WHAT

WHY

HOW

Exploring the fundamental questions for resource management law reform in Aotearoa New Zealand

Paper 2: The scope of the system

Environmental Defence Society
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Summary: What is the proper scope of the resource management system?

Introduction

The Environmental Defence Society (EDS) is looking at what the key design features of a future resource management system should look like. The context is that the government, in 'phase 3' of its resource management reforms, is proposing to replace the Resource Management Act 1991 (RMA) with two statutes based on the 'enjoyment of property rights'. It has established ten high level principles to guide this reform.

We are producing a series of think pieces looking at three key conceptual questions at the heart of reform: the *What* (scope); the *Why* (purpose) and the *How* (machinery) of the system. We are not seeking to create a detailed blueprint for reform for government to adopt. Nor is the point to critique government proposals per se. Rather, we are wanting to ensure that the right questions are being asked and that they are framed very carefully. For the most part, Ministers' concerns with the RMA are valid and deserve attention, but this attention needs to be focused in the right places to target the real problems without creating new ones. In particular, there are significant procedural issues with the current system. For example, things take too long, outcomes are too uncertain, costs are too high, legislation is too complex, there are too many plans, and processes are misaligned. These can cause problems for both development and the environment, and will need to be carefully addressed.

But the first and most fundamental question, and the subject of this paper, is what a future resource management system's scope should be. What rationales for intervention should lie at the heart of a future system? What do we expect it to do, and not to do? And when should a control be regarded as overreach?

The scope of the RMA, outlined in Parts 2 to 4, is relatively wide owing to its definitions of 'effect' and 'environment' and the breadth of territorial authority functions relating to land use in section 31. In particular, under Part 3 the RMA can control:

- The 'use' and subdivision of land (sections 9 and 10)
- Discharging 'contaminants' (broadly defined) into land, air or water[1]
- Dumping/incinerating/storing waste at sea
- Any 'activity' in, on, under or over the coastal marine area (or 'in relation to' its natural and physical resources)
- With respect to the bed of lakes and rivers: disturbing, building/using structures, depositing substances, introducing/removing/disturbing plants and animals or their habitat, reclaiming, draining, entering/passing across
- With respect to water (and its energy/heat): taking, using, damming, diverting (with some exceptions)
- Unreasonable noise.

Under section 30, regional councils can control these activities for the purposes of:

- Achieving the integrated management of natural and physical resources
- Conserving soil
- Maintaining and enhancing the quality of water and its ecosystems, and the quantity of water
- Avoiding and mitigating natural hazards
- Identifying and monitoring contaminated land
- Controlling land, occupation, extraction and emission of noise in the coastal marine area

- Controlling the taking, using, damming and diverting water (coastal water and freshwater) and the taking of geothermal energy
- Controlling discharge of contaminants
- Controlling dumping at sea
- Providing for sufficient development capacity
- Maintaining indigenous biodiversity
- Allocating the taking of water/energy, the assimilative capacity of water/air, and the occupation of coastal space if appropriate
- The strategic integration of infrastructure with land use.

And under section 31, territorial authorities (district and city councils) are responsible for regulating land and subdivision for the following purposes (some of which overlap with regional council functions):

- Achieving the integrated management of the effects of the use, development, or protection of land and associated natural and physical resources
- Providing for sufficient development capacity
- Avoiding and mitigating natural hazards
- Preventing and mitigating any adverse effects of contaminated land
- Maintaining indigenous biodiversity
- Mitigating the effects of noise (except in the coastal marine area)
- Controlling activities on the surface of rivers and lakes.

The aim of all of this is stated in Part 2 – the purpose and principles of the Act. The core of Part 2 is about managing 'effects' on the 'environment'.

environment includes—
(a) ecosystems and their constituent parts, including people and communities; and
(b) all natural and physical resources; and
(c) amenity values; and
(d) the social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) or which are affected by those matters

natural and physical resources includes land, water, air, soil, minerals, and energy, all forms of plants and animals (whether native to New Zealand or introduced), and all structures

land (a) includes land covered by water and the airspace above land…

… **effect** includes—
(a) any positive or adverse effect; and
(b) any temporary or permanent effect; and
(c) any past, present, or future effect; and
(d) any cumulative effect which arises over time or in combination with other effects—
regardless of the scale, intensity, duration, or frequency of the effect, and also includes—
(e) any potential effect of high probability; and
(f) any potential effect of low probability which has a high potential impact.

The breadth of the RMA outlined above has caused some concern, and the government has signalled its desire to reduce scope to one based on the management of 'actual' or 'material' effects. That could mean quite different things in different contexts, but the basic idea seems to be that the system should only deal with legitimate impacts on the physical environment. Looming over all this is the question of what property rights (especially those in *land*) should mean for the system's scope to intervene.

The first point is that there are three distinct meanings of 'scope' that should not be confused: (1) the scope of public intervention (where authorities like councils have no business being involved), (2) the scope of regulatory tools (as opposed to 'softer' tools like economic instruments), and (3) the scope of the RMA (as opposed to *other* statutes). Policy makers should be clear what they are meaning in any given situation, because each has different implications. For example, saying something should not be managed at all is quite different to saying the RMA should not be managing it.

In thinking about the role of public intervention in resource management, it helps to remember that the main reason that a system like the RMA exists is because of serious deficiencies in the common law. One can no longer rely on private actions in tort like nuisance and trespass to resolve the kinds of complex collective action problems that modern environmental and planning legislation grapples with. For example, these mechanisms are reactive to harm only once it occurs, they lack certainty of outcome, and they fail to recognise the *public* interest in many forms of environmental harm. For these and many other reasons, *some* form of legislation is needed.

What should the boundaries of such legislation be? We identify four key rationales that justify intervention, and which should lie at the heart of a future system: (1) protecting the commons and allocating rights to use it; (2) managing the impacts that people can have on each other; (3) managing impacts on the broader environment (notably land itself); and (4) creating positive effects. In te ao Māori, there can be no hard and fast distinctions made between such things, and a future system will need to be sensitive to this holistic approach if it is to honour Te Tiriti. There are, however, legitimate issues of scope for each of these rationales – as pointed out by Ministers – and policy effort should address these in targeted ways.

'Common pool' resources need to be protected and allocated

Sometimes, people use terms like 'common pool resources' or 'the commons' to describe aspects of the natural environment, like freshwater in rivers or lakes, which are not privately owned. Of course, these terms are not ideal, because arguably they imply that the environment is nothing more than a set of resources to be carved up for human use. That is not our intention in using the term. Nor should it be taken to dismiss legitimate questions about Māori rights and interests in resources like water or the marine space. Rather, the commons is a useful shorthand, in that it distinguishes unowned things from the broader 'natural environment' in which there *are* many private property interests (eg land).

History has shown that proactively protecting the commons from overuse or pollution is essential and this will need to form the core of any system of environmental law. The so called 'tragedy of the commons' is well documented.[2] The scope of the RMA (notably with respect to regional council functions in section 30, and the matters that regions can regulate under Part 3 of the Act – including air quality, water takes and pollution, and the coastal marine area) is therefore largely fit for purpose and should be carried over, even if there is debate about the specific tools that are used.

Some questions of scope exist with respect to management of the commons, but they need to be approached with caution. In particular:

- Which specific aspects of the environment are, and are *not*, regarded as part of the 'commons'? Freshwater, the coastal marine environment, air and the climate are obvious examples (they are not, and should not, be 'owned' in the same sense as land). But other elements of the environment can be regarded as part of the commons too. For example, a lot of biodiversity, including fauna protected under the Wildlife Act, is not actually owned by a landowner.[3] A

precise definition of 'commons' and 'property' might matter less if there is a strong recognition that private rights are not absolute. But if a system tries to create a binary distinction between public and private interests (eg a protective purpose for the commons and an enabling purpose for land) it will need to recognise that there is actually a quite a bit of the 'commons' on and in private property.

- What is the role of the system (as opposed to free markets) in allocating (or reallocating) rights to use common pool resources? This is a longstanding philosophical question, which has never been resolved under the RMA. It has essentially created a blind spot where neither the system nor the market have embraced the allocative role meaningfully, meaning some rights have been allocated in ways that have been inefficient, inequitable, questionable from a Te Tiriti perspective and bad for the environment. Our view is that a more strategic approach is needed, and while market mechanisms (eg trading) may have a place, the resource management system has a vital role in overseeing their operation and placing public interest constraints on them.

- What are the proper circumstances in which the system should *give up* jurisdiction to manage common pool resources? For example, once rights are granted, the system should not have the scope to reallocate those rights to others (it would be a derogation of grant). But our view is that the system should not lose the jurisdiction to protect the resource itself from harm, even if doing so would affect people's consented rights. For example, people exercising their consented rights to discharge contaminants to water might infringe environmental limits across a catchment, in which case the system needs the ongoing ability to intervene. Some situations may be more difficult, such as where the system seeks to shape the use to which the commons is put (eg where a landowner wishes to put water rights to a different use, such as changing from water bottling to irrigation). If a change in use might be damaging to the environment, it should be within the scope of the system to restrict.

The system needs to manage the negative impacts that people can have *on each other*

The resource management system is about much more than just managing the commons. It also needs to manage the effects people can have on each other directly. Historically, this has developed largely as part of 'planning' frameworks that deal with tensions arising from how people use land. Notably, a lot of this rationale for intervention is about protecting (and even *defining* or *conferring*) property rights, and mediating between them where they conflict. In this sense, many controls under the RMA are *already* squarely aimed at the enjoyment of property. For example, the property 'right' to build close to a boundary can undermine the property 'right' of a neighbour to sunlight or privacy. This is partly why there are broad powers for territorial authorities to manage land under sections 9 and 31 of the RMA, and broad definitions of 'effect' on the 'environment'. Planning legislation needs to deal with a wide range of effects arising from land use that are not easy to codify.

It is also vital that a future system continues to recognise that this rationale extends to the management of impacts on a much wider range of rights and interests, not just *property* rights. Notable are impacts on people's health, safety and wellbeing (eg from air quality, noise, and other contaminants), and Māori interests specifically (eg wāhi tapu). There is good reason why the RMA's definition of effect is not just limited to effects on those who happen to hold property rights, just as human rights are not limited to this category of person.

There are three key questions of scope for policy makers to focus on here.

1. Where there is an improper purpose

The resource management system should not be used for improper ('non-resource management') purposes. These need to be excluded from its scope. However, great care is needed so as not to throw out the consideration of legitimate and potentially significant environmental effects alongside improper ones. One key area is trade competition, where businesses seek to use planning and consenting processes to engage in anti-competitive behaviour (eg by submitting in opposition to rival businesses). The effects of competition on businesses should not be regarded as a 'material' (legitimate) effect. Amendments to the Act have, however, strengthened its approach since 2015, and clearer evidence is required as to the extent of the current problem before the scope of the system is narrowed further. In particular, concerns about trade competition should not be used as a reason to reduce the scope of the system to one that only deals with 'directly affected' persons (eg neighbours). Doing that would prevent people raising genuine environmental concerns.

Another key area is where the RMA has, in practice, allowed councils to prevent the rezoning of land (eg from rural to residential) because they cannot (or will not) fund the public infrastructure needed to service it. In other words, the breadth of 'effects' on the 'environment' from new developments encompasses impacts on councils' balance sheets. Ministers have quite rightly pointed out this issue. However, while the fiscal capacity of councils should not be a valid type of effect, it *is* a symptom of very real shortcomings in separate infrastructure funding and financing settings. These issues will need to be fixed before there is an explicit restriction on using the RMA to 'ration land' by councils, because the alternative is that land will simply be rezoned without an achievable plan for the provision of public infrastructure to go with it. Managing where and when growth occurs is also important for other reasons (eg reduction of greenhouse gas emissions, efficient delivery of infrastructure). Such considerations are vital for a healthy environment and need to remain firmly within the scope of councils' jurisdiction under sections 9, 30 and 31 of the Act, as well as the definition of an effect.

A third area is where the effects of one person on another are entirely subjective or trivial. Many relate to urban design requirements imposed by district and city councils through plans or consents, and justified under the broad ambit of environmental effects (eg the colour of a building, the internal design of a house, or the location of a clothesline on a property). However, the *reasoning* behind controls need to be carefully considered in context before considering how to phrase any exclusions. For example, restrictions on the colour or materials of a fence might range from the pedantic (subjective preference) to the legitimate (eg high reflectivity that blinds motorists). Here, a requirement for proportionality would be more appropriate than an attempt to exclude whole categories of effect (which would be hard to define without context).

A fourth category is where an effect is already properly managed elsewhere outside of the resource management system (eg under the Building Act, Health Act or Fisheries Act). Policy makers need to proceed with extreme caution here when contemplating reducing system scope. True overlap is much less than one might imagine (things are managed for quite different purposes), and cutting out things like aspects of urban design or fishing controls from the resource management system could have significant environmental ramifications.

2. Where affected persons have consented to harm

Arguably the system should not intervene if affected persons have *consented* to harm. The government has signalled that many resource management outcomes in an urban context should be able to be negotiated between affected parties in this way. This is a reasonable point. That said, despite effects on the environment being defined very broadly as a starting point, the RMA provides

for a number of avenues for such effects to be *removed* from its jurisdiction (eg through permitted boundary activities, limited notification, affected person signoff, mediation and consent orders). If the scope of the system were to be narrowed more than this, care needs to be taken to ensure that effects are truly limited to specific parties, rather than other persons or society/the environment more broadly. For example, increasing the impervious area of a property (even by building some decks) can cumulatively increase flooding risk for other people in a community.

3. Where the person creating harm is the only person affected

Should the system protect people from their *own* choices? Arguably that person is better placed than a council or consent authority to decide whether any personal harm is acceptable. For example, Ministers have pointed to requirements for new builds to include balconies, for minimum apartment sizes and for private open spaces for houses. Such things can add cost to developments and people may not even want them (or want to pay more for them). In many scenarios, such things may well be overreach.

But context is important. The system needs to be mindful of potentially broader social and health outcomes that flow from private decisions, which is one reason why the jurisdiction of territorial authorities is quite broad under the RMA. For example, poorly designed, sized or located housing can impact disproportionately on the poor, who may have little option in their choice of housing. This can be seen in Hong Kong's tiny 'coffin' apartments, which have created enormous social and health issues. Perhaps most importantly, a future system needs to prevent or carefully manage development in areas of high natural hazard risk (exacerbated by climate change), even if people are willing (or forced by circumstance) to take on a high level of risk in living there.

The system needs to address negative impacts on the broader 'environment'

The sections above have focused on common pool resources and where there is harm to other people. But are there other reasons for intervention? What about the harm to the broader 'environment'? This concept cuts across artificial boundaries between land, water, air, soil, flora and fauna. The most important question about scope here is where the proper boundary lies between private and public interests in land.

The first thing to note is that some controls on 'land' are not really managing impacts on the land at all. Instead, they are proxies for the management of effects on the commons (often freshwater or estuaries). *Controls* may well be on land (eg stocking rates or input controls for fertiliser), but the purpose is to deal with impacts on the commons arising from how it used. The two things should not be confused. Almost all regional council jurisdiction over land under sections 9 and 30 of the RMA is arguably appropriate for this reason.

But there can also be a significant public interest in land itself. This is not necessarily safeguarded by the exercise of private property rights alone. A public interest in land can arise in a number of ways. For example, private land contains a lot of indigenous biodiversity, which is taonga to Māori, vital to New Zealand's economy, gives rise to international legal obligations, and the removal of which can have cumulative impacts on ecosystem services that go well beyond title boundaries. Soil is another part of land in which there is a public interest, because its stability, health and food producing capacity is vital to society and the economy, not just landowners or business owners. Private land also contains culturally significant sites and ancestral connections for Māori. How land is used can impact on landscapes and features that go to the heart of our identity as a nation, as well as having significant value to the country's economy (eg tourism). Such things are, quite rightly, encompassed

by the RMA in the section 30 and 31 functions of regional councils and territorial authorities to control land.

Of course, the public interest runs up against private rights in land, making this a fraught area. Property rights are not absolute, but they are important. For this reason, the RMA already provides significant safeguards for property rights (such as restrictions on controls that prevent reasonable use, a presumption in favour of freedom of land use unless expressly restricted, and proportionality of regulation). Rather than narrowing the scope of legislation per se (removing things like biodiversity, soil and landscape from the jurisdiction of the resource management system), the key focus for policy makers should be who bears the burden of public interest restrictions (eg protected areas) and the package of tools that is used. For example, there needs to be discussion of financial assistance (or potentially compensation in some well-defined situations), and the development of incentives to *complement* the resource management system and address issues of equity and hardship. Some mechanisms were described by the biodiversity collaborative group that made recommendations on the National Policy Statement for Indigenous Biodiversity, including tax incentives, rates relief, and payments for ecosystem services.

The system needs to generate positive effects

A future system needs to encompass the goal of achieving positive effects on the environment, not just preventing or mitigating negative ones. This is for several reasons.

First, the natural environment is severely degraded in places, and requires a focus on improvement, not just maintenance. The resource management system cannot solve such issues by itself (deeper changes are needed to things like the tax system), but it can help in a variety of ways. For example, it is possible to smooth the consenting pathway for activities having known environmental benefits, or to require biodiversity net gains in consenting conditions (which the United Kingdom has introduced). Narrowing scope to an 'effects-based' system (the implication being one that only manages *negative* effects) would take away this opportunity. Despite some claims to the contrary, the RMA is not just about mitigating adverse impacts. Its scope in Part 2, as well as the functions of councils, includes enhancing and restoring the environment. This should not be lost in a future system.

Secondly, a proper system of urban planning is about proactively generating positive effects for communities. This includes bringing nature into cities (one study has even shown that the positive effects of nature are larger than the negative effects of poverty), providing infrastructure and services (including nature-based services like wetlands), coordinating public services with land use change, and shaping places that are inspiring, socially connective and inclusive. Ultimately, a planning system is about creating happy communities and supporting the agglomeration benefits that well managed cities can have. Although the RMA is not a strong framework for proactive urban planning, Parts 2 to 4 of the Act have not prevented it occurring, and policy makers should not further narrow this aspect of its scope in a fundamental way. More specifically, there are dangers in removing the ability to impose urban boundaries, which (as long as they are responsive to demand) are important in managing growth and a sustainable urban form for the benefit of residents and future generations.

Thirdly, a changing climate requires the proactive pursuit of greater resilience, not just the reduction of future risk (eg more than just preventing *new* houses being built in floodplains). This is a complex area, but one key element will be how the system approaches land use, including potentially rezoning vulnerable areas, extinguishing existing use rights, and 'making room for rivers'. Adapting land use to climate risks will be needed in rural and natural environments as well as cities (eg to

relocate habitats containing threatened species, or to protect food producing and economic systems). For example, large parts of the Hauraki Plains will be vulnerable to coastal inundation, rendering land unusable for agriculture. These are big challenges that need to be front and centre of a future system for managing land. While in many ways the RMA is not fit for purpose when it comes to climate change adaptation, its basic scope (in Part 2, the definition of 'effect' and regional and district council functions to control land) encompasses the issue, and should not be lost in an attempt to define a 'material' effect in an unduly narrow way.

Finally, the system arguably has *some* role to play in strengthening the resilience of the country's economy. Our natural and physical resources (including land) require a more strategic approach if our economy is to thrive and be resilient. There is also a growing need to figure out where infrastructure like wind farms and solar panels (as well as activities like aquaculture) *should* and should *not* go to ensure economic and social resilience, not just leaving it up to the market to propose locations or defend existing ones. In these senses, the existing scope of the RMA is arguably too narrow, and needs to be expanded to include spatial planning.

Concluding comments

Overall, policy makers need to be extremely careful when thinking about narrowing the scope of a future resource management system. General statements about the RMA doing 'too much' and needing to focus on 'material' adverse impacts that affect 'property' or a narrowly defined 'natural environment', risk losing sight of the multifaceted and nuanced reasons why a statute like the RMA has evolved and is needed. Yes, there are some legitimate issues about system scope to fix up or clarify. In particular, and as explored above, this is where (and the extent to which):

- processes are being misused to stifle trade competition;
- effects arise from people's perception of the socio-economic characteristics of residents (eg social housing tenants);
- effects are truly subjective or only affect the person creating them (but not where there are more nuanced public interest justifications behind them);
- effects are *only* on councils' balance sheets (with the important caveat that related issues about infrastructure funding and financing need to be addressed first);
- issues are managed adequately under other legislation (with the caveat that many other statutes are *not* adequate without further reform);
- consents impose requirements for positive effects entirely unrelated to adverse effects (with the caveat that under the RMA there often *are* links between these if one looks closely).

Responses to these issues should be targeted, rather than creating a fundamentally narrower definition of 'effect' or 'environment' or cutting down on the functions articulated in sections 30 and 31 of the Act. Controls can be *proportionate* while not being excluded from consideration of the legislation entirely.

The RMA is not fit for purpose in many ways. But policy makers should not rush to constrain its scope in drastic ways when the most significant issues lie elsewhere. The biggest concerns about the RMA are often more about three other things: its purpose and principles (the balance of criteria that guide decisions), process (how long and costly approvals are) and legislative design (whether something should be managed under the RMA or another statute). Process, and the cost and time that come with it, will be particularly important to fix, which is a point that has been quite rightly emphasised by the government. These issues are the subject of future papers we are producing on reform of the RMA as part of this project.

1. Introduction – the question of scope

1.1 Context

The Environmental Defence Society (EDS) is looking at what the core of a future resource management system – a replacement for the Resource Management Act 1991 (RMA) – should look like. The context is that the government, in 'phase 3' of its resource management reforms, is wanting to replace the RMA with two statutes based on the enjoyment of property rights. It has established ten high level principles to guide this reform.[4]

EDS is producing a series of think pieces that aim to assist policy makers by exploring the three conceptual questions at the heart of any fundamental reform effort: *what, why and how*.

- *What* is the resource management system (its proper scope)?
- *Why* does this system manage resources/the environment (what outcomes should it be seeking to achieve)?
- *How* (and therefore *when*, by *whom*) should decisions be made?

In this paper, we are looking at the first question – that of scope. Ministers have said that the RMA's scope is too broad and should narrowed.

1.2 What does scope mean?

The most fundamental question (and the first of the government's ten design principles) is what a future system's 'scope' should be. Policy makers will need to be very clear on what they are talking about when they use this word. It has three quite different meanings, and the government has tended to use these interchangeably, which could lead to people talking at cross-purposes.[5]

1. What is the proper scope of *public intervention*?

   This invites us to consider what human activities should lie purely in the realm of free markets and private choice, where intervention by government, councils or other public body has no place and is 'overreach'.

2. What is the proper scope of *regulatory tools*?

   Regulatory tools are those that can be enforced (ultimately) through coercion. It is often what people mean when they talk about the scope of the RMA (which is often assumed to be a purely regulatory statute based on rules and resource consents).[6] The question is whether non-regulatory forms of intervention (eg education campaigns, voluntary covenants, or economic incentives) may be more effective in achieving public policy outcomes. For some, such choices might be influenced not just by the effectiveness and efficiency of different tools, but also by a desire not to erode property rights. But this is quite different to saying something should be beyond the scope of *any* intervention.

3. What is the proper scope of the *RMA* (as opposed to other statutes)?

   This is not a question about system scope per se, but rather one of *legislative design*. Interventions may well be legitimate and necessary, but might be better framed under legislation other than the RMA. There are many reasons why this may be desirable (eg statutes might use

different tools, have different purposes, or be focused on a specific issue). However, casting some things (eg biodiversity or landscape) out of an Act like the RMA and into another one can create difficult interfaces and result in things falling between the cracks. It should only be contemplated if there is a clear and compelling rationale to do so.

Changing the 'scope' of the system should also not be treated as the solution to issues that are not really about scope at all. For example, Ministers have expressed frustration that the RMA allows too many people to participate 'vexatiously' in consenting processes.[7] But is that really about scope? It is entirely possible to have a system where controls are still within the jurisdiction of legislation, but where some forms of undesirable participation (and therefore the cost or time they bring with them) is constrained.

