EDS is leading a project which is taking a first principles look at the resource management system in New Zealand and outlining options for reform. This synthesis report considers the whole system according to themes, including ethics, principles, the proper role of the system, legislative design, institutional arrangements, public participation, and tools. It culminates in three tangible models for what a future system could look like.
REFORM OF THE RESOURCE MANAGEMENT SYSTEM
The Next Generation Synthesis Report

Greg Severinsen & Raewyn Peart

Published with the assistance of The New Zealand Law Foundation
Acknowledgements

The Environmental Defence Society would like to give special thanks to the primary funder of this project, The New Zealand Law Foundation. Thanks also to the Property Council New Zealand, Infrastructure New Zealand and the Employers and Manufacturers Association (Northern) for providing financial support for the project. We are very grateful to Professor Tim Hazledine, Dr Tim Denne, Dr Theo Stephens, Dr Robert Joseph and Dr Marie Brown who contributed content. We would also like to specifically thank Aidan Cameron, Helen Marr, Keir Volkerling, Joe Beaglehole, Shay Schlaepfer and Brooke Cox who provided material which was incorporated into the report. Numerous other people contributed to this project including members of our Advisory Group, Watercare, interviewees, those who attended our workshops on 27 November 2017, 12 April 2018 and 31 July 2018 and those who provided direct feedback. We acknowledge all those contributions with thanks and respect.
FOREWORD

This report, Reform of the Resource Management System: The Next Generation is the product of not just 18 months of dedicated research, workshops, working papers, and careful thought – it also synthesises much of the collective experience of the Environmental Defence Society (EDS) and our partners over many years. It is driven by the need to lift the quality of the debate about resource management out of hyperbolic anecdotes and knee-jerk reactions to a properly considered analysis of what kind of system we need to manage our natural and built environments over the next several decades.

It goes right back to first principles and builds the foundation for change. It resists the temptation to rush to ill-considered solutions. It draws on the work of others including the Productivity Commission, Infrastructure New Zealand and Local Government New Zealand in a genuinely multi-partisan way.

The output is a report that is designed to assist others to think about resource management reform. It doesn’t yet offer a final solution but rather the building blocks for creating one. We are mindful that the Government is proposing to kick off its own review in mid-2019. This report should help that review. We have developed three broad models for reform but in a way that enables their components to be mixed and matched as debate continues.

We are also of the view that reform needs to look at more than just the Resource Management Act 1991. Here we look at the entire system, including institutions, funding and other legislation. The last time this was done was in the 1980s, and it created the system we have today. It’s time for another fundamental review and an exercise with that scope is vitally important to all New Zealanders. Such reform is quasi-constitutional in its import. It will create the framework to provide for our collective futures. We need to get it right. We need an outcome that works for all.

We consider how New Zealand will change over the next several decades and what foundational thinking is needed to build a resource management system fit for the purpose of managing our future needs. Our current world is quite different to that of the 1980s and is changing rapidly. So, the resource management system needs to be agile and adaptable, efficient and effective.

We are extremely grateful for the support of The New Zealand Law Foundation, the primary funder of this project. From our perspective, it’s very encouraging that the Foundation believes in us and supports our work. We also acknowledge with thanks support from our partners, the Employers and Manufacturers Association (Northern), Property Council New Zealand and Infrastructure New Zealand.

EDS is inviting considered feedback on this report. We will be working on the next and final phase of the project during 2019. This will involve developing criteria for choosing a preferred model, which will not necessarily see the wholesale adoption of one of those presented in this paper. We will work up that model into a fully-fledged proposition for reform. And we’ll describe what a practical implementation pathway for reform might look like. Significant change looks less overwhelming if we know how we will get there over time.

Finally, can I acknowledge with respect the principal authors of this report: Dr Greg Severinsen and Raewyn Peart. Their effort has been considerable. Nothing like this analysis has been done before. And we are grateful to the many individuals and organisations that showed interest and support, and contributed their ideas to this exercise.

Gary Taylor QSO
Chief Executive
Environmental Defence Society
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<td>EEZ Act</td>
<td>Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012</td>
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<td>GDP</td>
<td>Gross domestic product</td>
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<td>NES</td>
<td>National Environmental Standard</td>
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<td>Nimby</td>
<td>Not in my backyard</td>
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<td>NPS</td>
<td>National Policy Statement</td>
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<td>NZCPS</td>
<td>New Zealand Coastal Policy Statement</td>
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<td>NZTA</td>
<td>New Zealand Transport Agency</td>
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<td>RMA</td>
<td>Resource Management Act 1991</td>
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<td>Three waters</td>
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EXECUTIVE SUMMARY
0.1 Introduction
This project analyses New Zealand’s resource management system from first principles, and outlines options for reform. We are asking fundamental, future-focused questions about how our overall package of laws, institutions and interventions should and can work. The scope of the review is wide because we are adopting a wide definition of the system under analysis. But at its core are the topics of environmental protection, urban and infrastructure planning, and the ways in which we use our natural and physical resources to achieve the outcomes we want. Simply put: Can we manage our natural and physical resources better? We are optimistic that we can.

As a nation, we are facing an array of resource management problems. Many indicators of environmental health are rapidly declining. The current system is also failing to deliver on social, economic and cultural outcomes, including in our urban areas. Our laws have become complex, confusing and inaccessible. At some point the accumulation of issues becomes so great, and so suggestive of deeper systemic problems, that it merits sitting back and considering how the system works as a whole. There is a growing consensus among many that we have reached this kind of systemic reflection point.

This report starts by considering the most fundamental questions. What is the resource management system, and why do we have it (Chapter 2)? What are the past, present, and future contexts that will drive or influence reform (Chapter 3)? How do we, as New Zealanders, see ourselves in relation to our natural and physical surroundings, and what outcomes do we want (Chapters 4 and 5)? And what role should a formal system play in realising those outcomes (Chapters 6 and 7)?

The focus then shifts to the bones of the system – what kind of legislation we have (Chapter 8), how we apportion responsibilities among institutions (Chapter 9), and in what ways the public can be involved in decision-making (Chapter 10). We then investigate the tools the system uses – the ways in which it can intervene to shape people’s behaviour and make real change on the ground (Chapters 11–14). Each section of analysis culminates in broad options for change, and the report as a whole leads to the presentation of three potential overall models for a future system (Chapter 15). The report’s structure is outlined below in Figure 0.1.

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<td>Chapter 11: Strategic tools</td>
</tr>
<tr>
<td>Chapter 12: Regulatory tools</td>
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<tr>
<td>Chapter 13: Non-regulatory tools</td>
</tr>
<tr>
<td><strong>Part 5: Drawing the threads together</strong></td>
</tr>
<tr>
<td>Chapter 14: Harmonising our tools</td>
</tr>
<tr>
<td>Chapter 15: Three models for a future system</td>
</tr>
</tbody>
</table>

Figure 0.1: Structure of this report
We emphasise that there are few specific recommendations in this report. Its primary aim is to shape and guide a conversation, not construct a solution. That will need to happen, of course – and will be progressed in a second phase of this work – but a particular model is not the starting point for discussion. We need to think carefully about many things before we get there. Finally, we note that the material traversed in the report is wide ranging, and in many ways defies a short summary. Readers are encouraged to engage deeply with the material in each chapter and, using the three models presented in Chapter 15 as a springboard, consider for themselves how it could come together in a coherent package that will work for all New Zealanders.

0.2 Conceptualising the resource management system

In Chapter 2 we consider why we have a resource management system, how it can be defined, and how it can be deconstructed into meaningful units for analysis. At its most basic, we conceive of the resource management system as the set of public interventions designed to influence how, when, where, why and by whom resources are (or are not) used. It is about how we shape our physical surroundings. The system provides a vehicle for defining our collective aims, allowing them to change (or not change) over time, and providing methods to achieve them. It also provides a way to determine if we are actually achieving what we want (and how to change things if we are not).

Defining the resource management system only by the type of outcomes sought (eg environmental, social, economic, cultural etc), by the boundaries of existing statutes (eg the the Resource Management Act 1991 [RMA] or the Local Government Act 2002), or by “topics” (eg housing, transport, water) causes difficulties. Instead, in Chapter 2 we define the system by defining its constituent terms (“resource”, “management” and “system”). This can be seen in Figure 0.2 below.

As well as defining the system, it is also necessary to consider how to break it down into parts for analysis. The report does so by considering “themes”, rather than particular sectors (eg agriculture or fisheries), spaces (eg urban or rural) or domains (eg freshwater or air). A theme refers to the kinds of things the system as a whole must do. We order them into four categories: norms, functions, structures and tools. They are addressed sequentially, and reflect the structure of the report. Themes (eg a structural theme like legislative design) apply to all sectors, spaces and domains.

<table>
<thead>
<tr>
<th>“New Zealand”</th>
<th>The resource management system operates within the geographical constraints of New Zealand, which includes (with relevant limitations) areas where New Zealand has sovereignty or sovereign rights.</th>
</tr>
</thead>
<tbody>
<tr>
<td>“Resource”</td>
<td>A resource can be broadly defined as a natural and physical resource. (To the extent that seeing the environment in terms of “resources” is objectionable, the system can be recast as the “environmental” management system.) Resources and environment include:</td>
</tr>
<tr>
<td></td>
<td>• Both natural resources/environment (broadly, things that would exist if humans did not) and built resources/environment (buildings, infrastructure)</td>
</tr>
<tr>
<td></td>
<td>• Both private resources (eg land, buildings, infrastructure) and public resources (eg air, water, infrastructure)</td>
</tr>
<tr>
<td></td>
<td>• Urban, rural, conservation and marine resources (across all New Zealand’s geographical areas)</td>
</tr>
<tr>
<td>“Management”</td>
<td>Resource management includes the following public interventions in relation to the resources described above:</td>
</tr>
<tr>
<td></td>
<td>• Regulation: requiring or restricting human action (you must/must not)</td>
</tr>
<tr>
<td></td>
<td>• Behavioural incentives: influencing human action (you should)</td>
</tr>
<tr>
<td></td>
<td>• Resourcing/funding: enabling human action (you can)</td>
</tr>
<tr>
<td></td>
<td>In order to generate the following kinds of action:</td>
</tr>
<tr>
<td></td>
<td>• Limiting or preventing the use of resources to manage adverse impacts (environmental protection – whether resources are used, and how)</td>
</tr>
<tr>
<td></td>
<td>• Influencing the use of resources for environmental, social and economic benefit (economic and social planning, and environmental enhancement – how and why resources are used)</td>
</tr>
<tr>
<td></td>
<td>• Shaping the spatial distribution of resource use, protection and enhancement (spatial planning – what happens where)</td>
</tr>
<tr>
<td></td>
<td>• Shaping the temporal distribution of resource use, protection and enhancement (strategic planning – when things happen)</td>
</tr>
<tr>
<td></td>
<td>• Distributing resources to different parties or communities of interest (allocation – who gets what)</td>
</tr>
<tr>
<td>“System”</td>
<td>The system is the framework of norms, functions, structures and tools within which all of these interventions interact.</td>
</tr>
</tbody>
</table>

Figure 0.2: Definition of the resource management system
0.3 Context – the past, the present and the future

In Chapter 3 we consider the context in which reform of the resource management system would occur, and draw out some key lessons. This sets the scene, and is presented in lieu of a traditional problem definition. We need to think not just about how to fix current problems, but also what our history means for our future and what challenges wait around the corner.

First, we consider the system’s historical context. In particular, the system we see today is the product of legal and ideological developments over many years, with many of its conceptual and structural foundations laid in a particularly tumultuous period in the late 1980s and early 1990s. It is also built upon crucial, but often fluid and uncertain, relations between the Crown and Māori.

Secondly, we consider a number of diverse challenges the system is facing. Many of these have increased markedly in recent years. Environmental quality is declining; we face peculiarly urban issues; allocative outcomes are questionable; and the overall coherence and operation of the system is less than ideal. But challenges are not all of a similar nature. Systemic challenges exist because the system was not really designed to do some things it needs to do now and in the future (eg the allocation of resources like freshwater), while other challenges exist because of ad hoc changes that have, over time, resulted in a complicated and fragmented system (eg multiple amendments to the RMA). Furthermore, some tensions are unavoidable in a system that partly exists for the purpose of resolving them, and these do not represent problems that we should ever expect to be “fixed” by reform. Perhaps most significantly, the system has failed to achieve what it was always meant to, notably in its establishment and defence of environmental bottom lines.

Thirdly, we briefly canvass the present government’s work programme for resource management. This forms a crucial part of the context against which wider reform would occur. Although not couched in terms of system reform, when looked at holistically these measures represent significant and transformative changes that require alignment and a consistent narrative.

Forthly and finally, we consider what the future will or could hold. A future system will need to be sensitive to such changes. For example, it will need to be strategic about how it manages increases in population. If we do not seek to control it per se, then the system (and not just the RMA) needs to consider what this means in the long term for urban growth patterns, food production,
and pressure on natural and physical resources. Core infrastructure vital to New Zealand's wellbeing also needs to be adequately funded, maintained, upgraded and enabled. A future system needs to be courageous and think long term about protecting areas of high natural value from inappropriate and creeping development, and do urban densification well. It needs to engage with an increasingly diverse society in ways that resonate with people of different ages and backgrounds, and regularly evaluate changes in people's values and preferences where firm bottom lines are not at stake (eg in the density of urban living and transport preferences).

If primary production continues to underpin New Zealand's economy, the system must place clear expectations around where and what kinds of activities are acceptable in the future. New Zealand also has clear climate change obligations under the Paris Agreement that will have to be met over the coming decades. In order to meet them, a future system will need to accommodate a great deal of change in a multipronged approach (not just an emissions trading scheme). It will need to be more directive and proactive, and contemplate land use change. Normative directions about climate change will need to be integrated across the whole system.

In addition, New Zealand faces substantial impacts from climate change and other forms of global change over the coming decades. The system needs to strengthen the resilience of people and nature to respond and adapt in sustainable, timely and predictable ways. In particular, the system will need to be more proactive, future-focused and directive in relation to broad land use changes, food production, where infrastructure can be located, how to fund the movement of existing infrastructure, the (re)allocation of scarce resources, and urban design. Clear expectations around government assistance and compensation need to be set, and tools created to manage this.

The future will see an increasing recognition that traditional methods of measuring wellbeing (largely economic) do not reflect the true picture. It will need to closely manage product life cycles to address waste before it is generated (or imported). New Zealand should be self-sufficient in waste management. New technology poses opportunities for positive change in the future, and a system should be flexible enough to embrace technological advancements as long as opportunities outweigh the risks. In particular, technology has the potential to improve efficiency in the agricultural sector. But it also has the potential to radically change the way food is produced. Such changes to the sector could lead to environmental benefits, but also produce significant social and economic disruption to farmers and the country as a whole. A reformed system will need to be future-focused and manage any transition with great care.

Finally, increasing economic and political involvement and expectations of Māori, alongside continuing Treaty settlement processes, may drive a future system towards one of greater partnership in how resources are managed. The unprecedented scale of change predicted for the coming decades in many areas requires new thinking about traditional governance models, including the need for future-focused institutions, contemplation of greater centralisation of some functions, and consensus-based and durable commitment mechanisms.

### 0.4 Worldviews and environmental ethics

In relation to resource management, big picture ethical questions concern the basic ways in which we see ourselves in relation to our surroundings and the natural world. Many different ethical theories exist, but they all seek to strike a balance between resource use and protection. Neither one of these things is ever absolute. There are four key questions here: how to distribute costs and benefits amongst people alive today, between current and future generations, between private and public interests, and between humans and non-humans (nature). Although it is a dramatic simplification, it is useful to think of Western theories about the environment as being either anthropocentric (human-focused) or ecocentric (nature-focused).

An economic approach informed by anthropocentrism tends to reduce the natural and physical world to monetary terms. This is only one possible way of valuing the environment and resources within it. A non-economic anthropocentric worldview focuses on the weighing of a broader range of human values concerning the environment, and rejects money as the only measure of value. In contrast, an ecocentric worldview sees the natural world as having intrinsic value, dignity and rights beyond its usefulness to humans. It rejects economic measurement and human values as the only metrics for valuation. Māori worldviews – Te Ao Māori – are more closely aligned to Western notions of ecocentrism than to anthropocentrism or an economic worldview. However, they are by no means the same thing. Te Ao Māori is a specific way of seeing the world, developed over centuries and incubated within an integrated social and cultural setting.

Overall, we consider that a future system will need to reflect multiple worldviews. However, embracing synergies between ecocentrism and Te Ao Māori more within a plurality of ethics may provide a positive direction of travel.

