple causes and require a sustained effort over a lengthy time period to address.

Many of the issues likely facing New Zealand in the future, including population growth, climate change and technological advancement, have strong global drivers and are of a scale that can be overwhelming for regional and local councils to address on their own. This suggests

that in the future greater central government involvement, and more national regulatory tools, may be required to help manage regional and local impacts.

### Questions for discussion:

- **Given the potential of new technologies, should we raise our expectations (and requirements) around monitoring and reporting environmental data?**
- **Should current land uses be required to adopt new technologies that can reduce environmental impacts (e.g., remote sensing of inputs on farms)?**
- **How can the law evolve rapidly enough to address the impacts of new technologies?**
- **Are the potential impacts on urban areas of driverless technologies so great that specific management approaches/tools are required to proactively manage them?**
- **Given the rapid advances in genomics, are our current approaches to scrutinising and approving the use of such technologies in New Zealand adequate?**
- **How should we evaluate proposals to use DNA technologies for pest control or to manufacture synthetic food, for example?**
- **Should our resource management system adopt the need to transition to a 'circular economy' as an underlying principle?**
- **Should the full product life cycle (and impacts off-site) be considered when consenting activities?**
- **On what basis do we decide which technologies can be deployed for biosecurity and pest control?**
- **How should we evaluate the risks versus the potential benefits?**
- **What are the implications of likely technological changes for the way we might need to manage agriculture as a sector?**



Electric car charger, Mark Tantrum

<sup>7</sup> Boston J and J Lawrence, *The case for new climate change adaptation funding instruments* (Institute for Governance and Policy Studies, Wellington, 2017).

<sup>8</sup> Boston J, 'Anticipatory governance: How well is New Zealand safeguarding the future?' (2017) 12(3) *Policy Quarterly* 11.

## 2. Designing our legislation

This chapter looks at how we design our suite of resource management legislation. To many people, such legislation is synonymous with the Resource Management Act 1991 (RMA). Yet this is far from the complete picture. Alongside the RMA we have the Local Government Act 2002 (LGA), the Land Transport Management Act 2003 (LTMA), a bevy of conservation legislation, hazardous substances legislation, and dozens of other statutes. In this chapter we consider the following kinds of questions: Why do we have so many (or so few) statutes? Why are they split up in the ways that they are? Should they be arranged differently?

### What does good design look like?

In this section we develop a series of design principles as an important first step; we cannot decide whether a different model is desirable unless we have something to measure it, and the current system, against. Although others may well be possible, we think that the following seven principles are important.

1. **Coherence:** This captures the idea that an overall model needs to *make sense*. We cannot make random, unthinking or spur of the moment design choices and expect them to work. More specifically, this suggests that it is risky to rely on ad hoc additions or reactive changes in order to further political agendas or to overcome new problems. If we have an issue, we should not just throw a new statute at it.

Coherence also suggests that statutes should fit well together. A helpful way to approach this idea is to think about different 'lenses' through which we can look when designing legislation. For example, we can split our statutes by looking through a sectoral lens (producing an 'Agriculture Act' and a 'Transport Act'); a domain-based lens (producing a 'Water Act' and a 'Climate Act'); or a location-based lens (producing

an 'Auckland Act' and a 'National Parks Act'). Other lenses are possible – and are explored below – but the key point is that they need to be used in a consistent way for the system to be coherent. If we have a framework like the RMA, for example, it can undermine coherence if we then introduce a sectoral Act regulating the environmental impacts of mining, or of urban development, on top of it. What is the point of a broad outcomes-based framework if you have to look elsewhere for extensive additions and exceptions for particular sectors?

#### Question for discussion:

- **What does coherence mean to you, when considering legislative design?**

2. **Certainty:** This principle tells us we need to make the relationships between statutes certain and precise. To some extent this certainty can be provided only through the effective *internal* structure and content of a statute, but the basic way in which we *split up* our statutes can affect the extent to which such certainty in relationships is achieved. For example, a system that has a broad outcomes-based statute like the RMA is likely to have an uncertain relationship with a sector-specific statute dealing partly with the same kinds of outcomes (e.g., the Fisheries Act 1996).

The more statutes we have in the system, the more interstatutory boundaries there are to be managed, and the greater the risk of uncertainty. This does not mean we enact one statute for everything, but it does suggest that 20 is preferable to 200. Uncertainty can also be caused by excessive overlap between statutes, because more complex provisions are required to manage the relationships.

3. **Accessibility:** Our suite of legislation should be designed in a way that is intuitive and accessible to



those who use it. People need to understand why statutes are arranged as they are, partly in order to determine easily whether they are affected by them. As the Chief Justice has stated, the RMA is 'meant to engage communities, not alienate them' and 'impenetrability and complexity in [the Act] is not a good thing.'<sup>9</sup>

However, an accessible system is not one that eliminates complexity or is 'dumbed down.' A system dealing with complex issues is itself always going to be complex. The important thing is that we do not make the system more complex or detailed *than it needs to be* to achieve its objectives, and certainly not to the extent that it undermines them.

#### Question for discussion:

▪ **For whose benefit, and accessibility, do we design resource management statutes? Is length an issue?**

4. **Integration:** In its substantive sense, integration essentially means that all relevant matters should be considered when making a decision. For example, we should not consider the impacts of an activity on soil and water separately. Integration is also an important principle in the context of legislative design. However, we should not immediately assume that a drive for integration in a substantive sense should translate to full integration in legislative design. The principle does not require us to enact 'one statute to rule them all.' It simply tells us to recognise and be sensitive to the connections between matters dealt with under different statutes within the same system.

There can be good reasons to separate statutes. Most significantly, constructive tensions within the system – including between statutes with different purposes – can be valuable where they serve a purpose. But our suite of legislation should be structured in a way that makes it clear how any such conflicts are to be resolved. We want to avoid normative dysfunction. For example, we may not want one Act to seek to reduce the emission of greenhouse gases to zero and another to promote the extraction of fossil fuels, which could have the opposite effect.<sup>10</sup>

#### Question for discussion:

▪ **What are the advantages and disadvantages of integrating our statutes?**

5. **Durability:** Our legislation should be structured in a way that will remain fit for purpose in a future that is bound to be very different from the present. We see

three key elements in this. First, the combined scope of our statutes needs to be broad enough to cope with change (whether socioeconomic, biophysical, or technological). Things that need to be regulated should not fall beyond the scope of what the system as a whole is designed to do (e.g., the proactive allocation of scarce public resources, arguably, does not fall comfortably within the bounds of our current system).

Secondly, our suite of legislation needs to be divided in a way that no gaps are likely to appear *between* statutes. Novel technologies or activities should not find themselves in a legal limbo while law-makers struggle to catch up.<sup>11</sup> New kinds of issues should not fall between the cracks. Thirdly, basic design choices need to be removed from the realm of political point-scoring. Constant tinkering with statutes not only reduces the coherence of the system, it also makes it more likely that they will not stand the test of time before there is pressure to overhaul them. The RMA is a case in point.

#### Question for discussion:

▪ **How do we ensure that our resource management legislation is durable?**

6. **Tailored to New Zealand circumstances:** As a small country, our system of legislation need not be overly complex or multi-layered. We are a unitary state, and are not legally bound to design our statutes in a way that reflects the specific legal status or jurisdictions of particular levels of government (although the constitutional place of local government is bound to generate heated debate). Yet legislative design must respect constitutional principles as well as be consistent with more general legislation like the Legislation Act 2012, the Interpretation Act 1999 and the Judicature Act 1908.

Other unique features that may prove important are New Zealand's economic reliance on primary production, the primacy of endemic species, and significant proportion of land in public ownership. One of the most important features of the New Zealand context is that the settlement process for historical grievances under the Treaty of Waitangi, between the Crown and Māori, is ongoing. New legislation should not be inconsistent with or undermine existing or likely future Treaty settlements (and laws must respect the principles of the Treaty more generally).

#### Question for discussion:

▪ **What uniquely New Zealand matters influence how we design legislation?**

9 Elias S, Chief Justice of New Zealand, 'Righting environmental justice' (address to the Resource Management Law Association, Salmon Lecture, 25 July 2013) at 2.

10 On this point, note the recent policy decision taken by the government to ban future offshore oil and gas exploration. Of course, there are much more nuanced arguments to be considered on this topic (such as impacts of such policies on domestic versus international emissions). Our point is a more general one: we need to think about how different statutes can reinforce or undermine each other's objectives.

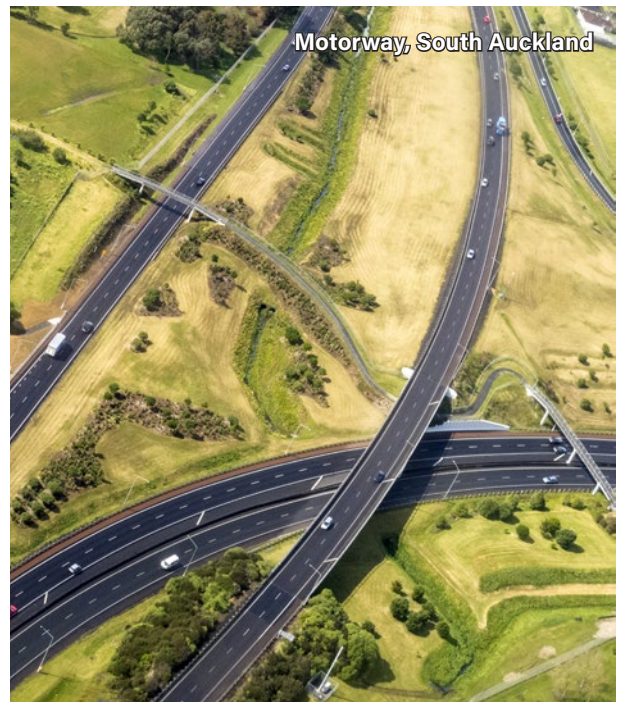
11 For example, other countries have had to enact bespoke statutes or targeted parts of existing statutes for technologies like carbon geo-sequestration. See generally: Severinsen G, 'Constructing a legal framework for carbon capture and storage in New Zealand: Approaches to legislative design' (2014) 63 *Energy Procedia* 6629.



7. **Efficiency:** The way in which we design our suite of legislation should be efficient. Duplication and overlap should be avoided unless there is a good reason for it. More fundamentally, unnecessary legislation should be avoided. This does not mean that fewer statutes are better; rather, it means that if we do not have to legislate to achieve a solution, then we should not do so.

Furthermore, the principle reinforces the idea that relationships between statutes should be clear (to avoid uncertainty and counter-productive litigation) and that statutes should be arranged in such a way that clarity in such relationships is achievable. Legislation should also be designed in ways that encourage efficiency in decision-making processes and administrative support; multiple processes should be avoided where possible, or at least be integrated, connected or aligned in some way.

We can compile the above principles into a set of key messages, outlined below. In summary, we need to design a set of statutes that:



**Question for discussion:**

- Are there any other principles that are important for how we design our suite of resource management legislation?

## Along what lines can we split statutory frameworks?

In this section, we consider the different lenses through which we can look when dividing our statutes. Examples of lenses are described in the table below.

Lens	Explanation	Example
Outcomes	We have particular statutes for particular kinds of outcomes.	One Act for the protection of the natural environment, one for allocating public resources, and another for encouraging exploitation of resources.
Institutional	We have separate statutes for specific institutions.	One Act for local government, one for an Environmental Protection Authority, another for the Environment Court.
Sectoral	We have particular statutes for specific sectors or industries.	One Act for agriculture, one for fisheries, another for mining.
Domains	We have particular statutes for specific domains.	One Act for fresh water, one for soil, another for the climate.
Location	We have particular statutes for specific locations or areas.	One Act for urban areas, one for rural areas, one for marine areas, another for conservation areas.

Other approaches may be possible. For example, we have heard some suggest a distinction between statutes that are primarily regulatory, policy oriented, or concerned with funding.<sup>12</sup> Another approach may be to categorise statutes according to whether they are concerned with protection, balance or exploitation.<sup>13</sup> No one approach will perfectly describe a set of statutes because any system will ultimately be designed through a messy political process defined by compromise. However, we think that the basic idea of lenses can offer useful insights when thinking about design questions.

While we can chop up our statutes in many different ways (use different lenses), a consistent rationale for doing so needs to be maintained across the whole system if we

are to ensure it is coherent. For example, we would not start off by enacting a broad act like the RMA to deal with environmental effects (using an outcomes lens), and then enact a series of acts dealing with the environmental effects of particular sectors (e.g., agriculture, mining and electricity generation) in particular locations (e.g., Auckland, Taranaki or in rural areas). To do so would undermine the point of the RMA. It would erode the coherence of the system. What *not to do* is represented in extreme form in the table below.

### Environmental Protection Act

*Outcomes-based*

To protect the natural environment from human activity

### Agriculture Act

*Sectoral*

To regulate the agricultural sector, including to protect the environment from the impacts of agricultural activities and to manage the allocation of fresh water to such activities

### Auckland Environment Act

*Location-based*

To protect the natural and built environment within the Auckland region

### Resource Allocation Act

*Outcomes-based*

To allocate the rights to use resources of a public nature

### Questions for discussion:

- **What are the advantages and disadvantages of splitting up our legislation according to location, domain, sector, institution and outcome?**
- **What is the best way to differentiate between different outcomes?**

That said, we do not have to choose to look through a *single* lens when designing our legislation. We do not have to have *only* sectoral statutes, or *only* location-based statutes. Instead, we can usefully think of lenses as existing in a hierarchy or sequence – a primary lens, a secondary lens, a tertiary lens, and so forth. We can have an institutional statute (a LGA) as well as a sectoral statute (a Mining Act) without making the system incoherent, as long as they fit well within this hierarchy.

For example, we could start by choosing a primary lens (e.g., sectoral), which we apply across the whole system. We could have (among others) a Mining Act, an Agriculture Act, and a Transport Act. Each would deal with all issues relevant to the sector in question, such as managing the sector's environmental impacts, any funding decisions, and the allocation of resource use rights.

<sup>12</sup> That may be promising for an act like the LTMA which above all provides a funding framework for land transport. It becomes a much murkier distinction when considering broader acts like the RMA or Conservation Act 1987.

<sup>13</sup> This distinction also poses difficulties because some statutes are concerned with none of them (e.g., official information legislation) or with several of them (e.g., the RMA both imposes bottom lines and allows for wellbeings to be weighed).

We can then consider what those statutes do *not* do, and apply a secondary lens (e.g., an institutional one) to fill those gaps. For example, if institutions were needed to operate across multiple sectors, such as an Environment Court or regional councils, it would not be appropriate to include them in any sector-specific act. So we could enact specific statutes – an Environment Court Act and a LGA (among others). But we would not need to enact a separate statute establishing an institution concerned

only with transport, for example, like the New Zealand Transport Agency. That would already fall firmly within the scope of a sectoral Transport Act.<sup>14</sup> Additional lenses would fill gaps, not produce overlap.

### Describing the current model

We have a large number of statutes in our current system. A few are represented in the diagram below, which shows a fragmented and complex legislative landscape.



<sup>14</sup> If each sector had its own targeted decision-making institutions, then there may be no need for any institutional statutes at all.



Below, we categorise these acts according to the main lens through which they appear to have been created.

Outcome-based statutes	Domain-specific statutes	Location-specific statutes	Sector-specific statutes	Institution-specific statutes
Resource Management Act 1991 <sup>15</sup>	Climate Change Response Act 2002	National Parks Act 1980	Crown Minerals Act 1991	Local Government Act 2002
Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012	Ozone Layer Protection Act 1996	Reserves Act 1977	Forests Act 1949	Environment Act 1986
Civil Defence Emergency Management Act 2002	Marine Mammals Protection Act 1978	Marine Reserves Act 1971	Land Transport Management Act 2003	Heritage New Zealand Pouhere Taonga Act 2014 <sup>16</sup>
Biosecurity Act 1993	Wildlife Act 1953	Continental Shelf Act 1964 <sup>17</sup>	Wild Animal Control Act 1977	Environmental Protection Authority Act 2011
Hazardous Substances and New Organisms Act 1996	Native Plants Protection Act 1934	Numerous location specific statutes <sup>18</sup>	Housing Accords and Special Housing Areas Act 2013	Queen Elizabeth II National Trust Act 1977
Waste Minimisation Act 2008	Marine and Coastal Area (Takutai Moana) Act 2011	Numerous Treaty settlement statutes	Building Act 2004	Local Government (Auckland Council) Act 2009
Litter Act 1979		Conservation Act 1987	Fisheries Act 1996	
Environmental Reporting Act 2015		Crown Pastoral Lands Act 1998	Electricity Act 1992	
			Energy Efficiency and Conservation Act 2000	
			Gas Act 1992	

#### Questions for discussion:

- **What other legislation can be considered core to the resource management system?**
- **Can the above lenses account for all kinds of statutes in the current system?**
- **Are the statutes above correctly categorised? If others are significant, where should they be placed?**

Although we have a complex and fragmented system, there is still some underlying order in its design. To use the language of lenses: no single lens is used. Instead, multiple lenses seem to be applied in the following sequence: outcomes, domains, locations, institutions, sectors. Statutes in each category largely fill gaps left by statutes in the previous one.



<sup>15</sup> The RMA and Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 can, in a sense, be seen as location-specific, because they apply to distinct areas. However, it is not really the kind of micro-level distinction we are trying to make when we speak of location-based acts. The exclusive economic zone is a broad area subject to jurisdictional nuances that arise from the international law of the sea.

<sup>16</sup> Despite its name, this can alternatively be seen as an outcomes-based act, as it deals with outcomes broader than those sought by the Heritage New Zealand Pouhere Taonga Act 2014 and other institutions under it.

<sup>17</sup> This is primarily concerned with a single sector – mining – but also has catch all provisions to deal with exploitation of other seabed resources.

<sup>18</sup> We will not attempt to provide an exhaustive list, but some include the Waitakere Ranges Heritage Area Act 2008, the Fiordland (Te Moana o Atawhenua) Marine Management Act 2005, the Sugar Loaf Islands Marine Protected Area Act 1991, the Auckland City Council (St Heliers Bay Reserve) Act 1995, and the Point England Development Enabling Act 2017.

The current system is founded on outcomes-based statutes. In other words, outcomes are the primary lens that has been used to divide legislation. These acts (such as the RMA and Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (EEZ Act)) generally apply across all locations, institutions, sectors and domains. They do a lot. But they do not do *everything*. So we have another layer of statutes that are divided by domain. In other words, we can see domains as a secondary lens. This range of statutes is much narrower, however, because most domains are already managed under broader outcomes-based statutes like the RMA. We do not, for example, have a 'Freshwater Act', a 'Biodiversity Act' or a 'Soil Act' because the RMA already deals with those. The most notable examples that do exist are the Climate Change Response Act 2002 and the Marine and Coastal Area Act, although *within* domains some more specific resources do receive targeted protection (wildlife, marine mammals, and the ozone layer being cases in point).

We can observe a third layer of statutes that are divided by location (a tertiary lens). These apply only in specially defined areas having *additional* needs to those already met by outcomes-based and domain-based legislation. Statutes managing the conservation estate, reserves, sanctuaries and so forth are examples of such legislation. Location-specific acts are seldom entirely carved out from outcomes-based and domain-based acts. Instead, they usually impose an *additional* layer of outcomes for particular areas (and, consequently, an *additional* layer of restrictions and obligations). In other words, they fill gaps left by previous lenses.

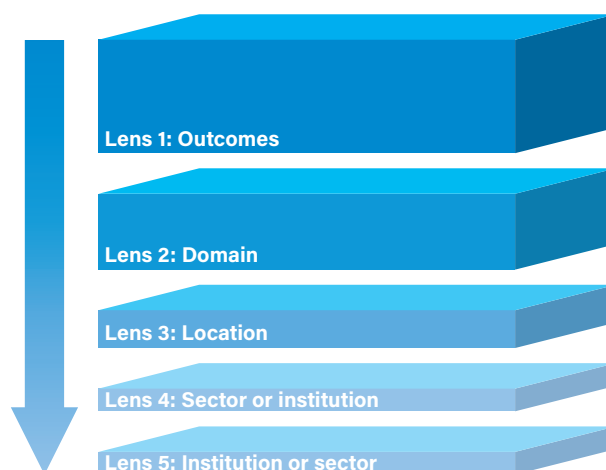
A fourth lens then produces a layer of statutes that are divided by sector. Again, sector-specific acts do not generally seek the same kinds of outcomes as outcomes-based or domain-based statutes. For example, they do not tend to impose sector-specific environmental protections, which are the prerogative of acts like the RMA that apply across all sectors. The Crown Minerals Act is an example. The role of sectoral statutes is to fill any gaps by seeking *additional* outcomes, unique to specific activities, which have not already been sought by outcome, domain, and location-based statutes.

A fifth layer of statutes is primarily institutional in nature. Such statutes concern particular institutions or categories of institution, and do not do the same things as outcomes-, domain- or location-based acts. In other words, they do not pursue the same outcomes as statutes like the RMA; they do not regulate specific domains; and they are not concerned with particular areas. Nor do they usually concern the regulation of particular sectors.

However, the treatment of local government and some sectors (transport and 'three waters' infrastructure) is a significant exception. There, we apply an institutional lens before a sectoral one (transport and water infrastructure are embedded in a statute defined by a particular

institution). This has implications for how we design the LGA and the LTMA, which are explored in more detail in the working paper.

The sequence of lenses described above is represented pictorially below. The decreasing thickness and increasing transparency of each lens illustrates the fact that progressively less resource management content is found within statutes created using lower lenses (they only fill gaps left by previous lenses; e.g., the Crown Minerals Act 1991 does not regulate the environmental effects of the mining sector).



#### Question for discussion:

- Does the sequence of lenses described above adequately account for how our current suite of resource management statutes has been designed?

#### Interactions between statutes in the current system

We observe that relationships between different kinds of statute, where they are discernible, generally fall within one of three camps: a hierarchy (one trumps the other),<sup>19</sup> a clear separation (what one statute does not at all affect what another does)<sup>20</sup> or by mutual reinforcement (they deal with different things to a common end).<sup>21</sup> Things quickly become confusing if we try to describe the relationship between different layers of statutes (those created using outcomes-, domain-, location-, institution- or sector-based lenses). Relationships between them can be strong, weak, non-existent, irrelevant, clear, vague, hierarchical or mutually reinforcing. In short, it's not worth trying to generalise relationships in these terms.

It is, however, useful to generalise the *normative* relationships between different kinds of statute. In other words, we can describe relationships according to the kind of outcomes they seek (protection, balance or utilisation). Here, we observe a hierarchy. Generally speaking, protective legislation (such as the National Parks Act

<sup>19</sup> For example, obtaining a mining permit does not excuse a miner from meeting RMA obligations.

<sup>20</sup> For example, the system for obtaining fishing rights does not impact on the system for funding land transport infrastructure.

<sup>21</sup> For example, a climate change national environmental standard under the RMA (if one were to be promulgated) and the emissions trading scheme under the Climate Change Response Act 2002 would both seek to mitigate climate change.

1980) 'overrides' legislation with a balancing role (such as the RMA). In turn, balancing legislation (again, think of the RMA) tends to override statutes concerned with the utilisation of resources (such as the obligation to provide roads under the LGA, or the promotion of mining under the Crown Minerals Act).

## Evaluating the current model

In this section we consider how the current system could be reformed. This involves three key kinds of question, which are summarised below.

1. Should we apply lenses in a fundamentally different order?

*For example, should outcomes continue to be used as a primary lens – producing some form of RMA – or should we instead use sectors as a primary lens – producing a raft of sectoral statutes?*

In short, we consider that the order in which we currently apply lenses – outcomes, domains, locations, sectors, institutions – remains broadly appropriate and should be retained. That means we believe that outcomes-based statutes (some form of RMA, whether broader or narrower in scope) should remain at the heart of the system, and contain most of its content. Such acts can be supplemented by other lenses – domain-, location-, sector-, and institution-based statutes.

2. Should we expand or contract the scope of some lenses?

*In particular, should we extend the scope of outcomes-based acts like the RMA to pursue a wider range of social and economic outcomes, or instead rely on sectoral statutes to do that?*

The active pursuit (rather than 'enabling') of people's social, economic and cultural wellbeing is an aim that could be more explicitly incorporated into a broad, outcomes-based statute like the RMA. In a sense, this may simply reflect the fact that a broad range of wellbeings is often *already* actively pursued (especially in the context of urban planning) under that Act. It could also provide a firmer foundation for allocative questions (especially those relating to fresh water) to be resolved in a proactive manner under the RMA (outside specific regimes like fisheries and minerals that already deal with allocation). However, outcomes-based statutes should not be in the business of promoting or facilitating particular sectors or industries.

### Question for discussion:

- **Should we extend the scope of our outcomes-based statutes to include the active pursuit of social, cultural and economic wellbeing?**

3. How should statutes be divided within any given lens?

*For example, should we split up outcomes-based statutes like the RMA into multiple acts (so that each pursues different outcomes) or keep them all in one*

*framework? To what extent should we integrate or split up multiple location-based statutes like the Conservation Act, National Parks Act, and Reserves Act?*

Here, we explore several different possibilities. We stop well short of recommending that any one of them be adopted; they are, for now, primers for discussion and exploratory ideas. We also recognise that they may have significant pros and cons. But the most important message is that we do not *necessarily* have to accept that the structural place of the RMA – or indeed any other statute – in the system is sacrosanct. The starting point for debate is not whether we keep the RMA, but rather what design options would best achieve our objectives. Keeping the RMA in much the same form may be one way to ensure that its positive features (such as key environmental jurisprudence) are retained and progressed, but it may not be the only one.

Most radical is the idea that our outcomes-based statutes – notably the RMA and EEZ Act – *could* be split up into separate statutes, one focusing on biophysical bottom lines and the other providing for balance and conflict resolution. Not all decisions inherently involve balance, trade-offs or conflict. Because statutes, and decisions taken under them, are each driven by a bespoke purpose statement, the separation of statutes is one way we can help establish and maintain effective hierarchies between the outcomes they seek. Alternative mechanisms are also possible, of course, without radical legislative restructuring. For example, we could redesign our institutions, provide for better implementation, build capacity and alter decision-makers' incentives. But statutory separation and the introduction of a firm purpose statement could complement such efforts by providing a firm legal basis for shielding environmental bottom lines against the temptation to 'balance' them against other matters.

We also explore what balancing legislation – whether we were to separate it or not – could do. In particular, it may have potential to be more active in setting policy that guides how resources are used. It could be used more strategically to channel the energy of both public and private sector into activities in which social, economic and environmental wellbeings converge and reinforce each other, and not just to assess whether negative environmental effects are acceptable. Of course, some trade-offs and conflicts are inevitable, and it would have to perform the function of resolving these too.

We also raise the question of whether there is a case to integrate domain-based legislation – such as statutes relating to the climate, the marine and coastal area, and wildlife – into outcomes-based statutes, whether the same should be done for sectoral statutes (like the Forests Act 1949 and Building Act 2004) and whether our galaxy of protective location-specific statutes (such as the Conservation Act and Marine Reserves Act 1971) could be rationalised further. We consider the structural future of Treaty settlement legislation: Is it possible or desirable to integrate an ever-expanding body of settlement legislation into more general frameworks, so that users do not have to consult and piece together multiple layers of statutes?



Finally, we consider how statutes should interact. We offer three thoughts. First, we think the current system's basic approach to normative relationships remains appropriate. Primary legislation already tends to exist in a hierarchy, with protective statutes at the top, balancing ones in the middle, and exploitative ones at the bottom. That will always be important. Secondly, we question the appropriateness of the recent trend to carve out bespoke, development-focused statutes from obligations under protective or balancing legislation (e.g., special housing areas). Thirdly, we raise the possibility of enacting some kind of framework legislation – an environmental 'constitution' – to ensure that the different pieces of the resource management system remain in a harmonious and coherent relationship with each other over time.

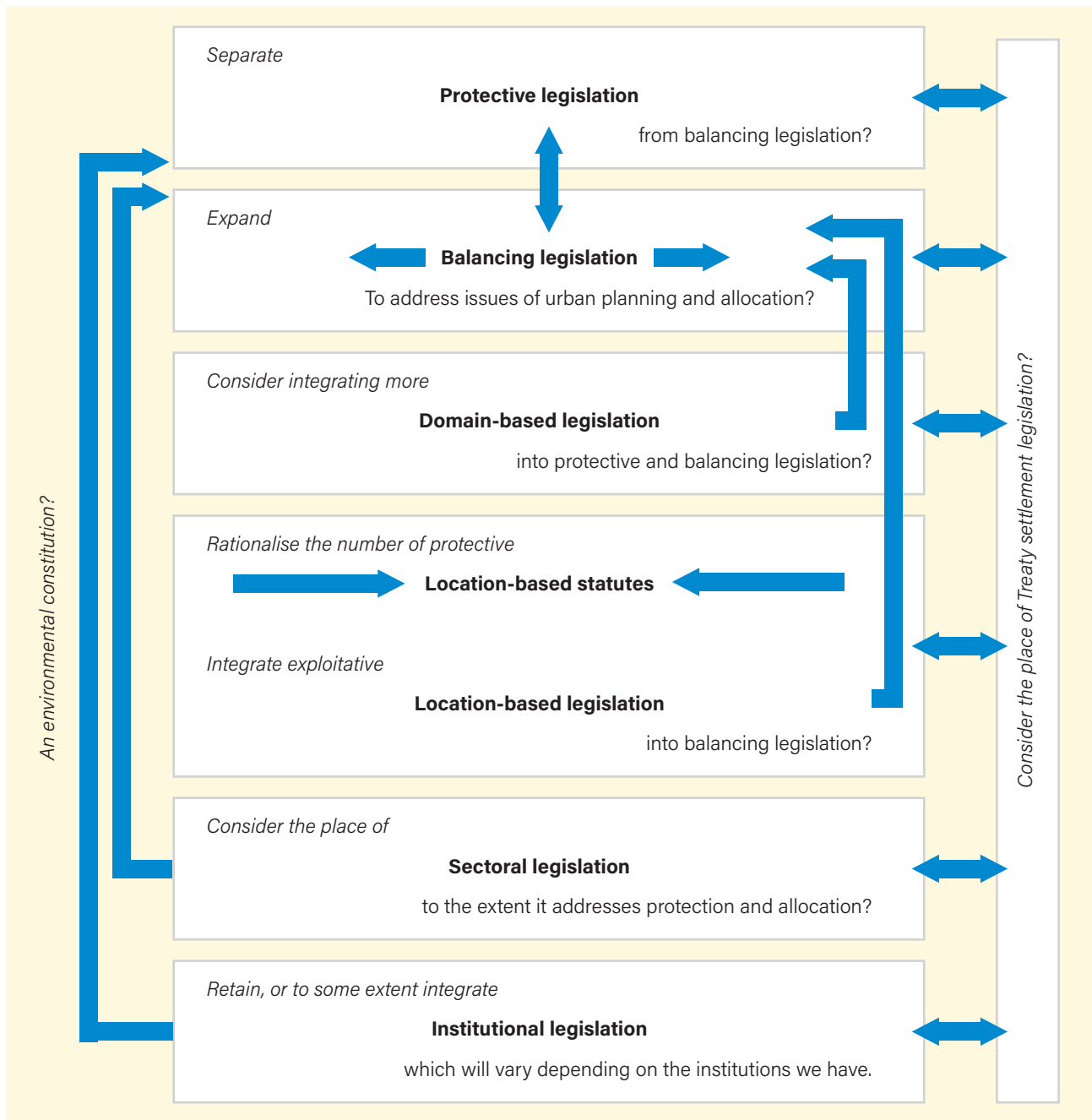


#### Questions for discussion:

- **Should we separate biophysical bottom lines into a separate statute?**
- **Should biophysical bottom lines also include social bottom lines, and the protection of the built environment?**
- **Should a balancing statute be limited to weighing the benefits of resource use against its environmental costs?**
- **Or should it be more proactive in guiding resource uses towards those that enhance all forms of wellbeing? If so, how? And are there particular kinds of resource use that fit this bill?**
- **Should the allocation of all non-private resources be combined under a single statute with a common purpose, or are the differences between resources or sectors too great to do so?**
- **Should we address some allocative issues in a statute concerned with environmental bottom lines?**
- **Should allocative decisions be integrated into balancing legislation like the RMA or form a stand-alone act?**
- **What are the advantages and disadvantages of separating specific statutes for hazardous substances and new organisms, waste minimisation, and biosecurity?**

- **Should we integrate domain-based statutes (such as the Climate Change Response Act, or the Marine Mammals Protection Act) into broader outcomes-based legislation?**
- **Should we amalgamate or otherwise rationalise our protective location-based statutes (such as the Conservation Act, Reserves Act and National Parks Act)?**
- **Should we continue to enact location-specific and development-focused legislation (e.g., special housing legislation) that is carved out from more general outcomes-based statutes like the RMA?**
- **Is the protection of some resources (like fisheries) within a framework focused on their exploitation the best way to improve ecological outcomes? Does it really make a difference?**
- **Should the forestry sector, and energy efficiency, continue to be managed partly under sector-specific statutes?**
- **Is the conceptual or practical distinction between construction legislation and resource management legislation strong enough to warrant legislative separation?**
- **How should we think about the structural place of Treaty settlement legislation in a future system?**
- **Do we need an overarching statute in the nature of an environmental constitution? If so, what would it look like?**

Below, we summarise in pictorial form some of the key ideas we have floated in Chapter 3. Again, we stop short of making firm recommendations, but think there is merit in further exploration.



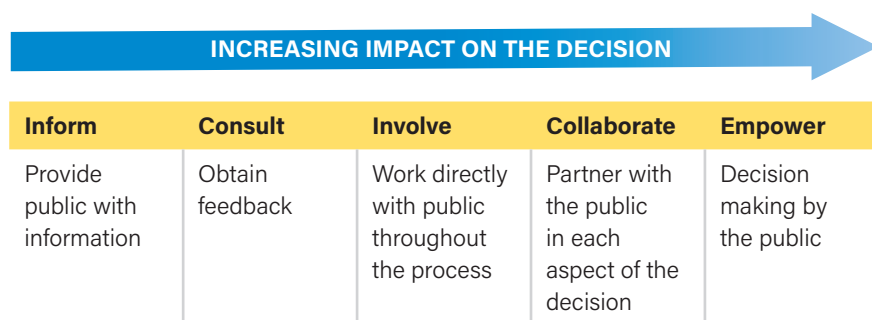
### 3. Public participation in the resource management system

Public participation in matters of resource and environmental management is widely recognised, both in New Zealand and overseas, as being extremely important. We are treating it, alongside legislative design and institutional design, as a core component of the system's basic architecture. Allowing people to be involved in decision-making has many benefits. However, participation cannot be absolute or endless. It has substantial costs. In this chapter, we consider what public participation means in the context of resource management, its advantages and disadvantages, and how participatory rights are provided for in a selection of New Zealand's existing resource management laws. We conclude by offering a series of key questions that need to be resolved in a future system.

#### What is public participation?

Like 'democracy' and 'justice,' public participation' is often a term that is used freely and loosely to refer to a great many different things. Put simply, it refers to the involvement in a decision-making process, of a public nature, by those who are affected by a decision but do not make it. Public participation has fuzzy boundaries. At one extreme, active participation can morph into a species of decision-making (as in some collaborative processes), and at the other it can morph into a passive absorbing of information (as under official information legislation and notification provisions).

Within these fuzzy boundaries, public participation can mean a variety of things. 'The public' doesn't always mean 'everyone.' Similarly, the concept of participation can come in many shapes and sizes. The International Association for Public Participation (IAP2) has produced a helpful spectrum of ways in which people may participate, from weak to strong.<sup>22</sup>



At the weaker end of the spectrum, public participation may be used to *inform* the public. This is to provide the public with balanced and objective information so they can understand the problem, alternatives, opportunities and/or solutions. Public participation that seeks to *involve* the public in a decision is next on the spectrum. Here,

a decision-maker aims to work directly with the public. The next step on the spectrum involves *collaborating* with the public. The goal is to partner with the public throughout the decision-making process in order to develop alternatives and identify preferred outcomes. The strongest level of public participation aims to *empower*. This places the final decision in the hands of the public.

#### Questions for discussion:

- What do we mean by 'public' and 'participation'?
- What are the reasons for providing public participation?

#### The benefits and costs of public participation

Most people would accept that public participation in resource management is a good thing. Its importance is enshrined in the Rio Declaration, with Principle 10 stating that 'environmental issues are best handled with the participation of all concerned citizens, at the relevant level.'<sup>23</sup> Participation increases the transparency of decision-making so that everyone who is affected knows what is happening and can be on the ground when it does. It provides additional information and knowledge to decision-makers as locals often know the most about the nature and extent of local impacts. It also helps to provide checks and balances in the system. The RMA, in particular, relies on this; parties may bring additional technical evidence which tests that provided by an applicant or other group (who may have vested interests in the outcome) and may challenge a decision-maker's findings. Participation can also provide catharsis by providing an opportunity for people to tell their story and air their grievances. If people feel the process has been fair, and their concerns have been heard and properly considered, they are more likely to accept the outcome.

But participatory rights also have costs and disadvantages. These can be substantial. We can get to a point where the costs of public participation outweigh its benefits, although exactly when that point is reached is never obvious. Some argue that involving the public in decision-making processes merely produces ambiguity and delays decisive action. Decision-makers open themselves up to a flood of

information, but there is no guarantee it is *good quality* information. Consultative processes can become 'talking shops' that take up a lot of time and fail to produce any substantive outcome. Furthermore, participatory processes can create rather than solve conflict, particularly when they become dominated by narrow interest groups. Extended

22 IAP2, 'Public Participation Spectrum' (February 2017), [http://www.iap2.org/resource/resmgr/foundations\\_course/IAP2\\_P2\\_Spectrum\\_FINAL.pdf](http://www.iap2.org/resource/resmgr/foundations_course/IAP2_P2_Spectrum_FINAL.pdf)

23 Rio Declaration on Environment and Development A/CONF.151/26 (Vol. I) 1992 (Rio Declaration), Principle 10 states: 'At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.'



public participation runs the risk of creating ‘consultation fatigue’ amongst the public and (rather paradoxically) can reduce the amount or quality of engagement.

Another drawback of providing for extensive participatory rights is that participants may endeavour to manipulate the system for ulterior purposes. Trade competition fits this bill, although whether an ‘ulterior’ purpose also encompasses the actions of those accused of ‘nimbyism’

is never clear-cut. There is also the problem of ‘the loudest voices carrying the greatest weight’, where a small, vocal minority expresses views contrary to those of the large, silent majority. The most obvious downsides of extensive public participatory rights are the time and cost involved. It can take many years for a plan to become operative under the RMA, and millions of dollars can be expended along the way.

Strengths	Weaknesses
<ul style="list-style-type: none"> <li>▪ More information is made available to decision-makers</li> <li>▪ Decisions are easier to implement and more durable</li> <li>▪ Decisions will better meet the needs of the community and provide a sense of ownership, especially in relation to plans</li> <li>▪ Decisions are seen as more legitimate; the process is more likely to be seen as fair</li> <li>▪ Provides more equality in the ability of parties to influence a decision</li> <li>▪ Improves relationships amongst parties</li> <li>▪ Fosters an element of trust</li> <li>▪ Promotes social learning</li> </ul>	<ul style="list-style-type: none"> <li>▪ Requires significant investment of resources and time</li> <li>▪ May reduce decision quality if the public are poorly informed</li> <li>▪ Can enhance conflict if not well managed</li> <li>▪ Can produce ambiguity and prevent decisive action</li> <li>▪ Can delay decisions being made</li> <li>▪ It is difficult to provide a fair process in practice</li> <li>▪ There is usually a strong disparity between the resources of individuals and organised interest groups</li> <li>▪ Can result in consultative fatigue</li> </ul>

Questions for discussion:
<ul style="list-style-type: none"> <li>▪ <b>How do we help ensure that participation doesn't go 'bad'?</b></li> <li>▪ <b>How should we treat nimbyism?</b></li> <li>▪ <b>How do we balance the need for participation against the benefits of timely processes?</b></li> <li>▪ <b>How do we ensure there is proper access to information?</b></li> <li>▪ <b>What does 'access to justice' mean in the resource management context?</b></li> <li>▪ <b>When does participation unduly impact on efficiency/timeliness of decisions?</b></li> <li>▪ <b>Who should pay for public participation?</b></li> <li>▪ <b>Is there a legitimate distinction to be made between participatory rights in relation to plans, and in relation to project-level authorisations like resource consents?</b></li> </ul>



## Public participation in the current system

The current system was premised on an expansive approach to public participation. In part, this was simply a recognition of the benefits of participation described above. It was also a reaction against the centralised and exclusionary approach to resource management decision-making in the Muldoon era. In any case, it resulted in the central statute in the system – the RMA – offering wide rights for the public to be informed of, make submissions on, be heard on, and appeal planning and consenting decisions. Subsequently, participatory provisions

have been narrowed and expanded based on political preference and the pressures of the time. In recent times we have seen substantial narrowing of participatory rights.

In Appendix 3 we describe in more detail the ways in which six statutes in the current system approach public participation. These are the RMA, the EEZ Act, the LGA, the Crown Minerals Act, the Climate Change Response Act, and the Conservation Act. We assess in general terms how strong participatory rights are under these regimes in the table below.

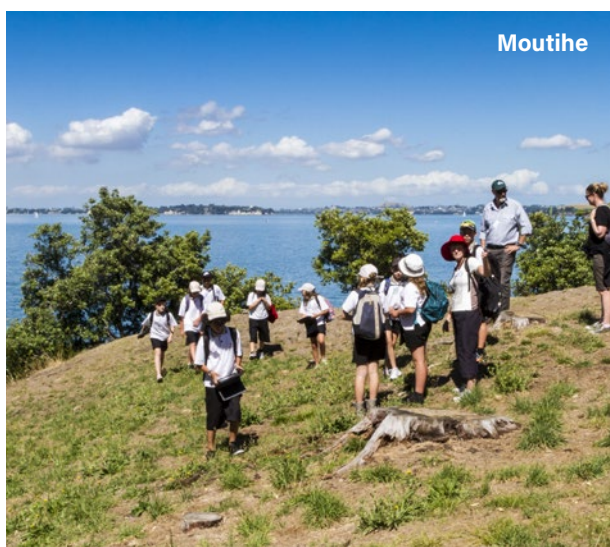
Statute	Mode of planning/regulation	Strength of public participation	Level of public participation
Resource Management Act 1991	National Policy/Standards	Med	Consult
	Regional Policy and Regional/District Plans	High	Consult/Collaborate
	Resource Consents	Med	Consult
Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012	Regulations	Med	Consult
	Marine Consents	Med	Consult
Local Government Act 2002	Long Term Plan	High	Collaborate
	Bylaws	High	Collaborate
Crown Minerals Act 1991	Minerals Programmes	Med	Consult
	Petroleum Permits	Low	Inform
Fisheries Act 1996	Sustainability measures	Low-Med	Inform/Consult
	Fisheries Plans	Low-Med	Inform/Consult
Climate Change Response Act 2002	Regulations	Med	Consult
	Targets	Low	Inform
Conservation Act 1987	Policy	High	Collaborate
	Conservation Management Plans	High	Collaborate
	Concessions	Med	Collaborate



We also raise a question: Is it not curious, even downright odd, that we provide for extensive participatory rights under the RMA but not in other areas of public life? Does the funding of pharmaceuticals or the development of foreign policy affect us less than the colour that our neighbour chooses to paint his or her fence? Why, in resource management, are we not content with electing people to make value-based decisions on our behalf, or simply for safeguards around transparency to be provided? Why do we go much further under the RMA by allowing the public to submit, to be heard at hearing, and to appeal?

#### Questions for discussion:

- **Should we rely on participation to provide a check and balance on developers?**
- **Who should have the right to participate in local issues?**
- **Do we need extensive public participation if there are strong protections for environmental bottom lines?**
- **When in the process should public participation be provided?**
- **If we have stronger/clearer plans can we reduce participation in consenting processes?**
- **Can appeal rights be replaced by other institutional mechanisms to provide checks and balances?**
- **Should we combine participation processes under different legislation?**
- **Should we actively promote participation or just provide for it?**
- **How do we provide for/promote participation of parties with no voice (e.g., nature, future generations)?**
- **Should we have prescribed processes or allow for flexibility on a case-by-case basis?**



## 4. New Zealand's obligations under international law

In this chapter we outline the obligations that New Zealand has under international environmental law. We consider five sources of international law:

- International treaties (also called Multilateral Environmental Agreements)
- Soft law
- Customary international law
- General principles of international law
- Judicial decisions of the International Court of Justice

The chapter is primarily descriptive and treated as a stand-alone topic. This is because international law is something with which the country's resource management system must simply comply, not something that can itself be reformed through a first principles review. Most of New Zealand's international environmental obligations are already provided for in existing domestic law to some degree. The key message for reform is that care is needed to ensure that international law continues to be honoured and implemented in new legal and policy frameworks.

### International treaties

International treaties include conventions, protocols and covenants. They are the main mechanism through which legal rights and obligations are created between states and are therefore the most important source of international environmental law. There are four main (and overlapping) topic areas of environmental treaties relevant to this project: biodiversity, marine management, waste management and climate change. Other (non-environmental) treaties may have environmental implications, such as international trade and investment treaties, but these have not been reviewed. More detail about the obligations under these treaties, including how they have been implemented in New Zealand, is provided in Appendix 3.

### Soft international law

Soft law generally refers to non-legally binding agreements, declarations, resolutions, programmes of action and similar instruments. These are often used when agreement to a formal treaty or instrument is not possible but the existence of a non-binding agreement reflecting majority consensus may encourage eventual conformity and compliance of states that do not want to be legally bound. Relevant soft law covers sustainable development and the rights of indigenous people, including the Declaration of the United Nations Conference on the Human Environment 1972 (the Stockholm Declaration); the Rio Declaration on Environment and Development 1992 (Rio Declaration); the Millennium Declaration 2000; the New Delhi Declaration of Principles of International Law Relating to Sustainable Development 2002 (Delhi Declaration); the 2030 Agenda for Sustainable



Development 2015; and the United Nations Declaration on the Rights of Indigenous Peoples 2007.

In broad terms, international soft law obliges New Zealand to:

- Protect and improve the natural environment
- Protect the interests of future generations
- Provide for public participation in decision-making
- Apply the polluter pays and precautionary principles
- Invest in science to better understand environmental problems
- Require environmental impact assessments to be undertaken for activities that are likely to have significant adverse environmental effects
- Put in place measures to promote sustainable production and consumption patterns

### Customary international law

Customary international law arises through widespread and consistent state practices that result in states considering such rules to be obligatory. New Zealand adopts a 'monist' system for customary international law, which means it is automatically part of domestic law subject to express exclusion by statute. However, at least in the environmental space, customary international law is not sufficiently crystallised for detailed consideration in this project. We are, primarily, concerned with *concrete* obligations to which a future domestic system must give effect. Principles, including those with international legal components, are discussed in Working Paper 1.

### General principles of international law

The general principles of international law are rules and principles accepted and applied in most legal systems. The doctrine of sovereignty has always been at the forefront, whereby each state is recognised as having 'exclusive legislative, judicial and executive jurisdiction over its own territory'.<sup>24</sup> However, other international environmental law developments, such as international treaties, are beginning to challenge traditional notions of state sovereignty. States are being required to assume legal functions and obligations in the general or common interest and must adhere to principles such as 'the principle of cooperation', 'common concern of humankind' and the 'common heritage of mankind'.<sup>25</sup>

In addition, there are environmental normative principles such as 'sustainable development', the 'precautionary approach' and the 'polluter pays' principles which have been widely endorsed by states through domestic measures and through soft law international instruments. Such principles will not generally override treaties or

established customary law principles but they may have an influence on the interpretation and application of international treaties and customary law.<sup>26</sup>

### Judicial decisions of the International Court of Justice

For parties that accept its jurisdiction, the International Court of Justice is able to make findings on and determine certain rules of international law. International environmental law historically has focused on how states impact other states, but there is some Court guidance for issues which are globally relevant and do not map easily to the current sovereignty-focused legal regime. The International Court of Justice has affirmed the obligation of the state to protect the environment and carry out an environmental impact assessment before potentially harmful activities are authorised.<sup>27</sup>

#### Questions for discussion:

- Have we identified the key international obligations and principles placed on New Zealand?
- Are there other matters, derived from international law, that New Zealand resource management law needs to provide for?



24 Grinlinton D, 'Defining the nature and boundaries of environmental law' in Peter Salmon and David Grinlinton (eds), *Environmental law in New Zealand* (Thomson Reuters, Wellington, 2015) at 64.

25 Kiss A and Shelton D, *Guide to international environmental law* (Martinus Nijhoff, Leiden, 2007) at 8.

26 Kiss A and Shelton D, *Guide to international environmental law* (Martinus Nijhoff, Leiden, 2007) at 62.

27 *Gabcikovo-Nagymaros Project (Hungary/Slovakia)* Judgment, *ICJ Reports 1997* (September) at 81. The most enduring impact of the case has been the importance the International Court of Justice gave to reconciling economic development with impacts on the environment. In its decision the Court implied that this reconciliation has become one of the standards which states must consider before planning new activities or carrying out existing commitments. Over time the Court has strengthened this doctrine.



# 1. INTRODUCTION: THE PROJECT AND THE PAPER

---



This project is about reforming New Zealand's resource management system. It will make recommendations on what a fit for purpose system might look like for the future and outline options for reform. The scope of the review is wide, because we are adopting a wide definition of 'system'. But at its core are the topics of environmental protection, urban planning, and the ways in which we use our natural and physical resources.

The work fits within a peculiarly New Zealand context. Reforms to the RMA – New Zealand's main environmental statute – have occurred in a piecemeal fashion over many years, producing an overarching framework and patchwork of provisions that in 2017 have lost much of their original simplicity and coherence. We are due for an overall review of the Act as a whole. But the system through which we manage our natural and built environments is much wider than the RMA. For example, it is about infrastructure planning and funding, conservation management, climate change mitigation, the role of iwi, institutional structures, capacity and capability, and a raft of other topics. The ways in which legislation addresses these topics are not always coherent and connected, even though they are intimately related to each other.

It is in this landscape of complexity and fragmentation that significant environmental challenges have emerged in recent times. As the Ministry for the Environment has shown in its *Environment Aotearoa 2015* report (followed up by its domain-specific *Our Land* report in April 2018), many indicators of environmental health are now rapidly declining. For some – such as freshwater and coastal environments – tipping points appear not far away. Cumulative effects are not being addressed well, and the result has been an inexorable creep towards environmental degradation. Climate change is a pressing issue that needs addressing. Environmental laws like the RMA – now over 25 years old – have not fully realised their aspirations of sustainable resource management and ecosystem integrity.

As well as environmental problems, the system is failing to deliver on social, economic and cultural outcomes. This is particularly evident in large urban areas (especially Auckland), where dramatic and unprecedented increases in population and development pressures, a booming housing market, and a scarcity of resources have caused many to question whether the system remains fit for purpose in the context of cities.

## What are we doing and how are we doing it?

The purpose of this project is to take a first-principles look at the resource management system in New Zealand and outline options for reform. By 'first-principles' we generally mean that we are asking fundamental, future-focused questions about how our overall package of relevant laws and institutions should and can work. We are not just reacting to particular problems or looking at better ways to do the same things. We are asking *why* we do certain things, *whether* we should be doing them, and *how* we should be doing things in the future. We seek to

locate issues within their wider context, and to construct a common framework for looking at questions in a coherent and consistent way.

The project involves a phased programme of research and analytical work, considering a range of themes, topics and issues. Its primary lens is a legal one – focused on the optimal regulatory and institutional arrangements – but it is also investigating non-legal matters. Analysis is encompassing diverse topics, including international law, legal principles and environmental ethics, legislative design, governance and institutional structures, participatory arrangements, and legal/economic tools. The project involves analysis of primary and secondary written sources, targeted interviews, an international study tour and workshop sessions. A series of working papers are being produced which are intended to frame debate and suggest tangible options for reform. A final report will be produced in late 2018.

## Why are we doing it?

The impetus for this work is a growing list of existing and emerging individual 'problems' in the system. Problems are legion, but vary in importance depending on who you talk to. Prominent issues have recently coalesced around the general topics of infrastructure, urban growth, housing unaffordability, water quality and process complexity. They stem from many different parts of the system.

This array of individual problems is the key trigger for the work. But at some point the accumulation of problems becomes so great, and so suggestive of deeper systemic problems, that it merits sitting back and considering how the system works as a whole. This is so we can reflect on its overall health, and not just treat symptoms as they emerge. There is a growing consensus amongst multiple people and organisations in New Zealand that we have reached this kind of systemic reflection point.

In addition, a focus on the wider system presents an opportunity to reflect on future risks and opportunities that may have otherwise gone unnoticed. We aim to continue to broaden the debate around system reform, and influence the government to take appropriate steps.

## Working Paper 2

This paper is the second in a series of working papers to be generated by the project. Its purpose is to present the work undertaken by the project team thus far, to explore and test ideas, and to stimulate discussion. To this end, general questions are posed throughout for the reader to consider. Before we reach conclusions, we need to be asking common questions.

The report is in the nature of an exploratory think-piece. It is not designed to be a comprehensive account, and does not as yet offer a definitive view or make firm recommendations. It is also intended to elicit feedback, which will be fed into the project as it progresses. Any responses can be directed to [RMPProject@eds.org.nz](mailto:RMPProject@eds.org.nz). We



are grateful to those who have already contributed to this paper, including those who provided feedback on a draft and those who attended a related workshop.

In Working Paper 1, which was published early in 2018, we addressed the following matters:

1. The conceptual analytical framework of the project
2. The New Zealand context in which reform would occur
3. The role of worldviews and ethics in informing the resource management system
4. An exploration of legal principles informing the resource management system
5. Standout lessons from international experience (from EDS's 2017 international study tour)

In that paper we provided a working definition for the resource management system. We reproduce that in Appendix 1 of this paper.

In Working Paper 2 – this paper – we consider the following matters in turn:

1. An exploration of how the future may look, and its implications for resource management

2. How we design our resource management legislation
3. How we provide for public participation in the resource management system
4. New Zealand's obligations under international law

Although each of these is important in its own right, combined they may present as a fairly random collection of topics. In one sense, they are. In a project of this nature, work seldom happens in an entirely linear fashion. Many different workstreams progress at the same time, and almost all are interconnected in some way. Such connections can be expected, or they can be surprising. For example, it is obvious that we cannot fully appreciate the design of legislation without thinking about the nature of institutions that would implement it (a new statute may be wholly unnecessary if we instead change how an institution operates or the incentives it has – the issue may be one of implementation, not legislation). But other links – such as those between institutions and public participation – may be more subtle. For example, it may be that we can reduce the scope for public participation if our institutional arrangements do not rely so strongly on the public as a check and balance on development. We cannot treat different topics in isolation.



These links between topics, and the presentation of a holistic system, will emerge fully only in the final report. In the working papers, we investigate particular aspects or 'chunks' of the system – the building blocks that then need to be glued together. Yet we do so in the knowledge that they fit within the wider analytical framework set out in Working Paper 1 (shown below in Figure 1). And this paper does have a unifying theme at its core: *system-level features* – namely legislative design and public participation. These kinds of topics follow naturally from Working Paper 1, which was concerned primarily with normative questions (ethics and principles). We

are turning from questions of what we should aim for to ones about how we design frameworks to achieve our aims. Work on institutions and governance – another system-level feature – is ongoing, and is also anticipated to be included in Working Paper 3. It will need to have particularly close connections with work on legislative design and public participation. Working Paper 3 will also be concerned with the *operational* features of the system that exist within its broader legislative, institutional and participatory structures (e.g., consenting, planning and funding mechanisms).

<b>Part 1</b>	<b>Setting the scene</b>
Ch 1	Defining the resource management system: Scope and components
Ch 2	The New Zealand context: Biophysical, socioeconomic and legal
	The future context in which the system will have to operate
Ch 3	The overseas context: Comparators
<b>Part 2</b>	<b>Normative: What do we want?</b>
Ch 4	Worldviews and ethics: How do we see the world and humanity's place within it?
Ch 5	Functions of the system: What is its proper role?
Ch 6	International law obligations
Ch 7	Legal and ethical principles (including under the Treaty of Waitangi)
Ch 8	From principles to rules
<b>Part 3</b>	<b>System: The architecture to enable our aims to be achieved</b>
Ch 9	Structural concerns: Legislative design
Ch 10	Institutional concerns: The question of governance and decision-making
Ch 11	Participation: The role of the public in the system
Ch 12	Flows of knowledge and information within the system
<b>Part 4</b>	<b>Operational: The tools to achieve our aims in practice</b>
Ch 13	The architecture of intervention: Designing plans
Ch 14	The machinery of intervention: Permissions, funding and incentives
Ch 15	The feedback loop: Compliance, enforcement, and self-evaluation
<b>Part 5</b>	<b>Drawing the threads together</b>
Ch 16	Synthesis
Appendix	Constructing system models

**Figure 1** Proposed report structure for the project as a whole. Blue denotes matters addressed in Working Paper 1. Orange denotes matters addressed in Working Paper 2.



## 2. LOOKING TO THE HORIZON: FUTURES SCANNING

---





## Table of contents

- a. Introduction
- b. Population and economic change
- c. Climate change mitigation
- d. Climate change adaptation
- e. Technological change
- f. Governance implications

### a. Introduction

It is essential that any reform of New Zealand's resource management system thinks about tomorrow, not just today. New Zealand faces a dynamic and unpredictable future. That there will be significant change in some areas, such as demographics, climate change and technology, is certain. In other areas, such as global markets and politics, there are considerable risks, but the extent of change is less clear. This chapter sets out some of the known and likely changes that New Zealand faces in the future, focusing on population and economic trends, the mitigation and adaptation implications of climate change and technological developments. It also draws out some of the potential implications of these for resource management law reform, and poses some challenging questions that we will, as a society, need to consider.

### b. Population and economic change<sup>28</sup>

**Significant population increase:** New Zealand's total population is projected to grow from 4.4 million in 2013 to 5.8 million in 2038, an average increase of 1.1 per cent per annum. The level of migration has a large impact on these figures. If there were no migration, it is estimated that the national population would peak at 5.3 million in the early 2050s and then decline. With net migration of 50,000 a year the population would reach 7 million by 2043, and if this was increased to 70,000, the figure would be 6 million by 2028 and 7.6 million by 2043. The composition of immigration will also impact on the ethnic and cultural diversity of New Zealand.

There is currently no long-term policy on how population growth will be managed in New Zealand, apart from a commitment by the current government to reduce net migration by an estimated 20,000–30,000 a year, mostly by reducing the number of student and work visas granted. The ability of government to control population increases is restricted to some extent by the number of New Zealanders currently residing overseas who have the right to return to the country at any stage. This is in the context of growing international environmental and political-economic pressures which are likely to make New Zealand a more attractive safe haven for potential immigrants.

Significant increases in the number of people living in New Zealand means that any new resource management system needs to be able to deal with fast-growing urban areas and significant additional housing and infrastructure provision. It needs to be robust enough to manage growing population pressures on natural resource systems. It also raises the issue of whether the system should contemplate explicit population policy.

#### Questions for discussion:

- **What other implications are there for resource management law reform from future projected population increases?**
- **Given the significant implications of population growth for management of natural and physical resources, should provision be made for the development of a national population policy?**

#### In the context of existing infrastructure under-

**investment:** Such population increase is likely to further strain current infrastructure and bring into starker relief the current investment lag, exacerbating the challenge of funding infrastructure for growth. In 2014 the Auditor-General observed that if current spending trends continue, by 2022 the gap between local government expenditure on the renewal of assets and depreciation could be between \$6 and \$7 billion. Many councils have adopted a 'run to fail' approach for underground assets, not investing in upgrades until there are problems. Such problems, when they do occur, often result in environmental pollution such as sewerage overflows or public health problems such as with faulty treatment of potable water. The need for large-scale replacement of water assets around the country is most likely to occur between 2040 and 2060, at the very time that population increases will be peaking. In contrast, roading assets are regularly renewed, perhaps because they are more visible, do not last as long, and there is co-funding from central government for their upgrade and maintenance.<sup>29</sup> Future population growth coupled with current underinvestment indicates that new funding models may be required for infrastructure provision.

#### Question for discussion:

- **How can a resource management law framework better support adequate infrastructure investment?**

#### Population growth concentrated in Auckland and

**northern North Island:** It is expected that the population will continue to concentrate in the northern half of the North Island and particularly Auckland. The population of the North Island is projected to increase from 3.4 million to 4.6 million between 2013 and 2043. In contrast, the South Island population is projected to only increase

<sup>28</sup> Using Statistics New Zealand medium projections. See Statistics New Zealand, 'Estimates and Projections' (February 2018), [http://archive.stats.govt.nz/browse\\_for\\_stats/population/estimates\\_and\\_projections.aspx](http://archive.stats.govt.nz/browse_for_stats/population/estimates_and_projections.aspx)

<sup>29</sup> Controller and Auditor General, *Water and roads: Funding and management challenges* (Office of the Auditor General, 2014).

from 1 million to 1.3 million during the same period. Most territorial authorities will experience population growth. Some of the highest growth rates are expected in the rural areas surrounding Christchurch – Selwyn (2.6 per cent) and Waimakariri (1.6 per cent) and the Queenstown-Lakes District (2.2 per cent). Tauranga and Hamilton, along with Auckland, are also forecast to have high growth rates.

Two-thirds of the North Island's growth will be in the Auckland region which is projected to increase from 1.5 million (2014) to 2 million (2033) and then surpass 2.3 million (2043). Under a very high migration scenario this could increase to 3 million by the early 2040s. In 2028 Auckland is likely to be home to 37 per cent of the national population (compared to 34 per cent in 2013) and 39 per cent in 2043.

Such concentration of population creates agglomeration opportunities as well as threats. Dense populations can create the opportunity to provide efficient and environmentally friendly mass transport systems, intensive housing and infrastructure. But if population increase is not well managed it can result in costly urban sprawl and environmental degradation. Dense urban areas require careful planning in order to maintain natural systems and to design in nature as part of the fabric of the city. Locations such as the Queenstown-Lakes District, which are experiencing strong growth in areas with very high natural values, will likely require careful proactive planning and strong protective rules to ensure that such natural values can be retained.

#### Questions for discussion:

- How do we maximise the opportunities of agglomeration while minimising the threats?
- What mechanisms can we deploy to better manage the challenges of strong growth in sensitive areas?

**Population ageing and becoming more ethnically diverse:** The median age of New Zealanders will likely continue to increase from 37.1 years in 2016 to 40 during the 2030s. By 2068 half the population is projected to be older than 46 years. The number of people 65 and older is projected to increase from 700,000 in 2016 to 1.32–1.42 million in 2043. At the same time, the population will likely become less European, with Māori projected to increase to 18.4 per cent, Asian to 22 per cent and Pacific populations to 10.2 per cent of the total population in 2038, with the European proportion dropping to just 65.5 per cent. Because different age groups and cultures have different lifestyles, values and aspirations, the changing diversity will have planning implications for housing, transport, the layout of urban areas, recreation and work. The system will need to provide for innovative methods of engagement that speak to the social and cultural expectations of different age and ethnic groups, and manage different

expectations around decision-making based on conflict and consensus.