Key points	• There are three distinct meanings of 'scope' that should not be confused: the scope of public intervention, the scope of regulatory tools, and the scope of the RMA (being one statute among many). Policy makers should be clear on what kind of scope they are dealing with.

1.3 The current scope of the RMA

To get a sense of what might be done differently (and whether changes to scope are needed at all), it is useful to set out briefly what the scope of the RMA is. This is mainly defined by three sets of provisions which outline when the Act can (and cannot) restrict people doing things.

Part 3 (notably sections 9 to 18) of the Act is key. This provides the legal basis for restricting what people can do when interacting with natural and physical resources:[8]

- The 'use' of land
- The subdivision of land
- Discharging 'contaminants' into land, air or water (contaminants being broadly defined)[9]
- Dumping or incinerating waste at sea
- Dumping/storing radioactive waste at sea
- Any 'activity' in, on, under or over the coastal marine area (or 'in relation to' its natural and physical resources)
- With respect to the bed of lakes and rivers: disturbing, building/using structures, depositing substances, introducing/removing/disturbing plants and animals or their habitat, reclaiming, draining, entering/passing across
- With respect to water (and its energy/heat): taking, using, damming, diverting (with some exceptions)[10]
- Creating unreasonable noise.[11]

All this creates the basic jurisdiction for Ministers and councils to impose more targeted controls in lower-level instruments, like national environmental standards (NESs) and regional/district plans.[12] But, at least for councils, jurisdiction is not open-ended. Part 4 of the Act outlines the functions, powers and duties of Ministers and councils, with sections 30-31 outlining the *reasons* for which councils can impose the kinds of restrictions allowed in Part 3.[13] In particular, regional councils can regulate natural and physical resources (including the use of land) for the purposes of:

- Achieving the integrated management of natural and physical resources
- Conserving soil
- Maintaining and enhancing the quality of water and its ecosystems
- Maintaining the quantity of water

- Avoiding and mitigating natural hazards
- Identifying and monitoring contaminated land
- Controlling land in the coastal marine area
- Controlling occupation, extraction and emission of noise in the coastal marine area
- Controlling the taking, using, damming and diverting water (coastal water and freshwater)
- Controlling discharge of contaminants
- Controlling dumping at sea
- Controlling the taking of geothermal energy
- Providing for sufficient development capacity
- Maintaining indigenous biodiversity
- Allocating the taking of water/energy, the assimilative capacity of water/air, and the occupation of coastal space if appropriate
- The strategic integration of infrastructure with land use

Territorial authorities (district and city councils) are responsible for regulating land and subdivision for the following purposes (some of which overlap with regional council functions):

- Achieving the integrated management of the effects of the use, development, or protection of land and associated natural and physical resources
- Providing for sufficient development capacity
- Avoiding and mitigating natural hazards
- Preventing and mitigating any adverse effects of contaminated land
- Maintaining indigenous biodiversity
- Mitigating the effects of noise (except in the coastal marine area)
- Controlling activities on the surface of rivers and lakes

Some functions in Part 4 are very broadly worded (eg the integrated management of land/natural and physical resources), especially when it comes to territorial authority powers to control land.

Part 2 of the RMA is also important for defining its scope. It outlines the purpose and principles of the Act, under the umbrella concept of 'sustainable management'. Anything beyond the aims of Part 2 is, in theory, not able to be controlled under the RMA. That is made clear in section 18A, which says that plans and policy statements can include "only those matters relevant to the purpose of this Act" and in section 104, where resource consent decisions are expressly subject to Part 2. The core of Part 2 is about managing 'effects' on the 'environment'. These terms are notable for their breadth.

environment includes—
(a) ecosystems and their constituent parts, including people and communities; and
(b) all natural and physical resources; and
(c) amenity values; and
(d) the social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) or which are affected by those matters

natural and physical resources includes land, water, air, soil, minerals, and energy, all forms of plants and animals (whether native to New Zealand or introduced), and all structures

land (a) includes land covered by water and the airspace above land…

… **effect** includes—
(a) any positive or adverse effect; and
(b) any temporary or permanent effect; and
(c) any past, present, or future effect; and
(d) any cumulative effect which arises over time or in combination with other effects—
regardless of the scale, intensity, duration, or frequency of the effect, and also includes—

(e) any potential effect of high probability; and
(f) any potential effect of low probability which has a high potential impact.

(Note also that an effect on the 'environment' encompasses an activity that is "noxious, dangerous, offensive or objectionable", if it is of sufficient 'extent'.)[14]

Overall, Parts 2 to 4 of the RMA provide a relatively broad (although not unlimited) scope for regulatory controls. This does not mean that the Act actually *allows* any regulation irrespective of its costs, only that the merits of regulation can be *considered* via the Act's various processes through a complex mix of independent and accountable institutions.

The RMA's scope is also limited by more targeted provisions and case law. Some of these reflect the fact that controls are imposed under other statutes which should not be duplicated (eg the management of fish stocks, genetically modified organisms, building safety, waste reduction, and the quality of food).[15] Other provisions carve out outcomes that *would* otherwise fall within the RMA's scope but are not legitimate effects for the RMA be managing (eg trade competition).

Key points	• The current scope of the RMA, outlined by Parts 2 to 4 of the Act, is relatively wide owing to its definitions of 'effect' and 'environment' and the breadth of territorial authority functions with respect to land.

1.4 The government's proposals for change

Is the scope of the RMA outlined above too broad? "What should resource management do? And where did the RMA go wrong?"[16] The government believes the system should be narrowed to go 'back to basics' and focus on effects that are 'material'. For example, Ministers have said the following (our emphases).[17]

> The scope of the RMA has expanded to cover virtually any aspect of land use. What are deemed "effects" has allowed too many objectors to frustrate and delay development… We want a system focused on **material effects** and not used for **other purposes**.
>
> Rules should only restrict activity with **material spillover effects** on other people's enjoyment of their own **property**, or on the **property rights of the wider natural environment** that sustains us.
>
> The resource management system should **protect the natural environment** and provide property owners with assurance against **unreasonable activities next door**… where an activity is **harming** others, the resource management system should step in to protect property owners' rights...
>
> Decisions should not shelter businesses from **competitors**, allow councils to restrict land use to manage **financial pressures** from infrastructure, or require developers and infrastructure providers to **"gold plate"** projects. Infrastructure asset owners should not be able to use the system to refuse connections or object to development on the grounds that new residents might want to use an existing road.
>
> The resource management system should not attempt to specify or direct development outcomes that are **better determined** by landowners and developers themselves in response to demand.
>
> Councils should not be able to use resource management to require balconies and private open spaces for houses, dictate the colour of houses, apply blanket "special character" protection in urban areas, regulate internal aspects of buildings, or manage greenhouse gas emissions, among other things.

> The RMA integrates land use planning and the management of loosely **defined environmental effects** and then tasks plans and consents with responsibility for **social, economic, and cultural outcomes** that the system is poorly placed to manage.
>
> Subsequent policy work will explore the full set of issues that might be better addressed outside the resource management system, and the tools needed to manage them. It will also clarify how regulation to protect important aspects of the environment such as **outstanding natural landscapes and significant natural areas** can be developed in a way that respects private property rights. Greenhouse gas emissions are already managed by other policy interventions.[18]

Many of these highlighted terms leave room for debate. For example, what is 'material'? Below, we explore the basic rationales for having a resource management system and therefore where its boundaries might be sensibly drawn in the future.

2. Why do we have a resource management system?

2.1 The common law is deficient

Why did sophisticated statutes for environmental protection and town and country planning (like the RMA) develop over the course of the 20th century? The main reason was serious shortcomings in the common law which, despite its flexibility and dynamism, failed to reflect the public interest in a healthy environment or provide efficient mechanisms for dispute resolution in increasingly congested cities.

More specifically, common law causes of action in tort (like private nuisance and trespass)[19] based on property were, and still are, not well-positioned to address the collective action problems that arise from managing natural and physical resources.[20] Some people (including some active in the current reform process) have previously suggested a much larger role for the 'tried and tested' common law in a future system, on the basis that its focus is on the protection of people's rights.[21] It is therefore worth pointing out why that would be a retrograde step.

- The common law is reactive to harm once it occurs, rather than putting in place measures to prevent or manage it. Adverse impacts on the environment, including on private property, cannot always be remedied (or compensated for by quantifiable damages). Harm may even be irreversible, and priceless. People can only sue when actionable harm has happened and it is too late.
- It lacks the tools to reduce conflict between rights-holders in advance, creating a system that may actually be more litigious than it needs to be. For example, the common law cannot prevent reverse sensitivity effects, such as where a housing development that chooses to locate next to a chicken farm may create legal vulnerability (in nuisance) for the farm's operations.[22]
- It relies on there being clear rights to defend in the first place (often property rights) and specific legal causes of action (which generally require an actionable harm to an identifiable person/property,[23] and causation). This can be hard to establish, especially where there are diffuse and cumulative impacts that only become apparent much later in time (which have been stumbling blocks in recent cases seeking to use tort law to sue greenhouse gas emitters).[24]
- The common law relies on people having the will to litigate where environmental outcomes are at stake. People may not care enough about inter-generational implications to pursue expensive and risky legal action in the present, and they may even consent or welcome harm if they are compensated financially for it.

- It relies on people having the resources to take legal action to defend their rights. This risks unjust outcomes given the power imbalances that are common between wealthy polluters and those affected by their actions. A right is not really a right if it cannot be defended.
- It may lack certainty of outcome (compared to clear rules in plans) where evidence or the law is contested, creating risks for litigants. For example, a nuisance action relies on there being an 'unreasonable' use of land, which may be a fuzzy concept in an age of novel activities.
- It is not particularly transparent or democratic, given that the common law is not readily accessible to non-lawyers in the same way as public-facing legislation or rules in plans (which are developed through participatory processes).
- The common law evolves in response to individual test cases (more so than legislation). This means that any given case lacks the bigger picture view and may not deal with cumulative effects. Environmental problems require a coordinated and systemic response across much larger scales, but it is harder to mobilise all relevant litigants than it is to create a plan dealing with an issue (and doing so would place a significant burden on the courts).
- It does not consider the public interest in environmental outcomes beyond just those represented by private litigants (who are generally free to negotiate or settle). Public interest litigants may frequently lack standing.
- It has not traditionally recognised the ancestral relationship between Māori and their whenua and moana, although that may be changing with increased recognition of tikanga, whakapapa and whanaungatanga.[25]
- It has not generally involved decision-makers that are subject matter experts on complex environmental problems, only ones focused on boundary impacts.
- It operates in a way where outcomes, and their implications for environmental wellbeing, are not easily monitored. Common law remedies, such as damages or injunctions, may not be consistently applied or adequately enforced.
- It is typically focused on more immediate, localised issues, making them ill-suited to addressing the scale and timeframes of national or global environmental problems.

Because of all this, resource management legislation like the RMA has evolved to fill the gaps. And although common law actions are still available:[26]

> many litigants prefer to seek remedies by application to the Environment Court — a main reason being the prospect of less cost and delay, by contrast with a comparatively drawn out civil action incorporating formal steps of discovery, administration of interrogatories and the like.

This should be borne in mind when contemplating a narrower scope for the system, especially one in which heavy reliance is instead placed on the defence of property rights through mechanisms like trespass or nuisance. The common law has, indeed, been tried and tested. But it has been found wanting.

Key points	• The common law is deficient when it comes to the efficient and effective management of the natural environment and land use.

2.2 Four kinds of rationale for legislative intervention

It is one thing to say that the common law is deficient, but harder to sketch out what the specific boundaries of the system that supplements the common law should be. Policy makers need to recognise that the system intervenes for four quite different reasons, even though these are

currently contained within the single concept of 'sustainable management' under the RMA. These are:

- Managing 'common pool' resources
- Managing the impacts of activities on other people and their rights
- Managing adverse effects on the 'environment' more broadly (including land)
- Creating positive effects (including restoration, resilience and good urban planning).

We consider these in the remainder of this paper. But note that the rationale for environmental management from te ao Māori perspectives is more holistic, making such distinctions artificial. The categories are simply a useful analytical structure for approaching questions of scope, not something that should be used to create separate frameworks. For example, in te ao Māori there are no sharp lines between 'common' and 'private' resources or the rights of 'people' and 'nature' (which is intertwined with ancestral relationships between te tangata and te taiao). For Māori, when it comes to scope, there is also Te Tiriti o Waitangi and the protections afforded to Māori under it to consider. It therefore matters *who* is making the intervention (to retain the mana of mana whenua), not just whether the rationale for intervening is justified – raising questions about the place of Māori at the decision-making table and thus broader institutional arrangements. As James Whetu explains:[27]

> Māori hold a deep interconnected view of the natural world through whakapapa and whanaungatanga. This worldview is based on the principle that everything in the environment (land, sea, rivers, forests, and natural resources) is interconnected and should be treated as so. Humans, animals, plants, and natural elements all share a kinship, and their well-being is linked to the well-being of the environment.
>
> Kaitiakitanga recognises the connection of whakapapa and whanaungatanga (unique relationship) to our environment. As kaitiaki, Māori have a role and responsibility to care for and protect the relationship and those natural resources within their environment. This role, and its responsibilities, is not just practical but also spiritual because encompasses both tapu and mauri, and many of Aotearoa New Zealand's natural features, such as maunga/mountains, awa/rivers, ngāhere/forests, and other landscapes are imbued with significance and are treated so accordingly. The relationship with the environment is not just one of resource use, but also of care and reverence (tapu and mauri).

Key points	
	• It is useful to recognise four key rationales for the system to intervene: managing the commons; managing impacts of people on each other; managing impacts on the broader environment; and creating positive effects. • In te ao Māori, there can be no hard and fast distinctions made, and a future system will need to be sensitive to this holistic approach.

3. 'Common pool' resources need to be managed

"Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons."[28]

3.1 Introduction

Both Māori and Western worldviews encompass a fundamental idea that the 'commons' needs to be managed or else it risks being degraded. This refers to aspects of the environment that do not have

clear property rights in them. In New Zealand, they include freshwater, the heat/energy surrounding geothermal water, the coastal marine area, molecules in the air, and the climate.[29] Note the term 'commons' is used to refer to aspects of the environment lacking clear property rights at the moment and should not detract from iwi rights and interests (eg in freshwater and in the coastal marine area). Nor should the term 'resource' be taken to accept an anthropocentric view of the world (it is both legitimate and desirable to see aspects of the environment as their own 'being' and not just things to be used).[30] It is simply useful shorthand to distinguish aspects of the natural environment in which there are not property rights from those in which there are (notably land). We use it with such caveats.

There are two distinct reasons justifying management of the commons. The first is to prevent or manage human activities having adverse effects (eg diffuse runoff of nutrients to rivers and lakes). Here, public intervention avoids what would otherwise be Garrett Hardin's famous 'tragedy of the commons'.[31] There is ample historical evidence in New Zealand and elsewhere that uncontrolled (or under-controlled) use of the commons for consumptive uses generally results in the depletion or degradation of the resource, and poor outcomes for both people and the natural world.[32] The phenomenon can be seen in the recent report on the Ashburton Lakes and broader freshwater decline in Canterbury.[33] Indeed, many of the poor statistics in environmental reporting reflect systemic failures to protect the commons, be it freshwater quality, kai moana, or a warming climate.[34]

The second reason to manage the commons is to allocate (or reallocate) clear rights to use such resources where they have potential to be scarce. It is about *who* gets rights and who does not, in situations where not everyone can be rightsholders. Scarcity can be caused by natural constraints (a resource physically running out) or by regulatory limits designed to protect the commons from overuse. The resource management system here is a proxy for the freely tradeable private property rights that exist in other resources like land.

These two rationales already form much of the RMA's jurisdiction described earlier, notably with respect to regional council functions under section 30 of the Act. They focus on controlling pollution to receiving environments that no one owns (and therefore no one is incentivised or able to defend) and distributing rights to take or use these resources.[35]

Our contention is that the basic scope of the RMA is already fit for purpose on this front, and should not be narrowed. This appears to align with the government's intention. The key questions are, instead, about (1) which *tools* the system should use to protect and allocate rights to the commons (eg through regulation or economic instruments), (2) the criteria/purpose under which decisions about them are made (eg Part 2 and hierarchical concepts like te Mana o te Wai or allocative efficiency), and (3) who gets to make such decisions (eg councils, courts, tangata whenua or other bodies). That said, four key questions of scope exist and will need careful consideration. We explore these in the following sections.

Key points	• Core to a future system will be the need to (1) protect common pool resources from harm and (2) to provide a mechanism for allocating rights to use them in cases of scarcity.

3.2 What does the 'commons' actually include (and therefore justify public control over)?

Various commentators have emphasised that common pool resources require clearly defined boundaries for effective management.[36] But the distinction between commons and private property is not always straightforward. One can ask, for example, whether elements having a degree of public interest like landscapes/natural features, built heritage/character and indigenous flora and fauna should also be regarded as part of the commons if they are located on privately owned land. We look at this further below when we explore the 'environment' as being something that cannot always easily be pigeon-holed.[37]

3.3 To what extent should the system be responsible for allocating (or reallocating) rights to use the commons?

In theory, the allocation of much of the commons is firmly within the scope of the RMA (it is a function of regional councils). However, in practice, most allocative choices are determined by who happens to apply for a consent first (eg to take water from a stream or to occupy the seabed). This approach, born in a time when resources were less scarce, may have led to a belief that the system should continue to be a largely passive bystander. It is also arguably consistent with the (partly) neoliberal origins of the RMA itself, which some saw as being about managing adverse effects and not deciding which uses or users would be 'best' for the country. It has led to allocation that is economically inefficient (eg water does not go to its most valued use), inequitable (eg new entrants, including owners of Māori land, are excluded from getting water rights), and bad for the environment (eg where marine aquaculture rights have been granted, and extended, in locations that are no longer suitable).[38] At the same time, the Act *allows* much more interventionist and structured approaches to allocation like attribute weighted tendering (eg for coastal occupation or other coastal resources) or the zoning of marine/freshwater space for particular activities or uses. Some of these methods have been used in some places, but practice is inconsistent around the country.[39]

This longstanding philosophical tension between the proper role of market and regulation (and planners/experts) in allocating the commons has never really been resolved. Is it the resource management system's job or not? Policy makers will need to decide. In doing so they will need to address Māori rights and interests in freshwater.

Increasing competition/conflict between publicly important uses of the commons suggests to us that strategic planning is needed for allocation, not just a first in time or market-based approach that relies on choices made outside the system. For example, there is considerable competition for the same marine space in some parts of the country, such as between offshore wind farms and iron sand mining off the Taranaki coast.[40] There are some publicly important users of water, such as hydro-electric generators, who require long-term certainty. Recognising an allocative role for the system would not preclude the use of market tools in allocating rights more efficiently (eg through tradeable permits). But it would ensure that their use was carefully framed by a system that maintained oversight and sought outcomes beyond those driven solely by market forces.

3.4 In what circumstances should the system *lose* the jurisdiction to protect common pool resources?

When someone is allocated rights to use it, the commons does not necessarily *stay* common. Various rights and interests are conferred over it, to the exclusion of others. Some of these amount to

'property' rights when resources can be reduced to possession. For example, water can be bottled and sold for a profit, and once bottled the RMA has no jurisdiction over where it goes. But there are other kinds of legal rights which do not amount to *ownership* (eg customary marine title or a resource consent to build a jetty or use water for hydro-electric generation).[41] Going even further, what some people might refer to as 'rights' are better described only as 'expectations' for the future, such as:

- where permission for afforestation (replanting commercial forests) might be assumed to also mean permission to clearfell those trees 30 years later despite having inevitable impacts on water quality;

- where a right to take water for irrigation has been assumed by the market to be tied to the land (eg a dairy farm), and therefore priced into land values, on the expectation it will be renewed.[42]

The nature of all these rights is an important question. At what point should resources no longer be treated as being part of the 'commons'[43] and therefore beyond the jurisdiction of regulators?

If the purpose of regulation is to reallocate a right from one user to another, this is generally (and quite rightly) regarded as a derogation of grant. The system should not intervene unless there is an exceptional reason and compensation (as occurs in cases of compulsory acquisition). Security of tenure is important for things like water and coastal occupation rights, even though consented rights do not amount to property per se. There is already strong case law about 'non-derogation' under the RMA.

But the system must retain some scope if the purpose is to protect the resource itself, even if this would erode private rights. After all, circumstances can change markedly over the life of a consent, and are likely to do so even more in a changing climate. We have seen this with aquaculture in the Marlborough Sounds, where long-term consented rights have been linked to particular sites that are increasingly unsuitable from both an industry and environmental perspective because of pollution and warming seas. Permission to plant a pine forest should not necessarily confer a right to harvest it in a particular way years later (eg through clearfell).

The RMA recognises this to some extent already, in that it gives councils the ability (although not *duty*) to review consent conditions in some situations. But it does not allow consents to be cancelled or frustrated even where rights are creating significant adverse impacts on the environment. This has been especially problematic for the environment in the case of farms around the ecologically sensitive Ashburton Lakes, where there now has to be reliance on voluntary measures from farmers because the council lacks powers to pare back consented rights.[44] Effectively, the commons lies beyond the scope of the system already, and its scope needs to be *expanded* to address the issue. The now repealed Natural and Built Environment Act 2023 (NBA) provides a useful model for how that might be done (where rights can be cancelled where they breach limits).

There are more challenging situations. For example, once water is stored and contained in private infrastructure on farmland, should a council be able to prevent the pollution of that resource? And should a landowner have complete freedom to decide how water is *used* once it is taken or stored (eg for irrigation, bottling or even selling to someone else if they no longer need it)?[45] The Supreme Court has recently confirmed that the purpose for which water is used can be controlled under the RMA quite separately from the question of whether water can be taken.[46] But some have suggested that once a take is authorised, any use of that water should be up to the landowner.[47]

Policy makers will need to think carefully about the risks in leaving this entirely to private choice. In the past, water storage has been used not just to increase security of supply for an existing activity, but also to enable additional intensification and expansion of land uses (and pollution) through more irrigation.[48] If a change in use might be damaging to the environment, it should be within the scope of the system to restrict it.

Key points	• A key rationale for public intervention is the protection and allocation of common pool resources like freshwater and the coastal environment. This needs to remain at the heart of a future system. • There are three key questions of scope: what exactly is regarded as the commons (notably biodiversity); the role of the system versus the market in allocating common pool resources; and the circumstances where the system loses some jurisdiction to manage such resources (where private rights are conferred).

4. Negative impacts on people and their rights need to be addressed

4.1 Introduction

Not all resources are part of the commons. In particular, land generally has 'property' or 'ownership' rights of some sort.[49] So does the system have a further role to play if the commons is not involved? If so, why?