### 0.5 Legal and ethical principles

A society's basic worldview(s) and ethics provide the normative foundation of its resource management system. But it is important to operationalise worldviews through the recognition or development of more detailed principles – like sustainability, intergenerational equity, and precaution. In Chapter 5 we provide a short exploration of key principles that have been developed in the field of resource management, and which could form the basis of a future system. These are summarised below in Figure 0.3.
<table>
<thead>
<tr>
<th>Principle</th>
<th>Brief description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sustainability</td>
<td>Sustainability provides a framework within which other more detailed substantive principles can be applied. It is essentially about balancing the value of resource use with the value of environmental protection in a way that can be maintained over time. Sustainable development is concerned not only with ensuring environmental protection in the face of development pressures, but also with active recognition of the need to drive socioeconomic development. Sustainable management, in the New Zealand experience of the term, has a narrower focus of protecting the environment. It seeks only to enable socioeconomic wellbeing, not drive it. Alternative “umbrella” principles to sustainability in a future system could include resilience and risk management.</td>
</tr>
<tr>
<td>Environmental justice and distributional equity</td>
<td>Environmental justice and distributional equity seek to distribute the costs and benefits of resource use and protection between groups in present-day society, according to equity or sensitivity to harm. Ecological justice is an extension of this idea, which assigns rights to the natural world (and corresponding responsibilities to humans to defend them).</td>
</tr>
<tr>
<td>Intergenerational equity</td>
<td>Intergenerational equity seeks to distribute costs and benefits of resource use and protection between present and future generations, so that at least the basic needs of future generations are met.</td>
</tr>
<tr>
<td>Polluter-/user-pays</td>
<td>The principle of polluter-/user-pays seeks to distribute the costs of resource use between private and public interests. It generally places costs on the polluter or user.</td>
</tr>
<tr>
<td>Common but differentiated responsibilities</td>
<td>The principle of common but differentiated responsibilities seeks to distribute the costs of environmental protection among the international community. It means that New Zealand bears greater responsibility for the costs of mitigating climate change than some other countries.</td>
</tr>
<tr>
<td>Subsidiarity</td>
<td>Subsidiarity seeks to locate decision-making responsibilities closest to (and according to the values of) the relevant community of interest. There is a separate Māori community of interest alongside national, regional and local ones.</td>
</tr>
<tr>
<td>Principles of the Treaty of Waitangi</td>
<td>The principles of the Treaty of Waitangi include active protection, good faith, remediation of past grievances, and informed decision-making. They will be extremely important in a future system.</td>
</tr>
<tr>
<td>Kaitiakitanga, mauri and mātauranga Māori</td>
<td>Māori values in the system are not just a way to provide recognition or power to Māori as a distinct group. They also have merit in their own right. In the resource management context, the central Māori idea is often kaitiakitanga (stewardship), but other important concepts are mauri (life-force or essence) and mātauranga Māori (knowledge and ways of knowing).</td>
</tr>
<tr>
<td>Resource development</td>
<td>The development principle is a convenient label for a principle that recognises that the resource management system should place value on, and incentivise or mandate, some resource uses that are in the public interest.</td>
</tr>
<tr>
<td>Conservation</td>
<td>The conservation principle recognises that protection and enhancement of the environment must be relatively absolute in some geographical areas. It encompasses the principle of non-regression, which states that measures beneficial for the environment should not subsequently be removed or eroded, and the public trust doctrine, under which the state acts as trustee of the ecological health of public areas.</td>
</tr>
<tr>
<td>Precaution</td>
<td>The precautionary principle states that where there is uncertainty as to the adverse effects of an activity, this is not a reason to fail to take action to address them. It includes approaches to risk identification, risk assessment, and risk management.</td>
</tr>
<tr>
<td>Participation</td>
<td>The participatory principle provides that the public have a legitimate interest in being involved in decisions about resources and the environment that impact on them or are of significant public interest. Such rights are not absolute. They must be balanced against the need for efficiency and timely decision-making. Māori should have relatively strong participatory rights because of their status as Treaty partners. Access to information, transparency of process, and access to justice are also important.</td>
</tr>
<tr>
<td>Efficiency</td>
<td>The principle of efficiency is important in resource management. In terms of process, decisions should be streamlined and use comparable units of measurement where possible, but must be balanced against the need for good information, public participation, and the evaluation of values, not just monetary units.</td>
</tr>
</tbody>
</table>

Figure 0.3: Key resource management principles
The rationale for public intervention, and the roles of a future system

In Chapters 6 and 7 we explore the grounds on which it would be appropriate for a future resource management system to intervene in people’s lives. In Chapter 6, we consider which basic test we should use, and in Chapter 7 consider what that means for the more specific roles the system needs to play.

Rationales for public intervention

Public authorities can intervene in a wide range of things. The real issue is whether they should. Are there occasions where we should categorically not use public interventions to influence outcomes, and instead let private persons get on with doing it themselves? If so, what test should we use to determine what those occasions are? As shown in Figure 0.4 below, it is often unclear exactly where public responsibility should stop and private freedom should start. The roles that the system performs can expand and contract over time in light of changing social and biophysical circumstances (see Figure 0.5).

While it would not be a legal test, it is useful to have a shared expectation about when public intervention or private choice is more desirable. One general test would be the internalisation of externalities. This reflects an economics-focused way of defining the role of the system, and may be too narrow to encompass what we need it to do. An alternative test would be where intervention is demanded by the public interest. This has significant advantages, but it also raises the risk of uncertainty and regulatory overreach. However, it is important to remember that the system has much more nuanced kinds of intervention available to it than just command and control style regulation. Other rationales for intervention could be to protect people from their own poor choices, and to distribute rights to use resources (which some may not see as a matter of public interest).

The protection and promotion of Māori interests is not the same thing as the public interest, although there may be overlap. How these interact is an intensely political, unpredictable and complex area. However, it may mean that we cannot constrain the scope of the system by justifying intervention only on the grounds of the public interest. It must also contemplate intervention in order to discharge the Crown’s Treaty of Waitangi obligations.

We are in no doubt that system change is needed. This is not because we think society’s expectations are wrong, but because of the increasing disjunct between our society’s aspirations for the future and what the current system is actually producing. The system, in practice, does not implement many values that New Zealanders hold, and which reflect the public interest. For example, most would accept that we should enhance the environment, not just prevent further degradation; yet the existing system provides few widespread or meaningful mechanisms for doing so. The system needs to catch up to what the “public interest” means in an age of rapid change.

Because the public interest can change over time, so too can the roles performed by the system. In Chapter 7 we suggest that a future resource management system should have seven core roles. Each of these is conceptually distinct, and should be exercised to the extent necessary to secure the public interest and recognise Māori interests. This recognises that private and...
personal freedoms and choices are also important in New Zealand society. In short, a future system should:
1. Impose environmental bottom lines
2. Manage trade-offs above bottom lines
3. Fund and ensure the delivery of public goods (including infrastructure)
4. Pursue "good" outcomes (not just prevent or manage "bad" outcomes)
5. Protect and promote Māori interests
6. Resolve disputes
7. Allocate rights to use non-private resources

**Imposing bottom lines**

A future system needs to impose firm environmental bottom lines. Environmental bottom lines are not about balance or mitigation. They are outcomes-based lines in the sand that need to be defended strictly and vigorously against erosion by cumulative human actions. They are not just about preventing harm; in some cases securing bottom lines is about enhancing the environment to an acceptable state. That requires regulatory action to be firmly linked to predictable and effective funding and resourcing. We suggest that a strong case can be made for imposing firm, durable and specific bottom lines to secure the following outcomes:

- Freshwater quality
- Freshwater flows and volume
- Quality of the coastal and marine environment
- Soil quality
- Climate change mitigation
- Climate change adaptation
- Maintenance and improvement of indigenous biodiversity
- Maintenance and enhancement of wilderness areas
- Biosecurity
- Sustainability of fisheries
- Māori values, taonga and ancestral relationships
- Protection of landscapes
- Protection of human health and safety

That said, a system that allows inflexible limits to be set in places, or for issues, that do not align with the balance of society's values may undermine those limits' long-term durability. We need to be careful to focus and put limits on the things that are really essential, not treat all our aspirations in the same way.

A future system may need to think about bottom lines in a more progressive way than it currently does. More specifically, it may need to:

- Be much clearer and more honest about the hierarchy of our basic objectives (such as affordable housing and freshwater quality) where they may come into conflict
- Clarify which outcomes require long-term, durable and strict bottom lines, and which are preferences that may change over time
- Clarify that Part 2 of the RMA (or its future equivalent) itself sets high level bottom lines for truly long-term and essential matters, not just that it allows them to be made if authorities choose to. It should impose obligations to set them at all levels of government.
- Transform general policy bottom lines (ie those that require interpretation through discretionary consenting decisions) into specific and measurable ones (where possible) in planning instruments. Big picture bottom lines – protecting ecosystem integrity – are ineffective if not supported by little picture ones – rules and standards.
- Not continue to operate in a way that requires recourse to a general provision like Part 2 to determine bottom lines
- Be more proactive in reconciling provisions in policy instruments and plans that have unclear relationships between them
- Be much more rigorous about an integrated approach to bottom lines that cascades down through a vertical hierarchy. A comprehensive suite of bottom lines at the national level could be created (eg through a single Government Policy Statement on the Environment) and flow down through all levels of planning instruments. National bottom lines could be targeted at the regional level, to recognise important differences in how they are expressed.
- Take a more strategic approach to bottom lines – not just in the form of static rules and directive policies, but also in the form of meeting binding targets over time (eg the carbon budgeting approach)
- Ensure that bottom lines are clear, but also incorporate buffer zones as a precautionary approach
- Consider carefully which bottom lines are place based (eg particular wilderness areas or landscapes) and which are value based (applying across the whole country)
- Consider the points at which bottom lines bite. Are they an ambulance at the bottom of the cliff, only to be assessed when harm is imminent, or important in preventing activities before harm becomes likely?

It is not enough for the system just to impose bottom lines and walk away. It also needs to balance and make trade-offs between interests above bottom lines or for things where true bottom lines do not really exist. In particular, the system has a role to play in making trade-offs where communities wish to balance different wellbeings or to enhance the environment above bottom lines.

**Managing trade-offs above bottom lines**

The current system conflates the concepts of bottom lines and trade-offs. For some things we require bottom lines, but the current system does not deliver them to the extent needed. For other things we require balance, but the system doesn't talk about one important side of the equation – the positive effects of resource use and urban
renewal. It strains to do both, and the product is confusion, uncertainty and an underwhelming commitment to either. A future system could usefully make a clearer distinction between the two.

Providing public goods and pursuing positive outcomes

The provision of public goods is another crucial role that a future system will need to play. Whether a good is “public”, and thus requires intervention in some form, can be debatable. One approach is based on market failure, and another is based on community preference for public provision. However, a public interest in goods and services does not necessarily mean they should be funded or delivered by public bodies. The system also has an important role to play in coordinating development. This includes aligning the planning, funding and delivery of public goods and services.

However, setting bottom lines, facilitating trade-offs and providing public goods are not enough to secure the public interest. A future system must also be better at actively pursuing positive outcomes. Public authorities have a key role to play here. Authorities should have clear mandates, linked to predictable sources of funding and resources, to pursue positive outcomes, not just prevent or manage potentially negative ones. We need to encourage and incentivise activities in which there are synergistic benefits (those that can achieve multiple wellbeing at the same time), in a strategic and planned way. Furthermore, as it restricts undesirable activities or behaviours, a future system could more actively manage a transition towards something else—a practical vision for the future that provides similar levels of social, economic and environmental wellbeing.

That said, the system’s active pursuit of positive social and economic outcomes should not conflict with or undermine its other roles (especially the imposition of bottom lines). These tensions should be resolved and harmonised early, including by aligning the set of objectives that apply to the whole system. In that way, the system’s distinct roles can be mutually reinforcing rather than set against each other. Spatial planning at a national and regional level offers a mechanism for more actively guiding resource use choices in a synergistic way. This is considered in Chapters 11–13.

Protecting and promoting Māori interests

A future system will need to protect and promote Māori interests. This is not just about adopting Māori concepts in laws and plans. It involves much more difficult questions about partnership and power (institutional arrangements are explored in Chapter 9). Among other things, the system needs to recognise and protect wāhi tapu (ancestral sites) and Māori relationships with key components of the natural world more generally. That needs to encompass intangible impacts, such as effects on spiritual wellbeing. Mātauranga Māori needs to inform, even if it does not determine, decisions.

Allocation

Allocation is a distinct role the system needs to play, and one that presents significant challenges. It involves debates not just about environmental values, but also about fairness. But when allocating rights to take or use public resources, the system can be doing quite different things. We need to determine what we want it to do, because that may have ramifications for how the system does it.

First, a future system could treat allocative questions as, essentially, an economic transaction. If people were made to pay for the enjoyment of non-private resources, that could be used for the benefit of New Zealanders or even channelled back into measures designed to enhance the resource being used. Secondly, a future system could simply treat allocative decisions as requiring a predictable process for obtaining rights (such as a first in, first served model). However, under the RMA, that has presented significant issues. Thirdly, the system could more actively influence allocative decisions by establishing an overarching set of principles (or resource-specific principles), or facilitating the development of regionally or locally based principles, for decision-makers to implement. Fourthly, the system could be more proactive in picking winners—allocating resources to particular kinds of activities in which there is a strong public interest. Methods of allocation are considered in Chapters 12 and 13.

0.7 Legislative design

Chapter 7 considers the seven core roles that a future resource management system will need to perform. However, the reality is that these roles will be performed not within the “system” generally, but within particular statutory frameworks having different purposes and design features. How we split up our statutes to perform these overall roles is an important question—one of legislative design—and is explored in Chapter 8. First, we explore several “design principles”. In short, we consider that resource management legislation should be coherent, certain, accessible, durable, integrated, tailored to New Zealand circumstances, and efficient.

Good legislative design demands that statutes are divided in a way that makes sense. In particular, while we can divide our statutes in many different ways, a consistent rationale for doing so needs to be maintained across the whole system if we are to ensure it is coherent. Here, the concept of lenses can be useful. A lens is, essentially, about what our main concern is when we slice and dice legislative boundaries. If we have a broad, outcomes-based framework like the RMA, for example, it can undermine coherence if we then introduce an act regulating the environmental impacts of mining, or of urban development, on top of it. What is the point of a broad framework if you have to look elsewhere for extensive additions, exceptions and alternatives for particular industries or spaces? This idea is reflected in Figure 0.6 below, and in Figures 0.7 and 0.8 we outline different lenses that could be used to divide legislation.
**Environmental Protection Act**
To protect the natural environment from human activity

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

**Auckland Environment Act**
To protect the natural and built environment within the Auckland region

**Resource Allocation Act**
To allocate the rights to use resources of a public nature

**Figure 0.6:** How not to design legislation

<table>
<thead>
<tr>
<th>Lens</th>
<th>Explanation</th>
<th>Example</th>
</tr>
</thead>
<tbody>
<tr>
<td>Outcomes</td>
<td>We have particular statutes for particular kinds of outcomes.</td>
<td>One act for the protection and restoration of the natural environment, one for allocating public resources, and another for encouraging exploitation of resources</td>
</tr>
<tr>
<td>Institutional</td>
<td>We have separate statutes for specific institutions.</td>
<td>One act for local government, one for an Environmental Protection Authority (EPA), another for the Environment Court</td>
</tr>
<tr>
<td>Sectoral</td>
<td>We have particular statutes for specific sectors or industries.</td>
<td>One act for agriculture, one for fisheries, another for mining</td>
</tr>
<tr>
<td>Domains</td>
<td>We have particular statutes for specific domains.</td>
<td>One act for freshwater, one for soil, another for the climate</td>
</tr>
<tr>
<td>Location</td>
<td>We have particular statutes for specific locations or areas.</td>
<td>One act for urban areas, one for rural areas, one for marine areas, another for conservation areas</td>
</tr>
</tbody>
</table>

**Figure 0.7:** Potential lenses through which we can look when designing legislation
We can usefully think of lenses as existing in a hierarchy or sequence. A later lens (eg a sectoral one) fills the gaps left by an earlier one (eg an outcomes-based one), but does not manage the same things for the same reasons. For example, if we have an environmental outcomes-based act like the RMA, sectoral acts (eg for mining or agriculture) do not generally manage the environmental impacts of those sectors.