#### Question for discussion:

- How do we accommodate a broader range of needs and aspirations within our resource management system?

**Growing economy:** Treasury predicts an average of 2 per cent gross domestic product (GDP) growth per year to 2060. Under current norms, primary sector exports are likely to remain important to the country, which implies ongoing and growing pressures on rural land and freshwater systems as well as the marine area. However, food technology developments could bring fundamental change to the sector as new and revolutionary production techniques evolve (see below).

Auckland contributed 24 per cent of total national GDP growth between 2010 and 2015 and Auckland firms are generally more productive than those elsewhere in the country. Productivity in the Auckland CBD is 72 per cent higher than the rest of New Zealand. This highlights the economic benefits that can be derived from increasing agglomeration in large urban areas. Auckland's freight is projected to increase by 78 per cent over the next 30 years, with the majority being transported within Auckland, placing increasing pressure on urban transportation systems.<sup>30</sup>

#### Questions for discussion:

- Can we continue to grow our primary sector exports whilst protecting and restoring natural systems?
- How can planning help maximise economic agglomeration benefits within Auckland and other urban areas?

**Large and growing Māori economy:** The Māori economy grew from \$36.9 billion to \$42.6 billion in nominal terms between 2010 and 2013, which is a 7.2 per cent real increase. It is thought to currently be around \$50 billion. A large proportion of this asset base (\$11.2 billion) is in agriculture, forestry and fishing, and \$8.2 billion is in property. Ownership stakes in these sectors are thought to include 40 per cent of New Zealand's forestry, 30 per cent of lamb production, 10 per cent of dairy production, 50 per cent of fishing quota, 30 per cent of sheep and beef production and 10 per cent of the kiwifruit sector.

Māori are increasingly investing in housing, with Ngāi Tahu building 400 homes at Hobsonville Point in Auckland. There is likely to be continued growth in the Māori economy driven by further Treaty settlements and increased merger and acquisition activity. Around 40 iwi have yet to settle, including the largest by

<sup>30</sup> Treasury, *He tirohanga mokopuna: 2016 statement in the long-term fiscal position, New Zealand* (Treasury, Wellington, 2016).

population, Ngāpuhi.<sup>31</sup> Along with this financial strength comes an increasingly prominent Māori role in natural resource governance and management, spearheaded by co-governance provisions in many Treaty settlements. The growing economic and governance strength of Māori, and their large stake in the primary production sector, may create opportunities to integrate environmental considerations more holistically into natural resource use in line with Te Ao Māori.

#### Questions for discussion:

- **What are the implications of the growing Māori stake in New Zealand's primary sectors for resource management law?**
- **What opportunities are there to integrate environmental considerations more holistically into natural resource use in accordance with Te Ao Māori?**

**Growing visitor numbers:** International visitor arrivals are forecast to increase to 4.9 million in 2023 (of which 1.8 million are likely to be sourced from Australia and 1 million from China). This is up 39 per cent from 3.5 million in 2016, with an average growth rate of 4.8 per cent per year. The international spend in New Zealand is forecast to rise 52.1 per cent over the same period to reach \$15.3 billion.<sup>32</sup> Such increases are likely to place strong and increasing pressures on New Zealand's conservation land and natural systems as well as built tourism infrastructure, likely requiring a more sophisticated resource management regime to address this sector than is currently in place. They also raise the need for new revenue streams to fund the required infrastructure through such mechanisms as imposing a tourist tax at the border or instituting differential charging for access to national parks.

#### Questions for discussion:

- **Do we need new approaches/tools to better manage tourism pressures on natural resources?**
- **Do we need a different approach to managing tourism pressures on conservation land versus other natural resources?**
- **Do we need new funding mechanisms to better provide for and manage tourism impacts?**

**Broader economic matters:** Treasury is developing new metrics to measure progress in New Zealand through its Living Standards Framework and these are considerably wider than just GDP. The Framework measures four capital stocks (financial & physical, human, social and natural) and the types of wellbeing that flow from them

(e.g., security, leisure, freedom, environmental services, consumption, innovation, employment and income). Treasury has defined 'good public policy' as that which enhances the capacity of the four capitals to generate wellbeing. Accordingly, good public policy:

- is sustained or enhanced, not eroded by current generations at the expense of future generations (*sustainability*)
- is shared equitably in a way that sustains or enhances capitals (*equity*)
- allows for a cohesive society, where all people and groups respect others' rights to live the kinds of lives they value (*social cohesion*)
- is resilient to major systemic risks (*risk management*)
- generates material wellbeing (*economic growth*)<sup>33</sup>

These five bullet points are used by Treasury to analyse the impacts of government policy choices. Such criteria could be used to assess resource management law reform proposals as an alternative to the current cost-benefit approach. Treasury also notes that investment in restoration (e.g., of wastewater and stormwater infrastructure, pest control and clean-up initiatives) should be seen as investment in New Zealand's natural resources and be weighed up against long-term benefits.<sup>34</sup>

The rise of new technologies, as discussed below, with have significant impacts on jobs and employment in New Zealand. It has been estimated that up to 885,000 jobs (46 per cent of the total) are at risk from automation over the next 20 years. These include predominately labouring jobs (75 per cent) but also professional jobs (12 per cent).<sup>35</sup>

The future economic and social conditions in New Zealand will also be significantly impacted by international developments. In a 2018 review of global risks, the World Economic Forum identified the politically destabilising force of societal polarisation (which, for example, has led to Brexit and the Trump presidency), growing geopolitical risks in the form of the nuclear confrontations (potentially including North Korea, Pakistan, India and Israel) and conflicts in the Middle East, growing environmental risks (including climate change, accelerating biodiversity loss and pollution) leading to social and economic disruption, and threats to cyber security. The Forum expresses concern at the impact of such risks on a complex world system. 'When a risk cascades through a complex system, the danger is not of incremental damage but of "runaway collapse" – or alternatively, a transition to a new, suboptimal status quo that becomes difficult to escape.' It notes that as change accelerates we cannot discount the possibility that one or more of the global social, economic or environmental systems will collapse, with devastating

31 Treasury, *He tirohanga mokopuna: 2016 statement in the long-term fiscal position, New Zealand* (Treasury, Wellington, 2016); and Chapman Tripp, Te Ao Māori: Trends and insights (June 2017), <https://www.chapmantripp.com/Publication%20PDFs/2017%20Chapman%20Tripp%20Te%20Ao%20Maori%20-%20trends%20and%20insights%20E-VERSION.pdf>

32 Ministry of Business, Innovation and Employment (MBIE), *New Zealand tourism forecasts 2017–2023* (MBIE, Wellington, 2017).

33 Treasury, *He tirohanga mokopuna: 2016 statement in the long-term fiscal position, New Zealand* (Treasury, Wellington, 2016) at 9.

34 Treasury, *He tirohanga mokopuna: 2016 statement in the long-term fiscal position, New Zealand* (Treasury, Wellington, 2016).

35 New Zealand Institute of Economic Research, *Disruptive technologies risk, opportunities – can New Zealand make the most of them?* (Chartered Accountants Australia and New Zealand, 2015).



consequences.<sup>36</sup> Growing economic inequality within New Zealand is another trend that may have significant and potentially unforeseen consequences for resource management and society more broadly.

**Questions for discussion:**

- **Does Treasury's Living Standards Framework provide a good basis for assessing policy, planning and project choices?**
- **How do we factor in global risks to our resource management system?**

### c. Climate change mitigation

Under the Paris Agreement, New Zealand has signed up to a series of national emissions reduction targets including:

- An unconditional 5 per cent net reduction in emissions below 1990 levels by 2020
- A conditional target range of 10 to 20 per cent below 1990 levels by 2020
- A target of 30 per cent below 2005 levels (and 11.2 per cent below 1990 levels) in 2030
- A long-range target of 50 per cent below 1990 levels by 2050

Nearly half (48 per cent) of New Zealand's total emissions come from agriculture, with sheep and cattle being responsible for nearly all these emissions. Energy is the next largest emitter (40 per cent), mainly comprising transport (18 per cent of which 90 per cent is from road vehicles), industrial heat including food processing (11 per cent), and electricity generation (5 per cent). Forestry sequesters nearly 30 per cent of New Zealand's gross emissions, albeit temporarily. Mitigation actions in some key sectors are likely to include:<sup>37</sup>

- **Agriculture** – reduction in stock numbers and/or application of technologies to reduce emissions per animal (e.g., methane vaccine, methane inhibitor, targeted breeding, nitrogen inhibitor applied to pastures and low emission feed). Reducing stock numbers could free up rural land for other uses such as horticulture, forestry or biofuel production. In addition, alternative ways to increase soil fertility that are not reliant on natural gas will be required, and could include replacing urea with the use of legumes such as clover.<sup>38</sup>
- **Forestry** – establishment of new permanent forests on highly erodible land with additional harvested (or permanent) forests established on other land. This could create a win-win situation where soils are stabilised, carbon sequestered and more habitat for indigenous species is created.
- **Industry** – greater use of renewable heat energy through the uptake of biomass, solar and geothermal to replace coal and natural gas.
- **Transport** – switching the fleet from fossil fuels to renewables (especially electric and possibly hydrogen fuel cells) resulting in greater renewable energy demand (see below) and need for an extensive electrical recharging network. Moving to different modes of transport would also help to reduce emissions, such as from cars to walking and cycling, and from road freight to rail and coastal shipping. The electrification of trucks will present much greater challenges than for light vehicles due to the weight of batteries currently required, which compete with the payload. Short-haul electric plane flights are also in prospect. New technology is enabling mobility without car ownership such as through car sharing schemes and Uber taxis (see more below on technology impacts).<sup>39</sup> Achieving the transition to a fully electric fleet is likely to require 'a carrot and a stick' approach. One carrot would be greater public investment in charging technology. A potential stick would be to ban



36 World Economic Forum, *The global risks report 2018* (World Economic Forum, 2018).

37 New Zealand Productivity Commission, *Low emissions economy: Issues paper* (New Zealand Productivity Commission, Issues Paper, 2017); Royal Society of New Zealand, *Transition to a low-carbon economy for New Zealand* (Royal Society for New Zealand, Wellington, 2016); and Royal Society of New Zealand, *Climate change implications for New Zealand* (Royal Society for New Zealand, Wellington, 2016).

38 Sims R, 'What's the point of looking for more gas?' (2018), *Pure Advantage*, <http://pureadvantage.org/news/2018/03/09/whats-the-point-of-looking-for-more-gas/>

39 Royal Society of New Zealand, *Transition to a low-carbon economy for New Zealand* (Royal Society for New Zealand, Wellington, 2016).

the sale of all new and imported used vehicles with internal combustion engines by a prescribed date. For example, Norway has imposed such a ban from 2025.<sup>40</sup>

- **Electricity** – generation of more renewable energy (likely primarily from wind and solar, but also from bioenergy, geothermal and small hydro as well as potentially ocean energy) and the development of smart grids and greater decentralisation of generation. This will increase the challenges of integrating the grid and providing reliable supply. It will likely increase the pressures on the environment from renewable generation options (e.g., landscape impacts of wind generation), which will need to be carefully managed.
- **Buildings** – improving the energy efficiency of buildings through design, orientation and use of insulation/glazing in new and retrofitted existing buildings as well as the use of low emission building materials. The resource management system will need to enable, facilitate and/or incentivise such energy efficiency options.

Overall, achieving substantial reductions in net greenhouse gas emissions in New Zealand is likely to require significant land use change away from dairy and sheep and towards horticulture and forestry (indigenous and exotic). In two of the three emission reduction scenarios developed by Vivid Economics, increases in afforestation of 1 to 1.6 million hectares were proposed. The Parliamentary Commissioner for the Environment identified at least a million hectares of marginal land that has the potential to revert to shrubland and native forest.<sup>41</sup> There could be important co-benefits from such land use change including improved water quality, the stabilisation of riverbanks, improvement of soils, habitats

and biodiversity and improved visual amenity.<sup>42</sup> A resource management system regime will need to be flexible enough to accommodate large-scale rural land use change and should seek to maximise the co-benefits of afforestation and effectively manage dis-benefits (such as the impacts of clear felling harvested forests).

#### Questions for discussion:

- **Are there other climate change mitigation matters that should be considered?**
- **How can a resource management system accommodate large-scale rural land use change? Should it incentivise such change?**
- **Do we need stronger mechanisms and/or new tools to manage the environmental impacts of clear-fell rotation forestry? Are new forestry models possible?**
- **How can environmental co-benefits from afforestation be maximised?**
- **How can we support the growth of renewables while effectively managing the environmental effects (e.g., landscape impacts of wind farms, ecological impacts of hydro, etc.)?**
- **How could a resource management system support low emission urban and building design?**
- **Do we need tailored transition mechanisms to better manage change (e.g., moving space from roads to cycleways, changing land use from pasture to forest, transitioning to a fully electric fleet)?**



<sup>40</sup> Anderson T and Boston J, 'Vehicle ban could drive efforts on emissions targets' (*Dominion Post*, 20 March 2018).

<sup>41</sup> Parliamentary Commissioner for the Environment (PCE), *Climate change and agriculture: Understanding the biological greenhouse gases* (PCE, Wellington, 2016) at 72.

<sup>42</sup> Kazaglis A et al., *Net zero in New Zealand: Scenarios to achieve domestic emissions neutrality in the second half of the century* (Vivid Economics, Report prepared for GLOBE-NZ, London, 2017).

## d. Climate change adaptation

Climate-related changes in New Zealand are likely to include the following:<sup>43</sup>

- **Temperature:** By 2040 an increase in average temperature by +0.7 to +1.0 degrees; a significant reduction in cold nights and frosts (30–50 per cent); and a 40 to 100 per cent increase in hot days.
- **Ocean:** Progressive increase in ocean warming (+2.5 degrees by 2090, with higher temperatures in the north Tasman Sea) and ocean acidification with surface pH declining by 0.33 by 2090 (a rate of change unprecedented during the last 25 million years). In addition, carbon sequestration is likely to decline in open oceans around New Zealand.<sup>44</sup>
- **Sea-level rise:** Progressive sea-level rise, which will vary around New Zealand's coast, of around 0.2–0.4 metres by 2060 and 0.3–1 metre by 2100. There is considerable uncertainty about these figures as the collapse of the Antarctic ice sheets could substantially increase the upper range. There will be increased coastal erosion, more frequent and extensive coastal flooding, higher storm surges and more saltwater intrusion.
- **Rainfall patterns:** There will likely be a decrease in rainfall in Northland and an increase in the south-west of the South Island, with more and less dry days respectively. This will be coupled with an increase in extreme rainfall events in the west and a decrease in the east. Snow and ice will decrease, with snow days reducing by 30 days or more by 2090, accompanied by the loss of many glaciers. There will be a concomitant increase in the severity and frequency of drought.
- **Storms:** Extreme wind speeds will likely increase in the southern half of the North Island and in the South Island. There will likely be a small reduction in storm frequency but New Zealand should expect stronger ex-tropical cyclones.

The predicted impacts of these changes on various domains and sectors are as follows:<sup>45</sup>

- **Biodiversity:** The physical range of ecosystems and species will change, as will the timing of seasonal events such as beech masting and ecosystem functions. At the same time, the range and abundance of invasive pests and weed species is likely to increase. Climate change could likely be a significant driver of biodiversity loss over the next century, with the most vulnerable ecosystems including alpine, subalpine, freshwater, coastal and marine.

- **Fresh water:** Climate change is likely to increase pressure on water resources due to higher temperatures and increasing droughts reducing soil moisture, groundwater supplies and river flows in some areas. Greater variability in flows is expected, with decreased runoff in the east of the country and increased runoff elsewhere. In particular, central North Island east coast rivers with alpine headwaters and Canterbury braided rivers are predicted to have increased flows. Groundwater recharging will differ, depending on locality, with a 10 per cent decrease predicted for the Canterbury Plains Rangitata River catchment and a potential doubling of the recharge in the Wellington region.<sup>46</sup> Saltwater intrusion will impact lowland freshwater systems and intensified stratification of some lakes may occur.
- **Ocean and coasts:** Species with carbonate shells including plankton, pāua, mussels and oysters will be vulnerable to increasing acidification affecting shell forming processes. Ocean warming may adversely affect deepwater coral, and associated deep-sea ecosystems and biodiversity, due to the shallower depths at which carbonate will dissolve. There could be fewer temperate species and more subtropical species in New Zealand waters. There will likely be more nutrient poor conditions, and the primary production of surface waters will likely decline by an average of 6 per cent by 2100, with subtropical waters experiencing the largest decline. A reduction in particle flux from the surface to the seabed is likely to alter food supplies for fish, with a decline identified for all 38 species modelled.<sup>47</sup> Overall, New Zealand waters are likely to become less productive.
- **Physical infrastructure:** The majority of New Zealand's urban areas are located on the coast, or in river floodplains, putting them potentially at risk. For example, 68,170 buildings and 133,265 residents are located less than 1.5 metres above mean high water springs, including 382 critical buildings, 5 airports, 1,547 jetties and wharves, 2,121 kilometres of roads and 46 kilometres of railway.<sup>48</sup> Sea-level rise will also affect stormwater pipes and drainage resulting in more wastewater overflows and flooding.
- **Primary industries:** Climate change is expected to reduce crop quality and yield, and pest and diseases may become more problematic. Soil erosion could increase, as could demand for irrigation (due to increased evaporation and drought). Exotic forests could benefit through increased growth, but there will be increased fire, pest and erosion risks. Fisheries production is projected to decline by around 6 per

43 Climate Change Adaptation Technical Working Group, *Adapting to climate change: Stocktake report* (Ministry for the Environment, Wellington, 2017) at 21.

44 Law CS et al., *The New Zealand EEZ and South West Pacific, Synthesis Report RA2, Marine case study, Climate changes, impacts and implications (CCII) for New Zealand to 2100* (MBIE, Wellington 2016).

45 Royal Society of New Zealand, *Climate change implications for New Zealand* (Royal Society for New Zealand, Wellington, 2016).

46 Office of the Prime Minister's Chief Science Advisor, *New Zealand's fresh waters: Values, state, trends and human impacts* (Office of the Prime Minister's Chief Science Advisor, Auckland, 2017).

47 Law CS et al., *The New Zealand EEZ and South West Pacific, Synthesis Report RA2, Marine Case Study, Climate changes, impacts and implications (CCII) for New Zealand to 2100* (MBIE, Wellington 2016).

48 Bell R et al., *Preparing for climate change: A summary of coastal hazards and climate change guidance for local government* (Ministry for the Environment, Wellington, 2017) at 11; and PCE, *Preparing New Zealand for rising seas: Certainty and uncertainty* (PCE, Wellington, 2015)



cent by 2100, harvesters of shellfish species will be more vulnerable, and finfish aquaculture will be affected by rising temperatures and reduced oxygen levels in the sea.

In light of these projected climate change risks, a resource management system needs to be future-looking, flexible and responsive. It needs to place high importance on effective monitoring, strategic assessment, and constant self-evaluation. The system will need to anticipate that structures, buildings, activities and species will be impacted over time and that many will need to relocate. It will need to facilitate and effectively manage such spatial changes and their impacts, and provide certainty and clear direction where possible for investors. Local government will almost certainly be unable to manage such risks on its own and greater central government involvement will likely be necessary. The scale of investment that will be required to respond to climate risks is large, given that billions of dollars of assets and tens of thousands of people are at risk. For this reason new funding mechanisms, such as the establishment of a national Climate Change Adaption Fund, have been proposed, similar to the Natural Disaster Fund administered by the Earthquake Commission.<sup>49</sup>

Threats to biodiversity are likely to significantly increase through changes to habitat and increased risk of pests. Consideration will need to be given to greater protection for threatened species and habitats and the system will need to enable them to shift locations.

#### Questions for discussion:

- **Are there other implications of climate change adaptation that we need to consider?**
- **How can a resource management system accommodate, and potentially incentivise, the movement of physical infrastructure away from risk areas (and associated people/communities)? How could such movement be funded?**
- **How do we protect biodiversity whilst providing for habitat and species to physically move? Does this require new mechanisms as opposed to spatially fixed reserves?**
- **How could a regime governing water rights accommodate marked changes in flows over time?**
- **How can a fisheries management regime accommodate decreasing productivity and increasing vulnerability (e.g., through acidification, increased pests) of marine species?**

## e. Technological change

Advances in technology are driving profound change in the way people live their lives, in employment and in the production and distribution of goods and services. The accelerating pace of change is so great that it has been termed the Fourth Industrial Revolution.<sup>50</sup> It is being driven by rapid advances in mobile and interconnected computing power, artificial intelligence and genetic sequencing.

- **Mobile and intelligent technology:** The wide availability and low cost of mobile connectivity is creating a society which is much more strongly networked and where there is rapid transfer and diffusion of information. This has enabled the more efficient delivery of many services and has created new ways for people to perceive and interact with the physical world. It creates new opportunities to educate and alert people to environmental issues and to enable decision-makers to better understand the likely impacts of future projects. The growing 'Internet of Things,' which refers to networks of low cost sensors and control systems (including drones and wildlife tags) for remote data collection, monitoring and decision-making, has significantly reduced costs and increased our ability to observe and monitor environmental change. It has also helped to increase the efficiency of sectors such as agriculture, reducing the need for inputs of water and fertilisers (and consequent polluting outputs). Such technology is growing exponentially.<sup>51</sup> It has created challenges for our legal system, highlighted by the current controversy over the use of drones in airspace, and the need for a more developed regulatory system to control them.
- **Energy:** Advances in energy storage mechanisms (including batteries) and in renewable energy technology could herald a shift towards more dispersed generation sources and greater mobile uses. There are some groundbreaking technologies under development in this space. For example, the design of lithium-ion batteries is rapidly progressing, and lithium-air batteries, which would have an energy density comparable to petrol, could be as close as a decade away.<sup>52</sup> Such technological shifts will facilitate the move to renewable energy sources (e.g., to electric cars and trucks, solar homes) and also enable better and cheaper environmental science and monitoring, amongst other things.

49 Boston J and Lawrence J, *The case for new climate change adaptation funding instruments* (Institute for Governance and Policy Studies, Wellington, 2017).

50 World Economic Forum, *Harnessing the Fourth Industrial Revolution for the Earth* (World Economic Forum, Paper, 2018).

51 Manyika J et al., *Disruptive technologies: Advances that will transform life, business, and the global economy* (McKinsey Global Institute, New York, May 2013); McKinsey Global Institute and KPMG, *The changing landscape of disruptive technologies, Part 2: Innovation convergence unlocks new paradigms* (KPMG, Publication, 2017).

52 Sutherland WJ et al., 'A 2017 horizon scan of emerging issues for global conservation and biological diversity' (2017) 32(1) *Trends in Ecology & Evolution* at 31.

### Questions for discussion:

- Given the potential of new technologies, should we raise our expectations (and requirements) around monitoring and reporting environmental data?
- Should current land uses be required to adopt new technologies that can reduce environmental impacts (e.g., remote sensing of inputs on farms)?
- How can the law evolve rapidly enough to address the impacts of new technologies?

- **Transportation infrastructure:** New technologies may change (and potentially reduce) the demand for road capacity, but it is not yet clear in what way or to what extent. For example, the introduction of autonomous vehicles may result in diminished private car ownership through making it easier to use shared vehicles or alternative modes of transport.<sup>53</sup> Driverless trucks are also in prospect. Currently, the mobile internet (and GPS maps) makes it easier for travellers to access information on routes and travel times and therefore to plan their trips. This is increasing the accessibility and utility of public transport as well as resulting in the more efficient use of roads through the ability to be alerted to, and avoid, high congestion areas. Such

technology should enable the more efficient use of transportation infrastructure going forward.

### A spotlight on self-driving vehicles

An OECD report sets out the findings of a simulated study which explored the impacts of using self-driving cars that could either transport several passengers together ('TaxiBots') or single passengers sequentially ('AutoVots'). The study found that TaxiBots combined with high capacity public transport could remove 9 out of every 10 cars in a mid-sized European city, with there being 65 per cent less vehicles at peak times (reducing to 8 out of 10 cars without high capacity public transport). However, distances travelled overall increased due to the need for repositioning and servicing trips. Self-driving cars free up a very large amount of space currently used for parking. They completely removed the need for on-street parking, freeing up an area equivalent to 20 per cent of current street space. In addition, up to 80 per cent of off-street parking could be removed. The transition to self-driving cars could, however, be problematic, because if half the car travel is by shared self-driving vehicles and the other half by traditional cars, total vehicle travel was predicted to increase by 30 to 90 per cent.<sup>54</sup>



53 Baker T et al, Disruptive technologies and transportation: The impact of Artificial intelligence and machine learning (Texas A & M Transportation Institute, 31 July 2017).

54 International Transport Forum, *Urban mobility system upgrade: How shared self-driving cars could change city traffic* (OECD, 2015).

The benefits of driverless technologies could include decreased congestion (and roading demand) from a more efficient traffic flow, with driverless vehicles predicted to increase road capacity by between 50 and 250 per cent. In addition, less space could be required for parking, and parking facilities could be in more dispersed areas (rather than concentrated in the CBD).<sup>55</sup>

The drawbacks of driverless cars could be an acceleration of urban sprawl as the cost of travel reduces and travel time becomes more productive (as occupants can be engaged in other activities whilst travelling). Driverless cars would also make car travel more accessible for older people and those with disabilities through removing the necessity to drive. This could increase demand (particularly with an ageing population), thereby exacerbating rather than reducing congestion. Driverless cars may also more effectively compete with public transport, driving down demand and making public transport harder to fund.<sup>56</sup> The magnitude of impact that driverless technologies could have on urban form, land use and transportation suggests that a resource management system needs to deeply engage in this area to proactively manage the change process.

#### Question for discussion:

▪ **Are the potential impacts on urban areas of driverless technologies so great that specific management approaches/tools are required to proactively manage them?**

- **Genomics:** Advances in fast, low cost gene sequencing, big data analytics and synthetic biology (creating new DNA) has created opportunities for developments in effective pest control, food production and synthetic products such as synthetic meat. This creates significant opportunities (as described below for pest control and food production) as well as threats.

For example, the World Economic Forum is promoting the development of a new 'bio-economy' where the genetic value of indigenous species is monetised and recycled back into conservation.<sup>57</sup>

#### Questions for discussion:

- **Given the rapid advances in genomics, are our current approaches to scrutinising and approving the use of such technologies in New Zealand adequate?**
- **How should we evaluate proposals to use DNA technologies for pest control or to manufacture synthetic food, for example?**

- **Disruptive substances:** Manufactured substances such as plastics, microbeads, nanoparticles, drugs and hormones have the potential to be destructive of wildlife and ecosystems and are an emerging issue that a resource management system would need to grapple with. They may also impact human health. For example, a study of mussels and oysters farmed in Europe found that they contained microplastics and that European shellfish consumers could be ingesting up to 11,000 microplastics a year.<sup>58</sup> Microplastics are also ubiquitous in tap and bottled water worldwide.<sup>59</sup> On the positive side, nanotechnology is creating opportunities for new technologies such as more efficient and cost-effective electricity generation through cheaper solar cell production.<sup>60</sup>

The growing cumulative impacts of plastics on the oceans in particular highlights the need to shift to a 'circular economy' where the product life cycles mimic that of biological systems, with components being recycled, repurposed and reused rather than discarded as waste.<sup>61</sup> This suggests that a resource management system may need to engage with product and infrastructure life cycles.



55 New Zealand Institute of Economic Research, *Disruptive technologies risk, opportunities – can New Zealand make the most of them?* (Chartered Accountants Australia and New Zealand, 2015).

56 New Zealand Institute of Economic Research, *Disruptive technologies risk, opportunities – can New Zealand make the most of them?* (Chartered Accountants Australia and New Zealand, 2015).

57 World Economic Forum, *Harnessing the Fourth Industrial Revolution for life on land: Towards an inclusive bio-economy* (World Economic Forum, Paper, 2018).

58 Van Causwenberghe L and Janssen CR, 'Microplastics in bivalves cultured for human consumption' (2014) 192 *Environmental Pollution* at 60.

59 World Economic Forum, *The global risks report 2018* (World Economic Forum, Report, 2018).

60 Graham-Rowe D, 'Can nanotechnology provide cheaper solar energy?' (*Guardian*, 20 September 2011).

61 Matthan R, 'The circular economy' (*Livemint*, 24 January 2018).



#### Questions for discussion:

- **Should our resource management system adopt the need to transition to a circular economy as an underlying principle?**
- **Should the full product life cycle (and impacts off-site) be considered when consenting activities?**

- **Biosecurity and pest control:** New technologies are revolutionising biosecurity and pest control. Gene editing has great potential for controlling invasive species and disease vectors. Other forms of biological pest control, such as the use of bacteria and fungi for plant pests, are being developed. Robots are being used to target invasive species, such as the Crown of Thorns starfish on the Great Barrier Reef, where the robot locates the starfish and injects it with a lethal substance. Similar autonomous drone technology could possibly be used to target wilding pines or other pest plant species with poison. Improvements in battery technology are likely to increase the range and utility of autonomous equipment for the likes of environmental monitoring and control.<sup>62</sup> Technology also has the potential to assist biosecurity efforts. For example, electronic 'noses' are now being used at airports to detect illegally traded wildlife. Blockchain technology can be used to trace the supply chain and detect illegal species trade and the like.<sup>63</sup>

#### Questions for discussion:

- **On what basis do we decide which technologies can be deployed for biosecurity and pest control?**
- **How should we evaluate the risks versus the potential benefits?**

- **Agriculture:** Technology seems likely to drive radical change in the agriculture sector, creating both opportunities and threats. The transformation is underpinned by the application of cloud computing, technology-led smart farming practices and increasing consumer sophistication in developed countries. These provide opportunities to add significant value to the agricultural sector, but also create significant threats if the sector fails to aggressively adopt smart farming practices. A recent Massey University study found that the disruptive elements of technology were not well appreciated by those in the agricultural-food sector.<sup>64</sup>

Cloud-based systems create significant opportunities to better monitor and improve operations on farms, and also to better communicate to regulators and consumers. In particular, remote monitoring and control systems can help improve efficiency and compliance. Examples of this include remote measurement of soil moisture to limit water use, measurement of nutrient loading to reduce fertiliser application and leaching, and greater use of data to allow comparison with industry norms and standards.<sup>65</sup> In addition, blockchain technologies are enabling the better tracking of the entire food chain.

Greater changes in agriculture are likely to be driven by the reinvention of the entire food system, with radically different farming models being developed. There are emerging protein markets looking to produce protein sources that are plant based or synthetic, including by companies such as 'Beyond Meat' and 'Impossible Foods'.<sup>66</sup> Cellular agriculture is set to disrupt conventional farming models. It enables meat to be grown in a laboratory within six weeks, and could enable meat to be produced for as little as \$2 a kilo. There is evidence that millennials are particularly attracted to such new technologies due to significant environmental benefits, absence of hormones and antibiotics, greatly reduced bacterial contamination and the avoidance of the need to slaughter animals.<sup>67</sup> Such an attitude shift seems likely to translate through to future generations, and many now predict a revolution in how we produce food:

*...technology, represented by hardware, software, and "liveware" (genetics), has the potential to radically change the agri-food sector, and, through intensity and integration, the competitive landscape.*<sup>68</sup>

*'...we are fully emerged in a technological revolution in the agriculture sector and consequently, at the start of the first global agrarian revolution.'*<sup>69</sup>

#### Question for discussion:

- **What are the implications of likely technological changes for the way we might need to manage agriculture as a sector?**

62 Sutherland WJ et al., 'A 2017 horizon scan of emerging issues for global conservation and biological diversity' (2017) 32(1) *Trends in Ecology & Evolution* at 31.

63 Sutherland WJ et al., 'A 2017 horizon scan of emerging issues for global conservation and biological diversity' (2017) 32(1) *Trends in Ecology & Evolution* at 31.

64 Kelly S et al., *Disruptive technology in the agri-food sector: An examination of current and future influence on sustainability, bio-security, and business effectiveness* (Massey University, Palmerston North, 2017).

65 Sutherland WJ et al., 'A 2017 horizon scan of emerging issues for global conservation and biological diversity' (2017) 32(1) *Trends in Ecology & Evolution* at 31.

66 KPMG, *The changing landscape of disruptive technologies, Part 2: Innovation convergence unlocks new paradigms* (KPMG, Publication, 2017); World Economic Forum and McKinsey & Company, *Innovation with a purpose: The role of technology innovation in accelerating food systems transformation* (World Economic Forum, Paper, 2018); and Beef and Lamb New Zealand, *Future of meat: How should New Zealand's red meat sector respond to alternative protein advancements?* (Beef and Lamb New Zealand, Summary Report, February 2018, Auckland).

67 Barnett J, 'Farming must adapt to disruptive tech', New Zealand Landcare Trust (28 August 2017), <http://www.landcare.org.nz/News-Features/Features/Farming-Must-Adapt-to-Disruptive-Technology>.

68 Kelly S et al., *Disruptive technology in the agri-food sector: An examination of current and future influence on sustainability, bio-security, and business effectiveness* (Massey University, Palmerston North, 2017) at 2.

69 KPMG, *The changing landscape of disruptive technologies, Part 2: Innovation convergence unlocks new paradigms* (KPMG, Publication, 2017) at 10.

## f. Governance implications

The rapidly escalating pace of change indicates that new governance models may be required to respond, with current models being typically slow and cumbersome. Jonathan Boston has suggested we need to be moving towards an 'Anticipatory Governance' model which is proactive and forward looking, cognisant of risks, recognises interconnections and favours prevention over cure. Such an approach is better configured to address the country's environmental and social 'creeping problems' which are those that develop gradually (with a long time lag between cause and effect), which often have multiple causes and which require a sustained effort over a lengthy time period to address. In order to overcome the short-termism evident in our current governance systems, Boston recommends the following design principles for our governance arrangements:

- require policy-makers to have regard to the best available scientific information;
- ensure a high level of transparency in government decision-making (at all levels);
- use analytical frameworks that capture the full range of likely costs and benefits (and make transparent the impacts of using different discount rates);
- design in 'commitment devices' such as regular foresight exercises, risk assessments and long-term planning;
- require governments to set explicit, meaningful and measurable targets for improving outcomes and to regularly report on them;
- establish independent future-orientated institutions;
- encourage respectful deliberation and informed, reasoned debate, such as through collaborative policy-making and multi-stakeholder forums; and
- nurture trust, shared values and common goals and seek cross-party agreements for durable long-term commitments.<sup>70</sup>

In addition, many of the issues likely facing New Zealand in the future, including population growth, climate change

and technological advancement, have strong global drivers and are of a scale that can be overwhelming for regional and local councils to address on their own. For example, councils may be ill-equipped to address end-of-life issues associated with new materials and products produced overseas, and foreseeing consumption trends is as important as managing waste. This suggests that greater central government involvement, and more national regulatory tools, may be required to help manage regional and local impacts.

Some other countries have invested in public sector policy labs and innovation hubs to develop innovative policies (the MindLab in Denmark and EU Policy Lab being two examples) which look to experimental, creative and citizen-centred approaches to policy.<sup>71</sup> This is somewhat analogous to the experimental development of collaborative processes in New Zealand, which has been civil society-led. But these innovations currently comprise 'workarounds' of the current governance system rather than the transformation of it. Elmi and Davis (2018) suggest that we need to be looking towards 'Agile Governance', defined by the World Economic Forum as 'adaptive, human-centred, inclusive and sustainable policymaking, which acknowledges that policy development is no longer limited to governments but rather is an increasingly multi-stakeholder effort.' The future may need to see a shift towards a more collaborative and negotiated style of decision-making, although the potential for a consensus-based model may be reduced by increased diversity in New Zealand's population.

### Questions for discussion:

- **What principles should underpin future institutional design?**
- **How do we encourage institutions to be future orientated?**
- **How do we design institutions to better address long-term 'wicked' environmental problems?**
- **What should be the role of multistakeholder and collaborative processes in the future?**



<sup>70</sup> Boston J, 'Anticipatory governance: How well is New Zealand safeguarding the future?' (2017) 12(3) *Policy Quarterly* at 11; and Boston J, *Safeguarding the future: Governing in an uncertain world* (Bridget Williams Books, Wellington, 2017).

<sup>71</sup> Elmi N and Davis N, 'How governance is changing in the 4IR' (18 January 2018) World Economic Forum, <https://www.weforum.org/agenda/2018/01/agile-governance-changing-4ir-public-private-emerging-technologies>

# 3. DESIGNING OUR LEGISLATION

---





## Table of contents

### a. Introduction

*Legislation is important*

*What is legislative design?*

### b. What is 'good' legislative design?

*Design principles*

*Design principle 1: Coherence*

*Design principle 2: Certainty*

*Design principle 3: Accessibility*

*Design principle 4: Integration*

*Design principle 5: Durability*

*Design principle 6: Tailored to New Zealand circumstances*

*Design principle 7: Efficiency*

### c. Along what lines can we split statutory frameworks?

*We can look through different lenses when splitting our resource management statutes*

*Lens 1: Location*

*Lens 2: Domain*

*Lens 3: Sector*

*Lens 4: Institution*

*Lens 5: Outcomes*

*Compatible lenses*

### d. Describing the current model

### e. Interactions between statutes in the current model

*Normative relationships between statutes*

*Relationships between subordinate instruments and permitting processes*

### f. Evaluating the current model

### g. Should we apply lenses in a different order?

*The current order is broadly appropriate*

*Sector first or institution first? A spotlight on the LGA and LTMA*

### h. Should we expand or contract the scope of some lenses?

*Is the scope of the RMA too narrow?*

*Is the scope of the RMA wider than it appears?*

*Three thoughts on the scope of outcomes-based statutes*

### i. How should statutes be divided within any given lens?

*Splitting up outcomes-based legislation*

*A separate statute for biophysical bottom lines?*

*A separate statute for 'balancing'?*

*Balancing in practice*

*Where do issues of allocation belong?*

*The place of domain-based statutes*

*The place of location-based statutes*

*The place of sectoral statutes: Fisheries, forestry, and construction*

*The place of institutional statutes*

*The place of Treaty settlement legislation*

### j. How should statutes interact: Hierarchy, carve-outs, and constitution

### k. Summary

Plimmerton



## a. Introduction

Having looked at what the future could hold, we turn now to the question of how we design our suite of resource management legislation. 'Legislation' is used interchangeably here with two other terms: 'statutes' and 'acts.' It refers to written laws made by Parliament. These are usually referred to as 'primary' legislation to distinguish them from secondary or tertiary (delegated) legislation that is made by others (often public bodies) under the authority of primary legislation. But we will also sometimes talk more broadly about statutory 'frameworks.' This is important, because it means we can consider structural components (including plans, permits and economic instruments) that are set up or contemplated by primary legislation. We are concerned in this project not just with how statutes themselves relate to one another,<sup>72</sup> but also how subordinate instruments interact.<sup>73</sup>

### Legislation is important

One note should be made about our deliberate focus on legislation. Legislation is, of course, a narrower term than 'law' (which also includes the common law). Over centuries, the common law has developed principles and rules that impact on how we manage natural and physical resources.<sup>74</sup> Such measures developed largely as an extension of laws concerning private property and the reasonable exercise of public power, not the protection of the public interest. Ultimately, those extensions proved inadequate to address environmental and social problems, and resource management law is now primarily contained within legislation. The impact of the common law on 'resource management' as defined here is important, but largely incidental.<sup>75</sup>

It is desirable to have resource management laws contained primarily in statutory frameworks. They form the backbone of the rule of law.<sup>76</sup> First, statutes offer greater transparency. Any person can now obtain the wording to an Act of Parliament or regulations (or plans) at minimal (or no) cost, and we do not have to obtain and read through pages of case law to understand or interpret what the rules are. Secondly, statute law is proactive and amenable to fast and targeted change. Parliament (or those with delegated authority under a statute) can develop rules in anticipation of a problem in order to prevent it, with the involvement of all interested persons. It can be strategic. The common law develops on a reactive and ad hoc basis when people bring disputes to court, and generally only parties to the proceedings can contribute.

It is primarily about conflict resolution, not the proactive pursuit of publicly important outcomes. Thirdly, resource management questions often involve highly political or values-based decisions. Decision-making by elected persons (at least at the high level of the fundamental rules) is most appropriate for such questions. That occurs through the parliamentary – but not the judicial – process.<sup>77</sup>

Furthermore, our aim in this project is to make concrete recommendations for legal change that can be achieved only through legislative change, not through the gradual evolution of the common law. We are addressing policy makers, not judges. That does not mean that the common law is unimportant for resource management outcomes. It simply means that if legal changes are needed, legislative intervention will be the preferred method of change.<sup>78</sup> None of this is to diminish the importance of public policy, strategy development and good planning practice *outside* legislative frameworks. Legislation can be a blunt tool to change people's behaviours, and ineffectual in changing how people view the world. However, legislation is important, and is our focus in this chapter.<sup>79</sup>

### What is legislative design?

At this point, it is timely to pause and put the concept of legislative design into its real-world context. What are we actually trying to do in this chapter? To many people, resource management legislation is synonymous with the RMA. That is understandable, given its name. Yet we have already seen that this is not true.<sup>80</sup> We will look at the current system in more detail later on, but for now we can simply observe that the RMA doesn't deal with everything. Alongside it we have the LGA (which, among other things, concerns the funding and delivery of infrastructure necessary for the development of land), the LTMA (which does a similar thing for land transport infrastructure), a bevy of conservation legislation (which imposes additional requirements for activities on conservation land) and hazardous substances legislation (which imposes rules on the storage, transport, and so forth, of hazardous substances). In fact, we have dozens of other key resource management statutes (or hundreds, if we count the many obscure and specific acts that lead a nebulous and largely forgotten existence on the fringes of the system).<sup>81</sup>

Each core act does different things, and many previously fragmented domains (like water, soil and air) *have* been brought together through the law reform process that led to the RMA. But because all these statutes are part of one

72 For example, a statement in one act that 'nothing in this act affects the duties and obligations' in another act.

73 For example, the relationship between regional land transport plans and district plans.

74 Both directly (e.g., laws relating to nuisance, trespass and negligence), and indirectly (e.g., general public law around how authorities tasked with managing resources go about their business, such as judicial review).

75 The common law is narrower than 'case law', the latter of which can arise from the interpretation of legislation and is extremely important in the resource management context.

76 Palmer G, 'Law-making in New Zealand: Is there a better way?' (2014) 22 *Waikato Law Review* at 3.

77 See also Legislative Design and Advisory Committee, *Legislation guidelines: 2018 edition* (Legislative Design and Advisory Committee, 2018) at 9. We say 'at the high level' because more detailed merits decisions often *do* have to be made by bodies other than elected members (including the judiciary, at least under present settings).

78 Thus we are not concerned with the design of the common law, if such a concept can be said to exist. However, the extent to which legislation *overrides* the common law should be made explicit: Legislative Design and Advisory Committee, *Legislation guidelines: 2018 edition* (Legislative Design and Advisory Committee, 2018) at 10.

79 Many issues will cut across legislative boundaries and system boundaries, such as 'urban' management, economic wellbeing, housing supply, biodiversity, etc.

80 See Heitzmann M, 'Lessons from the past and advice for the future' in R Peart (coll.), *Beyond the RMA: An in-depth exploration of the Resource Management Act* (EDS, Auckland, 2007).

81 As an extreme example, consider the Lincoln Road Mill Dam Act 1865, which in its long title enables 'John Cracroft Wilson Esquire CB his heirs executors administrators and assigns to maintain a Dam across the River Heathcote in the Province of Canterbury and to divert the waters of the said River.'



system,<sup>82</sup> there can be complex relationships between them. Changing one can have flow-on effects on others.<sup>83</sup> As such, we are fully justified in asking: Why do we have so many (or so few) statutes? Why are they split up in the ways that they are? Why do the relationships between them look like they do? And should they be arranged differently?

Legislative design is a highly topical issue in resource management at the moment, with some calling for the enactment of a separate Urban Planning Act, and others questioning the future place of the RMA given the alarming number of carve-outs and workarounds that have occurred and have been proposed.<sup>84</sup> But we are not limiting the inquiry to how we might give the RMA a makeover, or how we might improve relationships between existing acts. We are, instead, returning to first

principles. In doing so, we are encouraged by the general direction in the Legislation Act to facilitate 'the progressive and systematic revision of the New Zealand statute book so that . . . it is arranged more logically.'<sup>85</sup>

This chapter moves from the general to the specific. First, we ask what 'good' legislative design means. From this, we produce a series of design principles. This is an important first step: we can't decide whether a different model is desirable unless we have something to measure it against. We then describe the current system and consider whether, and how, it could be changed or improved. The chapter is not intended to provide a blueprint for reform, and does not claim to consider every single statute. Rather it attempts to provide a framework – a way of thinking – to enable us to have a more considered conversation about legislative design in the resource management context.



82 More accurately, they all have at least some *components* that fall within that system.

83 For example, some have complained that changes to the purpose of the LGA and the LTMA have reduced the coherence of the overall system for providing land transport infrastructure.

84 See generally Berry S, Andrews H and Vella J, 'The death of the RMA by a thousand cuts: The next two incisions' (2017) *Resource Management Journal* at 3; Berry S and Andrews H, 'The final straw for the RMA? Some shortcomings of the Resource Legislation Amendment Bill 2015' (2016) *Resource Management Journal* at 1; and Jenkins M, A 'blue skies' discussion about New Zealand's resource management system (Local Government New Zealand Discussion document, 2015) at 41.

85 Legislation Act 2012, s 3(e).



## b. What is 'good' legislative design?

Recently we have been hearing calls for the topic of 'urban planning' or the 'built environment' to be separated from the RMA and put into a new statute, or to be separated in some other way. A degree of separation was an idea that was floated – among others – by the Productivity Commission in its *Better Urban Planning* inquiry.<sup>86</sup> Prior to the 2017 general election, the National-led Government went one step further:<sup>87</sup>

A re-elected National-led government will introduce new fit-for-purpose urban planning laws separate from the Resource Management Act to encourage more responsive planning, faster development, and better protection for the environment in our growing cities.

But is that a good idea? Our short answer is *maybe*. Or it depends. It *depends* on what else is happening within the structural components of the resource management system. If we were to do something like that, we can't consider the RMA in isolation.

But we should not get ahead of ourselves. We need to ask some more fundamental questions first. Is legislative design really that important? Does it matter if we have five different acts, or 20 different acts? Does it really make a difference if we have separate acts dealing with, for example, fisheries management (under a Fisheries Act) and the health of marine habitats (under an RMA)?

To some, it may not really matter. After all, there is no single perfect way to arrange our legislation. That is an illusory goal. There are many different viable options, as can be seen by the plethora of approaches used overseas.<sup>88</sup> Splitting marine management into a Fisheries Act and an RMA, or minerals management into a Crown Minerals Act and an RMA, is not immediate cause for alarm. Neither, for that matter, is having a dedicated Act for urban planning or the built environment. We need to be realistic about what legislative design is here to do. Two things can be said in this regard.

First, a wide range of design options exists not because people differ in their worldviews or principles. It exists because there are multiple ways to reach exactly the same kinds of outcome. Our values do not really help us make a choice between different models. If we want to protect areas of indigenous bush, we could do so equally well by integrating those protections into a general statute dealing with water, soil and air (as we do under the RMA), or by imposing them in targeted, area-specific pieces of legislation (which we also do, for example under the National Parks Act). Freshwater quality could be improved by, for example, having a separate Act dealing specifically

with freshwater management. It could also be improved by ensuring it is well integrated with land use planning in a combined statutory framework like the RMA. It is not immediately obvious whether the stereotypical 'greenie' or 'developer' would favour one or the other.<sup>89</sup>

Secondly, we should never expect a reshuffling of our statutes to be a solution to substantive problems. Without the right content and the right institutions doing the right things, arranging statutes in a different way will not make much difference.

So when someone proposes to remove urban planning from the RMA into a separate statute, we may find it is not a complaint about legislative design at all.<sup>90</sup> It is more likely to be a complaint about the *content* of the RMA (or how it is being *applied*), combined with two assumptions: that the content to be put in a new Urban Planning Act would be *more* suitable, and that the alternative option of substantively amending the RMA would simply be too hard. The absence of a dedicated Urban Planning Act does not immediately tell us we have suboptimal legislative design. Instead, it's a rejection of the RMA's content, and a testament to the political dysfunction that has come to surround attempts at its amendment.<sup>91</sup> So legislative redesign – such as enacting a new statute or splitting an existing one – should not automatically be used as a knee-jerk solution to a problem that has been caused not by faulty legislative design, but rather by sub-optimal content or application. In other words: if we have a problem with substance, let's just change the substance.

However, true questions of legislative design *do* exist. There are many viable models for us to use, but in no way does that mean *all* models are viable. And although poor content in our laws cannot be cured by good legislative design, substantive outcomes can be hampered by poor design.<sup>92</sup> We can shuffle our statutes in a way that undermines any good content that we do have. Thus in a sense we look at legislative design not to determine what particular model we should adopt, but rather to determine what models we should avoid.

But how can we do this? Do we, for example, assume that fewer statutes are better, because there are fewer places we need to look? Or do we assume more are better, because they are bound to be more targeted? This is a crude simplification, but it highlights the importance of a question that is sometimes forgotten: How do we *measure* good legislative design?

### Design principles

As in the substantive discussion of ethics and principles in Working Paper 1, there can be no 'right' or 'wrong' answer

86 New Zealand Productivity Commission, *Better urban planning* (New Zealand Productivity Commission, Final Report, 2017) at 426.

87 See, for example, the National Party's pre-election policy in 2017: National Party, 'New urban planning law for cities' (September 2017), [http://www.national.org.nz/new\\_urban\\_planning\\_law\\_for\\_cities](http://www.national.org.nz/new_urban_planning_law_for_cities). See generally McLeod A, 'From scratch' (2012) 185 *Planning Quarterly* 10.

88 For example, it is not uncommon in Europe for environmental impacts to be managed in sector-specific or domain-specific frameworks; this may be the product of targeted interventions at the European Union level, such as the Water Framework Directive or the Waste Framework Directive, which are then translated using similar frameworks at the domestic level.

89 Rest assured that we *can* identify principles that show some design choices are better than others. It is just that they do not overtly rest on our substantive *values*.

90 It *could* be; it is just that it is not usually couched in those terms.

91 'We have reached the end of what can be done by making incremental changes to [the RMA]' at National Party, 'New urban planning law for cities' (September 2017), [http://www.national.org.nz/new\\_urban\\_planning\\_law\\_for\\_cities](http://www.national.org.nz/new_urban_planning_law_for_cities)

92 The ways this can happen are explored below.

to this question. If anything, the difficulty is even more pronounced here. While most would agree that we need, for example, better freshwater quality, there is much less consensus over how we should arrange our legislation to help deliver it. In the former case, at least the direction of travel is clear. In the latter, it is not – proposals can vary wildly, from tinkering with the RMA to a complete overhaul of our statutes.

However, we can make the task easier by going back to first principles. We won't expect too much, because principles will never spit out a particular 'correct' model for us to use. But they can help us construct viable models, give us a yardstick to measure their viability, and allow us to evaluate the relative merits of those that seem to cut the mustard.<sup>93</sup> Above all, we should avoid the temptation to go straight to developing and defending a specific model. That puts the cart before the horse. For example, it is premature to proclaim that we need a separate Urban Planning Act simply because the RMA is not working as it should in cities (one might equally say that the RMA is not working as it should, so we need to *fix it*).

In the coming sections, we identify and consider seven principles that we think are important. Some of these can be distilled from the Legislation Act and the general guidelines of the Legislation Design and Advisory Committee.<sup>94</sup> We propose others that are more specific to the resource management context. These by no means form a complete list of principles relevant to the resource management system. Substantive principles have been discussed in Working Paper 1 (including sustainability, subsidiarity, accountability, and so forth). Their relevance to institutional design and behaviour will be addressed separately. Here, however, we are focusing on legislative *design* principles, which are of quite a different nature. In short, we think that resource management legislation should be coherent, certain, accessible, durable, integrated, tailored, and efficient.

#### Question for discussion:

- Are there any other principles that are important for how we design our suite of resource management legislation?

## Design principle 1: Coherence

Above all, the structure of our resource management legislation needs to form a *coherent* whole. As common sense as this sounds, it is easy to forget in practice when confronted with a messy parliamentary process (especially one with the wheeling and dealing encouraged by MMP). The principle of coherence captures the idea that an overall model needs to *make sense*. We cannot make random, unthinking or spur of the moment design choices and expect them to work. A system is coherent if it has 'clarity and intelligibility' or is 'logically ordered'.<sup>95</sup>

Two more specific things can be said about coherence in the context of legislative design. First, it is risky to rely on ad hoc additions or reactive changes in order to further political agendas or to overcome new problems.<sup>96</sup> Tinkering is a dangerous game.<sup>97</sup> If we have an issue, we should not just throw a new statute at it. This does not mean that the statutes in our system should be set in stone. Far from it. Flexibility and adaptability are essential to deal with a rapidly changing environment and society.<sup>98</sup> However, primarily, we should expect flexibility to be built *into* the system, which should be based on enduring principles, rather than expecting changes to be made constantly *to* the system itself. A system that cannot bend will eventually break under the cumulative pressures of change.

Rather than enacting new, targeted, statutes for every issue we discover, we need to think very hard in advance about what our suite of statutes needs to do (both now and in the future), and make sure they have the capacity and scope to actually do those things. Completely unforeseen issues may still arise, warranting a new act or two. But that should not be the norm. Imagine building an art gallery – if we design the spaces right, we have the potential for accommodating very different exhibitions without having to tinker with the structural integrity of the building.

The second thing that can be said about coherence is that *statutes should fit well together*. This idea of 'fitting well' can be looked at in different ways. One way is to imagine a sort of jigsaw puzzle, where the boundaries of one act about the boundaries of another with no overlap or gaps.<sup>99</sup> Another way may be simply to make sure the interactions between statutes are clear (in which case the way they are divided is not really that important).<sup>100</sup> But we are attracted to a slightly more sophisticated viewpoint. In short, we think it is useful to look through different 'lenses' when considering how to divide statutes. There are many

93 Note that, to the extent that design principles guide how we 'should' or 'should not' design legislation, the questions are still normative ones. But they are not normative questions of *substance* like those addressed by the polluter pays principle or the idea of distributional equity.

94 Legislative Design and Advisory Committee, *Legislation guidelines: 2018 edition* (Legislative Design and Advisory Committee, 2018). The guidelines do not directly address the question of how to design of a *suite* of statutes from first principles. They are more concerned with ensuring any new legislation is consistent with basic legal principles and integrates well with existing law. For sound practical reasons, they are often more relevant when assessing the content of new legislation that has to fit within an existing ecosystem, rather than rethinking the ecosystem itself.

95 Compare Merriam Webster Online Dictionary, 'coherent' (n.d.), <https://www.merriam-webster.com/dictionary/coherent> with Legislation Act 2012, s 3(e)(i).

96 See generally Gow L, 'The Resource Management Act: Origins, context and intentions' (speech to the Resource Management Law Association conference, Dunedin, 25 September 2014).

97 Palmer G, 'The Resource Management Act: How we got it and what changes are being made to it' (keynote address to Resource Management Law Association, Devon Hotel, New Plymouth, 27 September 2013).

98 In fact, the extreme dynamism of resource management means the need for change is much more obvious than in other areas like criminal law. For example, key policies and rules in regional plans are often reviewed every few years, whereas the rules relating to murder or fraud remain fundamentally untouched for much longer periods of time.

99 This has the drawback of often being unrealistic; if you prevent overlap or gaps in one sense you usually create it in another sense, because most things in the real environment are multilayered or multifaceted. For example, the bright line (12 nautical miles from the shore) drawn between the jurisdiction conferred under the RMA and the EEZ Act ignores the reality that activities and their effects straddle boundaries, and has therefore required the use of complex provisions managing 'boundary activities' in the latter.

100 This has the disadvantage of not really answering key questions because we can in theory divide our statutes in an infinite variety of ways as long as the relationships between them are certain.

different lenses we could use (none of which mean we need to abandon substantive principles, such as those in Part 2 of the RMA) but the important point for coherence is that we need to choose one or more compatible lenses and use them *consistently across the whole system*.

Let us explain what we mean. Consider, for a moment, the RMA. This is a statute that has an extremely wide scope. It deals with water and air quality, ecosystem health, noise pollution, the development of land, and many other things. It is concerned with effects, in that (at least in theory) it regulates activities based on the impacts they have on the environment (e.g., air or water) not the sector to which an activity belongs (e.g., agriculture), the kind of person doing the activity (e.g., the government), or the area in which something happens (e.g., cities).<sup>101</sup> For convenience, we can call this kind of statute an 'outcomes-based' one – it deals with a package of related outcomes ('environmental ones').<sup>102</sup> Looking through an outcomes lens, we would divide our statutes according to different kinds of outcome. For example, we could have different statutes seeking environmental, conservation, health, social, and economic outcomes.

Other statutes may be 'sectoral', in that they regulate a particular industry or activity (e.g., an act regulating mining or an act regulating transport). Looking through a sectoral lens, we would divide our statutes according to different sectors. Still others may be 'institutional', in that they regulate the behaviour of a particular kind of entity (e.g., an act dealing with local government or an act dealing with state-owned enterprises). Looking through an institutional lens, we would divide our statutes according to different actors in the system. A lens is, essentially, about what our main concern is when we slice and dice legislative boundaries.

Many other lenses are possible.<sup>103</sup> But for a system to be coherent, we cannot chop and change lenses at will. When we begin by separating statutes according to different outcomes (environment, conservation, health, etc.) it erodes the coherence of the system if we then – without thinking<sup>104</sup> – add statutes that deal with particular institutions or particular sectors. If we have a framework like the RMA, for example, it can undermine coherence if we then introduce an act regulating the environmental impacts of mining, or of urban development, on top of it. What is the point of a broad outcomes-based framework if you have to look elsewhere for extensive additions and exceptions for particular industries?<sup>105</sup> Furthermore, extensive exceptions and carve-outs, especially where

contained within separate statutes, can undermine the coherence of the system (proposed mangroves legislation springs to mind). If too many are needed, it may be a signal that the content of our more general statutory frameworks needs a rethink. Exceptions should prove the rule, not replace it.<sup>106</sup>

Later in this chapter we identify and consider a more complete range of lenses, and comment on how they can be used in compatible ways. At the level of principle, however, it is enough to observe that how statutes fit together is crucial for the overall coherence of the system, and that the idea of lenses is a useful way to think about how they fit together. To be clear, the principle of coherence does not itself require that we have outcomes-based regimes like the RMA. That may be an unfashionable thing to admit, but outcomes are only one of many different lenses that we *could* use. A system could be just as coherent, for example, if each sector had its own targeted piece of environmental legislation. Coherence demands the consistent use of compatible lenses across the system, not the adoption of any particular lens.

#### Question for discussion:

- What does coherence mean to you, when considering legislative design?

### Design principle 2: Certainty

As with the substantive principle of sustainability, we can think of coherence as the umbrella principle of legislative design. However, other principles operate within this umbrella and provide us with more specific guidance. These principles can support each other, although sometimes they can conflict. In the latter case, they may need to be balanced.<sup>107</sup>

One is the principle of certainty. Once we have laid out the basic building blocks (statutes) in a coherent way, we need to make sure the relationships between those statutes are certain and precise.<sup>108</sup> Some kinds of uncertainty are unavoidable, and even *desirable*, in the resource management system. For example, broadly worded policies and discretionary activity statuses under the RMA allow decisions to be contextualised on their merits, which can be a very good thing in a regime concerned with weighing positive and adverse effects and avoiding arbitrary distinctions and overprescription. So too can the ability for rules and policies to change over time; adaptation and agility are essential in a world that is

101 Although it must be conceded that the RMA is geographically limited, and does not apply in New Zealand's EEZ.

102 This is an intentional oversimplification to illustrate a general point, as the RMA also seeks to enable outcomes that are not environmental in the 'biophysical' sense (social, economic, cultural outcomes).

103 Some are explored in more detail later in this chapter.

104 This caveat is included because we can use multiple *compatible* lenses. This is explored later in the chapter.

105 Compare Berry S and Andrews H, 'The final straw for the RMA? Some shortcomings of the Resource Legislation Amendment Bill 2015' (2016) *Resource Management Journal*; Berry S, Andrews H and Vella J, 'The death of the RMA by a thousand cuts: The next two incisions' (2017) *Resource Management Journal*; and Severinsen G, 'Constructing a legal framework for carbon capture and storage in New Zealand: Approaches to legislative design' (2014) 63 *Energy Procedia* 6629. Consistent with this, the International Energy Agency has suggested that the first step in determining whether new legislation is required for a new technology is to assess the extent to which adequate modifications can be made to existing regimes; see International Energy Agency, *Carbon capture and storage model regulatory framework* (International Energy Agency, Information Paper, 2010).

106 On location-based carve-outs, see New Zealand Productivity Commission, *Better urban planning* (New Zealand Productivity Commission, Final Report, 2017) at 127.

107 As with, for example, the public interest use principle and conservation principle discussed in Working Paper 1.

108 Complicated or uncertain boundaries with other legislation or the common law should be minimised: Legislative Design and Advisory Committee, *Legislation guidelines: 2018 edition* (Legislative Design and Advisory Committee, 2018).



constantly changing.<sup>109</sup> However, fundamental uncertainty as to *how statutes relate to each other* is not a good thing.<sup>110</sup> It is a failure of design.

To some extent this certainty can be provided only through a statute's effective internal structure and content. For example, one act can have provisions in it that spell out how it relates to another act (it may be expressly subordinate, or apply in addition, to another act). These 'flag' provisions are increasingly common in modern legislation, and are extremely important.<sup>111</sup> But the basic way in which we *split up* our statutes can affect the extent to which such certainty in relationships is achieved. Some may be better at fostering certainty between their parts than others. For example, a system that has a broad outcomes-based statute like the RMA is likely to have an uncertain relationship with a sector-specific statute dealing partly with the same kinds of outcomes (e.g., the Fisheries Act).

Most fundamentally, the more statutes we have in the system, the more inter-statutory boundaries there are to be managed, and the greater the risk of uncertainty. Furthermore, as we add more statutes, the number of boundaries that require certainty increases not in a linear way, but almost exponentially.<sup>112</sup> Of course, boundaries within statutes matter too. But relationships between parts of a single statute tend to be more certain, and can be managed more easily, than boundaries between statutes.<sup>113</sup> This does not mean we enact one statute for everything, but it suggests that 20 is preferable to 200.