One rationale is because restrictions are needed to address harm that one person's activities can cause to others. This is recognised already in many of the restrictions in Part 3 of the RMA. For example, it can be seen in the ability of councils to regulate discharges to air, noise, odour, traffic movements and other aspects of 'amenity' (eg blocking sunlight, reflected light etc). Such controls are particularly important in the urban context, where people live in close proximity, and their activities can affect others directly. It is a key reason why planning systems developed to supplement the law of nuisance.[50]

Ministers have recognised a lot of these effects as the bread and butter of legislation: for example, "height limits and setback rules will continue to protect existing homes from inappropriate developments next door. That is the core business of any planning system."[51] We agree. In fact, the rationale is often about mediating between the equally valid but conflicting property rights/interests of different people. For example, the 'right' to build close to a boundary undermines the 'right' of a neighbour to sunlight or privacy; and the right of a farmer to continue to farm (with all its attendant noise, smell and other externalities) affects the right of a new residential neighbour to peaceful enjoyment.[52]

Here, a system of regulation is not really restricting or eroding property rights at all, but rather defining the boundaries of what different people's property rights are in the first place (and minimising conflicts between them). In this sense, the RMA is actually about *recognising* and *defending* property rights. Indeed, a landowner may actually "be able to obtain greater rights under the RMA than available under the common law".[53]

A new system based on the enjoyment of property rights would not have any obvious difference in scope to the RMA on this front, unless it allowed one person (eg a developer) to have greater enjoyment than another (eg a neighbour). Any system with a pared back scope (eg one based purely on negotiation between rights holders, with no regulators in sight) would still require the clear articulation of what those rights are in the first place. Rights would not be clear (or would be much harder to figure out) without a planning framework, since other rights-based concepts like nuisance rely on interpretation of what is reasonable (see earlier).[54]

A well-functioning city (or, for that matter, countryside) also depends on much more than the defence of *property* rights from harm. The idea that 'material' effects are really about those that are felt by property owners has been a persistent idea in statements from Ministers in phase 3 reforms, but not all rights and interests worthy of legal protection can be characterised as property. For example, people also have rights to bodily autonomy and health and safety. Air pollution, odour, noise and vibration do not just affect people who hold 'property'. They also impact those working, visiting or travelling in an area.[55] Indeed, some effects may actually affect property owners *less*, if like most landlords they are not physically present on or near the land. The health impacts of various polluting activities are already inequitably distributed across society, and a narrow property-based system would leave vulnerable a vast group who cannot, or choose not, to own land. This is partly why there are broad powers for territorial authorities to manage land under sections 9 and 31 of the RMA, and broad definitions of 'effect' on the 'environment'. Planning legislation needs to deal with an eclectic range of effects arising from land use that are not always easy to codify exhaustively.

A spotlight on Māori interests

Māori hold many rights and interests that are not property-based ones. For example, adverse effects on wāhi tapu may not always fit easily within the Western concept of property. James Whetu explains that:[56]

> Narrowing the scope of New Zealand's resource management system to focus solely on managing actual effects on the environment would have significant consequences for Māori. It risks undermining Māori cultural values, rights under Te Tiriti o Waitangi, the exercise of kaitiakitanga, and ability to participate fully in decisions that determine effects and management on taonga, waahi tapu/tupuna, and overall, te taiao (the environment)…
>
> [one concern] is that there will be difficulty in protecting sites and areas of significance and importance to Māori [including] archaeological sites. [This is because] a large number of waahi tapu and taonga for Māori are not located on whenua Māori (land owned by Māori).

More broadly, kaitiakitanga is a right as well as a responsibility. The RMA defines it as the "exercise of guardianship by the tangata whenua of an area in accordance with tikanga Māori in relation to natural and physical resources". But it is not constrained to Māori owned land and cannot be described as a property right.

There are other impacts on Māori that do not fit into the property rights paradigm. For example, one potential impact of urban growth is displacement of Māori from small peri-urban communities as cities expand or are upzoned (because houses become unaffordable). These are negative impacts that are important to consider (they involve cultural ties to the land) but are far from the Western notion of property rights.

Key points	
	• A second key rationale for public intervention is to manage the negative impacts people can have on each other and their rights. • A lot of this is about protecting (and defining) people's *property* rights, but it also extends to the management of impacts on a wider range of rights and interests. Notable are impacts on Māori rights/interests and people's health (eg from air quality and other contaminants) and wellbeing.

When thinking about impacts that people can have on each other, there are nevertheless some matters of scope that warrant reconsideration. After all, the RMA confers powers to control land use to deal with very broadly defined 'effects' on a very broadly defined 'environment'. Some commentators have pointed to, for example, excessive controls on house extensions, the construction of residential decks, minimum apartment sizes, protections for heritage buildings, mandatory provision of balconies, and inappropriately strict urban limits.[57] Much comes down to a difficult judgement about what comprises 'material' harm.

4.2 What if controls have an improper purpose?

Some effects arising from the use of land are real but should not be controlled. Essentially, this is where the power to regulate what happens on land is being misused to support an *undesirable* outcome or one that is not for a 'resource management purpose'.[58] We have identified the following five categories, although note that some of these will need to be approached with caution and nuance (as explained).

Where land use controls are used to weaken trade competition

Anti-competitive behaviour is a rational response to a market economy, but it is detrimental to consumers. This is the reason we have legislation and institutions, in the form of the Commerce Act and Commerce Commission, addressing monopolies and predatory pricing.[59] Yet some businesses (eg supermarkets and other retailers) have sought to use the RMA's zoning and consenting processes to prevent competitors setting up in the neighbourhood. This is an improper use of the system, and has plagued planning laws for decades. Seldom does this take the form of direct argument about the impacts of competition on businesses. More common is for trade competitors to get involved in submission and hearings processes for publicly notified consents, and then object on other grounds, or to simply seek to delay through litigation. Ministers have used such concerns as a reason to support reduced system scope based on 'material' effects.

But is this a legislative problem? The RMA already restricts trade competition arguments. For the last 15 years it has also restricted the standing of trade competitors to make submissions, appeal or join proceedings, and piggyback on 'surrogates' by paying them to make arguments on their behalf.[60] Competitors are not excluded from processes per se, but they can engage only to the extent they are directly affected (a constraint that does not exist for other submitters where consents are publicly notified) and where they are not advancing trade competition arguments. Declarations can be sought to this effect. Breaching the law attracts significant risks in the form of costs and damages. Decision-makers are also, for the most part, very aware of ulterior motives in consenting processes (it is not a new issue), and they have not been shy about striking out proceedings or submissions where they are an abuse of process. For example, the High Court has struck out arguments by trade competitors because of a 'pattern of behaviour' suggesting this was their true motivation.[61]

A spotlight on McDonald's

Recently, some expressed concern that a proposed McDonald's in Wanaka was declined consent by commissioners partly because other businesses in the area feared the fast-food giant would undercut their bottom line.[62] It was said that "the opinions of lobby groups, busybodies, and would-be competitors shouldn't come into it"[63] and a system emphasising property rights is therefore long overdue.

But the reality of that decision was quite different. While many people made submissions covering various topics (some of questionable merit and beyond the scope of the RMA, which were disregarded), the determining factor in the decision was simple and clear. There were impacts on an outstanding natural feature that were more than minor and contrary to the relevant plan's policies.[64] Trade competition played no part in the decision. The commissioners noted that no submissions were vexatious or frivolous, and they were quite prepared to address them if they were.[65]

Keep in mind also that a very small proportion of resource consents are publicly notified, meaning that trade competitors are prevented from engaging in most proposals unless they are identified as being directly affected.[66] If they *are* directly affected (eg from noise or traffic), it would be just as improper to disregard such effects simply because they have the status of a competing business. And when it comes to broader plan-making processes, it would be unjust and unworkable to exclude all businesses – who are by definition engaged in competitive trade – from making submissions about the shape of their communities and the effects that land use gives rise to. For example, permitting excessive big box development in suburban areas can have very real impacts on the social vibrancy of a central business district, which is more than just a place of commerce.[67] Trade competitors, as long as they are not advancing arguments *about* trade competition, have actually led to better decisions in some cases.[68] Even in 1999:[69]

> Consent authorities [were] well aware of trade competitors' abuse of the process, and the Environment Court… very experienced in dealing with such matters… [it] should have the chance to hear the genuine resource management issues debated and to determine the motivations of trade competitors implicitly during the course of the proceedings and then award costs as necessary.

To the extent evidence shows that trade competitors *are* still improperly engaging in planning and consenting decisions (something that has not yet been established), a future system will require stronger oversight of the existing law (striking out of submissions that amount to an abuse of process), not a more constrained scope (eg one based only on biophysical effects on things like water, air or noise). Concerns about trade competition should not be used as a reason to throw the baby out with the bathwater and reduce the scope of the system to one that only deals with 'directly affected' persons (eg neighbours). Doing that would prevent people raising genuine environmental concerns.

Key points

- The scope of effects on the environment should not include effects on trade competition. The RMA already provides provisions to this effect.
- More evidence is needed to understand the extent to which trade competitors are misusing the RMA, despite these provisions.
- If there is a problem, better oversight of the current law is needed rather than narrowing its scope, as this would raise natural justice concerns and exclude legitimate effects on people and the environment.

Where land use controls are used to exclude people from communities

No one, whether a property owner or not, should have a right to prevent people from living in a place based on their personal characteristics. This has been an issue under the RMA for many years. For example, publicly notified consent applications for social housing projects often attract a disproportionate number of submissions from nearby residents seeking to prevent such developments. As with trade competition arguments, it can be difficult to draw a hard boundary here between legitimate and illegitimate effects, and between different motivations (submissions invariably state that they do not oppose social housing, only effects like shading, amenity, density of housing, and infrastructure pressure).[70]

A sensible solution can be found the NBA, which required decision-makers to disregard effects, and therefore submissions, arising only from the social/economic characteristics of residents (eg disability or status as beneficiaries or renters).[71] A similar approach to that applied to trade competition (Part 11A of the RMA, which provides for declarations and costs awards) could also be explored to further reduce scope. Anti-social behaviour may well be an issue in some places, but it needs to be addressed by targeted means focused on actual behaviour (eg from Kāinga Ora as landlord, police or wraparound social services as needed), not harmful and misleading stereotypes that effectively regulate for non-inclusive communities.

Key points	• The scope of effects on the environment should not include those arising from the socio-economic or other status of people wishing to live in a community (eg in social housing). • The NBA provided a good starting point for how scope could be constrained to address this.

Where the power to ration land at the urban fringe is used as a way to control the fiscal impacts of council infrastructure provision

The RMA has, in practice, allowed councils to prevent the rezoning of land (eg from rural to residential) because they cannot (or will not) fund the public infrastructure needed to service it. Residential land is not particularly useful unless there are pipes to deliver water, or roads to get people to their front door.

This has been an issue in fast-growing areas like Auckland, where land supply has been constrained because of underlying infrastructure affordability issues.[72] Ministers have thus said that the RMA should not "allow councils to restrict land use to manage financial pressures from infrastructure". On the face of it, that makes a lot of sense.

However, while the fiscal capacity of councils is not a valid type of effect under the RMA, it *is* a symptom of very real shortcomings in separate infrastructure funding and financing settings. The tools under the Local Government Act and Land Transport Management Act provide complex constraints and incentives in cases of high urban growth (as explained at length by the Productivity Commission and others).[73] For example, some have pointed to the mismatch between the heavy burden of infrastructure funding that falls on councils and the benefit (through increased economic activity) that largely goes to central government, meaning ratepayers might be less willing to pay.[74]

In some cases, historical infrastructure deficits are now having to be remedied through upgrades that are not affordable for ratepayers (or because of debt constraints). This can be exacerbated where

councils are very small (few ratepayers or limited borrowing capacity) and have many other expensive responsibilities. For example, in South Wairarapa the district council has been forced to stop new connections to the wastewater network from residential development in Greytown and Martinborough because treatment facilities have reached capacity.[75]

These issues will need to be fixed before there is an explicit restriction on using the RMA to 'ration' land by councils. The alternative is that land will be rezoned (or earmarked for future development) without an achievable plan for the provision of public infrastructure. Developments may be refused connections to councils' networks for water and wastewater at the 11th hour, as has been the case in South Wairarapa. In Auckland, Watercare has also highlighted the importance of aligning its infrastructure planning with the Council's Future Development Strategy prepared under the RMA (outlining where new development should and should not go) due to significant constraints on water and wastewater in some areas.[76] Local government in Queenstown has also expressed concern that infrastructure constraints (quite apart from other biophysical constraints around the Wakatipu Basin) will inhibit the town's ability to enable significant new development in the future.[77]

The solutions are largely outside the remit of the current RMA and include councils engaging in formal spatial planning (which could be provided for in a replacement for the RMA) and having access to a broader selection of funding tools (and therefore incentives).[78] We have looked at this in more depth in other work (and note the intention of the government to introduce a value uplift capture mechanism, which has potential).[79] For present purposes we simply note that constraining the scope of the RMA (or its replacement laws) will not solve the problem – it may even make it worse by giving the impression that the development of land will be feasible (when it is not).

It is also important to bear in mind that creating an efficient, coherent and environmentally sustainable urban form – including by 'rationing land' – is about more than just reducing the burden of infrastructure spending on councils. A compact and predictable urban form is vital for environmental wellbeing, climate resilience, and well-functioning cities (see further below, on the importance of positive effects). It is also valuable for the efficient deployment of infrastructure – *even if developers would be prepared to bear the initial cost of providing pipes and roads within their project footprint*. Councils would still inherit such infrastructure, be obliged to provide other services (eg waste collection), and deal with flow on effects of dispersed development on other parts of a town or city (eg traffic congestion, costly trunk upgrades and treatment facilities). Such considerations are within the scope of urban planning under the RMA, and should remain in a future system.

Key points	• The cost of infrastructure required to service new development is not a legitimate effect on the environment under the RMA, but it is a practical reality that needs to be addressed elsewhere (eg through councils' funding and financing tools). • Until those issues are resolved, it would be counterproductive to prevent councils from 'rationing' land in district plans or signalling where new growth can go.

Where effects are entirely subjective

Ministers have suggested that some effects dealt with under the RMA have become so broad as to be no longer about resource management, and their subjectiveness or triviality means they are not actually 'adverse' effects at all. Many of these relate to urban design requirements imposed by

councils. They might include the colour of a building, the architectural style of a neighbour's home in a new residential development, the internal design of a house, or the location of a clothesline on a property. It has been said, for example, that:[80]

> [controls] can get down to some questionable detail, e.g. where we put the water cylinder, colour of doors… [It] varies from building lay-out to position, size of garages, colours and type of fences.

Is micromanagement of private land a systemic problem? Other than anecdotal evidence, the answer to this is not clear. As Sir Geoffrey Palmer has said:[81]

> before changes are made it is really necessary to find out what is actually happening. Only that way can meaningful improvements be made. Far too many of the changes to the RMA have been driven by anecdote…

More evidence is needed, not only on the extent of such conditions/standards, but also on the *reasoning* behind controls. Context is crucial to determine whether a restriction is addressing a genuine effect or not. For example, the orientation of a building may not *always* be trivial. It could, for example, have significant implications for privacy, or the energy efficiency of the building. In the 2000s, market choices in the Wellington CBD led to undesirable design outcomes, like apartments being built with their main windows located on the boundary wall, with some relying upon neighbouring properties remaining vacant to retain their daylight and outlook.[82] This is what developers *can* provide, and the system must think about the lowest common denominator and the context of *future* development. Even controls on the colour or materials of a fence might range from the pedantic (subjective preference) to the legitimate (eg high reflectivity that blinds motorists).[83] Visual aesthetics may be much more important in heritage character areas, but much less in a new greenfields development. All these things are hard to judge in a vacuum.

Some subjective or emotive language in urban design guides, used by councils to make decisions under district plans,[84] may be undesirable because of its broad scope and potential to be applied in inconsistent or unpredictable ways. Examples include "quality of experience," "positive open spaces,"[85] and "a vision-led, design-based approach to formulating ideas and concepts."[86] With respect to Wellington, one report noted that:[87]

> Conflicting opinions were generally created by the differing approaches of different disciplines within Council, namely traffic engineering, wind engineering, heritage conservation, urban design and planning, to design elements of common interest.

Similarly, Ministers have said that:[88]

> One developer told me that they were told by council to cluster their doors in one development to create a sense of community, but in another development shortly after, they were told to separate the doors to create a sense of privacy.

However, despite issues with consistency of implementation and vagueness of expression, it should be kept in mind that design guides cover legitimate and important kinds of effects (beyond just the classic bulk, setback and site coverage standards common in plans). To some extent, inconsistencies in how principles are applied (eg when it comes to privacy or interaction with the street) will reflect real differences in the context of a site or community, not someone's arbitrary opinion. That is why they are principles, not rules.

One need only look at some residential developments offshore to see the risk of going in the opposite direction and allowing free reign to the private sector in questions of design. This manifests

in large-scale developments in less affluent areas. One study in the United Kingdom, for example, found that poorer communities are ten times more likely to get worse design, even though better design would have been affordable.[89] This can have significant ramifications for the quality of people's lives within a community (and not just for residents of individual houses); it is about building places that are welcoming, connective and safe, among other things.

As such, our view is that the system requires greater specificity and predictability (and early engagement with planners) rather than removing whole categories of effect (eg 'amenity' or 'urban design') from the scope of planning legislation.[90] It appears that the Minister for Infrastructure accepts the importance of these matters:[91]

> I am a believer in urban design done well and see it as a critical part of establishing the social license needed for greater density in our cities.

It is not clear that legislative change would be required to address concerns about overreach where it does exist. There is the ability for national direction to provide guidance on the weight to be given to various effects, and to inform good planning practice. For example, cross-reference could be made to urban design guidelines prepared by the Ministry for the Environment (which exist, but which could be updated and made more precise).[92] National direction could even conceivably declare that the colour of someone's front door (at least in most urban zones) is not an adverse effect to which weight is to be given, or provide for such things to be a permitted activity. This is, after all, how concerns about NIMBY ('not in my backyard') resistance to urban intensification have been addressed under the RMA – the NPS on Urban Development simply clarifies that "significant changes" to an urban area are not "themselves, an adverse effect".[93] The courts, when looking at amenity (where concerns about subjectivity can arise), are also very careful to consider whether people's views are "reasonably" held.[94] And the RMA already provides for truly *de minimis* (negligible) effects to be disregarded alongside the ability to strike out vexatious arguments.[95]

The more pertinent issue is not one of scope, but proportionality.[96] Some effects may be minor, but it does not necessarily follow that they should not be managed at all, lest they have more than minor cumulative effects. Rather, responses should be proportionate to the risks involved.
For example, when applying the RMA the courts have observed that:[97]

> a viewshaft [from heritage listed houses] would severely restrict development of private land. It should therefore be designed so that it has no greater impact on development potential than is necessary to achieve its objective… It is important to keep the burden on the private landowner in proportion to the public benefit to be gained from the restriction.

There is a sensible provision in Victoria's 2017 Environment Protection Act that could build on this approach in new legislation:[98]

> a decision, action or thing directed towards minimising harm or a risk of harm to human health or the environment should be proportionate to the harm or risk of harm that is being addressed.

Finally, the control of 'subjective' effects often arises not from district plans or consents, but from covenants imposed by developers or landlords/body corporates who wish to preserve the amenity (and therefore value) of their property. For example, this has prevented clotheslines from being placed on the north side of houses or on balconies, forcing households to use electric dryers.[99] It is worth exploring further whether such things are a greater source of unjustified micromanagement than the RMA, and therefore whether changing the law applying to the latter would make much of the problem go away.[100]

A spotlight on 'material' effects in Victoria

Victoria's Environment Protection Act, concerned with pollution and waste, has a narrower scope than the RMA, because the state has separate planning legislation regulating land use. The Act imposes a general duty to minimise the risk of 'environmental' harm.

However, the Act's definition of 'environment' is broad, and includes the "physical factors of the surroundings of human beings including the land, waters, atmosphere, climate, sound, odours and tastes", the "the biological factors of animals and plants" and "the social factor of aesthetics".[101] The Act also defines "harm", as an adverse effect on human health or the environment.

The concept of harm is constrained in a number of ways, including through the test of reasonableness: "an adverse effect on the amenity of a place or premises that unreasonably interferes with or is likely to unreasonably interfere with enjoyment" and "a change to the condition of the environment so as to make it offensive to the senses of human beings".[102] "Material harm", which is an aggravating factor in breaches of the Act's environmental duty,[103] is also defined as harm caused by pollution or waste that is "not negligible" or "on an area of high conservation value or of special significance".[104]

Key points

- There are legitimate concerns about the subjectiveness and imprecision of some design principles and controls. More evidence is needed as to how widespread these issues are across the system.
- The legitimacy of many urban design controls will depend on their context. Excluding them from the scope of legislation in a blanket way may cause significant harm.
- A focus needs to be on proportionality, not scope per se. Most issues could be addressed through the nuance of national direction, not the blunter force of legislative reform.
- Policy makers should explore the extent to which improperly subjective controls are imposed through property law mechanisms like covenants, and whether district plans are the main problem.

Where some kinds of effects are addressed under other legislation

What about where an activity is, or can be, managed under multiple statutes? Arguably it is inefficient if the same effects can be controlled in different places. For example, some may be of the view that urban design concerns could be dealt with under the Building Act or Health Act, or that the impacts of fishing on marine biodiversity could be managed under the Fisheries Act. Perhaps the scope of the RMA could be reduced.

Extreme caution is needed here. Overlap is much less than one might imagine. Even if the same effects or activities are being considered, they are generally for different reasons. This includes the Building Act (which is concerned primarily with health and safety within a building's envelope and quality of construction), the Health Act (which covers only basic and direct impacts of building design on people's health, like a requirement for bedrooms to have windows, not the wellbeing impacts of urban form), the Fisheries Act (which is concerned with sustainable utilisation, not sustainable management)[105] and the Climate Change Response Act (which lacks the regulatory tools to address climate, biodiversity and other impacts in the synergistic way enabled by land use planning).[106]

Some statutes (eg the Conservation Act, Wildlife Act or QEII National Trust Act) may have overlapping *purposes* with the RMA (protection of biodiversity), but their much narrower scope, tools and ultimately effectiveness (the Wildlife Act in particular is deeply flawed) means that they should not be regarded as alternatives unless they are themselves reformed or better implemented.[107] It would be particularly concerning if biodiversity protections were to rely only on covenants under the QEII Trust Act or Conservation Act on the basis that these are duplicative of RMA controls. There is not duplication, given that covenants (while a very good thing) are voluntary and are deployed in an ad hoc way.

Perhaps most importantly, the Fast-track Approvals Act is not an appropriate place for the environmental effects of nationally or regionally beneficial projects to be assessed, and keeping such projects outside the scope of a future system would be inconsistent with the intention to safeguard environmental limits. In short, the apparent overlap between the RMA and several other statutes is not a good reason to reduce the scope of the former, even if there could be better alignment of their *processes* (eg a one stop shop for obtaining resource consents, building consents, conservation concessions and so forth).

Key points	• There are very few matters where the RMA truly overlaps with other legislation, because of its unique purpose and tools. • The scope of a future system should not be narrowed on the grounds that some outcomes can be achieved under other statutes (as they stand at the moment).

4.3 What about where those affected have consented to harm?

Some effects on people (eg dust, noise, shading) might be *significant* enough, and *objective* enough, to warrant intervention through a tool like a district plan. But arguably the system should not intervene to the extent that those affected have *consented* to it. The idea is that individual people, not councils, are best placed to understand whether a reduction of their rights is acceptable. For example, a developer might offer an affected person some compensation or a 'side-deal'.

The government has signalled that many resource management outcomes in an urban context should be able to be negotiated between affected parties in this way. Several points should be made here. First, it is unclear how this would differ from the current situation under the RMA, unless the scope of an 'affected' person were narrowed to just direct neighbours.[108] Despite effects on the environment being defined very broadly as a starting point, the Act provides significant scope for private negotiation between affected persons that effectively remove effects from its scope, through:

1. limited notification, where only affected persons are notified and have rights to submit on consents and some plan changes;[109]
2. affected person signoff, in which case such impacts are to be disregarded by consent authorities;[110]
3. court-assisted dispute resolution between parties (for plans and consents), which can result in a consent order (in which the Court confirms that any private agreement complies with Part 2 of the Act);
4. boundary activity provisions, where structures close to adjacent properties are treated as permitted activities (effectively, council has no jurisdiction) where neighbours agree, irrespective of what a plan says.[111]

A spotlight on boundary activities

'Temporary' or 'marginal' non-compliance with rules at property boundaries, which would otherwise require consent, can be deemed to be permitted activities under certain conditions. This means that no consent is needed.[112] The mechanism allows councils to apply common sense when dealing with minor boundary disputes where intervention is not really warranted. There has been extensive use of these deemed permitted activities by councils in the past few years, dealing with things like home alterations and extensions.[113] Of the nearly 2,000 applications received by councils in 2022-2023, only 37 were declined.[114] It seems a sensible middle ground between regulatory control and purely private negotiation.