We have many statutes in the current resource management system (some of which, as shown in Figure 0.9 below, straddle other systems). We have institutional statutes (eg the Environmental Protection Authority Act 2011 and the Environment Act 1986). We have sectoral statutes (eg the Fisheries Act 1996, the Forests Act 1949, and the Crown Minerals Act 1991). We have domain-based statutes (eg the Climate Change Response Act 2002). We also have location-specific statutes (eg the National Parks Act 1980 and Te Urewera Act 2014). And we have broad outcomes-based statutes too, such as the RMA and the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (EEZ Act).

**Figure 0.8:** An example of applying lenses. Our choice of lens determines how the system’s content is grouped together in statutes. Here we see that we can split statutes along outcomes or sectoral lines, to produce an “Urban Development Act” or a “Mining Act”.
As shown in Figure 0.10 below, outcomes form the primary lens used to divide legislation in the current system. That means most of the system’s content is found in a small number of statutes based on broad outcomes, which apply across all (or most) sectors, spaces and domains. Domains form a secondary lens that fill the gaps left by outcomes-based legislation. Location forms a third lens, which fills gaps relating to the needs of particular geographical locations (eg national parks). Sectoral statutes also fill remaining gaps. However, legislation is not needed for all sectors, only those where laws are necessary to safeguard the public interest (eg for the public provision of some infrastructure). Institutional statutes tend to fill gaps left by previous lenses, although some sectors (eg water and transport) are dealt with within institutional legislation (eg the Local Government Act).
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Figure 0.10: Lenses used to design statutes in the current system. The decreasing thickness and increasing transparency of each lens illustrates the fact that progressively less resource management content is found within statutes created using lower lenses.

We consider that outcomes-based statutes like the RMA should form the core of a future system, and that domain-based and location-based statutes should generally fill gaps. The order in which we apply a sectoral and institutional lens (eg whether we regulate sectors within institutional statutes or institutions within sectoral statutes) is more difficult. This is relevant to the question of how we treat the Local Government Act and Land Transport Management Act 2003. Some have suggested that we should integrate the infrastructure planning and funding components of these acts with each other and with the land use planning components of the RMA (into a single Planning Act). That could assist with the integrated management of urban growth and renewal.

The strength of connection needed between components of the local government system, and between land and other domains under the RMA, may mean that legislative separation between the RMA, Local Government Act, and Land Transport Management Act is desirable in a future system. Connections can be made through aligning planning processes under each. Some may, however, see the connection between infrastructure planning and land use as more significant, especially in high growth urban areas. That could see the integration of the infrastructure and land use components of the three acts within a single statute.

Some have also pointed to shortcomings in the RMA’s scope, pointing to its reactive, effects-based character. Arguably it is concerned with preventing “bads”, not pursuing positive outcomes. Although in practice the Act has been used to pursue a much wider range of outcomes than just impose biophysical limits, the active pursuit of people’s social, economic and cultural wellbeing could be more explicitly incorporated into a broad, outcomes-based statute like the RMA (as long as this was subject to firm biophysical bottom lines). The different kinds of tools deployed under various other outcomes-based statutes (eg the Biosecurity Act 1993 and Hazardous Substances and New Organisms Act 1996) may provide reason to keep them separate.

A key question is whether we should split up the RMA itself. There are risks and difficulties in carving out urban issues, the built environment, or land use planning from the Act. But in Chapter 8 we explore the idea that statutory separation between bottom lines and balancing, and the development of an Environmental Protection Act, may help to protect the former. An Environmental Protection Act would have a firm purpose and principles that did not contemplate the consideration of non-protective matters or trade-offs. It would operate primarily through the imposition of clear and precise rules and performance standards in subordinate instruments that flow from a clear purpose statement, not through extensive use of discretion and interpretation of policy in the consideration of permits.

To complement an Environmental Protection Act, a separate statute – a Resource Stewardship Act – could be enacted to provide a framework for balancing wellbeings above biophysical bottom lines, as well as enhancing the environment (see Figure 0.10 below).
Other key legislative design features of a future system can be traversed more briefly. We could enact a separate Allocation Act to allocate non-private resources like freshwater, or alternatively we could incorporate allocative decision-making into more general, outcomes-based legislation (eg the RMA or future equivalent) concerned with the adverse environmental effects of activities. We could integrate domain-based legislation (eg for climate change mitigation and the coastal marine area) into more general outcomes-based legislation like the RMA. Alternatively, these could be kept separate if the kinds of tools or approaches used under each were an inappropriate fit for more general statutory frameworks. A future system could integrate protective location-specific statutes (eg the Conservation Act and National Parks Act) into a Protected Areas Act. It may also be possible to integrate sector-specific statutes concerned with protection (eg forestry) into more general outcomes-based frameworks, although it seems more sensible to separate building legislation from more general frameworks (with the outcomes sought by each being more aligned). The protection of some resources (such as fish) within a framework focused on their exploitation may not be the best way to improve ecological outcomes or achieve holistic ecosystem-based management. It is crucial that any future system uphold existing Treaty settlement legislation, but there may be room for improvement in how this is integrated into more general frameworks.

Finally, one option for reform is to enact an overarching piece of strategic legislation – an Environmental Strategy Act – that influences all other resource management statutes. This could even be given some form of constitutional protection (eg entrenchment). It could be the integrative framework under which spatial planning occurred, and the place where an overarching resource management strategy (discussed in Chapter 11) was produced.

0.8 Institutional design

In Chapter 9 we consider the kinds of public institutions we have in the resource management system, and what they should do. The institutional landscape in the current system is extremely complex.

First, we outline a general framework for thinking about questions of institutional design. We then explore the general characteristics that institutions can have. Finally, we consider what characteristics our institutions may require in the future when performing the system’s seven core roles (identified in Chapter 7).

Providing checks and balances on the exercise of public power is one, but not the only, important reason we split up our resource management institutions. Different combinations of institutional characteristics offer us different strengths. We need to look, in a systematic way, at the different possible combinations of characteristics that our institutions can have before we decide which ones we may want. We also need ways to measure them. Overall, we think that the kinds of characteristic (and ways to measure them) outlined in Figure 0.12 are material, although it may well be possible to include others.
1. The degree of an institution’s independence

An institution can be independent of political influence (such as the Environment Court) or politically accountable (such as Ministers and regional councils).

Independent and accountable institutions offer different things, but it is the balance between them that is most important when looking at the system as a whole. In particular, independent institutions are most valuable where decisions are about implementing (rather than determining) values, where efficient management is important, or where they are necessary as a check and balance on accountable institutions.

2. The degree of an institution’s centralisation

An institution can be central in that it functions across the whole country (such as a government department) or locally (such as a district council). Both central and local institutions can be accountable or independent.

The principle of subsidiarity is important when determining how local or central institutions should be for a particular role or task. Decisions should be taken by those reflecting the appropriate community of interest. However, the efficiencies that can be gained by exploiting economies of scale are also important when considering centralisation or regionalisation of functions.

3. The extent of an institution’s subject focus

An institution can focus narrowly on specific resources or domains (such as the Queen Elizabeth II National Trust, concerned with open space) or have a wide focus (such as the Ministry for the Environment).

A wide subject focus is crucial at a strategic and national level. At the policy and operational levels, there is value in having institutions with more targeted focuses, to guard against objective overload.

4. The extent of an institution’s geographical focus

An institution can focus narrowly on a specific geographical area (such as the Fiordland Marine Guardians) or on a broad area (such as the Department of Conservation).

The formal creation of a geographically focused institution can be useful where the context of an area is truly unique. However, we should resist the temptation to throw new layers of institutions at particular problems as they arise.

5. The nature of an institution’s task

An institution can have different kinds of tasks. Among other things, it can create policy, impose regulation, or enforce decisions.

The key question is the extent to which multiple tasks should be the responsibility of a single institution, or distributed across different ones. There are advantages and disadvantages of both integrating and separating tasks.

6. The formality of an institution’s creation

Some institutions can be formally created (such as by statute), while others are created in a more informal way (such as by Cabinet decision).

Formality of creation is particularly important where an institution’s specific position and durability in the system is important to achieve our long-term objectives, and where it is likely to require protection from outside pressure.
7. The nature of an institution’s mandate

An institution can have a protective mandate (such as the Department of Conservation), or it can have an exploitative mandate and seek to secure the benefits of resource use (such as the Ministry for Primary Industries). The word “exploitative” is not intended to have any negative connotations. It simply means driving resource uses that are considered to be in the public interest.

Integrating mandates within an institution can promote synergies and integrated management. However, there are risks in combining quite different mandates within an institution, notably that one may get weakened in practice.

8. The extent of an institution’s power

An institution can have binding powers (such as a Minister who imposes a National Environmental Standard [NES]) or a recommendatory power (such as the Parliamentary Commissioner for the Environment inquiring into an environmental issue).

Figure 0.12 Spectra of institutional characteristics

Whether we want an institution to have a significant degree of power in any given situation will depend on its other characteristics (eg whether it is central or accountable). It can be valuable to have institutions that have no decision-making power, but which exist to hold to account those that do.

Desirable institutional characteristics can be reflected through either well-considered internal design of an institution (eg a council-controlled organisation has elements of both independence and accountability), or through the separation of institutions that then interact with each other in a defined way (eg councils are highly accountable, while the Environment Court is highly independent, and their roles are carefully distributed).

After exploring the general characteristics that institutions can have, we consider which ones may be desirable for institutions performing particular roles identified in Chapter 7 (setting bottom lines, making trade-offs, providing public goods, proactively pursuing positive outcomes, protecting and promoting Māori interests, resolving disputes, and allocating resources).

Both independence and accountability are needed in some measure for setting bottom lines, and this is best done by consciously separating our independent and accountable institutions. To the extent that decision-making on bottom lines is about implementing shared values rather than determining them, there may even be a greater role for independent institutions. There may also be a role in a future system for a wider ranging independent watchdog, in the form of a Resource Management Commission. Central government could also take a more proactive and comprehensive role in setting environmental bottom lines through, for example, the creation of a comprehensive Government Policy Statement. The system could provide for greater centralisation, or shared responsibilities, for the enforcement of environmental bottom lines.

A future system also needs to make trade-offs above bottom lines. This is a values-based exercise, and requires a significant focus on accountability. However, independent institutions can have important roles in providing advice and in constraining the politicisation of issues. A future system could also define relevant central and local communities of interest in a clearer and more predictable manner.

Current institutional arrangements for the provision of public goods and services are varied, and some depend upon historical circumstances. Where the relevant community of interest resides is crucial, as are questions of efficiency (both economies of scale and efficiencies from adopting commercial institutional models). The funding tools available to different kinds of institutions, and incentives, are extremely important. Funding is explored in Chapter 13.

In particular, we suggest that from a wider system perspective there are three core issues that need to be resolved before we decide on future institutional arrangements for the “three waters” (drinking water, waste-water and stormwater) sector. First, where does the relevant community of interest lie in controlling three waters services? Secondly, to what extent do we want to charge users the true cost of the services provided to them? And thirdly, at what scale should we socialise the costs of water services?

Turning to the pursuit of positive outcomes beyond the provision of public goods, we consider that two kinds of outcome require a more proactive approach, and could be assisted by a degree of institutional change. The first is urban planning, and the second is environmental enhancement. We shine spotlights on these in Chapter 9.3.

Institutions must protect and promote Māori interests in a future system, but there are different ways in which that could occur. To some extent the role can be discharged by existing institutions that are subject
to sufficiently strong directions to do so. Alternatively, institutions could be modified to be more reflective or representative of Māori interests. Another option would be to recognise or strengthen specifically Māori institutions as decision-makers in their own right, or provide for greater partnership.

It may be possible in a future system to draw a sharper distinction between a policy role (for accountable institutions) and a legal dispute resolution role (for independent institutions). It would also be possible for many different kinds of institutions to allocate non-private resources (e.g., freshwater). Their ideal characteristics will, however, depend on what we think the allocative role is for, as discussed in Chapter 7. Accountable institutions are important for deciding values (a principles-based approach to allocation), but independent ones could facilitate technocratic exercises (such as auctioning).

Institutions’ degree of centralisation may depend on the nature of the resource in question. Collaborative groups are one possible way forward for allocative questions, although they have their risks.

### 0.9 Public participation

In Chapter 10 we consider the role of public participation in the resource management system: what it can mean, its advantages and disadvantages, how it is treated in the current system, and how it could be approached in a future system. Much depends on the purpose for which we want the public to engage. Sometimes institutional reform (discussed in Chapter 9) can be an alternative to changing participatory rights.

Public participation refers to the involvement in a decision-making process, of a public nature, by those who are affected by a decision but do not make it. As shown in Figure 0.13 below, the public can participate in many different ways and to different degrees. Participation provides a number of benefits, but can also incur significant costs. In particular, how the system approaches participation has implications for the provision of information, the durability of decisions, the nature of relationships between authorities and the public, fairness and legitimacy, the quality of decisions, consultation fatigue, time, and cost. Extensive participatory rights can delay action and reduce the ability of the system to respond to rapidly changing conditions. But participation has much to offer the resource management system, supporting better decisions and promoting transparency and fairness. The challenge for a future system is to incorporate participatory processes that deliver benefits that outweigh their costs.

As discussed in Chapter 3, the system’s approach to participation is often not a “problem” per se – it is a tension between legitimate concerns and values.

The extent of participatory rights will differ depending on the type of decision being made and the scale of potential impacts. Values-based policy and the imposition of regulations which impact property rights will merit greater participation. Decisions with broader public impact merit greater public participation than those with localised impacts. Less public participation may be warranted when there are strong regulations in place to protect biophysical bottom lines.

At its inception, the RMA provided for very extensive public participation rights, partly because it gives decision-makers the power to erode people’s property rights. In particular, plan-making under the Act comes with a set of strong legal rights for submitters. However, participatory rights more broadly (e.g., for resource consent applications) have been narrowed substantially in recent years.

A variety of mechanisms has also been used to enable Māori to participate in resource management decisions. Some of these, such as the obligation on councils to consult or notify, place Māori in a passive role. More recent approaches have enabled iwi and hapū to initiate engagement and more actively protect their own interests. To some, the way forward may be less about strengthening participatory rights and more about institutional reform and partnership in decision-making (discussed in Chapter 9).

A future system could take different approaches to public participation in several areas, all of which come with risks and trade-offs. For example:

- If more certainty is built into plans, there will be less need for participation in consenting decisions, as the outcomes will be more predictable.
- A future system could potentially combine public participation processes across several statutes.
- Non-notification of resource consents can result in poor decisions due to the council being unaware of Māori and/or public concerns. To address this, non-notification could be replaced by a category of consent which is publicly notified but where submitters do not have hearing or appeal rights.
- Achieving a fair process in the courts requires active measures to “level the playing field” between those with greater and lesser resources to run their cases.

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**Figure 0.13: The International Association for Public Participation’s public participation spectrum**

<table>
<thead>
<tr>
<th>Inform</th>
<th>Consult</th>
<th>Involve</th>
<th>Collaborate</th>
<th>Empower</th>
</tr>
</thead>
<tbody>
<tr>
<td>Provide public with information</td>
<td>Obtain feedback</td>
<td>Work directly with public throughout the process</td>
<td>Partner with the public in each aspect of the decision</td>
<td>Decision making by the public</td>
</tr>
</tbody>
</table>

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Simply providing the opportunity for members of the public to make submissions will not likely result in the broad range of interests being expressed. A future system may need to adopt a more proactive approach to public participation, to ensure all relevant voices are heard. This may necessitate the use of novel mechanisms.

Two key purposes of participation, the provision of information to decision-makers and providing a check and balance on developers and councils, could potentially be provided (at least in part) by other elements of the system, including institutional measures (e.g., providing appeal rights to a Public Defender’s Office).

The ability to lodge merits appeals to an appellate court (the Environment Court) is not merely a duplication of the first-instance hearing, but provides an important independent check and balance on devolved decision-making. Therefore while single-hearing planning processes can substantially reduce the time it takes for a plan to become operative, they need to be carefully designed to ensure both rigour and fairness.

**0.10 Strategic, regulatory, and non-regulatory tools**

Having considered the norms, functions and structures of the resource management system, in Chapters 11–14 we turn to the kinds of tools it can use. “Tools” is a broad label we are using to describe public interventions that are intended to influence human behaviour directly—both public institutions and private persons. They are interventions that bite in some way. Tools can be placed on a broad spectrum according to the amount of freedom of action people enjoy (see Figure 0.14 below). They are not just about regulation. “Plans” can be seen as a tool in their own right. Alternatively, they can be seen as a mechanism for combining different kinds of tools into a coherent instrument.