Uncertainty can also be caused by excessive overlap between statutes, because more complex provisions are required to manage the relationship. A couple of things should, however, be said about the concept of overlap. It is not always a bad thing. For example, two different statutes may deal with the same issue from different standpoints or using different tools, and still be said to overlap in a sense.<sup>114</sup> Similarly, institutions may be given overlapping jurisdictions under different statutes in order to foster cooperation and joined-up approaches to planning.<sup>115</sup> However, *separate statutes should not do the same kinds of things for the same kinds of reasons.*

### Design principle 3: Accessibility<sup>116</sup>

Our suite of legislation should be designed in a way that is intuitive and accessible to those who use it.<sup>117</sup> This requires us to do more than simply set the boundaries of statutes in a way that is certain and precise, or use plain English

in drafting. People need to understand why statutes are arranged as they are, partly in order to determine easily whether they are affected by them. Gone are the days in which legislation was considered the sole concern of lawyers and judges, especially in areas like resource management where legal frameworks affect people in their day-to-day lives. This supports the earlier conclusion that extensive exceptions, especially where contained in separate statutes, should be avoided. It is hard for people to understand the design of a system if they are led on a merry trail of exceptions across several statutes.

On the face of it, the principle also tends to support the idea that fewer statutes are better. Is a system more accessible if you have to consider a list of 20 statutes rather than 200? Perhaps. But this raises a more fundamental question: accessible *for whom*? Arguably the most accessible system would be one in which every single person in New Zealand were subject to her or his own bespoke piece of legislation. That would produce over four million statutes. It is a patently ridiculous idea, but it poses a legitimate challenge. For example, a local authority may find the system most accessible if it were comprised of a statute that contained every provision relevant to local government responsibilities and powers.<sup>118</sup> An urban developer may find the system most accessible if all the rules relating to urban development were contained in a single statute.<sup>119</sup> The Ministry for the Environment would probably find it easiest to administer a statute that combined at least some



<sup>109</sup> The tensions between agility and predictability in plan-making are to be explored elsewhere in the project.

<sup>110</sup> On the general principle, see Legislative Design and Advisory Committee, *Legislation guidelines: 2018 edition* (Legislative Design and Advisory Committee, 2018) at 9.

<sup>111</sup> Legislative Design and Advisory Committee, *Legislation guidelines: 2018 edition* (Legislative Design and Advisory Committee, 2018) at 10.

<sup>112</sup> A new Act may have to interact in some way with many, or all, existing ones, not just the one from which it has been carved out.

<sup>113</sup> They are usually subject to greater scrutiny both when a statute is drafted and amended, and they are more likely to be aligned by the common purpose within a statute. For example, the statutory relationship between national policy statements and regional plans is fairly clear.

<sup>114</sup> For example, the Climate Change Response Act deals with climate change, whereas national environmental standards under the RMA (ss 104E–104F) can also deal with climate change. The closure of oil wells is managed both under the RMA and under health and safety legislation.

<sup>115</sup> For example, regional councils and territorial authorities for land use under the RMA.

<sup>116</sup> See generally Legislative Design and Advisory Committee *Legislation Guidelines: 2018 edition* (Legislative Design and Advisory Committee, 2018) at 12.

<sup>117</sup> Legislation Act 2012, s 3(e).

<sup>118</sup> For example, a combination of parts of the RMA, LGA, LTMA, Local Government (Rating) Act 2002, Local Government Borrowing Act 2011 and Local Government Official Information and Meetings Act 1987, to name just a few.

<sup>119</sup> Not dissimilar to the policy intention behind urban development authority legislation, which would essentially provide a single site containing or identifying the rules for land use, infrastructure funding and delivery, public works, land amalgamation and the powers/duties of institutions. See New Zealand Government, *Urban development authorities* (Ministry for the Environment, Discussion document, 2017).

of the many listed in the schedule to the Environment Act 1986.<sup>120</sup> If we had the interests of applicants or opponents of particular projects at heart, we would probably have an act that dealt with the ins and outs of all forms of permitting<sup>121</sup> (e.g., resource consents, conservation concessions, and permits for hazardous substances), with separate acts for strategic planning and the establishment of public institutions.<sup>122</sup> After all, what do average consent applicants under the RMA care about a provision establishing the legal basis of the Environment Court? They are more likely to be concerned with the law relating to judicial review, the exclusive economic zone or conservation land (all of which are found in separate statutes).

We won't labour the point. But in each of these cases, we can see that enhancing accessibility to one kind of person tends to erode accessibility to others. For example, a system in which all aspects relating to local government were contained in one statute would mean that a consent applicant would be obliged to look across multiple statutes (for local *and* central government rules and policies).

We think that a focus on accessibility is appropriate, but that it should not unduly favour any particular person or actor within the system. It should rather focus on what is *conceptually* accessible. The structure of the system should encourage public understanding and acceptance of the law. Any person possessing full mental capacity should be able to look at the system and say, 'I understand why it has been designed that way; *it makes sense*.' We shouldn't find laws (or regulations under them) in obscure, unexpected or controversial places.<sup>123</sup> They should be found in statutes where their content fits comfortably within a well-defined and meaningful statutory purpose.

That said, equity is still an important consideration. Legislative design choices should maximise the system's accessibility to those least able or equipped to understand it. That suggests that, primarily, it should be tailored to the needs of lay persons rather than public institutions or private corporations. As the Chief Justice has stated, the RMA is 'meant to engage communities, not alienate them' and 'impenetrability and complexity in [the Act] is not a good thing.'<sup>124</sup>

However, an accessible system is not one that eliminates complexity or is 'dumbed down'. A system dealing with complex issues is itself always going to be complex. If it is not, we may find it has abandoned a degree of certainty, and that real public understanding is therefore

an illusion.<sup>125</sup> The important thing is that we do not make the system more complex or detailed *than it needs to be* to achieve its objectives, and certainly not to the extent that it undermines them.<sup>126</sup>

Similarly, the principle does not place a maximum length on a statute. Some acts may need to be fairly large in order to do justice to the subject matter contained within them; the RMA as originally enacted fell just short of 400 pages.<sup>127</sup> Just as compressing a message to 140 characters on Twitter can lose much in translation, so too can a short statute leave gaps and uncertainties.<sup>128</sup> However, again, a statute should be no longer *than is necessary to achieve its purpose*. Much can also be contained within subordinate instruments.<sup>129</sup> Some have complained that the RMA is now too long, at over 700 pages.<sup>130</sup> We prefer to dwell not on its length per se, but rather see such complaints as a symptom of its relative incoherence and disjunction.<sup>131</sup>

#### Question for discussion:

- **For whose benefit, and accessibility, do we design resource management statutes? Is length an issue?**

### Design principle 4: Integration

The principle of integrated management is central to the resource management system. It is already a core feature of sustainability under the RMA, as outlined in Working Paper 1. In its substantive sense, integration essentially means that all relevant matters should be considered when making a decision. For example, we should not consider the impacts of an activity on soil and water separately. For good reason, integration has come to be seen as a positive thing; if the natural and built environments do not recognise rigid boundaries, then any human decision-making frameworks that create them are bound to miss important connections.

Integration is also an important principle in the context of legislative design. The resource management law reform process that led to the enactment of the RMA integrated a large number of statutes, under which many interrelated subjects (such as water and soil, town and country planning) had been separately managed. A common purpose of 'sustainable management' was considered to be appropriate to all of those subjects, so they were included in a single statutory framework. Integration was an intuitive and a seductive idea.

120 There may also be a tendency for particular institutions to defend their 'turf' where they have a statute targeted at their activities.

121 For example, in the Netherlands an approach has been taken in the past whereby an applicant needed to submit only one application, to a single front-of-house agency, which was then responsible for obtaining and integrating decisions from multiple agencies responsible for different aspects of the application (under its General Act on Environmental Permitting). This basic idea also lies behind Victoria's Major Transport Projects Facilitation Act 2009.

122 For example, applicants for consent under the RMA are unlikely to be interested in the provisions creating/continuing the Environment Court.

123 An act's purpose 'should not be artificially extended so as to create potentially conflicting or non-cohesive aims'; see Severinsen G, 'Constructing a legal framework for carbon capture and storage in New Zealand: Approaches to legislative design' (2014) 63 *Energy Procedia* at 6629.

124 Elias S, Chief Justice of New Zealand, 'Righting environmental justice' (address to the Resource Management Law Association, Salmon Lecture, 25 July 2013) at 2.

125 For example, the EEZ Act has a simpler framework than the RMA, and initially omitted policy instruments like national policy statements. That produced a great deal of uncertainty in an act that does not have significant inbuilt policy guidance.

126 Some have complained that the relationship between the RMA, the LGA and LTMA is unnecessarily complex: see Lenihan TM and Bartley J, *Review of Māori planning futures: Review of the Productivity Commission's 'Better Urban Planning' draft report* (Nga Aho and Papa Pounamu, 2016) at 36.

127 Palmer G, 'Ruminations on problems with the Resource Management Act' (keynote address to the Local Government Environmental Compliance Conference, Heritage Hotel, Auckland, 2-3 November 2015) at 6.

128 As was found with the initial absence of national policy instruments under the EEZ Act.

129 Legislative Design and Advisory Committee, *Legislation guidelines: 2018 edition* (Legislative Design and Advisory Committee, 2018) at 49.

130 Jenkins M, A 'blue skies' discussion about New Zealand's Resource Management System (Local Government New Zealand, Discussion document, 2015) at 4.

131 Elias S, Chief Justice of New Zealand, 'Righting environmental justice' (address to the Resource Management Law Association, Salmon Lecture, 25 July 2013) at 2.

In many people's minds, this may translate to 'the fewer statutes we have, the better.' However, we should not immediately assume that a drive for integration in a substantive sense should translate to full integration in legislative design. The principle does not require us to enact 'one statute to rule them all.' While the RMA integrated many resource management matters, it is no accident that it did not integrate them all.<sup>132</sup> Matters can be integrated or connected across the system in ways other than inclusion in the same statutory framework. The principle simply tells us to recognise and be sensitive to the connections between matters dealt with under different statutes within the same system. In fact, there are several good reasons to separate statutes. And we suggest that all of them relate to a single observation: *the key consequence of having different statutes is that we have different purpose statements.*<sup>133</sup>

First, people (regulators and regulated) need to know how to act. Thus it needs to be reasonably clear from the title and purpose of a statute what is expected of them under it. There should not be so few statutes as to make it unclear what exactly each one does. If a statute is too broad in scope, especially in its purpose, that message can be lost, and confusion can result. Some may argue that the RMA itself is guilty of this, in its wide and contestable definition of sustainable management; this uncertainty (or vagueness) could be *more* pronounced if other statutes were integrated into it. In other words, the principle of accessibility actually warns us against total integration. Imagine if we had a single statute with a purpose as wide as the scope of the system itself (described in Working Paper 1) – it would be so broad as to leave the most accomplished civil servants, or the most experienced developers, scratching their heads.

Secondly, constructive tensions within the system can be valuable where they are intentional and serve a logical purpose. The guidelines of the Legislation Advisory Committee expressly contemplate that statutes may be intentionally conflicting, as long as it is clear how they operate together.<sup>134</sup> For example, we can observe that both the RMA and the Conservation Act apply to conservation land, but that they may conflict.<sup>135</sup> One may allow an activity, the other may prohibit it. Yet this can be helpful; it can foster cooperation and constructive dialogue between different authorities that wear different hats. Clear legislative separation can also be valuable to implement checks and balances on institutions wielding public powers. For example, the Department of Conservation has obligations under the Conservation Act that are quite different and potentially conflicting with obligations of ministries and councils under other legislation.<sup>136</sup> Having distinct statutes and clear purposes

on which each can rely when making decisions can lessen the risk of roles being watered down. Imposing advocacy responsibilities under statutes with different purposes can make the decision-making process more transparent and encourage accountability. We have a Parliamentary Commissioner for the Environment not to slavishly agree with the Environmental Protection Authority, or with the Environment Court, but rather to offer its own, potentially conflicting, perspective.

Thirdly, a statute that has a well-defined purpose of its own may prove more resistant to inappropriate or unintended interference. It is more obvious if amendments are proposed to erode a highly protective statute than if amendments are made to a more complex statute in which protective considerations mix with exploitative ones. For example, a proposal to amend the National Parks Act requires an explicit decision to alter the protective values contained within it. This may form a larger political barrier, or at least a clearer signal to the public, than if those values had been integrated into a broader, more balanced framework like the RMA. People would be alerted to the issue – as with the 2010 proposals to allow mining on parts of the conservation estate.<sup>137</sup>

Somewhat paradoxically, it can also be easier to make *desirable* amendments if policy makers are able to focus on a particular silo defined by a single statute. It can be difficult to make amendments to complex schemes in larger statutes without disrupting their coherence or expending a lot of time and resources (as seen with amendments to the RMA). On the other hand, it can be easier to forget that a wider system exists if we are only looking at one of many interrelated statutes within it. There is a risk that amending statutes individually, as silos, can lead them to grow apart and form less of a coherent whole over time.<sup>138</sup> For example, some have complained that the initially coherent system for land transport infrastructure provided by the RMA, LGA and LTMA has been eroded through separate amendments that led each in different directions.<sup>139</sup> There can be ripple effects. The greater the number of connected statutes, the greater the risk that narrowly focused amendments can pose to the integrity of the system as a whole.

However, this problem of multiple statutes is not intractable. What we need is a mechanism by which we are constantly reminded that the relationship between the parts of the system is as important as the content of each part. It can be useful to have separate statutes for different things, but *there must still be some kind of meta-architecture for the system as a whole*. This does not mean that we need a single framework act, in the nature of a resource management constitution, to which all other acts

132 For example, the management of minerals, which could not be done 'sustainably', was (eventually) deliberately excluded. Key resource management questions concerning minerals, fisheries, forests, conservation lands and hazardous substances (and many others) continue to be dealt with under separate statutes.

133 This is important because a statutory provision is always to be interpreted in light of the statute's purpose (Interpretation Act 1999, s 5(1)).

134 Legislative Design and Advisory Committee, *Legislation guidelines: 2018 edition* (Legislative Design and Advisory Committee, 2018) at 9.

135 Conservation provisions are usually more protective.

136 See generally PCE, *Making difficult decisions: Mining the conservation estate* (PCE, Wellington, 2010).

137 See generally PCE, *Making difficult decisions: Mining the conservation estate* (PCE, Wellington, 2010).

138 Legislative Design and Advisory Committee, *Legislation guidelines: 2018 edition* (Legislative Design and Advisory Committee, 2018) at 10.

139 Simpson Grierson, *The statutory framework of New Zealand's local government sector: Is the key legislation working properly?* (Simpson Grierson, 2016); New Zealand Productivity Commission, *Better urban planning* (New Zealand Productivity Commission, Final Report, 2017) at 93 and 94; and New Zealand Council for Infrastructure Development, *Integrated governance planning and delivery: A proposal for local government and planning law reform in New Zealand* (New Zealand Council for Infrastructure Development, Proposal, 2015) at 44.



are subordinate (although that is one option).<sup>140</sup> It simply means that the system *as a whole* needs to be normatively or strategically aligned by design. As one commentator has put it, 'The need for lined up decision-making . . . is relevant for addressing many issues facing New Zealand – the relationships between urban growth and energy use, urban growth and water quality, water quality and rural productivity, mining activities and conservation areas.'<sup>141</sup> That comment is significant not just for the *content* of laws, but also for how we divide them up. The system's parts are so interconnected that we cannot treat statutes as islands, or as just a series of connected processes. They all need to contribute to a common set of system objectives.

As will be clear from the earlier discussion, that does not mean every piece of legislation must have the same purpose statement. For example, a statute concerning the construction and funding of the national highway network is bound to have a different purpose to one protecting the conservation estate. They manage behaviour in two very different contexts. Nor does it mean that we avoid all normative conflict between statutes. Responsibilities for regional economic development under one statute are bound to grate against duties of environmental protection under another, and that does not necessarily make the separation of these things into different statutes wrong. As the litigation process shows, tensions can be constructive and illuminating.<sup>142</sup>

But it *does* mean that our suite of legislation should be structured in a way that makes it clear how any normative conflicts are to be resolved. What we want to avoid is normative dysfunction in the relationship between statutes. For example, we would not want one act to seek to reduce the emission of greenhouse gases to zero and another one to promote the extraction of fossil fuels that could have the opposite effect.<sup>143</sup> The Legislation Act encourages us to remove inconsistencies.<sup>144</sup> We are intrigued by the idea of an 'environmental constitution', which could keep different statutes in line with each other in a normative sense.

#### Question for discussion:

- What are the advantages and disadvantages of integrating our statutes?

### Design principle 5: Durability

Although 'time and events render most statutes obsolete in the end',<sup>145</sup> the design of our suite of legislation must

be reasonably durable. By this we mean that it should be structured in a way that will remain fit for purpose in a future that is bound to be very different from the present. We see three key elements in this.

First, the combined scope of our statutes needs to be broad enough to cope with change (whether socioeconomic, biophysical or technological). For example, in 2018 it seems clear that the system needs to proactively consider how scarce resources are allocated between different people and interests, not just consider how activities may adversely impact on the environment. We can foresee that the system will also need to provide a pathway towards enhancement for already degraded parts of the natural environment, not just the prevention of further harm. Our statutes must be sufficiently broad to do those kinds of things without needing 'add-on' legislation. Predictability is important. Allocative and enhancement questions do not necessarily have to be resolved in the same statute that deals with environmental bottom lines,<sup>146</sup> but they must be addressed *somewhere* within the system.

Secondly, our suite of legislation needs to be divided in a way that no gaps are likely to appear *between* statutes. Novel technologies or activities should not find themselves in a legal limbo while law-makers struggle to catch up.<sup>147</sup> New kinds of issues should not fall between the cracks. Changes can certainly be made to legislation as the future unfolds, but the basic bones of the system should be future proofed. This suggests that a wholly sectoral approach to resource management legislation (an act each for mining, agriculture and transport) has risks, because we cannot predict what new sectors or novel activities may emerge over time.

Thirdly, basic design choices need to be removed from the realm of political point-scoring. Constant tinkering with statutes not only reduces the coherence of the system, it also makes it more likely that they will not stand the test of time before there is pressure to overhaul them.<sup>148</sup> As Sir Geoffrey Palmer has observed, the combined weight of amendments can mean it is 'often better to start again'.<sup>149</sup> This is being seen now with the RMA, and even though they may be necessary, such large-scale upheavals are conducive neither to social cohesion or long-term business confidence. Therefore, to the extent that there are *legitimate* differences in values that the system is willing to accommodate – based on ethics or political persuasion – flexibility should be accommodated *within* the system, and it should be self-evaluative. For example, it is disruptive and disorienting for successive governments to amend the RMA based on different philosophies of

140 For example, at the federal level Canada has an Environmental Protection Act (1999) which imposes key principles on the behaviour of the federal government in implementing an array of other statutes

141 Simpson Grierson, *The statutory framework of New Zealand's local government sector: Is the key legislation working properly?* (Simpson Grierson, 2016) at 1.

142 It does not mean they *always* are, though.

143 On this point, note the recent policy decision taken by the government to ban future offshore oil and gas exploration. Of course, there are much more nuanced arguments to be considered on this topic (such as impacts of such policies on domestic versus international emissions). Our point is a more general one: we need to think about how different statutes can reinforce or undermine each other's objectives.

144 Legislation Act 2012, s 3(e)(ii).

145 Palmer G, 'Law-making in New Zealand: Is there a better way?' (2014) 22 *Waikato Law Review* at 3.

146 As we can see in the separation of the RMA, Fisheries Act and Crown Minerals Act.

147 For example, other countries have had to enact bespoke statutes or targeted parts of existing statutes for technologies like carbon geo-sequestration; see generally Severinsen G, 'Constructing a legal framework for carbon capture and storage in New Zealand: Approaches to legislative design' (2014) 63 *Energy Procedia* 6629.

148 See, for example, Berry S and Andrews H, 'The final straw for the RMA? Some shortcomings of the Resource Legislation Amendment Bill 2015' (2016) *Resource Management Journal*.

149 Palmer G, 'Law-making in New Zealand: Is there a better way?' (2014) 22 *Waikato Law Review* at 4.

public participation, or to enact an array of bespoke legislation dealing with particular issues already dealt with by the RMA.<sup>150</sup> It would be better for us to accept that some things may need to change occasionally or even frequently, and provide an inbuilt mechanism for that to happen as context changes. The challenge, of course, is to identify what things should be set in stone and what things should be susceptible to change. The ecological health of waterways is not likely to be one of the latter, but aspects of public participation, residential intensification or urban amenity may be.

**Question for discussion:**

- **How do we ensure that our resource management legislation is durable?**

### Design principle 6: Tailored to New Zealand circumstances<sup>151</sup>

The design of our legislation should be tailored to New Zealand physical and socio-political circumstances. We cannot simply adopt models that have been used overseas, even if they have proven successful.<sup>152</sup> Of course, sensitivity to New Zealand's circumstances is most significant for the *content* of legislation. However, it may also bear on how we divide our statutes.

We are also a small country by population, reinforcing the idea that a system of legislation need not be overly complex or multi-layered. We are also a unitary state, and are not legally *bound* to design our statutes in a way that reflects the specific legal status or jurisdictions of particular levels of government.<sup>153</sup> This provides substantial flexibility. However, New Zealand *does* have a constitution (comprised not of a single document but of a number of key statutes, precedents and conventions).<sup>154</sup> Legislative design must respect constitutional principles as well as be consistent with more general legislation



like the Legislation Act, the Interpretation Act and the Judicature Act. Other unique features that may prove important are New Zealand's economic reliance on primary production, the primacy of endemic species, and significant proportion of land in public ownership.

One of the most important features of the New Zealand context that needs to be mentioned specifically is that the settlement process for historical grievances under the Treaty of Waitangi, between the Crown and Māori, is still ongoing. New legislation should not be inconsistent with or undermine existing or likely future Treaty settlements (and laws must respect the principles of the Treaty more generally). There is a potentially significant challenge in reconciling this principle with those of integration and accessibility, since dozens of bespoke settlement acts may need to interact in different ways with general statutory frameworks. Do we see this scattering of hard-fought settlement legislation as a core part of the system's design, or rather as a series of concessions and exceptions to the norm? Are they even capable of being generalised and integrated in a coherent way?

**Question for discussion:**

- **What uniquely New Zealand matters influence how we design legislation?**

<sup>150</sup> For example, concerning housing supply (in the form of the Housing Accords and Special Housing Areas Act 2013).

<sup>151</sup> Legislative Design and Advisory Committee, *Legislation guidelines: 2018 edition* (Legislative Design and Advisory Committee, 2018) at 11.

<sup>152</sup> In a legislative design sense, we do not believe that wholesale legal transplants can work. That is something to be acutely aware of when looking at urban development authorities legislation.

<sup>153</sup> Local government is significant, and arguably significant in a fundamental constitutional sense. But it ultimately has statutorily assigned roles, which are not specified or guaranteed by New Zealand's constitution. A policy intention to devolve much responsibility to local government under the RMA does not detract from the significant potential role that is firmly laid out for central government. That is not to belittle arguments for greater clarity as to local government's constitutional place in New Zealand more broadly, but it does recognise that the principle of subsidiarity for *resource management* does not mean the same thing as *localism* or *devolution*.

<sup>154</sup> On New Zealand's constitutional arrangements, see generally Palmer G and Palmer M, *Bridled power: New Zealand's constitution and government* (4th ed., Oxford University Press, Melbourne 2004).

### Design principle 7: Efficiency

The way in which we design our suite of legislation should be efficient. Duplication and overlap should be avoided unless there is a good reason for it.<sup>155</sup> More fundamentally, unnecessary legislation should be avoided. This does not mean that fewer statutes are better; rather, it means that if we do not have to legislate to achieve a solution, then we should not do so.<sup>156</sup> For example, more informal routes like collaborative processes can in some circumstances be effective, either in their own right or to pave the way for a smoother legislative process later on. Efficiency also steers us towards considering whether regulations or other subordinate instruments, rather than primary legislation, can be used to provide greater agility and flexibility where change may be needed on a regular basis. The parliamentary process can be expensive and protracted.

Furthermore, this principle reinforces the idea that relationships between statutes should be clear (to avoid uncertainty and counter-productive litigation), and that statutes should be arranged in such a way that clarity in such relationships is achievable. Statutes should also be designed in ways that encourage efficiency in



decision-making processes and administrative support; multiple processes should be avoided where possible, or integrated, connected or aligned in some way.<sup>157</sup>

We can compile the above principles into a set of key messages. In short, we need to design a set of statutes in a way that:



155 Legislation Act 2012, s 3(e)(ii).

156 Legislative Design and Advisory Committee, *Legislation guidelines: 2018 edition* (Legislative Design and Advisory Committee, 2018) at 7; and compare Palmer G, 'Law-making in New Zealand: Is there a better way?' (2014) 22 *Waikato Law Review*.

157 For example, resource consent, conservation concession, and mineral permit processes can be aligned. For attempts to do so for conservation concessions, reserves swaps, private plan changes and resource consents, see Ministry for the Environment, *Resource legislation amendments 2017 - Fact Sheet 12* (Ministry for the Environment, Wellington, 2017).



### c. Along what lines can we split statutory frameworks?

#### ***We can look through different lenses when splitting our resource management statutes***

In the above section we have considered general principles of legislative design. These do not provide us with ready-made models of legislation. Rather, principles offer a normative framework within which we can consider options for splitting up statutes.

At this point we are not choosing and evaluating specific models (e.g., models in which we split the RMA into urban and non-urban Acts, or combine the RMA, LGA and LTMA into one act). Instead, we are narrowing the range of acceptable models by considering the different grounds upon which we could divide statutes. In other words, we are considering the different 'lenses' through which we can look when dividing them. The idea of lenses was introduced earlier when we considered the principle of coherence. There, we suggested that lenses need to be used in a consistent way for the system to be coherent. There are several different lenses we could look through, as outlined in Figure 2 below. Others may be possible, too.



Lens	Explanation	Example
Outcomes	We have particular statutes for particular kinds of outcomes.	One Act for the protection of the natural environment, one for allocating public resources, and another for encouraging exploitation of resources.
Institutional	We have separate statutes for specific institutions.	One Act for local government, one for an Environmental Protection Authority, another for the Environment Court.
Sectoral	We have particular statutes for specific sectors or industries.	One Act for agriculture, one for fisheries, another for mining.
Domains	We have particular statutes for specific domains.	One Act for fresh water, one for soil, another for the climate.
Location	We have particular statutes for specific locations or areas.	One Act for urban areas, one for rural areas, one for marine areas, another for conservation areas.

**Figure 2** Potential lenses through which we can look when designing legislation

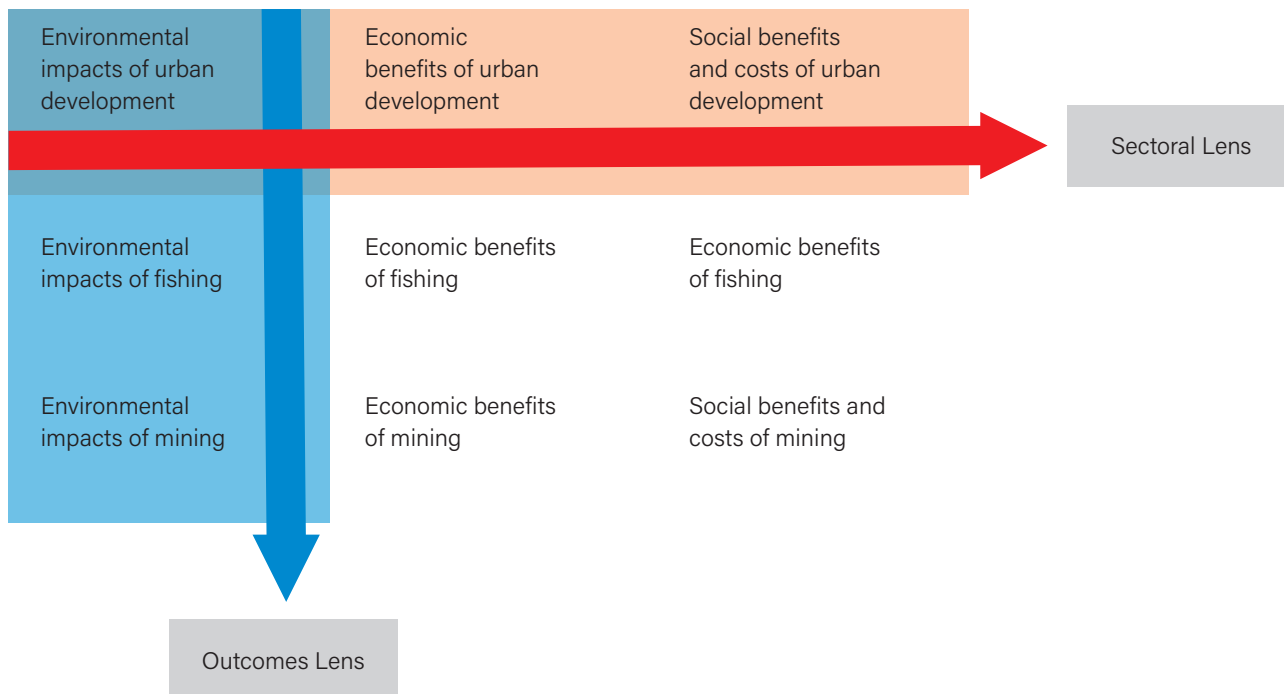
We should make one thing clear. Adopting one lens does not mean that we ignore the content of other lenses. For example, an *institutional* statute is still concerned with outcomes (all statutes seek *some* form of outcome) and can be concerned with particular sectors. The LGA, for example, is focused on one kind of institution (local government) and can be described as an institutional statute. But it is still concerned with sustainability *outcomes* and the *transport sector*. It does not *just* set up institutions or tell them how to function – that is not what we mean by this label. We simply mean that the outcomes or sectors contained within that statute relate only to the institutions it is concerned with. For example, the LGA does not deal with the outcomes sought by the Ministry for the Environment, or the regulation of a particular sector like fishing.<sup>158</sup>

Similarly, an *outcomes*-based statute is still capable of dealing with particular sectors and institutions. For example, even the RMA churns out plans that deal

<sup>158</sup> Some may contend that the LGA is mainly about the expenditure of public money and not institutions per se. But while its financial components (and associated accountabilities) are central to it, the statute is still 'institutional' in nature because it only deals with financial (and other) matters *associated with local government*.

with different sectors/activities in different ways.<sup>159</sup> The RMA also creates (or continues) institutions – such as the Environment Court.<sup>160</sup> The Waste Minimisation Act 2008 – another outcomes-based statute – creates an institution: the Waste Advisory Board. However, again, the sectors and institutions contained within those statutes relate only to the outcomes they are concerned with. For example, the RMA does not actively pursue

the economic benefits of mining, so is not concerned with institutions that deal with this (such as minerals enforcement officers).<sup>161</sup> The more general point is that, no matter what lens we use, the basic content of outcomes, sectors and institutions (and other content) is still found *somewhere* in the system. The lens we use to divide statutes simply determines *where* that content is found.



**Figure 3 An example of applying lenses** Our choice of lens determines how the system’s content is grouped together in statutes. Here we see that we can split statutes along outcomes or sectoral lines.

Outcome 1 = statute 1		Outcome 2 = statute 2		Outcome 3 = statute 3	
Institution 1	Institution 2	Institution 1	Institution 2	Institution 1	Institution 2
Sector 1	Sector 2	Sector 1	Sector 2	Sector 1	Sector 2

**Figure 4** Part of a suite of legislation created using an outcomes lens. Institutions and sectors are still regulated, but that occurs within statutes that are defined by outcomes.

Sector = statute 1		Sector 2 = statute 2		Sector 3 = statute 3	
Institution 1	Institution 2	Institution 1	Institution 2	Institution 1	Institution 2
Outcome 1	Outcome 2	Outcome 1	Outcome 2	Outcome 1	Outcome 2

**Figure 5** Part of a suite of legislation created using a sectoral lens. Outcomes and institutions are still there, but are contained within statutes that are defined by sectors.

While we can chop up our statutes in many different ways, a consistent rationale for doing so needs to be maintained across the whole system if we are to ensure it is coherent. For example, we would not start off by enacting a broad act like the RMA to deal with environmental effects (using an outcomes lens), and then enact a series of acts dealing

with the environmental effects of particular sectors (e.g., agriculture, mining and electricity generation) in particular locations (e.g., Taranaki, or in rural areas). To do so would undermine the point of the RMA, and the coherence of the system. In the sections below we consider different possible lenses in more detail.

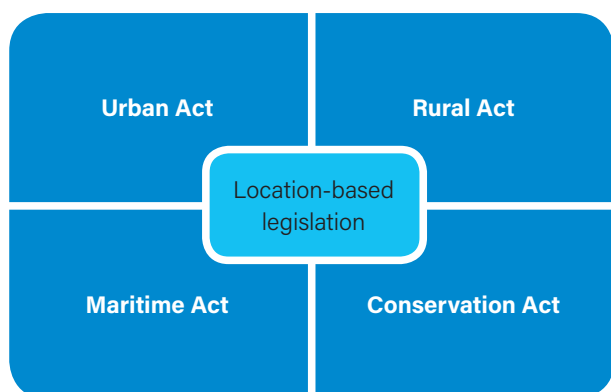
<sup>159</sup> The RMA itself gives special treatment to the generation of renewable electricity (a sectoral distinction), and plans refer to activities like farming. A purely effects-based regime has proven hard to realise since its conceptual abandonment in 1991.

<sup>160</sup> Resource Management Act 1991, s 247.

<sup>161</sup> Crown Minerals Act 1991, s 99A.

## Lens 1: Location

If we look through a location-based lens, we would separate our statutes based on the geographical area in question. At its broadest, we could divide New Zealand's territory into spaces having different fundamental *characters*. For example, we could have an 'Urban Act',<sup>162</sup> a 'Rural Act', a 'Marine Act' and a 'Conservation Act', and clearly define different areas of New Zealand that were subject to each. We could even have a spatially defined 'Deep Subsurface Act'. Each act would manage all kinds of outcomes, sectors, institutions, and domains within the area to which it applied.



**Figure 6** Possible statutes produced by looking through a location-based lens

To some extent the current system reflects this lens. We have a Conservation Act (and other conservation legislation) that applies only to specific areas. There are also calls to remove 'urban' areas from the scope of the general RMA regime (although there is much variation as to what that could mean in practice) on the grounds that the spatial areas designated as 'cities' have unique circumstances and problems.

We could go even further by embracing the idea that different *local or regional units* have fundamentally different contexts and concerns from each other. We could, for example, have an 'Auckland Act', a 'Westland Act', or even a 'New Plymouth Act'.<sup>163</sup> This kind of approach is fairly common overseas, although mostly in federal systems where separation of statutes reflects constitutional divisions of jurisdiction rather than biophysical differences between locations. It was, however, an idea that was floated in New Zealand following targeted legislative intervention concerning Canterbury's freshwater and post-earthquake resource management. To a limited extent, it has been realised with Earthquake Recovery legislation in Canterbury and with local government planning in special Auckland legislation.<sup>164</sup>

Yet another variant of this lens would be to base statutes on ownership. For example, statutes could be targeted at different areas based on who owns them or controls them (particularly the division between private and non-private

ownership). A statute governing resource management on private property would have very different considerations and rules to those on Crown land (like the conservation estate). In any of these cases we could draw lines on a map and apply a separate statute to each.

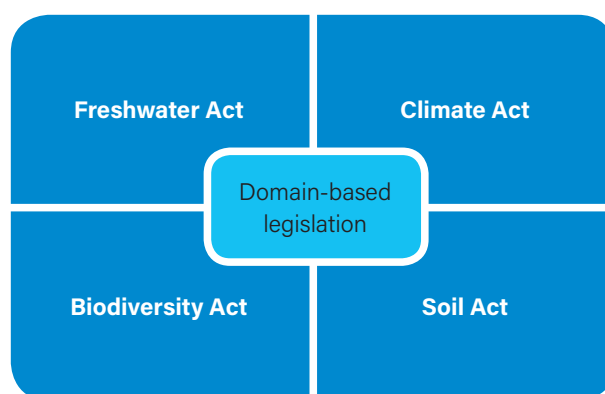
### Question for discussion:

- What are the advantages and disadvantages of splitting up our legislation according to location?

## Lens 2: Domain

Statutes could, instead, be divided according to particular domains that we wanted to manage or protect. The term 'domain' defies universal definition, but has been explained in Working Paper 1. We are treating a domain as an aspect or component of the natural world that we value. They are not inherently spatial: domains like soil, biodiversity, and fresh water can all exist in any given space. When we speak of domains, we are concerned with managing the environment or resource itself, not the particular way in which a resource or resources are used by humans. So while 'marine' and 'fish' can be domains, 'fishing' (the act of taking fish) is not (it is, instead, a 'sector').

Using a domain-based lens, we could (among others) have a 'Freshwater Act', a 'Climate Change Act' and a 'Biodiversity Act'. Each one would be a mini-code governing all things relating to that domain. For example, a Freshwater Act could contain rules about the protection, use and allocation of fresh water. To a limited extent we already use this lens in the current system (e.g., we have a Climate Change Act specific to that domain).



**Figure 7** Possible statutes produced by looking through a domain-based lens

Domains are generally defined quite broadly (air, water, etc.), to reflect the closely connected environmental processes that occur within them. However, it is possible for more specific components of the environment to receive more targeted attention in a separate statute. This can be seen in bespoke legislation concerning

<sup>162</sup> This would be broader than an 'Urban Planning Act' which would be more focused on land use patterns in the traditional concept of 'town planning'. An Urban Act would be a code for all things relating to resource management in a defined urban space (including the protection and allocation of water, air, soil, etc.).

<sup>163</sup> On this general idea, see Miller C, 'An alternative view on the future of the RMA' (2015) 196 *Planning Quarterly* 8.

<sup>164</sup> See generally New Zealand Productivity Commission, *Better urban planning* (New Zealand Productivity Commission, Final Report, 2017) at 126–127.



marine mammals, wildlife protection, or the ozone layer.<sup>165</sup> Conceptually these still justify a 'domain' label, because they are concerned with resources, not a particular way or ways in which they are used by people.

**Question for discussion:**

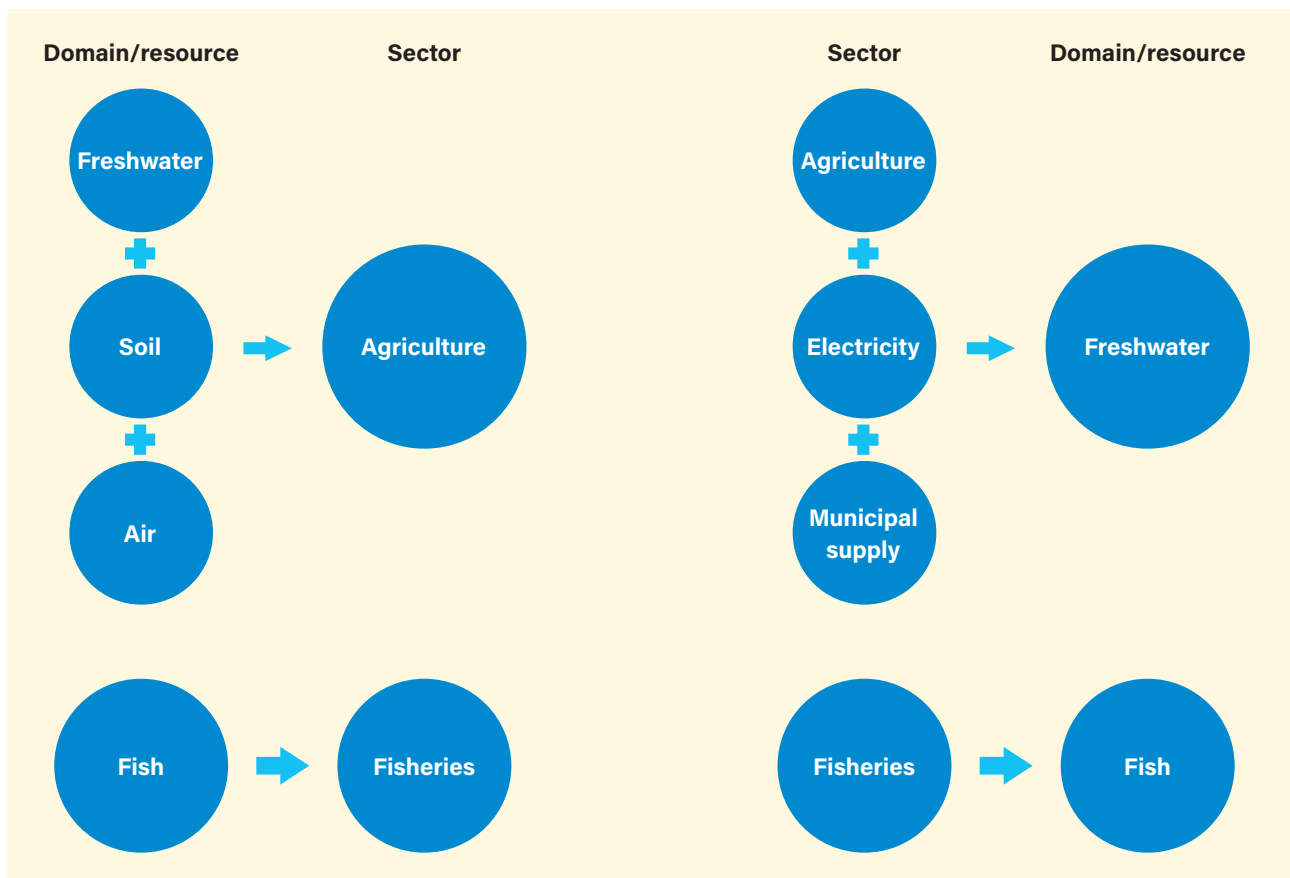
- **What are the advantages and disadvantages of splitting up our legislation according to domain?**

**Lens 3: Sector**

Looking through a sectoral lens, we would divide statutes along the lines of particular sectors, industries or activities. We are applying the term 'sector' in a broad sense here – as a particular way or ways that people use a resource or resources, not resources (or, for the more ecocentrically minded, components of the environment) themselves. In this way, we are distinguishing sectors from domains/resources. Some sectors are concerned with multiple domains/resources. For example, agriculture uses and impacts on fresh water, soil and air, and electricity generation can use solar energy, wind, fresh water and

fossil fuels. Similarly, some domains/resources support multiple sectors (uses). For example, fresh water is used for (among other things) agriculture, municipal drinking supply and electricity generation.

However, some sectors *are* concerned with the exploitation of a single resource. Where a resource supports only one sector, and a sector uses only one resource, the concepts can be virtually indistinguishable. Fisheries is one example; we use fish<sup>166</sup> almost exclusively by *taking* them.<sup>167</sup> 'Mining' describes the way in which people exploit one resource – minerals. In those cases, statutes may equally be described as 'resource-based' (or, on a broad definition, 'domain-based') statutes rather than sectoral ones. However, they are still fundamentally concerned with the way in which people *exploit* the resource, not the resource per se.<sup>168</sup> As such, they are better understood as being sectoral in nature. Such statutes differ from those concerning parts of the environment that require protection but are not directly exploited (such as marine mammals or the ozone layer). The latter are better understood as a kind of domain-based legislation, although there is a fine line between the two.<sup>169</sup>



**Figure 8** A conceptual distinction between domains/resources and sectors (examples). Most sectors (such as agriculture) use multiple resources, and most resources (such as fresh water) support multiple sectors. However, in some cases a sector may use only one resource, and that resource is used only by one sector.

165 Marine Mammals Protection Act 1978; Wildlife Act 1953; Ozone Layer Protection Act 1996.

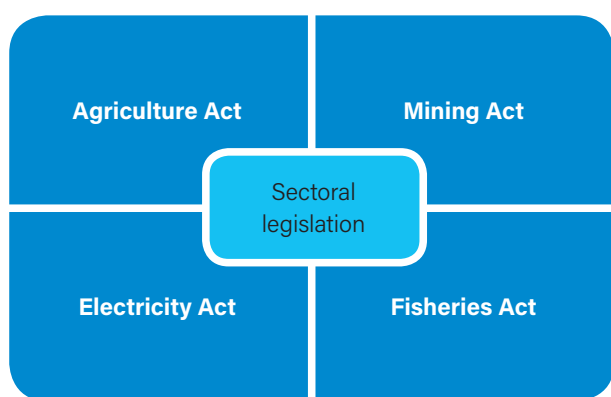
166 'Fish' is useful shorthand for the subset of marine life that we harvest.

167 Although we do also look at them, including as part of the tourism sector (e.g., shark cage viewing, glass bottom boats such as in the Leigh and Hahei marine reserves) and underwater diving.

168 For example, we could wonder what the utility of a resource-based 'Wind Act' would be outside the generation of electricity (sectoral).

169 For example, if marine mammals were to become significantly less threatened, it is not inconceivable that they could become subject to direct exploitation and part of a sectoral regime for fisheries (or even whaling), although there would be considerable moral issues to work through. The Wildlife Act is a borderline example, because it is equally concerned with wild animals as parts of the natural world to be protected (domain-based) and as the subject of a particular form of human exploitation (hunting).

If we adopt a sectoral lens for designing legislation, we could have (among others) an 'Agriculture Act', a 'Fisheries Act', a 'Mining Act' and a 'Transport Act'. We could have an 'Electricity Act', but we would not – for example – have a 'Wind Act' or a 'Sunlight Act' (the latter are about resources, but not ways in which we use them). Each would contain targeted environmental protections relevant to the sector, as well as any provisions concerning the funding and delivery, or even promotion, of particular resource uses.<sup>170</sup> To some extent we already have sectoral legislation in the current system (e.g., the Building Act and the LTMA).<sup>171</sup>



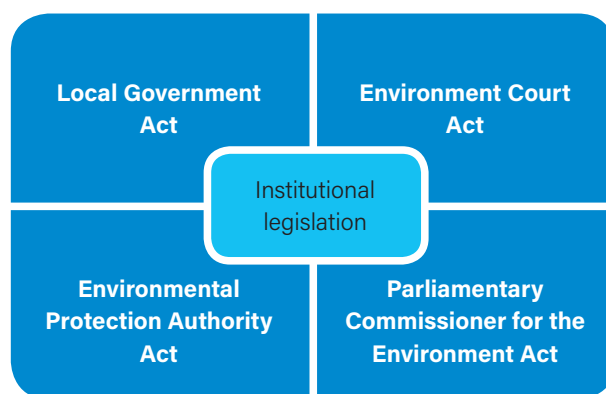
**Figure 9** Possible statutes produced by looking through a sectoral lens

**Question for discussion:**

- **What are the advantages and disadvantages of splitting up our legislation according to sector?**

**Lens 4: Institution**

Using an institutional lens, we would enact statutes targeted at particular institutions within the system. For example, we could have a 'Local Government Act', a 'Parliamentary Commissioner for the Environment Act' and an 'Environment Court Act' that create or continue those institutions, outline their functions, powers and duties, and establish frameworks under which those institutions are responsible for making resource management decisions. To some extent we already have institutional legislation in the current system (e.g., the LGA, the Environmental Protection Authority Act, and the Environment Act).<sup>172</sup> An institutional lens would produce statutes very different from what we have now, however, because they would subsume much of the content currently contained in other acts like the RMA (e.g., the production of regional and district plans and consents would be contained within a LGA).



**Figure 10** Possible statutes produced by looking through an institutional lens

**Question for discussion:**

- **What are the advantages and disadvantages of splitting up our legislation according to institution?**

**Lens 5: Outcomes**

The idea of an outcomes-based lens has been touched upon earlier when we looked at the principle of coherence. If we look through this lens, we would divide our statutes according to different kinds of outcomes (or, to use different language, 'aims' or 'objectives'). How we identify different kinds of outcome, and thus the way in which statutes would be divided, is inherently subjective. For example, some may suggest categories of 'environmental', 'social', 'economic', 'cultural' and 'health' outcomes (and a separate statute to pursue each). Others may see these as not severable, or as artificial fictions.

We tend towards the latter view. It would be nonsensical to have one statute pursuing cultural outcomes and another pursuing environmental outcomes (they are often the same thing).<sup>173</sup> Similarly, our social wellbeing can be enhanced by planting trees in urban areas and providing walking tracks in national parks; our long-term economic prosperity relies on renewable energy sources that are better for the environment; human health relies on clean water. The list goes on, but the point is that links between statutes split along these lines would simply be too complex and overlapping to manage. One option is to accept that we can have only one truly outcomes-based statute, like the RMA, that combines all these things into a single, albeit complex and conflict-ridden, decision-making matrix. Even within a single statutory framework like the RMA this wide range of outcomes has proved fiendishly difficult for users to unpick and navigate.

However, rather than think about outcomes per se, we see value in thinking about the different things that the system needs to do in order to achieve all of those outcomes. In

<sup>170</sup> Such as the funding and delivery of transport currently under the LGA and LTMA. A more extreme version would be to divide statutes on a project basis, as occasionally happens overseas, where a bespoke statute is enacted to regulate particular projects (like the Barrow Island Act 2003, which is concerned with a specific gas and geo-sequestration project). We are not entirely innocent of this approach in New Zealand, even in recent times: see, for example, the Point England Development Enabling Act 2017.

<sup>171</sup> Although parts of these statutes are not concerned with resource management per se.

<sup>172</sup> Although much of the LGA does not fall within the resource management system, and the Environment Act is not completely about institutions (and is not named in an 'institutional' way).

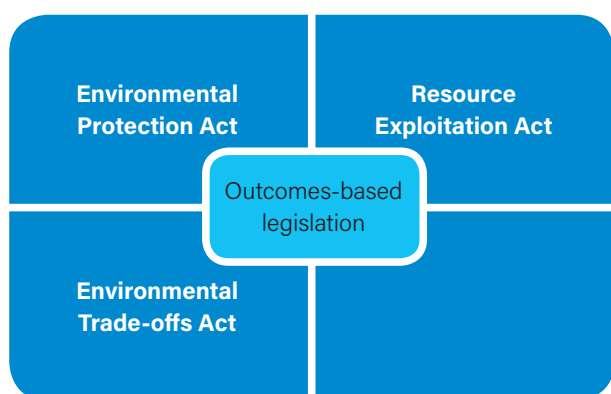
<sup>173</sup> For example, the concept of Te Mana o Te Wai (now recognised in the National Policy Statement for Freshwater Management 2014).

fact, these are well reflected in the set of objectives that will be described elsewhere in the project. The system needs to:

- Protect and enhance components of the natural world that are necessary for human wellbeing, the wellbeing of future generations, and the inherent dignity and intrinsic value of the living world
- Protect and enhance parts of the built environment that are accorded overriding value (including heritage, urban form and infrastructure)
- Facilitate the use of resources in particular ways where it is in the public interest
- Allow trade-offs where legitimate public values concerning the protection and use of resources clash<sup>174</sup>
- Resolve disputes (concerning the distribution of the private costs and benefits of resource use)

Looking through this version of an outcomes lens, we could have, for example, a 'Natural Environment Protection and Enhancement Act', a 'Built Environment Protection Act', a 'Resource Development and Planning Act', and a 'Resource Values Resolution Act'. Those names are horrendously clunky, and this is, admittedly, a fairly simplistic way to divide statutes. It is intended only as a basic illustration of the concept.

More practically, we could have a greater number of statutes, but with each still able to be categorised into one of the above general groups. The key point is that there would be a separation between those statutes concerned with protective outcomes/aims, exploitative outcomes/aims, and outcomes/aims involving compromise, balance, and trade-offs (e.g., urban amenity).<sup>175</sup> The idea is that no statute would seek to do more than one of these things.



**Figure 11** Possible statutes produced by looking through an outcomes lens

### Questions for discussion:

- **What are the advantages and disadvantages of splitting up our legislation according to broad outcomes?**
- **What is the best way to differentiate between different outcomes?**

### Compatible lenses

Above, we have outlined five lenses we could look through when dividing statutes. Others may be possible, although perhaps less workable.<sup>176</sup> However, as explained above, it is important to note that we do not have to pick a *single* lens for the system to be coherent. The key thing is that we use lenses in a *compatible* way. For example, we should not enact one statute using an outcomes-based lens (an Environmental Protection Act), then another using a sectoral lens (an Agriculture Act), then another using a location-based lens (an Auckland Environment Act), and then return to using an outcomes-based lens for another (a Resource Allocation Act). That is a recipe for confusion and incoherence, and is likely to produce complex relationships, overlaps, gaps, exceptions and carve-outs. In short, it is likely to violate not only the principle of coherence, but most of the other principles we have discussed as well.

#### Environmental Protection Act

To protect the natural environment from human activity

#### Agriculture Act

To regulate the agricultural sector, including to protect the environment from the impacts of agricultural activities and to manage the allocation of fresh water to such activities

#### Auckland Environment Act

To protect the natural and built environment within the Auckland region

#### Resource Allocation Act

To allocate the rights to use resources of a public nature

**Figure 12** How not to design legislation

Instead, we can usefully think of lenses as existing in a hierarchy or sequence. We can start by choosing a primary lens (e.g., sectoral), which we apply across the whole system. For example, we could have (among others) a Mining Act, an Agriculture Act, and a Transport Act. Each act would deal with all issues relevant to the sector in question (such as managing the sector's environmental impacts, any funding decisions, and the allocation of resource use rights). We can then consider what those statutes do *not* do, and apply a secondary lens (e.g.,

<sup>174</sup> Including tensions between protection of resources/environment and the ability of people to provide for their own social, cultural and economic wellbeing.

<sup>175</sup> There may be legitimate dispute as to what things are contained in each of these statutes (and if they could move between them).

<sup>176</sup> For example, a 'process' lens separating statutes on the basis that different kinds of statutes use different kinds of processes (such as collaborative, consultative or appellate processes) or a 'tools' lens whereby a statute using one kind of tool – say, economic instruments or behavioural incentives – is separated from another using a different tool – say, regulation or performance standards.



an institutional one) to fill those gaps across the whole system. For example, if institutions were needed to operate across multiple sectors, such as an Environment Court or regional councils, it would not be appropriate to include them in any sector-specific act. So we could enact specific statutes – an Environment Court Act and a LGA (among others). But we would not need to enact a separate statute establishing an institution concerned only, for example, with transport, like the New Zealand Transport Agency, because that would already fall firmly within the scope of a sectoral Transport Act.<sup>177</sup>

Again, we can then consider what still remains to be done, and apply a tertiary lens (say, a location-based one) to fill any gaps. For example, if a location had a special character that could not be recognised through restrictions on particular sectors or the behaviour of a particular institution, we could enact a specific statute to do so. Te Urewera may be a good example of such a location that has special treatment in our current pantheon of statutes.

Applying a hierarchy or sequence of lenses produces a significant result: *most of the content of the system is*

*contained within those statutes created using a primary lens.* Those statutes are the first cab off the rank, so to speak. Using a sectoral lens as a primary lens would result in sectoral statutes dealing with most things (the environmental impacts of each sector, the allocation of resources used by the sector, sector-specific institutions, and so forth). Statutes created using a secondary lens would therefore have less scope, because their role would be simply to fill any gaps that remain. For example, we would not have a broad outcomes-based statute like the RMA if we started by using a sectoral lens – it would be duplicative and confusing to do so. Our choice of primary lens is therefore extremely important.

None of this is to predetermine what lens *should* be used as a primary lens. The key point is that we need to avoid the random and inconsistent use of lenses if we want to create or maintain a coherent system. As described above, that could cause statutes to overlap,<sup>178</sup> create gaps between them, or cause boundaries to be unclear and unnecessarily complex. Using multiple lenses in a sequential way – primary, secondary, tertiary, and so on – helps the overall system to have a basic degree of coherence.

Lens	Things the system must do					
Primary lens (sectoral)	Act 2 (e.g., Agriculture)		Act 3 (e.g., Electricity Generation)			Act 4 (e.g., Aquaculture)
Secondary lens (institutional)		Act 6 (e.g., Environment Court)			Act 7 (e.g., Local Government)	
Tertiary lens (location)				Act 8 (Te Urewera)		

**Figure 13 Primary, secondary and tertiary lenses** Most of the content of the system is contained in statutes that are created using a primary lens. In this highly simplified slice of a hypothetical system, a sectoral lens has been used as a primary lens. Other lenses are then applied only to fill the gaps left by previous ones; here, statutes created using an institutional lens would not address matters already addressed by sectoral legislation (an LGA would not contain provisions relating to transport planning or funding).



177 If each sector had its own targeted decision-making institutions, then there may be no need for any institutional statutes at all.

178 In that they would seek to do the same things, in the same places, for the same reasons.

## d. Describing the current model

So far in this chapter we have considered legislative design largely in the abstract. We have presented a theoretical framework comprised of principles and various lenses through which we can look when dividing statutes. We have not wanted to jump straight to questions like whether the RMA is appropriate, or whether we should have a separate act for urban planning.

However, we must be mindful that legislative design is something that must happen in the real world. The next step, then, is to look at the system we currently have. We need to consider how it stacks up. What lens or lenses (if any) have been used to divide its statutes, and is that model appropriate?

We will seek to describe the current model in this language before evaluating it. Dozens<sup>179</sup> of existing statutes can be



**Figure 14** Key statutes in the current resource management system, showing overlap with other possible systems

179 There may in fact be hundreds, if you include geographically specific or project specific legislation. Although we hesitate to pick on John Cracroft Wilson Esquire CB and his heirs, executors and administrators yet again, an excellent example remains the Lincoln Road Mill Dam Act 1865.

described as falling within our resource management system (as we have defined it). Some of these can be described as falling within other systems too (such as the local government or transport systems).<sup>180</sup> It would not be particularly useful (or interesting) to traverse all of them.<sup>181</sup> We by no means offer a complete picture of every single relevant statute. However, Figure 14 shows what we consider to be the key ones. It also indicates, loosely, whether they can be considered to span other systems.<sup>182</sup>

The striking thing about this diagram is the sheer number of statutes in the system. Many more exist than are shown.<sup>183</sup> Furthermore, a veritable galaxy of regulations, plans and other subordinate instruments exist within some of these statutory frameworks.<sup>184</sup> It is a fragmented and complex legislative landscape.

**Question for discussion:**

- **What other legislation can be considered core to the resource management system?**

Since the late 1980s, New Zealand's resource management system has also seen a great deal of amendment. Some statutes have been added or replaced entirely. Much of that has been ad hoc change in the form of exceptions, additions and carve-outs. In particular, it has become something of a political rite of passage for an incoming government to change the RMA, and a recent trend has been for that to occur through the enactment of separate bespoke legislation that overrides the Act or otherwise influences how it applies.<sup>185</sup>

The period of reform in the 1980s and 1990s witnessed a wide-ranging review, but it did not see the creation of an entirely new system. In fact, a number of important statutes have been with us since the 1950s, 1960s and 1970s. At no point in time has anyone consciously designed the system from a completely blank slate; for the most part the more pressing task has been to consider how new statutes should relate to existing ones. Legislative reform is usually a cumulative process.

Overall, we should not be offended if an observer describes our system as fairly messy, especially when project-specific or location-specific legislation is added into the mix. It is not surprising, then, that no single lens proposed above adequately explains how our statutes have been divided. In fact, all lenses are represented in some form. We have purely institutional statutes (e.g., the Environmental Protection Authority Act and the Environment Act).<sup>186</sup> We have sectoral statutes (e.g., the Fisheries Act, the Forests Act, the Housing Accords and Special Housing Areas Act 2013 (HASHA Act), and the Crown Minerals Act). We also have domain-based statutes (e.g., the Climate Change Response Act). We have location-specific statutes (such as the National Parks Act and Te Urewera Act).<sup>187</sup> And we have outcomes-based statutes too – we cannot forget the RMA or the EEZ Act, and a handful of other acts fit this bill.<sup>188</sup>

Figure 14 above gave an indication of how many statutes we have, and which ones span multiple systems. In Figure 15 below these are categorised according to the main lens through which they appear to have been created.



<sup>180</sup> There is no definitive list of 'systems', of course, but some are commonly used (such as the local government system, the transport system, and the property system).

<sup>181</sup> Indeed, it would not be possible without an extremely long and even more extremely tedious report.

<sup>182</sup> The diagram is not intended to reflect relationships or overlap between statutes, only their place within various systems, it is indicative only.

<sup>183</sup> Furthermore, many statutes have bearing on the resource management system without forming part of it directly – for example, the Health Act 1956, official information legislation, and the Judicature Act 1908.

<sup>184</sup> For example, every regional council can have multiple plans under the RMA.

<sup>185</sup> For example, the Housing Accords and Special Housing Areas Act 2013 and the Point England Development Enabling Act 2017.

<sup>186</sup> Almost purely – the Environment Act 1986 is not named after an institution, and has a modest amount of independent normative content too.

<sup>187</sup> The Conservation Act 1987 and Reserves Act 1977 can also be seen as location-based statutes, although they apply to wide areas of the country.

<sup>188</sup> In that they apply to all sectors, locations, institutions and domains. For those who wish to be a bit too clever, the RMA and EEZ Act can be explained as location-specific acts as well, in that they deal with defined and separate spaces (within and without the 12 nautical mile limit of New Zealand's territory). However, that classification is not really useful. All statutes are location-specific in a sense, because they operate within New Zealand.



Outcome-based statutes	Domain-specific statutes	Location-specific statutes	Sector-specific statutes	Institution-specific statutes
Resource Management Act 1991 <sup>15</sup>	Climate Change Response Act 2002	National Parks Act 1980	Crown Minerals Act 1991	Local Government Act 2002
Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012	Ozone Layer Protection Act 1996	Reserves Act 1977	Forests Act 1949	Environment Act 1986
Civil Defence Emergency Management Act 2002	Marine Mammals Protection Act 1978	Marine Reserves Act 1971	Land Transport Management Act 2003	Heritage New Zealand Pouhere Taonga Act 2014 <sup>189</sup>
Biosecurity Act 1993	Wildlife Act 1953	Continental Shelf Act 1964 <sup>190</sup>	Wild Animal Control Act 1977	Environmental Protection Authority Act 2011
Hazardous Substances and New Organisms Act 1996	Native Plants Protection Act 1934	Numerous location specific statutes <sup>191</sup>	Housing Accords and Special Housing Areas Act 2013	Queen Elizabeth II National Trust Act 1977
Waste Minimisation Act 2008	Marine and Coastal Area (Takutai Moana) Act 2011	Numerous Treaty settlement statutes	Building Act 2004	Local Government (Auckland Council) Act 2009
Litter Act 1979		Conservation Act 1987	Fisheries Act 1996	
Environmental Reporting Act 2015		Crown Pastoral Lands Act 1998	Electricity Act 1992	
			Energy Efficiency and Conservation Act 2000	
			Gas Act 1992	

**Figure 15** Key statutes in the current resource management system, and the lens through which each has been created

**Questions for discussion:**

- Can the above lenses account for all kinds of statutes in the current system?
- Are the statutes above correctly categorised? If others are significant, where should they be placed?

How are we to make sense of this bewildering array of statutes? Do we simply need to accept that statutes are a reaction to issues as they arise and a product of a messy political process? We don't think so. Although it is by no means perfect – and we have considerable sympathy for the view that the system's coherence has been eroded over time<sup>192</sup> – we can observe that there is still some underlying order in its design. No single lens is used. Instead, multiple lenses seem to be used in sequence: outcomes, domains, locations, institutions, sectors. Statutes in each category largely fill gaps left by statutes in the previous one.