In practice, side agreements are already common under the RMA (although their detail is often not disclosed). They are generally confirmed through consent orders at the Environment Court level without problem. For example, much opposition to the Waipipi wind farm near Waverley was resolved by obtaining affected person signoff from tangata whenua.[115] The use of 'no complaint' covenants (to prevent a new resident from complaining about effects from existing activities next door, like a farm or factory) are common, and can be included in conditions of consent following agreement between parties.[116]

The NBA also provided for an alternative dispute resolution pathway enabling purely private matters to be negotiated or resolved privately,[117] building on Environment Court practices around mediation that already exist. This process used 'accredited adjudicators' and could only be deployed for matters that were 'discrete or confined to a particular location only',[118] but it allowed plans to *require* the process to be used.

If the scope of the system were to be narrowed more than this, care needs to be taken to ensure that effects are truly limited to specific parties, rather than other persons or society more broadly. Often, what can be cast as an impact on a single property owner, actually has broader implications that should not be removed from the jurisdiction of planners and consent authorities.

For example, increasing the impervious area of a property (by concreting or building over more land, including adding some kinds of deck) can cumulatively increase flooding risk for other people in a community (as well as the infrastructure burden on council and therefore rates). It is neither a trivial effect, nor one confined to two parties. Wider effects can also arise from the intensification ('upzoning') of a whole neighbourhood or street (eg when it comes to traffic effects, parking and shading in public spaces). Among other things, this is why private plan changes are not just negotiated between a critical mass of, say, 80 percent of landowners on a street (as has been suggested by some),[119] but are carefully assessed as part of a broader planning framework that considers the urban fabric as a whole.

In particular, the idea that "infrastructure asset owners should not be able to use the system to … object to development on the grounds that new residents might want to use an existing road" ignores the very real issues that a more intensive use of land has on infrastructure (congestion, safety concerns, lack of parking) that may not easily be retrofitted (eg through widening of roads or creating public transport).[120] If one simply allows unplanned, market-led density, the community will bear many costs down the road (so to speak).

There are other examples too. Cutting down trees in cities, even on private property, can have implications for urban heating and flooding (and therefore resilience and energy demand in a changing climate), not just the property owner and neighbours.[121] Auckland, in particular, has lost a large amount of its green cover in the past two decades as it has densified.[122]

The same can be said for controlling the colour of roofs and other building materials, which can be made to sound like an unreasonable intrusion but may (if used well in context) have significant city-wide impacts as the world gets warmer in the future, usually at no additional cost to the property owner. This is because light coloured roofs can mitigate the effects of urban heat islands (notably in extreme heatwaves) as well as cooling the interior of buildings themselves without the need for electrically hungry air conditioning.[123] Cities like Paris have taken significant steps in that direction, having experienced a heatwave in 2003 that contributed to the deaths of 15,000 people.[124] This is not micromanagement – it is seeing the forest, not just the trees.

Even seemingly simple boundary issues like those to do with shading, privacy and extensions do not *just* affect neighbours; they also affect future occupiers who will inherit the tensions that this creates across a dense urban fabric.[125] Such things cannot easily (or cheaply) be retrofitted out of the system when dwellings change hands or circumstances change.

Potential issues of duress and coercion also need to be front of mind when thinking about the 'consent' of affected persons, especially where there is an imbalance of power (eg financial resources) between those creating an effect and those feeling (and, in theory, being 'compensated' for) it. A dollar does not have the same value for everyone (eg a large-scale developer and the retiree next door), which can lead to people being forced into choices that have negative effects on themselves. The system must guard against such eventualities.

Key points	• Where people have genuinely consented to harm, there is a case for the system not to interfere further. However, the RMA already provides several mechanisms by which private negotiation can occur outside of the system, effectively constraining its scope. • Beyond this, policy makers need to take great care, since many effects on a person may have broader implications for others, or on the urban environment more generally.

4.4 What if a person creating an effect will be the *only* person affected?

A similar, but subtly different, question arises where the people *creating* an effect are the only people affected. They are consenting to harm they have imposed on themselves. Should the system protect people from their *own* choices?

Arguably that person is best placed to decide whether any personal harm is acceptable given the benefits, or whether an effect is regarded as harmful at all. Ministers have pointed to, for example, requirements for new builds to include balconies, for minimum apartment sizes and for private open spaces for houses.[126] The mandatory provision of onsite car parking presents a similar issue.[127] These will primarily affect the person living there, who may not want such amenities (or may not wish to pay extra for them).

In many scenarios, such things may well be overreach (eg controls on streetscape heritage impacts where alterations are not actually visible to anyone except an owner). They constrain people's choices and potentially inflate development costs. But evidence is needed as to how widespread

these conditions are before policy decisions are taken on legislative change that remove broader urban design from the remit of the RMA.

Moreover, yet again, context is everything in resource management. The system needs to be careful not to lose sight of potential market failures that, depending on the situation, might affect social and health outcomes and have flow on effects for the public interest beyond just individuals. This is one reason why the jurisdiction of territorial authorities is quite broad under the RMA. For example:

- A lack of access to fresh air or open space can contribute to residents' poor mental health or vulnerability to illness. For instance, balconies in apartment buildings proved to be extremely valuable for urbanites during the COVID 19 pandemic.[128]
- A recent report from Auckland Council has highlighted the importance of urban design in maintaining basic living standards for residents, such as floor space, storage, shade, temperature and privacy, not all of which are being adequately met.[129]
- A lack of requirement for onsite carparks might sound like the market providing cheaper choices for carless families, but that is undermined if residents end up parking on footpaths and roads with the cars they have decided to keep anyway.[130]
- Poorly designed, sized or located housing can impact on vulnerable people.[131] Potential effects of such developments are not felt by the developer who has property rights *now*, but rather by those living there (buying or renting) in the future. Tenants, including social housing tenants, might not require the 'nice to haves' but they do deserve the dignity of a liveable home. The risks can be seen in Hong Kong's 'coffin apartments', which are quite literally the size of coffins (6 by 3 feet)[132] and where authorities are seeking to mitigate the serious impacts this has had on poorer sections of the population.[133]
- A future system needs to prevent or carefully manage development in areas of high natural hazard risk, which must include consideration of how risk will be affected by climate change. This is even though some people may well be willing to buy or rent properties in vulnerable (eg flood prone) locations and bear the risk, given their financial constraints. A cheap roof over their heads may be an extremely dangerous one. It might also be one that puts emergency personnel in danger when they are forced to respond, or places a burden on healthcare systems. We have looked at this in more detail in other work on climate change adaptation, and here simply note that a land use system that strengthens resilience to climate impacts will need to affect people's freedom to use their property how they wish.[134]

All these things can have significant flow on effects for public services and spending (eg the health system and emergency management system), which may be expected to pick up the pieces despite mitigation being possible much earlier through careful planning.

There is, of course, a place for guidance as to what 'unhealthy' and 'risky' means in our changing social context. For example, it would be unacceptable for bedrooms not to have windows – we all know that, and it is strongly regulated – but not everyone needs a deck. Also, planning controls like minimum apartment sizes or balconies will always be *worth it* given the costs they impose. Proportionality is important; a good reason is needed for regulation. But leaving such things solely to the market, and excluding them from planning oversight, risks poor outcomes being baked into our future urban fabric.

Key points	
	• If people create risks or harm only to themselves, they will generally be best placed to determine if it is worth it or not. • However, excluding such effects from the scope of the resource management system should only be done with great care, partly because there can be flow on effects on others, and partly because vulnerable people may need to be shielded from outcomes in which they may actually have little choice.

Overall, it is hard to draw a clear line in legislation between effects on people that are 'material' and those that are not. Much depends on context, and this is why the RMA provides a broad scope. Across all of the categories above, the best way forward would be to provide provisions in the RMA that limit the scope of plans and consents in very specific ways (or in national direction to guide weight given to various effects), rather than seeking to narrow the definitions of 'effect' or 'environment' in a fundamental way (eg a 'material' impact on 'property' rights). It will be much better to 'overshoot and carve out' than undershoot and leave unintended gaps.

5. Negative impacts on the broader 'environment' need to be addressed (the place of land)

"It would be hard to find anyone today who would argue that there should be no control of the use of land for the purposes of sustainably managing scarce resources for the present as well as for the future."[135]

"Appropriate controls on the use of property rights, and effectively managing the environmental consequences of such use, are critical in addressing the environmental challenges of our time."[136]

5.1 Introduction

The sections above have focused on common pool resources and where there is harm to other people. But are there other reasons for intervention? Notably, the government has said that rules should only restrict activity with "material spillover effects on other people's enjoyment of their own property, or on the property rights of the wider natural environment that sustains us."[137] Setting aside the curious statement about the environment having a property right of its own, this raises questions about what the "wider natural environment" actually means.

A system for protecting the 'environment' is concerned with preserving the public and intergenerational interest in healthy ecosystems, and recognising that future people, and te taiao itself, have interests as well. This concept of the 'environment' cuts across artificial property and management boundaries between land, water, air, soil, flora and fauna. There can be considerable public interest in preventing or managing adverse impacts on all these resources, whether or not they are privately owned.

The most important question about scope here is exactly where the boundary lies between private and public interests in 'land'.[138] Land is a curious human construct, comprising many elements (a description of a spatial envelope as well as tangible things within it like soil, biota, the air column, deep subsurface, buildings and other fixtures).

5.2 Land use controls are sometimes a proxy for protecting common pool resources

The first thing to note is that some controls on 'land' are not really managing impacts on the land at all. Instead, they are proxies for the management of effects on the commons contained on, within, or next to it. In other words, controlling how land is used (eg number of cows on a dairy farm or level of fertiliser inputs) can be a more effective or measurable point of intervention than regulating the types of impacts it creates (eg restricting the amount of nutrients flowing into water).[139] For example, some councils have chosen not to require resource consent for diffuse discharges (which can be difficult to monitor/model) as long as land use standards are met or land use consents are obtained.[140]

Even something like roofing materials, which can be made to sound like micromanagement of someone's house, can have ramifications for the health of the commons. Urban water quality is worse than pastoral catchments, and one contributor has been runoff of heavy metals from zinc roofs and a failure to capture contaminated water before it ends up in our favourite swimming spots.[141] A requirement for raingardens is not just to improve aesthetics, it is also an onsite stormwater management tool to prevent flooding and the contamination that often comes with urban development.

For such things there is clear and present justification for some form of intervention, whether that be controls to manage diffuse discharges to groundwater from intensive agriculture, restrictions on afforestation to manage sedimentation of the coastal environment from clear fell forestry harvesting, or provisions that shape urban form to minimise greenhouse gas emissions. The *controls* may well be on land, but the purpose is to deal with the externalities arising from how it is used. Almost all regional council jurisdiction over land, under sections 9 and 30 of the RMA, is arguably appropriate for this reason.

The key point is this: property rights in land do not confer rights to affect the commons, even where these are within the spatial envelope of the land (eg in the case of groundwater under someone's farm). This confusion frequently occurs. For example, it can be seen in the persistent historical assumption that water rights on which agriculture or horticulture has been enabled will continue to be renewed, because it is so connected to the use of the land.[142] As one commentator notes:[143]

> In the absence of regulations [on land] such as the agricultural intensification rules (the National Environmental Standards for Freshwater 2020 Regulations), there would be nothing to stop us overindulging in our love of cows, leading to a real-world tragedy of the commons, with resulting impacts on nitrogen leaching, methane gas emission, and over-demand for surface and ground water.

By all means we need a conversation about *how* to protect the commons. But 'letting farmers farm' and allowing enjoyment of property rights should not extend to the enjoyment of rights that do not belong to them. In the Netherlands, for example, nutrient runoff (among other things) has led to strongly interventionist approaches to agricultural land use change, including drastic reductions in allowable stocking rates (combined, interestingly, with substantial buyout schemes).[144]

Key points	
	• There is an important distinction between controlling land for the purpose of protecting the commons and controlling land itself. • Property rights in land do not automatically confer rights to degrade the commons.

5.3 There is some public interest in private land itself

> "*Many sense that being a good steward involves looking after the land - what it sustains and what sustains it. Others seem to believe that landowners have no role or responsibility whatsoever… These attitudes are determined, in part, by differing views about property rights - a notion that is poorly understood.*"[145]

> "*Why should I care about future generations? What have they ever done for me?*"[146]

Some activities on land may not affect the 'commons' in the narrower sense of the word (resources without clear ownership). They might not even impose costs beyond the property boundary (externalities or spillover effects). But they may still impact the land *itself* in ways that have public interest implications.

Often this is about the interests of future generations (being a good ancestor), respecting one's tupuna (being a good descendant), or te taiao itself. Land can be a strategic resource for the country and its future population, not *just* a private good. Ben France-Hudson has said that restricting the scope of the system to intervene would be based on a belief that:[147]

> there is a [misguided] distinction between the people who live on the land and the land itself, which has no intrinsic worth beyond its ability to be exploited. This allows for use in ways that are not ecologically sound and which do not consider the interconnected whole or interests of future generations.

There are two important questions of scope facing policy makers here. The first is whether private property rights are *themselves* an effective tool for securing public interest outcomes in land. If so, a 'property system' dealing with the defence and disposal of such rights is all that is needed, and the scope of a statute like the RMA could be dramatically reduced. Some, writing in the tradition of economist Ronald Coase,[148] are of the view that free markets can be relied upon entirely under certain conditions (eg where property rights are clearly defined and transaction costs are low):[149]

> Applied to the environment, the theory is that if all resources are privately owned with strong [and well defined] property rights, the socially optimal level of environmental use should be reached through the complete specification of private property rights and privately ordered bargaining.

If property rights are well designed and regulated, they *can* be good for the environment. For example, many farmers are responsible stewards who care for their property and those who come after, and welcome assistance from councils to improve the environment (eg through rates relief, riparian planting and fencing schemes). Some property owners voluntarily protect land via QEII covenants (now amounting to more than 180,000 hectares),[150] which have been an important tool because of their strong legal status and durable nature (which may not be provided by more flexible regulatory plans). Care will need to be taken that regulation does not 'crowd out' the continued deployment of such protections.[151] David Grinlinton has also floated the novel use or creation of new kinds of property rights to improve environmental outcomes.[152] And some have even proposed the more widespread privatisation of the commons, to provide incentives for environmental improvement, in that:[153]

> If you believe that individuals are rational it is tempting to conclude that if you only leave people alone to make their own decisions, they will do the right thing.

However, history has repeatedly shown that the public interest in land is not *necessarily* secured by 'enclosure' and the exercise of private property rights alone. "Despite … the enthusiasm and efforts of landholders, iwi, hapū, and of the wider community, current public and private investment is falling short of what we need to protect nature"[154] and "on private land, economic drivers render conservation the exception and degradation the rule."[155] The kinds of challenges facing the environment are not aligned with property boundaries, often misaligning the incentives of landowners with the public interest.[156]

Intergenerational value in land is not reflected in present day market valuations.[157] This is the case even where it is *possible* to measure such things in dollar terms. But markets struggle even more when meaningful measurement is impossible. For example, farmers clearing habitat will struggle to quantify the moral value of preventing species extinctions.[158] Simply paying money to compensate for harm is not an adequate response in such situations, because natural and financial capital will not be interchangeable from the perspective of our grandchildren.[159]

The dangers of taking a property rights and market-led approach too far can be seen in one study, which tried to work out the value of the entire biosphere. It came up with a figure of up to US$54 trillion per year,[160] which was more than global GDP at the time, but which is still a poor measure of the existential value of life on Earth.

Key points	• There can be considerable public interest in private land even where effects do not impact the commons or things outside its boundaries. • One key question is the extent to which property rights are themselves an effective tool in achieving the public good. Although in some situations this may be the case, and should be encouraged, it cannot be relied upon.

The second, and in many ways more difficult, question is whether the scope of the system should be curtailed *even if* that system would be more effective in achieving environmental outcomes than property rights alone. In other words, what should happen where a genuine public interest in land clashes with private property interests? Such conflicts arise frequently.[161] The government's view seems to be that property rights come first, as a general rule:[162]

> RM must cease to be a vehicle for taking. Development will go from a privilege to a protected right.

The implication, perhaps, is that such rights could be exercised even if they threaten the public interest. If so, it reflects an "absolute theory of private property rights [which] is accompanied by a view that any interference with those rights by government is illegitimate."[163] But there is a significant grey area between 'taking' property (compulsory acquisition), on the one hand, and granting unfettered rights to landowners to do as they please on the other. Like so many things in a society of people and things, the solution lies somewhere in between.

In our first paper, we explored the idea that property rights are important, but they are not absolute. This is particularly relevant when it comes to thinking about the system's scope in controlling land, in that such rights do not form a solid barrier beyond which controls are no longer valid. Barry Barton has noted, for example, that regulating the use of private land is not only constitutional and lawful, but also principled and ethical, in a modern society facing environmental pressures that do not respect lines on a map or legal boundaries between property and commons.[164]

Key points	
	• Property rights in land are important, but they are not absolute in legal or moral terms. • The role of the resource management system is to constrain how those rights are exercised, where justified in the public interest, not to enable them.

5.4 Indigenous biodiversity on private land

"*Birds, bats and bees don't see boundary lines. The whenua is indistinguishable*."[165]

The public interest in private land is not limitless. So what *does* it include? While the answer can change over time,[166] one obvious example is the protection of indigenous biodiversity. New Zealand has seen "stop-start attempts" to safeguard this over the years, which have been politically fraught[167] partly because we never seem to be sure if living things are part of the land or not.

Private land contains significant amounts of indigenous flora and fauna. This includes remnant forest, regenerating bush, and the ecological hotspots provided by remaining wetlands. Its maintenance is crucial for societal wellbeing, for many reasons – not least ecosystem services that sustain food production and regulate natural processes that support humans.[168] A great deal has been lost, especially since European colonisation (with only around 10 percent of wetlands left).[169] Losing the remainder would be hugely detrimental to society. Safeguarding biodiversity on the 30 percent of land in the conservation estate will not be enough, given that it is unrepresentative of the full range of habitats, and many at-risk species only live outside it.[170] Moreover, biodiverse land has a lot of economic and non-economic value to the country, not just to landowners:

> The small pockets of native species which lie scattered across the North or South Island landscape are not equal alternatives to woodlots and windbreaks. They are the last strands of a long and proud history of the land.[171]
>
> Our identity as New Zealanders is closely linked to our indigenous biodiversity. Our natural landscapes are our backyards and our playgrounds, which support our 'brand' on the global stage and are a significant drawcard for international visitors. Indigenous biodiversity (from genetic to ecosystem diversity) provides supporting, provisioning and regulating services, such as carbon sequestration, climate regulation, nutrient recycling, resistance to weeds and pests, pollination and commercial products such as Mānuka honey - all of which underpin our economic, social and cultural wellbeing. A study in 2013 concluded that the total economic value of all land-based ecosystem services in Aotearoa New Zealand is worth $57 billion a year.[172]

But while it is possible to see some aspects of indigenous biodiversity as part of the 'commons', it is equally possible to see elements as private property. The legal position is complex. For example:

- Ownership of indigenous plants under the common law is vested in a landowner (they are part of the land), subject to various statutory controls.[173] For example, if someone owns a kowhai tree or flax on their land, they can generally trim it or sell it.
- Flora on conservation or reserve land is publicly owned because of the status of the land (excluding areas like Te Urewera, which is no longer Crown owned), but animals and plants in the common marine and coastal area (like the space itself) are not 'owned' by anyone.[174] The beds of rivers and lakes are sometimes owned by the Crown and sometimes privately (eg smaller stream beds on farms).

- Under the Wildlife Act, property rights in protected wildlife (which excludes insects, pets/livestock, most fish and various other species) are currently vested in the Crown, subject to legislation (including specific Te Tiriti arrangements).[175]
- A range of rights in other fauna (indigenous or introduced) is determined by the common law, again subject to restrictions in legislation. Pets and livestock have private ownership.
- Many animals are not owned at all (eg most invertebrates), although access to them is generally controlled by those occupying the land on which they roam.
- Some animals can be privately owned only once they are lawfully reduced to possession (eg if someone shoots a duck with a license or a fish in line with fishing controls).

All this shows that humans have created artificial partitions between things that are property and things that are not, fragmenting their management. This fact alone means it is essential for the system to take a bigger picture view and harmonise its interventions according to ecological reality, not tenure. For example, the life cycle of many native creatures relies on them being able to traverse boundaries between different land tenures, aquatic and terrestrial environments, and different institutional jurisdictions. Fencing off random areas of bush where farming or forestry is not viable, or where owners have volunteered it, is good but will not necessarily generate the outcomes needed to sustain ecosystems and their living components.

The following more specific rationales can be given to justify intervention to protect biodiversity on private land.

1. Removal or disruption of indigenous flora and fauna can have **impacts on the broader rights and interests of people other than a landowner**, such as cumulative impacts on ecosystem services that go well beyond title boundaries. Terrestrial plants are not part of the 'commons', but their treatment or removal can still create very real externalities for people alive now as well as future generations. These may be diffuse and slow burning, but cumulatively they are tangible and material (eg the decline of pollinating species like bees).[176] Note that Ministers have recognised that the 'rights' to be recognised under a new system will include 'communal' rights, of which biodiversity needs to be a core element.

2. Indigenous flora and fauna are **taonga to Māori**, irrespective of Western property arrangements that have been imposed since colonisation. This justifies intervention on grounds of the articles and principles of Te Tiriti, beyond just the recognition of customary rights or particular sites of cultural significance (eg waahi tapu). In particular:

   > Tangata whenua and plants have a common origin in the Māori story of creation with plants as the link between humans and the sacred ancestors Papatūānuku and Ranginui. Indigenous species enable, inform and inspire customary practices including mahinga kai, rongoā, waiata, and whaikōrero.[177]
   >
   > There is a lot to be learnt from a philosophy that protects the environment as a family member, not just a resource that can be traded at a price.[178]
   >
   > As kaitiaki, Māori [take] on the role and responsibility of speaking on behalf of the … environment. So harm to people is one thing, but also harm to a resource/environment is very relevant to Māori.[179]

3. There is a **property-rights based argument** for protecting the habitat of protected wildlife (eg bats) on private land, due to the Crown's ownership of the latter under the Wildlife Act.[180] In other words, degrading habitat would undermine someone else's property right in the fauna that relies on it, making it not dissimilar to a landlord who interferes with quiet enjoyment of a leaseholder's rights. As with the management of property conflicts between urban neighbours, the system has a crucial role in mediating between two sets of competing property rights.

4. The benefits of biodiversity protection for **economic growth and trade** are also highly relevant, including tourism and New Zealand's trading reputation as a clean, green country (and associated obligations under recent free trade agreements).[181] This has significant economic implications for the country.

5. The same **'coordination' rationale** for managing urban land use change (so that rezoned private land is aligned with provision of associated public infrastructure – see further below) also applies to public and private aspects of indigenous biodiversity. Ecosystems are connected and must be managed holistically, justifying the coordination of controls on private land with management of non-private elements (eg wildlife that moves across land of different tenures, connections with conservation land, or ecosystems that span aquatic and terrestrial environments). For example, the point of a 'public' marine reserve is undermined if it is flooded with sediment from adjacent land-based activities.[182]

6. Finally, New Zealand has obligations under **international law** relating to the protection of biodiversity, reflected in *Te mana o te taiao the New Zealand Biodiversity Strategy*.[183]

These are all reasons to regard the loss of indigenous biodiversity as a 'material' effect that lies at the heart of the resource management system, and a rationale for controlling land.[184] As such, we consider that the broad scope of the RMA in Parts 2 to 4 remains appropriate. The key question is the package of tools that is deployed to achieve protective outcomes (eg regulation, offsetting, credits). To achieve better biodiversity outcomes, there is clearly a need for a much more strategic approach to land use change (rather than just preventing clearance of existing biodiversity hotspots).