**Strategic tools**

In Chapter 11 we explore strategic tools. A strategic tool is an overarching instrument that guides the actions of public authorities over time without being binding on people as a matter of law. Some have criticised the current system for not being strategic (forward-thinking) enough, and a future system could embrace strategic tools more in performing most of its core roles identified in Chapter 7. In particular, the system could require the government to promulgate a single, overarching resource management strategy. This could have three defining features:

1. It would be mandatory
2. It would be integrated across all domains, sectors, spaces and institutions
3. It would have a clear and firm legal pathway to implementation under all relevant statutory frameworks

The spatial components of such a strategy could be implemented through national and regional spatial planning. Spatial planning already occurs in the current resource management system, but it could be deployed more widely, in a more integrated and strategic way, and with greater legal influence over more detailed decision-making.

Alternatively, or in addition, under the RMA (or future equivalent) central government could express its expectations and requirements through an integrated government policy statement rather than relying on ad hoc, fragmented and overlapping instruments like National Policy Statements, NESs, National Planning Standards and other regulations. Statutory purpose statements can also be powerful strategic tools in their...
own right. If the system is to drive change, it needs to do so through statutes that are premised on the need for it and which mutually reinforce each other. Targets and budgets are other strategic tools that could be embraced more in a future system, although they may not apply to all roles and contexts. A strategic approach to government spending and investment could also drive significant change. In Chapter 11.4 we shine a spotlight on the Treasury’s “wellbeing” budget. We also note the recent announcement of the government’s $100 million Green Investment Fund.

**Regulatory tools**

The defining feature of regulatory tools is that they have teeth – they can result in sanctions on people if they do not comply. They tell people what they can and cannot do. However, regulatory tools are not just “regulations” in the traditional sense. There are many ways in which people can be compelled or coerced into acting or refraining from acting. In Chapter 12 we explore some of these.

Property and other rights are important regulatory tools, even if they are not usually thought of as such. Although the privatisation of resources is not a sure-fire way to ensure responsible stewardship of them, the ideas of environmental human rights and rights for nature are other ways in which the system can use rights to protect the environment. On a more prosaic level, some rights will be necessary in a future system to provide investment certainty (that people can continue to use a resource for a specified amount of time). However, such rights need to bow to the public interest in environmental bottom lines, and may be better characterised as privileges.

It would also be possible for a future system to use regulatory tools to allocate rights to use non-private resources, if it had reasonably precise principles upon which those decisions could be made. However, reallocating resources and “de-allocating” overallocated resources pose greater challenges. This is particularly problematic for freshwater. Māori interests may need to be resolved before a regulatory or principles-based approach to the allocation of some resources can be deployed widely. This is a vexed question, and one that is ultimately reliant on political will.

Regulatory tools are crucial for protecting environmental bottom lines. These require expression through clear regulatory restrictions in order to be effective as a safety net. In Chapter 12.3 we shine spotlights on Water Conservation Orders and rāhui. But regulatory tools can be used to make people do positive things, not just to restrict or prevent them from causing harm. Public authorities need to be obliged by statute to discharge regulatory and other functions, accompanied by adequate resourcing and institutional checks and balances (see Chapter 9). Particularly important are duties to monitor the state of the environment. A future system could more effectively tie the results of such monitoring to a requirement to take action in response.

In a libertarian political context, it is much more challenging to force private people to take action through regulatory means if it is not linked to adverse effects that they are causing. However, offsetting using a principle of net gain (if used carefully) provides one option for requiring private action, and firmer duties may be possible if the funds and resources are provided for people to comply with them. The prospect of future or conditional regulation can also encourage people to act voluntarily, and regulatory processes can be made simpler or easier for desirable activities relative to undesirable ones.

In Chapter 12 we also consider plans, as instruments within which a variety of tools come together. Some of these are primarily regulatory plans, as under the RMA. In relation to these, we suggest that a future system is likely to require both an effects-based and activity-based approach to planning. That said, greater predictability and precision could be injected into plans, with less reliance on contextual and discretionary decision-making at the permitting level (particularly for bottom lines). Alternative plan-making processes could be embraced, such as using a single-stage hearings panel (rather than relying on a first instance hearing followed by appeal rights). That is also touched upon in the context of public participation in Chapter 10.

Effective compliance and enforcement of regulatory tools is an essential component of any future system. A number of options may be possible here, from using existing mechanisms better (eg the development of national direction under the RMA) to significant structural change (eg relocating enforcement functions to different – including central – institutions).

**Non-regulatory tools**

In Chapter 13 we explore non-regulatory tools. While regulatory tools are important for defending bottom lines, imposing regulatory minimum outcomes is a recipe for long-term environmental and social mediocrity. There are limits to how much regulation can drive positive change. Non-regulatory tools – including economic instruments – will be important in driving a race to the top.

How the activities of public institutions are funded is a crucial consideration, and one that has been mentioned in multiple places of this report already. Often, not much can be achieved without money. For one, a future system must properly fund the policy and regulatory responsibilities of public authorities, including those of local government. There may be several ways of doing this better. Of particular importance are the funding pressures and constraints on local government, which have significant implications for the delivery of core goods and services (eg water and transport infrastructure).

Some have also suggested that funding incentives on local government – such as a reliance on rates – have led to sub-optimal outcomes (eg a bias against facilitating urban growth). This is partly an argument about who should pay, and in what measure. There are two general ways in which costs can be distributed by using different funding tools: between current and future communities; and between people who benefit and those who do not. The mix of tools we use may depend on our approach to distributional equity and intergenerational equity. A
future system will also need to consider whether to tie particular sources of revenue with particular kinds of expenditure (hypothecharion of funds). Funding tools (eg for infrastructure) must be closely linked with regulatory tools (eg land use plans), to ensure that the objectives underpinning both are realised in practice.

Funding tools can have significant implications for how private persons behave. But financial incentives (economic instruments) can also be used in a more deliberate way to shape behaviour in ways that regulatory tools cannot. Many kinds of economic instruments are available, and some are already provided for in the current system. In Chapter 13 we outline a number of these – such as taxes, subsidies and feebate schemes. A future system could potentially make more use of economic instruments to drive changes in people’s behaviour and catalyse private investment in desirable activities. Non-economic incentives can also be used to change people’s behaviour, including through the use of behaviourial “nudges”. Such measures could be deployed in a more systemic and creative way in a future system, if used with care.

Economic tools (such as auctioning, tendering and transferable rights) can also be used as mechanisms to allocate and reallocate non-private resources like freshwater. However, they have potential risks and downsides. In particular, tradeable permits have the potential to enhance efficiency, but need to be subject to careful regulatory constraints to ensure the local environment is protected. To some, reducing allocative choices to monetary terms may be objectionable in principle.

Charging for non-private resources is not just about providing a mechanism for allocation. A resource may not need to be allocated in a proactive way, but still legitimately have a price. A future system could be more active in charging for the use of such resources (eg freshwater or coastal space), even if they were not scarce or associated with a specific need for revenue. That would recognise that the public has an interest in obtaining a return from the private use of such resources. However, widespread charging may face practical and political challenges.

**Harmonising our tools**

In Chapter 14 we explore ways in which a future resource management system might harmonise strategic, regulatory, and non-regulatory tools. This is in both a normative sense (the outcomes that different tools are seeking) and a procedural sense (making sure they interact in clear and timely ways).

The current system could be better aligned in a normative sense, so that the relationships between its aims were made clearer and more consistent. As described in Chapter 12, central government could be required to create a comprehensive and integrated statement of national policy/regulations under the RMA (a Government Policy Statement), recognising that central government is a core actor, rather than just an intervenor, in resource management matters. We should also remember that the goal towards which tools are being aligned is wider than just the pursuit of efficiency, which has implications for how we manage urban expansion (including the use of a rural-urban boundary and whether we adopt a competitive land-markets approach).

As described in Chapter 11, a future system could better align its different goals through an overarching resource management strategy. A spatial planning process could also help align the spatial components of different statutory frameworks. Furthermore, economic tools could be used to align the basic incentives on private persons with the broader goals the system is trying to achieve.

One far-reaching idea would be to change the basis of the tax system so that it both raised revenue and provided positive incentives for environmental enhancement (through an environmental footprint tax).

It is also important that the tools in a future system align well in a procedural sense – that they interact in clear, coherent, and timely ways. This manifests in different ways. One is the question of whether tools should “overlap”, in that we use multiple tools to achieve the same goals. To some, that may be inefficient. But overlapping tools may not always be undesirable. For example, there may be potential in a future system for regulatory and non-regulatory approaches to climate change mitigation to coexist, and be mutually reinforcing. In particular, the RMA could be more geared towards addressing climate change mitigation alongside a robust emissions trading scheme.

The procedural alignment of regulatory and non-regulatory tools (such as land use regulation and infrastructure funding) is particularly important in the context of rapid urban growth. Generally, it would be possible for connections to be made earlier in the policy and development cycle for land use planning under the RMA and the associated planning and funding of core infrastructure under the Local Government Act and Land Transport Management Act. One approach to create clearer connections within the resource management system would be legislative redesign: to combine the land use and infrastructure planning and funding components of these statutes. An alternative could be the use of an additional, overarching layer of strategic planning. One expression of this could be a national and/or regional spatial plan(s), which could have strategic influence or direct regulatory effect.

But the need for alignment and harmonisation between planning instruments goes beyond the context of urban growth and the three statutes mentioned above. Many planning instruments exist in the current system, and there is a mix of strong, weak and non-existent connections between them. Some of these are illustrated in Chapter 14 in Figures 14.2 and 14.3. Permitting processes under multiple statutes could also be aligned or rationalised. A “front-of-house” service for permitting, in which multiple decisions under different statutory frameworks are made but they are integrated from the perspective of the applicant and/or the public, is one interesting possibility.

Finally, effective evaluation is essential; in particular, a future system could have clearer triggers requiring some form of policy or regulatory action to be taken in response to the measurement of unacceptable indicators. We do
not monitor for the sake of it, and evaluation could be done in a more systemic way.

Overall, the tools in a future system could be more harmonised in both a normative and a procedural sense. Central to this alignment is the idea of integrated strategic planning – the production of either an overarching strategic plan that filters down clearly to subordinate frameworks, or at least a plan that aligns the spatial components of the system (notably land use and infrastructure). Spatial planning could be done on a national and/or regional basis, and would allow for the regulatory (land use) and funding (infrastructure) components of urban growth and development to be harmonised. Yet we also need to be aware of the need to align the non-spatial components of the system through an overarching strategic document, and to take opportunities to strengthen horizontal links between planning and permitting processes occurring under separate statutory frameworks.

0.11 Models for a future system

In Chapter 15, we present three high level models for reform, based on combinations of options that have been discussed throughout the report. A great many combinations are possible, and therefore many legitimate models can be produced (not just the three we present in this report). We also emphasise that we are not here selecting a preferred model, but simply showcasing how the preceding analysis can be used to produce tangible models. They are designed to be played around with. Only some features of each model are summarised below, and we encourage readers to engage with the additional detail and brief assessments contained in Chapter 15.

Model 1

The most striking feature of Model 1 is the retention of the RMA as an integrated statute at the core of the system for managing natural and physical resources, and for many other structural features of the system to remain the same. Alongside the RMA there would still be the Local Government Act and the Land Transport Management Act, separate legislation for hazardous substances and new organisms, and existing domain- and location-specific legislation like the Conservation Act and Climate Change Response Act.

However, Model 1 would see the introduction of an additional layer of strategic legislation, in the form of a Spatial Planning Act. This would mandate the creation of spatial plans, with the intention of them guiding integrated decision-making under the RMA, Local Government Act, Land Transport Management Act, and the spatial components of other statutes. The EEZ Act would also be melded into the RMA to form a single statute for the sustainable management of land and sea. Model 1 would also see the expansion of some tools, and the transfer of some institutional responsibilities. The system would remain readily recognisable as the one we have now, but with improvements.

Model 2

Model 2 involves a greater degree of structural change than Model 1. The RMA would be split into a Planning Act and an Environment Act, and the infrastructure planning and funding components of the Local Government Act and Land Transport Management Act would be incorporated in the Planning Act. So too would proposed Housing and Urban Development Authority legislation. There would be a separate Allocation Act, which would deal with the current resource allocation functions of the RMA, Crown Minerals Act, and Fisheries Act. Included in the Environment Act would be the protective elements of the Fisheries Act, Forests Act, heritage legislation, and the Environmental Reporting Act 2015. There would be no separate strategic spatial planning statute, as this would occur under the Planning Act.

The EEZ Act would remain separate, as would climate legislation relating to the emissions trading scheme, but conservation and species protection legislation would be integrated into a single Protected Areas and Species Act. Local government arrangements would be overhauled, with the creation of regional level unitary councils, the decentralisation of land transport planning, and the compulsory creation of regional level council-controlled organisations for the provision of water and waste-water services. Unitary councils would do planning, and a beefed-up EPA would deal with environmental regulation.

Model 3

Model 3 also represents fairly fundamental change to the existing system, but in different ways to Model 2. The RMA would be split into an Environmental Protection Act and a Resource Stewardship Act. This split would not be about built vs natural, or land vs common-pool resources (like air and water). Instead, the Environmental Protection Act would be concerned with imposing strict bottom lines under a protective purpose, and the Resource Stewardship Act would be about facilitating trade-offs and pursuing synergies in resource use above bottom lines. The Local Government Act and Land Transport Management Act would remain and perform the same functions as they do now. But there also would be an additional overarching act above these four core statutes: the Environmental Strategy Act. That would provide common principles that would have to be given effect to in all other resource management legislation. It would also require the production of spatial plans to align more targeted decisions on land use planning and infrastructure funding made under the four core acts mentioned above. A separate Allocation Act would be enacted, incorporating the allocative parts of the RMA and Fisheries Act (but not the Crown Minerals Act, which would remain separate).

To counteract the fragmentary effect of these reforms (ie the creation of several additional statutes), a number of existing statutes would be integrated into them. Relevant provisions of legislation concerning the exclusive economic zone, climate change, heritage, pest management, environmental reporting, waste minimisation, conservation land, protection of flora and
fauna, and protection of fisheries would be contained in one or more of the six core statutes described above, depending on the kind of role being performed. The plans produced under these acts would therefore be more integrated and wider ranging than at present. More specific frameworks such as hazardous substances and new organisms, civil defence, and construction would remain separate. So too would the Marine and Coastal Area (Takutai Moana) Act 2011. The existing Environment Act would be renamed the Environmental Governance Act, and subsume provisions that establish permanent institutions like the Environment Court, the EPA, and a new Resource Management Commission.

There would be significant institutional and funding reform. There would be no local government reorganisation per se, but responsibility for setting bottom lines under the Environmental Protection Act would fall to an EPA with strengthened mandate and greater resources. Transport services would continue to be provided as at present, but the delivery of water and waste-water services would become the responsibility of regional level, arm’s-length Crown entities. That would require bespoke legislation – a Water Services Act – which would also need to be aligned through the spatial planning process mentioned above. An independent Resource Management Commission would also be established, which would provide independent advice to government and hold it to account in relation to environmental bottom lines, and subsume the Parliamentary Commissioner for the Environment and proposed Climate Commission. Local government funding would come primarily from a regional GST, and at a national level the tax system would be gradually reconfigured on the basis of an environmental footprint tax.

0.12 The future of reform

New Zealand’s current resource management system is not delivering the environmental, social, economic and cultural outcomes we want. It is increasingly complex, incoherent, and inaccessible. We are convinced we can do better, and reforming the system is a conversation all New Zealanders should be a part of. It is not a technocratic exercise just for lawyers and planners, but one that goes to the heart of our values as a nation and as human beings.

In this report, and previous working papers, we have sought to contribute to an already lively debate about reform. Through the analysis of various themes – the system’s norms, functions, structures, and tools – we have sketched out a framework within which big picture questions can be asked, and within which the differences between solutions can be meaningfully assessed. In particular, we have presented three tangible system-wide models for what a reform package could look like.

These models are a conversation starter, and present building blocks for people to play around with. Primarily, they are designed to showcase how various options presented in the report could work together, and we have made a deliberate choice not to represent the status quo as one of the models. However, it may be that a preferred model does not look like any of those presented here. People can mix and match their features – or add entirely different ones – depending on what they think the key drivers of reform are.