189 Despite its name, this can alternatively be seen as an outcomes-based act, as it deals with outcomes broader than those sought by the Heritage New Zealand Pouhere Taonga Act 2014 and other institutions under it.

190 This is primarily concerned with a single sector – mining – but also has catch all provisions to deal with exploitation of other seabed resources.

191 We will not attempt to provide an exhaustive list, but some include the Waitakere Ranges Heritage Area Act 2008, the Fiordland (Te Moana o Atawhenua) Marine Management Act 2005, the Sugar Loaf Islands Marine Protected Area Act 1991, the Auckland City Council (St Heliers Bay Reserve) Act 1995, and the Point England Development Enabling Act 2017.

192 New Zealand Productivity Commission, Better urban planning (New Zealand Productivity Commission, Final Report, 2017) at 128, see finding F5.11.

The current system is founded on outcomes-based statutes. In other words, outcomes are the primary lens that has been used to divide legislation. These acts generally apply across all locations, institutions, sectors<sup>193</sup> and domains. Those like the RMA and EEZ Act seek a wide range of outcomes (which are collectively described as sustainable management): protecting the environment;<sup>194</sup> enabling the use of resources for social, cultural and economic wellbeing; making trade-offs between competing values; and resolving conflict. Others, like the Waste Minimisation Act, Litter Act 1979 and Biosecurity Act 1993, also seek broad outcomes that apply to all locations, institutions, sectors and domains. Many of those outcomes overlap with those sought by the RMA.<sup>195</sup> A key point of difference between them, though, is the kinds of tools they employ to achieve them. The kinds of *tools* employed by the RMA are usually reactive, whereas the others allow for more proactive measures to be taken for particular kinds of problems or threats.<sup>196</sup>

It is hard to characterise the Hazardous Substances and New Organisms Act 1996 (HSNO Act) as anything other than an outcomes-based statute because it also applies irrespective of sector, location, institution or domain. Its separation may be explained by its highly technical nature, its concern with health and safety as well as the health of the natural environment, and the kinds of activities that are restricted (transport, packaging, etc., rather than the use of land or the discharge of contaminants). But its conceptual overlap with the RMA continues to create tension and uncertainties.<sup>197</sup>

As a product of a primary lens, outcomes-based statutes do a lot. But they do not do *everything*. As such, we have another layer of statutes that are divided by domain. In other words, we can see domains as a secondary lens. This range of statutes is much narrower, however, because most domains are already managed under broader outcomes-based statutes like the RMA. We do not, for example, have a 'Freshwater Act', a 'Biodiversity Act' or a 'Soil Act', because the RMA already deals with those.

The most notable examples that do exist are the Climate Change Response Act and the Marine and Coastal Area Act,<sup>198</sup> although *within* domains some more specific resources<sup>199</sup> do receive targeted protection (wildlife, marine

mammals and the ozone layer being cases in point).<sup>200</sup> As described earlier, we can consider these to be of the same basic character as domain-based statutes and extend that label to them. Overall, we have very few purely domain-based statutes, for the simple reason that to do so would undermine the point of having an integrated, outcomes-based framework like the RMA. If we had a statute for every domain, the RMA would become largely redundant and the relationships between statutes would become extremely difficult to manage. Instead, they fill gaps. It is curious, though, that we do have *some* domain-based acts. We will return later to the question of whether this is justifiable.



**Figure 16** Domains form a secondary lens in the current system

We can observe a third layer of statutes that are divided by location (a tertiary lens). These apply only in defined areas having *additional* needs to those already met by outcomes-based and domain-based legislation. We can look at a map and pinpoint such areas. Some location-specific acts are so targeted as to be better described as *project-specific* acts.<sup>201</sup> Again, location-specific statutes are a narrow range (we do not have a bespoke statute for every location in New Zealand, or for locations already dealt with under outcomes or domain-based acts),<sup>202</sup> but they tend to be more numerous than domain-based statutes.

This can be explained by the notion that few domains require regulation for reasons other than the outcomes sought under the RMA,<sup>203</sup> but particular locations often do. In fact, location-specific acts seek a wide spectrum of different outcomes not pursued by the RMA, depending on the character of the location in question. Some seek stricter environmental outcomes (additional protections for the biophysical environment), such as the National Parks Act or Te Urewera Act, which would not be appropriate for all land

193 Although not *all* outcomes apply to all sectors. For example, the RMA deals with issues of allocation of public resources, but not fisheries or Crown-owned minerals. In other words, our outcomes-based statutes do not pursue *all* possible outcomes, but where they do, they generally apply in all contexts.

194 Although not the built environment, in the case of the EEZ Act.

195 Such as environmental protection, and social, economic and cultural wellbeing (see Biosecurity Act 1993, s 54; Waste Minimisation Act 2008, s 3).

196 The RMA allows for methods other than rules and policies to be put in place through plans, but other regimes contemplate and provide specific legal authority for earlier intervention. For example, the Waste Minimisation Act provides for product stewardship schemes, the Litter Act obliges authorities to provide receptacles for litter, and the Biosecurity Act imposes obligations to eradicate pests and actively intervene to stop incursions before they occur at New Zealand's borders.

197 See Heitzmann M, 'Lessons from the past and advice for the future' in R Peart (coll.), *Beyond the RMA: An in-depth exploration of the Resource Management Act* (EDS, Auckland, 2007).

198 The reasons for these domains being managed separately are quite different. The outcomes sought under the Climate Change Response Act are not much different in nature than those sought under the RMA (climate change fits well within the broad sustainable management purpose of the RMA, because it is about protection of the biophysical environment), and it has therefore been artificially carved out. The Marine and Coastal Area (Takutai Moana) Act deals with an *additional* kind of outcome that is required in the coastal marine area, and which does not as comfortably fit within the purpose of the RMA (the active pursuit of cultural rights to use resources), so is layered on top of the RMA; here, the management of the coastal marine area is not carved out, it is merely subject to a statute-specific overlay.

199 Or, alternatively, 'parts of the environment that we value,' depending on the ecocentricity of one's views.

200 Again, these are better described as elements of domains, rather than sectors, because the former is generally about protection from other human activities (e.g., incidental harm), and the latter is concerned with the ways in which humans use resources (conscious use).

201 We will not pick on the Lincoln Road Mill Dam again, but the Point England Development Enabling Act 2017 deserves another mention.

202 For example, a variety of zones can be imposed in instruments under the RMA (such as significant natural areas, or commercial zones). Where locations are relevant to specific domains, they tend to be incorporated into domain-based legislation (such as wildlife sanctuaries under the Wildlife Act 1953, and marine mammal sanctuaries under the Marine Mammals Protection Act 1978).

203 The outcomes sought by the RMA are primarily about the protection of the biophysical environment, which can be thought of as the sum of all domains. In other words, the very concept of a 'domain' is a protective one, so all domains fit within the protective outcomes sought by the RMA.

(especially privately held land) managed under the RMA. Other acts are concerned with the more active pursuit of economic or social wellbeing.<sup>204</sup> Still others are concerned with the active pursuit of cultural outcomes (such as geographically specific Treaty settlement legislation).

Location-specific acts are seldom entirely carved out from outcomes-based and domain-based acts. Instead, they usually impose an *additional* layer of outcomes for particular areas (and, consequently, an *additional* layer of restrictions and obligations). In other words, they fill gaps. For example, national parks under the National Parks Act are still subject to the RMA, but impose a layer of stronger biophysical protections.<sup>205</sup> However, there are some examples of location-specific statutes that have essentially been carved out from outcomes-based statutes (such as special housing area legislation).<sup>206</sup> These encroach on the territory of outcomes-based statutes rather than filling gaps left by them.<sup>207</sup> Again, we consider whether that is justified below.



**Figure 17** Locations form a third lens in the current system

A fourth lens then produces a layer of statutes that are divided by sector. Again, sector-specific acts do not generally seek the same kinds of outcomes as outcomes-based or domain-based statutes. For example, they do not tend to impose sector-specific environmental protections, which are the prerogative of acts like the RMA that apply across all sectors.<sup>208</sup> We do not have an 'Agriculture Act' that seeks to protect soil, water and air from the impacts of farming. Nor are sectoral statutes usually concerned with the attributes of particular locations.<sup>209</sup> This is because a previous layer of statutes – location-based ones like the Reserves Act 1977 and National Parks Act – already applies across sectors. The role of sectoral statutes is to fill any gaps by seeking *additional* outcomes, unique to specific activities, that have not already been sought.

What kinds of outcomes do sectoral acts seek? As with location-based statutes, they vary depending on the sector in question. They are sometimes about protecting the safety of the public or preventing market monopolies, in which case they stray beyond the resource management system and are no longer our concern. For example, the Telecommunications Act is mainly about commercial law and has little to do with resource management.

Some of our sectoral statutes, such as the Forests Act, impose environmental protections that are targeted at a particular sector. This is rare. But more common is legislation that encourages or facilitates the *utilisation* of resources within a sector. Those outcomes are still firmly within the resource management system, because the system is as much about resource exploitation as it is about protection. But they are not ones with which our more general outcomes-based statutes are concerned. The RMA, for example, is agnostic about whether or not resources are used in the first place, or the kinds of uses to which they are put. It only cares about whether resource uses, *if* they occur, will produce acceptable environmental effects.<sup>210</sup> Consent conditions under the Act must relate somehow to an activity's adverse effects; one cannot use the RMA to force an ailing business to keep producing goods or services, no matter how important they may be to people's social wellbeing.<sup>211</sup>

But for a limited range of sectors, we need an additional layer of law to drive resource exploitation. For example, the Crown Minerals Act promotes mining and actively allocates mineral rights within the mining sector. The LTMA facilitates national-level funding and delivery of land transport infrastructure. It ensures that roads are built, and that they are built *well*. The Fisheries Act may have a protective sheen, but it is primarily about enhancing the resource's potential for long-term exploitation. The Gas Act 2002 and the Electricity Act 2002 have provisions recognising the benefits of using resources.<sup>212</sup> Even the Public Works Act 1981 can be seen in this light, because it smooths the way for resource use and development in a range of publicly important sectors (transport, schools, communications, etc.).<sup>213</sup>

Of course, we do not have a bespoke statute for *every* sector. This is, for the most part, because this kind of legislation is not *needed* for most sectors.<sup>214</sup> The market, not legislation, generally determines if a particular use of resources eventuates. Society is not overly concerned, for example, if the local corner dairy goes under – we do not enact a 'Convenience Store Act' to ensure every neighbourhood has one. Intervention is needed mainly

204 Such as the Housing Accords and Special Housing Areas Act 2013.

205 Although in reality restrictions under the National Parks Act would usually 'win out', because the Act is more protective.

206 Compare also the general proposal for special economic zones: Local Government New Zealand, *Local Government Funding Review Point Plan: Incentivising economic growth and strong local communities* (Local Government New Zealand, 2015).

207 Although admittedly that is ultimately a matter of perspective. For example, the Climate Change Response Act fills a 'gap' in the RMA only because that gap has been consciously created in (i.e., carved out from) the RMA.

208 On the peculiar exception of the Fisheries Act, see later in this chapter.

209 Although a partial exception is Schedule 4 to the Crown Minerals Act, which identifies particular areas in which access for mining is restricted (rather than being contained across multiple protective acts like the Reserves Act and National Parks Act). This may be partly explained by the fact that not all restricted access areas are in locations that are managed under other legislation.

210 Severinsen G, 'Glass half empty or glass half full? Adverse effects, positive effects and conditions under the Resource Management Act 1991 and Resource Legislation Amendment Bill 2015' (2016) 11(9) *Resource Management Bulletin* at 110; and *Queenstown Central Ltd v Queenstown Lakes District Council* [2013] NZHC 815 at [79].

211 Severinsen G, 'Glass half empty or glass half full? Adverse effects, positive effects and conditions under the Resource Management Act 1991 and Resource Legislation Amendment Bill 2015' (2016) 11(9) *Resource Management Bulletin* 110; and RMA, s 108AA(1)(b). For example, if a wind farm was consented but never built, it failed financially, or it was built in a way that failed to generate the social wellbeing promised, remedial action could not be forced under the RMA.

212 Gas Act 1992, s 1A; Electricity Act 1992, s 1A(a).

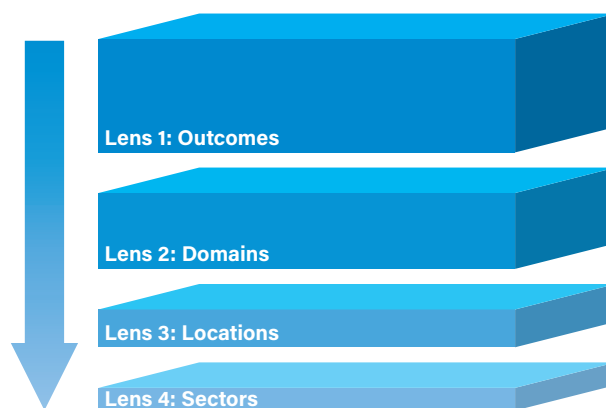
213 Public Works Act 1981.

214 Recall that we do not legislate unless we need to, under the principle of efficiency.



where a sector is seen as delivering an essential public good, and where failure to deliver would be detrimental to public wellbeing.<sup>215</sup>

Whether a sector fits this bill can change with time because the public interest itself can change. Traditionally, many public-interest sectors have been those in which public authorities have obligations to provide infrastructure, or those which have been privatised or partially privatised in the past. Private housing development has not in recent times been seen as an activity in which we need public intervention,<sup>216</sup> but acute issues with housing supply have led to the enactment of statutes like the HASHA Act and the Urban Development Authorities proposal. Overall, we have a smattering of separate sectoral statutes that encourage resource use. They do quite different things than statutes created under other lenses – they fill gaps.<sup>217</sup>



**Figure 18** Sectors form a fourth lens in the current system

A fifth layer of statutes is primarily institutional in nature. Such statutes concern particular institutions or categories of institution, and do not do the same things as outcome,



<sup>215</sup> Refer to the public interest use principle described in Working Paper 1.

<sup>216</sup> Public housing supply has ebbed and flowed over the decades according to the perspective of the government of the day.

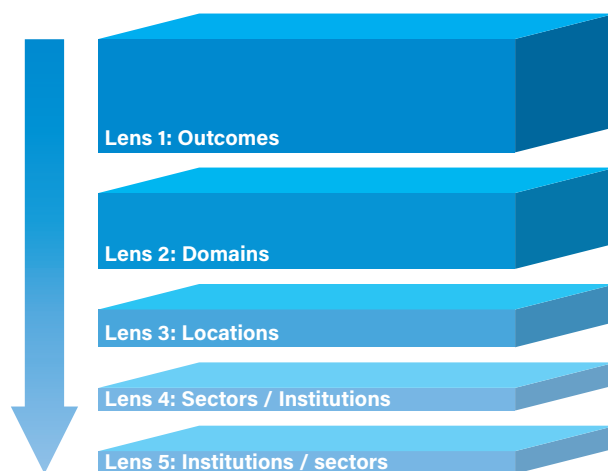
<sup>217</sup> One further example is the Electricity Industry Act 2010, which (among other things) compels Transpower to act as the operator of the national grid.

domain, or location-based acts. In other words, they do not pursue the same outcomes as statutes like the RMA, they do not regulate specific domains, and they are not concerned with particular areas. Nor do they usually concern the regulation of particular sectors. Again, institutional statutes fill *gaps* left by previous layers. Their role in the system is therefore more limited.

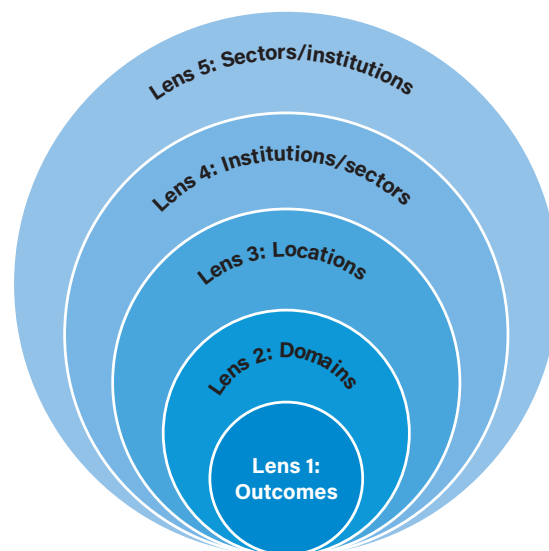
Some institutional statutes simply create and govern the general behaviour of institutions that have specific roles under other statutes. In this case, the fact that their roles are so cross-cutting makes it inappropriate to include them within any specific statute created using another lens. For example, the Environmental Protection Authority Act establishes the eponymous Environmental Protection Authority, which has substantive roles under multiple other acts.<sup>218</sup> It would be anomalous to find it created and regulated under only one of them (such as the RMA). In contrast, the Environment Court (at least originally) had its primary role under the RMA, so it was justifiable to include its creation (or continuation) in that Act.<sup>219</sup> Some institutional statutes concern entities that have even wider roles – including roles *outside* the resource management system. For example, many things that local government is tasked with (liquor control, bylaws, community wellbeing generally) have little or nothing to do with resource management. It would be anomalous for local government to be created and regulated under an act with a purpose of, for example, sustainable management, which only concerns the resource management system.

The treatment of local government and some sectors (transport and ‘three waters’ infrastructure) is, however, one significant exception to the order in which we apply sectoral and institutional lenses. Usually, a sectoral lens comes first, in that we have separate acts focused on sectors that exploit resources (like minerals and fisheries). Institutions are set up *within* sectoral acts. Only those institutions that do not fall comfortably within them are governed by separate statutes. For example, we do not have an institutional ‘National Fisheries Advisory Council Act’ separate to a sectoral Fisheries Act, nor do we have an institutional ‘New Zealand Transport Agency Act’ separate to a sectoral LTMA. Sectoral statutes have ‘first dibs’ on the regulation of institutions relevant to those sectors.

However, the reverse is true when we consider local government. We do not have a ‘Water Infrastructure Act’ with relevant local government roles within it. Instead, we prioritise an institutional lens by having an LGA that contains sectoral provisions about the funding and delivery of water infrastructure. We return later to the question of whether this variable use of lenses is justified.



**Figure 19 The hierarchy of lenses used in the current system** Lenses used to design statutes in the current system. The decreasing thickness and increasing transparency of each lens illustrates the fact that progressively less resource management content is found within statutes created using lower lenses.<sup>220</sup>



**Figure 20 An alternative representation of lenses used in the current system** An alternative way to represent the sequence of lenses applied in the current system. The widest circle represents the boundaries of the system as a whole. Outcomes-based statutes like the RMA have ‘first dibs’ on the content of the system. Subsequent layers of statutes generally only fill the gaps left by previous ones (represented by layers of crescent shapes) and do not encroach on their territory.

**Question for discussion:**

- **Does the sequence of lenses described above adequately account for how our current suite of resource management statutes has been designed?**

<sup>218</sup> Such as under the RMA, the EEZ Act, and the HSNO Act.

<sup>219</sup> Similarly, the Environmental Risk Management Authority (now disbanded), had its main role under the HSNO Act.

<sup>220</sup> For example, because outcomes-based Acts like the RMA are concerned with environmental protection across all sectors, sectoral legislation does not then contain sector-specific environmental protections. Its role, and thus content, is more limited.

## e. Interactions between statutes in the current model

Above, we have tried to account for how statutes have been divided in the current system. This is by no means a perfect explanation, but it reveals a degree of coherence in its design. What we have not yet considered is how different statutes, once they have been divided, then *interact* with each other.

Because different layers of statutes generally perform different roles (e.g., sectoral statutes do not generally impose environmental protections), they tend not to overlap. In other words, they do not usually do the same kinds of things for the same reasons.<sup>221</sup> However, that does not mean those statutes exist in splendid isolation from each other. Doing different things for the same reasons,<sup>222</sup> doing the same things for different reasons,<sup>223</sup> or even doing different things for entirely different reasons<sup>224</sup> can still produce difficult interactions, conflicts and uncertain boundaries.

We observe that relationships between different kinds of statute, where they are discernible, generally fall within one of three camps: a hierarchy (one trumps the other),<sup>225</sup> a clear separation (what one statute does not at all affect what another does)<sup>226</sup> or by mutual reinforcement (they deal with different things to a common end).<sup>227</sup> The most difficult and uncertain kind of relationship is often the last one, as the 'end' sought may be expressed slightly differently, and different decision-makers may interpret that end in different ways. For example, the idea of sustainability connects the RMA, EEZ Act, HSNO Act and Fisheries Act, but there is significant divergence in how it is expressed in each.<sup>228</sup> They may head in the same direction, but they end up in slightly different places.

Aside from the comment above, we will not attempt to describe the relationship between every individual statute in the current system. To do so would require several volumes. Instead, we are interested in whether relationships between different *kinds* of statutes can be generalised in a useful way.

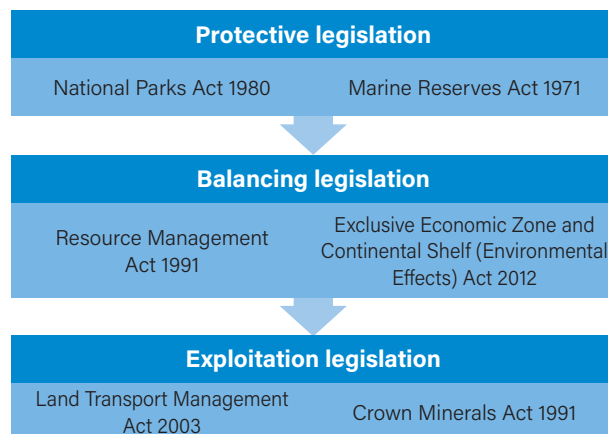
Things quickly become confusing if we try to describe the relationship between different layers of statutes (those created using outcome-, domain-, location-, institution- and sector-based lenses). For example, the relationship between the LGA and the LTMA is of a completely different character to that between the Environment Act and the Crown Minerals Act, even though both relationships are between institutional and sectoral statutes. The interface between the RMA and Forests Act has little in common with that between the EEZ Act and the Fisheries Act, although both link outcomes-based and

sectoral statutes. Many more examples could be given. Relationships between statutes from different lenses can be strong, weak, non-existent, irrelevant, clear, vague, hierarchical or mutually reinforcing. In short, it's not worth trying to generalise relationships in these terms.

### Normative relationships between statutes

It is, however, more useful to generalise the *normative* relationships between different kinds of statute. In other words, we can describe relationships according to the kind of outcomes they seek (protection, balance, utilisation), irrespective of the lens through which they have been created. For example, some sectoral statutes are concerned with protection, others are concerned with exploitation.<sup>229</sup> This normative relationship is one of *hierarchy*.

Statutes concerned with strict protection generally sit at the top. Obtaining a resource consent under the RMA, or a mining permit under the Crown Minerals Act, does not entitle a person to extract minerals in a national park. Obtaining a marine consent under the RMA or a fishing permit under the Fisheries Act does not entitle a person to conduct aquaculture or fishing activities in a marine reserve. Statutes concerned with balance are generally subordinate to protective legislation. Obtaining a resource consent under the RMA does not allow for a residential development on reserve land. But balancing legislation usually sits higher in the hierarchy than statutes concerned with utilisation. A new road for which funding has been obtained under the LGA and LTMA cannot proceed unless a consent authority grants consent under the RMA, after weighing many matters in the matrix of sustainable management.



**Figure 21** The normative relationship between protective, balancing, and exploitative legislation is generally hierarchical.

<sup>221</sup> Although this is not completely the case, and we return to this feature when we evaluate the current system below.

<sup>222</sup> For example, regulating climate change under the RMA while also pricing carbon emissions under the emissions trading scheme.

<sup>223</sup> For example, managing water infrastructure for its environmental impacts and its social benefits.

<sup>224</sup> For example, promoting petroleum extraction for economic benefit while restricting the emission of greenhouse gases for environmental wellbeing.

<sup>225</sup> For example, obtaining a mining permit does not excuse a miner from meeting RMA obligations.

<sup>226</sup> For example, the system for obtaining fishing rights does not impact on the system for funding land transport infrastructure.

<sup>227</sup> For example, a climate change national environmental standard under the RMA (if one were to be promulgated) and the emissions trading scheme under the Climate Change Response Act would both seek to mitigate climate change.

<sup>228</sup> The HSNO Act refers to the same kinds of things as the RMA. It refers to in the RMA's definition of sustainable management, even though it doesn't mention sustainability directly.

<sup>229</sup> For example, an outcomes-based statute like the RMA seeks to protect the environment. For the most part, so too does the Forests Act 1949 – a sectoral statute. Other sectoral statutes, like the Crown Minerals Act, LTMA and Fisheries Act, are concerned with promoting or driving resource exploitation. Institutional statutes can be primarily protective (think of the Environment Act) or concerned more with resource use (the LGA).



Admittedly, it doesn't always make sense to label a statute as being concerned only with protection, balance or exploitation. That is not an explicit choice Parliament has to make when creating legislation. Some acts (e.g., the Fisheries Act) straddle boundaries, and others (e.g., the Building Act) have components that can fit into multiple categories. Some acts do not produce tensions, so it is not always useful to talk about a hierarchy at all (e.g., the establishment of the Parliamentary Commissioner for the Environment in the Environment Act is something that neither overrides, nor is overridden, by the RMA). But although distinctions are not perfect, they remain useful. Protection is usually at the top of the pile.

As always, exceptions exist. Some may be more justifiable than others. For example, actions taken under the Civil Defence Emergency Management Act 2002 in times of emergency are not subject to the RMA. The HASHA Act, concerned with residential development, has also effectively overridden balancing legislation like the RMA. The Waitakere Ranges Heritage Area Act 2008 is highly protective, but defers to the RMA in the event of conflict.<sup>230</sup>

### Relationships between subordinate instruments and permitting processes

It is not only the high-level relationships between primary legislation that are significant. Arguably interfaces between subordinate instruments – regulations, strategies and plans – are even *more* important in practice. This is because they usually contain more specific restrictions and obligations than statutes. If subordinate instruments made under different legislation (or even those promulgated under a single statute) do not align well, then uncertainty, confusion and conflict can be magnified; the

only thing more confusing than having to consult three *statutes* with unclear relationships may be to consult 10 *plans* that say fundamentally inconsistent things. For example, long-term and annual plans (and other plans and strategies) under the LGA, regional transport plans under the LTMA and district plans under the RMA are all vital for the delivery of land transport projects, and need to be closely connected. It is not enough simply to state baldly that district plans 'override' long-term plans.<sup>231</sup>

Furthermore, inefficiency can result if related instruments are created using completely separate *processes*. Relationships between subordinate instruments can be complex, because they are often as much to do with the method by which they are created and revised than with their static position in a hierarchy. They need to inform each other at key points in sometimes lengthy and complex processes. We should not create district plans and long-term plans in separate dark rooms and then emerge red-faced when it turns out they are not as aligned as we thought they may be.

Statutory frameworks also interact at the permitting or consenting level. This usually raises questions of efficiency; if authorisations for a single project or activity are required under multiple statutes (or even multiple plans under them), it can be inefficient to have parallel or sequential processes by which applications are made, heard, considered and decided. Relationships between subordinate instruments and between permitting processes are considered in more detail in later chapters, because they are intimately concerned with the kind of plans and permits (and other tools, such as economic instruments and behavioural incentives) we have.



<sup>230</sup> Waitakere Ranges Heritage Area Act 2008, s 9. Although this is a bit misleading, as instruments under the RMA are obliged to *give effect* to the Act.

<sup>231</sup> On difficulties in the relationship between these statutes, see Jenkins M, A 'blue skies' discussion about New Zealand's resource management system (LGNZ, Discussion document, 2015) at 28.



## f. Evaluating the current model

Seeing our existing suite of statutes as the product of a sequence of lenses paints an intriguing picture. Perhaps surprisingly, given the chaos suggested by Figure 14, it has a fair amount of coherence already. But it is arguably not perfect, and we can use this conceptual framework to identify any gaps, overlaps, alternatives and other improvements in legislative design.

More specifically, in the following section, we ask three kinds of question, in turn, to evaluate the current system:

1. Should we apply lenses in a different order?

*For example, should outcomes continue to be used as a primary lens – producing some form of RMA – or should*

*we instead use sectors as a primary lens – producing a raft of sectoral statutes?*

2. Should we expand or contract the scope of some lenses?

*In particular, should we extend the scope of acts like the RMA to fill gaps (to pursue a wider range of social and economic outcomes), or instead rely on sectoral statutes to do that?*

3. How should statutes be divided within any given lens?

*For example, to what extent should we integrate or split up multiple location-based statutes like the Conservation Act, National Parks Act and Reserves Act? Should we split up outcomes-based statutes like the RMA into multiple acts so that each pursues different outcomes, or keep them all in one framework?*



## g. Should we apply lenses in a different order?

The most important aspect of this question is what lens we choose to use as a primary lens. This is because, as described earlier, most of the content of the system is contained within statutes created using it. Those statutes become the most broad-ranging and, arguably, significant ones in the system. Presently, this is the RMA and a handful of other acts.

### The current order is broadly appropriate

We suggest that an outcomes lens should continue to be used first. This is for several reasons. First, we re-emphasise that the key result of having a separate statute (as opposed to a separate part *within* a statute) is that it becomes defined by its own *purpose statement*.<sup>232</sup> A key consequence of splitting up our statutes is, therefore, that we also split up our statutory purposes. A purpose section in a modern statute is not just a generic statement about what a statute does or regulates; it seeks a normatively charged outcome. This suggests that the primary way in which we divide our statutes should be according to a clear division of the outcomes they pursue: one purpose for one set of outcomes.<sup>233</sup> Other lenses would produce a multitude of statutes (such as one for every sector or institution) having the same or very similar purpose statements. This would be inefficient and may be confusing.<sup>234</sup>

Secondly, we think that a system based primarily on broad, outcomes-based statutes is likely to be better at managing cumulative impacts of activities on the natural environment. An act that sought environmentally protective outcomes – for example, to safeguard the life-supporting capacity of the natural world as a whole, irrespective of sector, location, domain or institution – is likely to be more effective in recognising the complex interconnections between parts of the environment than an array of separate acts, each concerned with the impacts of specific sectors, institutions or spaces. It is also likely to be more durable; completely new sectors or institutions may be needed over time, but the basic kinds of outcomes we seek (clean water, healthy ecosystems, etc.) will be slower to evolve. Building statutes around existing sectors could risk new kinds of activities falling between the cracks. The trade-off, of course, is that any given sector, institution or location may need to look to multiple statutes (and, potentially, multiple plans and permitting processes). However, given the importance of environmental outcomes in the system's objectives, we think that is a trade-off well worth making.

Thirdly, in practical terms, it is likely to be easier to transition to a new suite of legislation if its basic foundations (represented by the outcomes-based statutes like the RMA) closely resemble those in the current system. It would also more easily enable good jurisprudence that has developed around protective outcomes – such as the nature of sustainable management – to be retained.

The order in which we apply subsequent lenses (secondary, tertiary, and so on) is less important than our choice of primary lens, because less of the system's content is found within the former. However, we think that the order in which we currently apply them (domain, then location, then institutions and sectors) remains broadly appropriate.

As with outcomes-based statutes like the RMA, it makes sense for domain-based legislation to apply across all sectors, institutions and locations. Having domain-based statutes separate from the RMA is confusing enough,<sup>235</sup> without the management of those domains being located across multiple sector-specific or location-specific acts. For example, it is arguably not ideal to have climate change mitigation removed from the RMA and placed exclusively in the Climate Change Response Act. But imagine if we had, say, 30 different sector-specific acts (energy, forestry, construction, etc.) or an act for different locations (urban, rural and marine areas) in which emissions trading rules were contained. It would be much more confusing and less accessible.<sup>236</sup>

Again, it makes sense for location-specific lens to be the next cab off the rank. Some areas have specific additional needs – such as Te Urewera – that are not provided for in general outcomes-based or domain-based statutes like the RMA. But it would be much more difficult to appreciate the special character of those areas if it were spread across multiple sector-specific statutes (one statute prohibiting mining in that area, another preventing industrial activities in that area, and so forth).

The question of whether we should apply an institutional or a sectoral lens next is more finely balanced. When describing the current system, we pointed out that we do not apply these lenses in a consistent way. In some cases we have sectoral statutes that create and govern institutions, and in other cases we have institutional statutes that concern the management of particular sectors. We return to this issue now. A useful way to explore it is by looking at the structural place of the LGA and LTMA in the system.

232 Palmer G, 'Law-making in New Zealand: Is there a better way?' (2014) 22 *Waikato Law Review* at 3.

233 See Palmer G, 'Law-making in New Zealand: Is there a better way?' (2014) 22 *Waikato Law Review*. Of course, we could still have a statute concerned with the *sustainable management* of the mining sector, and another statute concerned with the *sustainable management* of the transport sector, and so on. These are still based on outcomes. But it would be inefficient and confusing to have multiple statutes having the same or similar purposes. There would also be a risk that the statutes were interpreted in different ways, and some sectors favoured over others. It would be more efficient and equitable to combine those statutes into a single one dealing with the sustainable management of *all* sectors.

234 For example, imagine you are trying to influence a child's behaviour – say, teaching her or him to talk to others with respect. You would not create separate sets of rules for talking respectfully in the bathroom, in the kitchen, or on the grass outside. Nor would you create separate sets of rules for talking respectfully while playing, while reading a book, or watching TV. The most accessible set of rules would be one dealing with the basic outcome sought, irrespective of location or activity.

235 The more important question, which we return to in a moment, is whether we should have domain-based legislation at all, or whether it should be integrated into outcomes-based legislation.

236 To some extent we already have this – in Part 3B of the Forests Act.



## Sector first or institution first? A spotlight on the LGA and LTMA

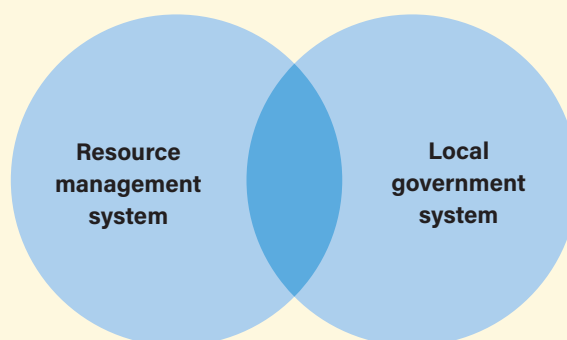
The LGA is an institutional statute, but it (among other things) deals with the local funding and delivery of three waters and transport infrastructure (which can be regarded as sectors). At the *local* level, this design choice puts an institutional lens ahead of a sectoral one. The alternative, putting a sectoral lens first, would produce a separate 'Water Infrastructure Act' and 'Transport Infrastructure Act'<sup>237</sup> dealing with the funding and delivery of those types of infrastructure (the latter of which would likely incorporate the LTMA too). In that model, a LGA would still need to exist – to deal with the many other things for which local government legislation is needed – but only to fill gaps left by transport and water legislation.

In contrast, at the national level, we *already* prioritise a sectoral lens for the funding and delivery of transport infrastructure. We have the LTMA – a transport-specific statute dealing with the funding and delivery of land transport infrastructure by central government. The establishment and governance of institutions – such as the New Zealand Transport Agency (NZTA) and regional land transport committees – is contained *within* that sectoral statute. We do not have an 'NZTA Act' under which that organisation plans and funds land transport infrastructure.

Is this inconsistent approach to legislative design justified? It forces us to navigate difficult boundaries between statutes – the LGA and LTMA<sup>238</sup> – when delivering transport networks. But when we are considering resource management statutes concerned with particular sectors or institutions, we must remember we are often dealing with complex interfaces between *multiple* systems – not just the resource management system. Whether we embed sectoral resource management provisions (transport infrastructure) within institutional legislation (an LGA) or instead embed institutional provisions (local government functions) within sectoral resource management legislation (a Transport Infrastructure Act) depends ultimately on the degree of connection those provisions need to have with *other* systems.

If institutional connections need to be stronger than sectoral ones, it will justifiably result in institutional legislation containing sectoral provisions (like the LGA). If sectoral connections need to be stronger than institutional ones, it will justifiably result in sectoral

legislation with institutional provisions. Usually, sectoral connections will need to be stronger, because comparatively few complex systems exist that are centred around particular institutions.<sup>239</sup> Usually, institutions form part of other – sometimes sectoral – systems.<sup>240</sup> For example, the NZTA is part of the transport system; the transport system is not part of an 'NZTA system.'



**Figure 22** The local funding and delivery of 'three waters' and transport infrastructure. As shown by the shaded, overlapping area, it is a matter that is highly relevant to two systems.

Local government is different because it forms part of its own 'institutional' system. That system is highly complex, with councils performing numerous roles across multiple statutes (not just resource management ones). The system has a core statute – the LGA – and multiple peripheral ones.<sup>241</sup> Laws relating to the *local* funding and delivery of water and transport infrastructure are subsumed within the LGA<sup>242</sup> because the local government system requires particularly close and seamless integration between its parts. One can imagine the chaos of a system in which the planning of core infrastructure was done in isolation from councils' broader annual and long-term planning processes. Planning new pipes, or upgrading existing ones, without the ability to pay for them would make little sense. Seamless integration is best achieved by having those parts contained within the same statute.

However, *transport* is not just a local government concern. Central government has a keen and legitimate operational and financial interest in land transport infrastructure, including local roads.<sup>243</sup> In fact, the majority of funding for local roads comes from the national land transport fund administered by the NZTA, a central government agency.<sup>244</sup> There is also a much wider transport system, which is largely

237 Or just a single 'Infrastructure Act'.

238 And the RMA, for that matter – although the separate place of outcomes-based statutes has been considered earlier.

239 For example, the Crown Minerals Act, Gas Act, and Fisheries Act.

240 For example, there is no Environmental Protection Authority 'system'. The Environmental Protection Authority is an institution that forms part of the resource management system.

241 For example, the Local Government Official Information and Meetings Act 1987, the Local Electoral Act 2001, the Local Government Rating Act 2002, and the Local Government Borrowing Act 2011.

242 Or, in the case of Auckland, within bespoke local government legislation.

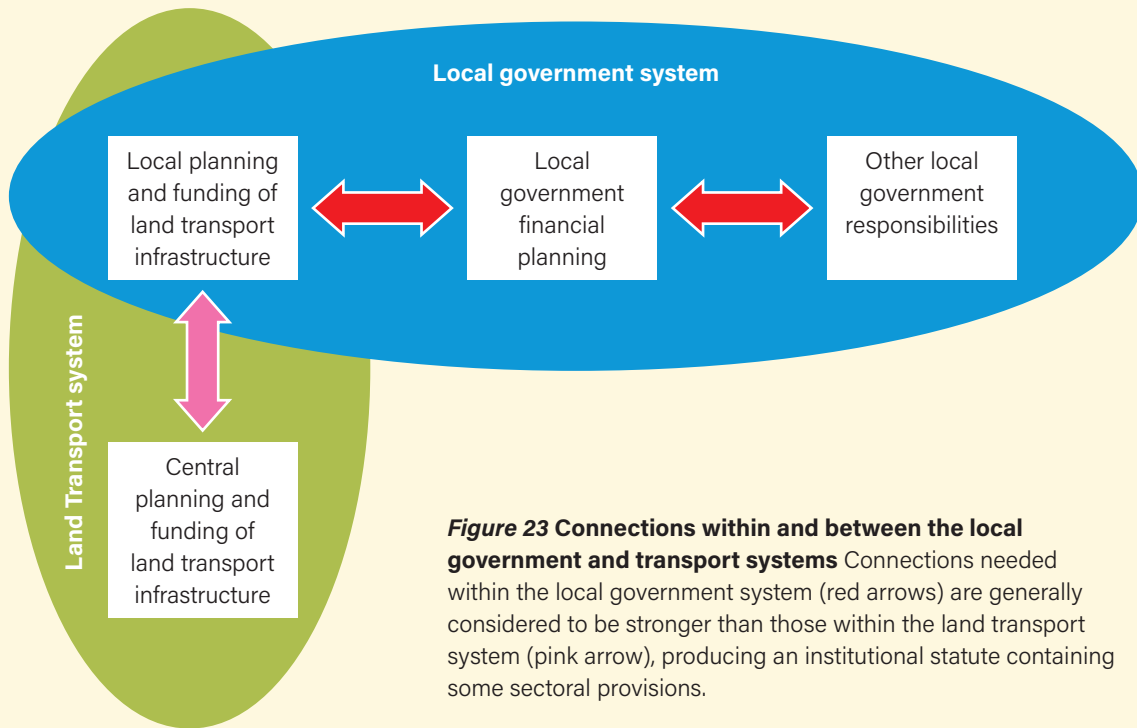
243 Some may be of the view that this position is not necessarily a natural state of affairs, and that (given the right funding and financing tools) local government funding of local roads should be more complete.

244 New Zealand Productivity Commission, *Better urban planning* (New Zealand Productivity Commission, Final Report, 2017) at 113.

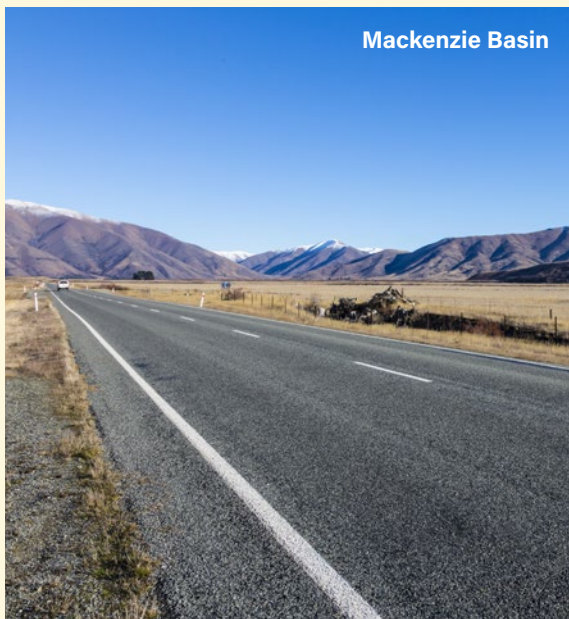
managed at the national level.<sup>245</sup> But, for obvious reasons, *central* government funding and delivery of transport infrastructure cannot find a home in *local* government legislation. So although it would make a lot sense for local *and* central transport infrastructure to be managed within a single sectoral framework, the trade-off of this would be a weaker connection within the local government system.

The strength of connection needed within the local

government system has, essentially, been accepted as greater than the connection needed within the transport system.<sup>246</sup> This has resulted in the integration of institutional (local government) matters in one Act (the LGA), and fragmentation of remaining sectoral (transport) matters across multiple acts (the LGA and LTMA). In the LTMA we are left with a sectoral resource management<sup>247</sup> statute that must therefore interface with a separate institutional statute – the LGA – to fund and deliver land transport projects.<sup>248</sup>



**Figure 23 Connections within and between the local government and transport systems** Connections needed within the local government system (red arrows) are generally considered to be stronger than those within the land transport system (pink arrow), producing an institutional statute containing some sectoral provisions.



Because outcomes-based acts like the RMA are concerned with the impacts of land uses (such as roads) but are not in the business of promoting or requiring resource use in particular sectors, it would be anomalous for the acts to be integrated. However, they still require close connections, because planning land use is critical to the location of transport networks. Methods adopted in plans under the RMA also, more generally, require the means to pay for them, which is influenced by funding decisions made under the LGA. We therefore end up with a trilogy of statutes with quite different purposes – but with close connections – when planning, funding and delivering land transport projects.

Short of entirely removing funding and other transport-related functions<sup>249</sup> from the purview of either central government or local government, a tension between the local government and transport systems looks inevitable. Each exists for a necessary reason and holds a

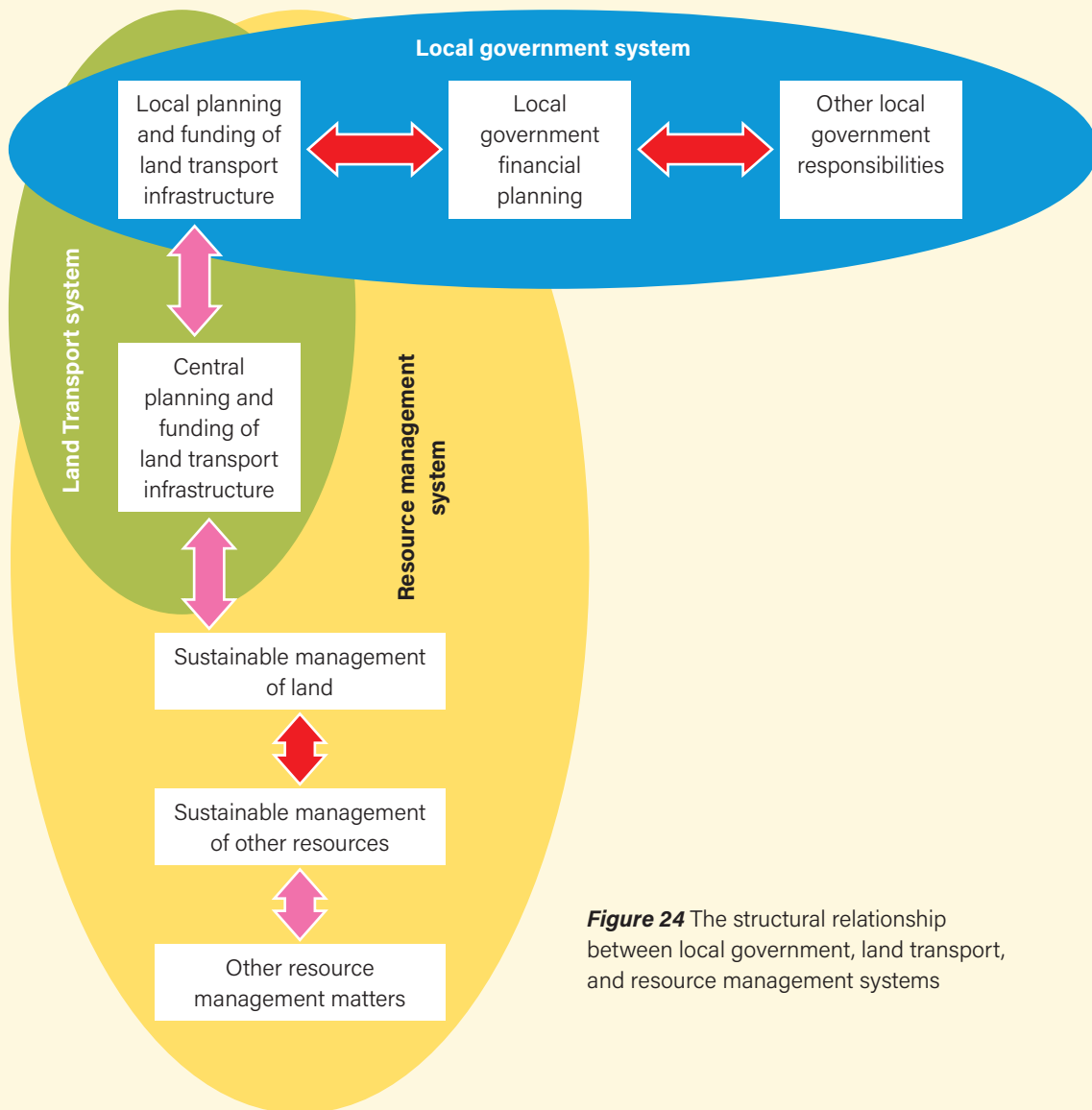
245 For example, safety, policing and licensing.

246 It is curious then that public transport, a regional (or, if delegated, local) concern is regulated under the LTMA rather than the LGA.

247 Interestingly, the LTMA has not been integrated with other components of the transport system (such as the Land Transport Act 1998), and forms a stand-alone sectoral statute concerned primarily with resource management matters. It is, however, beyond the scope of this report to comment on the integration within the transport sector.

248 If central government took a greater role in 'three waters' infrastructure, a similar kind of sectoral-statute may be required for that too.

249 Such as road safety, policing and licensing.



**Figure 24** The structural relationship between local government, land transport, and resource management systems

legitimate place in our suite of resource management legislation. The reality is that systems sometimes overlap and resource management content is drawn into different orbits. The way forward may be better integration and alignment *between* statutes, not the merging of statutes or the redistribution of their parts.<sup>250</sup>

The ways in which this could happen are closely connected to how plans are made and how infrastructure is funded, and are therefore explored elsewhere in the project in a chapter concerning plans and tools. We will need to move from general statements that integration is somehow important to more concrete proposals for how that can happen in practice. A key question will be whether it is the social and economic aims of the transport system (dominated by central funding) or rather the

broader aims of effective land use planning (local considerations of urban form, mixed use, density, etc.) that should have the dominant or leading role in decision-making.<sup>251</sup> Another will be whether road and rail are seen through a regional lens (likely to prioritise roads), or rather a local lens (more likely to focus on the importance of mass transit and residential densification). A third will be how strategic we want the three statutes to be, and what the appropriate planning horizons for each would be.

More generally, outside the context of the LGA and LTMA, we suggest that an institutional and sectoral lens can justifiably be applied in either order. This will depend on the strength of connections that need to be made with other systems.

<sup>250</sup> Nor do we recommend the redistribution of material between these and the RMA. As concluded earlier, the RMA should not require or promote the delivery of goods or services in particular sectors because it pursues outcomes that do not exist across the whole system. They only exist in particular sectors or institutions, and therefore should be targeted by statutes aimed at those sectors and institutions.

<sup>251</sup> Links are fairly weak at the moment. For example, under s 14 of the LTMA, regional land transport plans only need to 'take account' of national policy statements, while district plans are not mentioned at all.



## h. Should we expand or contract the scope of some lenses?

Above, we have considered the *order* in which we should apply lenses when designing legislation. We have outlined why we think an outcomes-based lens should continue to be applied first, and apply subsequent lenses in much the same order as we do already. But that is not the end of the story. The next logical question is how wide or narrow each lens should be. For example, we can choose to apply an outcomes-based lens first (an act like the RMA that applied to all domains, all sectors, etc.), but that doesn't mean that Act has to pursue all possible outcomes. The lens could be applied narrowly (e.g., the Act could pursue only protective outcomes) or broadly (e.g., it could pursue social and economic, as well as environmental, wellbeing).

### Is the scope of the RMA too narrow?

The extent to which our outcomes-based statutes currently seek a broad or narrow range of outcomes is debatable. We will focus on the RMA, as the broadest statute in the system and the one in which this question is most significant.<sup>252</sup> This Act applies across all locations, sectors, institutions and (for the most part) domains. However, there are some outcomes – which are, nevertheless, key to the resource management system – that it does not actively seek. The RMA is ultimately an *environmental* statute, not a *resource exploitation* statute. For some, this may have a bearing on whether the current system has gaps, and whether we need to extend the scope of our outcomes-based statutes to fill them.

Let us explain what we mean. The RMA is a product of its time.<sup>253</sup> It was intended to protect the environment. It aims, in its purpose statement, only to manage resources to *enable* social, economic and cultural wellbeing. It does not *require* it or even *pursue* it. People are expected to provide for their *own* wellbeing, subject to biophysical limits.<sup>254</sup> In other words, if a proposal does not harm the environment in an unacceptable way, the RMA does not care whether, or how, it happens – or whether a different proposal would have produced a better social or economic outcome overall. The Act places great faith in people's individual choices and market forces for achieving wellbeings.

Some may see this as a gap in our set of outcomes-based statutes. It goes some way to explaining why we have a limited range of sectoral statutes that then have to fill it in some contexts. A separate Crown Minerals Act can be explained not only because mineral extraction cannot be managed 'sustainably' (minerals are finite), but also because the RMA is simply not in the business of promoting the exploitation of resources for social and economic benefit.<sup>255</sup> The RMA may not care whether

minerals are extracted or who gets to extract them, but the Crown Minerals Act certainly does. Similarly, the RMA is agnostic about whether authorities use resources to provide water and transport infrastructure. It only cares about whether that infrastructure would have acceptable environmental impacts. Currently, we need separate acts like the LGA and LTMA to ensure those things are built.

Of course, the LTMA and Crown Minerals Act are extreme examples where particular *sectors* are actively promoted by law. They deserve targeted sectoral statutes because they promote specific outcomes that do not apply across the whole system.<sup>256</sup> Neither one would be a comfortable fit within the RMA. But is the more general agnosticism of the RMA – how resources are used to pursue social and economic outcomes – a broader problem? The use of the term 'enable' in the RMA raises much more subtle questions that go to the heart of what kind of statute the RMA is. We can legitimately ask whether outcomes-based acts like the RMA should be more proactive in pursuing all wellbeings, not just preventing harm to environmental wellbeing while letting people do what they want.

Seemingly different criticisms of the RMA can be seen as expressions of this more general observation. For example, some may complain that the RMA is not really an outcomes-based statute at all. It reacts to the adverse effects of activities by avoiding, remedying or mitigating them but does not actively pursue positive outcomes. It takes a defensive position, and there is no clear agenda for change embedded within it. Others may lament the Act's limited ability to look at alternative proposals and choose one that *best* promotes sustainable management. It is not a comparative framework. Still others may choose to criticise the RMA as being an unsuitable framework for urban planning because good urban planning requires a much more proactive approach to pursuing people's wellbeing. It requires us to promote 'goods,' not just address 'bads.' It is also possible to see the RMA as deficient when it comes to questions of allocating non-private resources (such as fresh water or the assimilative capacity of receiving environments) to different people or groups. This is because the Act is concerned only with the adverse effects of activities. *Many* different proposals from different people could have acceptable effects, but for scarce resources choices still somehow need to be made between them. All of the above complaints can be seen as general ones about how the RMA does not proactively pursue a wide enough range of outcomes. They suggest we should extend the scope of our outcomes-based statutes.

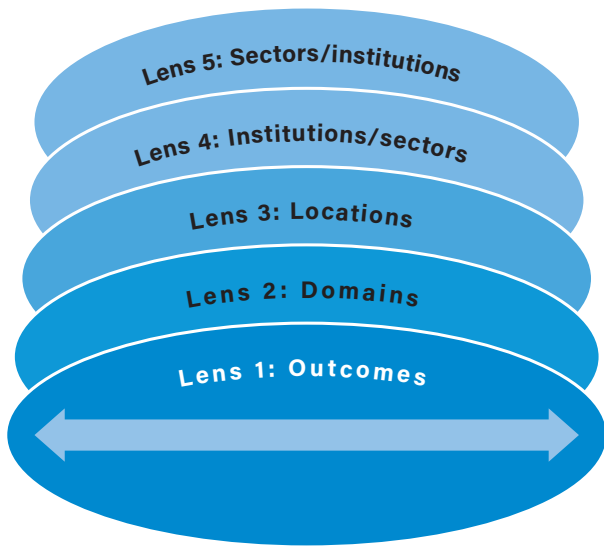
252 Much the same reasoning can apply to the EEZ Act.

253 See Working Paper 1 for the key ideas underpinning the RMA from the period of the late 1980s.

254 See New Zealand Productivity Commission, *Better urban planning* (New Zealand Productivity Commission, Final Report, 2017) at 107.

255 The Crown Minerals Act *promotes* exploitation: see s 1A(1).

256 For example, we do not promote agriculture in an Agriculture Act in the same way we promote mining in the coastal marine area, and we do not require people to build supermarkets in the same way we require local authorities to build water infrastructure. In contrast, all sectors should operate in a 'sustainable' way.



**Figure 25 Expanding our outcomes-based lens**

A revised version of Figure 20 showing a sequence of lenses using an extended outcomes lens. It would be possible for an outcomes-based Act like the RMA to do more (notably, it could actively pursue rather than just enable social, cultural and economic outcomes, and proactively rather than reactively pursue biophysical environmental outcomes). That may leave less to be done by subsequent layers of statutes (notably sectoral statutes), represented by relatively smaller layers. Alternatively, it may extend the boundaries of the system as a whole (if it pursues outcomes not previously pursued by the system).

### Is the scope of the RMA wider than it appears?

The complaints outlined above are not shared by everyone. The framers of the RMA may have been fairly clear that it was intended to protect the biophysical environment and not much else, but the language used has been fairly open to interpretation, and in practice the Act has been used to do a wider range of things. In other words, such complaints may be more to do with how it

looks, not what it does. For example, if the RMA were clearly unable to be used as an urban planning statute, a way to engage in strategic planning, or to allocate non-private resources, then the case for fundamental change would likely have been made out many years ago. Those things can, and have, occurred under the Act. In Appendix 2, we consider urban planning and allocation in more detail in this context. Ultimately, there is a degree of disconnect between what the RMA was intended to do and what it has been able to do. In some ways, it has shown remarkable flexibility as a general framework.

Even so, the RMA's foundations – how it 'looks' – mean it has arguably not been as effective in doing those things as it *could* have been. The need to allocate rights to increasingly scarce resources – particularly fresh water – are laying bare the allocative inadequacies of the legislation. While allocation is expressly a function of regional councils, the Act provides no normative guidance as to how allocation should occur. It allows some competitive processes for granting permits, but the criteria for doing so are not well-defined. Furthermore, rapid urban growth, housing supply issues, and associated infrastructure problems are exposing the dearth of urban-specific guidance and process in the Act. While it allows cities to be planned, it provides no real guidance as to what the benefits of cities are that are to be sought. And our creep beyond ecological bottom lines is calling into question an approach whereby we respond to harm rather than pursuing environmental enhancement. Actively pursuing social, economic and cultural (and even environmental) outcomes under the legislation may not be quite like jamming a square peg into a round hole, but it is still not an entirely comfortable fit. And if the Act is not really meant to do something, blame cannot be laid entirely at its door when it fails to do so.<sup>257</sup> At the very least, even if the RMA *can* struggle on in dealing with these kinds of issues, it is unhelpful to continue the debate and confusion over what the RMA 'is' and what things it should and should not do.



<sup>257</sup> In other words, these things cannot be seen entirely as a matter of implementation by local authorities.

However, the more directly relevant question for legislative design emerging from this broader debate is whether we should explicitly extend the scope of our outcomes-based statutes.<sup>258</sup> The alternative is that we continue to pursue social, cultural and economic outcomes through an ever-expanding set of resource or sector-specific legislation with complex inter-statutory boundaries. For example, we could enact a Freshwater Allocation Act and an Urban Planning Act to deal with those (alleged) shortcomings of the RMA. Below, we offer three thoughts, which are also represented pictorially in Figure 26.

### Three thoughts on the scope of outcomes-based statutes

First, the active pursuit of people's social, economic and cultural wellbeing could be more explicitly incorporated into a broad, outcomes-based statute like the RMA – including in relation to the management of land. Land is a private resource, but the ways in which it is used can have such a significant positive impact on society's wellbeing that its management in a proactive way seems justified.<sup>259</sup> Our laws need not be agnostic as to how land is planned (especially in cities), even if the impacts of land uses are environmentally sustainable.<sup>260</sup> Nor should the system be content with imposing environmental constraints – bottom lines – without seeking to ameliorate the social and economic impacts of doing so.<sup>261</sup> It can usefully get its hands dirty in social and economic matters.

Social and economic outcomes should, of course, be expressly subject to biophysical environmental bottom lines. After all, rivers do not stop once they reach cities (and when they do arguably their health becomes *more* important, not less). But we should recognise that environmentally protective goals are not enough by themselves, especially when planning cities.<sup>262</sup> Regulation will not always be the most appropriate tool for pursuing wellbeings,<sup>263</sup> but to recognise the basic outcome as one sought by our laws would at least provide a more solid conceptual foundation for much good urban planning practice that already occurs under the RMA.<sup>264</sup> However,

we stop short of recommending a separate Urban Planning Act (a location-based statute) to do this; rural (and other) areas equally warrant the active pursuit of social, economic and cultural outcomes. In particular, land use planning outside cities is critical for the provision of infrastructure. It would also be extremely difficult to delineate areas that are 'urban' and 'non-urban'; even a region like Auckland contains significant non-urban spaces, and effective urban and growth management requires integrated consideration of constantly changing peri-urban areas.<sup>265</sup>

Secondly, it may be helpful to align *allocative* outcomes across all non-private resources.<sup>266</sup> Deciding allocative questions under a single statutory framework – dealing with rights to fresh water, the occupation of coastal space, rights to use the assimilative capacity of receiving environments, and so forth – would enable us to lock in an overarching set of allocative principles that we currently lack.<sup>267</sup> That *could* mean combining previously fragmented statutes concerned with allocation (such as minerals and fisheries) into a single framework, although important differences between them – including culturally important characteristics – would need to be recognised within that framework.<sup>268</sup> Whether that would work may depend on the strength of connection required between allocative matters and other aspects of sectoral regulation (e.g., if the allocation of fishing rights really needs to be in the same statute as one setting a total allowable catch).<sup>269</sup> Aligning allocative principles within one act may also provide an opportunity to integrate Treaty settlement legislation concerned with resource use or access rights into more general, accessible and durable frameworks without undermining or even changing its substance. We leave that simply as a thought to consider.

Thirdly, we suggest that the promotion of particular sectors or activities, and the social, economic or cultural benefits they provide, should *not* be included within general outcomes-based legislation. This is because not all sectors *require* promotion or protection. As described earlier, it is only where sectors produce goods or services in which

258 Without, for now, presupposing whether we should do so by extending existing outcomes-based statutes like the RMA, or by creating new ones such as a 'Resource Allocation Act'.

259 The whole discipline of planning, as something wider than the internalisation of externalities and provision of public infrastructure and services, is based on this idea of there being a degree of public interest in how we manage private land. The management of land has proved more important than the management of other private resources. For example, we would not regulate how people use their food to ensure it maximises overall societal wellbeing. On a fairly narrow approach to the role of planning, see New Zealand Productivity Commission, *Better urban planning* (New Zealand Productivity Commission, Final Report, 2017), ch. 3.

260 This is not to pre-determine what the proper role of 'planning' and 'market' is in delivering the social and economic benefits of land use. That is considered elsewhere in the project.

261 For example, a compact urban form may be justified partly for environmental reasons (climate change, reducing the urban footprint). A system that was only concerned with environmental protection would then be agnostic as to the social and economic impacts that could have (such as a constraint on land for housing supply, and affordability issues). But if the system were concerned also with pursuing social and economic outcomes, it would seek to soften the impact of environmental restrictions by offering planning solutions (such as the provision of smaller/affordable houses in new developments, or allowing residential intensification).

262 Environmental wellbeing in many cases can produce social wellbeing and cultural and economic wellbeing, for example in the provision of green space in cities and clean water. However, some land use decisions that impact on social wellbeing do not have a biophysical component (such as how streets are connected to enhance mobility and social connection, or how mixed use zones can encourage economic collaboration and creativity).

263 See New Zealand Productivity Commission, *Better urban planning* (New Zealand Productivity Commission, Final Report, 2017) at 96.

264 Whether that would make a difference in practice would remain to be seen. As discussed, urban planning already occurs under the RMA, and complaints around urban planning are more likely to be around process (timeframes) and whether environmental considerations should be *weakened* to make development of land easier, not whether the RMA is conceptually equipped to pursue social and economic wellbeing in a proactive way.