Key points	• There is a significant public interest in the protection of indigenous biodiversity on private land, which transcends the artificial distinction in tenure that has been created between different aspects of the environment. • Intervention can be justified on a number of grounds, including Te Tiriti, the risk of externalities, moral arguments around extinction, the protection of the Crown's property right, economic benefit for the nation, and international law.

The nub of the issue may not be scope per se (*whether* controls are imposed), or even what *kind*, but rather *who pays* for them. Area-based protection for indigenous biodiversity on private land may warrant close consideration of the merits of providing financial assistance.[185] This is because strong protections can be seen as the system demanding provision of a public *benefit* from private property (by using it in a way that has positive spillover effects for society as a whole) rather than the prevention of *harm* (stopping externalities).

Whether a protected area is actually providing positive effects or preventing future adverse effects depends, of course, on one's starting assumptions about what property rights do and do not include. Is there a right to clear habitat, and is it being taken? The baseline for whether farmers should pay or be paid also depends on how far back we look into history:[186]

> Landowners will look to be compensated by the taxpayer for environmental improvements. This, however, undermines the 'polluter pays' principle, especially in cases where landowners have contributed to – and benefitted from – environmental damage without paying for it. How much should they contribute to solve the problem? Or, looking at it another way, how much of their effort

should they contribute for free? To be good stewards of the land, what baseline level of environmental management should simply be expected?

The RMA is clear that rules controlling land use are not 'takings' and do not trigger compensation. There are some solid reasons for that.[187] But widespread protection of biodiversity areas will nevertheless constrain what people have long expected they can do on their land. This is particularly pronounced where previously farmed areas have regenerated (and there is a desire to clear them), or where new important habitat has developed on private land by accident (for example, indigenous species can make their home in commercial pine forests).

There is also a reality to recognise, that many farmers may not be capable of bearing the large financial burdens of proactive protection (eg fencing), lost opportunities (no longer being able to graze stock on a piece of land) or land use change (eg from economically marginal activities like sheep farming).[188] Such concerns have particular resonance for Māori landowners, since there is a long legacy of land confiscation and marginalisation to reckon with. For these and other reasons, it was anticipated that national direction requiring significant natural areas (SNAs) would be accompanied by non-regulatory financial assistance. So while the scope of the RMA is appropriate because of the public interest in biodiversity, complementary measures may also be needed to facilitate an equitable transition.[189] Some potential mechanisms were described by the biodiversity collaborative group that made recommendations on the National Policy Statement for Indigenous Biodiversity, including tax incentives, rates relief, and payments for ecosystem services.[190]

Note also that no other legislative framework or tool currently deals with the biodiversity issues that the RMA is expected to address, including the Conservation Act, Fisheries Act, Native Plant Protection Act, Wildlife Act, Land Act, Fisheries Act or QEII National Trust Act.[191] To suggest otherwise is to ignore the serious gaps and deficiencies such frameworks have, which we have looked at in other policy work.[192] Biodiversity protections will therefore need to be core to the RMA's successor.

Key points	• Although there is a public interest in protection of biodiversity on private land, it is less clear who should bear the burden of this protection and in what measure. • Such issues involve difficult decisions about equity, but should not prevent biodiversity controls themselves being core to a future system.

5.5 Soil on private land

Sediment being washed into waterways (eg from forestry harvesting and urban development) is a big problem, and its management is one that lies firmly within the rationale of protecting the commons (see earlier). However, it is not the only compelling reason for public authorities to protect our soils, most of which is privately owned.

First is the idea that soil is only useful – notably for primary production and therefore the social and economic wellbeing of the country – if it actually remains on the land. Once lost, it is not easily regenerated, because it is the product of centuries or millennia of complex natural processes. Long experience with the erosion of steep, deforested land since the early 20th century has shown that the market (as well as misguided government subsidies for land clearance) does not necessarily protect the value of soil on private land, despite its significant long-term economic value.[193]

Secondly, even if soil remains *in situ*, it can be rendered less productive or usable through compaction and contamination (eg from chemicals and intensive agricultural use).[194] This affects not only the biodiversity of the soil, but also its utility for future economic use that is hard to put a dollar value on in the present. For example, contamination can render land unsuitable for food production or residential use unless there is expensive remediation.[195] Again, statistics around soil compaction and the large legacy effects of land contamination show that private property rights do not necessarily incentivise good long-term environmental outcomes where soil is privately owned,[196] potentially exacerbated where owners do not actually live on or have a relationship with the land.

Some commentators have faith that "the cost of land pollution is usually borne by the landowner who will have to accept a lower purchase price in the future, or face the cost of cleaning it up before it can be sold".[197] Yet there is a patchwork of contaminated land across the country that says otherwise. Some of it has fallen to public authorities to clean up at considerable cost to the taxpayer.[198] Soil is, ultimately, an essential part of society's food producing system, and if its degradation continues from contamination, compaction, erosion or other forms of harm "we risk our current food production systems becoming unsustainable."[199]

Thirdly, the system needs to take a role in preventing land use choices that will constrain options for future generations, especially where those may be essential to human needs. For example, paving over highly productive soils (and, to some extent, allowing uncontrolled subdivision into lifestyle blocks) effectively removes this resource in perpetuity from future generations which may rely on it for food security.[200] As a country we do not have an enormous amount of elite soil, and it needs to be preserved. Some interviewees did not see such things as a problem, the idea being, again, that the value of various uses should be determined by the market in response to demand. But a century on from now, letting market forces place greater value on irreversible urban sprawl than the ability to produce food may look distinctly unwise (especially if trade barriers go up). This is of particular concern around Auckland, where there are substantial pressures for urban development into productive land at the margins and where market gardeners face enormous incentives to sell.[201]

Similarly, some have flagged that the emissions trading scheme (although the product of an imperfect market tool, rather than a free market per se) may incentivise permanent carbon forestry on large amounts of rural land.[202] This would fail to recognise the importance of longer-term economic and social wellbeing in the drive to meet short-term emissions targets. In other words, a future planning system, not just a *pricing* system, will need to be a part of putting the 'right tree in the right place'.

The idea of safeguarding land for strategic purposes is already well recognised when it comes to infrastructure (eg designations for roads or transmission lines prevent incompatible land uses from occurring, and safety zones can be established around oil and gas facilities). Food production is a similarly strategic use of soil, even if it is privately held.

As always, context is everything. Resource management is a fundamentally place-based thing. In some places, the effects of land use choices may be so small as to be immaterial (for example, it may be acceptable to allow for *some* greenhouses or solar panels on elite soils).[203] In other places (eg around Auckland), opportunity costs for society and environment may be much more significant. Proportionality will be appropriate, as long as it takes a long-term view. The key point is that the system needs to have a role in determining whether that is the case. The RMA's existing scope, which has nurtured nuanced tools like the National Policy Statement for Highly Productive Land, will remain suitable.

Key points	
	• There is significant public interest in the health of soil on private land, and also notably when it comes to erosion, contamination, compaction and strategically important uses (eg food production). The system should have a scope that encompasses all of these matters.

5.6 Sites of cultural significance

As mentioned earlier, in te ao Māori there is no clear distinction between te taiao and cultural wellbeing, and between property rights and kaitiakitanga. Kaitiaki responsibilities exist outside whenua Māori. In particular, many sites of cultural significance exist on private land and are part of the 'environment' that needs protection in a future system. Statutory acknowledgements across public land sometimes reflect strong associations with adjoining private land too. A landowner may not be incentivised to protect these (or even be aware of them, since district plans do not identify all such sites). Archaeological authorities under separate heritage legislation will not provide adequate protection either.[204] And by no means are all of these protected under Treaty settlements.

It will be important for the RMA's scope not to be unduly narrowed with respect to impacts on cultural sites of significance, notably with respect to Part 2's recognition of Māori ancestral relationships and in the definition of an 'effect'. This would allow proper consideration of cultural impact reports and iwi environmental management plans, as well as providing a hook for addressing effects under Te Tiriti settlements (eg for the Waikato River).[205] Cultural *landscapes* are important to keep within scope too. These are a broader concept than just *sites* of significance, and have had careful recognition in some plans under the RMA to address effects on tangata whenua.[206] Such landscapes are said to "transcend the boundaries of 'land'scape into other 'scapes'; rivers, lakes, ocean and sky. It is enshrined in our whakapapa, pepeha, tauparapara, whaikorero, karakia, waiata, tikanga, ngā korero a kui mā a koroua mā, and our mahi toi."[207]

There will, of course, be tensions between Māori interests and those of property owners that need to be resolved, but Bollard reminds us that careful analysis is required within the system – not outside it – to do so effectively:[208]

> the need is always present … to analyse and assess the merits of each case, including the persuasiveness of the evidence directed to Māori issues.

Key points	
	• The scope of a future system needs to encompass the protection of sites of cultural significance to Māori and broader cultural landscapes. These are legitimate effects on the environment.

5.7 Landscape and natural features/character

Some forms of development (eg urban expansion or tourism infrastructure) can impact outstanding natural landscapes (ONLs), features (ONFs) and the natural character of the coastal environment. Landscapes can also be significant and highly valued at a regional and local level, not just a national level. There can be significant public interest in protecting such things, even if a development's actual footprint occurs only on private land. This is partly because:[209]

> The landscape is who we are. As a young nation, it is the flora and fauna, the mountains, lakes, wetlands and coastlines that are our tūpuna, our ancestors, and it is these natural forces that form our view of 'home'.[210] The landscape, in all its dimensions, is alive. It moves with us as we ebb and flow through life, forming the interface between humans and place.

EDS has explored this in depth in its landscape project and we refer readers there for more information.[211] A handful of points can be made for present purposes. First, while landscape is sometimes seen as 'subjective', there is considerable expert assessment involved and well-developed legal principles for identifying what is outstanding, natural and inappropriate.[212] Reasons for public interest protection are about much more than just 'looking nice'.[213]

Secondly, recognition of ONLs and ONFs does not automatically lead to protections, or diminution of what people can do on their private property. Rather, it depends on whether something is 'inappropriate' in context, as well as consideration of the positive and negative impacts it would have.[214] Many human activities *can* occur in ONLs, including farming.

Note also that the public interest in landscape is not just for environmental, aesthetic or experiential reasons (although landscape does form a strong element of national identity). It also extends to economic factors, given the enormous monetary value of natural landscapes and character for tourism in New Zealand.[215] International visitors come to see majestic mountains, indigenous forests and crystal lakes.

We therefore view with some concern the (possible) intention of Ministers to move landscape from the scope of the 'system' into a fundamentally different (and potentially weaker) framework.[216] Overall, we regard the scope of the RMA (and years of carefully crafted case law) as broadly appropriate, with the more pertinent questions being around the proportionality of controls and the precision or predictability with which protections are identified (eg with ONLs, ONFs and amenity landscapes comprehensively mapped, their values explained, and their controls specified in plans).[217]

As with biodiversity, there is also a question of who bears the burden of the costs of protection – landowners or the public. Again, this might partly depend on whether landowner rights are seen to include the right to impact landscapes or features in the first place (and are therefore being 'taken away'). Either way, landscape protection represents a clear market failure that requires correction through the system:[218]

> In essence the public cannot easily transact to satisfy a demand for landscape as a good. In the absence of a demand backed by a willingness to pay, land owners, predominantly but not exclusively farmers, may not be motivated to provide the features that might match demand. This is because landscape is a public good and they cannot capture benefits from all forms of users. Accordingly, and provided landscape is valuable to the public, there is a rationale for government intervention to stimulate the supply of features that are deemed to be in the public interest.

Key points	
	• Landscape and natural character protections need to remain core to a future system. They go to the heart of our identify as a nation, as well as having significant value to the country's economy. • Recognition and protection of landscape values does not inevitably affect property rights. • A future system could provide greater predictability by mapping all ONLs and ONFs, providing for proportionality in controls, and tackling the question of who bears the cost of protection in a nuanced way.

5.8 Protections for private property already exist under the RMA

All of the rationales above have potential to affect people's expectations about how they can use their land. But would a 'property rights-based system' be totally alien from what we have at the moment? The RMA already provides various safeguards to protect property interests. Indeed, the Act could actually be described as one that respects the enjoyment of property rights, sometimes to the detriment of the environment. For example:

- Section 9 of the Act treats land differently to most other domains, in that it presumes landowners can do as they wish unless expressly restricted by a rule or regulation. Such provisions then need to be specifically justified and are frequently tested through the courts. In practice, aside from subdivision, territorial authorities "have a relatively permissive attitude to land use (in the sense that land use is permitted relative to various standards)".[219] It is therefore not correct that "the RMA [is] fundamentally incompatible with what people actually want by establishing a presumption against land use".[220]

- The definition of an 'effect' on the 'environment' encompasses impacts on people's property rights and interests, meaning that such effects can be, and often are, weighed in planning and consenting decisions. One of the key rationales for creating a strong Environment Court was to have a judicial body overseeing rules that could have significant impacts on property. Many controls on land are, as mentioned earlier, about safeguarding *others'* freedom to enjoy their own property rights.

- Section 32 of the RMA requires exploration of whether a plan (ie regulation) is the most 'appropriate' way to achieve the objectives of a proposal, including efficiency and effectiveness, and its benefits and costs (including on people's property). For example, in the Mackenzie District the Environment Court carefully weighed up the competing interests of private landowners and the public good in protecting landscape values in the Basin.[221]

- A person can apply to the Environment Court to determine whether a provision in a plan or a proposed plan "renders any land incapable of reasonable use" and places an unfair and unreasonable burden on the interest holder (in which case it can direct the local authority to modify, delete or replace the provision or acquire the land).[222] This guards against true regulatory takings based on the specific facts of a case.[223] In practice this has been used, for example, to stop 'open space' zoning for private land,[224] and to remove heritage listing on properties requiring significant funds for restoration.[225]

- The Act provides strong protection for 'existing use' rights. This means that uses of land, if they were established before a regulatory restriction in a district plan was notified, can continue in perpetuity as long as their effects are similar in character, intensity and scale.[226]

- As mentioned earlier, consent authorities cannot cancel a consent once granted (and there are strong restrictions on the circumstances in which conditions can be reviewed).[227] It is also not possible to impose conditions that frustrate or derogate from a consent once granted.[228]

- Arguably some institutions (eg some councils) have been captured or influenced by sectoral interests, leading to political incentives not to impose controls that are seen to erode property rights or expectations.[229] This has contributed to a gap between what plans aim to achieve in their objectives and the actual controls on property that would be capable of achieving them.

For example, a recent report noted the "disconnect between rules and outcomes" in Canterbury's land and water regional plan, which:[230]

> has objectives and policies for maintaining or improving the naturalness of the region's lakes, but the rules do not directly manage the significant pressures on … lakes (land use, stock numbers, farming intensity).

If anything, the scope of the system needs to be expanded in some places, notably to curtail existing use rights or consented rights where they are undermining essential public interest outcomes. This would include where they threaten environmental limits or where needed to adapt to climate change.[231]

Key points	• The RMA already protects private property rights in a variety of ways, sometimes to the expense of the natural environment.

5.9 Property rights for the environment?

One intriguing possibility for protecting property rights is for the regulatory land use system itself to be recast as a rights-based system. Here, the environment itself would have rights it could defend, alongside those of property owners. Aspects could even be granted legal personhood, as they have been under some Te Tiriti settlement legislation. The government has suggested:[232]

> there is "a perception that a property rights approach is somehow incompatible with environmental goals. What this ignores is our ambition to for the environment to get a property right, too.

This warrants further exploration, and it would be speculative to do that here. But one can also foresee risks. For example, whose rights are paramount where they clash? Would limiting these rights to the *environment* exclude the broader public from involvement (since they would not necessarily have rights)? Would the custodian of an environment with a property right be able to dispose of that interest, like other property owners? Would the environment be liable for harm it caused to other people's property? And is a rights-based system really meaningful unless it is accompanied by responsibilities? As Joe Williams points out:[233]

> No right in resources can be sustained without the right holder maintaining an ongoing relationship with the resource. No relationship; no right. The term that describes the legal obligation is kaitiakitanga. This is the idea that any right over a human or resource carries with it a reciprocal obligation to care for his, her or its physical and spiritual welfare.

6. Positive impacts need to be generated

6.1 Restoration and enhancement of the natural environment

"*Behind New Zealand's clean and green image is a dirty truth*."[234]

The discussion so far has focused largely on preventing or managing adverse effects, whether on the commons, on other people, on the broader environment or on interests of future generations. In economics speak these are all about internalising negative externalities. The question then becomes how best to do so (which tools to use).

Although supported by some,[235] such a system can be criticised for being largely reactive. It responds to people's proposals that could cause further harm. But the reality is that we live in an environment that is, in places, *already* degraded and requires improvement.[236] And for Māori:[237]

> The exercise of kaitiakitanga is not only about sustainably managing the whole of an interconnected environment, but also recognising and addressing the legacy effects from past developments/activities such as deforestation, drainage of wetlands, or discharge of untreated contaminants into waterways…

Sometimes, improvements might be achieved by reducing human pressure on natural systems so they can recover over time. Nature is remarkably resilient. For example, water quality improved significantly following the prohibition on discharging raw sewage into the Manukau Harbour (although significant issues still remain).[238] However, in some cases the damage is done – wetlands will not magically reappear, and native birds will not flourish if we leave them alone – and more proactive steps are needed to shape a different future.

To some extent this must lie beyond a regulatory (planning and consenting) system, and it explains why we have other frameworks and institutions (eg for conservation and biosecurity/pest control) as well as non-statutory initiatives for restoration (including grants and other, relatively ad hoc, incentives).[239] We need carrots, not just sticks, to mobilise landowners and others.[240] Financial mechanisms like green ('Pigouvian') taxes would provide some of the strongest incentives for improvement and probably need to lie outside legislation like the RMA. Work by the Tax Working Group should be looked at again very closely.[241]

But it is possible for resource management legislation to contribute to restoring the natural environment. It is therefore of potential concern that the government has announced its intention to create a narrower 'effects-based' system, rather than one that seeks 'outcomes'. The implication is that the system's scope (ie the reasons for which controls can be imposed) may no longer extend to the pursuit of positive environmental effects, only the mitigation of negative ones.

This would narrow the scope of the existing RMA – which has some constraints on requiring positive effects,[242] but which nevertheless recognises the importance of environmental improvement when planning and consenting.[243] It also goes in the opposite direction to what is needed, in that the scope of the RMA actually needs to be expanded if it is to restore the natural environment. For example, an outcomes-based regulatory system could:

- Enshrine a list of desirable outcomes and impose a duty on authorities to pursue or achieve them (including through non-regulatory methods);[244]
- Create a framework for binding targets for improvement and an accountability framework around meeting them (which has been done, for example, in the National Policy Statement for Freshwater Management);[245]
- Impose general duties on persons (including landowners) to safeguard the environment (which has been done in Victoria);[246]
- Provide relatively smoother consenting pathways (eg fast-tracking or controlled activity status) for activities having known environmental benefits.[247] For example, Paris has created a 'license to green' where residents are authorised to plant trees and gardens on vacant land;
- Provide for competitive allocation mechanisms (eg attribute weighted tendering) that give greater weight to applications proposing environmental benefits (creating a 'race to the top');[248]
- Provide a clearer framework for the creation of economic instruments to incentivise restoration;[249]

- Use plans to align activities or land uses having synergistic benefits for the environment (eg offshore wind farms and marine protected areas);
- Direct fees or charges (eg coastal occupation charges) into environmental improvement programmes;
- Use the consenting process as a trigger for requiring not just mitigation, but net benefit (which has been done in the United Kingdom).[250]

All these and other specific mechanisms would be desirable. None would be inconsistent with the enjoyment of property rights. But they are just a selection of examples. The more urgent point is that environmental enhancement should not be artificially excluded from the scope of future legislation, given (1) the significant challenges the country faces and (2) the very real opportunities for addressing them through regulatory tools.[251]

Key points	
	• New Zealand's natural environment is severely degraded in places and requires a focus on improvement. • Although this will need to involve non-regulatory measures, a future resource management system can also play its part in a variety of ways to make things better. • The scope of a future system should not be artificially constrained to one that just manages the adverse effects of activities – it should pursue positive outcomes for the natural world.

6.2 Urban planning

"One response to the complex, adaptive nature of cities, is for planners to use a relatively few, simple rules that prohibit certain types of harmful spillover effects. Planners would otherwise leave households and businesses free to develop private land as they wish."[252]

"Forget the damned motor car and build the cities for lovers and friends."[253]

"… cities are humanity's greatest invention, they make us richer, smarter, greener, healthier, and happier."[254]

Greening the city

"I'd far prefer to be in the shade of a tree than the shade of a building."[255]

Aside from the need to restore polluted or degraded environments across the country, there is extensive evidence that flourishing ecosystems and access to nature have significant social and health benefits for urbanites.[256] There is a reason, for example, why hospitals are traditionally located next to green space and botanical gardens, and why doctors in Japan prescribe 'nature bathing' alongside drugs; the natural world reduces mental distress (neural imaging has proven this).[257] It helps children learn, too (one study has shown that the positive effects of nature are larger than the negative effects of poverty),[258] and makes it three times more likely for people to exercise (although no one is *making* them do so).[259] Green walls improve air quality and create thermal buffers. Streetscapes – where the public and private realms meet – are even more important than a scattering of public parks, because people interact with them much more in their daily lives.[260] A green city is, empirically, a happier city.

Urban nature can also flow through into tangible economic benefits. For example, one study has shown that shoppers are willing to spend around 10 percent more in places having high quality tree canopies.[261] Contact with nature also improves cognitive performance and memory, making workers more productive.[262]

A key role for a future system must be to bring more nature into the urban fabric, creating positive outcomes for residents and visitors, as well as te taiao itself. This role includes enhancing not only nature but people's *access* to nature (for example through the creation of esplanade reserves, green streetscapes, and walkable/accessible neighbourhoods that do not require cars or even buses). Our cities are not just marketplaces, just like people are not just workers. They are, rather, habitats for humans.

Key points	• Urban planning is about more than just mitigating the bad stuff. • Happy, healthy cities rely on bringing nature into urban space.

The importance of infrastructure – but not just pipes and pumps

There is a more prosaic, but just as important, sense in which the role of the broader resource management system is more than just the prevention of harm. Public infrastructure or services like roads, water pipes and wastewater treatment facilities are essential, as well as all sorts of social infrastructure (eg libraries). These things are planned and funded outside the regulatory framework of the RMA, and lie beyond the scope of this report.

However, planning legislation does need to ensure that there is effective *coordination* of these public services and the associated rezoning of private land (ie that they happen at the same time). Without such services, land use change (eg more residential housing, open urban green space, commercial opportunities) cannot be achieved. The Productivity Commission and Infrastructure New Zealand have identified this as one of the key functions of the system, with better coordination needed, especially in times of rapid urban growth.[263] Some have suggested legislative design solutions (merging bits of the RMA with funding legislation like the Local Government Act)[264] while others have supported a higher layer of spatial planning that seeks to line up separate decision-making processes.[265] Either way, a future system will need to create better coordination.

Taking this idea a step further into the 21st century, infrastructure and the resource management system support each other through nature-based solutions: wetlands or rain gardens rather than pipes as stormwater management infrastructure; active transport routes like cycleways through green space rather than just roads. Cities need to work with nature, not against, and the market does not necessarily achieve this on its own. One study in Beijing showed, for example, that a project which increased green space by 10 percent and converted 50 percent of impervious area into porous surfaces, reduced runoff by over 85 percent and reduced the peak rate of discharge by over 92 percent.[266] It is a win-win.