Drivers will vary from person to person. To some, underlying concerns may be normative (eg to change the basic principles underpinning our laws to ones that are ecocentric, or more based on Te Ao Māori). To others, they may be structural (integrating or aligning our existing statutes, or changing what our institutions do). And to some, they may more about a general feeling that we should not rock the boat too much, resulting in reforms that retain the heart of what we have now. For example, we could use our existing tools better. That is potentially a legitimate outcome – while we should be ambitious, a first principles review does not necessarily require fundamental reform in all areas. Those two things should not be confused. We are not faced with a choice between throwing out the RMA or tinkering with it, and a preferred model may be different to any of those presented here.

It is also too simplistic to talk about reform as if timing doesn’t matter. Change can, and must, happen over time. Evolution is not revolution, even though some elements of reform may be urgent (and, in fact, are already in train).

There are two crucial observations here. The first is that we should not artificially shut down the scope of what is considered in the first place. Indeed, that is the point of thinking about a single “system”, where components have significant connections between them. Secondly, we need a plan for reform – not just what a future system will look like, but when its various components can come into being in a way that allows everyone to adjust and take the journey together.

This report is the culmination of the project’s first phase. It seeks to provide a foundation for a first principles conversation about system-wide reform. It provides options and analysis, but does not recommend any particular model. We need a wide ranging discussion before we jump to particular solutions. It will be followed by a second phase in 2019, which will have three purposes:

• To generate a set of criteria and select a preferred model for reform
• To fully develop the selected model
• To map out an implementation pathway to reform

EDS is inviting considered feedback on this report (Phase 1) to inform Phase 2.

Ultimately, the prospect of fundamental reform requires a unified approach and level of ambition across government (and, ideally, cross-party support). We cannot afford reform that is just another exercise to amend the RMA. We need to look across traditional policy siloes, statutory frameworks and institutional fiefdoms, at both the political level and the departmental level. This report takes the first steps on a journey that will call for a great deal of leadership, courage, and an openness to doing things differently.
ENDNOTES

1 For example ecosystems, including their constituent parts, freshwater, air and atmosphere, land/soil, marine and heat.

2 However, acknowledgement is also made of the existence of broad claims by Māori around rights to water.

3 Purely private actions are not conceived of as forming part of the “system”, although public actions that influence private behaviour are.

4 International Association for Public Participation Public participation spectrum (February 2017) at <www.iap2.org>.
This project analyses New Zealand’s resource management system from first principles, and outlines options for reform. It considers what a fit-for-purpose system might look like for the future. The scope of the review is wide because we are adopting a wide definition of the system under analysis. But at its core are the topics of environmental protection, urban and infrastructure planning, and the ways in which we use our natural and physical resources to achieve the outcomes we want. Simply put: Can we manage our natural and physical resources better?

1.1 Problems and issues: A strong push for a rethink

It is clear that as a country we are not doing this well enough. Reforms to the Resource Management Act 1991 (RMA) – New Zealand’s main environmental statute – have occurred in a piecemeal fashion since it was passed, producing an overarching framework and patchwork of provisions that have lost much of their original simplicity and coherence. A review of the Act as a whole is now due. However, the system through which we manage our natural and built environments is much wider than the RMA. For example, it is about infrastructure planning and funding, conservation management, climate change mitigation, the role of iwi and hapū, institutional structures, capacity and capability, and a raft of other topics. The ways in which our laws address these topics are not always coherent and connected, even though they are intimately related to each other. It is not just about legislation, either: attitudes, institutions, incentives, practice, and resourcing are just as important.

It is in this context of complexity and fragmentation that significant environmental challenges have emerged in recent times. Many indicators of environmental health are now rapidly declining. For some – such as freshwater and coastal environments – tipping points appear not far away. Cumulative effects are not being addressed well, and the result has been environmental degradation. Climate change is a pressing issue that needs addressing. Environmental laws like the RMA – now over 25 years old – have not fully realised their aspirations of sustainable resource management and ecosystem integrity.

As well as environmental problems, the system is failing to deliver on social, economic and cultural outcomes. This is particularly evident in large urban areas (especially Auckland), where dramatic increases in population and development pressures, a booming housing market, and a scarcity of resources have caused many to question whether the system remains fit for purpose in the context of cities. At the forefront of complaints are housing unaffordability, traffic congestion and other pressures on public infrastructure, constraints on economic growth, and excessive red tape and development uncertainty.

The RMA has always had the goal of integrated environmental management and has been widely admired. It provides a single framework for managing both urban and non-urban areas and for managing land use/urban growth as well as common pool resources like air, freshwater and the marine environment. But the urban problems the country is now facing are shaking the foundations of this ethos and provoking difficult questions. Are there better ways to achieve good urban outcomes while not threatening the integrity of the natural environment? Should management be focused on integrated urban management rather than integrated environmental management? Are cities so different that they require special treatment? A recent report on urban planning by New Zealand’s Productivity Commission has helped to invigorate this conversation. However, we need to be mindful that the urban planning “system” is just one part of a wider resource management system. Others (notably Infrastructure New Zealand and Local Government New Zealand) have also made valuable “blue skies” forays into whole-of-system reform, albeit with different scopes and focuses.

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

The purpose of this project is to take a first principles look at the resource management system in New Zealand and outline options for reform. Exactly what we mean by the “resource management system” is explored in Chapter 2, where we develop a conceptual framework for analysis. By “first principles” we generally mean that we are asking fundamental, future-focused questions about how our overall package of laws, institutions and interventions should and can work. We are not just reacting to particular problems or looking at better ways to do the same things. We are asking why we do certain things, whether we should be doing them, and how we should be doing things in a future that will be quite different from the present.

The project has involved a phased programme of research and analytical work. It has considered a wide range of themes, topics and issues. Its primary lens is a legal one – focused on optimal regulatory arrangements – but it also investigates non-legal matters. The law is a formal framework within which many more subtle features of the system operate. This report encompasses diverse topics, including legal principles and environmental ethics, legislative design, governance and institutional structures, participatory arrangements, and legal/economic tools. It has involved analysis of primary and secondary written sources, interviews, international study tours, engagement at conferences and numerous workshop sessions.

The project is wide-ranging, in that it seeks to explore all core facets of a broadly defined system within a single analytical framework. The holistic and interconnected view this gives is, we think, crucial to the review of a system that can be split into parts in different ways (by domain, by sector, by process, by outcome, and so forth) but which are all inherently linked. As such, analysis begins at the conceptual level, and does not engage in detailed legislative drafting.

The primary contribution of this project is to provide a framework within which common questions can be asked...
in a coherent and systematic way. But we are also mindful of the need for analysis to lead to concrete change. To this end, analysis in each chapter (or part) culminates in broad options for change, and the report as a whole leads to the presentation of three potential overall models for a future system (see Chapter 15).

1.3 Why are we doing it?

The impetus for this broad look at the resource management system has been a growing list of existing and emerging individual problems. Some of these have been touched on in broad terms above, and are explored more in Chapter 3. Problems are legion, but vary in importance depending on who you talk to. They include the general topics of infrastructure, urban growth, housing unaffordability, water quality, process complexity, climate change, marine protection (and others). Issues stem from many different parts of the system (institutions, practice, legislation, norms, etc).

This array of problems is the key trigger for the work. There would be little appetite for reform if everything was working well! At some point the accumulation of issues becomes so great, and so suggestive of deeper systemic problems, that it merits sitting back and considering how the system works as a whole. There is a growing consensus among many people and organisations in New Zealand that we have reached this kind of systemic reflection point. In addition, a focus on the wider system presents a chance to reflect on future risks and opportunities that may have otherwise gone unnoticed. To the question “If it isn’t broken, why fix it?”, we can respond with two answers: “Because we may unearth opportunities we did not know existed” and “Because today’s complacency may be tomorrow’s problem.” Times can change alarmingly quickly and, as described in Chapter 3, it looks like they will over the coming decades. Therefore rather than starting with a problem definition as the basis for analysis, we prefer to take a less orthodox approach: focusing on the context against which reform will or should happen. The past offers lessons, the present poses problems and tensions, and the future presents challenges and opportunities. All are equally important in the reform equation: we are not just solving a set of current problems.

The government has confirmed that it will commence its own first principles review of the resource management system in 2019. With this project, we aim to inform this process as well as broaden the debate around system reform.

Finally, some words need to be said about the format and nature of this report. First, because it needs to cover a lot of ground, it does not claim to address every specific issue or topic. Rather, the report provides a framework for analysis. Secondly, it is a synthesis report, incorporating analysis from three working papers produced over the previous 18 months. Although this report is a standalone document, we frequently refer readers to the more detailed analysis contained in the working papers.

Thirdly, as well as providing summaries of key points throughout chapters (in blue boxes), at the end of each chapter (or at appropriate places) we provide tables of high-level options for reform. We combine these in the Appendix, with the intention that readers can consider for themselves how those choices could (or could not) work together. Fourthly, while we do not shy away from offering perspectives on features that a future system would need and offer three tangible models for a future system, we do not at this stage make firm recommendations. The next step will be to produce a desired model, and flesh it out in greater detail. That model may not end up looking exactly like those presented in this report.
ENDNOTES

1 New Zealand Productivity Commission Better urban planning (2017).
3 D Parker “Two step RMA reform to start by fixing the previous government’s blunders” (9 November 2018) Beehive.govt.nz <www.beehive.govt.nz>.
2: CONCEPTUALISING THE RESOURCE MANAGEMENT SYSTEM
2.1 Introduction: The nature of a resource management system

In this chapter we describe the project’s conceptual analytical framework: the way in which we are conceiving of the system, and the way in which the system will be analysed. We look first at its definition, then explain how the report divides the system into its constituent parts for deeper analysis.

At the outset, it is worth reflecting briefly on two fundamental questions: first, what is the “resource management system”? And, secondly, what is it for? The term sounds technical, confusing, and complex. Lawyers, planners, economists and academics devote entire careers to understanding, and helping others to understand, the resource management system.

The resource management system describes a general idea rather than a concrete thing or universally agreed set of rules and processes. It is not defined in statute, nor is it the preserve of one particular profession. In most contexts, people do not choose to use the term at all, preferring the relative precision of a particular statute (like the RMA), field of study (like law or economics), or resource (eg water management).

In this project we will define the scope of the system in our own way, in light of the project’s broad purpose. This definition is explored in more detail below but, essentially, we have conceived the system as a set of public interventions designed to shape how we use, or do not use, our physical surroundings.

At its most basic, the resource management system is the set of public interventions designed to influence how, when, where, why and by whom resources are (or are not) used.

Before exploring the technicalities of scope and definition, however, it is worth observing something much simpler, yet more profound. We do not manage resources for the sake of it. Instead, we construct a resource management system to provide us with some of the most fundamental outcomes that we want as a society. It is a very human question about what we value.

We want a healthy environment. We want to experience nature. We want jobs. We want affordable houses. We want water to come out when we turn the tap on. We expect a blaze of light when we flick the light switch. We do not particularly desire to be stuck in traffic for two hours every day to get to work. We want all of this at the same time.

People may argue about whether we do want certain things (eg denser suburban areas). But a fundamental function of the resource management system is to provide a vehicle for defining our collective aims, and to allow them to change (or not change) over time. The system is not inherently about stopping us from doing things; it is about fostering, and furthering, the collective human (or natural) enterprise.

However, it is not always possible to have everything we want at the same time. Decisions will also produce winners and losers. A formal system is necessary partly because what some people want can come into conflict with what others want. This does not mean we should stop pursuing genuine win-win situations. But we need to engage with hard trade-offs and prioritisations. It is not enough for the system to make a laundry list of all things great and good, and assume they are compatible. Many will not be.

We also need to consider how we realise our aims. This involves a more objective and evidence-based debate over the kinds of mechanisms that are likely to prove more or less effective. This is about the kinds of tools we want to put in our toolbox (eg regulation, pricing and subsidies), and how they operate together over time.

However, doing these things are all academic exercises if we don’t know whether our goals are being met. The system therefore measure what we have against what we want, and provide for corrective action. In other words, the system needs an evaluation and feedback mechanism.

A fundamental function of the resource management system is to provide a vehicle for defining our collective aims, and to allow them to change (or not change) over time. Our collective aims cannot just be a wish-list of conflicting aspirations; synergies (win-win situations) should be pursued, but difficult tensions and trade-offs must also be resolved. The system must also set out methods to achieve our aims over time, and provide a way to determine if we are achieving what we want (and how to change things if we are not).

What do we want?

Are we achieving what we want?

How do we get there?

Figure 2.1: The basic questions that a resource management system needs to answer.
2.2 Defining the resource management system

The concept of the resource management system loses its utility if we define it too widely (e.g., to include asking what we want in areas like health and safety, the land transfer system, or employment law). The job becomes too difficult, solutions too unwieldy, and the overall story too incoherent. But if we define it too narrowly (e.g., only the RMA) we may lose the value of big picture reform (e.g., by not including things like funding mechanisms, or the incentives provided by our wider system of taxation). Its components need to be sufficiently interconnected and to have real influence over each other for a “system” label to be useful.

So what is the common factor that means a question or issue is one of resource management? There is a common core of topics that most would intuitively accept as being within scope. Land use planning is one (e.g., basic zoning rules in a district plan). The protection of the “environment” is another (e.g., policies and regulations about biodiversity protection, water quality and soil health). But there are many grey areas. People may argue whether transport, or local government, or energy, or funding are more appropriately analysed as part of different systems (e.g., a “local government system” encompassing all things councils do, including concerts and liquor control, or a “transport” system that includes things like speed limits).

In reality, extensive overlap exists between multiple systems with ill-defined edges. Flow-on effects between systems need to be carefully considered when placing one system at the forefront of analysis.

We need to define the resource management system in a useful, yet flexible, way. There are different ways to do this. First, we could define resource management by the kinds of outcomes sought (environmental, social, economic, cultural, etc.), or by the boundaries of existing statutes (e.g., the RMA, the Local Government Act), or by “topics” (e.g., housing, transport, water) causes difficulties.

This project defines New Zealand’s resource management system by defining its four constituent terms. It is crucial to remember that this is not an exclusive system. Many components of it will also rightly belong to other systems.

Figure 2.2: Overlap between multiple systems. For our purposes, the resource management system is the central concern, but for others it may not be.

Grey Lynn, Auckland
A definition of New Zealand’s resource management system

In a nutshell, the resource management system is about how we shape our physical surroundings. A more extensive definition is provided in Figure 2.3.

Two things need to be noted about this definition of the resource management system. First, there is nothing that limits it to particular kinds of “outcomes” (eg economic, social or environmental). Some may contend that the system should not have a role in pursuing social or economic goals (eg in combating obesity or reducing crime rates). However, we consider that many legitimate purposes (not just environmental ones) can influence how we choose to manage resources. These rest on complex choices of ethics and principles, and require more considered analysis (see Chapters 4-5). But it would be premature to shut down that conversation by narrowly defining what the system can pursue.

Secondly, there are no explicit references to people and communities in the definition. This is deliberate. Of course, people and communities are part of, and not separate to, the environment and resources in which they live. But the system as defined is about public interventions that shape the relationships between people and their physical surroundings, not public interventions designed to manage people and communities themselves.

No definition will be perfectly precise, and this may be for the best. The resource management system needs to be conceived as a series of connected parts, and thus be open to extension and compression. For example, construction standards for private buildings may fall within scope, but their connection with other parts may prove to be too tenuous to be useful. In practice, most consideration is given to those areas that are at the heart of how we manage resources: notably those aspects covered by the RMA. However, this is not to dismiss the importance of other aspects; it is simply a matter of relative focus.

Finally, the main purpose of this project is to contribute to government reform (or any independent review panel which may be established on the topic). As such, it deliberately limits the system to questions of management – that is, public interventions that are imposed (or deliberately not imposed) to influence public and private action (such as regulations, funding and other incentives). That is not to demean the importance of behaviour change at the level of individuals or companies, which can be affected by other drivers. It simply reflects what government – and therefore this project – can influence.