265 The National Policy Statement on Urban Development Capacity 2016 provides one such way of thinking about what 'urban' is, but it does not attempt to create a statutory boundary. It is just one national policy statement among many under an Act concerned with all spaces.

266 The distribution of private resources is the role of the market. This still begs the question: Should public resources be privatised? There are competing views on this complex question; see New Zealand Productivity Commission, *Better urban planning* (New Zealand Productivity Commission, Final Report, 2017) from 42. We will address this elsewhere in the project.

267 On the desirability of allocative principles, see Barton B, 'Private property rights and the public interest' in R Peart (coll.), *Beyond the RMA: An in-depth exploration of the Resource Management Act* (EDS, Auckland, 2007).

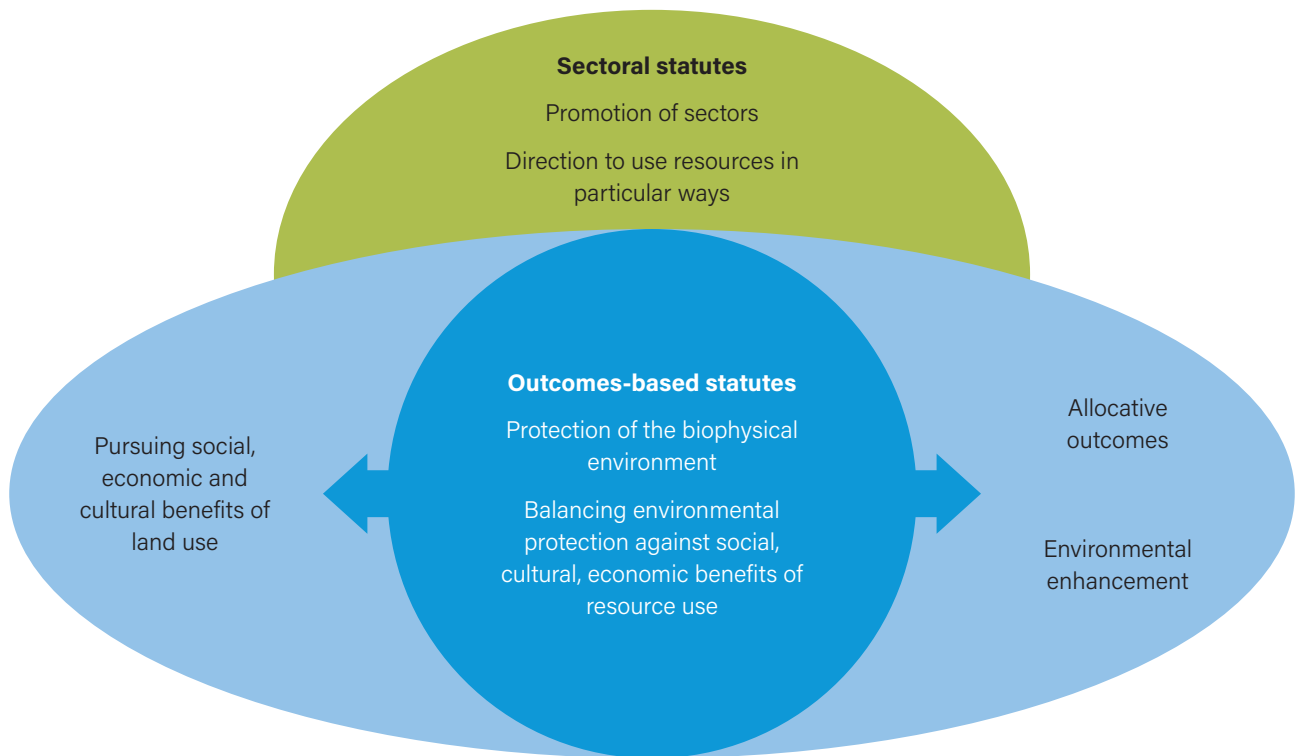
268 For example, minerals are Crown owned whereas fish are not. The coastal marine area is partly privatised but mainly not owned by anyone.

269 Fisheries and minerals legislation are not just concerned with allocation. They also set bottom lines of their own (the idea of a total allowable catch for fisheries, and Crown decisions not to release areas for exploration for minerals). So integrating allocative questions may also require the integration of other aspects, or risk severing important connections within sectoral frameworks. It is also questionable whether the release of acreage for exploration under minerals legislation could conceptually find a home within broader legislation, because finite minerals cannot be managed 'sustainably'.



there is a high degree of public interest that legislative intervention is warranted to ensure they are delivered. Whether the necessary degree of public interest exists must necessarily be asked on a case-by-case basis, as new kinds of activities emerge or decline in importance.<sup>270</sup> For example, the obligations of Transpower to maintain the national electricity grid, or the New Zealand Transport Agency to maintain the highway network, should not be found in a broad outcomes-based statute like the

RMA because (unlike environmental protection) they do not describe outcomes that apply to all sectors. Neither should the promotion of mining 'for the benefit of New Zealanders' be found in an act like the RMA. Similarly, local government's mandate to provide core infrastructure (such as 'three waters' and transport infrastructure) should not be found in a general outcomes-based statute. These are gaps that can legitimately be filled by legislation created under subsequent lenses.



**Figure 26** A potential expansion of outcomes-based statutes. The dark blue circle represents the narrowest reading of the outcomes currently pursued by the RMA. The light blue circle represents an expanded set of outcomes – all different expressions of how social, economic, cultural and environmental outcomes could be more actively pursued.

**Question for discussion:**

- Should we extend the scope of our outcomes-based statutes to include the active pursuit of social, cultural and economic wellbeing?



<sup>270</sup> For example, it is conceivable that in the future the idea of a road network will be redundant if progress on flying cars continues. On the relationship between environmental principle and new technologies, see Severinsen G, 'Applying principles of environmental law to novel technologies: The case of carbon capture and storage' (2017) 4 *New Zealand Law Review* 635.

## i How should statutes be divided within any given lens?

### Splitting up outcomes-based legislation

Above, we have considered whether we could expand the scope of our outcomes-based statutes as a whole. But there are different ways in which we could do this in a structural sense. For example, we could integrate the pursuit of social, economic and cultural outcomes into a biophysically focused statute like the RMA. At its most basic, this may see an expansion of the kinds of matters included in ss 6 and 7 of the Act, and the emendation of the word 'enable' in s 5 to something like 'actively pursue.'<sup>271</sup> Alternatively, we could create a stand-alone statute dealing only with those outcomes, and define its relationship with a biophysical act like the RMA (e.g., that an act with social objectives was subject to the RMA). We could even create two additional statutes. One could deal with the pursuit of all wellbeings when managing land (as a rather alarming nod to the past, we could call it a Town and Country Planning Act). Another could deal with the allocation of public resources (such as fresh water).

How we should split up our set of outcomes-based statutes is, however, a broader question than whether we should expand the RMA to more firmly embrace urban planning and allocation. It is also about whether we should split up the outcomes that are *already* sought by acts like the RMA. We could, in theory, have a wide array of different acts dealing with different outcomes. We don't have to do it all in the one act.

We already have separate outcomes-based legislation dealing specifically with hazardous substances and new organisms, biosecurity, and waste management,<sup>272</sup> and we pause momentarily to ponder whether the separation of those acts continues to be justified. On the one hand, they arguably seek outcomes that, in general terms and at least in part, are concerned with sustainability. They have substantial normative overlap with the RMA. But, on the other hand, they employ quite different tools, are more specific in their focus, and some impose technical requirements targeted at specifically equipped institutions.

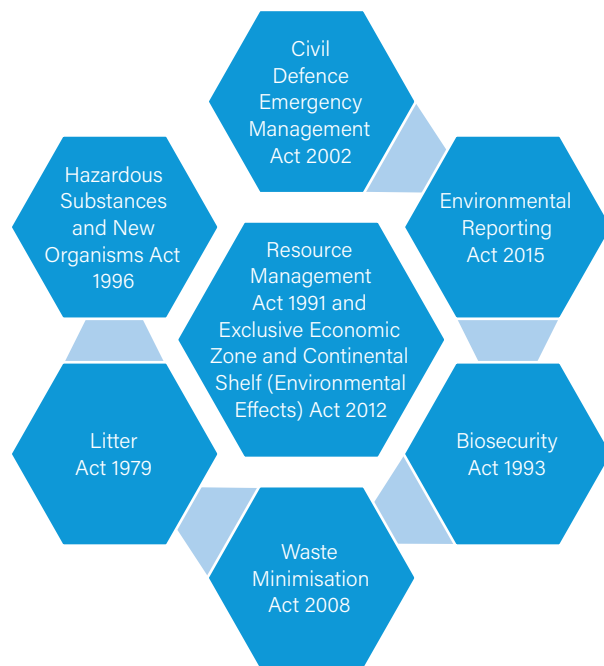


Figure 27 Outcomes-based statutes in the current system

#### Question for discussion:

- What are the advantages and disadvantages of separating specific statutes for hazardous substances and new organisms, waste minimisation, and biosecurity?

A more fundamental question, however, is whether the RMA itself should be split up into acts focusing on different outcomes. Earlier in this chapter, we suggested that a useful way to conceive of outcomes is not in terms of different wellbeings (social, cultural, economic, environmental) – because they are so inherently inter-connected that distinctions become artificial and confusing<sup>273</sup> – but rather in terms of the different things the system must do in order to achieve all of those outcomes. In short, the system must grapple with four broad kinds of outcome: protective, balancing, exploitative, and allocative.<sup>274</sup> Currently, the RMA does some heavy lifting in the name of integrated management. It seeks to protect resources,<sup>275</sup> balance the benefits and costs of using and protecting them, and allocate public resources.<sup>276</sup> But should it continue to do so, or do we need separate statutes?

Let us go back to first principles. There are some decisions within the resource management system that will always be conflicted or involve the balancing of legitimate values and interests.<sup>277</sup> Even the most ecologically dogmatic amongst us cannot pretend otherwise. For example, we have scarce public resources, so we will always have

271 To ensure that bottom lines were still met, this could usefully be accompanied by a stronger and clearer direction than 'while' as the conjunction in s 5. However, see below for an alternative proposal for how bottom lines could be achieved.

272 Under the HSNO Act, the Biosecurity Act, Litter Act and Waste Minimisation Act.

273 Distinctions *can* be made, but they may be undesirable. For example, a distinction between economy and environment can be made if economic outcomes are based on neoclassical measures like GDP only.

274 Although many nuances to this crude division are possible.

275 Note that the EEZ Act does not protect built resources.

276 Except those with sector-specific statutes like fisheries and mining.

277 New Zealand Productivity Commission, *Better urban planning* (New Zealand Productivity Commission, Final Report, 2017) at 12.



to pick winners and losers when allocating rights to use them. Sometimes the protection of a resource will unjustifiably prevent a person making money or society benefiting from its use. In other cases the use of a resource will prevent its protection for the benefit of society, future generations, or nature itself. We must reach many compromises that provide for all interests fairly.

However, *not all decisions inherently involve balance, trade-offs or conflict*. As a society we get to choose which kind of decisions do and do not get put in this basket. That choice depends on our objectives. In the conservation estate, for example, we do not endlessly agonise over the correct balance between use and protection. We have a statute that – pure and simple – enshrines the pursuit of highly protective outcomes. Of course, there are features of the conservation estate that means this cannot be extrapolated across the whole system (e.g., it is Crown owned, and private property rights are not a factor), and we obviously cannot turn the whole country into one indigenous forest. For that reason the Conservation Act is, and has to be, a location-specific one. However, in this we can see the germ of a more basic idea: if there is broad consensus that particular kinds of outcomes are essential, then we should stop the hand wringing, balancing and compromising – *and simply get on with pursuing them*.

It is by no means simple to identify what kinds of decisions require bottom lines and which decisions do not. There are three key difficulties. First, less significant environmental matters may be amenable to trade-offs, but whether something is 'significant' can be endlessly debated.<sup>278</sup> Significant for whom? Secondly, it can be challenging to differentiate between biophysical bottom lines and social bottom lines. For example, the overall ecological health

of a river clearly (in our view) requires the imposition of bottom lines under a protective statute, but what about the question of whether a factory should be located in a socio-economically deprived area? That is a question of environmental justice, and blurs the distinction between biophysical restrictions and social restrictions. Do the latter belong in a protective statute? Thirdly, we need to consider whether an act focused on environmental protection is an appropriate place for protecting the built environment (such as heritage buildings or iconic skylines). The values involved may be quite different. Furthermore, natural but culturally defined features like landscapes may not be as amenable to the same kinds of bottom lines as ecological features. Do *they* belong in the same Act?

Difficulties abound. However, admitting this does not invalidate the more general conclusion: if we *do* agree as a society that some things require bottom lines, they should not then be eroded by subsequent trade-offs and compromise. Elsewhere in the project, we will suggest that there is actually a high degree of consensus that basic biophysical bottom lines – the overall wellbeing of the biosphere – are essential. We cannot gamble with the basic ecological health of our waterways, for example, in the interests of temporarily bouncing up our GDP. That does not necessarily mean that we prohibit all exploitation; it may simply mean that we change the way in which use resources so that bottom lines are met.<sup>279</sup> But we cannot continue to be equivocal about it.

### **A separate statute for biophysical bottom lines?**

This has implications for how we design our statutes. The principle of integration tells us to recognise and be sensitive to the connections between matters dealt with



Kea

<sup>278</sup> For example, preventing a toxic smog over an urban area (requiring a biophysical bottom line) is quite a different proposition to allowing residential intensification in a suburb with heritage value (a question of balance), but there are grey areas in between (a clash of values over urban landscapes and housing supply may be one).

<sup>279</sup> For example, using land for forestry rather than intensive agriculture.



under different statutes. But it does not require a single statute for everything. Matters can be connected in different ways, and constructive tensions between different statutes can sometimes be extremely useful.

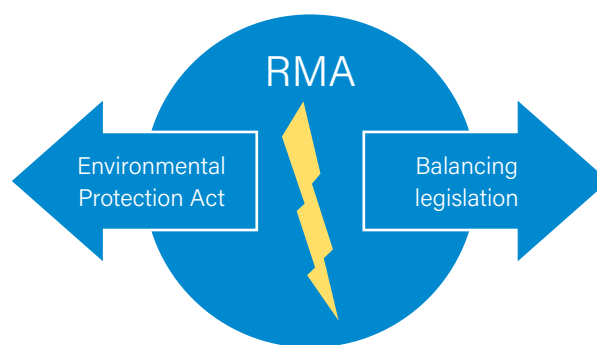
So what is the nature of the connection between 'protection' and 'balance'? It is certainly not like the complex ecological connection between domains. Nor is it like the tight web of connections between social, economic, cultural and environmental outcomes. These things need to be considered within one framework because they are often indistinguishable. Instead, the connection between notions of protection and balance is much more amenable to *separation and hierarchy*.<sup>280</sup> Questions of balance (whether the pros outweigh the cons) can be subject to questions of protection (there are some things that are so important we should never make trade-offs).<sup>281</sup>

Because statutes, and decisions taken under them, are each driven by a bespoke purpose statement, the separation of statutes is one way we can help establish and maintain effective hierarchies between outcomes and associated accountabilities. The RMA's purpose and principles have to account for such a wide variety of outcomes (including protection and balance) that, perhaps, we should not be overly surprised that the laudable protective bottom lines it envisaged now look more like a scattering of obstacles than a coherent planetary boundary.<sup>282</sup> It may have suffered from 'objective overload'.<sup>283</sup>

In contrast, we need only look at the impact of unashamedly protective statutes like the Queen Elizabeth II National Trust Act and the Conservation Act, as well as the 'system within a system' of water conservation orders,<sup>284</sup> all of which effectively override the purpose of the RMA,<sup>285</sup> to see the impact that a statutorily separated hierarchy can have.<sup>286</sup> Similarly, where there is a clear social and economic need for someone to build and fund roads, we don't find those outcomes tacked on to the broad purpose of the RMA. We find it in a separate statute, with its own clear purpose, and which fits into a clear hierarchy (institutions building roads under the LGA and LTMA are *subject* to both firm environmental protections and more open balancing exercises in the RMA).<sup>287</sup>

Is it time to embrace this same kind of statutory separation between protection and balance? Even more so than in 1991, we can see that highly protective outcomes – bottom lines – are generalisable across the whole system, not just in defined

geographical areas having unique characteristics. Such outcomes are declining across the board.<sup>288</sup> This does not *have* to happen by creating a statutorily separated hierarchy. We could, instead, build on the *King Salmon* jurisprudence to strengthen a protective hierarchy – bottom lines – within an act like the RMA.<sup>289</sup> That is a path that we are already part way along, and we could simply wait to see where it took us. We may see substantial improvement with the promulgation of more protective national policy statements and national environmental standards, and keep intact the good parts of Part 2 jurisprudence. We don't want to throw the baby out with the bathwater. However, we find legislative separation one intriguing and attractive proposition given the historical failures of a more integrated framework to do so and the questions that may still arise over *King Salmon*.<sup>290</sup> The Parliamentary Commissioner for the Environment, writing in 2013, considered that the idea of balancing equally weighted considerations does not belong in a truly protection-focused act.<sup>291</sup> Legislation that is focused on weighing a wide range of outcomes, especially an act that is reliant on elected institutions to translate that to practical terms, will always be susceptible to central and local fluctuations in political will.<sup>292</sup> Statutory separation may help.



**Figure 28** A separation of 'protective' and 'balancing' legislation. Statutory separation is one way in which we may enshrine the hierarchy between protection and balance.

**Questions for discussion:**

- **Should we separate biophysical bottom lines into a separate statute?**
- **Should biophysical bottom lines also include social bottom lines, and the protection of the built environment?**

280 On the value of hierarchy, see Carlman I, 'The Resource Management Act through external eyes' (2007) 11 *New Zealand Journal of Environmental Law* (NZJEL) 181 at 210.  
 281 Of course, we also need to 'balance' different considerations when setting where bottom lines should be in the first place. If we did not, bottom lines would simply become a series of prohibitions on doing anything with resources. However, the point is that, once bottom lines are set according to a clear protective direction, they should not then be undermined by subsequent trade-offs.  
 282 Although that can be explained by other failures of implementation, too: conflicted incentives on actors like regional councils, lack of national direction imposing bottom lines, and lack of resourcing for plan reviews and compliance, monitoring and enforcement.  
 283 New Zealand Productivity Commission *Using Land for Housing* (New Zealand Productivity Commission, Draft Report, 2015) at 119. Although the Productivity Commission cited environmental protection as an objective that undermined development objectives, we suggest that the opposite is more apt given the scale of the environmental issues we face.  
 284 Because this part of the RMA is subject to its own purpose.  
 285 For example, the obtaining of consent under the RMA does not remove the need to obtain concessions under the Conservation Act, and a plan change under the RMA does not remove the effect of an open space covenant under the Queen Elizabeth the Second National Trust Act.  
 286 A clear statutory direction – such as the primacy given to ecological protection under the Crown Pastoral Lands Act – can be a helpful basis for legal action if authorities fail to interpret a statute correctly.  
 287 In that where firm bottom lines do not exist, the benefits of a road are still weighed with a variety of matters, and consent can still be declined as a result of that weighing exercise.  
 288 See Ministry for the Environment and Statistics New Zealand, *Environment Aotearoa* (Ministry for the Environment and Statistics New Zealand, 2015).  
 289 *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] NZRMA 195.  
 290 These will be discussed elsewhere as part of this project.  
 291 PCE, *Submission to the Minister for the Environment on improving our resource management system* (Discussion document, PCE, Wellington, 2013) at 9.  
 292 See generally Carlman I, 'The Resource Management Act through external eyes' (2007) 11 NZJEL 181 at 201.

## An Environmental Protection Act

An Environmental Protection Act would be focused only on protecting those biophysical elements that require protection through firm bottom lines. Under an increasingly ecocentric ethic, this would include the imposition of bottom lines to reflect the intrinsic value of the natural world as well as the instrumental value of resources and the role of the environment in protecting human health. The Act would:

- Have a firm purpose and principles that did not contemplate the consideration of non-protective matters or trade-offs<sup>293</sup>
- Deem that protecting the basic health of the environment is a way of promoting people's social, cultural and economic wellbeing, not something that is in conflict with it
- Require the proactive<sup>294</sup> identification and imposition of all protections necessary to achieve the public interest in a healthy natural environment now and for future generations<sup>295</sup>
- Be non-regressive<sup>296</sup>
- Be strategic *and* regulatory
- Operate primarily through the imposition of clear and precise rules and performance standards in subordinate instruments that flow from a clear purpose statement, not through extensive use of discretion and interpretation of policy in the consideration of permits<sup>297</sup>
- Apply to all domains, locations, institutions, and sectors much as the RMA does (including land and currently excluded sectors such as fisheries)<sup>298</sup>
- Apply restrictions and regulation not only on the basis of direct interactions with receiving environments (as in Part 3 of the RMA) but also proactively on the basis of activities' and goods' potential for harm<sup>299</sup>
- Incentivise the *enhancement*, not just protection, of the natural environment<sup>300</sup>

## A separate statute for balancing?

An Environmental Protection Act would prevent human activity that threatens the basic integrity of the biophysical environment. Bottom lines are important and of overriding value. However, they are not enough. There are three things bottom lines do not do.

First, bottom lines by themselves are what we may call a neoliberal approach to environmental wellbeing. They set clearly specified limits, and allow people to do whatever they want as long as those limits are not infringed. They do not recognise the value of proactively pursuing all wellbeings (which are particularly important in designing and managing urban spaces).

Secondly, bottom lines are ultimately only a safety net. They can encourage a race to environmental mediocrity in a world that is already defined by environmental mediocrity. We need to be clawing back environmental wellbeing, not slowing down its decline. We might prevent a developer from bulldozing an area of indigenous bush, but is that really going to save a threatened species from extinction? One way to fill this gap would be to transform the idea of a bottom line into a 'middle line' (or even a 'top line') by expanding the ambition of an Environmental Protection Act. We would take less water, we would discharge less waste, and we would prevent land uses that do not help biodiversity thrive. We would protect more, and balance less. We would do more than just hold the line – we would raise the bar.

However, that solution comes with challenges. Because the third thing that bottom lines fail to do is recognise that much of the resource management system is about the value of *using* resources, not just protecting them. But use and protection can come into conflict, and at some point environmental trade-offs will become worthwhile. We do not completely deny ourselves seafood simply because fish are living creatures with intrinsic value, nor do we abandon cities because they are not ideal habitats for kākāpō. New Zealand is not just one big national park.

To complement an Environmental Protection Act, therefore, a separate statute could be enacted to do all of these things in an integrated way. It would facilitate appropriate trade-offs between all forms of wellbeing (above biophysical bottom lines)<sup>301</sup> and enhance the natural environment.

Those two things may sound contradictory. How can balancing economic wellbeing against environmental

293 For example, Natura 2000 sites in the European Union are identified based on scientific assessment of their significance, not by balancing whether the benefits would outweigh the costs.

294 In that bottom lines should not be determined when a tipping point is reached (by assessing the consent that breaks the camel's back), and should not be protected in a reactive way only when issues appear (by promulgating a patchwork of national policy statements and national environmental standards).

295 Exactly what should be protected is a difficult question, in two senses: the *kinds* of things protected (e.g., landscape and amenity may not be), and the *degree* to which they are protected rather than balanced (e.g., the ecological health of waterways may not have to be absolutely pristine). However, a good starting point would be the general matters in Part 2 of the RMA.

296 Providing that standards could not become less protective over time (although the ways in which they were met could change).

297 Essentially, clear performance standards linked to prohibited activity status.

298 In that we want to protect land for, for example, its landscape value and its food producing value.

299 For example, to include proactive restrictions on the production of things that can cause harm, and the way in which private goods are used – not just the way in which activities impact directly on the environment. This would encompass cradle to grave waste management and the idea of a circular economy.

300 Although the Act would not contemplate balance or trade-offs, so the idea of 'enhancement' would be achieved through direct funding, behavioural incentives, and public agency action rather than offsetting, which requires balancing (you are doing something bad here, so do something good over there).

301 To give greater protection to the environment, to protect existing uses, and to protect impacts on people's economic and social and cultural and medical wellbeing. This is essentially what the RMA already does in its balancing role.

wellbeing possibly produce *better* environmental outcomes? Twenty years of balancing under the RMA has certainly failed to do so.<sup>302</sup> We think the answer may lie in how proactively the system guides how we choose to use resources.

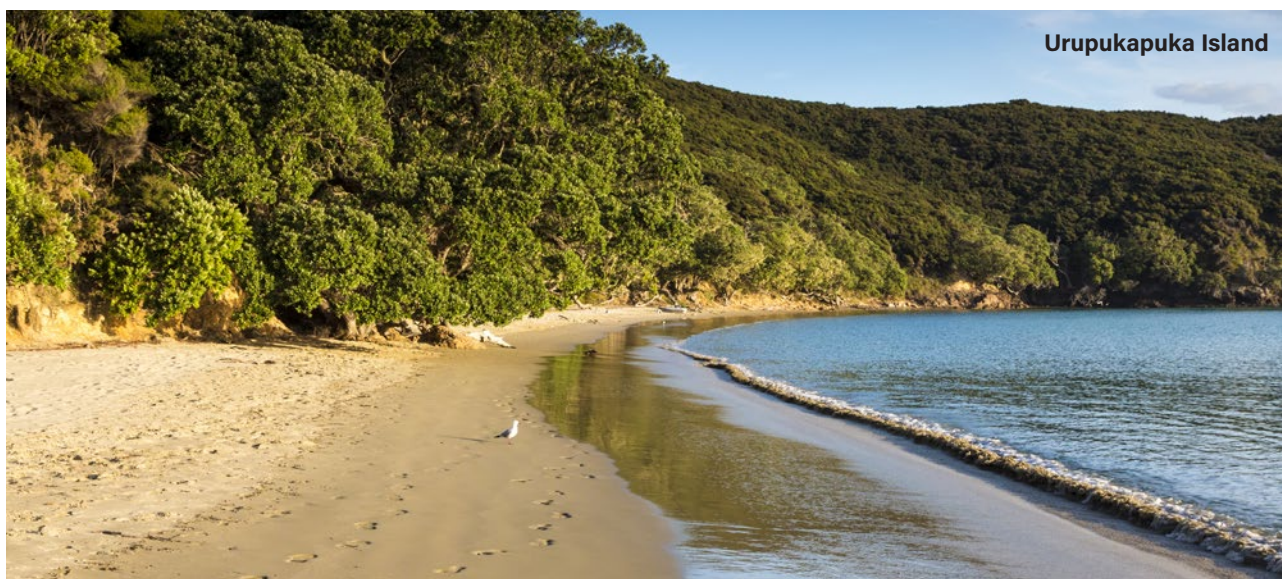
Let us explain what we mean. The prevailing mindset at the moment is that if we use a resource, we must accept some environmental (or social) cost. The question is usually: Is the harm worth it? That is what 'balance' means to most of us: a grudging (and sometimes enthusiastic) acceptance of degradation. In an application for a gas-fired power plant, for example, the social and economic benefits of electricity generation must be balanced against its social and environmental impacts. It's a tough choice, but is often seen to be a trade-off worth making. We can't live in a world without electricity, and carbon emissions and local amenity impacts may be the price we pay.

Conflict, it is true, is sometimes unavoidable. Most resource uses will invariably cause negative impacts of some kind. A wind farm, for example, may sound great to people in theory, but it will produce noise, affect birds and impact on landscape values.<sup>303</sup> And such tensions cannot always be simplified to 'development' versus the 'natural environment', or be resolved by imposing ecological bottom lines. For example, the height of a neighbour's fence is of no consequence to the health of the biosphere. A threatened ecosystem is unlikely to bat a collective eyelid at your oddly coloured letterbox. Managed retreat from rising sea levels is usually about balancing people's property values with their long-term social wellbeing, not primarily about protecting nature.

The system needs to provide for all those conflicting matters to be weighed and resolved together because they cannot be readily separated. We see nothing

fundamentally wrong with how the RMA currently performs this balancing role under a rubric of sustainable management.<sup>304</sup> The Act may have many 'contradictory' values, but that does not mean it is inherently unworkable. It simply reflects the reality that many things need to be identified and considered together. However, we also suggest that any trade-off with the health of the *natural* environmental should be reasonably offset using a principle of *net gain*. If we adopt an ecocentric view, we could say that net gain is about providing restitution for the historical grievances of the natural world. On an economic view, we would say that we are increasing our stock of natural capital. Taking a broader anthropocentric outlook, we are simply pursuing the things we value as a society. In any case, the idea of net gain is needed to claw back environmental wellbeing we have already lost.

However, we need to remember that the relationship between resource use and environmental protection is not *only* one of conflict. Looking at it from the perspective of the public interest, more synergies exist than we might expect. For example, our landscapes and biodiversity bring substantial economic benefit to the country. Where would our economy be without nature and adventure tourism? Irrespective of climate change, a transition to electric vehicles is likely to produce greater energy security as fossil fuels dwindle, and proliferation of localised solar electricity generation could see a significant convergence of wellbeings. Even ecological enhancement projects – the restoration of a wetland, for example – require the *use*, not just the protection, of resources (we do not *just* ring-fence areas and leave nature to do the rest).<sup>305</sup> Similarly, we *use* marine reserves for recreation and scientific research. Green infrastructure and water-sensitive buildings contribute to all kinds of wellbeing.



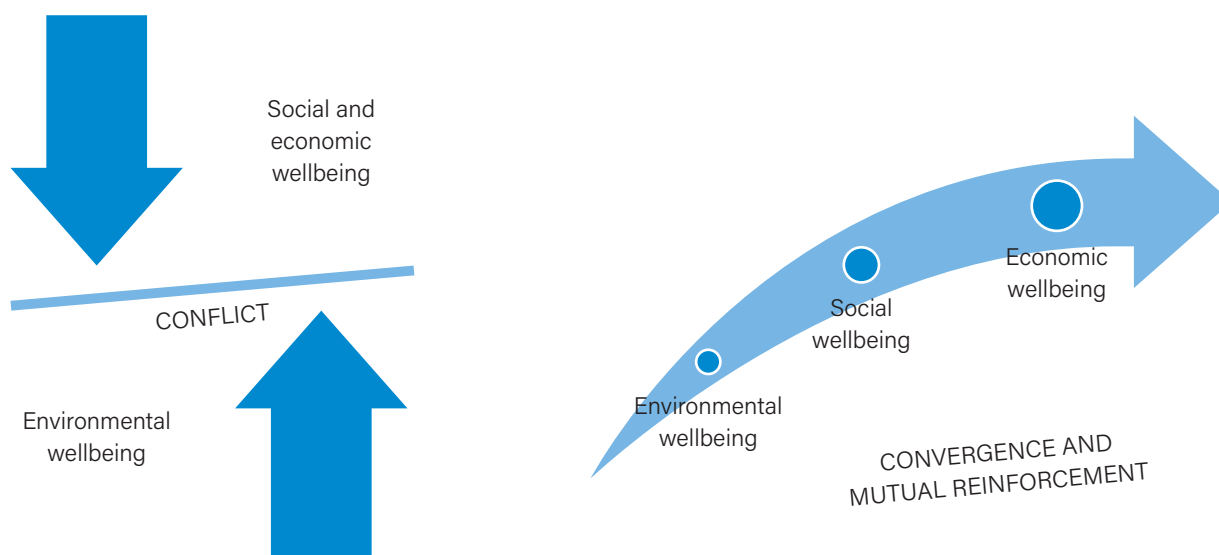
302 Ministry for the Environment and Statistics New Zealand, *Environment Aotearoa* (Ministry for the Environment and Statistics New Zealand, 2015).

303 In the context of hydroelectricity, see PCE, *Hydro-electricity or wild rivers: Climate change versus natural heritage* (PCE, Wellington, 2012).

304 Subject, of course, to the bottom lines contained within an Environmental Protection Act. In this sense we do not entirely share the optimism of some who have seen Part 2 as requiring no change or supplement; see Randerson T, 'The beginnings of the Resource Management Act', in R Peart (coll.), *Beyond the RMA: An in-depth exploration of the Resource Management Act* (EDS, Auckland, 2007).

305 For example, by planting riparian margins we are using land and trees; by installing green infrastructure we are using land and buildings; and reserves like Zealandia are actively managed for pests.





**Figure 29** Two roles of separate balancing legislation. Decisions could be as much about promoting synergies between different wellbeings as it is about resolving any conflicts between them. The red line represents bottom lines imposed by an Environmental Protection Act.

The concept of balancing, therefore, does not always need to be about weighing the pros and cons of using or protecting resources, or reaching a grudging and fragile compromise. By using resources in particular ways, we can sometimes further social, economic, cultural and economic wellbeings all at the same time. We need no longer accept that a project that enhances economic wellbeing must come at an environmental cost, or simply be as environmentally neutral as possible.<sup>306</sup> We can demand that it inherently produces environmental enhancement, and not just through offsetting. Resource use can be a race to the top, not to the bottom. The system should therefore think not just about ‘trade-offs’, but also about ‘convergence’. We should try to find resource uses where our objectives become mutually reinforcing. This would go some way to answering critics’ complaints that the RMA lacks clear goals.<sup>307</sup> The goals of a balancing statute should be as much about promoting synergies, and influencing positive behaviour, as about managing trade-offs and preventing negative behaviour.

### Balancing in practice

The points above sound nice in theory, but we concede that this approach poses significant challenges. How would a balancing statute actually do these things in practice? We leave the door firmly open on that question, but offer a few thoughts.

In particular, we are talking here about a statute more actively guiding or choosing *how* we should use resources.

It would not just be managing the environmental effects of choices made by the market. It would be easy for such an approach to stray into the realm of social and economic planning, which has been unpopular in New Zealand (and, at least in theory, anathema under the RMA). To many people, public authorities should be in the business of guarding against adverse effects – internalising externalities – not telling people how to use resources. On this view, for example, it is not the role of regional coastal plans to allocate space to specified groups or give preference to some over others, only to identify the total space for allocation.<sup>308</sup> But others may see the role of public authorities as actively planning how resources should be used, preferring some activities over others, and shaping what proposals come before them in the first place.<sup>309</sup> Over the last decade some judges have been quite willing to use the RMA as a tool to be more interventionist in this space.<sup>310</sup>

Both views have validity. On the one hand, private persons are best placed to understand which kinds of resource use will be economically viable. Public authorities should not be in the business of declining environmentally acceptable proposals (e.g., a wind farm) simply because they speculate that a ‘better’ one *might* come along tomorrow (e.g., an array of solar panels). Specific sectors and projects should not be promoted or opposed, and we should not witness a return to the ad hoc executive interference of the 1970s and the first half of the 1980s. We need to recognise that the private sector is best placed

<sup>306</sup> See Carlman I, ‘The Resource Management Act through external eyes’ (2007) 11 NZJEL 181.

<sup>307</sup> Carlman I, ‘The Resource Management Act through external eyes’ (2007) 11 NZJEL 181.

<sup>308</sup> *Carter Holt Harvey Ltd v Waikato Regional Council* [2011] NZEnvC 380 from [435].

<sup>309</sup> That view certainly better explains the framework for urban planning.

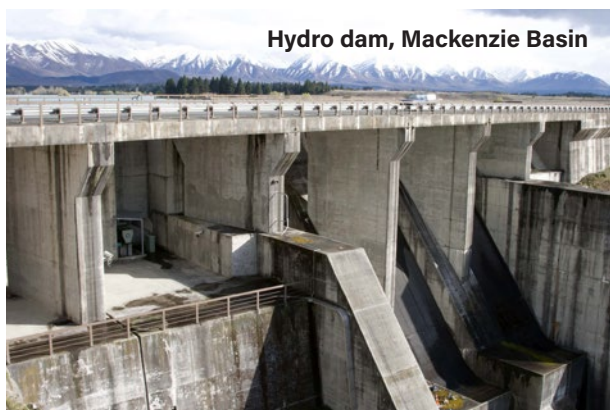
<sup>310</sup> Both the Court of Appeal and Supreme Court have hinted that the merits of applications close in time may sometimes be compared, on the understanding that one of them might better promote sustainable management; see *Central Plains Water Trust v Synlait Ltd* [2009] NZCA 609, [2010] 2 NZLR 363 (CA) at [89]; *Synlait Ltd v Central Plains Water Trust* [2010] NZSC 32, [2010] NZRMA 257; *Ngai Tahu Property Ltd v Central Plains Water Trust* [2009] NZSC 24; *Central Plains Water Trust v Ngai Tahu Properties Ltd* [2008] NZCA 71, [2008] NZRMA 200 (CA) at [90]–[91]. Furthermore, it has been held that using a resource in one way (such as land for commercial purposes) that could otherwise be used for other, more valuable, purposes (industrial use) can be regarded as having an ‘adverse effect’ on the environment: *Queenstown Central v Queenstown Lakes District Council* [2013] NZHC 815 at [91]. Foregoing an alternative opportunity to use a resource in a different way is quite a radical conception of what an ‘adverse’ effect is under the RMA.

to come up with innovative and efficient new uses for resources. In short, a planned economy does not work.

On the other hand, however, we do not think it objectionable in principle for resources, in which there is a substantial public interest, to be managed more actively and strategically *in accordance* with that public interest. Balancing legislation could, for example, require authorities to *consider* which kinds of resource uses would achieve synergies between all wellbeings, and to create policies to support a move towards them. This idea sounds quite vague, and in a way it is. Policies should not be prohibitions or prescriptions in the nature of rules, or express support for particular sectors. But what they could be are clear, effects-based policies guiding decisions and providing predictable signals for future investment. They would be a nudge to the private sector.

In fact, we already have this kind of provision built into the RMA (albeit in embryonic form) in the Act's active policy support for the climate benefits of renewable electricity generation.<sup>311</sup> A similarly proactive policy can be seen in the idea of product stewardship schemes under the Waste Minimisation Act. Such strategic policy support could usefully be extended to other resource uses. It is only a small conceptual step from having effects-based laws that react to *adverse* impacts to having effects-based laws that promote *positive* impacts.

Ultimately, we need to get people passionate about what the future *should* hold, not just thinking about things that it should *not* have. Resource management will always be a negative thing if we think about it in negative terms. We need to forge the same kind of social consensus and national identity that drove energy choices away from nuclear energy and apply it to resource choices in a brave new world of ecological and social sustainability. The specific tools and incentives for making this happen are discussed in another chapter.<sup>312</sup> There is a limit as to what legislation can do. Here, we simply observe that, while the RMA is currently quite reactive in nature (it operates largely by restricting activities when they trigger restrictions in Part 3), more proactive balancing legislation could usefully influence behaviour *before* such thresholds are reached to achieve synergies between wellbeings.<sup>313</sup>



311 Although this is more to encourage renewable generation instead of *non-renewable* generation, rather than to encourage one use of a particular resource (like fresh water) for renewable generation instead of its use by an alternative use (like agriculture).

312 For example, subsidies, feed-in tariffs, rates rebates, tax breaks, behavioural nudging, and pricing. The drive towards electric vehicles is an example.

313 Such as under the Waste Minimisation Act and Litter Act.

## A Resource Balancing Act

This Act could be concerned with balancing those aspects of wellbeing (social, economic, cultural and environmental) that did not need to be protected absolutely through biophysical bottom lines. It would manage the contested space between an environmental floor and a social ceiling.

By 'balancing' we do not just mean trading off the benefits and costs of protecting resources against the benefits and costs of using them. Where trade-offs and compromises had to be made, the Act would need to do so, as the RMA currently does. Tough choices will always need to be made. But the Act could also seek more proactively to guide – although not prescribe – the ways in which resources should be used. It would promote uses that enhanced *all* wellbeings simultaneously, thereby furthering the *public* interest and reducing the need for trade-offs and conflict. In that way we could hope to reverse the race towards environmental mediocrity created by just imposing bottom lines, and signal positive directions for future investment.

### Questions for discussion:

- **Should a balancing statute be limited to weighing the benefits of resource use against its environmental costs?**
- **Or should it be more proactive in guiding resource uses towards those that enhance all forms of wellbeing? If so, how? And are there particular kinds of resource use that fit this bill?**

### Where do issues of allocation belong?

The elephant in the room here is allocation. We cannot meaningfully talk about balancing legislation nudging resource uses in certain directions without tackling how we allocate rights to the resources themselves. For example, we may think that renewable electricity generation is a great activity in which multiple wellbeings converge, and be happy to adopt supportive policies for it and incentives for people to develop projects. But what is the use of supportive policies if – for example – there is no fresh water available for a hydro-electric dam to use? The reality is that a mechanism is needed to make tough choices between different resource uses and different applicants (which may not all be ready to proceed at the same time). This chapter is not the place to tackle such questions, which are considered elsewhere in the project. We do offer a few initial thoughts in Appendix 2 of this paper, and suggest that allocation is an issue that needs

to be dealt with explicitly *somewhere* in our system. The continued use of a reactive first in, first served model under the RMA will not produce optimal outcomes in a future that is bound to be defined by scarcity. But our primary concern here is the kind of statute in which allocative questions would be addressed.

Earlier, we suggested that allocative questions *could* be dealt with proactively under outcomes-based legislation like the RMA – if we think that those outcomes can be generalised across the whole system. If not, we could deal with the allocation through multiple resource-specific statutes, recognising that each has its own peculiar characteristics and issues.<sup>314</sup> To some extent we already do this: the allocation of mineral rights occurs under the Crown Minerals Act, and the allocation of fisheries occurs under the Fisheries Act. We could continue this trend by having a ‘Freshwater Allocation Act’, for example.

#### Question for discussion:

- **Should the allocation of all non-private resources be combined under a single statute with a common purpose, or are the differences between resources or sectors too great to do so?**

Assuming, for now, that we can generalise allocative outcomes across all non-private resources (fisheries, fresh water, coastal space, etc.), we need to consider the *kind* of outcomes-based statute in which allocation should be addressed. We could include it in protective legislation, balancing legislation, or a stand-alone ‘Resource Allocation Act’.

Allocation and environmental bottom lines may be awkward bedfellows in an Environmental Protection Act. In a sense, allocation is not really about environmental protection at all; it is about the distribution of resource use rights. We do not, for example, allocate rights to extract water in order to *prevent* its extraction.<sup>315</sup> Rather, allocation is about balancing competing interests to the extent resource use is acceptable. In other words, allocative questions kick in only once we determine what we are willing to allocate and what we are not, and are generally about choosing between different people’s social, economic and cultural wellbeing rather than the wellbeing of nature. It is, in a nutshell, about fairness between people.

However, in another sense, allocation *is* inextricably linked to environmental protection. This is because in many

places we are likely to be already breaching bottom lines. If we are to claw our way back up into the black, so to speak, how do we allocate the cost of doing so among those responsible for it? For example, if a catchment is already overallocated, in what proportions or according to what criteria should we reduce existing users’ allocations to meet minimum flows? An Environmental Protection Act might need not only to *set* bottom lines, but also chart a workable pathway to meet them. The latter is ultimately an allocative question, not a protective one, but it is hard to separate the two. The polluter or user pays principle is equally concerned with both.<sup>316</sup>

#### Question for discussion:

- **Should we address some allocative issues in a statute concerned with environmental bottom lines?**

Allocating rights *above* bottom lines would seem a strange task for an Environmental Protection Act. But should we address those instead in a *balancing* statute? Or, alternatively, should we create a stand-alone Resource Allocation Act? That choice may depend on how balancing legislation operates. It could operate in one of two ways.

First, balancing legislation could set an absolute test – such as ‘sustainable management’ – and allow activities to proceed if they met that test. This would mean that quite different proposals *could* proceed. For example, a dairying operation and a paper mill might both meet the test of sustainable management. Either one could, in theory, proceed (if they had access to the necessary resources, like fresh water). Balancing legislation would not be concerned with their relative merits – which one were *better* – only whether their effects were acceptable. On this approach, allocative questions would not fit well within a balancing statute, *because they are inherently relative*. It is easy to declare that alternative proposals are both sustainable, but we cannot always allocate a scarce resource to both.

Currently, the RMA imposes only an absolute threshold of sustainable management, not a relative one. For this reason (despite some creative approaches by the courts)<sup>317</sup> it largely treats allocative questions as a world apart.<sup>318</sup> If we kept this model, we could comfortably enact a separate Resource Allocation Act to allocate resource rights outside balancing legislation, just as separate Crown Minerals Act

314 Not least, that different resources have different ownership characteristics.

315 Unless we confer legal personhood to natural features and ‘allocate’ it to the river itself (an ecocentric approach). But we are really talking about prevention of *people* using resources and allocation to *people*.

316 See Working Paper 1.

317 As mentioned earlier, both the Court of Appeal and Supreme Court have hinted that the merits of applications close in time may sometimes be compared, on the understanding that one of them might *better* promote sustainable management; see *Central Plains Water Trust v Synlait Ltd* [2009] NZCA 609, [2010] 2 NZLR 363 (CA) at [89]; *Synlait Ltd v Central Plains Water Trust* [2010] NZSC 32, [2010] NZRMA 257; *Ngai Tahu Property Ltd v Central Plains Water Trust* [2009] NZSC 24; *Central Plains Water Trust v Ngai Tahu Properties Ltd* [2008] NZCA 71, [2008] NZRMA 200 (CA) at [90]–[91].

318 For example, determining who gets to extract minerals under the Crown Minerals Act (a relative assessment) is determined quite separately to the question of whether the environmental impacts of doing so are acceptable (an absolute assessment). Rights to take fish are decided in quite a different way from minerals (the allocation and trading of quota), but this is still a relative question that is separated from the absolute question of whether the impacts of doing so are acceptable. Even where more structured processes for resource allocation have been included under the RMA itself, they use quite separate mechanisms from that of sustainable management. A person who wishes to occupy coastal space, for example, can be compelled to obtain an authorisation via a tendering or other competitive process (a relative question) *before* obtaining a coastal permit (an absolute question of sustainable management). Arguably such allocative mechanisms are anomalous in a statute that is quite open about its agnostic normative attitude to questions of how resources are used. They could easily be carved out (in the same way that minerals and fisheries are).



does so already for minerals.<sup>319</sup> There would be a two-stage process: (1) obtaining resource use rights under one act (confirmation that the proposed use were optimal),<sup>320</sup> and (2) securing consent under another act (confirmation that environmental effects were acceptable).

Secondly, and alternatively, balancing legislation could set a relative test. Instead of allowing multiple competing proposals to meet a threshold of 'sustainability', it would instead compare proposals seeking to use the same resource and, using a structured and competitive process, determine which one was 'best'. The idea of 'best' could mean many different things (e.g., the least impact on the environment, or the greatest enhancement of social wellbeing, or the best convergence of all wellbeings). But the key point is that, if balancing legislation imposed a relative test, it is then much more difficult to separate allocative questions. It would be inefficient and confusing if one proposal were deemed to be best under balancing legislation (e.g., because its adverse effects were least), only for an alternative proposal to be considered best under an Allocation Act (e.g., its social benefits were largest). We would need a single, normatively aligned, decision. That would be best achieved under a single statute with a coherent purpose.

Separating allocative questions may prove difficult for a different reason. To allocate resources, we must first know how much of a resource is available to allocate. For example, if a regional plan specifies a maximum amount of nitrogen in a catchment, or a minimum flow in a river, we have some idea of how much resource there is left to allocate. If we know what we can use, a separate and proactive approach to allocation is possible. However, if a plan does not (or, due to a lack of information, cannot) set clear limits within which resources can be allocated (relying instead on discretionary consent decisions), each application must be assessed on its own merits. In other words, we do not always know whether there is a resource to allocate until we consider the most recent application.<sup>321</sup> It would hardly be fair to use one person's application to determine whether a resource is available, only to turn around and allocate that resource to someone else under separate legislation. The main lesson here is that our laws need to be clear as to what is available for allocation, but it also suggests that questions of allocation may need to be closely integrated into balancing legislation.

#### Question for discussion:

**- Should allocative decisions be integrated into balancing legislation, or form a stand-alone act?**

## The place of domain-based statutes

Above, we have spent a considerable amount of time focusing on outcomes-based statutes. That makes sense – they are the product of the primary lens used in our current system, and therefore contain most of the system's content. For example, they manage most domains and most sectors to the extent they are relevant to those outcomes. We do not have a domain-based 'Freshwater Act' to manage the adverse effects of agriculture on rivers, or a sectoral 'Agriculture Act' to manage the adverse impacts of agriculture on the environment. These things are dealt with by outcomes-based legislation – namely the RMA. As discussed earlier, we think that it is appropriate to keep an outcomes-based statute at the core of the system. However, some may consider that targeted domain-based statutes (especially for water) could avoid 'objective overload' and produce better outcomes. In Europe, dedicated water legislation is not unusual.

However, as identified earlier, not all domains have been integrated fully into the RMA. Some domains (or, more accurately, parts of them) and some sectors have their own targeted statutes. Notable among such domains are the climate (under the Climate Change Response Act)<sup>322</sup> and aspects of the marine and coastal area (under the Marine and Coastal Area [Takutai Moana] Act). Furthermore, specific components of some domains have separate statutory frameworks (such as wildlife, marine mammals and the ozone layer). These are concerned with protection and balance, and they do not pursue outcomes that are fundamentally different from those sought under the RMA (sustainable management). They simply have more specific expressions of this idea.

The question for legislative design is whether this smattering of domain-based acts outside the RMA and EEZ Act can be justified. There seem some compelling reasons to try to integrate such statutes in a future system. Is not the idea behind integrated management that we should consider impacts on all domains within a single framework? Carving out some domains (or parts of them) can create confusion and uncertainty as to the relationships between legislation and what falls within the jurisdiction of different decision-makers.<sup>323</sup> Because they are all generally concerned with environmental protection or balance, domain-based statutes have purposes that are not fundamentally inconsistent that of the RMA. Thus integration would not create undue normative tension.

However, there are other factors to consider. Would an Act like the RMA become excessively long, complicated and inaccessible if a statute like the Climate Change Response Act or Ozone Layer Protection Act were integrated into it?

319 We would not *have* to enact a separate act; we could enact a separate part within balancing legislation concerned with allocation (like Part 7A of the RMA). We would, however, have to expand the purpose of the Act to include allocative outcomes.

320 As will be explored elsewhere in the project, using the law to make an initial allocation of public resources does not preclude the subsequent use of pricing and trading mechanisms.

321 For example, an application to occupy the coastal marine area may fail not because another use is preferable, but because we realise on its facts that the proposal would have unacceptable impacts on public access (there is not enough privatisable land left to allocate). An application to discharge a chemical into a waterway may fail not because another person wants to conduct a similar discharge for a better purpose, but because it would infringe policies around the health of waterways (there is not enough assimilative capacity to allocate).

322 A national policy statement and national environmental standard *could* still deal with climate change mitigation, although not entirely. In practice, a policy decision has been taken to pursue climate change mitigation through an emissions trading scheme rather than regulation.

323 For example, there has been extensive confusion and litigation concerning what exactly consent authorities can consider under ss 104E and 104F of the RMA (which prevent consideration of climate change mitigation). See Severinsen G, 'Climate change considerations under the Resource Management Act: A barrier to carbon capture and storage deployment in New Zealand?' (2014) 22 *Waikato Law Review* at 117; *Greenpeace NZ Inc v Genesis Power Ltd* [2008] NZSC 112, [2009] 1 NZLR 730; *West Coast ENT Inc v Buller Coal Ltd* [2013] NZCS 87, [2014] 1 NZLR 32.

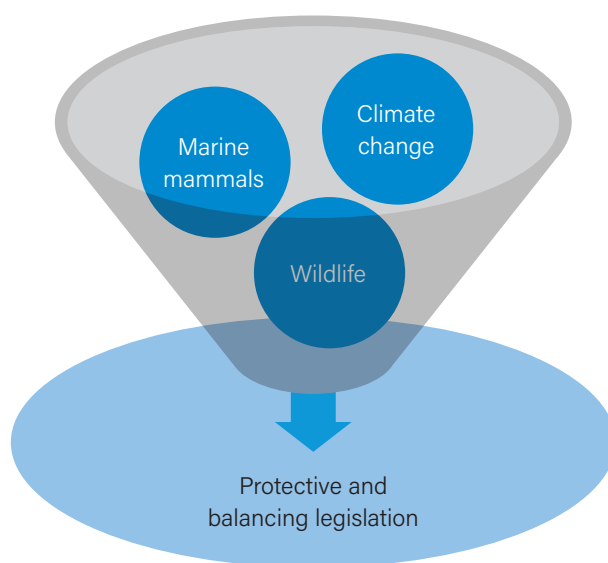
Provisions in the Climate Change Response Act relating to the emissions trading scheme, in particular, arguably form a coherent and quite separate code because the nature of the instrument used is so specific and complex. On the other hand, would we use the same argument to justify creating another sector-specific statute for the trading of, say, water rights? Or any other trading framework? Would we enact bespoke legislation just because a novel kind of tool, such as environmental taxation, were needed? Such logic could lead to troubling fragmentation of domain-based management and leave the RMA (or something like it) as just one among many statutes.

Some may argue that there is something fundamentally different about global issues like climate change and ozone protection that means they need their own statutes. It is certainly not because they require national-level intervention, or because other statutes are concerned only with direct impacts of activities in New Zealand; the RMA already contemplates that national environmental standards can be made concerning climate change mitigation, and there is case law confirming that global impacts are within the wide scope of the RMA.<sup>324</sup> But is it, for example, easier to translate international obligations, including (potentially) internationally linked trading regimes, into stand-alone frameworks?

We are used to treating climate change as a world apart, but as the government ventures into policy development for yet another separate statute – the Zero Carbon Act – it is timely to consider whether this assumption should remain unchallenged. If we were to integrate climate change mitigation more closely into an act like the RMA through the use of national environmental standards, a close relationship would be needed with both an emissions trading scheme and other policy measures under a Zero Carbon Act. While the aim of the proposed Act is laudable, we need to think hard before adding layer upon layer of domain-based legislation with all the inter-statutory boundaries that creates.<sup>325</sup>

The Marine and Coastal Area (Takutai Moana) Act is, if anything, even more fraught with difficulty. The Act was the culmination of an extremely difficult conversation around cultural and public interests in the foreshore and seabed, and is not just concerned with biophysical protections or balance. For example, it actively protects cultural rights to use resources, and is concerned with ownership, not just resource rights. Although the Act is domain-specific, its role in the system may be better compared to Treaty settlement legislation than domain-based legislation. It requires a close interface with an act like the RMA and instruments under it, but it may not be able to be comfortably integrated within it (unless the purpose of such legislation were expanded). That is, however, one option that *could* be pursued.

Statutes protecting particular components within domains – like marine mammals (under the Marine Mammals Protection Act 1978), and wildlife and native plants (under the equally creatively named Wildlife Act and Native Plants Protection Act) – could conceivably also be integrated into broader outcomes-based statutes concerned with protection or balance. They seek the same kinds of outcomes – protection, conservation and management of natural resources. The fact that the Minister or Department of Conservation has primary management responsibility under an act is not itself good reason to separate it, as those institutions have some strong roles under the RMA as well. However, as with the Climate Change Response Act, the tools these acts use to achieve those outcomes are quite different. The RMA imposes restrictions on some activities that could impact on marine mammals and wildlife indirectly, but does not restrict the taking or holding of marine mammals and wildlife. Furthermore, because the RMA does not restrict fishing directly, the impacts of fishing on marine mammals is a gap that is filled by the Marine Mammals Protection Act.<sup>326</sup> It thus needs a close interface with the Fisheries Act as well as the RMA. Whether such legislation should be integrated into more general outcomes-based statutes may therefore depend on the tools – the kinds of restrictions – we are willing to see in the latter.



**Figure 30** A model in which domain-based statutes are more fully integrated into outcomes-based legislation

**Question for discussion:**

**• Should we integrate domain-based statutes into broader outcomes-based legislation?**

<sup>324</sup> See, for example, *Environmental Defence Society Inc v Auckland Regional Council* [2002] NZRMA 492 (EnvC).

<sup>325</sup> Climate change mitigation can be addressed through many quite different frameworks: regulatory statutes dealing with air emissions and land use planning, sectoral statutes dealing with forestry, construction legislation dealing with buildings, emissions trading legislation, and transport planning legislation. It would be misleading to say that the Climate Change Response Act is the only See, for example, *Environmental Defence Society Inc v Auckland Regional Council* [2002] NZRMA 492 (EnvC), legislation that tackles – or is capable of tackling – climate change mitigation.

<sup>326</sup> Impacts on marine mammals are environmental impacts that can be considered if consent is required, but the *trigger* for consent, and the opportunity to consider them, cannot be the taking of fish.

### The place of location-based statutes

Location-based statutes generally perform roles that are not already provided for in previous layers of legislation. Most of them are protective; for example, we have a plethora of statutes protecting national parks, reserves, marine reserves, and other conservation areas. These are, importantly, not *carved out* of general frameworks like the RMA; they continue to apply. Location-based acts impose *additional* requirements and restrictions in particular areas. As such, the RMA's coherence is not threatened by this raft of protective statutes, and there seems good reason to keep them distinct.

Although protective location-based legislation does not undermine the coherence of more general regimes like the RMA, it is still worth asking whether the sheer number of such statutes can be rationalised. These already tend to revolve around the Conservation Act, and extensive cross-references are made. So does it make sense for national parks, different kinds of terrestrial and marine reserves, forest parks, specific lakes, sanctuaries – the list goes on – to be managed under separate statutes? Many of them apply to multiple areas having the same broad character (such as national parks under the National Parks Act), but others apply only to particular sites (such as the Waitakere Ranges Heritage Area Act). If combined into fewer statutes, areas could still be managed in different ways as parts within them. They need not abandon the strategies and plans that apply to them and start from scratch. Their

particular governance and management arrangements have often been hard fought, and should not be abandoned. But if the basic purpose for which many exist – some form of nature conservation or protection – is common, then coherence, accessibility and understanding can only be enhanced by some degree of amalgamation. And if we require greater protection for new areas, providing common and well-understood categories and processes for conflict resolution within a statute can dispense with the need for a new parliamentary process every time.<sup>327</sup>

#### Question for discussion:

- **Should we amalgamate or otherwise rationalise our protective location-based statutes?**

In contrast to protective legislation, a potentially troubling trend from a design perspective has been for location-specific statutes promoting *development* to erode more general legislation. For example, the HASHA Act essentially overrides parts of the RMA in defined locations designated as special housing areas. An urban development authority proposal has been touted to do a similar thing, on a much grander scale and for much broader reasons.<sup>328</sup> Under the previous government there was even talk of legislation that could impose 'special economic zones' to get around the RMA's restrictions on significant projects.<sup>329</sup> Ignoring the substantive merits of such measures, we suggest that this design trend



**Figure 31** A model in which protective location-based statutes are rationalised. Many more such Acts exist than are shown.

<sup>327</sup> As can be seen with the challenges and controversies surrounding proposed protections for the Kermadec Islands.

<sup>328</sup> Although whether they can override the RMA's purpose and principles, and not just transfer decision-making power to an urban development authority, remains to be seen under the current government's approach.

<sup>329</sup> See Forest & Bird, 'OIA reveals Government plans to circumvent rules for new coal mines' (11 July 2017), <http://www.forestandbird.org.nz/what-we-do/publications/media-release/oias-reveal-government-plans-circumvent-rules-new-coal-mines>



should be halted and reversed.<sup>330</sup> If we need to change the balance between social and environmental wellbeing in cities, or between the wellbeings of different groups, that debate should be conducted in a more general way and enshrined in general legislation. We envisage that the removal of clear biophysical bottom lines into a separate Environmental Protection Act could provide more latitude for environmentally responsible housing stock to be built faster, and in appropriate locations, under more integrated and accessible balancing legislation that explicitly recognises the value of resource use.

**Question for discussion:**

▪ **Should we continue to enact location-specific, and development-focused, legislation that is carved out from more general outcomes-based statutes like the RMA?**

**The place of sectoral statutes: Fisheries, forestry and construction**

Currently, some of our resources (such as fisheries, forestry and built resources) are managed, at least in part, outside outcomes-based statutes like the RMA. Such acts are best described as sectoral, because they focus on a particular way in which people use resources, not the resources themselves.<sup>331</sup> As described earlier, sectoral regimes are usually about facilitating the use of resources in particular ways for social and economic wellbeing, not ensuring their protection. Fish are managed in order to maximise the amount we can catch over time. Minerals are managed to obtain royalties for the social and economic benefit of New Zealanders. We build roads for people's social and economic wellbeing, and we have a Building Code primarily to safeguard people's health and safety. In contrast, outcomes-based and domain-based regimes are concerned with protecting resources from use by imposing bottom lines or providing a framework for balancing different interests.

Most sectoral acts do not currently escape obligations under outcomes and domain-based ones (a miner needs a mining permit as well as resource consents, and a builder needs authorisation under the RMA and Building Act) but some do (a fisher does not need a resource consent under the RMA). There should, in theory, be little overlap or confusion, and sectoral acts can justifiably remain separate to the extent they promote particular ways of using resources (subject, of course, to environmental restrictions in other acts).

In some sectors this theoretical separation translates well to practice. Maximising the social and economic benefits of many kinds of resource use does not rely on the resource being protected from use. For example, refraining from digging up gold today will not increase the total amount of gold we have tomorrow. Refraining from building a road or gas pipeline today will certainly not result in a more extensive transport or energy network tomorrow. For the promotion of these sectors, it makes sense to retain bespoke legislation with a development focus.<sup>332</sup>

However, for living resources, exploitation *does* rely on a degree of protection. For example, over-exploiting fish stocks today means we will have less fish on our plates and in our ports tomorrow. Here, sectoral statutes concerned with the exploitation of a resource can equally be seen as domain-based statutes concerned with its protection.<sup>333</sup> The thing that distinguishes them, though, is that protection is sought for very different reasons. We don't protect kiwi in order to eat more of them, but that is exactly what we do for fish.

This can create tensions for legislative design. There would be excessive overlap, inefficiency and confusion if we restricted the taking of fish in *both* the RMA and the Fisheries Act. But by including restrictions on catch in sectoral legislation rather than protective legislation we essentially accept that the connections between the protection and exploitation of fish need to be tighter than the connections between the protection of fish and the protection of marine ecosystems in which they live.<sup>334</sup> This may be for historical reasons – fisheries have always been managed in this way. It may be that, like hazardous substances legislation, a stand-alone framework recognises the highly technical and specialised nature of decisions.<sup>335</sup> Inter-statutory connections still exist, of course; but they are liable to be weaker than those within a statutory framework that are guided by a common purpose.

**Question for discussion:**

▪ **Is the protection of some resources within a framework focused on their exploitation the best way to improve ecological outcomes? Does it really make a difference?**

The forestry sector is in a slightly different position. The Forests Act is sector-specific, but it is primarily focused on protective outcomes that would not be too out of place in more general outcomes and domain-based legislation. Originally conceived as a framework for the Crown to manage its forest land, it has been denuded by the partial privatisation of the sector.<sup>336</sup> It is now mainly

330 Berry S, Andrews H and Vella J, 'The death of the RMA by a thousand cuts: The next two incisions' (2017) *Resource Management Journal* at 3; and Berry S and Andrews H, 'The final straw for the RMA? Some shortcomings of the Resource Legislation Amendment Bill 2015' (2016) *Resource Management Journal* at 1.