The opposite situation can be seen in places like Houston, where high growth accommodated by urban sprawl based on motor cars and extensive impervious surfaces (eg concrete) has contributed to massive issues with flooding, urban heating, costly infrastructure retrofits (eg floodgates for individual properties)[267] and large social and economic consequences.[268] There, almost 30 percent of freshwater wetlands were lost between 1992 and 2010.[269]

Just like other infrastructure, nature-based solutions cross the divide between public and private ownership. But at the moment they are generally perceived quite differently – as regulatory controls, not the provision of a service. For example, the response by some officials in Houston to suggestions that nature might be left to provide its own services (eg by stopping more concrete) was that "… people have a right to development. They own the land".[270] One can contrast Paris, where there is now a requirement for new commercial buildings to have partially vegetated roofs, or solar panels. Both are vital forms of infrastructure.

Studies have also shown that injecting greenery in places where people live and work generates social cohesion by encouraging diverse groups of people to linger and interact, meaning that nature is a form of *social* infrastructure as much as it is the utilitarian provider of services like stormwater retention or pollination.[271] The value of nature as infrastructure is increasingly being appreciated (for example in the Te Hoiere/Pelorus Catchment restoration project, and in Queenstown's blue-green network).[272] But it is by no means a universal way of thinking in a system where planners and engineers don't always see eye to eye. Narrowing the scope of the RMA to consider whether the bad effects of things like roads and pipes are acceptable will not create the kinds of change in wellbeing the country needs.

Key points	• A future system needs to provide effective coordination between land use change and the provision of associated infrastructure. • It also needs to create coordination between the provision of infrastructure and the environmental aims of the system, by deploying nature-based solutions.

Place shaping

"*Ko ahau te Taiao, ko te Taiao, ko ahau. I am the environment, and the environment is me.*"[273]

More broadly still, the role of urban planning and design is to shape places that *enhance* the wellbeing of communities. This is not just about preventing adverse effects or reducing the potential for future conflicts.[274] Rather, it is about "designing social, economic and cultural value, to create sustainable human settlements of complexity, diversity and vitality".[275] Careful planning of land and how it is used is vital to generate the many agglomeration benefits that cities can offer.[276] The overall aim is to see the wellbeing of communities and the environment flourish.[277]

The importance of planning can be seen in an array of urban design principles that have been developed over decades and are frequently used to inform decisions in district plans. For example, good urban design (how people, buildings, spaces and amenities interact) can have a positive influence on people's mental and physical health,[278] crime reduction,[279] social connection,[280] mobility, inclusiveness, energy efficiency[281] and general quality of life.[282] One study has shown that well-designed urban space means youth are less likely to participate in smoking, drinking, gang involvement or drug use.[283] Another has pointed to the importance of design in accommodating the physical and mental needs (eg social connection) of the elderly (an important consideration as our population ages).[284]

Some have therefore suggested that the RMA should be *more*, not *less*, courageous and specific when it comes to pursuing social and economic outcomes, including:[285]

> specific policy direction over urban growth and form to better secure or sustain efficient transport networks and maintain compact urban form…. [and] urban design (section, and street orientation and layout, to optimise solar warming/localised power generation and minimise reliance on centralised electricity generation and/or natural gas).

At the moment, planners *can* and *do* consider such things under the RMA by using the fairly weak hooks of "enabling people to provide for their … wellbeing", enhancing the "quality of the environment" and "amenity values", and "efficient use and development" of resources.[286] However, Phase 3 of the government's reform programme raises important questions about the future scope of urban planning and the role of the planner (relative to property owners and the market) in enabling positive outcomes. For example, Ministers have said that the RMA:[287]

> has had a breadth and complexity that is too great for councils to implement effectively… and that "the broad scope of the RMA, covering everything from trout to culture to social and economic well-being, allowed the enormous power of land use regulation to be misused [and] … [planning should not] direct development outcomes that are better determined by landowners and developers themselves in response to demand…

It is not clear what this might mean specifically for the scope of the RMA, aside from a general sense that some positive outcomes should be 'cut'. One idea seems to be that if a planning instrument does too much, it might therefore spread itself too thin, and lack focus and effectiveness. We have not seen any evidence that the system considering 'too much' is, by itself, causing worse outcomes. Integrating many factors is simply the unenviable job description of a planner – the reason the profession exists.[288] Planning by its nature is complex because the human, built and natural systems it interacts with are complex.

If anything, a truly outcomes-based system presents opportunities to reap significant synergistic social, economic and environmental benefits from urban design that cannot be achieved through other mechanisms in isolation (eg the Building Act or Local Government Act).[289] Artificially narrowing the role of the planner to managing adverse effects (eg on water quality) and coordinating pipes and roads, and excluding social and economic wellbeing, risks create perverse outcomes for communities. It may even add longer term costs to the public purse through policing, mental health and social services – the ambulances at the bottom of the urban cliff. And if some councils are struggling to implement the RMA (for which there is a strong case) then the logical solution is to *support* them rather than make the scope of planning fit the constrained capacity of our institutions.[290]

Others have been less concerned about objective overload per se (the system doing too much) and more about replacing the RMA's initial free-market and effects-based vision with a much more interventionist approach to planning. The idea is that the Act needs to go 'back to basics' and let the market get on with it in many areas.

However, it is not obvious there were ever "pure" economic origins for the RMA,[291] nor that these have been gradually eroded over the years by "scope creep".[292] A narrow neoliberal scope based on internalising negative externalities – mitigating the bad stuff – was never legislated for, only assumed by some based on the spirit of the times and selected parliamentary speeches.[293] The RMA has always anticipated a broad scope for urban planning where it is in the public interest, even though its purpose and principles do not have much to say about what urban development outcomes should be sought by planners.

There are also checks and balances that limit scope creep. For instance, when thinking about urban design, planners operate within the constraints of local democracy. Councils are accountable to

communities for their value-based decisions about how urban spaces grow and change, providing a constraint on the kinds of controls deemed unacceptable by residents. The rationale and evidence for restrictions on land can also be tested in the Environment Court. Section 32 analysis of alternative options seeks the most appropriate way to achieve those outcomes, including consideration of impacts on property and what results the market could more effectively deliver. Rather than reducing the scope of the system, more focus could be put on ensuring the robustness of section 32 analyses.

Key points	• Urban planning is fundamentally about shaping the urban and rural fabric for communities in positive ways, not just reducing conflict or responding to negative effects. Its scope should not be constrained to the latter. • Planning is complex, reflecting the complexity of the social, economic environmental and cultural elements of communities themselves. • The RMA never had 'pure' neoliberal origins. From the outset it enabled a focus on positive planning.

A spotlight on urban boundaries

One important expression of urban design at the macro level is the concept of the urban limit or boundary. This is a line that generally separates land that can be used for residential and associated urban uses from rural or other non-urban use (eg lifestyle). Such boundaries clearly need to be responsive to demand over time. They need to move. Excessively rigid limits have contributed to housing affordability issues in the past (eg in Auckland's metropolitan urban limit), because they constrained the supply of developable land in the context of increasing demand, driving underlying land prices up.[294] This is not a good planning outcome. Land markets need to be competitive.

However, establishing predictable and strategically planned growth corridors – where growth can go – is vital in generating positive impacts for cities. They can encourage a compact and sustainable urban form, reducing the environmental, climate and economic costs of sprawl. More specifically, benefits include:[295]

- encouraging active transport modes like walking and cycling (with health benefits) as well as public transport
- improving mobility while reducing the environmental and climate impacts of private motor vehicles
- making the provision of infrastructure (including green space) more efficient, including fully realising the potential of existing infrastructure
- make land and energy use more efficient over the long-term
- reducing pressure for the development of land protected for good reason (eg sensitive or rare ecosystems, buffer zones for streams or hazards, landscapes, and food producing land)
- having a strong sense of community, connectedness and vitality
- enhancing the ability to attract and concentrate high value knowledge-based industries that do not require large spaces
- providing people better access to job opportunities
- providing access to recreation, amenities, and essential services including for the elderly who can age in place and feel part of a community
- enhancing community safety (given there are more people around).

Ministers, on the other hand, appear to desire a more market-led approach to how cities grow to "make it easier for cities to expand outwards" and:[296]

> If you are a developer who wants to build on the city fringe, and are happy to pay for the infrastructure costs, you should be able to.

The idea is that allowing free reign for the market to choose where to develop will reduce housing costs by increasing supply. However, this would not *necessarily* be the case if an urban boundary were well placed and was sensitive to demand for developable land.[297] For example, an analysis of the impact of Auckland's post-Unitary Plan rural-urban boundary in 2020 showed that most discrepancy in land price was caused not by regulatory zoning – the existence of the boundary itself – but by the availability of infrastructure to service the land:[298]

> the boundary is likely to add a price premium of at most 5.2% to developed residential land inside the boundary compared to farmland outside, and at most 4.2% compared to lifestyle land outside. These premiums are substantially lower than estimates in previous studies, and are before accounting for any social costs of more expansive development not included in market prices, such as increased congestion or emissions.

Allowing sprawl can also be highly inefficient at the bigger picture level, arguably justifying this kind of modest premium.[299] A random scattering of private developments will have unpredictable impacts on public infrastructure and services (not just roads and pipes within their footprint, but also upgrades to trunk infrastructure and services like schools, libraries, waste collection and other things that make neighbourhoods work). Developers might cover initial costs, but councils will inherit any inefficiencies and maintenance costs in the longer term.

Unfettered sprawl will also have ramifications for the overall functionality and sustainability (eg climate footprint) of urban areas. In Ireland, for example, similar issues around disproportionate growth pressures in Dublin have led to a strict plan-led approach to where and when growth occurs around the city (as well as seeking to relieve pressure by incentivising growth elsewhere). In interviews, senior Irish planners appeared quite shocked that policy makers would contemplate significant unplanned or out of sequence development on the urban fringe. Removing the power to control sprawl has also caused significant issues in the USA when it comes to locking in the intergenerational impacts of car dependence, access to amenities, flooding and the efficient use of land.[300]

Reducing the scope of the RMA, to exclude consideration of urban form, also fails to recognise that a more nuanced and place-based approach to growth (and supply of housing) can be, and to some extent is, achieved through national direction. This already requires significant growth capacity to be planned for (well in excess of what is anticipated in the short term).[301] It is by no means clear that this is a problem in need of a legislative sledgehammer (the removal of all urban limits) that will lack the place-based nuance of planning process.

Of course, the market will always have an important place in shaping the built environment in positive directions (as it is best placed to understand what consumers *want*). The design of regulatory controls needs to take into account economic dynamics (eg providing land where developers would find development feasible, based partly on price differentials at the urban fringe).[302] However, left to its own devices, the market will respond to the demands of prospective purchasers, not society as a whole. It will also focus on individual parcels of land, not the effective coordination of public and private actions across a whole city. Such design considerations will become even more important as density (and therefore the potential for both conflict and connection in our cities) increases.

Key points	
	• Urban limits and planned growth corridors are an important tool in the planning toolkit if they are responsive to demand and flexible over time. • They can have benefits for the sustainability of cities, energy and infrastructure efficiency, social wellbeing, and greenhouse gas reduction.

Demanding positive effects from consent applicants

Finally, some have expressed concern about the RMA imposing unreasonable conditions on consent applicants to provide positive social, economic and environmental outcomes in urban areas that are wholly unrelated to the effects of a project.[303] This has led to a belief, expressed by Ministers, that the concept of 'effect' and thus scope of the RMA has ballooned, leading to 'gold plating' of projects and increasing costs. Concerns remain despite an existing requirement in case law that conditions must be 'reasonable' and relate to the proposed activity (a 'logical connection'),[304] and appear to be based at least partly on the findings of the Infrastructure Commission.

A spotlight on positive effects: Mussels, hockey and ponies

The Infrastructure Commission states that:[305]

> the RMA has been used to require unrelated activities, such as the establishment of mussel beds, the construction of a national hockey stadium and redevelopment of a pony club, to be funded in order for an infrastructure project to gain consent. In some cases the definition of an 'effect' has extended beyond the management of natural and physical resources ...

The reality turns out to be somewhat more nuanced. With respect to the mussel beds, the Te Ara Tupua project (a walking and cycling route between Wellington and Upper Hutt) requires the provision of structures to support mussels "to mitigate the loss of rocky reef habitat from building the walking and cycling link".[306] This is clearly a direct effect within the management of natural and physical resources.

Similarly, the 'unrelated' construction of a hockey stadium arose from the Northern Corridor improvements project. This involved taking a large amount of land away from the lease of an existing hockey stadium (which was agreed by all involved to be a "significant adverse effect" where "the proposed complete relocation of the hockey stadium is the only way to mitigate the significant adverse effect arising as a result of the Project on it").[307] It spurred a side agreement between the parties to relocate and develop the stadium which was embedded in a condition of consent, as well as a complex set of arrangements involving different legal frameworks.

The pony club referred to (this time in Te Atatu) was directly affected by the construction of Auckland's Waterview Connection to the point it could not carry out day to day operations under its lease – indeed, 4 hectares was to be used as a construction site and a further 0.7 hectares required permanently for interchange widening.[308] Again, this was a direct effect.

Thus, at least some of the examples of effects said to be beyond the proper scope of the RMA are actually significant and directly connected impacts on private property rights (leasehold estates) that are being mitigated or compensated for. The dismissal of such effects as overreach jars not only with the desire for a system based on property rights, but is also inconsistent with the (at least potential) appetite in phase 3 reforms to require compensation for any diminution of property rights relating to biodiversity protection (which are just as much in the public interest as the creation of a road or

cycleway). It is also important to note that the RMA specifically *does not allow* the imposition of conditions unrelated to adverse effects unless volunteered by an applicant (known as an *Augier* condition), with clear case law to this effect.[309]

Key points	
	• More evidence is needed about the prevalence of consent conditions that demand applicants to provide positive effects unrelated to their adverse effects on the environment. The RMA already limits the situations in which this can occur. • At least some examples of conditions given as 'overreach' involve the mitigation of adverse effects that are squarely generated by a proposal.

6.3 Climate change adaptation

One element of good urban planning is creating an urban fabric that is more resilient to hazards and environmental change. This is partly about avoiding or mitigating the potential effects of *new* development on residents and infrastructure providers themselves (eg preventing sensitive activities like housing in areas vulnerable to sea level rise).[310] But it is also about proactively increasing the resilience of what is already there. In some cases, it may need to involve complex programmes of managed relocation of whole communities.[311]

This is a complicated area of policy that goes well beyond the resource management system, into areas like insurance, funding and institutional design.[312] But a key element will be how the system approaches land use, including potentially rezoning vulnerable areas, extinguishing existing use rights, and 'making room for rivers'. Adapting land use to climate risks will be needed not just in urban centres, but also for the rural and natural environment (eg to relocate habitats containing threatened species, or to protect food producing and economic systems).[313] For example, large parts of the Hauraki Plains will be vulnerable to coastal inundation, possibly rendering land unusable for agriculture.[314]

EDS has recently done a deep dive on what the broader system, not just the RMA, needs to provide to support adaptation to a changing climate. The key point for this report is more straightforward: a changing climate will require the pursuit of positive, planned outcomes for the use of land. It cannot be achieved in a purely effects-based system, that assumes the status quo will remain, or only responds to the potential harm caused by new activities. Climate change adaptation is already within the broad scope of the RMA – and it needs to be retained in any attempts to narrow down the system.

Key points	
	• A future system will need to strengthen resilience to climate change, including through land use change. This is about much more than just responding to the adverse effects or risks of new development.

6.4 Economic resilience

Should the resource management system be used as a way to drive (rather than simply enable) positive *economic* outcomes? Should specific activities or sectors be supported or favoured relative to others?

When the RMA was enacted in the 1990s, it was anticipated that it would have no such role. The market would determine which uses of land (and other resources like water and the marine space) were appropriate as long as their effects on people and environment were acceptable.[315] In other words, the RMA would not be used to determine or test which activities would be 'best' or 'wise' for the country, as had been the case under previous Town and Country Planning legislation.

This has largely played out in practice. For example, alternative or 'better' uses of resources (whether common pool or private) are not generally considered in consenting decisions.[316] There have been some notable exceptions relating to the protection of spaces for particular purposes (eg elite soils for farming,[317] aquaculture management areas, or corridors for publicly important infrastructure like roads or transmission lines).[318] But mostly the RMA is set up to judge the acceptability of individual projects based on the effects they could have.

It is therefore not immediately clear what Ministers mean when they say "plans and consents are important, but they should not run economies."[319] The RMA may impose costs on business, but it does not obviously run the economy. If anything, it has frequently proved passive by providing little resistance to the immense economic pressures generated by the market or broader government policies. For example, the RMA has failed to safeguard freshwater from the dairying boom, or more recently to address the impacts of exotic forestry on waterways and communities.[320]

If anything, it has become apparent that the country's natural and physical resources (including land) require a more strategic, sustainable and to some extent interventionist approach if our economy is to thrive and be resilient. Some, for example, have pondered whether a continued reliance on primary production (and its erosion of our natural capital and almost inevitable socialisation of environmental costs) is the best idea economically.[321] Is our preference for monolithic land uses, covering swathes of our landscapes, still a choice that the market should be allowed to make without guidance, if in the long-term it reduces the resilience not just of the environment but also the economy?[322] In recent work the Parliamentary Commissioner for the Environment has shown that around one third of all catchments will require land use change – a fundamental economic, as well as environmental, shift.[323]

There is also a growing need to figure out where infrastructure like wind farms and solar panels (as well as activities like aquaculture) *should* and should *not* go, not just leaving it up to the market to propose locations or defend existing ones. For example, in Taranaki, there is currently a conflict between seabed mining and offshore wind, where the former looks likely to proceed despite the more compelling long-term benefits of the latter.[324] The economic use of this space is a nationally significant choice, not a race to be first to get consents. Similarly, a lot of the litigation that has slowed down onshore wind projects has been because of a lack of strategic planning about where wind farms *should* go. Instead, the market has been left to pursue projects in sensitive areas (eg ONLs), creating friction between economic and environmental outcomes.

Of course, resource management legislation is not well positioned to drive all strategic economic choices. These require a much broader set of considerations, for example in an Energy Strategy. Also, the more specific activities get (eg what kind of building gets built), the greater the role of the market. But legislation can certainly provide a mechanism by which big picture choices about land use are implemented. There appears to be a growing appetite for formal spatial planning to achieve this, which we are going to look at in more depth in a later paper.

Note finally that a more interventionist approach to resource management is by no means alien to our system. For example, the (misguided) assumption that the extraction of fossil fuels is

economically beneficial for the country means there is currently a regulatory framework that enables miners to gain access to private land for that purpose.[325] Existing marine farms were recently granted a blanket extension of consent duration because of a push to enable the economic benefits of aquaculture, despite more nuanced reconsenting processes being already underway and other possible uses of the space.[326] Similarly, the Fast-track Approvals Act gives a smoother consenting path to specific projects thought to be economically important, where priority in the queue can be determined by Ministers.[327] This is about as interventionist as it can get, which has been greeted with a degree of unease by free-market advocates.[328]

All these efforts at economic management are understandable, but they need to be redirected into a system that seeks a more sustainable and strategic economic transformation (eg how land use should change over time). For example, a landscape scale approach to land use change was stressed by the Ministerial Inquiry into Land Uses in Tairawhiti and Wairoa, which recommended returning erosion prone land to permanent native forest.[329] The Parliamentary Commissioner for the Environment has identified a number of places where intensive agricultural use needs to give way to other activities.[330] And if we look to Scotland, we see a planning system that is explicitly designed to "make sure that land is used and developed in the public's long-term interest".[331]

Key points

- A key question is the extent to which a future system should be able to support sectors or activities on the basis they would contribute to the economic wellbeing of the country.
- While the system should not plan the economy, there is a strong case for a more strategic approach to the use of land and other resources through spatial planning (guiding what kinds of activities should go where).

7. Concluding comments

Policy makers need to be extremely careful when thinking about narrowing the scope of a future resource management system. General statements about the RMA doing 'too much', and needing to focus on 'material' adverse impacts that affect 'property' or a narrowly defined 'natural environment', risk losing sight of the multifaceted reasons why a statute like the RMA has evolved and is needed.

Above, we have framed four quite different rationales where intervention is justified: to manage the commons (both its protection and allocation); to address impacts on people and their rights (which is especially notable in the urban context); to recognise the public and intergenerational interest in elements of private land itself (notably biodiversity and soil); and to pursue positive outcomes (by restoring already degraded environments, shaping urban spaces, and adapting to climate change). Although there is room for genuine debate about scope around the margins – and we have discussed some of them – these rationales need to remain core to a future system. For the most part, they are adequately reflected in Parts 2 to 4 of the RMA, and constraints should be specifically carved out only where justified. A requirement for proportionality may be appropriate when it comes to controls in the urban environment.

Policy makers also need to be precise as to what rationale is being talked about in any given situation. For example, impacts on private land (eg the use of elite soils for houses) should not be confused with impacts on the commons (eg the effect of land uses on groundwater). Property rights are important, but they are not absolute and should not be conflated with property *expectations*.[332] Effects that can be made to sound trivial (eg the colour of a roof) should not be dismissed without

understanding what their purpose is in context (eg to counter the risks of urban heating). And when it comes to property rights, the RMA already provides considerable protections, sometimes at the expense of the environment.

None of the above should be taken to mean the RMA is fit for purpose. It is not.

But policy makers should not rush to constrain its scope in drastic ways when the most significant issues lie elsewhere. Frustrations about the Act may make it tempting to eject some things entirely, and deal with them through some vague policy process later on. But concerns about the RMA are often more about three other things: its purpose and principles (the balance of criteria that guide decisions), process (how long and costly approvals are) and legislative design (whether something should be managed under the RMA or another statute). Process, and the cost and time that come with it, will be particularly important to fix, a point that has been quite rightly emphasised by the government. These issues are the subject of future papers we are producing on reform of the RMA.

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[1] Essentially, as anything that changes a receiving environment.
[2] Compare G Hardin "The tragedy of the commons" (1968) 162 Science 1243.
[3] Protected wildlife is owned by the Crown (although there are questions as to whether that *should* be the case). Other wildlife is generally not owned until reduced to possession.
[4] www.beehive.govt.nz/release/replacement-resource-management-act-takes-shape
[5] See www.environment.govt.nz/assets/publications/Cabinet-papers-briefings-and-minutes/MfE-Proactive-Release-Replacing-the-RMA.pdf.
[6] This is not entirely the case, since plans often provide for 'other methods', not just rules.
[7] https://www.beehive.govt.nz/release/replacement-resource-management-act-takes-shape
[8] Various activities within sections 9-15C have different presumptions associated with them. In other words, some are prohibited unless expressly authorised, and others (notably land use) are allowed unless expressly restricted.
[9] Essentially, as anything that changes a receiving environment.
[10] Section 14 effectively deems some takes, diversions and uses of freshwater and its energy beyond the scope of the system (eg if it is for an individual's reasonable domestic needs or for stock drinking water, as long as it is not likely to have adverse environmental effects).
[11] Although plans can also control noise that is not 'unreasonable' in certain circumstances.
[12] There is also a general duty in section 17, which allows enforcement (via enforcement orders) of any activity having adverse environmental impacts irrespective of controls in plans.
[13] Even though their main purpose is to distribute different RMA functions to different types of council (rather than to delineate the scope of the RMA itself). Note that the substantive scope of *Ministers'* functions are not obviously constrained by Part 4 in the same way that those of councils are.
[14] See section 322, which deals with circumstances when abatement notices can be issued. This provision is of broader significance, however, as it clarifies that such things are effects on the 'environment' and thus within the scope of the RMA.
[15] For example, under section 30 a regional council must not control the taking, allocation or enhancement of fisheries resources for the purpose of managing fishing or fisheries resources controlled under the Fisheries Act 1996.
[16] https://www.beehive.govt.nz/speech/speech-new-zealand-planning-institute
[17] Note that some of these criticisms about scope relate more to legislative design – *under which Act*, rather than *whether*, certain issues should be regulated.
[18] Ministers have also said that management of historic heritage would be better served through development of dedicated policy interventions, rather than as part of resource management planning and consenting processes.
[19] Public nuisance is where "there is collective personal or public injury or loss, for example, environmental harm of a widespread nature" and private nuisance applies "where there has been 'an unreasonable interference with a person's right to the use or enjoyment of an interest in land'". See B France-Hudson "Property Rights versus Environment? A critique of the coalition government's approach to the reform of the Resource Management Act" (2024) 20(4) Policy Quarterly 35 at 36; *Attorney-General v Sheffield Gas Consumers Co* (1852) 43 ER 119 at 125.
[20] Leases, covenants, easements and other common law mechanisms can help protect the 'environment' but that is not their purpose. These can, in fact, have the opposite effect. Similarly, the doctrine of waste in property law, which essentially prevents a leaseholder from creating irreversibly harmful change to the land, is narrow in scope given it applies only to leases and other interests like life estates where there is reversion to another owner in the future.
[21] *ACT's solutions for building New Zealand and conserving nature* (2022) at 7: "For most purposes, the Environmental Protection Act will rely on the tort of nuisance, allowing neighbours to sue their neighbours where their peaceable enjoyment of the land is put in jeopardy by their neighbours' actions, for land pollution-related claims."