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| “New Zealand” | The resource management system operates within the geographical constraints of New Zealand, which includes (with relevant limitations) areas where New Zealand has sovereignty or sovereign rights. |
| “Resource” | A resource can be broadly defined as a natural and physical resource. (To the extent that seeing the environment in terms of “resources” is objectionable, the system can be recast as the “environmental” management system.) Resources and environment include: |
| | • Both natural resources/environment (broadly, things that would exist if humans did not) and built resources/environment (eg buildings, infrastructure) |
| | • Both private resources (eg land, buildings, infrastructure) and public resources (eg air, water, infrastructure) |
| | • Urban, rural, conservation and marine resources (across all New Zealand’s geographical areas) |
| “Management” | Resource management includes the following public interventions in relation to the resources described above: |
| | • Regulation: requiring or restricting human action (you must/must not) |
| | • Behavioural incentives: influencing human action (you should) |
| | • Resourcing/funding: enabling human action (you can) |
| | In order to generate the following kinds of action: |
| | • Limiting or preventing the use of resources to manage adverse impacts (environmental protection – whether resources are used, and how) |
| | • Influencing the use of resources for environmental, social and economic benefit (economic and social planning, and environmental enhancement – how and why resources are used) |
| | • Shaping the spatial distribution of resource use, protection and enhancement (spatial planning – what happens where) |
| | • Shaping the temporal distribution of resource use, protection and enhancement (strategic planning – when things happen) |
| | • Distributing resources to different parties or communities of interest (allocation – who gets what) |
| “System” | The system conceived of here is the framework of norms, functions, structures and tools within which all of these interventions interact. This framework forms the structure of the report. |

Figure 2.3: Definition of the resource management system
2.3 Conceptual framework for analysis of the resource management system: Options

A definition of the resource management system is primarily about scoping the boundaries of inquiry, and does not itself provide an effective framework for analysis within them. How can we "chunk" the system into meaningful and manageable units for analysis?

There are different kinds of conceptual frameworks that could be used in a study of this nature. A number of efforts have been undertaken in recent years to consider reform of the system, and each uses quite a different framework, partly because each approaches issues from a particular perspective (eg infrastructure, local governance or urban planning). There is nothing wrong with this. Yet it is worth emphasising that the approach taken should reflect the purpose of the exercise. A focus on urban planning is appropriate if we wish to optimise urban outcomes. A focus on governance is appropriate if the end game is improvement in how we structure our institutions. But a wider blue skies approach to system reform requires an inclusive framework where all of these components, and more, interact closely together.

**Domain, sectoral and spatial approaches**

One traditional conceptual framework for analysing the resource management system is according to environmental domains (eg air, water, soil, flora and fauna). It is not uncommon to see relevant analyses with chapters having headings of this nature. It is, for example, the way in which our environmental reporting is done. It is becoming common for "land" and even "urban" environments to be treated as domains in their own right, even though they do not share the same kinds of features as the other domains (eg urban environments still contain air and water, and land still contains soil and biomatter).

Another option is to consider the different ways in which humans use resources (sectors). This focuses on the categories of use (agriculture, mining, fisheries), rather than the kinds of receiving environments on which those uses have impacts (water, air, soil). Sector has, in the past, been a common way of analysing the system, and is still reflected in the structure of laws in other jurisdictions (notably in Europe's civil law jurisdictions, where it is not uncommon for environmental laws and codes to be targeted at particular industries).

In recent times this has been a less fashionable analytical approach in New Zealand, given the push for integrated and effects-based management in the RMA. This Act generally treats activities according to their impacts on particular domains, not according to their sectoral classification. It is in this way that many New Zealand stakeholders have come to understand the system as a whole.

**Domain-based approach**

![Diagram](https://via.placeholder.com/150)

*Figure 2.4: The resource management system by domain*

**Sector-based approach**

![Diagram](https://via.placeholder.com/150)

*Figure 2.5: The resource management system by sector*

A third approach is to consider the kind of spatial surroundings in which human activities occur. This considers the character of an area (eg rural, urban, conservation or marine) on the quite reasonable assumption that the management of resources in one of these areas should look quite different to the management of resources in another. We do not allow cows to wander down Auckland’s Queen Street, nor do we allow the construction of an oil refinery in a national park.

A spatial approach can be differentiated from a domain-based approach because one spatial area may contain multiple domains (receiving environments). For example, an urban area (spatial) will contain rivers, air and soil (domains). It can be problematic to include spatial categories like “urban” and “rural” in a domain-based analytical approach (although this is sometimes done).

There may be considerable alignment between some spatial categories and domains (eg “marine” can be both). However, it is important to be clear about how we are using such terms. For example, if we consider “urban”
to be a domain separate to the water, soil and air within that defined space, then we can neglect the important links between, for example, different parts of a waterway that spans the urban-rural divide. We may assume that all components of resource management in one space need to be considered and managed separately from those in another space.

But the greatest risk is that domain-based, spatial and sectoral approaches all have a tendency to presuppose at least something. A domain-based approach assumes that each receiving environment can be considered, at least partly, in isolation of the others. In reality, they are intimately connected across varying spatial scales. Similarly, a spatial approach tends to focus on spaces artificially delineated by humans – the rural-urban divide or the line between private and public space. Yet today’s rural may well be tomorrow’s urban. It also runs the risk of ignoring ecological and other units (e.g., landscape or cultural units) that frequently exist across lines on a map. Furthermore, considering sectors is not only hard to do (there are thousands of potential categories, from horticulture to fishing), but also risks neglecting the importance of cumulative effects on receiving environments (which may be impacted by a large number of different sectors at the same time).

**An alternative approach: Thematic**

This project seeks to capitalise on the benefits of each of the above approaches while mitigating their risks. In a nutshell, it considers the system in terms of *themes*. This is reflected in the structure of this report, each chapter of which addresses one theme (see Figure 2.6 below).

A “theme” is hard to define, but here refers to the kinds of things the system as a whole must do. Themes have been ordered into four categories: norms, functions, structures and tools. They are addressed sequentially.

Themes cut across domains, sectors, and spaces. For example, the theme of public participation is one that must be considered irrespective of the sectoral, spatial or domain context. Asking these broader cross-cutting questions allows us to consider what we actually want overall, and helps to encourage coherence in the system as a whole.
Mitigating the risks of a thematic approach

The principal risk of a thematic approach is that it can underplay the things that make sectors, domains and spaces different. For example, the principles that govern air quality may be different to the principles that govern water. The design of legislation may need to be different to address the particular challenges of rural as opposed to urban spaces. In Working Paper 1, we considered the nature of domains, spaces and sectors, and refer readers to that discussion.

But that does not diminish the value of having an analytical framework focusing primarily on themes. For one, it makes it much easier to consider the big-ticket questions that are more and more on New Zealanders’ minds. For example, instead of asking “What do we want to achieve for water management?”, we can ask “What do we want to achieve in managing our country’s resources, and how does this apply to water?” And instead of asking “Should we charge for water use?”, we can ask “Who should pay to use public resources?” and then “What makes water so different to oil and gas?” Although it cannot be exhaustive (e.g. apply to all sectors), we can mitigate the risks of a thematic approach by stress-testing general conclusions against particular domains, particular sectors, and particular spaces. A theme-focused approach is better positioned to consider the reasons why particular cases should or should not deviate from general conclusions.

The themes

As to the themes themselves, we need to have a complete picture of what any resource management system needs to include. The system is not just about aims and outcomes. It also requires institutions, legislation, processes and many other features in order to work.

There are important relationships between themes. In particular, it makes sense to see relationships as broadly linear by starting with norms (what outcomes we ought to pursue, such as principles), then considering components of the system needed to achieve them (what kinds of things it needs to do, and the structures we need to establish, such as legislation and institutions), and ending with how we implement them (mechanisms such as plans, consents, processes and incentives). The conclusions of the prior exercise inform the consideration of the latter.

One particular thing should be noted: the absence of a dedicated theme in which Māori concerns are considered. It is common to see analyses of the RMA and resource management system containing this kind of chapter. Here, it is deliberately not included as a separate theme. Components of the Māori world, such as Treaty of Waitangi law and mātauranga Māori, are integrated.
into other themes (e.g., institutions and principles). Māori matters are not simply things the system has to address or "do," akin to legislative design or consenting mechanisms. They need to pervade all tiers of the system, so that Māori perspectives are fully integrated, not treated as an add-on, afterthought, or a group of matters placed in opposition to (or as grudging concessions to) a dominant Western paradigm. To treat them as a separate theme would deny their potential for synergies with other matters and partition Māori issues from their broader systemic context. That said, and for the same reasons, they must receive particularly close attention within themes.

Having considered the conceptual nature of the resource management system, and a framework for analysing it, we now move on to considering the context in which reform of the existing system would occur. This requires us to consider not just the present, but also the past and the future.

ENDNOTES

1. At this point there will be those who point out that environmental management should not be focused only on humans. This is explored in Chapter 4.
2. For example, in the greening of urban space, which has health, social, environmental and climate benefits and few downsides.
3. The term "environmental" poses its own definitional issues but is primarily concerned with protection of the natural world (features that would exist if humans did not). See generally D Grinlinton "Defining the nature and boundaries of environmental law" in P Salmon and D Grinlinton (eds) Environmental law in New Zealand (4th ed, Thomson Reuters, 2015) at 1-25.
5. For example, ecosystems (including their constituent parts), freshwater, air and atmosphere, land/soil, marine and heat.
6. However, acknowledgement is also made of the existence of broad claims by Māori around rights to water.
7. Purely private actions are not conceived of as forming part of the "system," although public actions that influence private behaviour are.
8. For example, see New Zealand Productivity Commission Better urban planning (2017); Local Government New Zealand A "blue skies" discussion about New Zealand’s resource management system (2015); New Zealand Council for Infrastructure Development (now Infrastructure New Zealand) Integrated governance, planning and delivery: A proposal for local government and planning law reform in New Zealand (2015).
10. Of course, this is not entirely the case. Separate sectoral regimes exist for fisheries, mining and forestry, to name a few (although the kinds of reasons these sectoral regimes exist are generally different to the reasons the RMA exists – see Chapter 8).
3.1 Introduction

In any system-wide reform effort, a decision needs to be made as to what degree the project should start with a blank slate and to what extent it should start with a close analysis of the context in which the reform would have to occur. In broad terms, the choice is between taking a blue skies approach and taking a problem-based approach. This project seeks to navigate this choice with care. It steers a middle path.

Context is important for reasons other than the identification of problems. We need to understand where we have come from to know where we are going. We cannot afford to repeat the mistakes of the past. But we also need to understand our own unique historical, social and cultural circumstances that have shaped who we are as a nation, because they will inevitably colour our future as well.

This section does three things. First, it sketches out in brief the historical development of the system we now have. Secondly, it describes the kinds of challenges we are now facing (some of which may be described as problems) and the more targeted reform measures that are currently being undertaken or proposed. Thirdly, it considers the future, and what New Zealand may look like over the coming decades. That is an equally important part of the context that must colour the design of a reformed system.

3.2 The past – the historical context of New Zealand’s resource management system

New Zealand’s current system of resource management is very different to the one it had a century (or more) ago. Although not only related to resource management, our present context needs to be understood in light of the complex and disputed relationship between the Crown and Māori, especially as based on the Treaty of Waitangi (Te Tiriti o Waitangi). Central to this is the question of whether sovereignty was ceded to the Crown, and the question of how this should be implemented. Distinct Māori perspectives exist alongside Western ones, and pervade all levels of the system.

While not reflecting current (or, likely, future) political and legal realities in New Zealand, this divergence of views about sovereign rights is still significant in a contemporary consideration of system reform. It affects the perception of partnership, Treaty principles, and how these should be implemented. Distinct Māori perspectives exist alongside Western ones, and pervade all levels of the system.

With the advent of a largely Western system of laws following British colonisation of New Zealand, the management of resources was initially considered to be one of property protection and minimising impacts of resource use on other people’s health and property. New Zealand went through various iterations of dedicated town (and country) planning laws prior to 1991. Planning and environmental controls were considered to be quite separate disciplines.

It was not until the 1960s and 1970s, in the wake of the international environmental movement, that New Zealand started to implement laws specifically targeting environmental health. This was done in a fairly ad hoc way, and by the start of the 1980s a large number of resource- and issue-specific statutes were in existence. At the same time, the 1960s witnessed the explosion of consumer society, including the emergence of an increased ideological attachment to the private motor vehicle and the demand for associated infrastructure.

The politics of the late 1970s and 1980s played a central role in producing the system we have today. The National government of Robert Muldoon (1975–1984) pursued an economic policy that aimed to free New Zealand from reliance on oil imports (in the wake of the 1973 oil price shock), including by expediting the process by which strategic energy projects were implemented. This strategy was given the label “Think Big” and its apogee was the National Development Act 1979, which essentially allowed Cabinet to suspend a variety of other acts (including many with environmentally focused restrictions and processes) in order to fast-track large scale government-backed infrastructure projects. The role of the courts was also significantly curtailed. The Act was partly a reaction to the slow, difficult and fragmented approval processes that would otherwise have been needed. Project-specific legislation was also implemented by the Muldoon government to authorise the construction of the Clyde Dam on the Clutha River, in order to circumvent the usual judicial process.

• The rangatira agreed to enter land transactions with the Crown, and the Crown promised to investigate pre-Treaty land transactions and to return any land that had not been properly acquired from Māori.

• Though Britain went into the Treaty negotiation intending to acquire sovereignty, and therefore the power to make and enforce law over both Māori and Pākehā, it did not explain this to the rangatira. Rather, in the explanations of the texts and in the verbal assurances given by Hobson and his agents, it sought the power to control British subjects and thereby to protect Māori.

The past – the historical context of New Zealand’s resource management system

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However, the Waitangi Tribunal when hearing the Wai 1040 Treaty Claim has said (among other things) that:

• The rangatira who signed Te Tiriti o Waitangi in February 1840 did not cede their sovereignty to Britain. That is, they did not cede authority to make and enforce law over their people or their territories.

• The rangatira agreed to share power and authority with Britain. They agreed to the Governor having authority to control British subjects in New Zealand, and thereby keep the peace and protect Māori interests.

• The rangatira consented to the Treaty on the basis that they and the Governor were to be equals, though they were to have different roles and different spheres of influence.
This was only one among a number of constitutionally significant and controversial measures taken by the government in those decades. David Lange’s Labour-led government came to power in 1984 on the back of political and public appetite for fundamental economic and social change. There was a reaction against the centralised, non-transparent and economically interventionist approach that drove measures like Think Big. As in other key areas of policy (particularly economic policy), this reaction eventually forced fundamental change in the resource management system.

The National Development Act was repealed, but it left a big issue in its wake. The resource management system was fragmented across multiple statutes and institutions; processes were complex and time consuming; and there was little normative consistency. Recent events had opened the gates for system reform on a wide scale and on a considered, principled basis. The spirit of the times was one of fundamental and ideologically driven change. Alongside this social and economic agenda was an increasing recognition of the role of Māori, particularly through the 1975 establishment and subsequent energetic activities of the Waitangi Tribunal, and through the recognition in the courts of the principles of the Treaty of Waitangi.

The central development in relation to resource management during the late 1980s was the drafting of the RMA, initiated by a Labour-led government and eventually passed in 1991 by a National-led government after an extensive process of expert involvement, public consultation and cross-party support. But the wide ideological basis of reform meant that its boundaries were not defined by pre-existing statutes, institutions or conceptions of the environment.

Around the same time, fundamental changes occurred in New Zealand’s institutional arrangements. Many of these changes were driven by free market ideology, a desire for accountable government and removal of conflicts of interest, and a reaction against interventionism (eg in the creation of state-owned enterprises). Many had direct impacts on resource management. The Ministry of Works, which had sponsored large government infrastructure with significant environmental impacts such as hydro dams, as well as housing the Town and Country Planning Division (which kept a close eye on council planning functions), was disbanded with its policy functions transferred. A new Ministry for the Environment was established by statute (not a common phenomenon) to provide advice to its Minister and to act as an environmental steward. At the same time, the Office of the Parliamentary Commissioner for the Environment was created to act as an independent watchdog and investigator, and a Department of Conservation was established to manage the conservation estate and act as an advocate for the environment. The Planning Tribunal was recast as the Environment Court, assuming many supervisory functions under the RMA. Fundamental reform to local government structures also occurred: a myriad of small councils were amalgamated into larger entities known as territorial authorities, and regional councils were established along catchment boundaries. Both were given significant roles under the RMA for managing land use and common pool resources.