331 For example, the Fisheries Act is concerned with the taking of fish, not the impacts of land based pollution on fish and their habitats. The Forests Act is concerned with how people harvest, process and export timber, not with the impacts of activities on trees or bush.

332 For example, under the Crown Minerals Act, Electricity Act, Gas Act, and LTMA.

333 This is more problematic for public resources than private resources, because people who own resources are more likely (although not guaranteed) to maximise their longer-term viability by protecting them.

334 In a similar way, as discussed earlier, that connections between local government financial planning and the local funding of transport infrastructure need to be more closely linked than the planning of local and central transport infrastructure.

335 Although the connections between the taking of fish and the health of overall ecosystems can hardly be described as less complex.

336 The management of Crown forestry assets is done under the Crown Forest Assets Act 1989.

an amalgamation of environmentally protective provisions (restrictions on felling, processing and exporting native timber) and climate change provisions (forest sinks). Whether protective provisions could be integrated into broader outcomes-based legislation may depend on the kinds of restrictions that it imposed (e.g., the RMA does not impose restrictions on export). Similarly, although the Energy Efficiency and Conservation Act is not overtly concerned with the protection of the environment,<sup>337</sup> its provisions would not be out of place in a balancing statute concerned with promoting activities having social, economic and environmental synergies.

#### Question for discussion:

- **Should the forestry sector, and energy efficiency, continue to be managed partly under sector-specific statutes?**

Finally, we observe briefly that the construction sector is regulated both under the RMA and the Building Act. The Building Act is at least partly a resource management statute, because buildings are a physical resource that are actively managed. But it does not aim to *prevent* construction in the interests of protecting the environment. Instead, it is overwhelmingly about safeguarding people's social wellbeing – their health and safety – by regulating *how* buildings are constructed.<sup>338</sup> We don't want buildings to collapse, or for people to suffer from the effects of asbestos.

However, the RMA is *also* concerned with the potential impacts of activities on people's health and safety, and restricts the use of land (including for building) partly for this purpose.<sup>339</sup> Local government plays a significant role in decision-making and implementation under both. Sustainable development is also one component of the Building Act's purpose. This, as well as the preservation of heritage, are key principles of the Act.<sup>340</sup> In short, the conceptual distinction between the acts is by no means a clear-cut one.

On a practical level, however, separation seems to make sense. No matter the overlap, the inclusion of a detailed, prescriptive or even performance-based Building Code under an effects-based act like the RMA may be an alarming and overwhelming prospect to many; attempts at controlling the design of building interiors under the RMA has been seen by some to be crossing a firm philosophical line.<sup>341</sup> There are many things in the Building Act that are not really about resource management at all,<sup>342</sup> but which still require a close connection with other provisions concerning the construction sector. In this sense, including some resource management provisions in sectoral legislation like the Building Act is a bit like incorporating

local transport infrastructure funding into the LGA; we place related provisions where the strongest links are required.

Furthermore, the Building Act is arguably of quite a different character not just because it is prescriptive, but also because it is less about the resolution of conflicting values than the RMA. In deciding whether a building is well constructed we may often need to weigh public safety against private cost, but we do not need extensive public debate about ethically charged trade-offs between nature and economic growth.<sup>343</sup>

However, even if we retain a separate sectoral statute for construction, we need to be vigilant about aligning our resource management objectives at the system level. Construction standards relating to energy efficiency, carbon neutrality, recycled materials, green infrastructure and living rooftops are crucial to the pursuit of environmental enhancement rather than just the mitigation of adverse effects, and should closely reflect or even mirror the values (and statutory wording) contained within more general outcomes-based legislation.

#### Question for discussion:

- **Is the conceptual or practical distinction between construction legislation and resource management legislation strong enough to warrant legislative separation?**

### The place of institutional statutes

As suggested earlier, we think that purely institutional statutes are justified where the institution or institutions with which they are concerned have functions separate from, or in addition to, those under other statutes. However, what such legislation looks like would depend on the nature of the institutions within the system, which is considered in a separate chapter. For example, whether a separate Environmental Protection Authority Act is justified may depend on what roles the Environmental Protection Authority played under other statutes.

That said, there may be a case for integrating some institutional statutes. For example, the Queen Elizabeth the Second National Trust Act, concerned with the preservation and enhancement of open space, could be integrated into a more general outcomes-based statute concerned with environmental protection. Although the former needs to be linked firmly to the real property 'system' – because it uses specific registrable instruments (covenants) – its purpose still fits comfortably within a protective statute.<sup>344</sup> The sustainable management of land under the RMA already requires the use of registrable

<sup>337</sup> See Energy Efficiency and Conservation Act 2000 s 5, which is equally explicable as pursuing the social and economic benefits of energy security.

<sup>338</sup> Including issues of access and durability.

<sup>339</sup> For example, consent can be required for buildings that block light or have an inappropriate footprint or envelope, and the Act also considers risks in relation to natural hazards. Restrictions can also be imposed based on how a building looks, its minimum floor size, provision of balconies, etc.

<sup>340</sup> Building Act 2004, ss 3 and 4.

<sup>341</sup> New Zealand Productivity Commission *Better urban planning* ((New Zealand Productivity Commission, Final Report, 2017) at 110. Even regulating balconies and parking spaces has been seen by some to be socially, not environmentally driven, and beyond the pale of what the RMA is meant to do.

<sup>342</sup> Such as the licensing of building practitioners.

<sup>343</sup> Although that is still possible under s 4 of the Building Act when considering principles relating to energy efficiency and water conservation.

<sup>344</sup> As long as bottom lines extended to the protection of landscapes. The Reserves Act also provides for the use of covenants.

property instruments, particularly in the context of subdivision, and that has not required the subdivision consenting process to be carved out into a separate framework. Although we offer no firm recommendations, it may also be worth considering whether heritage legislation should be more closely integrated with general protective and balancing legislation.<sup>345</sup> This may make clearer the relationship between, for example, the New Zealand Heritage List and restrictions on particular sites in district plans and the rather confusing advocacy, recommendatory and regulatory functions of different institutions in this area.<sup>346</sup>

Finally, at some point we must answer the broader question of whether the burgeoning challenges of growing, or otherwise complex, urban areas warrant the continued fragmentation of local government legislation (at least to the extent it is concerned with resource management). We already, to some degree, treat Auckland governance as a world apart. For very different reasons, Canterbury's legislation has also been bespoke. But should these be treated as justified reactions to overwhelming, unexpected and truly unique problems, or as the first drops of rain that start a flood of fragmentation? Do we create more responsive local government legislation capable of dealing with these kinds of issues as they arise, or do we accept that Auckland and Christchurch are exceptions?

### The place of Treaty settlement legislation

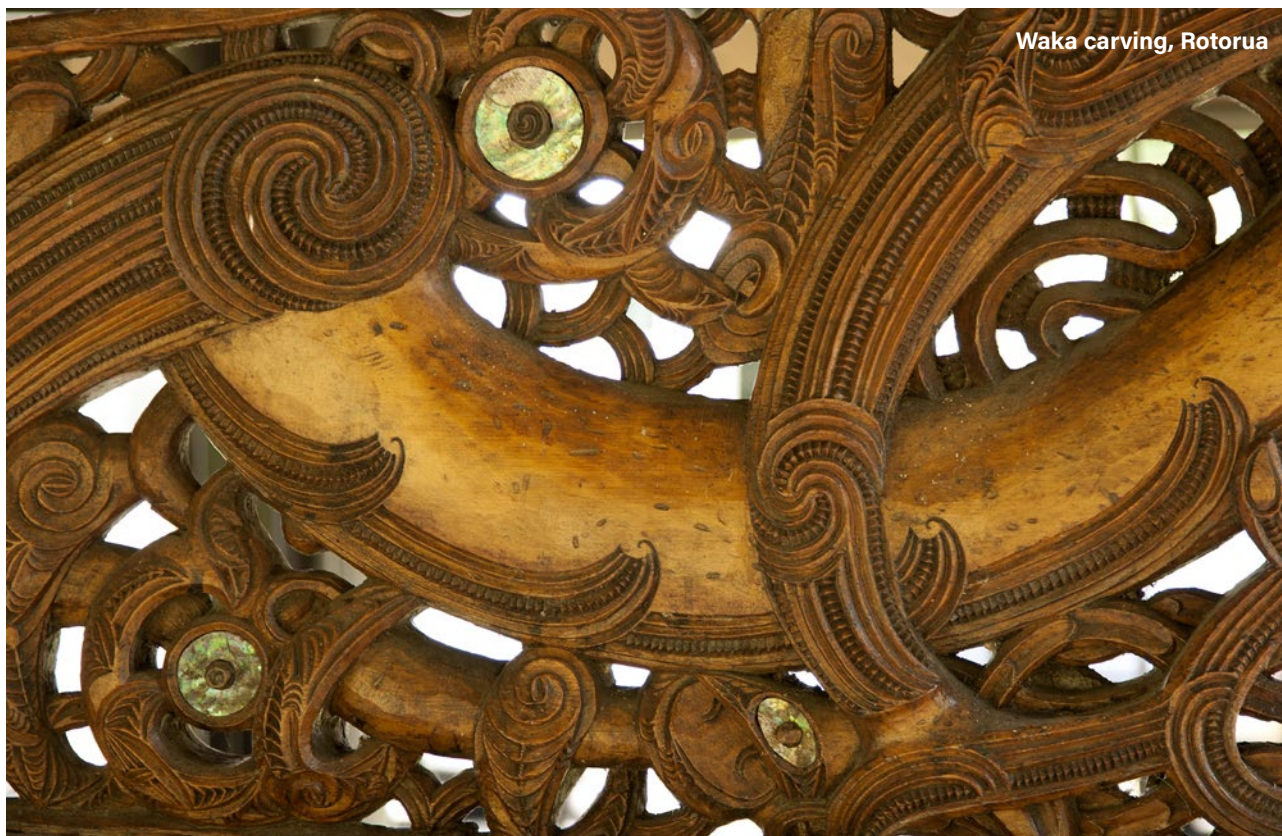
One of the most difficult areas of legislative design, which cuts across all of the lenses discussed above, is the role of

Treaty settlement legislation. We now have a significant, and expanding, body of bespoke statutes. While these tend to be location-based (because iwi and hapū possess mana whenua over defined areas), they usually address a wide range of matters and seek a wide range of outcomes. Acts are concerned with protection, exploitation, allocation, recognition, powers and participatory rights. Furthermore, settlement acts do not only deal with resource management matters.

Such statutes have developed against a legislative landscape with regimes like the RMA at its heart. Any proposal to fundamentally change the structure of our general laws thus poses a real challenge, because settlement legislation feeds into them in a variety of general and specific ways. It relies on their existence. Design principles unequivocally require the system to uphold the hard-won rights contained within settlement acts, but does this mean that the basic design of legislation they interact with must remain static? Is it possible or desirable to integrate an ever-expanding body of settlement legislation into more general frameworks, so that users do not have to consult and piece together multiple layers of statutes? Such questions are especially pertinent as New Zealand moves towards a post-settlement environment.

#### Question for discussion:

- How should we think about the structural place of Treaty settlement legislation in a future system?



<sup>345</sup> The Heritage New Zealand Pouhere Taonga Act is, from its title, institutional in nature. However, it is concerned with more than just a particular institution or its behaviour. For example, it imposes direct restrictions on modification and destruction of archaeological sites in s 42.

<sup>346</sup> For example, see s 74 of the Heritage New Zealand Pouhere Taonga Act 2014.



## j. How should statutes interact: Hierarchy, carve-outs and constitution

Only a brief note need be made here about the nature of relationships between statutes in the system. When describing the current system in section (e) above, we identified four kinds of relationships: (1) between statutes created under different lenses (which are so variable as to defeat any attempts at generalisation), (2) the normative relationship between protective, balancing and exploitative statutes, (3) the relationship between subordinate instruments made under different statutes (such as plans and regulations) and (4) the relationship between permitting processes under different statutes.

There is nothing further to add in relation to (1), and we defer most consideration of (3) and (4) to later chapters because they are so intimately related to the planning and permitting processes we use,<sup>347</sup> not just the structural place of statutes that set them up. Most commentary has focused on the inefficiencies produced by separate and misaligned planning and permitting processes under different acts.<sup>348</sup> However, we observe briefly for now that fragmentation at the level of primary legislation (e.g., a separate act for protection and balance) need not mean fragmentation at the level of plans and permits. Just as a single statute can produce a profusion of plans (picture the galaxy of plans under the RMA), so too can multiple statutes produce an integrated plan. We are attracted to the idea of a single, broad-ranging spatial plan, which would have a unifying effect on inevitably fragmented legislation.<sup>349</sup> The benefits of separating statutory purposes at the normative level does not *have* to come at the cost of accessibility to users at the coal face.

In relation to (2) – the normative relationship between statutes – we offer three thoughts. First, we think the current system’s basic approach to normative relationships remains appropriate. Primary legislation already tends to exist in a hierarchy, with protective statutes at the top, balancing ones in the middle, and exploitative ones at the bottom. The ‘Environmental Protection Act’ suggested earlier, which would set firm bottom lines, would see some components currently in the RMA elevated firmly to the top layer of this hierarchy.

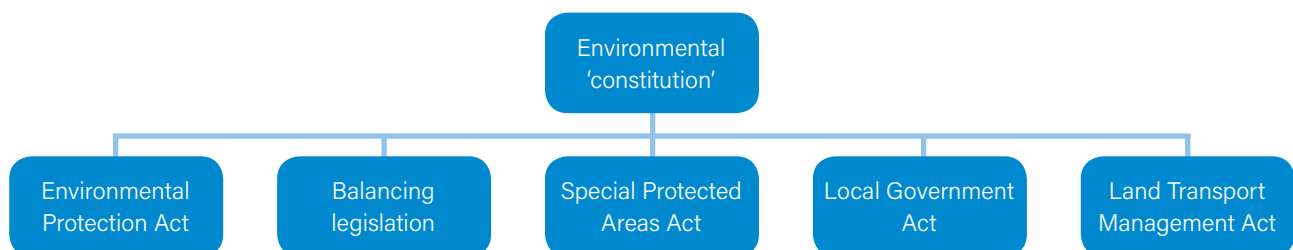
Secondly, we would suggest correcting some elements in the current system that do not comply with this approach. These are where bespoke development-focused statutes are carved out or excused from obligations under protective or balancing legislation. Some, such as the Civil Defence Emergency Management Act’s ability to override the RMA in emergency situations, seem sensible.<sup>350</sup> But others, such as the overriding nature of special housing legislation, have been less appropriate.<sup>351</sup> To the extent the basic content of such legislation is sound (which we do not comment on here), we would do better to integrate it within balancing or protective legislation. This echoes our earlier conclusion that sector-specific legislation (often concerned with resource use) should not be carved out of broader outcomes-based legislation (usually concerned with protection and balance).

Thirdly, the principle of integration tells us it is important that the whole suite of legislation in the resource management system is normatively aligned. It is also important that it *stays that way*. Statutes should not be amended in ways that lead them apart or undermine the coherence of the system over time. Different statutes will have different purposes, but each will fulfil an important role in the grander scheme of things. The resource management system should not be equated with a single statute – even one as important as the RMA.

Thus it may be worth considering whether an overarching framework statute, in the nature of a resource management ‘constitution’,<sup>352</sup> should be enacted to form the normative glue by which statutes remain in close and harmonious relationships with each other and our overall set of objectives. For example, it could ensure that the ‘environmental’ components of a Building Act were well aligned with the protective outcomes sought under protective and balancing legislation, and that resource management and local government legislation were never led in wildly different directions.

### Question for discussion:

- Do we need an overarching statute in the nature of an environmental constitution? If so, what would it look like?



**Figure 32** The potential place of an environmental constitution in the system. This is not designed to show all statutes.

<sup>347</sup> For example, ensuring an efficient process for people to obtain permission under the RMA, Conservation legislation, HSNO Act, EEZ Act, and Building Act. Also relevant is the question of what we choose to put in primary legislation versus subordinate instruments.

<sup>348</sup> See Sweetman G, ‘Reforming planning’ (2006) 160 *Planning Quarterly* 9. Most commentary has focused on the Building Act, LTMA, LGA, and Conservation Act.

<sup>349</sup> Broad-ranging in that it would include contain strategy, policy and regulatory provisions created using a single process by which multiple pieces of legislation were implemented (including transport, land use, and ‘environmental’ planning legislation).

<sup>350</sup> Civil Defence Emergency Management Act 2002, s 111.

<sup>351</sup> As well as the Point England Development Enabling Act, the urban development agency model as proposed by the previous government, and the proposal for special economic zone legislation.

<sup>352</sup> This could act as a guide only (to be considered when other legislation were amended), or its legal effect could be more forcefully embedded in some way.

## k. Summary

In this chapter we have considered how our resource management legislation is designed. It by no means contains a complete account of the current system, or a specific and firm set of recommendations for a future model. Instead, it has sought to construct a framework from first principles, within which we can think about questions of legislative design in a more considered way.

We started by identifying key design principles and different lenses through which we could separate or integrate statutes. Above all, we think that our suite of

legislation needs to be coherent. We then assessed the current system, and suggested that the basic way in which it is structured remains sound. In particular, we should continue to find statutes defined by the kinds of outcome sought – some form of RMA – at the heart of the system.

However, there is room for improvement. In particular, there may be merit in exploring what could be achieved by separating legislation focused on the protection of the natural world (bottom lines) and legislation providing for the weighing, and active pursuit, of all wellbeings (balance). Figure 33 below outlines the main ideas explored in the chapter, and is followed by a more fulsome summary.

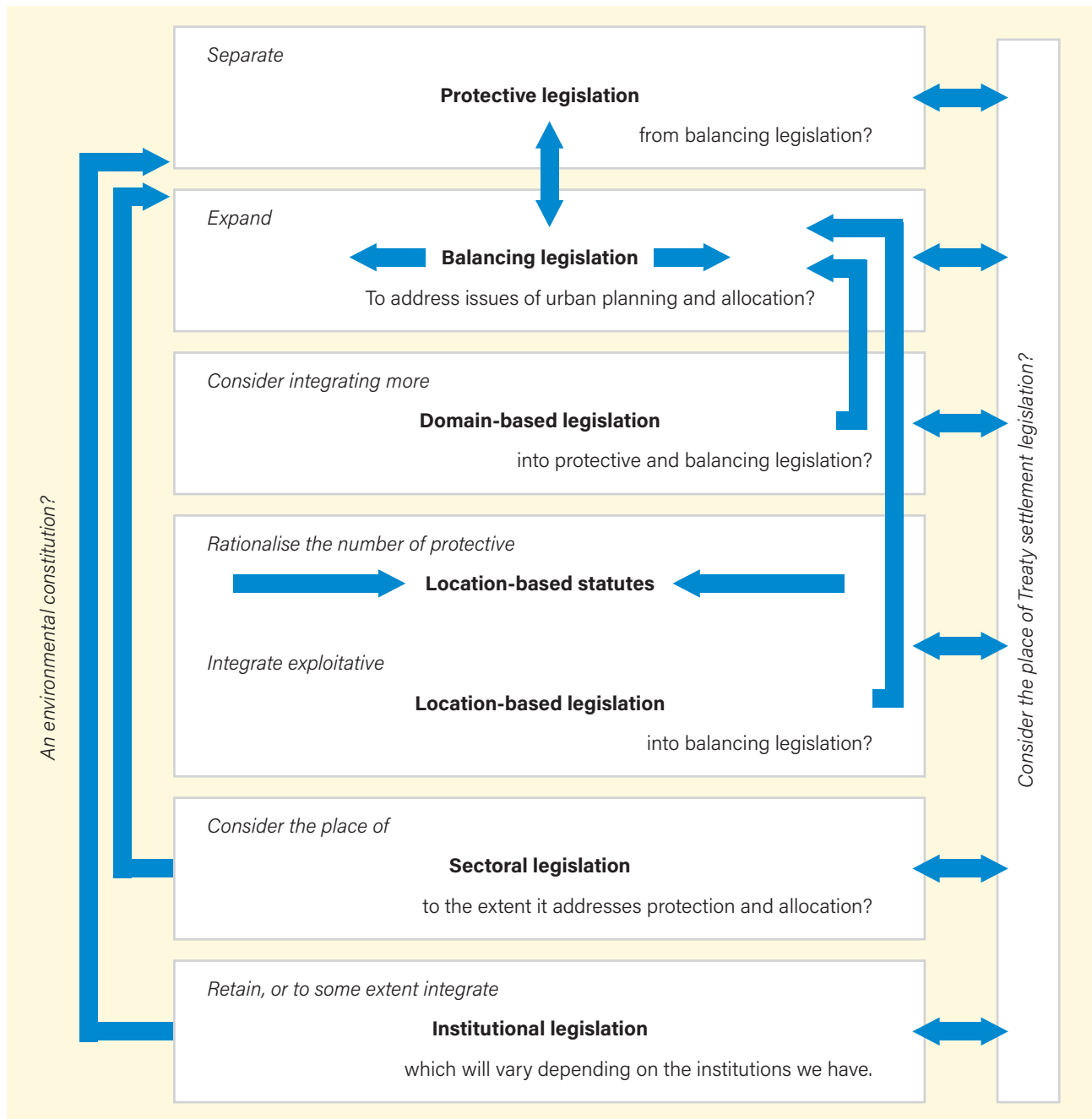


Figure 33 A summary of ideas for legislative design

- Good legislative design means choices that reflect design principles: coherence, certainty, accessibility, durability, integration, being tailored to New Zealand circumstances, and efficiency.
- There are different lenses we can look through when deciding how to split up our statutes: outcomes (which has created the RMA), domains (which has created the Climate Change Response Act), locations (which has created the National Parks Act), institutions (which has created the LGA), and sectors (which has created the LTMA).
- We do not need to pick a single lens, but multiple lenses should be used in a consistent way across the system. Lenses can be used in sequence, with any gaps in one lens being filled by the next (e.g., anything an outcomes-based statute like the RMA does not do can be filled by a location-based statute like the National Parks Act, and so on).
- The current system uses multiple lenses – in the sequence described above – and its core statutes have a surprisingly high degree of coherence.
- We should continue to split up our statutes by using this basic sequence of lenses.
- Within each lens, however, we could reconsider how we split our statutes.
- Outcomes-based statutes like the RMA could be expanded in scope to more fully embrace the benefits of resource use in urban planning and the allocation of resources.
- However, this expansion could be complemented by splitting up outcomes-based statutes into an ‘Environmental Protection Act’ (concerned with biophysical bottom lines) and a balancing statute (concerned with the active pursuit of all wellbeings, the balancing of conflicting wellbeings, and – potentially – the allocation of rights to use public resources).
- Any separate balancing statute should be expressly subordinate to an Environmental Protection Act.
- We could usefully think about whether integrating (or at least better linking) specific domain-based statutes into broader outcomes-based statutes is desirable.
- The promotion of particular sectors and their use of resources (such as transport) should continue to be achieved through sector-specific legislation, where needed.
- We could integrate some location-based statutes into outcomes-based statutes where they do not seek an *additional* layer of outcomes (e.g., where they have been carved out).
- We could consider whether Treaty settlement legislation should be integrated into more general frameworks.
- We could usefully rationalise our location-based statutes, integrating them with each other where they pursue the same or similar aims.
- The normative relationship between statutes in the current system (a hierarchy of protective, balancing and exploitative legislation) is sound, but imperfections in how it is applied should be fixed.

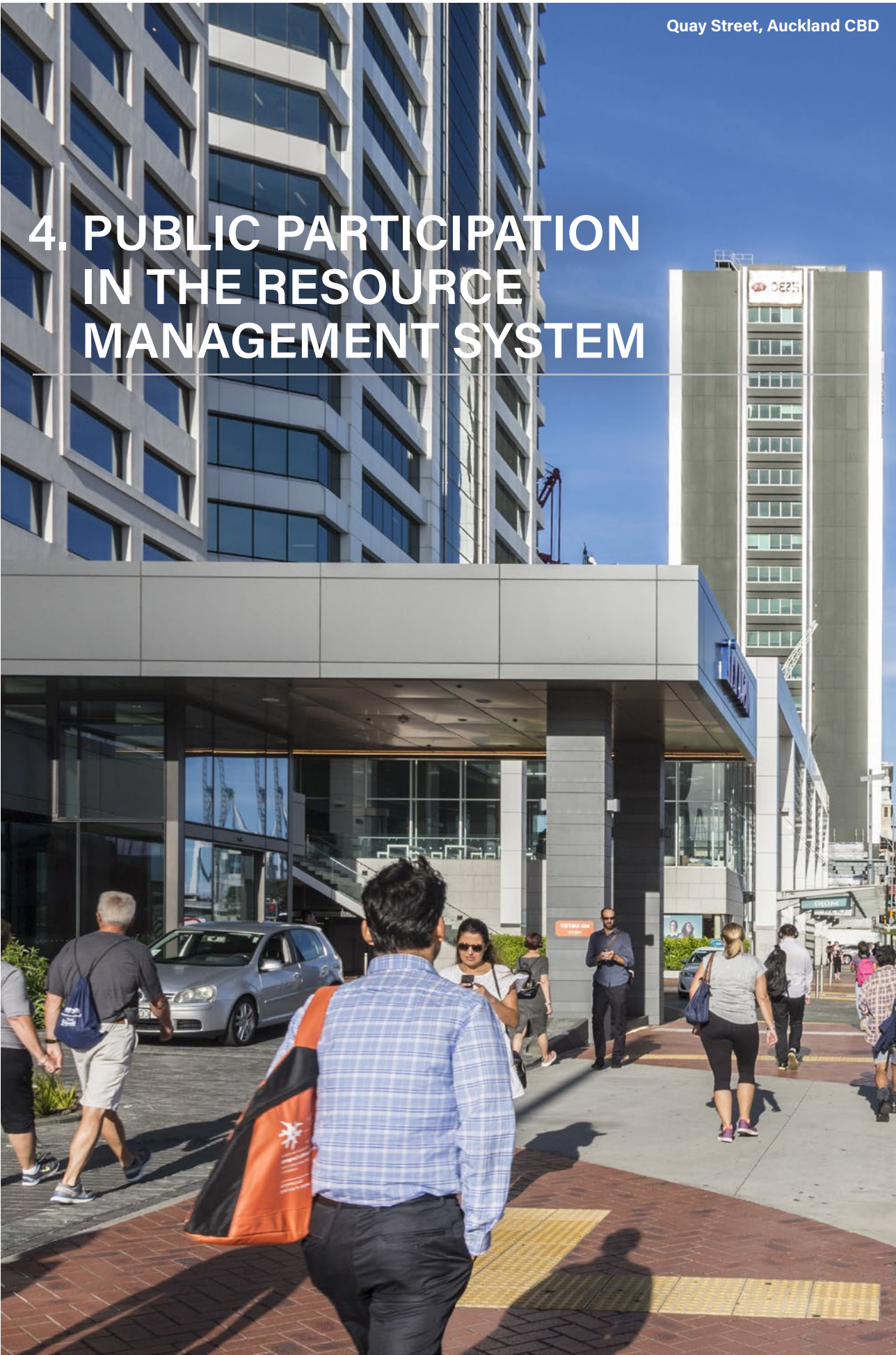








# 4. PUBLIC PARTICIPATION IN THE RESOURCE MANAGEMENT SYSTEM





## Table of contents

### a. Introduction

### b. A brief history

### c. What is public participation?

### d. The benefits and costs of public participation

*Participation as an information-gathering tool*

*Participation and durability*

*Improved relationships*

*Social learning*

*Fairness, equity and legitimacy*

*Decision quality*

*Consultation fatigue*

*Participation for 'ulterior' purposes*

*Time and cost*

*Balancing costs and benefits*

### e. Public participation in the current system

*Participatory rights under key New Zealand statutes*

### f. Key questions for reform

## a. Introduction

Public participation in matters of resource and environmental management is widely recognised, both in New Zealand and overseas, as being extremely important. Allowing people to be involved has many benefits. It can improve the quality of decisions, provide catharsis for people holding strong views, protect the legitimate interests of private persons as well as allowing the voice of public interest groups to be heard, and lead to greater

acceptance of outcomes. It is particularly important where competing values must be weighed, and where the potential impact on individuals is large.

However, participation cannot be absolute or endless. Being able to participate does not grant a licence to prevent outcomes from being realised or to defeat the public interest through the defence of private interests. Participatory processes can also be extremely costly and time consuming. Against this inescapable background of legitimate tensions, the status of public participation in New Zealand environmental law has fluctuated over the years, often in response to the changing social and political context. There are conflicting views as to its necessity and its desirability.<sup>353</sup>

In this chapter, we begin by considering what public participation means in the context of resource management. At first glance, it seems obvious. However, the phrase hides a complex spectrum of ways in which different kinds of people can be involved in decision-making. We then consider the advantages and disadvantages of public participation. As the extent of participatory rights grows larger, its benefits may grow, but so too may its costs. Innovative approaches are possible, but a legitimate tension between benefits and costs is a reality that is always encountered at some point. At some point costs will outweigh benefits, or there will be a diminishing return on increasing participatory rights. But the exact point at which that happens usually requires a value judgement. Those who focus on benefits are usually not the ones who must bear the costs, and those who focus on the costs are usually not the ones who reap the benefits. As such, the two seldom coincide.

We then consider how participatory rights are provided for in a selection of New Zealand's existing resource management laws, before offering some thoughts and identifying key questions that need to be resolved. As such, this chapter represents a work in progress.



353 See Paelhke R, 'Democracy and environmentalism: Opening the door to the administrative state' in R Paelhke and D Torgerson (eds), *Managing Leviathan: Environmental politics and the administrative state* (Broadview Press, Toronto, 2005) for a seminal argument that environmentalism and democracy can go hand in hand.



## b. A brief history

Public participation is a relatively recent development in resource management law. An ideology that put private property interests at the forefront of decision-making prevailed throughout the nineteenth century, based on the traditional common law approach to property rights. Put simply, property owners had a right to their property, and government could not 'dispose of the estates of the subjects arbitrarily'.<sup>354</sup> The protection of private property rights was seen as a constitutional imperative because, in this era, a person could only vote or stand for the executive office if they owned property. A landowner was entitled to be involved in decisions that could impact on private land. In the twentieth century, following universal suffrage and a greater acceptance of utilitarianism, a greater emphasis was placed on the wider public good, and rights were widened.<sup>355</sup>

Gradually the law began to provide rights of direct participation in the planning process, not by virtue of property ownership but by virtue of more general principles of democracy and justice. Many credit the ideas of John Stuart Mill with this ideological change. Mill argued that public participation was the only true way to legitimise decisions made in the interest of the public. Rather than a distant administration imposing regulation focused on the public good, all of those who were likely to be affected by, or who have an interest in, a proposed development or change in the environment should have a right to participate in the decision-making process. That way, the people would own decisions that affected them. The idea was that public officials should act only after a full public debate and subject always to continuous consultation with the public. These later ideologies were reflected in the development of New Zealand planning law, including the RMA, as well as in the more general design of resource management institutions.



## c. What is public participation?

Participation has an interesting history, and one coloured by social and ideological change. But what do we mean when we speak of public participation in modern times? Like 'democracy' and 'justice', it is often a term that is used freely and loosely to refer to a great many different things. Do I participate in resource management when I mow my lawn? In a sense, I do. I am managing a natural resource. But that definition is likely to draw frowns from those in the profession. It is not really what we mean. Do I participate when, as a regional councillor, I notify a regional coastal plan? I am certainly involved in a formal decision-making process. But, again, it is not really what we mean. A councillor is not the 'public' in this sense.

In simple terms, public participation refers to the involvement in a decision-making process, of a public nature, by those who are affected by a decision but do not make it. I do not participate in a public decision if I choose to go for a swim in a river, but I do if I make a submission on a resource consent application that would affect my ability to do so. This definition may outline some boundaries for what is and is not participation, but they remain fuzzy boundaries. At one extreme, I 'participate' if I casually glance at my open newspaper and see a public notice informing me that the local council has made operative its district plan. I may do so if I exercise my powers under official information legislation to obtain the minutes of a council meeting. At the other extreme, I arguably 'participate' if I am charged with developing a plan through a collaborative process or a community-led initiative. There can be grey areas where active 'participation' morphs into a species of decision-making or into a passive absorbing of information.

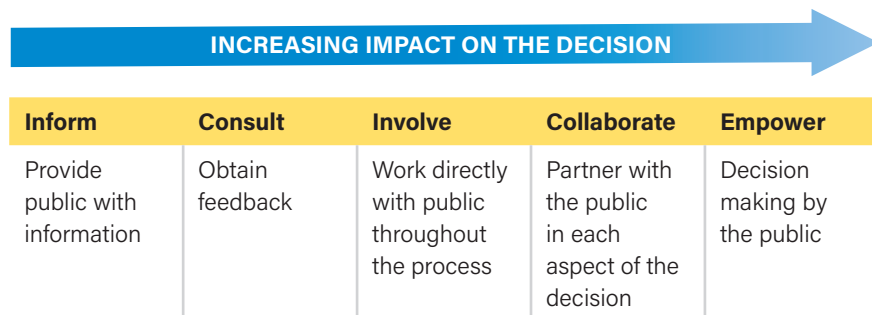
Within these fuzzy boundaries, public participation can mean a variety of things. The public doesn't always mean 'everyone'. It can mean quite narrow groups of people (e.g., consultation rights sometimes apply only to public authorities or to tangata whenua). It can mean everyone in the known universe – were Mars to be settled at some point in the future, that would not stop settlers from making a submission on the Stratford District Plan. On a more prosaic level, an expat Kiwi living in London can also do so. And in between these extremes, it often means people who are directly affected. A 'decision' is also a slippery concept – central government is constantly producing discussion documents on aspects of policy relating to resource management, and inviting submissions. These often reflect general thinking and options rather than decisions per se, and are quite different to the formal plans that are required to be notified under the RMA. Yet both are processes in which it is meaningful to talk about the public being involved.

Similarly, the concept of participation can come in many shapes and sizes. Although it does not capture every possible way in which a person may contribute to a decision,

354 McAuslan P, *The ideologies of planning law* (Pergamon Press, Oxford, 1980).

355 Utilitarianism is an ethical theory that determines right from wrong by focusing on outcomes. It is a form of consequentialism. Utilitarians believe that the purpose of morality is to make life better by increasing the amount of good things in the world and decreasing the amount of bad things.

the International Association for Public Participation (IAP2) has produced a helpful spectrum of ways in which people may participate, from weak to strong, and which is 'quickly becoming an international standard'.<sup>356</sup> According to the IAP2, the level of public participation a decision should attract depends on three factors: the goal of the public engagement, the promise made to the public, and the techniques employed to achieve public participation.



**Figure 34** The IAP2's public participation spectrum

At the weaker end of the spectrum, public participation may be used to *inform* the public. This is to provide the public with balanced and objective information so they can understand the problem, alternatives, opportunities and/or solutions. The decision-maker is promising the public they will be kept informed by utilising techniques such as fact sheets and websites.

The next step on the spectrum is *consultation*. The goal here is to actively obtain public feedback on analysis, alternatives and/or decisions. The promise by the decision-maker is to keep the public informed as well as to acknowledge and listen to their concerns and aspirations, and provide feedback on how the public input influenced the decision. Methods such as focus groups, surveys and public meetings are utilised to achieve this. New Zealand case law is clear that consultation, in the context of a statutory duty, does not equate to or require negotiation.<sup>357</sup>

*Wellington International Airport Ltd v Air New Zealand* [1993] 1 NZLR 671 is New Zealand's leading case that affirms the statutory duty to consult does not equate to negotiation. So long as the decision-maker held a meeting with those they were required to consult with, provided the relevant information, entered the meeting with an open mind, took due notice of what was said and waited until they had had their say before making the decision, then the decision can properly be said to have been made after consultation.

The submission process under the RMA could be considered a statutory form of consultation in this sense, in that members of the public have the opportunity to provide feedback on a proposal in order to influence a decision. However, it is also more than this, because members of the public (so long as they submit in the

first instance) can also often appeal a decision to a higher authority. This form of public participation comes with a set of strong legal rights, particularly in the development of plans (resource consent decisions can often also be submitted on and appealed, but in more limited circumstances).

Public participation that seeks to *involve* the public in a decision is next on the IAP2's spectrum. Here, a decision-maker aims to work directly with the public. Its promise is to ensure that the concerns and aspirations of the public are reflected in the alternatives developed, and to provide feedback on how the public input influenced the decision. This is often achieved through mechanisms like community workshops and deliberative polling.

The next step on the spectrum involves *collaborating* with the public. The goal is to partner with the public throughout the decision-making process in order to develop alternatives and identify preferred outcomes. This level of public involvement promises that the decision-maker will look to the public for advice and innovative ideas in formulating solutions. It is expected to incorporate such advice and recommendations into a decision as much as possible. Common participatory methods employed include citizen advisory committees and consensus-building exercises.

The strongest level of public participation aims to *empower*. This places the final decision in the hands of the public. Here, the promise by authorities is simply to implement what the public decides. Mechanisms to achieve this include citizen juries, ballots or referenda, and delegated decisions. Some collaborative processes may also fit this description, although whether a participatory



<sup>356</sup> IAP2, 'Public Participation Spectrum' (February 2017), [http://www.iap2.org/resource/resmgr/foundations\\_course/IAP2\\_P2\\_Spectrum\\_FINAL.pdf](http://www.iap2.org/resource/resmgr/foundations_course/IAP2_P2_Spectrum_FINAL.pdf).

<sup>357</sup> *Wellington International Airport Ltd v Air New Zealand* [1993] 1 NZLR 671.

process is truly 'public' depends on how wide and how representative the people involved are.<sup>358</sup> It may be difficult to legislate for who gets to participate in such processes. Simply because a council is elected, for example, does not transform its closed-door decision-making into a participatory exercise.

Interestingly, the international definition of 'collaboration' is a weaker concept than some collaborative processes that have recently evolved in the New Zealand context. In the latter, iwi and stakeholder representatives can directly develop a policy or plan, collectively approve it through a consensus process, and then present it to the statutory agencies for implementation.<sup>359</sup> This approach falls partway between the fourth (collaborate) and fifth (empower) elements of the IAP2's spectrum, and is a local innovation. The spectrum is, however, a useful way to visualise how extensive participatory rights may be.

#### Questions for discussion:

- What do we mean by 'public' and 'participation'?
- What are the reasons for providing public participation?

### d. The benefits and costs of public participation

If public participation had only benefits and no costs – or vice versa – our system would look quite different. The reality is that it has both. It is extremely difficult to determine how significant a benefit or cost is, and when one outweighs the other.

In modern times it has been, in our view quite correctly, assumed that a degree of public participation in resource management decision-making is a very good thing. This is reflected in the values espoused by the IAP2, who see participation as:

- based on the idea that those who are affected by a decision should have a right to be involved in the decision-making process;
- involving an expectation that the public's contribution will influence a decision;
- promoting sustainable decisions, by recognising and communicating the needs and interests of all participants, including decision makers;
- seeking out and facilitates the involvement of those potentially affected by or interested in a decision;

- seeking input from participants in designing how they participate;
- providing participants with the information they need to participate in a meaningful way;
- communicating to participants how their input affected the decision.<sup>360</sup>

That is a glowing appraisal of involving the public in decision-making in a general sense. And it is quite true – public participation has much to offer the system. It increases the transparency of decision-making so that everyone who is affected knows what is happening and can be on the ground when it does. It provides additional information and knowledge to decision-makers, as locals often know the most about the nature and extent of local impacts. It also helps to provide checks and balances in the system. The RMA, in particular, relies on this; opponents of a proposal may bring additional technical evidence which tests that provided by the developer (who has a vested interest in the outcome) and may also challenge the decision-makers' findings. Participation can also provide catharsis, by providing an opportunity for people to tell their story and air their grievances. If people feel the process has been fair, and their concerns have been heard and properly considered, they are more likely to accept the outcome. In its most extreme form, public participation is a form of direct democracy where the community gets to make the actual decision, such as through a binding referendum (or, to a lesser extent, through a collaborative process). A community is more likely to own the outcome of such a process, even though some parts of it may grumble.

The underlying idea is that public participation enables decisions to reflect the interests and concerns of affected or interested parties, and is important for the 'democratisation of social values and better planning and fulfilment of public needs.'<sup>361</sup> Public participation is often considered an essential part of democratic governance in environmental matters.<sup>362</sup> It helps to realise principles of fairness and equity, while fostering better social relationships and increasing the opportunities for social learning. Its importance is enshrined in the Rio Declaration, with Principle 10 stating that 'environmental issues are best handled with the participation of all concerned citizens, at the relevant level.'<sup>363</sup> The concept is underpinned by three pillars: the right to information (transparency), the right to participate in decision-making processes, and the right to justice.<sup>364</sup>

358 For example, some collaborative groups may be 'cherry picked' or not reflective of broader society.

359 Although it does not have to be implemented by authorities, a collaborative process has been undertaken by the Land and Water Forum. See also the Stakeholder Working Group in the Sea Change Tai Timu Tai Pari process.

360 IAP2, 'Vision' (April 2018), <http://www.iap2.org>. The 'Vision' states they are the preeminent international organisation advancing the practice of public participation.

361 Marzuki A, 'Challenges in the public participation and the decision making process' (2015) 201(1) *Sociological Journal* 21.

362 Kiss G, 'Why should the public participate in environmental decision making? Theoretical arguments for public participation' (2014) 22(1) *Periodica Polytechnica Social and Management Sciences* 13.

363 Rio Declaration, Principle 10 states: 'At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.'

364 Sumudu AA et al., *Emerging principles of international environmental law* (Transnational Publishers, New York, 2006).



## Participation as an information-gathering tool

Public participation is valuable as an information-gathering tool. Decision-makers are able to access a wider information base if a participatory process is carried out, accessing local knowledge, experience and expertise. This adds to the overall pool of knowledge and the quality of information influencing a decision. Local information allows decision-makers to have a better understanding of the complex and dynamic socioecological systems and social processes of the local community, allowing a solution to be tailored to the local context.<sup>365</sup> Public participation allows public values and preferences concerning the matters at hand to be ascertained. The very nature of resource management decisions means they often involve a value trade-off or some form of cost-benefit analysis. A decision is more likely to meet the needs of the local community if these values and preferences of the community are taken into account.

## Participation and durability

Decisions that are made through processes involving public participation have been proven to last longer. Tailoring a decision to the local environment, according to community values and preferences, will produce a decision that better meets the needs of the community, in turn increasing the decision's durability. Furthermore, including the public in the decision-making process can often result in the public gaining a sense of ownership over the decision – they will be more willing to accept a decision if they perceive themselves to have had a hand in its creation. Finally, by engaging with the public early in the process, the decision-maker may gain valuable insight into any potential issues that may arise, enabling them to be addressed earlier and reducing the risk that they escalate into more serious issues further down the track. The greater the consensus achieved earlier on in the process, the more durable the final decision is likely to be.

## Improved relationships

Public participation can improve relations between the public and administrators by helping to foster an element of trust between them; the public have greater trust in the authority to make the right decision and the authority has greater trust that its final decision will enjoy a relatively smooth uptake. This trust can flow through to future dealings between the parties rendering difficult decision-making and future conflict resolution more achievable. Participatory processes in themselves provide a mechanism by which disagreements can be worked out in a regulated and controlled manner, thereby subduing conflict.

## Social learning

Public participation in decision-making processes promotes social learning. Just as a decision-maker benefits from the information it receives from the public, the public can benefit from the reverse flow of information that occurs. For members of the public to actively participate, they must first be educated on the matter. The better the flow of information between the decision-making authority and the public, the better the process and subsequent decision.

## Fairness, equity and legitimacy

Public participation reflects democratic principles; it provides individuals with the opportunity to influence a decision. It is predicated on the assumption that the decision-maker has entered the decision with an open mind and a willingness to consider differing points of view. A key aim of wide consultation is to reduce the power of key stakeholder groups to capture the process (due in part to their powerful networks and/or rights as landowners). Good public participation provisions should provide equal opportunity for all citizens to participate.

A public participation process that is seen as fair helps to legitimise a final decision. The multidimensional nature of decision-making typically results in there being winners and losers. The merits of the decision become less of an issue if the decision is publicly viewed as having been



365 Reed MS, 'Stakeholder participation for environmental management: A literature review' (2008) 141(10) *Biological Conservation* at 2417.

reached via fair process.<sup>366</sup> Members of the public will be more willing to accept a decision if they feel they were given a reasonable opportunity to influence it.

However – and at this point we find ourselves transitioning from the benefits of participation to its costs and challenges – establishing a fair process can be a difficult thing to achieve. Members of the public must first be made aware that they can participate, and understand the process for doing so. Some sectors of society may even need to be encouraged or incentivised to participate in the first place, and in recent years there has been increasing appreciation for the need for authorities to use innovative engagement techniques (including social media). Involvement requires access to information, and education, which is often not readily available. Participation can be onerous, and an individual participant may be disadvantaged by the limited resources they have access to, compared to organised interest groups. Court processes often favour those with resources and expertise. There are a few avenues like the Environmental Legal Assistance Fund which provide not-for-profit groups<sup>367</sup> with financial assistance to advocate for an environmental issue of public interest.<sup>368</sup> But the fund is not available to individuals.

Achieving a fair process is even more difficult when an issue involves specific stakeholders. The ‘public’ typically refers to a general collective of unorganised individuals who may have an interest, but not necessarily a direct interest, in a final decision. They very rarely bear the cost of the decision. ‘Stakeholders’, on the other hand, will be directly affected by the decision. Allowances may need to be made for greater participation of directly affected stakeholders.

### Decision quality

Public participation can enhance the quality of decisions by providing wide input, including by experts and by those with knowledge of communities. But some argue that involving the public in decision-making processes merely produces ambiguity and delays decisive action. Decision-makers open themselves up to a flood of information. There is no guarantee it is *good quality* information. Public input can be based on a misunderstanding or misinterpretation of a proposal. Where decisions involve complex matters, it has been posited that ‘the views of the public should not be given much weight in [environmental] policy because the average citizen does a very poor job of handling probabilities and contingencies yet these are central to the decision.’<sup>369</sup> This may be through a lack of foresight, or the difficulties general members of the public have in conceptualising the whole decision in their mind.<sup>370</sup> Of course, this is only one perspective, and is not always the case. We should be mindful not to understate the ability of people to add value to challenging issues.”

Consultative processes can become ‘talking shops’ that take up a lot of time and fail to produce any substantive outcome. Furthermore, participatory processes can create rather than solve conflict particularly when they become dominated by narrow interest groups. Ultimately, decisions made through a process of consultation tend towards the ‘middle.’ They rarely succeed at producing bold changes as there is too much concern for proper process and due consideration. Whether that is a good or bad thing is up for debate.

### Consultation fatigue

Extended public participation runs the risk of creating ‘consultation fatigue’ amongst the public. This is particularly the case if participants perceive little gain in return for their efforts. The public are often misguided into believing consultation means consensus, which is not often the case. This can lead to feelings of dissatisfaction when the decision goes against them. Given the costs associated with participation, it can be frustrating for members of the public if they see no influence or change resulting from their input. Too many separate and overlapping processes may be confusing and frustrating, and actually cause people to reduce their engagement.

### Participation for ‘ulterior’ purposes

A drawback of providing for extensive participatory rights is that participants may endeavour to manipulate the system for ulterior purposes. This is most evident in the case of trade competition, when commercial competitors may try to use their participatory rights to delay or stymie the activities of a trade competitor. There is the problem of ‘the loudest voices carrying the greatest weight,’ where a small, vocal minority expresses views contrary to those of the large, silent majority. There is also the issue of ‘nimbyism’ – people and communities seeking to protect their property or neighbourhood from the impacts of development that would benefit the broader public. Nimbys are much maligned; the issue is more nuanced than nimbyism being simply ‘bad.’ It is about recognising the point at which the public interest properly overrides the private interest. That will always be open to a degree of debate.

### Time and cost

The most obvious downsides of extensive public participatory rights are the time and cost it involves. Collaborative processes are particularly resource intensive, although they can also foster a sense of ownership of an outcome (if one eventuates). It can also take many years for a plan to become operative under the RMA, and millions of dollars can be expended along the way. For example, Plan Change 13 to the Mackenzie District Plan

366 Reed MS, ‘Stakeholder participation for environmental management: A literature review’ (2008) 141(10) *Biological Conservation* at 2420.

367 Iwi and hapū groups, incorporated societies, and community groups.

368 The group must either already be engaged in the proceedings by being a party to the case – when the case is before the Environment Court, have lodged a submission with the Environmental Protection Authority – when the Minister for the Environment has directed the matter to a board of inquiry or if it is a proposal of national significance to the Environment Court and be a s 274 party or a party to the court proceedings – when the local authority has directly referred the application to the Environment Court.

369 Dietz T and Stern P C, *Public participation in environmental assessment and decision making* (National Academies Press, Washington, DC, 1980) at 54.

370 For example, a fundamental principle of environmental management is intergenerational equity. This principle recognises the need for present generations to safeguard the environment for future generations. This requires long-term thinking of how to best manage resources sustainably so they will still be available for future generations. This can be a difficult concept for members of the public to appreciate when they are faced with a proposal that seeks to limit their immediate interest or rights to use said resources.

took 10 years from notification to having legal effect. This is largely because of the extensive participatory rights that are provided for under Schedule 1, which can include pre-consultation (for some persons), written submissions, cross-submissions, pre-hearing mediation, council hearing, rights of appeal, more mediation and then a second de novo hearing in the Environment Court followed by appeals on matters of law to the higher courts. This begs the question as to whether all these steps are really required to enable the public to effectively participate in plan making, especially where many important decisions are already made by those directly elected by affected communities or their delegates. Plan-making processes

must be timely and adaptive to respond to rapidly changing social, economic and environmental conditions.

### Balancing costs and benefits

Facilitating public participation is a fairly onerous task. It requires a significant investment of resources that could be allocated elsewhere in the decision-making process. From the perspective of the decision-maker, public participation is worthwhile if it delivers quality information. Conversely, it is only worthwhile to members of the public if their input actually influences the decision. Achieving effective public participation, which justifies the allocation of resources, is a difficult task. Some of the benefits and costs of participation are summarised in the table below.

Strengths	Weaknesses
<ul style="list-style-type: none"> <li>▪ More information is made available to decision-makers</li> <li>▪ Decisions are easier to implement and more durable</li> <li>▪ Decisions will better meet the needs of the community and provide a sense of ownership, especially in relation to plans</li> <li>▪ Decisions are seen as more legitimate; the process is more likely to be seen as fair</li> <li>▪ Provides more equality in the ability of parties to influence a decision</li> <li>▪ Improves relationships amongst parties</li> <li>▪ Fosters an element of trust</li> <li>▪ Promotes social learning</li> </ul>	<ul style="list-style-type: none"> <li>▪ Requires significant investment of resources and time</li> <li>▪ May reduce decision quality if the public are poorly informed</li> <li>▪ Can enhance conflict if not well managed</li> <li>▪ Can produce ambiguity and prevent decisive action</li> <li>▪ Can delay decisions being made</li> <li>▪ It is difficult to provide a fair process in practice</li> <li>▪ There is usually a strong disparity between the resources of individuals and organised interest groups</li> <li>▪ Can result in consultative fatigue</li> </ul>

**Figure 35** Strengths and weaknesses of public participation

**Questions for discussion:**

- How do help ensure that participation doesn't go 'bad'?
- How should we treat nimbyism? When does the defence of private interests become 'bad', and when does it reflect one of the key reasons participation is important?
- How do we balance the need for participation against the benefits of timely processes?
- How do we ensure there is proper access to information?
- What does access to justice mean in the resource management context?
- When does participation unduly impact on efficiency/timeliness of decisions?
- Who should pay for public participation?
- Is there a legitimate distinction to be made between participatory rights in relation to plans, and in relation to project-level authorisations like resource consents?





## e. Public participation in the current system

The current system was premised on an expansive approach to public participation. In part, this was simply a recognition of the benefits of participation described above. In part, it was a reaction against the centralised and exclusionary approach to resource management decision-making in the Muldoon era. In any case, it resulted in the central statute in the system – the RMA – offering wide rights for the public to be informed of, make submissions on, be heard on, and appeal planning and consenting decisions. Subsequently, participatory provisions have been narrowed and expanded based on political preference and the pressures of the time. In recent times, that has seen substantial narrowing of rights.

We describe in more detail the ways in which statutes in the current system approach public participation below and in Appendix 3. Here, we wish briefly to consider one a curious feature of resource management process. Is it not curious, even downright odd, that we provide for extensive participatory rights under the RMA but not in other areas of public life? Does the funding of pharmaceuticals or the development of foreign policy affect us less than the colour that our neighbour chooses to paint his or her fence? Why, in resource management, are we not content with electing people to make value-based decisions on our behalf, or simply for safeguards around transparency to be provided? Why do we go much further under the RMA by allowing people to submit, to be heard at hearing, and to appeal?

One reason may be that the system is perceived as having the power to *take away* rights, not just provide benefits.

It is regulatory in nature, in contrast with other planning processes which are about 'providing things' (such as new infrastructure under the LGA and LTMA). Participatory rights are therefore partly provided in recognition of the power the resource management system has to erode people's rights (notably property rights). Or perhaps it is the 'closeness' of physical and natural features – the local river, the shape of your street, the view out your window – that makes public 'ownership' of these issues so much more pronounced? If we see or experience something every day, we feel like we are responsible for maintaining it. Although we do not have the answers, these are fascinating questions to ponder, and we invite you to do so.

### Participatory rights under key New Zealand statutes

In Appendix 3 we look at six New Zealand statutes to identify how public participation is provided for in practice, and for what purposes. We have deliberately selected a variety of different statutes:

- The RMA and the EEZ Act, which are outcomes-based statutes
- The LGA, which is an institutional statute
- The Crown Minerals Act and Fisheries Act, which are sectoral statutes
- The Climate Change Response Act, which is a domain-based statute
- The Conservation Act, which is a location-specific statute<sup>371</sup>



371 For an explanation of these labels, see Chapter 3 on legislative design.

Here, we simply make some general observations about how New Zealand law tends to deal with notification, submissions and appeals.

### Notification

- The public is most often notified of proposals via newspapers circulated in main cities or in the local area which the proposal refers to.
- Additionally, the public is sometimes notified through the responsible authority's website.
- Notification usually involves a statement describing the proposal and when submissions are due.
- Hard copy of plans are often able to be viewed at the responsible authority's office.
- For long-term plans prepared under the LGA, a consultative document sits alongside the notice. It describes the proposals and explains their objectives and implications.

### Submissions

- The public is usually given between 20 and 40 days to submit an opinion to the relevant authority. The LGA gives people 'reasonable opportunity' to present their views.
- Submissions are almost always required in writing. The only exception is through the special consultative procedure under the LGA where people may present their views verbally (or in sign language) and through audio/audio visual links.

### Processing

- Most submissions are incorporated into a report and must be considered by the decision-maker. The meaning of 'consider' differs between statutes, from utilising submissions 'as they see fit' to being used to amend policy.
- In some cases, members of the public are able to be heard in respect of their submissions. This is either at a meeting with the relevant authority<sup>372</sup> or in a hearing.<sup>373</sup> The RMA emphasises that hearings are intended to be informal.

### Appeal rights

- Appeal rights are only available under the RMA. Submitters on regional policy statements and plans and notified resource consents are able to appeal decisions to the Environment Court and further up the court hierarchy on points of law.

### Judicial Review

- All statutory decisions are subject to judicial review in the High Court where an individual has a sufficient interest in the matter.<sup>374</sup>



372 As under the Conservation Act.

373 As under the EEZ Act and RMA.

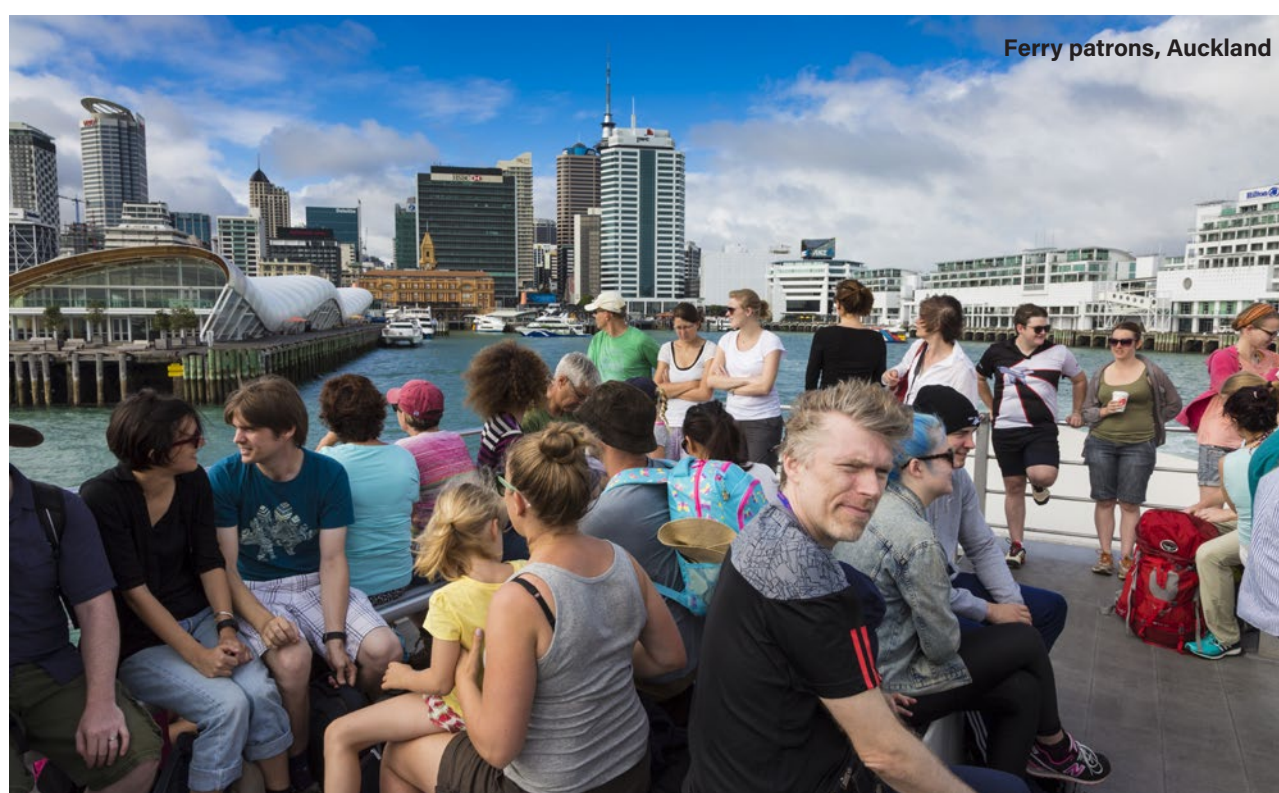
374 Section 27(2) of the New Zealand Bill of Rights Act 1990 recognises the right for persons whose 'rights, obligations or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination.'



In the table below, we also consider how strong participatory rights are under different statutes in the current system. This is by no means a technical analysis, and is intended to be a relative assessment.

Statute	Mode of planning/regulation	Strength of public participation	Level of public participation
Resource Management Act 1991	National Policy/Standards	Med	Consult
	Regional Policy and Regional/District Plans	High	Consult/Collaborate
	Resource Consents	Med	Consult
Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012	Regulations	Med	Consult
	Marine Consents	Med	Consult
Local Government Act 2002	Long Term Plan	High	Collaborate
	Bylaws	High	Collaborate
Crown Minerals Act 1991	Minerals Programmes	Med	Consult
	Petroleum Permits	Low	Inform
Fisheries Act 1996	Sustainability measures	Low-Med	Inform/Consult
	Fisheries Plans	Low-Med	Inform/Consult
Climate Change Response Act 2002	Regulations	Med	Consult
	Targets	Low	Inform
Conservation Act 1987	Policy	High	Collaborate
	Conservation Management Plans	High	Collaborate
	Concessions	Med	Collaborate

**Figure 36** An assessment of the strength of participatory rights under different legislation





## f. Key questions for reform

Each statute in our current system takes a different approach to public participation. Rights can vary hugely depending on the nature of the regime. The RMA, for example, provides for substantially larger participatory

rights than the Fisheries Act. In this section, we pose a number of questions and statements for consideration. They are intended to be primers for conversations about how a future system should provide for public participation.

Do we need to be more nuanced in how we think about public participation?

We may need to get away from a black and white approach where people think erosion or enhancement of participatory rights are 'good' or 'bad' in their own right. Instead, we need to ask what function participatory rights are performing in the system, and if those functions can be performed by other components more effectively and efficiently.

For example, do we continue to rely on public participation for a check and balance on developers, as was envisaged when the RMA was enacted? Do we wish to rely the public for the provision of information and knowledge? If we had a properly funded institution focused on advocacy, or an institution dedicated to strategic environmental assessment (or an auditing role) and providing independent evidence for large projects, do we need to provide for participation as much? What if we made greater use of *amici curiae* (independent 'friends of the court') or the Public Defender's Office to support the 'public' interest in environmental litigation?

On what *kind* of matters should people be able to participate, and in what ways? Different kinds of decision – discharges, coastal occupation, urban amenity – do not necessarily justify the same degree of participation. Are the tests for notification under the RMA appropriate?

Are all plan changes created alike? Are there some kinds of plan changes in which participation can be constrained? How do we identify those?

If capacity and capability were strengthened at local level, or provided for through alternative decision-making means (such as independent hearings panels), would there be as much need for extensive appeal rights under the RMA?

How prescribed should participatory processes be? There may be both advantages and disadvantages in having a general participatory process that can be tailored to different circumstances – such as under the special consultative procedure under the LGA. Similarly, there are advantages and disadvantages of having a specific and prescribed process like the RMA Schedule 1 process. The former enables the process to be tailored to the context. The latter provides more rigidity, but also more certainty that participatory rights will be protected.

Is there a fundamental difference between first instance participation and appellate participation?

Should we just enable or should we *promote* public participation? This may depend how we approach the purpose of participation. Is it about ensuring people are not excluded from decision-making process? If so, we need to recognise that the costs of participating, especially at court level, *do* exclude people from the process. We need to think about how we fund participation. But we need do little else. If people *can* participate but choose not to, then there's nothing wrong if our aim is simply not to exclude them.

But what if we rely on participation for information and to discover community values? In this case, we need to be more active in ensuring it happens. If the system fails to incentivise participation, then the system is deficient, because we miss out on essential information. There are some novel mechanisms for promoting participation and engaging with wide sections of the community that we might need to engage in more strongly (e.g., social media, drop-by sessions, etc.).

How do we promote participation by those with silent voices such as nature itself, future generations, or future residents of growing cities? This is a matter of institutional design (see Chapter 3). Should we create specific advocacy institutions that are not conflicted, for example? It is also about ensuring that groups that represent these interests have standing and resources to participate in a meaningful way.

Should we expect to see more extensive public participatory rights where regulations are being imposed that can take away rights (as under the RMA) and less for decisions about the expenditure of money to provide public benefits (such as under the LGA and LTMA)?