[22] As Dormer notes: "Prior to the emergence of a doctrine of reverse sensitivity [under the RMA], unreasonable activity by a neighbour, even one of long duration, could be the subject of a claim for damages and injunctive proceedings at the suit of the affected party." See A Dormer "Reverse sensitivity" (2002) 4 BRMB 29, at 30.
[23] For example, private nuisance requires there to be damage to a person's enjoyment of land, which may not always be the same thing as damage to the environment.
[24] The courts held that public nuisance and negligence were not viable causes of action due to the diffuse nature of greenhouse gas emissions, unclear causation, and identifiable damage to the claimant. See *Smith v Fonterra & Ors* [2024] NZSC 5.
[25] See generally https://www.lawcom.govt.nz/our-work/tikanga-maori/; *Trans-Tasman Resources Limited v Taranaki-Whanganui Conservation Board* [2020] NZCA 86 [3 April 2020].
[26] RJ Bollard "The Resource Management Regime and Private Property Rights and Interests — Is there an Untoward Tension between the Two?" (2010) 14 NZJEL 1. On the boundary between common law and the RMA see *Hawkes Bay Protein Ltd v Davidson* [2003] 1 NZLR 536 at [19].
[27] James Whetu *Think piece on consideration of kaupapa Māori ideals in a future resource management system* (commissioned by EDS, December 2024).
[28] G Hardin "The tragedy of the commons" (1968) 162 Science 1243.
[29] Common law does not assign ownership of movable resources, such as geothermal fluid, until it is captured. A landowner controls the air *space* above property to a distance enabling reasonable enjoyment.
[30] For example, this is recognised in the concept of Te Mana o te Wai under the NPS for Freshwater Management.
[31] G Hardin "The tragedy of the commons" (1968) 162 Science 1243.
[32] See generally E Ostrom *Governing the commons: The evolution of institutions for collective action* (Cambridge University Press, 1990).
[33] Ministry for the Environment *Ōtūwharekai/Ashburton Lakes lessons-learnt report: A Case Study Examining Ongoing Deterioration of Water Quality in the Ōtūwharekai Lakes* (Wellington, 2023).
[34] Ministry for the Environment & Stats *New Zealand Environmental Reporting Series: Environment Aotearoa 2022* (2022).
[35] There are also resources where 'ownership' exists but it lies with the Crown or other public authority. Here, a legal framework is often needed to ensure that publicly owned resources are used for suitable purposes or to achieve public interest expectations (eg Crown-owned minerals or reserves).
[36] E Ostrom *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge University Press, 1990).
[37] A precise definition of 'commons' and 'property' might matter less if there is a strong recognition that private rights are not absolute. But if a system tries to create a binary distinction between public and private interests (eg a protective purpose for the commons and an enabling purpose for land) it will need to recognise that there is actually a quite a bit of the 'commons' on and in private property.
[38] See Environmental Defence Society *Submission on the Resource Management (ExtendedDuration of Coastal Permits for Marine Farms) Amendment Bill*.
[39] See G Severinsen, R Peart and others *The Breaking Wave: Oceans Reform in Aotearoa New Zealand* (EDS, Auckland, June 2022).
[40] See www.documentcloud.org/documents/24675240-briefing-paper-offshore-wind-seabed-mining-10-may-2024-final/
[41] The RMA specifies in section 122 that a consent is not real or personal property. On the implications of this, see generally *Armstrong v Public Trust* [2007] 2 NZLR 859; B Barton *The nature of resource consents: Statutory permits or property rights* (New Zealand Law Society Seminar, 2009).
[42] Consents are not tied to the land *in perpetuity* in the same way that a land use consent is.
[43] Or, from another perspective, where the 'resource' is its own being with its own interests to defend.
[44] Ministry for the Environment *Ōtūwharekai/Ashburton Lakes lessons-learnt report: A Case Study Examining Ongoing Deterioration of Water Quality in the Ōtūwharekai Lakes* (Wellington, 2023).
[45] The trading of water permits is not proactively facilitated by the system, but private agreements have been made to buy and sell water taken lawfully under permits. See https://newsroom.co.nz/2017/04/26/h-2-oh/
[46] *Cloud Ocean Water Limited v Aotearoa Water Action Incorporated* [2023] NZSC 153.
[47] *ACT's solutions for building New Zealand and conserving nature* (2022).
[48] Water storage "should be used to provide security of supply to high-value uses, rather than to increase water use per se": Parliamentary Commissioner for the Environment *Going with the grain: Changing land use to fit a changing landscape* (May 2024), citing Thomas and others (2020).
[49] Land in the sense of terrestrial land. Technically, the seabed is also 'land' under the RMA.
[50] See K Palmer Separating regulation of the built and natural environments – legislative options (Working paper produced for the New Zealand Productivity Commission, 2017).
[51] https://www.beehive.govt.nz/speech/speech-replacing-resource-management-act
[52] And vice versa, via 'reverse sensitivity' effects on the farmer.
[53] RJ Bollard "The Resource Management Regime and Private Property Rights and Interests — Is there an Untoward Tension between the Two?" NZJEL at 24; B Barton "The Legitimacy of Regulation" Resource Management Law Association Annual Conference, 12–15 September 2002, Queenstown.
[54] As the Productivity Commission notes, "changes in land use frequently create conflicts between residents. Effective planning processes can help manage these conflicts, by setting clear expectations, defining property rights and resolving disputes." Productivity Commission of New Zealand *Better urban planning* (2017).

[55] For example, the odour and air discharge effects on Whareroa Marae in Tauranga.
[56] James Whetu *Think piece on consideration of kaupapa Māori ideals in a future resource management system* (commissioned by EDS, December 2024).
[57] See, for example, the commentary in New Zealand Productivity Commission *Using land for housing* (2015) at 5.
[58] Note that case law already requires conditions on consents to be for a resource management purpose, not an ulterior purpose: see *Newbury DC v Secretary of State for the Environment* [1981] AC 578.
[59] Commerce Act 1996. See generally JJ Cutler "The Use of the Resource Management Act 1991 for Trade Competition Purposes" (1999) NZJEL 67.
[60] Resource Management Act 1991, Part 11A.
[61] See www.tompkinswake.com/insights/knowledge/high-court-strikes-out-a-judicial-review-for-trade-competition/
[62] For example, see https://x.com/EricCrampton/status/1889763841011036234
[63] https://www.stuff.co.nz/politics/360580084/does-declined-wanaka-mcdonalds-application-represent-culture-no
[64] One of the issues was that the applicant chose to put forward an application in a sensitive location (affecting a recognised outstanding natural feature) rather than the many other places where commercial activities would have been more acceptable and even encouraged.
[65] *Decision of commissioners Helen Atkins, Lisa Mein and Robert Scott appointed by Queenstown Lakes District Council pursuant to section 34A of the RMA 1991* (RM230874), 12 February 2025 at [21], [134]-[138].
[66] Only around 2 percent of applications were notified in 2022-23. See Ministry for the Environment *Patterns in Resource Management Act Implementation – National Monitoring System data from 2014/15 to 2022/23* (2024).
[67] Big box development can significantly impact a city centre by leading to a loss of unique character, increased traffic congestion, and a shift in retail activity to the periphery of the city, often leaving the central area less vibrant and economically depressed.
[68] See JJ Cutler "The Use of the Resource Management Act 1991 for Trade Competition Purposes" (1999) NZJEL 67.
[69] JJ Cutler "The Use of the Resource Management Act 1991 for Trade Competition Purposes" (1999) NZJEL 67 at 89.
[70] See www.nzherald.co.nz/northern-advocate/news/kensington-residents-concerned-they-arent-being-heard-as-kainga-ora-applies-for-resource-consent/GE6R4NIVQVHWHMBB4ATVAHSEG4/; www.stuff.co.nz/nz-news/360589564/residents-who-challenged-approval-kainga-ora-homes-must-pay-55000; www.times.co.nz/news/opposition-building-to-housing-development/
[71] See section 175(d).
[72] See Productivity Commission of New Zealand *Better urban planning* (2017); Infrastructure New Zealand *Integrated Governance, Planning and Delivery: A Proposal for Local Government and Planning Law Reform in New Zealand* (2015); Infrastructure New Zealand *Building Regions: A Vision for Local Government, Planning Law, and Funding Reform* (2019).
[73] Productivity Commission of New Zealand *Better urban planning* (2017).
[74] Infrastructure New Zealand *Integrated Governance, Planning and Delivery: A Proposal for Local Government and Planning Law Reform in New Zealand* (2015); Infrastructure New Zealand *Building Regions: A Vision for Local Government, Planning Law, and Funding Reform* (2019).
[75] See www.1news.co.nz/2024/07/19/why-a-wairarapa-town-is-unable-to-have-any-more-houses/
[76] "This helps to ensure that we are investing in the right areas and at the right time to support anticipated growth": see www.watercare.co.nz/builders-and-developers/consultation/network-capacity-in-auckland
[77] See https://lwb.co.nz/content/infrastructure-pain-how-did-they-cope-in-the-past/; https://consultation.dpmc.govt.nz/national-security-group/critical-infrastucture-phase-1-public-consultation/results/queenstownlakesdistrictcouncil.pdf.
[78] For example, grants from central government, GST sharing, or value uplift capture.
[79] See G Severinsen *Reform of the Resource Management System: The urban context* (Environmental Defence Society, August 2020).
[80] Submission of Mike Greer Homes to the New Zealand Productivity Commission's inquiry Using land for housing (2015) at 142.
[81] G Palmer *Ruminations on the problems with the Resource Management Act* (Keynote address to the Local Government Environmental Compliance Conference, November 2015).
[82] Ministry for the Environment *Urban design case studies* (2008). On RMA and Building Act jurisdiction generally, see https://www.environmentguide.org.nz/activities/land-use/building-act-2004/.
[83] For example, compare concerns about New Plymouth's Len Lye Centre, which were subject to careful design consideration: https://www.stuff.co.nz/taranaki-daily-news/news/70409827/len-lye-centre-dont-fear-the-glare
[84] Some design guides have been incorporated in district plans, while others lie outside them.
[85] See New Zealand Productivity Commission *Using land for housing* (2015) at 142, citing the submission of the Registered Master Builders Association of New Zealand & the Construction Strategy Group (2015) at 8-9.
[86] *People, places, spaces: A design guide for urban New Zealand* (Ministry for the Environment, 2001) at 18.
[87] Ministry for the Environment *Urban design case studies* (2008).
[88] https://www.beehive.govt.nz/speech/speech-local-government-new-zealand-conference
[89] https://www.ucl.ac.uk/news/2020/jan/new-housing-design-england-overwhelmingly-mediocre-or-poor
[90] Compare Ministry for the Environment *Urban design case studies* (2008).
[91] https://www.beehive.govt.nz/speech/speech-local-government-new-zealand-conference
[92] https://environment.govt.nz/assets/Publications/Files/urban-design-protocol-colour.pdf

[93] Policy 6. See also Urban Development Act 2020, s 5 (in recognising sections 6 and 7 matters under the RMA, decision-makers must recognise that amenity values may change). Compare the NBA, which required the effects of activities on scenic views from private properties and the visibility of advertising to be *disregarded*, making this specific effect beyond scope without undermining broader considerations of urban design. See NBA, section 175(d).
[94] *Port Gore Marine Farms v Marlborough District Council* [2012] NZEnvC 72 at [213]
[95] RMA, section 41D.
[96] Ministers have pointed out that "regulation over the use of property must be justified, and that regulation must be proportional to effects."
[97] *Body Corporate 97010 v Auckland City Council* (1992) 2 NZRMA 257 at 265.
[98] Section 14: Compare NBA s 9(1), which was more focused on proportionality of process.
[99] For example, see https://www.stuff.co.nz/home-property/360520452/auckland-apartment-residents-told-not-dry-washing-balconies-maintain-buildings-stylish-aesthetic
[100] For example, covenants that require clotheslines to not be visible from the street front, relegating them to the south side of a house where drying is much less efficient (and therefore locks people into using electric dryers in winter).
[101] Section 3.
[102] Section 4.
[103] And has its own transitional duty.
[104] Section 5. It also includes where the cost of remediation would be higher than a certain threshold. Queensland's environmental legislation also defines "material" harm as excluding effects that are trivial, and defines environmental nuisance as "unreasonable" interference with environmental values. There is a separate definition for "serious" harm (irreversible, widespread or high impact). These do not define the scope of the Act as a whole, but they do create different tiers of response within it.
[105] Fisheries Act 1996, s 8.
[106] Note also that the RMA (through character overlays and scheduling of buildings in district plans) is the place where most protections for built heritage 'bite'. In this sense there is not a great deal of overlap with the Heritage New Zealand Pouhere Taonga Act 2014.
[107] See D Koolen-Bourke, R Peart and S Schlaepfer *Reform of the Wildlife Act 1953: An Opportunity for Transformational Change of Aotearoa New Zealand's Biodiversity Law* (2023).
[108] Compare Fast-track Approvals Act 2024.
[109] RMA, s 95B; schedule 1, cl 5A.
[110] RMA. S 104(3).
[111] Section 87BA.
[112] Section 87BB.
[113] https://data.mfe.govt.nz/table/104839-certificate-and-permitted-activity-applications-2014-15-to-2022-23/
[114] https://data.mfe.govt.nz/table/104839-certificate-and-permitted-activity-applications-2014-15-to-2022-23/
[115] See South Taranaki District Council *Waverley Wind Farm Resource Consent Application* (Section 42A RMA Planner's Report, April 2017) at 5.
[116] See D Nolan and K Gunnell "Reverse Sensitivity and 'No Complaints' Covenants" (2007) 7 BRMB 50.
[117] Sections 304-314.
[118] Section 305(1)((b).
[119] See *ACT's solutions for building New Zealand and conserving nature* (2022).
[120] Compare New Zealand Infrastructure Commission Te Waihanga *Rautaki Hanganga o Aotearoa New Zealand Infrastructure Strategy 2022-2052* (2022) at 109.
[121] https://interactives.stuff.co.nz/2022/03/urban-heat-island-tree-cover/
[122] https://www.globalforestwatch.org/dashboards/country/NZL/1/
[123] https://www.tandfonline.com/doi/abs/10.1080/2093761X.2016.1167644; https://e360.yale.edu/features/urban-heat-can-white-roofs-help-cool-the-worlds-warming-cities
[124] See https://www.c40.org/case-studies/cities100-paris-green-spaces-keep-the-city-cool/
[125] Compare Victoria's Planning Provisions, where permit is required for renovating or extending a house, including adding a new room or extending a deck.
[126] A "developer told me how they were forced to provide small Juliette balconies for each apartment in their social housing complex, massively raising the cost of the social housing units": https://newsroom.co.nz/2024/08/23/crappy-apartments-are-better-than-homeless-families-bishop/
[127] The National Policy Statement on Urban Development required Auckland Council to remove car parking minimums from the Auckland Unitary Plan. The removal of minimums occurred on 11 February 2022.
[128] See, for example, https://link.springer.com/article/10.1007/s10668-023-03732-w.
[129] K Ovenden and M McKelvie *Life in medium density housing in Tāmaki Makaurau / Auckland* (2024).
[130] Addressing such issues might then have additional flow on negative effects, like having to create carparks from available pedestrian or green space.
[131] For example, see: www.rnz.co.nz/news/national/531808/catastrophe-in-the-making-fast-tracked-housing-on-flood-prone-land-sparks-concern
[132] See https://www.theguardian.com/world/2017/aug/29/hong-kong-coffin-homes-horror-my-week
[133] https://www.visualcapitalist.com/mapped-the-worlds-least-affordable-housing-markets-in-2024/

[134] See R Peart *Design recommendations for a Climate Adaptation Act: Final report* (EDS, 2024).
[135] RJ Bollard "The Resource Management Regime and Private Property Rights and Interests — Is there an Untoward Tension between the Two?" (2010) 14 NZJEL 1 at 24.
[136] D Grinlinton "The intersection of property rights and environmental law" (2023) 25(3) Environmental Law Review 202.
[137] https://www.beehive.govt.nz/release/replacement-resource-management-act-takes-shape
[138] It is not the only important example of private property in which there is a public interest. For example, items likely to end up as plastic waste are generally privately owned and yet have significant public interest in their creation and life cycle.
[139] "Input regulations … are blunt and much derided by farmers as telling them what to do on their own land. But if farmers cannot control the impact of activities beyond their property boundaries and monitoring those impacts at a micro level is impractical, input controls will have a place in the policy toolkit": Parliamentary Commissioner for the Environment *Going with the grain: Changing land use to fit a changing landscape* (May 2024).
[140] Or other management tools like best industry practice (eg for fertiliser application under Auckland's Unitary Plan) or implementation of farm plans, as under Proposed Waikato Plan Change 1. Other councils require diffuse discharges to be authorised through discharge consents with conditions aimed at mitigating the effects over a period of time.
[141] See G Severinsen, R Peart and others *The Breaking Wave: Oceans Reform in Aotearoa New Zealand* (EDS, Auckland, June 2022).
[142] "Try and take away a consent someone has held now for 50 years for their farming operation" (Anthony Davoren, quoted in https://newsroom.co.nz/2017/04/26/h-2-oh/)
[143] B France-Hudson "Property Rights versus Environment? A critique of the coalition government's approach to the reform of the Resource Management Act" (2024) 20(4) Policy Quarterly 35, citing Baskaran, Cullen and Colombo (2009).
[144] As part of its effort to reduce nitrogen emissions by at least 55 percent by 2030. See https://www.mfat.govt.nz/en/trade/mfat-market-reports/netherlands-nitrogen-update-market-insights-october-2023. See also https://www.iddri.org/en/publications-and-events/blog-post/no-deal-farming-lessons-netherlands
[145] S Upton *Biodiversity management - what works??* (Speech at Wellington Town Hall, October 1999).
[146] Attributed to Groucho Marx.
[147] B France-Hudson "Property Rights versus Environment? A critique of the coalition government's approach to the reform of the Resource Management Act" (2024) 20(4) Policy Quarterly 35 at 39.
[148] RH Coase "The problem of social cost" (1960) 3 Journal of Law and Economics 1. The Coase theorem has since been developed mostly by other economists, based on a portion of Coase's article.
[149] B France-Hudson "Property Rights versus Environment? A critique of the coalition government's approach to the reform of the Resource Management Act" (2024) 20(4) Policy Quarterly 35 at 38.
[150] See https://qeiinationaltrust.org.nz/about-us/
[151] One analysis concluded that the rollout of QEII covenants relies primarily on their voluntary nature, peer pressure from other farmers, and a genuine desire to put something back. See D Grinlinton "The intersection of property rights and environmental law" (2023) 25(3) Environmental Law Review 202.
[152] D Grinlinton "The intersection of property rights and environmental law" (2023) 25(3) Environmental Law Review 202.
[153] D Friedman *Private and political markets both fail: A cautionary tale about government intervention* (New Zealand Business Roundtable, 28 June 2004) at 9.
[154] https://environment.govt.nz/assets/publications/biodiversity/Biodiversity-credit-system-discussion-document.pdf at 25.
[155] MA Brown *Banking on biodiversity* (EDS, 2017).
[156] Parliamentary Commissioner for the Environment *Going with the grain: Changing land use to fit a changing landscape* (May 2024).
[157] See generally the situation with respect to valuing elite soils: *Valuing highly productive land: A discussion document on a proposed national policy statement for highly productive land* (Ministry for Primary Industries and Ministry for the Environment, 2019).
[158] LL Butler "The pathology of property norms: living within nature's boundaries" (2000) 73 Southern California Law Review 927.
[159] B France-Hudson "Property Rights versus Environment? A critique of the coalition government's approach to the reform of the Resource Management Act" (2024) 20(4) Policy Quarterly 35 at 39.
[160] R Costanza and others "The value of the world's ecosystem services and natural capital" (1997) 387 Nature 253.
[161] D Grinlinton "The intersection of property rights and environmental law" (2023) 25(3) Environmental Law Review 202
[162] www.beehive.govt.nz/speech/speech-replacing-resource-management-act
[163] B France-Hudson "Property Rights versus Environment? A critique of the coalition government's approach to the reform of the Resource Management Act" (2024) 20(4) Policy Quarterly 35 at 40.
[164] B Barton "The Legitimacy of Regulation" Resource Management Law Association Annual Conference, 12–15 September 2002, Queenstown, at 4.
[165] James Whetu, personal communication 2025.
[166] See K Palmer Separating regulation of the built and natural environments – legislative options (Working paper produced for the New Zealand Productivity Commission, 2017).
[167] Parliamentary Commissioner for the Environment *Going with the grain: Changing land use to fit a changing landscape* (May 2024).
[168] Including shelter/shade, visual screening / noise mitigation, biodiversity reservoirs (including refuges for natural enemies of pests and for pollinators, sources of food and raw materials, erosion control, nutrient cycling and soil formation,

regulating water quality and air quality, recreation, leisure, and learning experiences, aesthetic value, cultural value, intrinsic value, sense of identity, and option/future use value and bequest value (for future landowners).
[169] JR Dymond and others "Revised extent of wetlands in New Zealand" (2021) 45(2) New Zealand Journal of Ecology 3444.
[170] "There has been a persistent idea even among public authorities that conservation, and thus biodiversity, is really a [Department of Conservation] thing": S Upton *Biodiversity management - what works??* (Speech at Wellington Town Hall, October 1999).
[171] S Upton *Biodiversity management - what works??* (Speech at Wellington Town Hall, October 1999).
[172] *Regulatory Impact Statement: Maintaining indigenous biodiversity under the RMA 1991* (Ministry for the Environment, 2022).
[173] For example, under the RMA or the Native Plants Protection Act, as well as covenants on land titles.
[174] Although there are various freedoms and rights in them – for example, customary marine title and protected customary rights, and recreational fishing freedoms.
[175] Wildlife Act 1953, s 57(3).
[176] See, for example, https://www.auckland.ac.nz/en/news/2021/03/12/birds-and-the-bees-slow-moving-tragedy.html
[177] *Regulatory Impact Statement: Maintaining indigenous biodiversity under the RMA 1991* (Ministry for the Environment, 2022).
[178] Parliamentary Commissioner for the Environment *Going with the grain: Changing land use to fit a changing landscape* (May 2024).
[179] James Whetu, personal communication 2025.
[180] Setting aside legitimate questions of whether that status remains appropriate.
[181] *Regulatory Impact Statement: Maintaining indigenous biodiversity under the RMA 1991* (Ministry for the Environment, 2022); https://environment.govt.nz/assets/Publications/Files/action-for-healthy-waterways-information-on-benefits-and-costs.pdf
[182] For example, see https://www.rnz.co.nz/news/national/361532/environmentalists-lobby-to-shut-developments-polluting-marine-reserve
[183] https://www.doc.govt.nz/nature/biodiversity/te-mana-o-te-taiao-aotearoa-new-zealand-biodiversity-strategy-2020/aotearoa-new-zealand-biodiversity-strategy/
[184] Note that Ministers have specifically said that the new system will provide for regulatory 'limits' for indigenous biodiversity, which cannot realistically be achieved without regulatory protections on private land. Yet Ministers have also signalled that spatial protections for indigenous biodiversity "might be better addressed outside the resource management system", which is concerning to the extent that such tools may take time (be left to subsequent policy development) and leave a significant lacuna in the meantime.
[185] Assistance was envisaged as a complementary measure as part of the NPS for Indigenous Biodiversity's implementation plan: see https://environment.govt.nz/assets/publications/biodiversity/NPSIB-Implementation-plan.pdf
[186] Parliamentary Commissioner for the Environment *Going with the grain: Changing land use to fit a changing landscape* (May 2024).
[187] For example, diminution of value may be hard to measure, there are issues of equity, and it could have a chilling effect where regulators cannot afford compensation.
[188] Parliamentary Commissioner for the Environment *Going with the grain: Changing land use to fit a changing landscape* (May 2024).
[189] "We have few tools for improving the environment where environmental goals impose a cost that landowners are unable to bear": Parliamentary Commissioner for the Environment *Going with the grain: Changing land use to fit a changing landscape* (May 2024).
[190] *Report of the biodiversity collaborative group* (Biodiversity (Land and Freshwater) Stakeholder Trust), October 2018.
[191] The Native Plants Protection Act is seriously deficient, and the Wildlife Act only applies to some direct interactions with particular species, not land use impacts on habitat. Conservation covenants and QEII covenants are positive, but also not sufficient in their current frameworks.
[192] See, for example, D Koolen-Bourke and R Peart *Conserving nature: Conservation system reform issues paper* (EDS, Auckland, 2021); G Severinsen and others *The breaking wave: Oceans reform in Aotearoa New Zealand* (EDS, 2022); D Koolen-Bourke, R Peart and S Schlaepfer *Reform of the Wildlife Act 1953: An Opportunity for Transformational Change of Aotearoa New Zealand's Biodiversity Law* (2023).
[193] https://teara.govt.nz/en/soil-erosion-and-conservation/media
[194] Ministry for the Environment & Stats *New Zealand Environmental Reporting Series: Environment Aotearoa 2022* (2022).
[195] See https://environment.govt.nz/facts-and-science/land/contaminated-land/
[196] Ministry for the Environment & Stats *New Zealand Environmental Reporting Series: Environment Aotearoa 2022* (2022).
[197] *ACT's solutions for building New Zealand and conserving nature* (2022).
[198] https://www.rnz.co.nz/news/national/529544/government-announces-funding-to-clean-up-contaminated-sites-vulnerable-landfills; https://www.rnz.co.nz/news/ldr/492164/doc-managing-over-300-contaminated-sites-on-west-coast
[199] Ministry for the Environment & Stats *New Zealand Environmental Reporting Series: Environment Aotearoa 2022* (2022).
[200] See *Valuing highly productive land: A discussion document on a proposed national policy statement for highly productive land* (Ministry for Primary Industries and Ministry for the Environment, 2019). Not all subdivision is necessarily a risk to food production, since smaller lots may be suitable for horticulture.