The RMA was at the core of legislative change in this period. The Act was a product of the tumultuous political context of the previous decade, and was based on constitutional principles, increasing environmental consciousness, and a particular brand of economic ideology – one focused on efficiency, deregulation and faith in the market. That is not to say that the Act was anti-interventionist. In fact, it saw a strong role for public intervention to safeguard environmental health, and to enable people to provide for their own social, economic and cultural wellbeing. However, to many, it was not intended to be a social or economic planning statute. Faith was placed in people to provide for their own wellbeing. These can all be seen in some of the Act’s key features, which are summarised below:

- **Sustainable management**: An overarching, consistent statement of purpose for most natural and physical resources that had previously been managed under regimes with arbitrary normative differences.
- **Integrated management**: The recognition that all domains are interconnected. Previously, many different sector- and resource-specific statutes had existed. However, some notable exceptions still persisted. For example, it was considered too difficult to manage the exploitation of finite minerals under the principle of sustainable management, and this was done under separate legislation. More proactive economic and allocative management of resources continued to occur outside the RMA, for example fisheries and indigenous forestry.
- **Effects-based management**: Decisions were to be made based on the actual and predicted environmental impacts of activities, not on the sector/industry in question or on a desired public social/economic outcome.
- **Simplicity, navigability and plain English**: This was to ensure open government and a participatory process that was not thwarted by overly complex and confusing language or legislative structures.
- **Open government**: Government entities were to be treated the same as any other party under the law.
- **Māori values and involvement**: The RMA sought to formalise Māori values and participation (and, to a more limited extent, decision-making power) in legislation, which had previously been largely overlooked.
- **Public participation**: There would be a single and inclusive process for producing plans, as well as extensive notification and appeal rights for resource consents.
- **Devolution**: While there was to be an important role for central government in setting national policy and standards, most decisions would be made by regional and local government (aspects of coastal management being a notable exception).
- **Independence and accountability**: There would be checks and balances to prevent the abuse of power. Regional and local government would be responsible for most decision-making (accountable), but there would be an appeal process to the Environment Court which would act as a national level independent overseer.

- **Enabling and laissez-faire**: The market was considered to be the best method to allocate scarce resources and determine which uses occurred, not government.

- **Environmental bottom lines**: The RMA always envisaged that the market would be left to make resource use choices, and people would be left to manage their own affairs, as long as environmental biophysical bottom lines were not infringed. These bottom lines were to be not only about the value of the environment to humans, but also its intrinsic value.

The bones of the system, centred around the RMA and associated institutional structures, have remained largely intact since this time. However, there have been many smaller (yet cumulatively significant) changes to the system, as well as some interesting trends.

The RMA itself has been amended many times, largely in response particular problems or agendas. Key amendments have related to planning and consenting processes, public participation, ministerial powers, the role of iwi in planning, aquaculture, trade competition, climate change, and the allocation of coastal occupation rights. The normative heart of the Act has remained largely untouched. Not all change has been legislative; for example, there was much debate and inconsistent jurisprudence about the correct interpretation of Part 2 of the Act until the Supreme Court’s 2014 decision in *King Salmon*. 5

Additional legislation has also been introduced and amended. Legislation addressing hazardous substances and new organisms was enacted in 1996, a new Local Government Act was passed in 2002, the Land Transport Management Act was passed in 2003, and legislation establishing special housing areas appeared in 2013.

Climate-focused legislation was passed in 2004, which served as a framework for the development of New Zealand’s primary response to climate change: an emissions trading scheme. The divisive debate over ownership of the foreshore and seabed resulted in the Marine and Coastal Area (Takutai Moana) Act in 2011, which adds another layer to planning and consenting arrangements for this area. A new resource management regime for the exclusive economic zone and continental shelf, after a long gestation period, was enacted in 2012. Various statutes implementing Treaty settlements have been enacted, some of which interact with or impact on more general resource management regimes.6

There have also been some significant institutional changes since 1991. The national level Environmental Protection Authority (EPA) was established in 2011, and was tasked with functions under various pieces of legislation, including hazardous substances and new organisms. Boards of inquiry received the power to decide some resource consent applications. The Land and Water Forum was established to bring key stakeholders together in order to formulate national freshwater management policy and provide advice to government. Special legislation has also been passed in relation to Auckland issues; mass amalgamation produced an Auckland unitary authority in 2009, followed by a spatial plan for the city. The Auckland Unitary Plan – the culmination of this process in resource management terms – was subsequently developed and is now partly operative. The legislation also created the Independent Māori Statutory Board which promotes issues of significance to Māori to the Auckland Council.

The resource management system we see today is the product of legal and ideological developments over many years, with many of its conceptual and structural foundations laid in a particularly tumultuous period in the late 1980s and early 1990s.
3.3 The present – resource management challenges

It is against this backdrop of legal and institutional arrangements, and iterative change, that an increasing appetite is emerging among stakeholders for more fundamental reform. New Zealand is facing an array of challenges, and there is a sense that our current system is not currently, and will not in the future, be fit-for-purpose in meeting them.

The use of the term “challenge” rather than “problem” here is deliberate. Some of the challenges we are facing are not objectively identifiable problems that are capable of being solved. Some involve difficult trade-offs, while the existence of others depends on whose perspective you take. These require not a solution, but rather a resolution.

Poor environmental outcomes

Many of the indicators of biophysical environmental health in New Zealand are poor. Many are getting worse. A number appear to be reaching significant tipping points, beyond which they may not recover, or recover only with difficulty. These are significant challenges.7

Indicators of environmental health can be broadly categorised by domain (eg air or water). The states in which we desire the environment to exist are based both on its ability to provide basic services to people (eg drinking water that does not make us sick) and the intrinsic value of parts of it (eg the existence of wilderness or the right to life of plants and animals). Some of the more recent data include:8

• **Biodiversity**: Biodiversity outcomes are overall very poor and worsening. Indigenous species facing extinction include bird species that breed in New Zealand (81%), freshwater fish (72%), reptiles (88%), frogs (100%) and resident marine mammal species (27%). Since 2005, the risk of extinction has increased for 7 per cent of our threatened freshwater, land and marine species. Key drivers of biodiversity decline include ongoing habitat loss (eg 10,000 hectares of indigenous forests was lost between 1996 and 2012), and invasive pests and weeds.

• **Freshwater**: Overall, nitrogen levels in rivers appear to be increasing and phosphorus levels decreasing. Nitrogen concentrations in rivers (which are monitored) are 18 times higher in urban areas and 10 times higher in agricultural areas than within indigenous forested areas. Nitrogen leaching from agricultural soils is thought to have increased by 29 per cent between 1990 and 2012 (along with dairy intensification) and nitrogen levels have been worsening at 61 per cent of monitored river sites within agricultural areas (with 22% of sites improving). In addition, the deposition of fine sediment in riverbeds is thought to be elevated (covering around 29% of riverbeds compared to an estimated 8% in pre-human times). There is no national reporting on the state of water quantity, but we know that 51 per cent of water take (excluding hydroelectricity use) is for irrigation purposes.

• **Soil**: Around 190 million tonnes of soil are lost into the aquatic environment every year. It is not clear whether the rate of loss is increasing or decreasing, although there may have been a downward trend since the 1980s, as marginal land has reverted to scrub and areas of plantation forest increased. Over half the soils measured under dry stock, and nearly 80 per cent of soils under dairy farming, are impacted by compaction which reduces soil productivity.

• **Coastal and marine**: Monitoring of the state of our coastal and marine areas is poor, but we do know that many coastal habitats and ecosystems are degraded, with the greatest pressures on them being ocean acidification and climate change, excess sedimentation, seabed trawling and dredging (which although still significant has been decreasing), marine pests and excess nutrients.

• **Air**: Air quality is the one success story, with significant improvements being achieved over the last decade. This has been due to a shift to cleaner home heating and improvements to fuel and stricter emission limits on new vehicles, leading to 14 per cent fewer premature deaths from air pollution.

• **Climate change**: Gross greenhouse emissions have increased by 24 per cent between 1990 and 2015, mainly due to an increase in road transportation and agricultural production. Net emissions rose by 64 per cent during the same period due to higher logging rates (and less replanting). Almost half of New Zealand’s total emissions are generated by agriculture.

Poor urban outcomes

At the same time as the health of the natural environment is declining, New Zealand is facing other substantial challenges in the urban setting. This is not to suggest that “natural” and “urban” challenges are mutually exclusive: trees, water and air exist and are just as important in cities as outside them.

In recent years, in New Zealand, the debate has tended to focus on two adverse urban outcomes in particular: housing unaffordability and transport difficulties.9 The cause, or at least the accelerator, of these challenges has been rapid and sustained population growth in and around Auckland. This has led to many different definitions of the problem: a slow and unresponsive system of urban land use planning; misalignment between land use planning and the infrastructure investment needed to realise those plans; a lack of capacity in the construction sector and passive approach to construction by central government; tax incentives for speculation in the real property market; cultural expectations around suburban living and nimby (“not in my backyard”) resistance to densification; a failure of the market to respond to demand at the low end of the housing market; immigration policy; rules around foreign investment; and others. Some have suggested, with some truth, that the market-reliant and effects-focused RMA is not really an urban planning statute.
The land transport system in Auckland is extremely congested, especially the roads. Again, the root cause of this problem is debatable. It is possible to blame underinvestment in roads, or (somewhat paradoxically) an excessive investment in roads (and tacit support of a transport system with private motor vehicles at its heart), underinvestment in public transport, or a lack of proactive coordination between land use and transport planning. It is also possible to blame the system of land transport funding and constraints on local government spending, or limits to the economies of scale possible within existing local government administrative units. Cities are also facing the looming challenge of upgrading and replacing ageing water and waste-water infrastructure. While not only an urban problem, challenges with transport and other infrastructure are manifesting most noticeably in urban areas. More generally, brownfields urban developments that could provide economic and social benefits (including but not limited to housing) are difficult, expensive and time consuming to realise.

Questionable and uncertain allocative outcomes

The resource management system restricts the use of resources, but in doing so it also determines, in practice, who is granted the right to exploit them (and who is not). For example, granting an application to take freshwater for irrigation purposes is not just an abstract declaration that such a use would not infringe minimum flows for reasons of environmental health. It is also a formal conferral of rights to the particular applicant to use the water resource for a certain period of time. Similarly, granting consent to a marine farm confers rights to occupy marine space, largely to the exclusion of others (particularly where the marine farm cannot be navigated through).

This presents few problems in a world where resources and space are abundant, or in a world where resources are off limits for any exploitation. However, where resources are both scarce and public, choices have to be made as to how they are allocated. This is particularly important where environmental limits need to be imposed on the use of a resource, as this increases its effective scarcity. We need to keep in mind that renewable resources can still be scarce; renewable does not mean infinite.

The RMA was not designed to direct the allocation of resources in a proactive way. A conscious choice was made by its framers to allow the market, in most cases, to determine the specific use to which resources would be put, and by whom. While some exceptions always existed and additional ones have been put in place over time, for resources that are not privately owned, the system remains one in which allocative choices are mainly determined by those who apply first. There is no public interest test or test based on the wisest or most sustainable use of resources. Reallocation is difficult; so too is the relative allocation of obligations to reduce pollution (such as nutrients to freshwater) where limits have already been exceeded (“de-allocation”).

Challenges in system design

A system is important not only for producing tangible outcomes. It also contains structural, institutional and process features that can be positive or negative. These can produce uncertainty, inefficiency and misalignment between our aims.

First and foremost, the ideal of integrated resource management has not been fully realised. This is not to say that integration is always a good thing or without trade-offs, simply an observation that much of the system remains fragmented across multiple statutes, processes and institutions. Minerals, fisheries, climate, transport, hazardous substances, conservation land and forestry are some examples of topics that are at least partly managed outside the RMA. Specific Treaty settlement legislation also contains provisions relevant to the management of resources, and interacts with more general resource management legislation in different ways (the case of the Waikato River being a prime example). The legal personhood granted to Te Urewera and the Whanganui River are innovative and progressive measures, but have come about through specific settlement processes rather than general policy-driven changes to the RMA or conservation legislation.

In more recent years, measures have been taken to circumvent normal RMA processes and protections by introducing bespoke legislation. For example, special housing areas were introduced in 2013, and some form of Housing and Urban Development Authority legislation is to be progressed by the current government. Despite the conscious removal of institutional conflicts of interest in the reforms of the late 1980s, some internal conflicts remain. The Department of Conservation retains its advocacy mandate, but is susceptible to budgetary constraints in its practical ability to exercise it.

Secondly, there has been a proliferation of alternative processes under the RMA. For example, the latest amendments to the Act have introduced the streamlined planning process and collaborative planning process alongside the ordinary Schedule 1 process. National planning standards now exist alongside national environmental standards (NESSs) and national policy statements (NPSs). Some of the defining features of the Act, as originally conceived, have been diluted through amendments (such as public participation, devolution and the role of the Environment Court).

Thirdly, tensions continue to exist over the delicate balance a system needs to strike between various values. There is an ongoing and active debate about the role of Māori values and decision-making power in the wider system, and whether current arrangements go far enough. More generally, views diverge on the appropriate balance between independence and accountability in decision-making. For example, it is entirely possible to view the rights of appeal to the Environment Court on planning matters as an affront to local democracy, but equally possible to see myopic or parochial planning decisions by under-resourced local authorities as a risk requiring
independent expert oversight. As central government interest and intervention in Auckland issues shows, there is also substantial room for debate as to what the appropriate respective roles are for central, regional and local government in resource management matters.

Fourthly, the experience of compliance, monitoring and enforcement under the RMA has been mixed. Significant improvements are possible in this area.

New Zealand faces a number of diverse challenges, many of which have increased markedly in recent years. Environmental quality is declining; we face peculiarly urban issues; allocative outcomes are questionable; and the overall coherence and operation of the system is less than ideal.

Different challenges have different characters

Some of the challenges discussed above are systemic in nature. They result from the fact that the current system does not do some things well, or does not do some things at all. Some of these things were a conscious decision (eg a choice largely to not address allocative issues under the RMA, and the separation of the legislative and institutional management of mineral depletion, fishing and transport). Although it is by no means the only or even primary reason for poor urban outcomes, the RMA was not fundamentally designed to be a proactive planning regime for urban areas (although it has been used to do so in many senses). The key question here is whether these kinds of challenges justify expanding or clarifying the basic role and ambition of the system and the way in which its parts interact.

Systemic challenges exist because the system was not really designed to do some things it needs to do now and in the future.

Other challenges have arisen because of a gradual erosion of the simplicity and coherence of the original system. Responses to individual issues have resulted in a series of ad hoc amendments to, or carve-outs from, the core of the system (notably the RMA) without a coherent framing to tie them together. It has produced multiple processes, confusing interrelationships and normative dislocation, as well as legislation that is long, cumbersome and user-unfriendly.

Coherence challenges exist because of ad hoc changes that have, over time, resulted in a complicated and fragmented system.

Some challenges reflect tensions between legitimate values. For example, increasing the ability for the public to participate in decision-making processes may improve outcomes, but will inevitably increase the costs, complexity and time involved. Effects-based management allows decisions to respond to important contextual factors, but reduces the predictability of plans. At a more practical level, complaints about the system may reflect dissatisfaction with outcomes where there are inevitable trade-offs to be made. Resource management decisions often cannot be win-win.

Tensions will always produce challenges, and will never be “fixed”. They require ongoing conversation and accepted process to reach outcomes, not “answers”.

Finally, the system has simply failed to deliver many things that it said it would. Most importantly, the RMA promised to set and uphold environmental bottom lines, but has not done so. Questions remain as to whether this is really an implementation failure (eg due to issues with capacity and capability, funding, a lack of national level involvement, misinterpretation by the courts, enforcement and education) or whether it is the product of fundamentally defective formal structures – legislation and institutions (eg the purpose and principles of the RMA).

The most problematic challenge is that the system has failed to achieve what it was meant to, notably in its establishment and defence of environmental bottom lines.
3.4 The present – current policy responses

We do not provide an exhaustive account of how the current system operates. It is more appropriate for that picture to emerge as we address particular themes. However, key structural features of the current system, and their historical context, have been outlined above.

It is, however, worth noting that the government is considering or pursuing a range of more targeted reforms. When combined, these measures contemplate significant change, even though they are not usually talked about in terms of “system” reform. A key part of a first principles review must be to shape these initiatives or provide a coherent narrative that can link them well. Key measures being contemplated or already underway include:

- Impending amendments to the RMA (many to unroll amendments made by the previous government)
- The introduction of a Zero Carbon Bill and related Climate Change Commission
- The potential creation of an NES for freshwater management and NPS for quality urban intensification
- The establishment of the Essential Freshwater Programme
- The rolling out of national planning standards
- The impending introduction of Housing and Urban Development Authority legislation
- Implementation of the billion trees initiative
- Consideration of the recommendations of the Tax Working Group
- Work on spatial planning as part of the urban growth agenda
- The establishment of a Ministry of Housing and Urban Development
- Providing the EPA with some enforcement functions
- Consideration of a draft NPS on Biodiversity
- A Productivity Commission inquiry into local government funding
- A review of the emissions trading scheme
- A wide-ranging review of the three waters sector (regulation and service delivery)
- The creation of an independent infrastructure commission
- The use of special purpose vehicles to fund infrastructure for urban growth
- A review of the New Zealand Biodiversity Strategy

A significant work programme is underway by the current government on matters that relate to resource management reform. This forms a crucial part of the context against which first principles system reform would occur. While the purpose of system reform is not to artificially combine these measures into a coherent whole, or to adopt them uncritically in a future model, they need to be considered and aligned.