Should we expect to see more participation provided for where values-based policy is being formulated (e.g., a regional policy statement) than in decisions applying those values (e.g., a resource consent)?

What about decisions where the public benefit and private benefit overlap? It is hard to separate the two. For example, people fighting to have their land included within urban limits cannot be prevented from participating, but should their concerns be couched in language of the public interest, rather than their private property interest?

Participatory rights are very different under different statutory regimes. This is not surprising, as different statutes do different things. Some may warrant extensive public participation, others a lesser amount. For example, there is extensive room for public participation in plan-making under the RMA, but less for allocation decisions under the Crown Minerals Act. Even in a revised model of legislation, it is highly unlikely we would be left with only one statute with one participatory process. An important question for efficiency is whether those processes of participation should be combined or otherwise aligned.

The risk of multiple processes of participation is that people get participation fatigue. People may have the same basic concern, but be forced to engage under multiple frameworks because that concern spans many different statutory

boundaries. For example, if I were concerned with impacts of fishing methods on marine mammals, I would potentially need to engage under the RMA, the Fisheries Act and the Marine Mammals Protection Act. Is such duplication an inefficient use of public resources?

There can also be extensive engagement under both the RMA and the LGA, sometimes on similar matters (such as in an informal spatial plan that then needs to be translated through an RMA process to a district or regional plan). Not only are there multiple participatory processes across acts, but there can also be several different options within an act (e.g., there are four potential plan-making processes under the RMA). On top of all this there is a multitude of central government discussion documents that people are expected to submit on.

How should we treat participatory rights in the context of national and local interests? Generally, we have provided more participatory rights at the local level (e.g., appeal rights on a district or regional plan) than at the national level (e.g., no appeal rights for a national policy statement or national environmental standard). Is that appropriate?

Who should have the right to participate in matters having very local (neighbourhood-level) impacts? This is especially fraught in matters of urban planning, such as the height of a neighbour's fence. But shouldn't we hear the voices of potential future residents rather than just those already living there?

We may need to consider the extent to which public participation is warranted depending on the objective sought by a decision. For example, if we have a separate statute with a clear purpose, leading to clear, overriding restrictions to protect biophysical bottom lines, do we really need extensive public participation?

But where decisions are balancing social, economic, cultural as well as environmental interests, is there a greater need for broad public participation? What about allocation decisions? Does the public need a say in *who* obtains a right to use a public resource, if biophysical bottom lines are protected?

It is important to determine at what point in *time* people should be able to participate. Should the public be involved in formulating policy (e.g., collaborative process), in responding to policy (e.g., submitting on plans) and/or in objecting to policy (e.g., legal proceedings)?

Should the public be involved in responding to particular projects (e.g., when a developer applies for resource consent)? In this case, if we are to lessen participatory rights, we may need to change the nature of plans. Much more certainty may need to be built into plans if people are to predict what they mean for particular projects and for their property and communities. If we make efforts to front-end participation – at the plan-making stage – it could be possible to avoid the need for extensive and duplicative participatory processes for consents. If it is clear from the plan what kinds of development are envisaged, and what is and is not allowed, then that is people's opportunity to submit.

The failure of current plans to achieve such certainty has arguably contributed to the current status where community members are frustrated at not being able to affect practical outcomes on the ground (in terms of non-notified projects which were not foreshadowed in the plan) and developers are frustrated at the delays caused by extensive public participation rights when activities are notified.

#### Questions for discussion:

- Should we rely on participation to provide a check and balance on developers?
- Who should have the right to participate in local issues?
- Do we need extensive public participation if there are strong protections for environmental bottom lines?
- When in the process should public participation be provided?
- If we have stronger/clearer plans can we reduce participation in consenting processes?

- Can appeal rights be replaced by other institutional mechanisms to provide checks and balances?
- Should we combine participation processes under different legislation?
- Should we actively promote participation or just provide for it?
- How do we provide for/promote participation of parties with no voice (e.g., nature, future generations)?
- Should we have prescribed processes or allow for flexibility on a case-by-case basis?



## 5. NEW ZEALAND'S OBLIGATIONS UNDER INTERNATIONAL LAW





## Table of contents

### a. Introduction

### b. International treaties

*Biodiversity*

*Marine management*

*Waste management*

*Climate change*

### c. Soft international law

### d. Customary international law

### e. General principles of international law

### f. Judicial decisions of the International Court of Justice

### g. Conclusion

## a. Introduction

International environmental law is a rapidly growing field due to increasing concern about the transboundary and global implications of environmental decline. Although not directly enforceable in New Zealand, international environmental law provides the underpinning framework for domestic law because passing legislation is often

the prime means through which the government meets the country's international obligations. Even when not directly legislated for, international law affects the application of domestic law through the legal presumption that Parliament intends to legislate consistently with the country's international obligations (and so where the words allow, they will be interpreted by the Courts accordingly). In addition, where the executive has a broad-based discretion under statute, it must be exercised consistently with international obligations.<sup>375</sup>

New Zealand's obligations under international environmental law are therefore of considerable importance to resource management law reform. Any new law will need to be written in a way that gives effect to such obligations, or at the very least is consistent with them. This chapter identifies key obligations under international environmental law of relevance to the scope of the overall project. We cover the five generally accepted sources of international environmental law, of which the first is the most significant:<sup>376</sup>

- International treaties (also called Multilateral Environmental Agreements)
- Soft law
- Customary international law
- General principles of international law
- Judicial decisions of the International Court of Justice



Harataonga

<sup>375</sup> Justice Susan Glazebrook, 'Statutory interpretation in the Supreme Court' (n.d.), [http://www.courtsofnz.govt.nz/speechpapers/HJG3.pdf/at\\_download/file](http://www.courtsofnz.govt.nz/speechpapers/HJG3.pdf/at_download/file)

<sup>376</sup> Birnie P et al., *International law and the environment* (3rd ed., Oxford University Press, Oxford, 2009) at 15.

## b. International Treaties

International treaties include conventions, protocols and covenants. They are the main mechanism through which legal rights and obligations are created between states and are therefore the most important source of international environmental law.<sup>377</sup> Treaties are legally binding on parties once they have come into effect (often after a certain minimum number of states have acceded to them). Even non-binding elements may create good faith obligations. In addition, obligations and privileges contained in treaties may develop broader import if they become broadly applied and evolve into customary international law.<sup>378</sup> There are four main (and overlapping) topic areas of environmental treaties relevant to this project: biodiversity, marine, waste, and climate change. Other (non-environmental) treaties may have environmental implications, such as international trade and investment treaties, but these have not been reviewed. More detail about the obligations under these treaties, including how they have been implemented in New Zealand, is provided in Appendix 3.

### Biodiversity

The United Nations Convention on Biological Diversity 1992 is the prime overarching international instrument dealing with the conservation and use of biodiversity. New Zealand ratified the convention in 2005. The Convention aims to (1) conserve biological diversity for its intrinsic value and provide for the sustainable use of its components; and (2) provide for the fair and equitable sharing of the benefits arising from the utilisation of genetic resources.<sup>379</sup> Parties are required to develop a national strategy for the conservation and sustainable use of biodiversity and to integrate the strategy into relevant plans.<sup>380</sup> Specific obligations under Article 8 include requiring parties to:<sup>381</sup>

- Protect threatened species and populations
- Establish a system of protected areas and areas where special measures are needed to conserve biological diversity
- Promote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings
- Rehabilitate and restore degraded ecosystems and promote the recovery of threatened species
- Regulate, manage and control the risks associated with the use and release of living modified organisms resulting from biotechnology
- Prevent the introduction of, control or eradicate those alien species which threaten ecosystems, habitats or species

- Endeavour to provide the conditions needed for compatibility between present uses and the conservation of biological diversity and the sustainable use of its components
- Respect indigenous and local community knowledge and promote the application to innovations and practices
- Where a significant adverse effect on biological diversity has been determined, regulate or manage the relevant processes and categories of activities.

Also in 2005, New Zealand ratified the Cartagena Protocol on Biosafety, which aims to address the potential risk to biodiversity from the import and export of living modified organisms. A main objective of the protocol is to provide information to importing countries to assist their decision on where or not to accept such organisms. To help achieve this, an internationally centralised web-based biosafety clearing-house mechanism has been set up.

More recently, the Aichi Targets were adopted by the parties to the Convention on Biological Diversity in 2010. These provide more specific and (in some cases measurable) biodiversity targets to be met by 2020 which include halving or bringing to zero the rate of habitat loss, restoring 15 per cent of degraded ecosystems and conserving 17 per cent of terrestrial and inland water and 10 per cent of coastal and marine areas.

In December 2016 the Cancun Declaration on Mainstreaming the Conservation and Sustainable Use of Biodiversity for Well-being was adopted which highlighted the need to change human development patterns, behaviours and activities in respect to nature. One of the notable broad commitments was to incorporate biodiversity values in national accounting and reporting systems. The Declaration includes detailed provisions related to the agriculture, forestry, fisheries and tourism sectors. For agriculture, parties are to adopt a holistic integrated view and assessment of ecosystems and the interlinkages between agriculture and biodiversity. For fisheries, governments are to integrate the ecosystem approach into fisheries policies, programmes and plans as well as strengthen the implementation of the United Nations Food and Agriculture Organisation (FAO) Code of Conduct for Responsible Fisheries. In addition, marine and freshwater ecosystems are to be conserved and actions to reduce pollution (including noise and plastic materials) are to be enhanced.

In 1976 New Zealand ratified the Convention on Wetlands of International Importance especially as Waterfowl Habitat 1971. Its purpose is to promote the conservation of wetlands, and their use, so that they continue to operate as functioning ecosystems.<sup>382</sup> Contracting parties commit to designate wetlands for inclusion on the List of Wetlands

377 Taylor P, 'The relevance of international environmental law for domestic law' in P Salmon and D Grinlinton (eds), *Environmental law in New Zealand* (Thomson Reuters, Wellington, 2015) at 270.

378 Ulrich B and Marauhn T, *International environmental law* (Hart Publishing, Oxford, 2011) at 15.

379 United Nations Convention on Biological Diversity 1992 (UBD), art 1.

380 UBD, art 6.

381 UBD, art 8 (a)-(m).

382 Convention on Wetlands of International Importance especially as Waterfowl Habitat 1971, Preamble.



of International Importance; to promote the significance of these wetlands and monitor and advise of any changes to their ecological character; and to promote the wise use of all wetlands, especially through formulating and implementing national policy on wetland conservation management, amongst other things.

The Convention on International Trade in Endangered Species of Wild Fauna and Flora 1973 (CITES) creates an international framework for regulating and restricting trade in specimens of species of wild animals and plants – a system of certification for imports and exports. It attempts to reconcile competing international trade and species conservation issues. New Zealand became a party to the Convention in 1989. Roughly 5800 species of animals and 30,000 species of plants are protected by CITES. Trade obligations for the categories of endangered species depend upon evaluations of ecological significance of the species and its effect on other species, as well as the levels of exploitation and the effects of harvesting techniques on the traded species. These obligations range from total trade bans to quota restrictions and other non-tariff measures, such as registration requirements, tagging systems, and microchip implants in live animals.<sup>383</sup>

Whilst not strictly a biodiversity treaty, the Convention Concerning the Protection of the World Cultural and Natural Heritage 1972 is included here for convenience. New Zealand ratified the Convention in 1984. The Convention seeks to better protect cultural and natural heritage recognising it as the world heritage of humankind as a whole. Parties have a duty to identify and protect natural and cultural heritage within their territory of 'outstanding universal value'. They are required as far as possible to set up a service for the protection, conservation and presentation of cultural and natural heritage and to identify measures to counteract dangers that threaten such heritage. States must also submit to the World Heritage Committee an inventory of such heritage suitable for inclusion on the World Heritage List.

Overall, the key international biodiversity obligations that resource management law would need to provide for include:

- Identifying and protecting natural and cultural heritage of outstanding universal value
- A system of well-connected and ecologically representative protected areas covering land, fresh water and marine
- Mechanisms to reduce, and preferably halt, habitat loss including wetland conservation management
- Mechanisms to restore degraded ecosystems
- Mechanisms for the recovery of threatened species
- Management of the risks associated with genetically modified organisms

- A system to prevent, control and eradicate invasive species
- A system to control trade in endangered species
- Management of activities which have significant adverse effects on biological diversity, including the use of tools and incentives
- Reduction of pollution which impacts biodiversity including noise and plastics
- Full participation of Māori and integration of mātauranga Māori into biodiversity management
- Integration of biodiversity values into planning and consenting processes and into national accounting and reporting systems
- Integration of biodiversity conservation into the management of primary production sectors including ecosystems-based fisheries management

#### Questions for discussion:

- **Are these the key international biodiversity obligations placed on New Zealand?**
- **Are there other biodiversity matters, derived from international law, that New Zealand resource management law needs to provide for?**

#### Marine management

The United Nations Convention on the Law of the Sea 1982 (UNCLOS) is the bedrock of international marine law. It comprises 17 parts, 320 articles and 9 annexes governing all aspects of ocean space including delimitation, environmental control, marine scientific research, economic and commercial activities, transfer of technology and settlement of disputes in relation to ocean matters. New Zealand ratified the Convention in 1996. Very importantly, the Convention establishes the jurisdiction of countries over the sea. It provides for states to have jurisdiction over the 'territorial sea' which extends up to 12 nautical miles from the mean low water springs (and comprises a country's territory) with foreign vessels having 'innocent passage' through those waters. States have lesser 'sovereign rights' over a 200 nautical mile exclusive economic zone with respect to natural resources and certain economic activities, and exercise jurisdiction over marine science research and environmental protection. States also have sovereign rights over the continental shelf where that extends further than 200 nautical miles for exploring and exploiting.

As well as creating rights, the Convention sets out a range of responsibilities. States have a general obligation to protect and preserve the marine environment.<sup>384</sup> This includes taking all measures necessary to reduce and control pollution of the marine environment from any source as well as 'to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened

<sup>383</sup> Regulation of Trade in Specimens of Species included in appendix 1, art III; Regulation of Trade in Specimens of Species included in appendix 2, art VI; and Regulation of Trade in Specimens of Species included in appendix 3, art V and the Convention on International Trade in Endangered Species of Wild Fauna and Flora 1973.

<sup>384</sup> United Nations Convention of the Law of the Sea 1982 (UNCLOS), art 192.

or endangered species.<sup>385</sup> In terms of fisheries, states are required to determine the allowable catch and, taking into account the best scientific evidence, ensure that stocks are not endangered by over-exploitation. This includes maintaining or restoring populations at levels which can produce the maximum sustainable yield (as qualified by relevant environmental and economic factors). States must also promote 'optimum utilisation' of living resources. In addition, associated or dependent species are to be maintained or restored above levels at which their reproduction may become seriously threatened.<sup>386</sup>

The FAO's Code of Conduct for Responsible Fisheries 1995 sets out how fisheries should be managed responsibly and includes requirements to minimise negative environmental impacts, reduce waste and preserve the quality of the fish caught; understand the effects on the environment before using new fishing gear; and protect important fish habitats from destruction and pollution. In 2003 the FAO released a technical guideline, *The Ecosystem Approach to Fisheries*, as a further development of the Code of Conduct.

UNCLOS is further fleshed out in the Agreement for the Implementation of the Provisions of UNCLOS relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish 1995 (Fish Stocks Agreement), which was ratified by New Zealand in 2001. This Agreement sets out a series of general principles including applying a precautionary approach, assessing impacts on an ecosystem-basis, minimising pollution, waste, discards and bycatch, and protecting biodiversity.<sup>387</sup>

Overall, the key international marine obligations that resource management law would need to provide for include:

- Measures to protect and preserve the marine environment
- Measures to control and reduce marine pollution
- Measures to protect and preserve rare and fragile ecosystems and habitat of depleted, threatened or endangered species
- An ecosystems management approach that minimises the negative environmental impacts of fishing (including waste, discards and bycatch), protects important fish habitats, and protects associated and dependent species
- Mechanisms to determine the allowable catch for fisheries, ensuring that this maintains or restores populations to a level which can sustain the maximum sustainable yield and avoids over-exploitation
- Requirement to consider the best scientific evidence available

#### Questions for discussion:

- **Are these the key international marine obligations placed on New Zealand (excluding waste, which is dealt with below)?**
- **Are there other marine matters, derived from international law, that New Zealand resource management law needs to provide for?**

#### Waste management

There is a raft of conventions that address various aspects of waste management. The Basel Convention of the Control of Transboundary Movements of Hazardous Wastes and their Disposal 1989, which New Zealand ratified in 1994, aims to reduce the amount of waste produced by signatories and regulates the international traffic in hazardous wastes.<sup>388</sup> It requires prior approval of hazardous waste imports and exports, and requires exporting countries to ensure that hazardous waste will be managed 'in an environmentally sound manner'.<sup>389</sup> It emphasises the principle of 'generator responsibility' for disposal of wastes, and requires parties to minimise the environmental effects of the movement and disposal of hazardous waste.<sup>390</sup> The Convention to Ban the Importation into Forum Island Countries of Hazardous and Radioactive Wastes and to Control the Transboundary Movement and Management of Hazardous Wastes within the South Pacific Region 1995 (Waigani Convention) is a regional agreement under the Basel Convention. It ensures that hazardous waste cannot travel from New Zealand or Australia to another Pacific country, or to Antarctica.

The International Convention for the Prevention of Pollution from Ships 1973 (MARPOL) is the prime international document addressing marine pollution. New Zealand became a party in 1998. It aims to eliminate pollution of the sea by oil and other toxic substances which might be discharged during normal operations or released accidentally as a result of collisions or stranding of ships.<sup>391</sup> It includes detailed regulations contained in a series of appendices which prescribe what can and cannot be discharged into the sea.

The Convention of the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1971 (London Dumping Convention) contributes to the international control and prevention of marine pollution by prohibiting the dumping of certain hazardous materials.<sup>392</sup> New Zealand became a party in 1975. A key principle is the avoidance, reuse and minimisation of waste sources in order to minimise the amount of material that is required to be dumped at sea. The Convention embodies the precautionary approach. Rather than setting out the wastes that are not allowed to be dumped, the Convention

385 UNCLOS, art 194.

386 UNCLOS, art 61.

387 Agreement for the Implementation of the provisions of UNCLOS relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish 1995, art 5.

388 Basel Convention of the Control of Transboundary Movements of Hazardous Wastes and their Disposal 1989 (Basel Convention), Preamble.

389 Basel Convention, Preamble.

390 Basel Convention, Preamble.

391 International Convention for the Prevention of Pollution from Ships 1973, art 1(1).

392 Convention of the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1971 (London Dumping Convention), art 2.

defines wastes that may be considered for dumping.<sup>393</sup> The permitted substances include dredged material, sewage sludge, fish waste, man-made sea structures and organic and inert geological material.<sup>394</sup>

The Stockholm Convention on Persistent Organic Pollutants 2001, which was ratified by New Zealand in 2004, aims to protect human health and the environment by banning the production and use of some of the most toxic chemicals known to humankind. It bans over 30 persistent organic pollutants.<sup>395</sup> The Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade 1998, which New Zealand became a party to in 1998, establishes a prior informed consent system when sending certain dangerous chemicals or pesticides across borders. Over 50 pesticides, severely hazardous pesticide formulations or industrial chemicals are listed. This helps countries be aware of the types of chemicals crossing their borders.

Overall, the key international waste obligations that resource management law would need to provide for include:

- Control of the transboundary movement of hazardous waste and toxic chemicals
- A comprehensive regulatory framework to manage the risk of marine pollution from ships
- Prohibition on the dumping of hazardous wastes into the marine area and strict management of other dumped material

#### Questions for discussion:

- **Are these the key international waste obligations placed on New Zealand?**
- **Are there other waste matters, derived from international law, that New Zealand resource management law needs to provide for?**

## Climate change

The prime international instrument on climate change is the United Nations Framework Convention on Climate Change 1992 (UNFCCC), which New Zealand ratified in 1993. Its primary objective is to achieve stabilisation of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.<sup>396</sup> This level should be achieved within a timeframe sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened, and to enable economic development to proceed in a sustainable manner. The Convention requires member states to act in the interests of human safety,

even in the face of scientific uncertainty, and puts the onus on developed countries to lead the way. It provides overall guidance on the assessment of adaptation to climate change and guidance on its assessment, planning and implementation. In particular, Article 4 includes requirements that all parties:<sup>397</sup>

- Adopt national policies to mitigate climate change through limiting anthropogenic (human-induced) emissions of greenhouse gases and protecting and enhancing greenhouse gas sinks and reservoirs
- Report detailed information on greenhouse gas inventories, national actions and projected human-induced greenhouse gas emissions and removal by sinks
- Take into account climate change considerations, in relevant social, economic and environmental policies and actions
- Promote, and cooperate in, relevant scientific and technological research and exchange information in such areas
- Promote public awareness of, and education about, climate change issues

The Kyoto Protocol to the United Nations Framework Convention on Climate Change 1997 (Kyoto Protocol) is a subsidiary agreement under the Convention. New Zealand ratified the Protocol in 2005. It operationalises the Convention by committing industrialised countries to limit and reduce greenhouse gas emissions in accordance with agreed individual targets. In 2012 the Doha Amendment was adopted for a second commitment period (2013–2020) but has not entered into force. Obligations under the Protocol include:

- A responsibility emissions reduction target for the first commitment period to reduce greenhouse gas emissions to their 1990 levels<sup>398</sup>
- Submitting an annual inventory of greenhouse gas emissions to the UNFCCC<sup>399</sup>
- Formulating, implementing and publishing regular updates to national and regional programmes that contain measures to mitigate climate change and facilitate adequate adaptation to climate change<sup>400</sup>
- Cooperating internationally in relation to policies and measures (including scientific and technical research and development) and facilitating public awareness and access to information on climate change<sup>401</sup>

The Paris Agreement 2015, which New Zealand ratified in 2016, seeks to hold the 'increase in the global temperature to well below 2C above pre-industrial levels

393 London Dumping Convention, art 4.

394 London Dumping Convention, annex 1.

395 Stockholm Convention on Persistent Organic Pollutants 2001.

396 United Nations Framework Convention on Climate Change 1992 (UNFCCC), art 2.

397 UNFCCC, art 4.

398 Kyoto Protocol to the United Nations Framework Convention on Climate Change 1997 (Kyoto Protocol), art 3.

399 Kyoto Protocol, art 7.

400 Kyoto Protocol, art 10.

401 Kyoto Protocol, art 2.



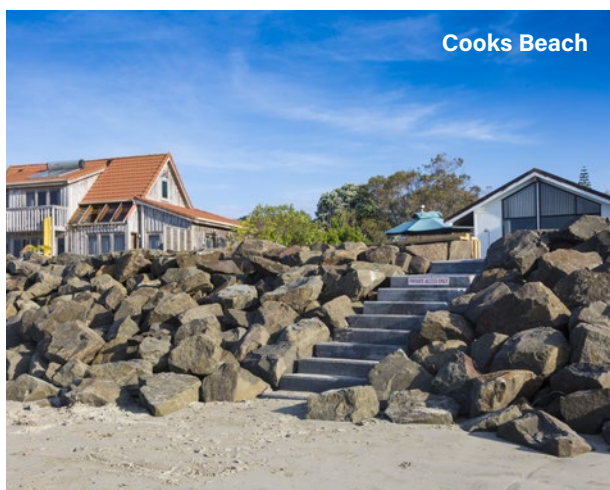
and pursuing efforts to limit the temperature increase to 1.5C.<sup>402</sup> The Agreement requires countries to set nationally determined contributions, to pursue domestic measures to achieve them, to communicate them every five years, and to ensure each successive contribution represents a progression beyond the previous one.<sup>403</sup> Countries must also regularly report on their emissions and how they are tracking to meet the target, engage in adaptation planning and continue to provide financial support to assist developing countries' mitigation and adaptation efforts.<sup>404</sup> The Agreement reinforces the need to reach global peaking of greenhouse gas emissions as soon as possible.<sup>405</sup> Developed countries are asked to take the lead by undertaking absolute economy-wide reduction targets<sup>406</sup>. The Agreement also encourages parties to conserve and enhance, as appropriate, sinks and reservoirs of greenhouse gas emissions.

Overall, the key international climate change obligations that resource management law would need to provide for include:

- National policies and measures to mitigate climate change sufficiently to meet New Zealand's greenhouse gas reduction commitments (as agreed to under the Paris Agreement)
- Measures to facilitate climate change adaptation
- Inventory and reporting system for greenhouse gas emissions and sinks

#### Questions for discussion:

- **Are these the key climate change obligations placed on New Zealand?**
- **Are there other climate matters, derived from international law, that New Zealand resource management law needs to provide for?**



## c. Soft international law

Soft law generally refers to non-legally binding agreements, declarations, resolutions, programmes of action and similar instruments.<sup>407</sup> These are often used when agreement to a formal treaty or instrument is not possible but the existence of a non-binding agreement reflecting majority consensus may encourage eventual conformity and compliance of states that do not want to be legally bound. Such instruments are also helpful where international NGOs develop strategies and proposals through which they hope to encourage international consensus and agreement. Relevant soft law covers sustainable development and the rights of indigenous people.

The Declaration of the United Nations Conference on the Human Environment 1972 (the Stockholm Declaration) was the first document in international environmental law to recognise the right to a healthy environment. The Declaration places great emphasis on protecting both species and their habitat. The first part of Principle 1 is seminal and states that 'man has the right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and wellbeing, and he bears a solemn responsibility to protect and improve the environment for present and future generations.'

The Stockholm Declaration consists of a preamble of seven proclamations followed by 26 principles. The principles contributed to a global paradigm shift in which the artificial conceptual split between humans and nature started to erode. The Declaration legitimised the environment as a matter of both national and international concern and cooperation. Many of the principles have since become central tenets of international environment law, each with varying legal status. For example, Principle 21 concerns state responsibility for transboundary environmental harm and this has been generally accepted as a rule of customary international environmental law.<sup>408</sup>

The Rio Declaration on Environment and Development 1992 (Rio Declaration) defines the rights of people to be involved in the development of their economies and responsibilities to safeguard the common environment. The Declaration states that long-term economic progress is only ensured if it is linked with the protection of the environment. If this is to be achieved, states need to work in global partnership, between governments, their people and key sectors of society. The Declaration consists of 27 principles, of which the most relevant are:

- People are entitled to a healthy and productive life in harmony with nature
- Development today must not threaten the needs of present and future generations

402 Paris Agreement 2015, art 2(1)(a).

403 Paris Agreement, art 2(1)(a).

404 Paris Agreement, arts 7, 9(1) and 13(7)(a).

405 Paris Agreement, art 4.

406 Paris Agreement, art 4.

407 Grinlinton D, 'Defining the nature and boundaries of environmental law' in P Salmon and D Grinlinton (eds), *Environmental law in New Zealand* (Thomson Reuters, Wellington, 2015) at 63.

408 Kiss A and Shelton D, *Guide to international environmental law* (Martinus Nijhoff, Leiden, 2007).

- Nations have the right to exploit their own resources but without causing environmental damage beyond their borders
- Environmental protection shall constitute an integral part of the development process
- Environmental issues are best handled with the participation of all citizens and they should have opportunities to participate in decision-making
- The polluter should, in principle, bear the cost of pollution
- Sustainable development requires better scientific understanding of the problems
- Environmental legislation should reflect the context it applies to
- Apply the precautionary approach widely
- Undertake environmental impact assessments for activities that are likely to have significant adverse effects on the environment

The United Nations Millennium Declaration 2000 stressed the observance of international human rights law, international humanitarian law and sustainable development treaties. The Declaration included 'respect for the environment' and required changes in patterns of production and consumption. Subsequently, the New Delhi Declaration of Principles of International Law Relating to Sustainable Development 2002 (Delhi Declaration) identified and adopted seven legal principles<sup>409</sup> which reaffirm the duty of states to ensure sustainable use of natural resources and the principles of equity, common but differentiated responsibilities, precautionary approach, public participation, good governance, integration and interrelationship.

More recently, the 2030 Agenda for Sustainable Development 2015 provided a 'plan of action for people, planet and prosperity' and recognised poverty as the greatest global challenge. It aims to 'protect the planet from degradation through sustainable consumption and production, sustainably managing its natural resources and taking urgent action on climate change, so that it can support the needs of the present and future generations'.<sup>410</sup> It also includes goals relating to people, prosperity, peace and partnership. The vision is for a world where all life can thrive and human habitats are safe, resilient and sustainable. It reinforces the need for democracy, good governance and the rule of law for environmental protection.

The Agenda includes a set of 17 Sustainable Development Goals and 169 targets which build on the Millennium Development Goals. The Goals include ensuring the availability and sustainable management of water and sanitation (Goal 6); making cities and human settlements inclusive, safe, resilient and sustainable (Goal 11); ensuring sustainable consumption and production patterns (Goal 12); taking urgent action to combat climate change and

its impacts (Goal 13); conserving and sustainably using the oceans, seas and marine resources for sustainable development (Goal 14); and protecting, restoring and promoting sustainable use of terrestrial ecosystems, sustainably managing forests, combatting desertification, halting and reversing land degradation and halting biodiversity loss (Goal 15).

In terms of indigenous people rights, the United Nations Declaration on the Rights of Indigenous Peoples 2007 aims to 'enhance harmonious and cooperative relations between the State and indigenous peoples, based on principles of justice, democracy, and respect for human rights, non-discrimination and good faith'. The Declaration has 46 articles that cover human rights as they apply to indigenous peoples. Key themes include self-determination; equality and non-discrimination; participation, underpinned by free, prior, informed consent; culture; and land, territories and resources. New Zealand adopted the Declaration in 2010.

In broad terms the key obligations on New Zealand from international soft law include:

- Protect and improve the natural environment
- Protect the interests of future generations
- Provide for public participation in decision-making
- Apply the polluter pays and precautionary approach principles
- Invest in science to better understand environmental problems
- Require environmental impact assessments to be undertaken for activities that are likely to have significant adverse environmental effects
- Put in place measures to promote sustainable production and consumption patterns

#### Questions for discussion:

- Are these the key soft environmental law obligations placed on New Zealand?
- Are there other matters, derived from soft international law, that New Zealand resource management law needs to provide for?



New Zealand dotterel

409 Seventieth Conference of the International Law Association, 'ILA New Delhi Declaration of Principles of International Law relating to Sustainable Development' (2002) 2 *Politics, Law and Economics* 21

410 United Nations General Assembly, *Transforming our world: The 2030 Agenda for Sustainable Development* (21 October 2015), GA/RES 70/1 A/RES/70/1(2015).

## d. Customary international law

Customary international law arises through widespread and consistent state practices that result in states considering such rules to be obligatory.<sup>411</sup> It may also be initiated by multilateral treaties representing, or later achieving, broad consensus and acceptance. Customary international law can operate bilaterally, multilaterally or universally depending upon the level of acceptance and adherence to the customary principles. New Zealand adopts a 'monist' system for customary international law which means it is automatically part of domestic law, subject to express exclusion by statute. In *Environmental Law in New Zealand*, the authors explain that 'states may object to treaties that they do not support or object to a customary international legal principle, in order to prevent "crystallisation" as a customary principle or at least avoid becoming bound to it through an assumption of universal consensus.'<sup>412</sup> In 2018 the International Law Commission is carrying out its first research report into customary international law, which indicates it is a novel and evolving area of study and not sufficiently crystallised for incorporation into this project.<sup>413</sup>



## e. General principles of international law

'General principles of international law' are rules and principles accepted and applied in most legal systems. The doctrine of sovereignty is at the forefront whereby each state is recognised as having 'exclusive legislative, judicial and executive jurisdiction over its own territory.'<sup>414</sup> However, other international environmental law developments, such as international treaties, are beginning to challenge traditional notions of state sovereignty. States are being required to assume legal functions and obligations in the general or common interest and must adhere to principles such as 'the principle of cooperation,' 'the common concern of humankind' and 'the common heritage of mankind.'<sup>415</sup> One of the fundamental purposes of the United Nations Charter is the maintenance of international peace, security and development of friendly relations and cooperation between nations.<sup>416</sup> The Charter emphasises the importance of strengthening world peace, promoting the rule of law and the universal application of principles.

The common concern of humankind principle provides a framework for approaching global problems and originates from humanitarian and human rights law. Issues of common concern are those that inevitably transcend the boundaries of a single state and require collective action as a response.<sup>417</sup> It is particularly suited to environmental problems which do not respect national boundaries. At the very least, a designation of a 'common concern' expresses the need for international cooperation through strong global institutions to face a shared problem.<sup>418</sup> The principle was posited first in the Convention on Biological Diversity and later in the UNFCCC and Paris Agreement.

A related principle is the common heritage of mankind, which is concerned with sharing the benefits that may arise from an area and thus is better suited for managing the sustainable exploitation of shared resources. In contrast, the 'common concern' principle provides a basis for protecting shared resources that are being threatened by a global problem including a strong focus on intergenerational equity and 'fair burden sharing.'<sup>419</sup> Problems of common concern are almost by definition those that will have long-lasting effects and which are therefore potentially devastating to future generations. The legal implications of these principles are requirements for:

- **Shared decision-making and accountability**
  - the Convention on Biological Diversity created international governing bodies to implement the Convention and the Paris Agreement emphasised

411 Kiss A and Shelton D *Guide to international environmental law* (Martinus Nijhoff, Leiden, 2007) at 8.

412 Grinlinton D, 'Defining the nature and boundaries of environmental law' in P Salmon and D Grinlinton (eds), *Environmental law in New Zealand* (Thomson Reuters, Wellington, 2015) at 60.

413 International Law Commission, 'Identification of customary international law' (February 2018), [http://legal.un.org/ilc/summaries/1\\_13.shtml](http://legal.un.org/ilc/summaries/1_13.shtml). The International Law Commission will be looking into the approach of the International Law Commission, state practice, the subjective element, the relevance of the practice of international organisations and the relevance of judicial pronouncements and writings of publicists.

414 Grinlinton D, 'Defining the nature and boundaries of environmental law' in P Salmon and D Grinlinton (eds) *Environmental law in New Zealand* (Thomson Reuters, Wellington, 2015) at 64.

415 Kiss A and Shelton D, *Guide to international environmental law* (Martinus Nijhoff, Leiden, 2007) at 8.

416 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations A/RES/2526/25.

417 Bowling C et al., *The Common Concern of Mankind: A potential framework for a new international legally binding instrument on the conservation and sustainable use of marine biological diversity in the high seas* (Yale Law School, New Haven, CT, 2018).

418 Bowling C et al., *The Common Concern of Mankind: A potential framework for a new international legally binding instrument on the conservation and sustainable use of marine biological diversity in the high seas* (Yale Law School, New Haven, CT, 2018).

419 Observed in the negotiations of the CBD.



regulatory actions by states and smaller units of governance instead of a separate body. For accountability, the Paris Agreement implements extensive reporting requirements. National Action plans are also a mechanism for states to clarify their commitments to the international community.

- **Sharing both benefits and burdens** – states are obliged to share the benefit of scientific knowledge with developing states to facilitate equal participation in decision-making about how best to exploit and conserve those resources moving forward.<sup>420</sup>
- **Common but differentiated responsibilities** – countries with fewer resources, which have historically contributed less to a problem, have fewer responsibilities, while developed states bear more responsibility for addressing it.<sup>421</sup>

In addition, there are environmental normative principles such as 'sustainable development', the 'precautionary approach' and the 'polluter pays principle', which have been widely endorsed by states through domestic measures and through soft law international instruments. Such principles will not generally override treaties or established customary law principles but they may have an influence on the interpretation and application of international treaties and customary law.<sup>422</sup>

In 1987 the United Nations Brundtland Commission published its report, *Our Common Future*, in an effort to link the issues of economic development and environmental stability. In doing so, it provided a definition of 'sustainable development' as 'development that meets

the needs of the present without compromising the needs of future generations to meet their own needs.' Although many definitions abound, this is the most often used. Albeit somewhat vague, this concept aims to maintain economic advancement and progress while protecting the long-term value of the environment. The concept of conserving resources for future generations is one of the major features that distinguishes sustainable development policy from traditional environmental policy. The overall goal of sustainable development is the long-term stability of the economy and environment.

The definition of sustainable development is also founded on other important principles. The polluter pays principle states that 'governments should require polluting entities to bear the costs of their pollution rather than impose those costs on others or the environment'. The precautionary principle establishes that 'where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measure to prevent environmental degradation.'<sup>423</sup> Therefore the proponent of any activity bears the burden of proving that this action will not cause significant harm.

A key underlying principle of sustainable development is the integration of environmental, social and economic concerns into all aspects of decision-making. It is this deeply fixed concept of integration that distinguishes sustainability from other forms of policy. In practice, sustainable development requires the integration of economic, environmental and social objectives across sectors, territories and generations.



420 The common concern of humankind is most concerned with sharing the burden of solving a problem. Frank Bierman also suggests the common concern of humankind principle includes a principle of international environmental solidarity whereby developed states have to assist developing states, financially and otherwise to address the common concern of humankind.

421 See Rio Declaration. This concept offers a way to address historical inequities that led to asymmetrical levels of pollution in the past, and the vastly different current resources states can commit in addressing the problems of current pollution. Brunnee J, 'The global climate regime: Wither common concern?' in H Hestermeyer et al. (eds), *Coexistence, cooperation and solidarity: Liber amicorum for Rudiger Wolfrum* (Brill/Nijhoff, Leiden, 2011).

422 Brunnee J, 'The global climate regime: Wither common concern?' in H Hestermeyer et al. (eds), *Coexistence, cooperation and solidarity: Liber amicorum for Rudiger Wolfrum* (Brill/Nijhoff, Leiden, 2011) at 62.

423 United Nations Conference on the Human Environment 1992.

## f. Judicial decisions of the International Court of Justice

For parties that accept its jurisdiction, the International Court of Justice is able to make findings on and determine certain rules of international law. It has jurisdiction to interpret treaties, question international law, determine breaches of international obligations and require compensation to be paid for those breaches.<sup>424</sup> It is not bound by precedent.<sup>425</sup> Article 38 of the Statute of the International Court of Justice states general principles of law recognised by civil nations. These include fairness, justice, good faith, *res judicata*<sup>426</sup> and the impartiality of judges. The decisions of the Court are highly influential as they usually identify and confirm the meaning and effect of rules and principles of international law. Jurisprudence of the International Court of Justice has significantly increased in recent years but is still modest and appears to be overly cautious. New Zealand has been involved in three cases with the Court with regard to nuclear testing and whaling.<sup>427</sup>

International environmental law generally focuses on how states impact other states but there is some International Court of Justice guidance for issues which are globally relevant and do not map easily to the current sovereignty focused legal regime. The Court has affirmed the obligation of the state to protect the environment; prevent transboundary harm to other states;<sup>428</sup> and carry out an environmental impact assessment before potentially harmful activities are authorised.<sup>429</sup>

Some of the key international environmental law principles that resource management law in New Zealand needs to recognise include:

- Sustainable development (meeting the needs of the present generations without compromising the ability of future generations to meet their needs)
- Polluter pays (polluting entities should bear the costs of their pollution)
- Precautionary principle (a lack of scientific certainty should not be a reasons to avoid action)
- Sharing responsibility and accountability for international environmental problems
- Integration of environmental, social and economic concerns into all aspects of decision-making
- Integration of decision-making across sectors, regions and generations

- Obligation to protect the environment and avoid transboundary harm
- Requirement to carry out an environmental impact assessment before potentially harmful activities are authorised

### Questions for discussion:

- **Are these the key international environmental law principles of relevance to New Zealand resource management law?**
- **Are there other matters, derived from international jurisprudence, that New Zealand resource management law needs to provide for?**

### The future generation



424 Statute of the International Court of Justice (ICJ), art 36.

425 Statute of the ICJ, art 59.

426 *Res judicata* is a matter that has been adjudicated by a competent court and therefore may not be pursued further by the same parties.

427 *Nuclear Tests (New Zealand v. France)*, Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (*New Zealand v. France*) Case and Whaling in the Antarctic (*Australia v. Japan: New Zealand intervening*).

428 *Barcelona Traction, Light and Power Company, Limited*, Judgment, *ICJ Reports 1950* (February) at 3. This case discusses the difficulty of addressing global problems. The Court noted that states have obligations that are not owed to other states in account of national sovereignty, but are rather obligations owed to all mankind giving examples such as outlawing genocide and slavery. The prohibition against carrying out activities that cause environmental harm seem to be *de facto* international law (rather than codified). States are obliged to conduct transboundary impact assessments because of this prohibition but whether any other environmental responsibilities rise to the same level of obligation is unclear.

429 *Gabcikovo-Nagymaros Project (Hungary/Slovakia)* Judgment *ICJ Reports 1997* (September) at 81. The most enduring impact of the case has been the importance the ICJ gave to reconciling economic development with the impact on the environment. In its decision the ICJ implied that this reconciliation has become one of the standards which states must consider before planning new activities or carrying out existing commitments. Over time the ICJ has strengthened this doctrine.



## g. Conclusion

International environmental law has transitioned from a focus on managing transboundary harm between nation-states to acknowledging that nature is part of the global commons which is to be managed for the benefit

of current and future generations. Most of New Zealand's international environmental obligations are already provided for in existing domestic law to some degree (see Appendix 3). Care will be needed during any reform process to ensure that they continue to be honoured and implemented in new legal and policy frameworks.





# 6. CONCLUDING COMMENTS

---





In this working paper we have considered four substantive matters. The two at the core of the paper are legislative design and public participation. These are crucial to the 'architecture' of any future system. We have also considered New Zealand's obligations under international law, and what the future may look like. A précis of the paper's key points can be found in the Executive Summary, and we do not reproduce those here. Instead, we now take the opportunity to offer – briefly – some more general thoughts as we look to the future.

There are no hard-and-fast answers to most the issues that have been raised in this paper. And if the reader is left with a sense that we have posed more questions than we have offered solutions, that is both understandable and intentional. Our view is that we must begin the journey of reform not by inundating policy and law-makers with specific and wildly different interventions, but rather by offering a coherent framework within which bigger questions can be framed, and within which the differences between solutions can be meaningfully assessed. We need not follow the same road to reform, but we should at least try to start a conversation in the same place and using common language. Above all, this paper and the project more broadly seeks to contribute to that process.

We are also seeking to elicit feedback. In a context where many questions of 'right' and 'wrong' are in the eye of the

beholder, the views of stakeholders *matter*. And, ultimately, every one of us is a stakeholder. To that end, we have sought to pose questions about legislative design, public participation and future contexts that, while being fairly open-ended, are also amenable to specific and concrete responses. A robust conceptual framework is important, but it must translate into concrete action to be meaningful.

Finally, while it is all too easy to get lost in the minutiae and conflicts within our complex resource management system, we should never lose sight of the bigger picture. We live in an amazing country, and can be justifiably proud of its people and its places. There is no question that we have big problems (and will face significant future challenges), but equally we have many reasons to be optimistic about both our future and the future of our children. Reforming our system is not just a mechanical exercise that can be done behind closed doors. It is not a task just for lawyers, or for politicians. It is a journey on which all New Zealanders are travelling. We have been particularly struck, in talking to international commentators, that many see New Zealand as 'a beacon to follow' in resource management matters. In the coming decade, the international community should continue to be able to look at New Zealand as a leader, not a laggard. Whether that happens depends on the choices we make.



# LIST OF REFERENCES

---

## Books and articles

- Barton B, 'Private property rights and the public interest' in R Peart (coll.), *Beyond the RMA: An in-depth exploration of the Resource Management Act* (EDS, Auckland, 2007)
- Berry S and Andrews H, 'The final straw for the RMA? Some shortcomings of the Resource Legislation Amendment Bill 2015' (2016) *Resource Management Journal*
- Berry S, Andrews H and Vella J 'The death of the RMA by a thousand cuts: The next two incisions' (2017) *Resource Management Journal* 3
- Birnie P et al., *International law and the environment* (3rd ed., Oxford University Press, Oxford, 2009)
- Boston J, 'Anticipatory governance: How well is New Zealand safeguarding the future?' (2017) 12(3) *Policy Quarterly* 11
- Boston J, *Safeguarding the future: Governing in an uncertain world* (Bridget Williams Books, Wellington, 2017)
- Boston J and Lawrence J, *The case for new climate change adaptation funding instruments* (Institute for Governance and Policy Studies, Wellington, 2017)
- Bowling C et al., *The Common Concern of Mankind: A potential framework for a new international legally binding instrument on the conservation and sustainable use of marine biological diversity in the high seas* (Yale Law School, New Haven, CT, 2018)
- Brunnee J, 'The global climate regime: Wither common concern?' in H Hestermeyer et al. (eds) in *Coexistence, cooperation and solidarity: Liber amicorum for Rudiger Wolfrum* (Brill/Nijhoff, Leiden, 2011)
- Carlman I, 'The Resource Management Act through external eyes' (2007) 11 *New Zealand Journal of Environmental Law* 181
- Dietz T and Stern PC, *Public participation in environmental assessment and decision making* (National Academies Press, Washington, DC, 1980)
- Grinlinton D, 'Defining the nature and boundaries of environmental law' in P Salmon and D Grinlinton (eds), *Environmental law in New Zealand* (Thomson Reuters, Wellington, 2015)
- Heitzmann M, 'Lessons from the past and advice for the future' in R Peart (coll.), *Beyond the RMA: An in-depth exploration of the Resource Management Act* (EDS, Auckland, 2007)
- Jenkins M, *A 'blue skies' discussion about New Zealand's resource management system* (Local Government New Zealand, Discussion document, 2015)
- Kelly S et al., *Disruptive technology in the agri-food sector: An examination of current and future influence on sustainability, bio-security, and business effectiveness* (Massey University, Palmerston North, 2017)
- Kiss A and Shelton D, *Guide to international environmental law* (Martinus Nijhoff, Leiden, 2007)
- Kiss G, 'Why should the public participate in environmental decision making? Theoretical arguments for public participation' (2014) 22(1) *Periodica Polytechnica Social and Management Sciences* 13
- Marzuki A 'Challenges in the public participation and the decision making process' (2015) 201(1) *Sociological Journal* 21
- McAuslan P, *The ideologies of planning law* (Pergamon Press, Oxford, 1980)
- McLeod A, 'From scratch' (2012) 185 *Planning Quarterly* 10
- Memon A and Skelton P, 'Institutional arrangements and planning practices to allocate freshwater resources in New Zealand' (2007) *New Zealand Journal of Environmental Law* 241
- Miller C, 'An Alternative view on the future of the RMA' (2015) 196 *Planning Quarterly* 8
- Owens S, 'International developments in environmental planning' in R Peart (coll.), *Beyond the RMA: An in-depth exploration of the Resource Management Act* (EDS, Auckland, 2007)
- Paehlke R, 'Democracy and environmentalism: Opening the door to the administrative state' in R Paehlke and D Torgerson (eds), *Managing Leviathan: Environmental politics and the administrative state* (Broadview Press, Toronto, 2005)
- Palmer G, 'Law-making in New Zealand: Is there a better way?' (2014) 22 *Waikato Law Review*
- Palmer G and Palmer M, *Bridled power: New Zealand's constitution and government* (4th ed., Oxford University Press, Melbourne 2004)
- Randerson T, 'The beginnings of the Resource Management Act' in R Peart (coll.), *Beyond the RMA: An in-depth exploration of the Resource Management Act* (EDS, Auckland, 2007)
- Reed MS, 'Stakeholder participation for environmental management: A literature review' (2008) 141(10) *Biological Conservation* 2417
- Severinsen G, 'Applying principles of environmental law to novel technologies: The case of carbon capture and storage' (2017) 4 *New Zealand Law Review* 635
- Severinsen G, 'Climate change considerations under the Resource Management Act: A barrier to carbon capture and storage deployment in New Zealand?' (2014) 22 *Waikato Law Review* 117
- Severinsen G, 'Constructing a legal framework for carbon capture and storage in New Zealand: Approaches to legislative design' (2014) 63 *Energy Procedia* 6629



Severinsen G, 'Glass half empty or glass half full? Adverse effects, positive effects and conditions under the Resource Management Act 1991 and Resource Legislation Amendment Bill 2015' (2016) 11(9) *Resource Management Bulletin* 110

Sutherland WJ et al., 'A horizon scan of global conservation issues for 2016' (2017) 31(1) *Trends in Ecology & Evolution* 44

Sutherland WJ et al., 'A 2017 horizon scan of emerging issues for global conservation and biological diversity' (2017) 32(1) *Trends in Ecology & Evolution* 31

Sweetman G, 'Reforming planning' (2006) 160 *Planning Quarterly* 9

Taylor P, 'The relevance of international environmental law for domestic law' in P Salmon and D Grinlinton (eds), *Environmental law in New Zealand* (Thomson Reuters, Wellington, 2015)

Ulrich B and Marauhn T, *International environmental law* (Hart Publishing, Oxford, 2011)

Van Causwenberghe L and Janssen CR, 'Microplastics in bivalves cultured for human consumption' (2014) 192 *Environmental Pollution* 60

Winefield P, 'Strategic planning in local government: An oxymoron?' (2007) *Planning Quarterly* 5

## Internet materials

Barnett J, 'Farming must adapt to disruptive tech' (28 August 2017), New Zealand Landcare Trust, <http://www.landcare.org.nz/News-Features/Features/Farming-Must-Adapt-to-Disruptive-Technology>

Chapman Tripp, *Te Ao Māori: Trends and insights* (June 2017), <https://www.chapmantripp.com/Publication%20PDFs/2017%20Chapman%20Tripp%20Te%20Ao%20Maori%20-%20trends%20and%20insights%20E-VERSION.pdf>

Elmi N and Davis N, 'How governance is changing in the 4IR' (18 January 2018), World Economic Forum, <https://www.weforum.org/agenda/2018/01/agile-governance-changing-4ir-public-private-emerging-technologies/>

International Association for Public Participation, 'Public Participation Spectrum' (February 2017), [http://www.iap2.org/resource/resmgr/foundations\\_course/IAP2\\_P2\\_Spectrum\\_FINAL.pdf](http://www.iap2.org/resource/resmgr/foundations_course/IAP2_P2_Spectrum_FINAL.pdf)

International Law Commission, 'Identification of customary international law' (February 2018), [http://legal.un.org/ilc/summaries/1\\_13.shtml](http://legal.un.org/ilc/summaries/1_13.shtml)

Merriam Webster Online Dictionary, 'coherent' (n.d.) <http://www.merriam-webster.com/dictionary/coherent>

National Party, 'New urban planning law for cities' (September 2017), [https://www.national.org.nz/new\\_urban\\_planning\\_law\\_for\\_cities](https://www.national.org.nz/new_urban_planning_law_for_cities)

Sims R, 'What's the point of looking for more gas?' (2018) *Pure Advantage*, <http://pureadvantage.org/news/2018/03/09/whats-the-point-of-looking-for-more-gas/>

See Statistics New Zealand, 'Estimates and Projections' (February 2018), [http://archive.stats.govt.nz/browse\\_for\\_stats/population/estimates\\_and\\_projections.aspx](http://archive.stats.govt.nz/browse_for_stats/population/estimates_and_projections.aspx)

Te Tari Taiwhenua Internal Affairs, 'How councils should make decisions' (23 March 2018), [http://www.localcouncils.govt.nz/Igip.nsf/wpg\\_url/About-Local-Government-Local-Government-In-New-Zealand-How-councils-should-make-decisions](http://www.localcouncils.govt.nz/Igip.nsf/wpg_url/About-Local-Government-Local-Government-In-New-Zealand-How-councils-should-make-decisions)

## Papers and reports

Baker T et al., 'Disruptive technologies and transportation: The impact of artificial intelligence and machine learning' (31 July 2017), Texas A & M Transportation Institute

Beef and Lamb New Zealand, *Future of meat: How should New Zealand's red meat sector respond to alternative protein advancements?* (Beef and Lamb New Zealand, Summary Report, February 2018, Auckland)

Bell R et al., *Preparing for climate change: A summary of coastal hazards and climate change guidance for local government* (Ministry for the Environment, Wellington, 2017)

Climate Change Adaptation Technical Working Group, *Adapting to climate change: Stocktake report* (Ministry for the Environment, Wellington, 2017)

Crampton E and Acharya K, *In the zone: Creating a toolbox for regional prosperity* (New Zealand Initiative, Report, 2015)

International Energy Agency, *Carbon capture and storage model regulatory framework* (International Energy Agency, Information Paper, 2010)

Kazaglis A et al., *Net zero in New Zealand: Scenarios to achieve domestic emissions neutrality in the second half of the century* (Vivid Economics, Report prepared for GLOBE-NZ, London, 2017)

KPMG, *The changing landscape of disruptive technologies, Part 2: Innovation convergence unlocks new paradigms* (KPMG Publication, 2017)

Law CS et al., *The New Zealand EEZ and South West Pacific: Marine case study: Climate changes, impacts and implications (CCII) for New Zealand to 2100* (Ministry for Business, Innovation and Employment Contract, Synthesis Report RA2, 2016)

Lenihan TM and Bartley J, *Review of Māori planning futures: Review of Productivity Commission's 'Better Urban Planning' Draft Report* (Nga Aho and Papa Pounamu, Review, 2016)

Manyika J et al., *Disruptive technologies: Advances that will transform life, business, and the global economy* (May 2013), McKinsey Global Institute

New Zealand Council for Infrastructure Development, *Integrated governance planning and delivery: A proposal for local government and planning law reform in New Zealand* (New Zealand Council for Infrastructure Development, Proposal, 2015)

New Zealand Institute of Economic Research, *Disruptive technologies risk, opportunities – can New Zealand make the most of them?* (Chartered Accountants Australia and New Zealand, Report, 2015)

New Zealand Productivity Commission, *Better urban planning* (New Zealand Productivity Commission, Final Report, 2017)

New Zealand Productivity Commission, *Low emissions economy* (New Zealand Productivity Commission, Issues Paper, 2017)

New Zealand Productivity Commission, *Using land for housing* (New Zealand Productivity Commission, Draft Report, 2015)

Royal Society of New Zealand, *Climate change implications for New Zealand* (Royal Society for New Zealand, Wellington, 2016)

Royal Society of New Zealand, *Transition to a low-carbon economy for New Zealand* (Royal Society for New Zealand, Wellington, 2016)

Seventieth Conference of the International Law Association, *ILA New Delhi Declaration of Principles of International Law relating to Sustainable Development* (2002) 2 *Politics, Law and Economics* 21

Simpson Grierson, *The statutory framework of New Zealand's local government sector: Is the key legislation working properly?* (Local Government New Zealand, Paper, 2016)

World Economic Forum, *Harnessing the Fourth Industrial Revolution for life on land: Towards an inclusive bio-economy* (World Economic Forum, Paper, 2018)

World Economic Forum, *Harnessing the Fourth Industrial Revolution for the Earth* (World Economic Forum, Paper, 2018)

World Economic Forum, *The global risks report 2018* (World Economic Forum, Report, 2018)

World Economic Forum and McKinsey & Company, *Innovation with a purpose: The role of technology innovation in accelerating food systems transformation* (World Economic Forum, Paper, 2018)

## Official sources

Controller and Auditor General, *Water and roads: Funding and management challenges* (Office of the Auditor General, Wellington, 2014)

International Transport Forum, *Urban mobility system upgrade: How shared self-driving cars could change city traffic* (OECD, Paris, 2015)

Legislative Design and Advisory Committee, *Legislation guidelines: 2018 edition* (Legislative Design and Advisory Committee, 2018)

Local Government New Zealand, *Local Government Funding Review Point Plan: incentivising economic growth and strong local communities* (Local Government New Zealand, 2015)

Ministry for the Environment, *A draft guide to collaborative planning processes under the Resource Management Act 1991* (Ministry for the Environment, Wellington, 2017)

Ministry for the Environment, *Changes to the standard planning track* (Ministry for the Environment, Wellington, 2017)

Ministry for the Environment, *Resource legislation amendments 2017 – Fact Sheet 12* (Ministry for the Environment, Wellington, 2017)

Ministry for the Environment, *Resource Management Act Survey of Local Authorities 2012/2013* (Ministry for the Environment, Wellington, 2014)

Ministry for the Environment and Statistics New Zealand, *Environment Aotearoa* (Ministry for the Environment and Statistics New Zealand, Wellington, 2015)

Minister for the Environment's Technical Advisory Group, *Report for Resource Management Act 1991's Principles Technical Advisory Group* (Ministry for the Environment, Wellington, 2012)

Ministry of Business, Innovation and Employment, *New Zealand tourism forecasts 2017–2023* (Ministry of Business, Innovation and Employment, Wellington, 2017)

Office of the Prime Minister's Chief Science Advisor, *New Zealand's fresh waters: Values, state, trends and human impacts* (Office of the Prime Minister's Chief Science Advisor, Auckland, 2017)

Parliamentary Commissioner for the Environment, *Climate change and agriculture: Understanding the biological greenhouse gases* (Parliamentary Commissioner for the Environment, Wellington, 2016)

Parliamentary Commissioner for the Environment, *Hydro-electricity or wild rivers: Climate change versus natural heritage* (Parliamentary Commissioner for the Environment, Wellington 2012)

Parliamentary Commissioner for the Environment, *Making difficult decisions: Mining the conservation estate* (Parliamentary Commissioner for the Environment, Wellington, 2010)

Parliamentary Commissioner for the Environment, *Preparing New Zealand for rising seas: Certainty and uncertainty* (Parliamentary Commissioner for the Environment, Wellington, 2015)

Parliamentary Commissioner for the Environment, *Submission to the Minister for the Environment on improving our resource management system* (Discussion document, Parliamentary Commissioner for the Environment, Wellington, 2013)

Treasury, *He tirohanga mokopuna: 2016 statement in the long-term fiscal position, New Zealand* (Treasury, Wellington, 2016)

## Cases

*Carter Holt Harvey Ltd v Waikato Regional Council* [2011] NZEnvC 380

*Central Plains Water Trust v Ngai Tahu Properties Ltd* [2008] NZCA 71, [2008] NZRMA 200

*Central Plains Water Trust v Synlait Ltd* [2009] NZCA 609, [2010] 2 NZLR 363 (CA)

*Environmental Defence Society Inc v Auckland Regional Council* [2002] NZRMA 492 (EnvC).

*Falkner v Gisbourne District Council* [1995] 3 NZLR 622 (HC)

*Gabcikovo-Nagymaros Project (Hungary/Slovakia) (Judgement)* (1997) ICGJ

*Greenpeace NZ Inc v Genesis Power Ltd* [2008] NZSC 112, [2009] 1 NZLR 730

*Murray v Whakatane District Council* [1999] 3 NZLR 276 (HC)

*Ngai Tahu Property Ltd v Central Plains Water Trust* [2009] NZSC 24

*Nuclear Tests (New Zealand v. France) (Admissibility)* (1974) ICGJ 457

*Queenstown Central Ltd v Queenstown Lakes District Council* [2013] NZHC 815

*Synlait Ltd v Central Plains Water Trust* [2010] NZSC 32, [2010] NZRMA 257

*Wellington International Airport Ltd v Air New Zealand* [1993] 1 NZLR 671

*West Coast ENT Inc v Buller Coal Ltd* [2013] NZCS 87, [2014] 1 NZLR 32

*Whaling in the Antarctic (Australia v. Japan) New Zealand intervening* (2014) 148, ICJ 471

## Statutes

Auckland City Council (St Heliers Bay Reserve) Act 1995

Barrow Island Act 2003

Biosecurity Act 1993

Civil Defence Emergency Management Act 2002

Climate Change Response Act 2002

Conservation Act 1987

Crown Forest Assets Act 1989

Crown Minerals Act 1991

Electricity Act 1992

Electricity Industry Act 2010

Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012

Fiordland (Te Moana o Atawhenua) Marine Management Act 2005

Fisheries Act 1996

Gas Act 1992

Hazardous Substances and New Organisms Act 1996

Health Act 1956

Heritage New Zealand Pouhere Taonga Act 2014

Housing Accords and Special Housing Areas Act 2013

Interpretation Act 1999

Judicature Act 1908

Land Transport Management Act 2003

Legislation Act 2012

Lincoln Road Mill Dam Act 1865

Litter Act 1979

Local Government Act 2002

Local Government Borrowing Act 2011

Local Government Official Information and Meetings Act 1987

Local Government (Rating) Act 2002

Maori Fisheries Act 2004

Marine Mammals Protection Act 1978

Ozone Layer Protection Act 1996

Point England Development Enabling Act 2017

Public Works Act 1981

Reserves Act 1977

Resource Legislation Amendment Act 2017

Resource Management Act 1991

Resource Management (Simplifying and Streamlining) Amendment Act 2009

Sugar Loaf Islands Marine Protected Area Act 1991

Waitakere Ranges Heritage Area Act 2008

Waste Minimisation Act 2008

Wildlife Act 1953

## International conventions

Basel Convention of the Control of Transboundary Movements of Hazardous Wastes and their Disposal 1989

Convention of the Prevention of Marine Pollution by Dumping of Wastes and Other Matters 1971

Convention on International Trade in Endangered Species of Wild Fauna and Flora 1973

Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations A/RES/252625

International Convention for the Prevention of Pollution from Ships 1973



Kyoto Protocol 2005  
Paris Agreement 2016  
Rio Declaration on Environment and Development A/CONF.151/26 (Vol.I) 1992  
Stockholm Convention on Persistent Organic Pollutants 2001  
Transforming our world: the 2030 Agenda for Sustainable Development GA/RES 70/1 A/RES/70/1(2015)  
United Nations Convention on Biological Diversity 1992  
United Nations Convention on the Law of the Sea 1982  
United Nations Framework Convention on Climate Change 1992  
Wetlands of International Importance especially as Waterfowl Habitat 1971

## Media

Anderson T and Boston J, 'Vehicle ban could drive efforts on emissions targets' (*Dominion Post*, 20 March 2018)  
Forest & Bird, 'OIAs reveal government plans to circumvent rules for new coal mines' (11 July 2017), <http://www.forestandbird.org.nz/what-we-do/publications/media-release/oias-reveal-government-plans-circumvent-rules-new-coal-mines>

Graham-Rowe D, 'Can nanotechnology provide cheaper solar energy?' (*Guardian*, 20 September 2011)

Matthan R, 'The circular economy' (*Livemint*, 24 January 2018)

Radio New Zealand, 'Watch: Ardern clarifies oil exploration remarks' (20 March 2018), <https://www.radionz.co.nz/news/political/352895/watch-ardern-clarifies-oil-exploration-remarks>

## Speeches

Elias S, Chief Justice of New Zealand, 'Righting environmental justice' (address to the Resource Management Law Association, Salmon Lecture, 25 July 2013)

Gow L, 'The Resource Management Act: Origins, context and intentions' (speech to the Resource Management Law Association Conference, Dunedin, 25 September 2014)

Palmer G, 'The Resource Management Act: How we got it and what changes are being made to it' (keynote address to Resource Management Law Association, Devon Hotel, New Plymouth 27 September 2013)

PalmerG, 'Ruminations on problems with the Resource Management Act' (keynote address to the Local Government Environmental Compliance Conference, Heritage Hotel, Auckland, 2-3 November 2015)



# APPENDIX 1: A WORKING DEFINITION OF NEW ZEALAND'S RESOURCE MANAGEMENT SYSTEM

The resource management system operates within the geographical constraint of **New Zealand**, which includes (with relevant limitations) areas where New Zealand has sovereignty or sovereign rights.