[201] https://www.stuff.co.nz/national/politics/local-democracy-reporting/300601264/auckland-market-gardeners-say-growers-being-squeezed-by-urban-sprawl
[202] Up to 5.4 million hectares (or 54 percent) of current farmland by 2075 could be converted to forestry: see Parliamentary Commissioner for the Environment *Going with the grain: Changing land use to fit a changing landscape* (May 2024). Note that some restrictions on obtaining credits for carbon forestry (on some land use classifications) have been introduced in the emissions trading scheme, to protect the country's highest quality soils.
[203] The government has, rather, signalled a more blanket approach to allowing things like greenhouses and solar panels on highly productive land: "we will be making it clear that you can have indoor primary production and greenhouses on highly productive land, as well as specifying that if a farmer wants to construct new specified pieces of infrastructure, such as solar farms, these are allowed."
[204] Heritage New Zealand (Pouhere Taonga) Act 2014; James Whetu *Think piece on consideration of kaupapa Māori ideals in a future resource management system* (commissioned by EDS, December 2024).
[205] Under Te Ture Whaimana o Te Awa o Waikato / Vision and Strategy for the Waikato River.
[206] For example on Banks Peninsula.
[207] See R Peart and others *Caring for the landscapes of Aotearoa New Zealand* (EDS, 2021) at 2, citing R Hoskins and others *Te aranga – Māori cultural landscape strategy* (2nd ed, 2008).
[208] RJ Bollard "The Resource Management Regime and Private Property Rights and Interests — Is there an Untoward Tension between the Two?" (2010) 14 NZJEL 1 at 24.
[209] R Peart and others *Caring for the landscapes of Aotearoa New Zealand* (EDS, 2021) at 2.
[210] S Brown 'A question of identity' (Paper presented to the Environmental Defence Society Landscape Conference, August 2019, Auckland).
[211] R Peart and others *Caring for the landscapes of Aotearoa New Zealand* (EDS, 2021).
[212] See generally www.environmentguide.org.nz/issues/landscape/protection-of-landscapes-and-features/what-is-an-outstanding-natural-feature-or/; R Peart and others *Caring for the landscapes of Aotearoa New Zealand* (EDS, 2021) from 16; *Wakatipu Environmental Society Inc v Queenstown Lakes District Council* [2000] NZRMA 59.
[213] Judge Borthwick, Opening address to the Resource Management Law Association Conference 2012.
[214] *Man O'War v Auckland Council* [2017] NZHC 3217 at [93] and [97].
[215] See www.tourismnewzealand.com/news-and-activity/new-zealands-beautiful-landscapes-and-scenery-key-driver-for-potential-visitors/
[216] www.environment.govt.nz/assets/publications/Cabinet-papers-briefings-and-minutes/MfE-Proactive-Release-Replacing-the-RMA.pdf.
[217] Which would require appropriate resourcing that councils might struggle with: see *Hawthenden Ltd v Queenstown Lakes District Council* [2019] NZEnvC 160 at [56].
[218] *Federated Farmers of New Zealand v MacKenzie District Council* [2017] NZEnvC 53 at [468], citing D Moran on The Economic Valuation of Landscapes.
[219] Parliamentary Commissioner for the Environment *Going with the grain: Changing land use to fit a changing landscape* (May 2024).
[220] https://www.beehive.govt.nz/speech/speech-new-zealand-planning-institute
[221] *Federated Farmers of New Zealand v MacKenzie District Council* [2017] NZEnvC 53 at [475].
[222] Resource Management Act 1991, s 85(3). Where a designation has been placed on the land, the Court can also order the acquisition of the land (s 185).
[223] The Courts have held that reasonableness here is "not whether the proposed zoning is unreasonable to the owner (a question of the owner's private rights), but whether it serves the statutory purpose of promoting sustainable management of natural and physical resources (a question of public interest)": see *Hastings and Anor v Auckland City Council* (Environment Court Auckland A068/01, 6 August 2001) at [98].
[224] *Hastings and Anor v Auckland City Council* (Environment Court Auckland A068/01, 6 August 2001).
[225] *Steven v Christchurch City Council* [1998] NZRMA 289. There is also power for an owner to apply under section 221(3) of the Act to vary or cancel a condition specified in a consent notice (which can impose conditions on subdivision that are registered on land titles).
[226] Resource Management Act 1991, s 10.
[227] Resource Management Act 1991, s 128.
[228] *Dart River Safaris Ltd v Kemp* [2000] NZRMA 440. However, this does not prevent the imposition of conditions that impose costs on an applicant that may undermine the viability of the activity.
[229] See generally SC Urlich and MN Hanifiyani "A stringent failure: regulators do not use available tools to protect aquatic ecosystems from clearcut forestry impacts in New Zealand" (2024) 370 Journal of Environmental Management; M Doole, T Stephens and G Bertram "Navigating murky waters: characterising capture in environmental regulatory systems" (2024) 20(4) Policy Quarterly 44; JK McNeil *The public value of regional government: How New Zealand's regional councils manage the environment* (PhD thesis, Massey University 2008).
[230] Ministry for the Environment *Ōtūwharekai/Ashburton Lakes lessons-learnt report: A Case Study Examining Ongoing Deterioration of Water Quality in the Ōtūwharekai Lakes* (Wellington, 2023).
[231] Compare Natural and Built Environment Act 2023, s 341.
[232] https://www.beehive.govt.nz/speech/speech-minerals-west-coast-forum

[233] J Williams "Lex Aotearoa: An heroic attempt to map the Māori dimension in modern New Zealand Law" (2013) 21 Waikato Law Review 1 at 4.
[234] https://www.abc.net.au/news/2021-03-16/new-zealand-rivers-pollution-100-per-cent-pure/13236174
[235] See New Zealand Productivity Commission *Better urban planning* (2017) at 39 and 47 (which emphasised externalities alongside providing public goods (eg infrastructure) and coordinating the supply of those goods with the provision of land); and compare Hansard debates at the enactment of the RMA: (4 July 1991) 516 NZPD 3019–3020.
[236] Ministry for the Environment & Stats *New Zealand Environmental Reporting Series: Environment Aotearoa 2022* (2022).
[237] James Whetu *Think piece on consideration of kaupapa Māori ideals in a future resource management system* (commissioned by EDS, December 2024).
[238] See Auckland Regional Council *Environmental condition and values of Manukau Harbour* (2009) at 12. Prior to construction of the Mangere Treatment Plant, 25 million litres of trade wastes and 675,000 litres of untreated sewage were discharged daily into the Manukau Harbour.
[239] For example, see the list of non-regulatory measures at https://www.qualityplanning.org.nz/node/765; https://www.qualityplanning.org.nz/node/791
[240] Parliamentary Commissioner for the Environment *Going with the grain: Changing land use to fit a changing landscape* (May 2024).
[241] See Tax Working Group *The future of tax* (2019), ch 4.
[242] See G Severinsen "Glass half Empty or Glass half Full? Adverse Effects, Positive Effects and Conditions under the Resource Management Act 1991 and Resource Legislation Amendment Bill 2015" (2016) 11(9) BRMB 110. The RMA is not well positioned to require people to provide environmental benefits that are not clearly linked to the creation of adverse effects.
[243] See Resource Management Act 1991, s 7(f): "maintenance and enhancement of the quality of the environment".
[244] Compare Natural and Built Environment Act 2023, ss 6-7.
[245] Compare Natural and Built Environment Act 2023, ss 107-108.
[246] Environment Protection Act 2017 (Vic), ch 3.
[247] Compare Parliamentary Commissioner for the Environment *Going with the grain: Changing land use to fit a changing landscape* (May 2024), which recommends considering the barriers that consent conditions have for mitigation activities (eg mitigation through earthworks, which itself sometimes requires separate resource consent or onerous permitted activity standards) and for novel land uses which may have lower impacts that an existing use.
[248] Compare Natural and Built Environment Act 2023, s 156.
[249] Which the RMA lists as a function of the Minister in section 24(h), but provides no real framing for. In practice, this uncertainty has led to a hesitation to use instruments that could be regarded as a 'tax'.
[250] https://www.gov.uk/guidance/understanding-biodiversity-net-gain
[251] For example, "by sacrificing some of the short-term benefits of carbon sequestration, it was possible to create a more diverse landscape with environmental benefits that reinforce one another": Parliamentary Commissioner for the Environment *Going with the grain: Changing land use to fit a changing landscape* (May 2024).
[252] Productivity Commission of New Zealand *Better urban planning* (2017).
[253] Lewis Mumford *My works and days* (1979).
[254] E Glaeser *Triumph of the City* (2011).
[255] Justin Morgenroth, cited in https://interactives.stuff.co.nz/2022/03/urban-heat-island-tree-cover/.
[256] See The Nature Conservancy *Outside our doors: The benefits of cities where people and nature thrive* (2016).
[257] One study of neighbourhoods in four large Dutch cities found the quality of streetscape greenery is positively associated with the overall health of residents: The Nature Conservancy *Outside our doors: The benefits of cities where people and nature thrive* (2016); GN Bratman and others "The benefits of nature experience: Improved affect and cognition" (2015) 138 Landscape and Urban Planning 41; GN Bratman and others "Nature experience reduces rumination and subgenual prefrontal cortex activation" (2015) 112(28) Proceedings of the National Academy of Sciences 8567.
[258] H Tallis and others "Are California elementary school test scores more strongly associated with urban trees than poverty?" (2018) 9 Frontiers in Psychology 2074.
[259] The Nature Conservancy *Outside our doors: The benefits of cities where people and nature thrive* (2016).
[260] The Nature Conservancy *Outside our doors: The benefits of cities where people and nature thrive* (2016).
[261] Y Joye and others "The effects of urban retail greenery on consumer experience: reviewing the evidence from a restorative perspective" (2010) 9 Urban Forestry and Urban Greening 57.
[262] GN Bratman and others "The benefits of nature experience: Improved affect and cognition" (2015) 138 Landscape and Urban Planning 41.

[263] *Better urban planning* (2017); Infrastructure New Zealand *Integrated Governance, Planning and Delivery: A Proposal for Local Government and Planning Law Reform in New Zealand* (2015); Infrastructure New Zealand *Building Regions: A Vision for Local Government, Planning Law, and Funding Reform* (2019).
[264] Infrastructure New Zealand *Building Regions: A Vision for Local Government, Planning Law, and Funding Reform* (2019).
[265] Resource Management Review Panel *New Directions for Resource Management in New Zealand* (2020).
[266] Wen Lui and others "Assessing the effectiveness of green infrastructures on urban flooding reduction: a community scale study" (2014) 291 Ecological Modelling 6.

[267] "Engineering projects can reverse the effects of land development and are doing so" claimed the head of the flood control district: https://greensourcedfw.org/articles/when-climate-change-meets-sprawl-why-houstons-once-lifetime-floods-keep-happening
[268] "The Katy Prairie northwest of Houston was once about 600,000 acres of flood-absorbing land; recent development has reduced it to a quarter of that capacity": https://greensourcedfw.org/articles/when-climate-change-meets-sprawl-why-houstons-once-lifetime-floods-keep-happening
[269] See https://greensourcedfw.org/articles/when-climate-change-meets-sprawl-why-houstons-once-lifetime-floods-keep-happening.
[270] https://greensourcedfw.org/articles/when-climate-change-meets-sprawl-why-houstons-once-lifetime-floods-keep-happening.
[271] S De Vries and others "Streetscape greenery and health: stress, social cohesion and physical activity as mediators" (2013) 94 Social Science & Medicine 26.
[272] See www.qldc.govt.nz/your-council/major-projects/blue-green-network-plan/; https://www.marlborough.govt.nz/environment/te-hoiere-pelorus-catchment-restoration-project
[273] New Zealand Planning Institute *The role of the planner* (Position paper, 2024).
[274] B Rae "Urban design and reform of the Resource Management Act" (April 2009) Resource Management Journal 16. See also New Zealand Planning Institute *The role of the planner* (Position paper, 2024).
[275] B Rae "Urban design and reform of the Resource Management Act" (April 2009) Resource Management Journal 16.
[276] See Ministry for the Environment *The value of urban design: The economic, environmental and social benefits of urban design* (2005) https://environment.govt.nz/assets/Publications/Files/value-of-urban-design-full-report-jun05_0.pdf
[277] New Zealand Planning Institute *The role of the planner* (Position paper, 2024).
[278] By providing for active transport or injecting nature into neighbourhoods.
[279] For example, through the design of how private and public spaces connect, including the visibility of entranceways and lighting. See generally the *Crime prevention through environmental design* guidelines.
[280] For example, pathways between streets rather than cul-de-sacs.
[281] For example, through controls on orientation to make use of passive heating and lighting
[282] Compare New Zealand Infrastructure Commission Te Waihanga *Rautaki Hanganga o Aotearoa New Zealand Infrastructure Strategy 2022-2052* (2022) at 138; C Montgomery *Happy city* (2013).
[283] C Cubbin and others "Neighbourhoods and health" (Issue brief no 3, Princeton, 2008).
[284] For example, see GR Lee "Social integration and fear of crime among older persons" (1983) 38(6) Journal of Gerontology 745.
[285] Lawyers for Climate Action New Zealand *Submission to issues and options paper: Transforming the resource management system* (February 2020).
[286] Resource Management Act 1991, ss 6-7.
[287] https://www.beehive.govt.nz/speech/speech-replacing-resource-management-act
[288] New Zealand Planning Institute *The role of the planner* (Position paper, 2024).
[289] For example, increasing policing is not an effective alternative to urban design that minimises crime.
[290] On the significant fiscal constraints facing local government, see Productivity Commission *Local Government Funding and Financing* (2019); *The Future for Local Government He Piki Tūranga, He Piki Kōtuku* (Wellington, June 2023).
[291] The RMA contains many tensions like this that have never entirely been resolved, which stem from its mixed and complex origins – a marriage between the economic rationalism and budding environmental movement that defined the late 1980s, alongside developing jurisprudence around Te Tiriti o Waitangi. See G Severinsen and R Peart *Reform of the resource management system: The next generation* (EDS, 2019), ch 3; C Knight *Beyond Manapouri* (2018).
[292] New Zealand Productivity Commission *Using land for housing* (2015) at 274.
[293] (4 July 1991) 516 NZPD 3019–3020.
[294] Combined with restrictions on density and height: see A Grimes and Y Liang *Spatial determinants of land prices in Auckland: does the metropolitan urban limit have an effect?* (Motu Working Paper 07-09, 2007).
[295] See generally People, places, spaces: A design guide for urban New Zealand (Ministry for the Environment, 2001) at 31; SL Martin and DS Norman *An evidence-based approach: Does the rural urban boundary impose a price premium on land inside it?* (Auckland Council, Chief Economist Unit, February 2020); New Zealand Productivity Commission Using land for housing (2015) at 297 (summarising various submissions emphasising such points); G McIndoe and others *The value of urban design* (Ministry for the Environment, 2005).
[296] https://www.beehive.govt.nz/speech/speech-local-government-new-zealand-conference
[297] Including through the appropriate consideration of price signals to release new land.
[298] SL Martin and DS Norman *An evidence-based approach: Does the rural urban boundary impose a price premium on land inside it?* (Auckland Council, Chief Economist Unit, February 2020), which noted that "converting farmland or lifestyle blocks outside the RUB into bulk-infrastructured residential sections similar to those inside the RUB would be unlikely to deliver land to the market substantially more cheaply".
[299] SL Martin and DS Norman *An evidence-based approach: Does the rural urban boundary impose a price premium on land inside it?* (Auckland Council, Chief Economist Unit, February 2020).
[300] Personal communication, February 2025. EDS is giving more detailed attention to the Irish experience in later papers.
[301] Through future development strategies, which are required under the NPS on Urban Development.

[302] See Housing Technical Working Group *Analysis of availability of land supply in Auckland: Results from improved land efficiency indicators and discussion on their use for policy* (November 2024), which noted that price differentials between urban and rural land at the urban boundary of Auckland have improved under the Unitary Plan, and that remaining differences can be partly accounted for by planned infrastructure provision (or lack of).
[303] Similarly, in the planning context, the Productivity Commission has recommending restraining "attempts to force the creation of economic, social or environmental benefits through restrictive rules (eg, planning policies that attempt to promote density in the expectation that this will necessarily lead to higher productivity)." See Productivity Commission of New Zealand *Better urban planning* (2017).
[304] *Newbury DC v Secretary of State for the Environment* [1981] AC 578.
[305] New Zealand Infrastructure Commission Te Waihanga *Rautaki Hanganga o Aotearoa New Zealand Infrastructure Strategy 2022-2052* (2022).
[306] see https://nzta.govt.nz/assets/projects/te-ara-tupua/te-ara-tupua-enhanced-reef-habitat-factsheet-february-2024.pdf.
[307] See www.epa.govt.nz/assets/FileAPI/proposal/NSP000039/Boards-Decision/f2a6b7d01d/NCI-Volume-1-of-2-Board-of-Inquiry-Draft-report-and-decision-FINAL.pdf from [1083], where it is said explicitly that "the proposed complete relocation of the hockey stadium is the only way to mitigate the significant adverse effect arising as a result of the Project on it."
[308] *Board of Inquiry Final Report and Decision into the NZTA Waterview Connection Proposal* at [234], from [1071].
[309] See *Olsen v Auckland City Council* [1998] NZRMA 66; G Severinsen "Glass half Empty or Glass half Full? Adverse Effects, Positive Effects and Conditions under the Resource Management Act 1991 and Resource Legislation Amendment Bill 2015" (2016) 11(9) BRMB 110.
[310] See Ministry for the Environment *Proposed national policy statement for natural hazard decision-making* (2023); R Peart *Design recommendations for a Climate Adaptation Act: Final report* (EDS, 2024).
[311] See www.parliament.nz/en/pb/sc/committees-press-releases/climate-adaptation-inquiry-completed/; R Peart *Design recommendations for a Climate Adaptation Act: Final report* (EDS, 2024);
[312] See R Peart *Design recommendations for a Climate Adaptation Act: Final report* (EDS, 2024); J Boston *Radically different world: Preparing for climate change* (BWB Books, 2024).
[313] See Forest and Bird *Tukua ngā awa kia rere Making room for rivers* (2022) www.forestandbird.org.nz/campaigns/room-rivers
[314] See https://hauraki-plains-adaptation-plan-boffa.hub.arcgis.com/documents/27671c24559a40349bbc07e905213b56/about
[315] (4 July 1991) 516 NZPD 3019–3020.
[316] For the suggestion that the Environment Court might occasionally compare competing proposals on their relative merit, see *Synlait Ltd v Central Plains Water Trust* [2010] NZSC 32, [2010] NZRMA 257; *Central Plains Water Trust v Synlait Ltd* [2009] NZCA 609, [2010] 2 NZLR 363.
[317] The idea that "less productive land may be available and better suited for urban use … for the benefit of New Zealand" is a far cry from the reactive ethos some see as constraining the RMA.
[318] Via the RMA's mechanisms for notices of requirement for designation and Public Works Act powers for compulsory acquisition.
[319] https://www.beehive.govt.nz/speech/speech-local-government-new-zealand-conference
[320] Ministry for the Environment & Stats *New Zealand Environmental Reporting Series: Environment Aotearoa 2022* (2022).
[321] See, for example, Parliamentary Commissioner for the Environment *Environment and economics: A marriage of (in)convenience?* (Speech to the Environmental Defence Society conference, 2024).
[322] See generally Parliamentary Commissioner for the Environment *Going with the grain: Changing land use to fit a changing landscape* (May 2024) at 32.
[323] Parliamentary Commissioner for the Environment *Going with the grain: Changing land use to fit a changing landscape* (May 2024).
[324] See www.rnz.co.nz/news/national/530149/offshore-wind-company-doubles-down-on-opposition-to-seabed-mining
[325] Under the Crown Minerals Act 1991.
[326] Resource Management (Extended Duration of Coastal Permits for Marine Farms) Amendment Act 2024.
[327] Fast-track Approvals Act 2024, s 38.
[328] www.nzinitiative.org.nz/reports-and-media/opinion/fast-track-approvals-are-necessary-but-should-be-temporary/
[329] *Outrage to optimism: Report of the ministerial inquiry into land uses associated with the mobilisation of woody debris (including forestry slash) and sediment in Tairawhiti/Gisborne District and Wairoa District* (2023).
[330] Parliamentary Commissioner for the Environment *Going with the grain: Changing land use to fit a changing landscape* (May 2024).
[331] https://www.gov.scot/publications/guide-planning-system-scotland/. See also New Zealand Planning Institute *Submission: RMA Review Panel issues and options paper* (2020).
[332] This seems to be a risk given that the ACT Party, albeit in its pre-election manifesto, went beyond the defence of rights pre se and also said that "property owners' legitimate expectations, established through years of law and practice, should be respected". See *ACT's solutions for building New Zealand and conserving nature* (2022).