**Resources** can be broadly defined as natural and physical resources. (To the extent that seeing the environment in terms of resources is objectionable, this can be recast as 'environmental management system'). **Resources** and **environment** include:

1. Both **natural** resources/environment (ecosystems, including their constituent parts, fresh water, air and atmosphere, land/soil, marine, heat) and **built** resources/environment (buildings, infrastructure)
2. Both **private** resources (land, buildings, infrastructure) and **public** resources (e.g., air, water,<sup>430</sup> infrastructure)
3. **Urban, rural, conservation** and **marine** resources (across all New Zealand's geographical areas)

Resource **management** includes the following public interventions in relation to the resources described above:

1. Regulation: requiring or preventing human action
2. Behavioural incentives: to drive human actions or inaction
3. Funding mechanisms: to channel resources to particular kinds of action

in order to do the following things for the public good (outputs):

1. Influence or shape the spatial distribution of resource use, protection and enhancement (spatial planning)
2. Influence or shape the temporal distribution of resource use, protection and enhancement (strategic planning)
3. Require or encourage the use of resources for social and economic benefit (economic and social planning)
4. Discourage or limit/prevent the use of resources due to its environmental, social and cultural impacts (environmental protection)
5. Influence the restoration and improvement of the environment/resources (active environmental enhancement)
6. Distribute resources to different parties or communities of interest (allocation)

The **system** conceived of here is a description of the way in which all of these human actions ('management mechanisms') interact:

1. What aims and objectives we set
2. How we design legislative and regulatory frameworks
3. How we establish and run institutions that decide management questions
4. What processes we use for decision-making when managing resources
5. How we implement management mechanisms/tools (including monitoring, compliance and enforcement, evaluation and feedback mechanisms)



430 However, acknowledgement is also made of the existence of broad claims by Māori around the ownership of water.



# APPENDIX 2: LEGISLATIVE DESIGN, URBAN PLANNING AND ALLOCATION

## Should the RMA do more? A spotlight on urban planning

It has always been questionable whether the RMA is a genuine urban planning statute.<sup>431</sup> Good planning practice goes well beyond the avoidance, remediation and mitigation of adverse effects on the environment. It is about more than just weighing positive impacts against negative environmental effects. It is about maximising good social, economic and cultural outcomes in their own right.<sup>432</sup> A city could be the greenest in the world and still be rife with crime, social dislocation and limited mobility. The RMA is really about addressing 'bads' rather than achieving 'goods', and for that reason it says very little about the social and economic benefits of well-planned cities (or the benefits of resource use more generally).<sup>433</sup> It remains a product of its time, marrying the agenda of a budding environmental movement with a neoliberal belief in the rationality and efficiency of the free market. At first glance, there seems little room in between for the wider concept of 'planning.'

This appears to suggest that we need a separate urban planning statute. As described in Chapter 3, it is fully in keeping with a coherent sequence of lenses for an outcomes-based act like the RMA to be supplemented by a location (urban)-specific act if that location requires an *additional* kind of outcome. For example, the Conservation Act imposes highly protective outcomes in defined areas (the conservation estate) on top of the more balanced outcomes imposed under the RMA. Why, then, should we not impose the proactive pursuit of additional 'social and economic wellbeing' outcomes in defined urban areas?

In practice, the RMA has never prevented councils from engaging in urban planning. District plans, in particular, have always performed that role. This can be explained in different ways. First, 'environmental' effects as defined in the RMA are much broader than just effects on the natural or even physical environment.<sup>434</sup> The impacts of land use and urban design on *people* and *communities* are also environmental effects. Thus many urban planning measures can be justified on the grounds that they are ways by which *adverse* effects on people can be

prevented or mitigated.<sup>435</sup> The prevention of 'bads' and the achievement of 'goods' can often be treated as different sides of the same coin.<sup>436</sup>

That this has been assumed in the context of urban planning seems natural because it is a practical social necessity for cities to be well planned (and not just to stop pollution).<sup>437</sup> But it is still interesting, because addressing adverse social and economic effects has not been used to justify the proactive promotion of particular industries under the RMA. For example, a decision-maker could arguably use the same logic to claim that promoting agriculture is not the proactive pursuit of some people's economic wellbeing, but rather a way to avoid a future adverse effect on those people and communities – also part of the environment – who *currently* rely on agriculture for their wellbeing.<sup>438</sup> In cases like this, it has been much clearer that the Act is about preventing the 'bads' of market-led activities, not determining which kinds of resource uses will promote 'goods.'<sup>439</sup>

Furthermore, despite its passive appearance, the Act's direction to manage the use of resources to 'enable' people to provide for their own wellbeing has been treated in practice as a fairly active one when planning cities. It is not just about ensuring that environmental protections are lenient enough to allow people to provide for their own wellbeing (the idea of 'balancing' environment against society/economy, or the idea of a social 'ceiling').<sup>440</sup> It has also allowed decision-makers to manage the use of land in ways that 'facilitate' or even 'secure' or 'enhance' people's wellbeing. Even where the negative impacts of different choices are indistinguishable or non-existent, councils have not been agnostic about those choices in urban planning.<sup>441</sup>

For example, roads in a new residential greenfields development can have many alternative configurations, which may often have negligible differences in their adverse environmental impacts (a series of new cul-de-sacs will often not impact upon existing residents or ecology more or less than new roads laid out in a grid). But a district plan will reflect those that best provide for social wellbeing (a grid might better enhance social connection and mobility among new residents). Actively providing for affordable housing in plans and consent conditions has

431 New Zealand Productivity Commission, *Better urban planning* (New Zealand Productivity Commission, Final Report, 2017) from 96.

432 A more detailed exploration of the role of 'planning' will be undertaken elsewhere in this project.

433 See generally Minister for the Environment, *Report for Resource Management Act 1991's Principles Technical Advisory Group* (Ministry for the Environment, 2012) from 35.

434 RMA, s 2.

435 For example, reverse sensitivity provisions and basic zoning rules.

436 For example, the setting aside of green space in a city through a district plan can be seen as providing a positive outcome for social wellbeing, or alternatively as preventing the adverse effects that would have resulted had green space *not* been provided for.

437 District schemes under the former town and country planning regime were to a large extent simply rolled over into district plans under the RMA, with apparently little soul searching.

438 There has, however, been a degree of reactive and unintentional promotion of existing activities. For example, an area in which agriculture or industrial activities is established can be protected from new residential activities using reverse sensitivity arguments (that we need to avoid a scenario in which farming would adversely affect a new activity and thereby cause pressure to make a farmer cease her or his operations).

439 See generally Minister for the Environment, *Report for Resource Management Act 1991's Principles Technical Advisory Group* (Ministry for the Environment, 2012) from 35.

440 The degree to which environmental protections should be able to *constrain* economic and social wellbeing in cities is often the real underlying concern for many people, not whether the RMA is equipped to pursue social and economic wellbeing in a proactive way. However, the former is not relevant to whether the scope of the RMA should be expanded, and goes rather to the question of whether it should be *split*.

441 See New Zealand Productivity Commission, *Better urban planning* (New Zealand Productivity Commission, Final Report, 2017) from 107.



nothing to do with protecting the natural environment. Furthermore, in the context of climate change adaptation, land is managed not to prevent human impacts on the biophysical environment but rather to safeguard people's social and economic wellbeing in the face of threats from the biophysical environment. Here, it is arguable people are not enabled to provide for their *own* wellbeing at all (choosing whether to build close to a rising sea); they are being *told* what course of action will secure their wellbeing.

Therefore despite its initial impression, the RMA is not just about protecting the biophysical environment or balancing it against economic and social needs. It is also about preventing adverse effects on people's and communities' social, economic and cultural wellbeing (including in cities), and in practice has been used to pursue these wellbeings in their own right. The RMA is not inherently deficient in matters of urban planning.

However, we must have sympathy for those who complain that the RMA is not a particularly proactive or inspirational framework for planning our cities.<sup>442</sup> Its purpose contemplates that managing the *use* of land – not just its protection – is important to enable people to provide for their social, cultural and economic wellbeing, but the remainder of its purpose and principles provides no further guidance or recognition of this. If the RMA, or something like it, is going to continue to manage urban land use and design, it needs to be more explicit and specific about what its users already practice, by directing decision-makers to identify and actively pursue ways to enhance the socioeconomic and cultural wellbeing of people and communities (subject, of course, to the kinds of biophysical bottom lines it already contemplates but so often fails to deliver).

It is arguable that the proactive pursuit of broader wellbeings should not be limited to urban areas or even the built environment (social wellbeing can also be improved by enhancing the natural environment). The built environment – including related infrastructure – is simply one notable expression of where such a direction is needed.<sup>443</sup> While an act like the RMA should not be used to promote *particular* sectors or resource uses (it should not be a social or economic planning statute in this sense),<sup>444</sup> it should be made clearer that decision-makers need to

pursue all wellbeings in the way they manage land, both in urban and non-urban areas.<sup>445</sup>

But what about the LGA?<sup>446</sup> To some extent local government can already do these things under the liberal sprinkling of references to wellbeing in that Act.<sup>447</sup> However, the more pessimistic among us may see the 2012 narrowing of the purpose of the Act and of local government (to one focusing on core services) as a constraint on doing so. Furthermore, we cannot plan cities under the LGA alone. It has no teeth. Urban planning ultimately requires some form of regulatory intervention in land use, which must currently be done by translating wide-ranging local government plans and strategies into district plans (and sometimes regional policy statements) under the RMA. Broader concerns of community wellbeing in local government strategies and visions can be lost in translation as this RMA process plays out, including through the inevitable trade-offs and private settlements made when district plans are appealed. Strategies prepared under the LGA are by no means assumed to have significant weight when making decisions on district (or unitary) plans under the RMA, partly because the purpose of the RMA is quite different.<sup>448</sup> This creates a normative disconnect, and has the potential to frustrate the aspirations of councils for their communities.<sup>449</sup> It can also be inefficient; why have two sequential processes of consultation and decision-making (one under the LGA, the other under the RMA) only for the strategies of the former to be undermined or constrained by the latter?<sup>450</sup>

Furthermore, to rely only on the ability of urban councils to pursue social wellbeing under the LGA ignores the potential interest that central government has in cities. Central government has, in effect, already intervened under the RMA directly, through the development of the National Policy Statement on Urban Development Capacity. It has effectively interpreted the Act's direction to manage land use to 'enable' people to provide for their own wellbeing in a fairly interventionist way; it is a stretch to frame this national policy statement as something that only 'protects' the environment. If the RMA is going to be used to pursue social, economic and cultural wellbeing in cities in a proactive way, its purpose and principles could usefully be amended to reflect this.<sup>451</sup>

442 See generally Owens S, 'International developments in environmental planning' in R Peart (coll.), *Beyond the RMA: An in-depth exploration of the Resource Management Act* (EDS, Auckland, 2007); *Report of the Minister for the Environment's Urban Technical Advisory Group* (2010); and New Zealand Council for Infrastructure Development, *Integrated governance planning and delivery: A proposal for local government and planning law reform in New Zealand* (New Zealand Council for Infrastructure Development, Proposal, 2015).

443 New Zealand Council for Infrastructure Development, *Integrated governance planning and delivery: A proposal for local government and planning law reform in New Zealand* (New Zealand Council for Infrastructure Development, 2015) at 34.

444 Although see below for some thoughts relating to where allocative choices belong.

445 This is a much broader role than the funding and delivery of transport and water infrastructure, which is already provided for under the LGA and LTMA.

446 See generally Winefield P, 'Strategic planning in local government: An oxymoron?' (2007) *Planning Quarterly* 5.

447 The purpose of the Act and of local government in the Act have been curtailed by 2012 amendments, but reference to wellbeings still pervades the Act. General plans and strategies, including spatial plans, can be produced to deal with such matters (a spatial plan is mandatory under bespoke Auckland local government legislation).

448 The requirement is only to have regard to them.

449 On the issues associated with the proliferation of general strategic planning documents, see New Zealand Productivity Commission, *Better urban planning* (New Zealand Productivity Commission, Final Report, 2017) at 109.

450 Incidentally, one design choice could be to separate common participatory processes (such as special consultative procedures, collaborative processes) into a separate 'process' Act, to which other statutes (and not just resource management ones) could refer. That could prevent a proliferation of bespoke, statute-specific processes by allowing each statute to 'shop around' for a suitable, but common and well-understood process, depending on its needs.

451 For those who think this raises echoes of the Minister for the Environment's Technical Advisory Group report on the purpose and principles of the RMA, which essentially advocated a balancing approach rather than bottom lines, this is not what we are meaning. Rather we mean that the RMA should not be agnostic about social, economic and cultural wellbeing to the extent that it does not infringe firm biophysical bottom lines. We consider this matter further below.

## Should the RMA do even *more*? A spotlight on allocation

The allocation of public<sup>452</sup> natural resources is a particularly controversial topic because it concerns not just *whether* people get to use resources – or even *how* they should use them – but also who gets to use them. Those questions are inextricably connected. In allocating rights to take fresh water we are not just asking, for example, whether hydroelectric generation is more important than agricultural irrigation, but also, for example, whether Māori interests should trump non-Māori interests or whether farmer A (an existing user) should be preferred to farmer B (a more efficient and ecologically minded new entrant).

Furthermore, allocation is not just about *taking* things. It is, more broadly, about *using* the commons. We need to allocate rights to use the limited assimilative capacity of receiving environments (waterways), not just rights to extract resources (fresh water). For example, if a catchment can cope with only a certain amount of nitrogen, we need somehow to allocate that between different dischargers.

The system's approach to allocation, and the idea of distributional equity, transferability and pricing, is discussed elsewhere in the project. But we offer two substantive thoughts here. First, allocative questions raise people's hackles because (unlike in most legal contexts) people are not treated equally under the law. Everyone must comply with environmental bottom lines – just as everyone must comply with the general criminal law or the Consumer Guarantees Act. But where there is only a certain amount of something to go around, one person may get to use it while another does not. That is about fairness, and something New Zealanders tend to feel very strongly about. Allocative issues are most intensely controversial and political if the question is not just allocation but *reallocation* (the transfer of existing or previous rights from one person to another). Some may feel that an incumbent user should be favoured, others will not.

Secondly, allocation is not *just* about resolving conflict between different people. Even where resources are abundant, and people have no need to fight over exclusive rights to use them, the law can still play the role of trustee.<sup>453</sup> The system does not *have* to hand over public resources to the first person who wants to use them, to give them away for free, or to see them simply as things that happen to be sitting idly on a shelf, waiting to be privatised.<sup>454</sup> Nor do we have to see them as forever locked up in their historical private uses.

Allocative issues are relevant to how we design our legislation. This is, primarily, because it is questionable whether existing statutes are designed to deal with such issues. Currently, the RMA is agnostic as to how the benefits of resource use (the rights to use resources) are allocated between people or groups because its focus is on the management of adverse effects and the resolution of related disputes. If the effects of a proposal are acceptable, and there is a process for resolving any disagreement over them, sustainable management is indifferent to who is applying or what kind of activity the resource is being used for. The National Policy Statement for Freshwater Management is a reflection of this ethos; it does not grapple with allocative issues.

The problem is that, although the RMA does not really *care* how resources are allocated, *it still goes ahead and does it anyway*. A resource consent decision is primarily a declaration that an activity meets environmental criteria and can proceed, yet in reality it also creates a legally defensible and sometimes exclusive right to use scarce resources (and sometimes for a long time – up to 35 years).<sup>455</sup> Usually, the first person to apply for a resource consent for an activity is the person who is allocated the right to exploit a public resource needed for it (a first in, first served model).<sup>456</sup> We should not pretend this is simply a neoliberal or market model. A market requires there to be rights to be traded in the first place. The market does not create rights, it simply offers a way to transfer them. The *law* is what creates rights – even property rights in land are an (albeit important and justifiably treasured) creation of the law, not an unassailable natural order.

Over time, more proactive and structured allocative mechanisms have been added to the RMA. For example, rights to occupy coastal space can be resolved through a tendering process.<sup>457</sup> Since 2005 regional councils' functions explicitly include the allocation of fresh water, energy and the assimilative capacity of public-receiving environments, including into the future, where *appropriate*.<sup>458</sup> However, structured mechanisms for allocation do not appear to be much used, and are not clearly based on any allocative principles (such as equity, the public good, or cultural value). Plans, rather than consents, have been used to allocate resources like fresh water more proactively in some cases, but usually in a fairly limited way: by treating prospective users as having adverse effects on existing users. Reallocation has proved problematic.

The RMA is therefore *capable* of resolving allocative disputes<sup>459</sup> but its neoliberal foundations mean it is by no means good at it. For example, under the Act regional

452 When we use the term 'public' this is really shorthand for 'non-private'. We certainly do not limit the concept to Crown or other public body ownership. We also include resources over which ownership is contested (fresh water) or is not possible (the common marine and coastal area). We are not concerned with built resources, even if they are publicly owned (such as allocation of roads and water infrastructure).

453 For example, the pricing of public resources is not just a way to resolve the question of which person gets to use resources. Even in a world of abundant fresh water, pricing can be a way to reflect the fact that the public interest is not necessarily served entirely by the free distribution of rights. In some cases it may be – such as domestic use of fresh water – but that need not be presupposed across the whole system. For minerals rights, we charge not just as an allocative mechanism but also as a reflection that we are allowing people to use public resources (royalties are still imposed even if just one company is interested in exploitation). This is especially because some resources may not be scarce now, but we need to hold them in trust for the future when they *may* be scarce; if we have a free for all now, we may regret granting non-derogable rights for the next 35 years.

454 In some cases, we can even see private land as a public resource waiting to be clawed *back* into public ownership (such as the Queen's chain).

455 Section 123. In practice, this can be even longer, given how s 124 of the RMA has played out.

456 For criticism of this model, see Memon A and Skelton P, 'Institutional arrangements and planning practices to allocate freshwater resources in New Zealand' (2007) NZJEL 241.

457 For example, see RMA, Part 7A.

458 RMA, s 30(1)(fa).

459 See generally Memon A and Skelton P, 'Institutional arrangements and planning practices to allocate freshwater resources in New Zealand' (2007) NZJEL 241.



councils can impose *rules* to allocate resources, but there is no mention of the development of allocative *policies*. This should, perhaps, come as no surprise because there is very little normative guidance in the Act's purpose and principles on the subject. How is a council meant to allocate a resource based only on a direction to manage it in a way that enables people to provide for their own wellbeing? *Every* prospective user can be said to be doing that! Elected institutions, often lacking political will, are expected to perform a crucial task in a normative vacuum. Nor is the gap filled by central guidance; allocative functions rest firmly at the regional level. Overall, the purpose and principles of the Act are concerned with preventing or managing the adverse effects of resource use, rather than determining who gets its benefits.

This is not the place to assess the merits of a first in, first served approach in detail. That will be considered elsewhere in the project. In terms of legislative design, however, we observe that outcomes-based statutes are not really designed to pursue allocative (or reallocate)

outcomes in a proactive way.<sup>460</sup> It is a gap that is left to be filled by other statutes in the system. This helps to explain why we have some sectoral statutes over and above the RMA; the Crown Minerals Act and the Fisheries Act provide frameworks for allocating scarce resource rights in sectors where a proactive approach has been deemed essential. Some Treaty settlement legislation also fulfils this role.<sup>461</sup> However, we observe that where resources can be exploited by *multiple* sectors<sup>462</sup> they have been slower to receive such attention through bespoke statutes. It can be much more conceptually difficult to decide whether to prioritise a *sector* (e.g., agriculture or electricity generation) when managing fresh water than it is to determine, for example, which miners *within* a sector get to take minerals. The RMA allows it, and the Land and Water Forum has taken significant steps forward, but the problem remains unresolved.<sup>463</sup> It may be easy to point the finger at a lack of political will and tools at the regional level, but we also need to have a hard look at the normative and strategic inadequacies of the Act itself.



460 Regional councils *may* allocate resources where *appropriate*.

461 For example, under the Maori Fisheries Act 2004.

462 By sectors we mean different kinds of uses, and not just large industrial interests.

463 See the reports of the Land and Water Forum at <http://www.landandwater.org.nz/Site/Resources.aspx>



# APPENDIX 3: HOW CURRENT LEGISLATION PROVIDES FOR RIGHTS OF PUBLIC PARTICIPATION

## Resource Management Act 1991

The RMA regulates the management of all land, air and water, to the outer limits of the territorial sea. The Act is premised upon 'sustainable management' and is a multidimensional statute that is not only concerned with sustaining the natural environment but enabling people and communities to 'provide for their social, economic and cultural wellbeing and for their health and safety'.<sup>464</sup> Compared to the previous planning regimes under the Town and Country Planning Act 1977, central government's role in plan making has reduced, and the scope of local government's powers and functions has broadened. The RMA creates a planning structure that is decentralised – with local plan-making and implementation at the district and regional level – but one that is guided by national directives contained in central government instruments which direct and bind local authorities' actions. All planning instruments are created using some level of public involvement that usually becomes more extensive down the hierarchy.

National Policy Statements (NPS) prescribe objectives and policies for matters of national significance. National Environmental Standards (NES) are regulations which prescribe technical standards, methods or requirements. A single process is used by the Minister when developing NPSs and NESs.<sup>465</sup> After preparing a proposed NPS/ NES, the Minister must choose a process to evaluate the statement. The first process is the Board of Inquiry (BOI), which notifies and calls for any member of the public to make a submission on the proposal.<sup>466</sup> The BOI then holds a public hearing at which any person who has made a submission may speak and call evidence. The submissions are then considered in the BOI report and recommendations made to the Minister. The alternative process is one which is established by the Minister.<sup>467</sup> The details of the process are not specified in the legislation but minimum requirements are. The Minister must notify the public and iwi authorities of the proposed NPS/ NES. The public must then be given adequate time and opportunity to make a submission. There are no rights to be heard or appeal.

There are four alternative processes for developing regional policy statements and regional/district plans under the RMA: Schedule 1, limited notification, streamlined or collaborative. The *Schedule 1* process<sup>468</sup>

begins with the local authority preparing a concept or preliminary proposal in consultation with central and local government, tangata whenua and other interest groups. The plan is then publicly notified and the public have 40 working days to submit on the plan. The submissions are summarised into a report which is publicly notified and all submitters are directly notified. There is a call for further submissions which allows another 20 days for certain members of the public to submit.

Submitters and further submitters are then notified at least 10 days before a hearing takes place and are able to attend a pre-hearing if desired. Pre-hearings are used to sort out issues to the extent possible before a hearing, in a relatively informal setting. A report about what went on at the pre-hearing meeting is given to the hearing committee and must be considered in their decision-making. Those submitters who indicated they wish to be heard are able to speak at the hearing. Hearings are to avoid unnecessary formality and no cross-examination is permitted. Members of the hearing panel may ask questions to clarify the evidence which has been presented.<sup>469</sup>

The local authority then notifies its decision and any submitter may appeal to the Environment Court within 30 days. Any person who did not make a submission but has an interest in the proceeding greater than the general public is able to become a party to the appeal.<sup>470</sup> The Environment Court initiates mediation to resolve disagreements between the parties. It then hears any outstanding appeals. Appeals are de novo and the Court can hear any evidence it deems appropriate.<sup>471</sup> After the Court releases its decision further appeals on a point of law may be made to the High Court, Court of Appeal and the Supreme Court. Following the resolution of any appeals either by mediation or through a final Court decision, the plan is made operative.

Proposals are able to be notified on a *limited* basis where all persons directly affected by the plan change can be identified.<sup>472</sup> They follow the Schedule 1 process, except that full public notification is not required. Only people directly affected by the proposal and the relevant Ministers, local authorities and iwi are notified and have the right to lodge submissions, participate in hearings and lodge appeals.<sup>473</sup> This process is intended be used for minor, small-scale or discrete plan changes.<sup>474</sup>

464 Resource Management Act 1991, s 5(2).

465 Resource Management Act 1991, s 46A.

466 Resource Management Act 1991, ss 47–52.

467 Resource Management Act 1991, s 46A.

468 Resource Management Act 1991, Schedule 1.

469 Resource Management Act 1991, s 39.

470 Resource Management Act 1991, s 274(d).

471 Resource Management Act 1991, s 276.

472 This change results from the Resource Legislation Amendment Act 2017.

473 Resource Management Act 1991, cl 5A, Schedule 1.

474 Ministry for the Environment, *Changes to the standard planning track* (Ministry for the Environment, 2017).

Councils are able to use a *streamlined* planning process on request to the Minister. The process must be 'proportionate to the issues being addressed' and is intended to provide greater flexibility and enable timeframes to be tailored to specific issues and circumstances.<sup>475</sup> Before requesting ministerial approval, the Council must be satisfied the proposal is at least one of the following: will implement national direction, is an urgent matter of public policy, is required to meet a significant community need, deals with an unintended consequence of a plan or will combine several policy statements or plans. If the Minister grants the application to streamline a process, this in the form of a written direction that is published in the *Gazette*. The direction specifies the procedural steps and timeframes for the council to follow and includes a statement of the Minister's expectations of the Council. On completion of the streamlined planning process, the Council must submit the proposal to the Minister for approval. Generally provisions made through a streamlined planning process cannot be appealed.

Councils may adopt a *collaborative* planning process as an alternative planning track. This provides for the community to participate at the front end of the planning process where alternatives, and the costs and benefits of various options, can be considered. It is designed to produce plans that better reflect community values and reduce litigation costs and lengthy delays in finalisation.

Councils must consider a range of matters when considering whether to use a collaborative plan-making process: the scale and significance of the resource management issues to be dealt with, the view and preference of those likely to be affected or who have an interest in the issues, the financial and other costs of the process, whether designations or heritage orders should be considered, whether members of the community are able and willing to participate as members of a collaborative group, whether matters of national significance are likely to arise and whether relevant provisions of any iwi participation legislation should be accommodated.<sup>476</sup> The Council must give public notice that a collaborative planning process will be used.

The local authority appoints members to a collaborative group.<sup>477</sup> The members must include at least one member to represent the views of tangata whenua, territorial authorities, customary marine title holders and the heritage protection authority. Other members must have the knowledge, experience, and skills relevant to resource management issues to be considered by the group. The group's membership must reflect a 'balanced range of the community's interests, values, and investments' in the topic area.<sup>478</sup> The legislation does not prescribe a process

for appointing members, nor does it provide a mechanism for contesting appointments.<sup>479</sup>

The group is required to provide the council with a consensus report including recommendations and reasons for them. The council then drafts a proposal that must give effect to the consensus recommendations accompanied by a s 32 evaluation. The proposal is publicly notified and any member of the public may make submissions. A review panel (established by the council) hears submissions and reports back to the council. Any changes to the proposed policy statement or plan must either be changes required to ensure compliance with legislative or regulatory requirements, or the collaborative group must be given a chance to comment on the changes. The council must then decide whether to accept the review panel's recommendations (this responsibility transfers to the Minister of Conservation in the case of a regional coastal plan) and publicly notify the amended policy statement or plan. Appeals to the Environment Court on the merits are available on the parts of the plan that are not based on a consensus recommendation from the collaborative group, on changes recommended by the review panel that were opposed by the collaborative group, or those that relate to a notice of requirement, designation or heritage order that the relevant requiring authority or heritage protection authority did not support, or supported with changes. Appeals on points of law to the Environment Court is also available.

Resource consent applications are processed by local authorities who determine if the resource consent does not require notification, or if it should be notified publicly or on a limited basis, each having implications for public involvement. There are sound public policy reasons for notifying resource consent applications. The RMA 'represents a policy shift towards a more public model of regulation based on concepts of social utility and public interest'<sup>480</sup> and resource consent decisions concern 'balancing competing factors to arrive at the resource use which is in the overall public interest.'<sup>481</sup> There have been many amendments to the statutory notification provisions since the enactment of the RMA. Until 2009, there was a statutory presumption in favour of notification.<sup>482</sup>

If a resource consent is not notified, members of the public are unable to file submissions on the application, play any role in the consent authority decision-making process, appeal any decision to the Environment Courts or higher Courts or be a respondent to any appeal to the Environment Court or higher courts. Non-notification locks the public out of the decision-making process. The only way to challenge non-notification is by judicial review. Public notification requires the public authority to give public notice. Any person can make a submission on the

475 Resource Management Act 1991, s 80B.

476 Resource Management Act 1991, s 37.

477 Resource Management Act 1991, s 40.

478 Resource Management Act 1991, s 40(8).

479 Ministry for the Environment, *A draft guide to collaborative planning processes under the Resource Management Act 1991* (Ministry for the Environment, 2017).

480 *Falkner v Gisborne District Council* [1995] 3 NZLR 622 (HC) at 631.

481 *Murray v Whakatane District Council* [1999] 3 NZLR 276 (HC) at 312.

482 This presumption was removed by the Resource Management (Simplifying and Streamlining) Amendment Act 2009.

application and any submitter can appeal the decision of the council to the Environment Court. Currently less than 5 per cent of applications are publicly notified.<sup>483</sup> This means that members of the public have no opportunity to make submissions on the vast majority of resource consent applications. Limited notification requires service on any 'affected' person (as defined in the Act). Only those served with the application can make submissions.

There is also a direct referral process which allows applicants to make a request that their notified resource consent be decided either by a BOI or by the Environment Court rather than the relevant council.<sup>484</sup> This is designed to avoid the need for two full hearings. Consent authorities have full discretion to grant or refuse the request.<sup>485</sup> If they refuse the request, the normal consenting process is followed. Submitters have no right to be heard on an application for direct referral.<sup>486</sup> There are no rights to appeal the council's decision but the applicant may make an 'objection' to the council.<sup>487</sup> The applicant may present arguments for their proposal in person to the council they are required to reconsider the matter. If direct referral is granted, and the applicant decides to proceed to a BOI or the Environment Court, councils prepare a report on the application for the Court, which includes a summary of written submissions.<sup>488</sup> Submitters are served a copy of the applicant's notice of motion and they have the right to appear before the Court and be involved in the hearing, including speaking at the hearing. This requires the submitters to become a 'section 274 party' or a party to the proceedings by lodging a notice with the Court. The form can be downloaded from the Court website and assistance is provided by the Court. However, the process often requires professional help from a lawyer.

## Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012

The EEZ Act primarily regulates the disturbance of the seabed and water column, including petroleum and mineral exploration and production, aquaculture, marine energy generation and carbon capture and storage. It sets up a management and decision-making framework which is largely based on the RMA framework. However, regulations, rather than plans, largely provide the more detailed management framework, including determining the activity status of marine activities. The exact process the Minister must follow when preparing regulations is not

prescribed. As a minimum, the public, iwi authorities, and persons whose existing interests are likely to be affected must be notified of the proposed subject matter of the regulations and be given adequate time and opportunity to comment.<sup>489</sup> The Minister must carry out a similar process when developing an EEZ policy statement, which was recently provided for during the 2017 amendments to the Act.<sup>490</sup>

The EEZ Act prescribes notification requirements in regulations instead of being determined on a case-by-case basis like in the RMA. The Environmental Protection Authority (EPA) or a ministerially appointed BOI makes decisions on marine consent applications. The EPA must notify the public if the activity is discretionary (and is not emergency dumping or a non-notified activity) or if they receive more than one application for a marine consent in relation to the same proposal.<sup>491</sup> Any person may make a submission to the EPA within 20 working days of public notification.<sup>492</sup> The EPA will hold a hearing if it considers it necessary or desirable or if the submitter requests a hearing. Those submitters who would like to be heard may speak or call evidence.<sup>493</sup> No questions are asked of submitters unless the EPA gives permission.<sup>494</sup> There are appeal rights on points of law to the High Court.<sup>495</sup> Applicants and submitters may appeal decisions on discretionary marine consents and applicants may appeal decisions on non-notified discretionary marine consents.<sup>496</sup>

## Local Government Act 2002

The LGA provides for democratic and effective local governance that recognises the diversity of New Zealand communities.<sup>497</sup> To that end, the LGA recognises the importance of public participation in local decision-making. Public are able to be involved in council decision-making processes by voting for council, standing as a candidate for council, making a submission on the boundaries for wards and constituencies, contributing to a consultation or making a submission on a council plan (including the long-term plan, annual plan or funding policies) and attending council meetings.

Part 6 of the LGA regulates local government decision-making,<sup>498</sup> including a local authority's obligations to consult with affected and interested persons, and the public at large for significant decisions which are highly important to community wellbeing. Section 78 recognises that a local authority must, in the course of its decision-making process in relation to a matter, give consideration

483 Ministry for the Environment, *Resource Management Act Survey of Local Authorities 2012/2013* (Ministry for the Environment, 2014).

484 Resource Management Act 1991, s 87C–87L.

485 Resource Management Act 1991, s 87E.

486 Resource Management Act 1991, s 87E(7).

487 Resource Management Act 1991, s 87E(9).

488 Resource Management Act 1991, s 87F(3)–(5).

489 Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012, s 32.

490 Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012, s 37B.

491 Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012, ss 32 and 37.

492 Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012, ss 46 and 47.

493 Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012, s 54.

494 Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012, s53.

495 Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012, s 105(1).

496 Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012, s 105(2).

497 Local Government Act 2002, s 3.

498 Any decision made by a local authority must be made in accordance with the provisions of Part 6 of the Act.



to the views and preferences of persons likely to be affected by, or to have an interest in the matter.<sup>499</sup>

Local Government New Zealand states the prime purpose of consultation is to enable the effective participation of individuals and communities in the decision-making of councils to enable elected representatives to make better-informed decisions on behalf of those they represent.<sup>500</sup>

The principles guiding consultation processes set out in the LGA are designed to ensure individuals and their communities have information about decisions, the opportunity to engage with their councils and make their views known. There are six guiding principles set out in the LGA:<sup>501</sup>

- Councils must provide anyone who will or may be affected by the decision, or anyone who has an interest in the decision, with reasonable access to relevant information
- These people should also be encouraged to express their views to council
- People who are invited to present their views to council should be given clear information about the purpose of the consultation and the scope of the decisions being made
- People who wish to present their views must be given reasonable opportunity to present them
- Councils should receive these views with an open mind and give them due consideration when making a decision
- The council should provide people presenting their views with information relevant to decisions and the reasons for them

There is a special consultative procedure that must be used for consultation on particular issues, such as the long-term plan or a proposal to adopt or amend a bylaw.<sup>502</sup> The local authority must prepare and adopt a statement and summary of the bylaw and make it understandable and widely available to the public, as a basis for consultation. They must also provide a description of how those interested will be able to present their views on the proposal. People must be given a reasonable opportunity to present their views and may do so verbally (or via sign language) or via audio/audiovisual link.<sup>503</sup>

For the long-term plan, instead of a statement and summary, a concise and simple consultation document must be prepared and adopted (the draft long-term plan cannot be used).<sup>504</sup> Long-term plans describe activities of the local authority, community outcomes, provide for integrated decision-making and long-term focus for the decisions of local authorities and are a basis for accountability.<sup>505</sup> The consultation document is intended to inform discussions on the long-term plan. It must make the proposals easily understandable by describing the proposals and explaining their overall objectives, implications and any alternatives.<sup>506</sup> It must also identify and explain significant issues and choices facing the community and the consequences of those choices.<sup>507</sup> Other matters of public interest relating to the local authorities financial and infrastructure strategy should also be addressed.<sup>508</sup> A copy of the proposal and links or references to relevant documents must also be provided.<sup>509</sup> The LGA also established processes for discussing concerns about a council with the Office of the Ombudsmen, the Office of the Auditor General or the Parliamentary Commissioner for the Environment.

## Crown Minerals Act 1991

The Crown Minerals Act governs the allocation of rights to prospect for and mine for minerals in New Zealand (including the EEZ) and is administered by the Ministry of Business, Innovation and Employment. The purpose of the Crown Minerals Act is to promote the prospecting, exploration, and mining of Crown-owned minerals for the benefit of New Zealand.<sup>510</sup>

Minerals programmes set out the policies and procedures followed for the allocation of mineral resources and managing permit changes. The Minister must notify the public of draft minerals programmes or changes to them in one or more daily newspapers circulating in the main metropolitan areas.<sup>511</sup> The notice specifies the contents of the minerals programme, what internet site it can be inspected at and how submissions are to be made and by what date.<sup>512</sup> The public has 40 days to make their submissions.<sup>513</sup> The Chief Executive then arranges a report with recommendations for the Minister, which he or she must consider.<sup>514</sup> Information contained in a submission is not necessarily available to requesters.<sup>515</sup>

499 Local Government Act 2002, s 75.

500 Te Tari Taiwhenua Internal Affairs, 'How councils should make decisions' (23 March 2018), [http://www.localcouncils.govt.nz/lqip.nsf/wpg\\_url/About-Local-Government-Local-Government-In-New-Zealand-How-councils-should-make-decisions](http://www.localcouncils.govt.nz/lqip.nsf/wpg_url/About-Local-Government-Local-Government-In-New-Zealand-How-councils-should-make-decisions)

501 Local Government Act 2002, s 82.

502 Local Government Act 2002, ss 86 and 93.

503 Local Government Act 2002, s 83.

504 Local Government Act 2002, ss 93 and 93C.

505 Local Government Act 2002, s 93.

506 Local Government Act 2002, s 93B, implications include financial implications.

507 Local Government Act 2002, s 93B, consequences include changes to a local authority's rates, debt and levels of service.

508 Local Government Act 2002, s 93C.

509 Local Government Act 2002, s 93C.

510 Crown Minerals Act 1991, s 1 A.

511 Crown Minerals Act 1991, ss 2 and 17.

512 Crown Minerals Act 1991, s 17(2).

513 Crown Minerals Act 1991, s 17.

514 Crown Minerals Act 1991, s 18.

515 Crown Minerals Act 1991, s 18(5) states that despite the provisions of the Official Information Act 1982 if a request is made by any person for disclosure of information contained in a submission, the department or Minister to whom the request was made may refuse to make the information available if the department or Minister is satisfied that (a) such refusal is necessary to avoid serious offence to tikanga Māori or to avoid the disclosure of the location of wāhi tapu; and (b) in the circumstances of the particular case, the importance of avoiding such offence or disclosure outweighs the public interest in making that information available.

The minerals programme is then made publicly available for inspection.<sup>516</sup> The public may also be notified of significant mining activities occurring on Crown land.<sup>517</sup> The process followed is that laid out for concessions in the Conservation Act (see below).

Each year the New Zealand Government allocates petroleum exploration permits in an annual tender called a 'Block Offer'. Public are notified of the Block Offer via the Ministry for Business, Innovation and Employment website. The notice has details of the proposal, the types of activities that may take place and the proposed timing and conditions of the round. The public are not able to submit on the proposal. Most information regarding permits is not released to the general public under the Official Information Act 1982 until five years after the permit is obtained or after the permit ceases to be in force.<sup>518</sup>

## Fisheries Act 1996

The Fisheries Act governs fisheries management throughout New Zealand's territorial sea and the EEZ. The Act provides for the utilisation of fisheries resources while ensuring sustainability.<sup>519</sup> There are three main categories of fishing activity which are managed under the legislation – commercial, customary and recreational. The Minister of Fisheries is responsible for making 'sustainability' decisions and approving fisheries plans under the Act. Fisheries plans are not mandatory and are usually prepared by the Ministry for Primary Industries to outline fisheries management objectives and strategies to measure and achieve them.<sup>520</sup> Sustainability decisions are wide and can include setting the total allowable catch and implementing measures to manage the impacts of fishing activities on fish stocks and the broader marine environment.

The Minister is required to consult people or organisations with Māori, environmental, commercial and recreational interest in the stock or effects of fishing in the area before approving fisheries plans or setting sustainability measures.<sup>521</sup> Afterwards, the Minister must provide the consulted parties reasons in writing for his or her decision.<sup>522</sup> There is no requirement for the general public to be notified of a proposal or to be given the opportunity to make a written submission or to be heard at a hearing. There are no appeal rights. In practice, consultation documents are circulated publicly calling for written submissions and any party is able to make a submission.

## Climate Change Response Act 2002

The Climate Change Response Act enables New Zealand to meet its international obligations under the United Nations Framework Convention on Climate Change 1992 and Kyoto Protocol 2005. It creates a ministerially approved market for emissions trading. The Minister of Finance manages New Zealand's holding of units that represent New Zealand's target allocation for greenhouse gas emissions under the Protocol. The Act enables the Minister to trade those units on the international market and establishes a national inventory agency to record and report information relating to greenhouse gas emissions in accordance with international requirements. There are seven regulations and four orders under the Climate Change Response Act covering a broad scope of technical regulations including: general exemptions, fishing allocation plans, eligible industrial activities, removal activities, stationary energy and industrial processes, synthetic greenhouse gas levies, the New Zealand Refining Company Limited, unique emissions factors, unit register, waste, forestry, and fossil fuels.

Fishing quota owners were given some New Zealand Units in a one-off allocation in 2010 to compensate for the effect of increased fuel costs from the emissions trading scheme on the value of the quota. Public were notified with regard to the fishing allocation plans via the newspaper.<sup>523</sup> They were provided with details regarding how submissions were to be made and what date. A hardcopy of the plan was provided at the Department's office and on their website. The Minister was then required to write a report containing recommendations in respect of those submissions.<sup>524</sup>

The Minister must also set a responsibility target<sup>525</sup> under the Climate Change Response Act.<sup>526</sup> The target is publicly notified and accessible but only those with an interest in the target are consulted.<sup>527</sup> Public are able to search the Registry unit website and can view the annual inventory report and the inventory agencies national communication.

## Conservation Act 1987

The Conservation Act provides for the protection of historic resources. This includes protection of historic resources within public conservation land guided by general policy, conservation management strategies and conservation plans. The Department of Conservation manages public conservation land in New Zealand on behalf of the public and consults the community accordingly. Members of the public are also able to be nominated onto Conservation Boards. The Department of Conservation consults when there is a legislative requirement but also if it does not

516 Crown Minerals Act 1991, s 20.

517 Crown Minerals Act 1991, s 61C.

518 Crown Minerals Act 1991, s 90.

519 Fisheries Act 1996, s 8.

520 Fisheries Act 1996, s 11A(3).

521 Fisheries Act 1996, s 12 states that the Minister must consult before doing anything under sections 11(1), 11(4), 11A(1), 13(1), 13(4), 13(7), 14(1), 14(3), 14(6), 14B(1), 15(1) and 15(2) or recommending the making of an Order under section 13(9) or section 14(8).

522 Fisheries Act 1996, s 12(2).

523 A notice must be published in a daily newspaper of each of the cities of Auckland, Wellington, Christchurch and Dunedin and made accessible via the internet.

524 Climate Change Response Act 2002, s 76.

525 New Zealand was required to submit a 'responsibility emissions target' for the first commitment period under the Kyoto Protocol 2005 to reduce gas emissions to their 1990 levels.

526 Climate Change Response Act 2002, s 224.

527 Climate Change Response Act 2002, s 224.

have adequate information to base its decision on or if not consulting would result in an alienated community or tangata whenua.<sup>528</sup> The Department of Conservation's non-statutory consultation principles state it will:

- Take new ideas on board and respect a diverse range of interests and opinions
- Maintain independence
- Run an efficient consultation process
- Get the best information from the community and tangata whenua
- Consult tangata whenua in accordance with the Treaty of Waitangi principles
- Complete the consultation process

The goal of the consultation policy is to:

- Provide useful information to contribute to decision-making process
- Ensure statutory consultation requirements are met
- Improve/increase the efficiency of consultation carried out by the department
- Improve community relations

With regard to the preparation of a general conservation policy under the Act, the Director-General prepares a draft statement in consultation with New Zealand Fish and Game and Conservation Authorities. A public notice is then placed in the newspaper stating the draft is available for inspection<sup>529</sup> and calling for written submissions within 40 days.<sup>530</sup> Any person is able to be heard in support of their submission, appearing before the Director-General. The Director-General then consults anyone in a manner

he or she considers 'practicable and appropriate.'<sup>531</sup> Later, submissions are summarised and used to amend the draft general policy.<sup>532</sup>

Conservation management strategies and plans are usually updated every 10 years. Initially a draft is prepared by the Director-General in consultation with the Conservation Boards and local authorities and iwi are notified. Subsequently a public notice is placed in the local paper advertising a review of the proposed strategy or plan. Public are invited to share their opinion on the proposal 'by any means.'<sup>533</sup> A second draft is then produced, and another public notice is placed in the paper, calling for further submissions. The draft is made available for public inspection at Department of Conservation offices. If submitters wish to be heard in support of their submissions, they can appear before a meeting of Director-General representatives and the Conservation Boards. The public opinion is then considered in the revised proposal.<sup>534</sup> Freshwater fisheries management plans are prepared similarly.<sup>535</sup>

Anyone wanting to run a commercial operation on public conservation land must apply for a concession, and their operation must be consistent with the principles laid out in legislation, policies and management plans. Depending on the nature of the application, it may be notified for public submissions. All leases and licenses (for more than 10 years) must be publicly notified which involves putting a public notice in the newspaper and inviting an objection or submissions in writing.<sup>536</sup> The public have 20 days to send their submission to the Director-General and may later appear before them. The Minister must then have regard to those submissions before deciding whether or not to proceed with the proposal.<sup>537</sup> There are no appeal rights under the Conservation Act.



528 Department of Conservation Consultation Policy can be viewed at <http://www.doc.govt.nz/Documents/getting-involved/consultations/how-doc-consults/consultation-policy.pdf>  
 529 The draft policy is held at DOC and is available for public inspection during normal office hours.

530 Conservation Act 1987, s 17B states that the newspaper must be circulating in Auckland, Hamilton, Wellington, Christchurch or Dunedin.

531 Conservation Act 1987, s 17B.

532 Conservation Act 1987, s 17B.

533 Conservation Act 1987, s 17F.

534 Conservation Act 1987, s 17F.

535 Freshwater fisheries management plans aim to implement policies and establish objectives for the management of freshwater fisheries.

536 Conservation Act 1987, s 17SC.

537 Conservation Act 1987, s 49.



## APPENDIX 4: NEW ZEALAND'S OBLIGATIONS UNDER INTERNATIONAL ENVIRONMENTAL LAW

Convention	Obligations	Implementation
<p>United Nations Convention on Biological Diversity 1992 (2005)*</p>	<p>Establish a system of protected areas and areas where special measures are needed to conserve biological diversity</p> <p>Develop guidelines to select, establish and manage these areas</p> <p>Regulate and manage biological resources to ensure conservation and sustainable use</p> <p>Promote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings</p> <p>Promote environmentally sound and sustainable development in areas adjacent to protected areas</p> <p>Rehabilitate and restore degraded ecosystems and promote the recovery of threatened species</p> <p>Regulate, manage and control the risks associated with the use and release of living modified organisms resulting from biotechnology</p> <p>Prevent the introduction of, control or eradicate those alien species which threaten ecosystems, habitats or species</p> <p>Endeavour to provide the conditions needed for compatibility between present uses and the conservation of biological diversity and the sustainable use of its components</p> <p>Respect indigenous and local community knowledge and promote the application to innovations and practices</p> <p>Protect threatened species and populations</p> <p>Where a significant adverse effect on biological diversity has been determined, regulate or manage the relevant processes and categories of activities</p> <p>Integrate consideration of conservation and sustainable use of biological resources into national decision-making</p> <p>Avoid or minimise adverse impacts on biological diversity</p> <p>Protect and encourage customary use of biological resources in accordance with traditional cultural practices to the extent they are compatible with conservation and sustainable requirements</p>	<p>New Zealand Biodiversity Strategy 2000–2020</p>
<p>Aichi Biodiversity Targets 2010 (2010)</p>	<p>Effectively integrate biodiversity values in development, planning processes, national accounting and reporting systems</p> <p>Eliminate incentives and subsidies that harm biodiversity and develop and apply those that incentivise conservation and sustainable use</p> <p>Governments, business and stakeholders will have plans to achieve sustainable production and consumption and keep impacts of the use of natural resources within safe ecological limits</p> <p>Halve the rate of loss of habitats or bring it to zero and reduce degradation and fragmentation</p> <p>Manage and harvest all fish and invertebrate stocks sustainably</p> <p>Manage agriculture, aquaculture and forestry sustainably, ensuring conservation of biodiversity</p> <p>Bring pollution to levels that are not detrimental to ecosystem functioning</p> <p>Identify invasive alien species and pathways and control and eradicate priority species</p> <p>Minimise the anthropogenic pressures on vulnerable ecosystems impacted by climate change and ocean acidification</p> <p style="text-align: right;"><i>...continued</i></p>	<p>New Zealand Biodiversity Action Plan 2016–2020</p>

Convention	Obligations	Implementation
<p><i>...continued</i></p> <p>Aichi Biodiversity Targets 2010 (2010)</p>	<p>Conserve and manage 17 percent of terrestrial and inland water and 10 percent of coastal and marine areas</p> <p>Restore and safeguard ecosystems that provide essential services, including services related to water and contribute to health, livelihood and wellbeing</p> <p>Restore 15 percent of degraded ecosystems</p> <p>Adopt the National Biodiversity Strategy and Action Plan</p> <p>Respect and integrate traditional knowledge and customary use</p> <p>Full integrated community engagement at all levels</p>	<p>New Zealand Biodiversity Action Plan 2016–2020</p>
<p>Cancun Declaration on Mainstreaming the Conservation and Sustainable Use of Biodiversity for Well-being 2016 (2016)</p>	<p>Integrate policies, plans and programmes and legal and administrative measures and budgets for the conservation, sustainable use, management and restoration of biological diversity and ecosystems</p> <p>Incorporate biodiversity values in national accounting and reporting systems</p> <p>Strengthen institutional support and capacities for biodiversity mainstreaming</p> <p>Promote conservation, sustainable use, management and restoration of biodiversity as a basis for achieving resilient, sustainable and inclusive cities and human settlements, and climate change adaptation and mitigation</p> <p>Promote sustainable growth as reducing the ecological footprint, combating land degradation and desertification and addressing social inequality</p> <p>Increase and strengthen ecologically representative and well-connected systems of protected areas and other effective area-based conservation measures</p> <p>Facilitate the active and effective involvement of all relevant actors and stakeholders</p> <p>Strengthen indigenous peoples and local communities' capacities to implement the Convention on Biological Diversity by respecting their rights and customary, sustainable use of biodiversity and fair and equitable sharing of benefits arising from their traditional knowledge and practices</p> <p>Improve the regulatory framework for private sector activities, enhance incentives and promote tools for the conservation and sustainable use of biodiversity</p> <p>Promote sustainable agriculture</p> <p>Adopt a holistic integrated view and assessment of ecosystems and the interlinkages between agriculture and biodiversity</p> <p>Use integrated and cross-sectoral planning processes to reduce inefficiencies and increase productivity whilst avoiding negative impacts on ecosystems and associated biodiversity</p> <p>Conserve and cultivate native varieties</p> <p>Prevent agricultural pollution</p> <p>Control pests and diseases</p> <p>Promote sustainable consumption and production patterns</p> <p>Integrate the ecosystem approach into fisheries policies, programmes and plans</p> <p>Establish actions for the conservation and sustainable use of fishery resources to ensure the long-term viability of the fishing sector</p> <p>Conserve marine, coastal and inland water ecosystems, recognising their role as carbon sinks</p> <p>Enhance actions to reduce pollution, including noise and plastic materials</p> <p>Promote and encourage aquaculture that uses native species</p> <p>Prevent, control and eradicate invasive alien species <i>...continued</i></p>	<p>New Zealand Biodiversity Action Plan 2016–2020</p>

Convention	Obligations	Implementation
<p>...continued</p> <p>Cancun Declaration on Mainstreaming the Conservation and Sustainable Use of Biodiversity for Well-being 2016 (2016)</p>	<p>Develop strategies to reduce unregulated and unreported fishing and illegal trade</p> <p>Strengthen the implementation of the <i>Code of Conduct for Responsible Fisheries</i> of the Food and Agriculture Organisation of the United Nations</p> <p>Promote sustainable forest management as a dynamic and evolving concept for all types of forest</p> <p>Emphasise the relevance of forests as carbon sinks and their critical role for developing strategies for climate change adaption and mitigation</p> <p>Design and promote incentive packages for restoration, conservation and sustainable use</p> <p>Promote participation in the private sector in the development of production chains to reduce deforestation and degradation</p> <p>Promote the International Agreement on Forests</p> <p>Adopt practices for sustainable blue and green infrastructure</p>	<p>New Zealand Biodiversity Action Plan 2016–2020</p>
<p>Convention on International Trade in Endangered Species of Wild Fauna and Flora 1973 (1989)</p>	<p>Protect approximately 5,800 species of animals and 30,000 species of plants from trade through a system of permits and certificates.</p> <p>Appendix I species are the most endangered and trade is more restricted for those species</p> <p>Appendix II species can withstand more trade</p> <p>Appendix III species are those where individual countries have asked for help to protect those species</p>	<p>Trade in Endangered Species Act 1989</p>
<p>Convention Concerning the Protection of the World Cultural and Natural Heritage 1972 (1984)</p>	<p>Identify and protect natural and cultural heritage within States territory of 'outstanding universal value'</p> <p>Set up a service for the protection, conservation and presentation of cultural and natural heritage and to identify measures to counteract dangers that threaten such heritage</p> <p>Submit to the World Heritage Committee an inventory of such heritage suitable for inclusion in the World Heritage List</p>	<p>Three sites on the World Heritage List: Tongariro National Park, Te Wahipounamu – South West New Zealand and the Subantarctic islands of New Zealand</p>
<p>Convention on Wetlands of International Importance especially as Waterfowl Habitat 1971 (1976)</p>	<p>Designate wetlands for inclusion on the List of Wetlands of International Importance</p> <p>Promote the significance of these wetlands and monitor and advise of any changes to their ecological character</p> <p>Promote the wise use of all wetlands, especially through formulating and implementing national policy on wetland conservation management</p> <p>Promote conservation of wetlands and waterfowl by establishing nature reserves on wetlands generally, to compensate for any loss of wetland resources of listed sites, encourage research, increase waterfowl populations and promote training in wetlands research, management and wardening</p> <p>Promote international cooperation in wetlands conservation, including the sharing of resources and expertise</p>	<p>Six wetlands are listed under the Ramsar Convention Resource Management Act 1991</p>
<p>The Cartagena Protocol on Biosafety 2003 (2003)</p>	<p>Ensure that the development, handling, transport, use, transfer and release of any living modified organisms are undertaken in a manner that prevents or reduces the risks to biological diversity</p>	<p>The Imports and Exports (Living Modified Organisms) Prohibition Order 2005</p>



Convention	Obligations	Implementation
United Nations Convention on the Law of the Sea 1982 (1996)	<p>Exert sovereignty over the territorial sea, exclusive economic zone and the continental shelf</p> <p>Protect and preserve the marine environment</p> <p>Protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species</p> <p>Determine the total allowable catch and, taking into account the best scientific evidence ensuring that stocks are not endangered by overexploitation</p> <p>Maintain and restore populations of harvested species at levels which can produce the maximum sustainable yield</p> <p>Promote optimum utilisation of living resources in the EEZ by determining its capacity to harvest the living resources of the EEZ</p> <p>Prevent and control marine pollution</p>	Resource Management Act 1991, Fisheries Act 1996, Continental Shelf Act 1964, Maritime Transport Act 1994, Territorial Sea, Contiguous Zone, and Exclusive Economic Act 1977 and Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012
Agreement for the Implementation of the provisions of UNCLOS relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish 1995 (2001)	<p>Adopt measures to ensure long-term sustainability of straddling fish stocks and highly migratory fish stocks and promote the objective of their optimum utilisation</p> <p>Ensure that such measures are based on the best scientific evidence available and are designed to maintain or restore stocks at levels capable of producing maximum sustainable yield</p> <p>Assess the impacts of fishing, other human activities and environmental factors on target stocks</p> <p>Adopt conservation and management measures for species belonging to the same ecosystem with a view to maintaining or restoring populations of such species above levels at which their reproduction may become seriously threatened</p> <p>Minimise pollution, waste, discards, catch by lost or abandoned gear, catch of non-target species, both fish and non-fish species and impacts on associated or dependent species</p> <p>Protect biodiversity in the marine environment</p> <p>Take measures to prevent or eliminate overfishing and excess fishing capacity and to ensure that levels of fishing effort do not exceed those commensurate with the sustainable use of fishery resources</p> <p>Collect and share complete and accurate data concerning fishing activities</p> <p>Promote and conduct scientific research and develop appropriate technologies in support of fishery conservation and management</p> <p>Implement and enforce conservation and management measures through effective monitoring, control and surveillance</p>	Fisheries Act 1996, National Fisheries Plan for Highly Migratory Species
FAO Code of Conduct for Responsible Fisheries 1995 (1995)	<p>Adopt clear and well-organised fishing policies that have been developed in cooperation with all the groups with an interest in fisheries</p> <p>Establish new regional fisheries organisations or strengthen existing organisations that aim to cover the cost of conservation, management and research activities for their members</p> <p>Minimise negative impacts on the environment of fishing and fishing processes in ways that reduce waste and preserve the quality of fish caught</p> <p>Ensure fishers keep records of their fishing operations</p> <p>Have enforceable laws with procedures for determining and punishing violators – punishment for violations could include fines or even the removal of fishing licences if violations are severe</p> <p>When developing fisheries policies consider the costs and benefits of fishing and the environmental and social impacts of fishing and use the best scientific information available whilst taking into account traditional fishing practices and knowledge</p>	Fisheries Act 1996, Resource Management Act 1991

Convention	Obligations	Implementation
<p>...continued</p> <p>FAO Code of Conduct for Responsible Fisheries 1995 (1995)</p>	<p>When information is absent take the precautionary approach to setting fishing limits</p> <p>Encourage people and organisations to share their views on fishing issues, and particular attention should be given to the needs of local people</p> <p>Prohibit dynamiting, poisoning and other destructive fishing practices</p> <p>Avoid overfishing and ensure the size of the fishing fleet should not be too large for the natural supply of fish</p> <p>Understand the effects of fishing gear on the environment (impacts on coral reefs, for example) before using a new fishing gear</p> <p>Ensure fishing methods and gear are selective and designed to minimise waste and promote high survival rates for escaping fish</p> <p>Ensure gear minimises the catching of fish species that are not wanted (non-target or bycatch fish) or that are endangered</p> <p>Phase out fishing gear and fishing methods that are not selective or which cause high levels of waste</p> <p>Protect important fish habitats such as wetlands, mangroves, reefs and lagoons from destruction and pollution</p> <p>Where natural disasters harm fisheries resources take emergency conservation and management measures when necessary</p> <p>Conserve genetic diversity and minimise negative effects of farmed fish on wild fish populations while increasing supplies of fish for human consumption</p> <p>Avoid disputes and conflict between different users of resources</p> <p>Ensure that the livelihoods of local communities are not negatively affected by aquaculture developments</p> <p>Establish procedures for monitoring and assessing the environmental effects of aquaculture</p> <p>Monitor the types of feed and fertiliser used in farming fish</p> <p>Take into account local communities and their ways of living and opinions in the coastal planning process</p> <p>Carry out fisheries practices in a way that avoids conflict among fishers and other users</p> <p>Support fisheries research efforts, monitor the conditions of fish and their habitat and gather data on the effects of different types of fishing gear on target populations and the environment generally</p>	<p>Fisheries Act 1996, Resource Management Act 1991</p>
<p>United Nations Framework Convention on Climate Change 1992 (1993)</p>	<p>Adopt national policies to mitigate climate change through limiting anthropogenic (human-induced) emissions of greenhouse gases and protecting and enhancing our greenhouse gas sinks and reservoirs</p> <p>Report detailed information on greenhouse gas inventories, national actions and projected human-induced greenhouse gas emissions and removal by sinks, according to timeframes set in the Convention</p> <p>Take into account climate change considerations, in relevant social, economic and environmental policies and actions</p> <p>Promote, and cooperate in, relevant scientific and technological research and exchange information in such areas (including transferring technology to developing countries)</p> <p>Provide additional financial resources to meet the agreed full costs incurred by developing countries in complying with their obligations under the Convention</p> <p>Promote public awareness of, and education about, climate change issues</p>	<p>Climate Change Response Act 2002</p>

Convention	Obligations	Implementation
Kyoto Protocol to the United Nations Framework Convention on Climate Change 1997 (2005)	<p>Reduce greenhouse gas emissions to their 1990 levels</p> <p>Submit an annual inventory of greenhouse gas emissions to the Convention</p> <p>Formulate, implement and publish regular updates to national and regional programmes that contain measures to mitigate climate change and facilitate adequate adaptation to climate change</p> <p>Cooperate internationally in relation to policies and measures (including scientific and technical research and development) and facilitating public awareness and access to information on climate change</p>	Climate Change Response Act 2002
Paris Agreement 2015 (2016)	<p>Prepare, communicate and maintain successive nationally determined contributions and pursue domestic measures to achieve them</p> <p>Communicate nationally determined contributions every five years and ensure each successive NDC represents a progression beyond the previous one</p> <p>Regularly report on emissions and how they are tracking to meet the target</p> <p>Engage in adaptation planning which involves submitting and periodically updating an adaptation communication of priorities, implementation and support needs, plans and actions</p> <p>Provide financial support to assist developing countries' mitigation and adaptation efforts</p>	
Basel Convention of the Control of Transboundary Movements of Hazardous Wastes and their Disposal 1989 (1994)	<p>Approve hazardous waste imports and exports prior to arrival</p> <p>Ensure hazardous waste are managed 'in an environmentally sound manner'</p>	Imports and Exports (Restrictions) Prohibition Order (No 2) 2004
International Convention for the Prevention of Pollution from Ships 1973 (1998)	<p>Prevent pollution of the marine environment from oil and oily matter, harmful substances carried in packaged form, sewage and garbage from ships</p> <p>Prevent air pollution from ships</p>	Maritime Transport Act 1994, Resource Management (Marine Pollution) Regulations 1998
Convention of the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1971 (1975)	Prohibit the dumping of any wastes except: dredged material, sewage sludge, fish waste, or material resulting from industrial fish processing operations, vessels and platforms or other man-made structures at sea, inert, inorganic geological material, organic material of natural origin, bulky items primarily comprising iron, steel, concrete and similar unarmful materials and carbon dioxide streams from carbon dioxide capture processes.	Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012, Maritime Transport Act 1994, Resource Management (Marine Pollution) Regulations 1998
Stockholm Convention on Persistent Organic Pollutants 2001 (2004)	Ban over 30 persistent organic pollutants	National Implementation Plan under the Stockholm Convention on Persistent Organic Pollutants 2006



Convention	Obligations	Implementation
Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade 1998 (1998)	Ban over 50 pesticides, hazardous pesticide formulations and industrial chemicals	Imports and Exports (Restrictions) Prohibition Order (No 2) 2004

\* Years in parentheses indicate when New Zealand became a party to the agreement











EDS is leading a project which is taking a first-principles look at the resource management system in New Zealand and outlining options for reform. This second Working Paper explores what the future could look like, and its implications for the resource management system; legislative design; public participation; and New Zealand's obligations under international law.