3.5 The future: It will be different from today

It is essential that any reform of New Zealand’s resource management system considers tomorrow, not just today. The problems we encounter in the future may be different to those we have currently (eg as the effects of climate change become more noticeable), and there will be new opportunities too (such as technological advancements in monitoring and renewable energy).

This section sets out some of the known and likely changes that New Zealand faces in the future. It also draws out some of the potential implications of these for resource management law reform, and lessons we can learn. More detail is contained in Working Paper 2.

Population and economic change

New Zealand’s total population is projected to reach 5.8 million in 2038, with an average increase of 11 per cent per annum. The level of migration will have a large impact on the size of increase and its composition will impact on the ethnic and cultural diversity of New Zealand. There is currently no long-term policy on how population growth will be managed in New Zealand, apart from a commitment by the current government to reduce net migration by an estimated 20,000–30,000 a year, mostly by reducing the number of student and work visas granted.

Any new resource management system needs to manage fast-growing urban areas and significant additional housing and infrastructure provision. It needs to be robust enough to manage growing population pressures on natural resource systems. It also raises the issue of whether the system should contemplate explicit population policy. What is, for example, the optimum population of Auckland? Or, indeed, New Zealand as a whole? And to what extent can we really control this?

A future system needs to be strategic about how it manages increases in population. If we do not seek to control it per se, then the system (and not just the RMA) needs to consider what this means in the long-term for urban growth patterns, food production, and pressure on natural and physical resources.
Future population growth coupled with current underinvestment indicates that new funding models may be required for infrastructure provision.

**Core infrastructure vital to New Zealanders’ wellbeing needs to be adequately funded, maintained, upgraded and enabled.**

It is expected that New Zealand’s population will continue to concentrate in the northern half of the North Island and particularly Auckland, which is likely to be home to 37 per cent of the national population in 2028 (compared to 34% in 2013) and 39 per cent in 2043. But most territorial authorities will experience some population growth. Some of the highest growth rates are expected in the rural areas surrounding Christchurch – Selwyn (2.6%) and Waimakariri (1.6%) – and the Queenstown-Lakes District (2.2%). Tauranga and Hamilton, along with Auckland (the “golden triangle”), are also forecast to have high growth rates.

Such concentrations of population create agglomeration opportunities as well as threats. Dense populations can create the opportunity to provide efficient and environmentally friendly mass transport systems (such as light rail), intensive housing and infrastructure. But if not well managed they can result in costly urban sprawl and environmental degradation. Locations such as the Queenstown-Lakes District, which are experiencing strong growth in areas with very high natural values, will likely require proactive planning and strong protective rules to ensure that such natural values can be retained in the face of significant economic and social pressures.

**A future system needs to be courageous and think long-term in protecting areas of high natural value from inappropriate and creeping development, and do urban densification well.**

New Zealanders will become older and more ethnically diverse. By 2043, those 65 and older are likely to exceed 1.3 million. The proportion of Māori is projected to increase to 18.4 per cent, Asian to 22 per cent and Pacific populations to 10.2 per cent of the total population in 2038, with the European proportion dropping to just 65.5 per cent. Because different age groups and cultures have different lifestyles, values and aspirations, the changing diversity will have planning implications for housing, transport, the layout of urban areas, recreation and work. The system will need to provide for innovative methods of engagement that speak to the social and cultural expectations of different age and ethnic groups, and manage different expectations.

**A future system needs to engage with an increasingly diverse society in ways that resonate with people of different ages and backgrounds, and regularly evaluate changes in people’s values and preferences where firm bottom lines are not at stake (eg in the density of urban living and transport preferences).**

Treasury predicts an average of 2 per cent gross domestic product (GDP) growth per year to 2060. Under current norms, primary sector exports are likely to remain important to the country, which implies ongoing and growing pressures on rural land and freshwater systems as well as the marine area. At the same time, the rise of new technologies, as discussed below, could bring fundamental change to the sector as new and revolutionary production techniques evolve. These will also likely have significant impacts on jobs in New Zealand, with an estimated 885,000 jobs (46% of the total) at risk from automation over the next 20 years.

If primary production continues to underpin New Zealand’s economy, the system must place clear expectations around where and what kinds of activities are acceptable in the future.

Auckland contributed 24 per cent of total national GDP growth between 2010 and 2015 and Auckland firms are generally more productive than those elsewhere in the country. This highlights the economic benefits of increasing agglomeration in large urban areas. Auckland’s freight is projected to increase by 78 per cent over the next 30 years, placing increasing pressure on urban transportation systems. This will necessitate tough decisions about investment in transport infrastructure – the amount, the timing, and choices as to modes of transport in which investments are made (such as road and rail).

**A future system’s transport investment choices must recognise, in a synergistic way, the need for economic efficiency, social connection, and environmental benefit.**

Within this more general picture, we have a specifically Māori economy which is thought to currently be around $50 billion. A large proportion of this asset base ($11.2 billion) is in agriculture, forestry and fishing, and $8.2 billion in property. Ownership stakes in these sectors are thought to include 40 per cent of New Zealand’s forestry, 30 per cent of lamb production, 10 per cent of dairy production, 50 per cent of fishing quota, 30 per cent of sheep and beef production and 10 per cent of the kiwifruit sector.

Māori are increasingly investing in housing, for example at Hobsonville Point in Auckland. There is likely to be continued growth in the Māori economy driven by further Treaty settlements and increased merger and acquisition activity. Around 40 iwi have yet to settle, including the largest by population, Ngāpuhi. Along with this financial strength comes an increasingly prominent Māori role in natural resource governance and management, spearheaded by co-governance provisions in many Treaty settlements. The growing economic and governance strength of Māori, and their large stake in the primary production sector, may have implications for how resources are managed in practice.
Increasing economic and political involvement and expectations of Māori, alongside continuing Treaty settlement processes, may drive a future system towards one of partnership in how resources are managed, with an increasing recognition of Te Ao Māori as one normative basis.

International visitor arrivals are forecast to increase to 4.9 million in 2023 with an average growth rate of 4.8 per cent per year. The international spend in New Zealand is forecast to rise $2.1 per cent over the same period to reach $15.3 billion. Such increases are likely to place strong and increasing pressures on New Zealand’s conservation land and natural systems as well as built tourism infrastructure, likely requiring a more sophisticated resource management regime to address this sector than is currently in place. They also raise the need for new revenue streams to fund the required infrastructure through such mechanisms as imposing a tourist tax at the border or instituting differential charging for access to national parks as being implemented by the current government.

Increasing visitor pressures in the future (and its uneven distribution) highlights the need for the system to more proactively manage access to sensitive areas, to fund supporting infrastructure and services, and to more equitably distribute costs alongside benefits.

Treasury is developing new metrics to measure progress in New Zealand through its Living Standards Framework, and these are considerably wider than just GDP. The Framework measures four capital stocks (financial and physical, human, social and natural) and the types of wellbeing that flow from them (e.g. security, leisure, freedom, environmental services, consumption, innovation, employment and income). Treasury has defined “good public policy” as that which enhances the capacity of the four capitals to generate wellbeing. It also notes that investment in restoration (e.g. of waste-water and stormwater infrastructure, and pest control and clean-up initiatives) should be seen as investment in New Zealand’s natural resources and be weighed up against long-term benefits.

The future will see an increasing recognition that traditional methods of measuring wellbeing (largely economic) do not reflect the true picture.

The future economic and social conditions in New Zealand will also be significantly impacted by international developments. Global risks include the politically destabilising force of societal polarisation (which, for example, has led to Brexit and the Trump presidency), growing geopolitical risks in the form of nuclear confrontations and conflicts in the Middle East, growing environmental risks (including climate change, accelerating biodiversity loss and pollution) leading to social and economic disruption, and threats to cyber security. In a complex world system, we cannot discount the possibility that one or more of the global social, economic or environmental systems will collapse, with devastating consequences. Growing economic inequality within New Zealand is another trend that may have significant and potentially unforeseen consequences for resource management and society more broadly.

Global change is often beyond the control of New Zealand public policy, and we must react to it. However, it is essential that a future system is sufficiently future-focused, sensitive to risk, and agile to respond in meaningful and timely ways. It must recognise that environmental change is intimately linked to social and economic change, and one can be a precursor to the others.
Climate change mitigation
Under the Paris Agreement, New Zealand has signed up to a series of national emissions reduction targets including:

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

Nearly half (48%) of New Zealand’s total emissions come from agriculture, with sheep and cattle being responsible for nearly all these emissions. Energy is the next largest emitter (40%), mainly comprising transport (18%; of which 90% is from road vehicles), industrial heat including food processing (11%), and electricity generation (5%). Forestry sequesters nearly 30 per cent of New Zealand’s gross emissions, albeit temporarily.

Working Paper 2 described the likely mitigation actions in key sectors. Overall, achieving substantial reductions in net greenhouse gas emissions in New Zealand is likely to require significant land use change away from dairy and sheep and towards horticulture and forestry (indigenous and exotic), with increases in afforestation of 1 to 1.6 million hectares likely required.22 There could be important co-benefits including improved water quality, the stabilisation of riverbanks, improvement of soils, habitats and biodiversity and improved visual amenity. A resource management system regime will need to be flexible enough to accommodate large scale rural land use change and should seek to maximise the co-benefits of afforestation and effectively manage dis-benefits (such as the impacts of clear felling harvested forests).

New Zealand faces substantial impacts from climate change over the coming decades. A future system needs to strengthen the resilience of people and nature to respond and adapt in sustainable, timely, and predictable ways. In particular, the system will need to be more proactive, future-focused and directive in relation to broad land use changes, food production, where infrastructure can be located, how to fund the movement of existing infrastructure, the (re-)allocation of scarce resources, and urban design. Clear expectations around government assistance and compensation need to be set, and tools created to manage this.

Technological change
Advances in technology are driving profound change in the way people live their lives, in employment and in the production and distribution of goods and services. The accelerating pace of change is so great that it has been termed the Fourth Industrial Revolution.24 It is being driven by rapid advances in mobile and interconnected computing power, artificial intelligence and genetic sequencing.

The wide availability and low cost of mobile connectivity is creating a society which is much more strongly networked and where there is rapid transfer and diffusion of information. It creates new opportunities to educate and alert people to environmental issues and to enable decision-makers to better understand the likely impacts of future projects. The growing “Internet of Things”, which refers to networks of low-cost sensors and control systems for remote data collection, monitoring and decision-making, has significantly reduced costs and increased our ability to observe and monitor environmental change. It has also helped to increase the efficiency of sectors such as agriculture, reducing the need for inputs of water and fertilisers (and consequent polluting outputs). Such technology is growing exponentially.25 It has created challenges for our legal system, highlighted by the current controversy over the use of drones in airspace, and the need for a more developed regulatory system to control them.
Rapid advances in energy storage mechanisms (including batteries) and in renewable energy technology could herald a shift towards more dispersed generation sources and greater mobile uses. This will in turn facilitate the move to renewable energy sources (e.g. towards electric cars and trucks, solar homes) and also enable better and cheaper environmental science and monitoring, amongst other things.

New technology poses opportunities for positive change in the future, in terms of effective monitoring, scientific understanding of impacts, efficiency of resource use, and low carbon energy. A future system should be flexible enough to embrace positive new technology as it is proven, for example by embracing the idea of best available technology in regulatory frameworks.

New technologies may change (and potentially reduce) the demand for road capacity, but it is not yet clear in what way or to what extent. For example, the benefits of driverless technologies could include decreased congestion (and roading demand) from a more efficient traffic flow, less space could be required for parking, and parking facilities could be in more dispersed areas (rather than concentrated in the CBD). However, they could drive an acceleration of urban sprawl as the cost of travel reduces and travel time becomes more productive. Driverless cars would also make car travel more accessible for older people and those with disabilities through removing the necessity to drive – a positive thing. But this could also increase demand (particularly with an ageing population), thereby exacerbating rather than reducing congestion. Driverless cars may also more effectively compete with public transport, driving down demand and making public transport harder to fund. The magnitude of impact that driverless technologies could have on urban form, land use and transportation suggests that a resource management system needs to deeply engage in this area to proactively manage the change process. There are also risks to the climate – urban sprawl and autonomous vehicles may make transport emissions worse if not accompanied by a rapid shift towards electric vehicles as well as the creation of new renewable generation.

A spotlight on self-driving vehicles

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

Advances in fast, low cost gene sequencing, big data analytics and synthetic biology (creating new DNA) has created opportunities for developments in effective pest control, food production and synthetic products such as synthetic meat. This creates significant opportunities (as described below for pest control and food production) as well as threats. Manufactured substances such as plastics, microbeads, nanoparticles, drugs and hormones have the potential to be destructive of wildlife and ecosystems and are an emerging issue that a resource management system would need to grapple with. On the positive side, nanotechnology is creating opportunities for new technologies such as more efficient and cost-effective electricity generation through cheaper solar cell production.29

The growing cumulative impacts of plastics on the oceans, in particular, highlights the need to shift to a “circular economy” where product life cycles mimic that of biological systems, with components being recycled, repurposed and reused rather than discarded as waste.30 This suggests that a future resource management system may need to engage with product and infrastructure life cycles.

New technologies are revolutionising biosecurity and pest control. Gene editing has great potential for controlling invasive species and disease vectors. Other forms of biological pest control, such as the use of bacteria and fungi for plant pests, are being developed. Robots are being used to target invasive species and could potentially be used to target wildling pines and other pest plant species with poison. Improvements in battery technology are likely to increase the range and utility of autonomous equipment for the likes of environmental monitoring and control.31 Technology also has the potential to assist biosecurity efforts. For example, electronic “noses” are now being used at airports to detect illegally traded wildlife. Blockchain technology can be used to trace the supply chain and detect illegal species trade and the like.32

A future system should be flexible enough to embrace useful technological advancements, as long as the long-term benefits/opportunities outweigh any long-term costs/risks.

Technology seems likely to drive rapid change in the agriculture sector, creating both opportunities and threats. Cloud-based systems create significant opportunities to better monitor and improve operations on farms, and also to communicate to regulators and consumers. Examples include remote measurement of soil moisture to limit water use, measurement of nutrient loading to reduce fertiliser application and leaching, and greater use of data to allow comparison with industry norms and standards.33 In addition, blockchain technologies are enabling the better tracking of the entire food chain.

**A spotlight on virtual fences**

GPS technology has the potential to revolutionise farm management practices and to avoid the need for costly physical fencing. This could have major implications for the protection of waterways, for example, where farmers argue that the cost of fencing smaller streams is too high. It could also help to protect other areas, which can be damaged by stock grazing including remnant vegetation, wetlands and sodden soils. The concept behind “virtual fences” is that animals wear GPS-enabled collars and are tracked on a digital farm map. When an animal gets close to the “virtual fence” the collar beeps, alerting it to the boundary. If animals proceed to cross the fence, they receive a mild electric shock, which encourages them to head back inside the line. After a period of training, the beep is sufficient to “fence in” the animals. The cost of the technology appears modest when compared to fencing costs, being around $2000–3000 for installation and $100 per animal for the collars.34

These measures are largely about driving efficiency improvements and transparency. But more significant changes in agriculture are likely to be driven by the reinvention of the entire food system, with radically different farming models being developed. There are emerging protein markets looking to produce protein sources that are plant based or synthetic.35 Cellular agriculture enables meat to be grown in a laboratory within six weeks and it could be produced for as little as $2 a kilo.

Technology has the potential to improve efficiency in the agricultural sector. But it also has the potential to radically change the way food is produced. Such changes to the sector could lead to environmental benefits, but also produce significant social and economic disruption to farmers and the country as a whole. A reformed system will need to be future-focused and manage any transition with great care.

**Governance implications**

The rapidly escalating pace of change indicates that new governance models may be required, with current structures being typically slow and cumbersome. In addition, many of the issues likely facing New Zealand in the future are of a scale that can be overwhelming for regional and local councils. This suggests that greater central government involvement, and more national regulatory tools, may be required to help manage regional and local impacts.

Jonathan Boston has suggested we move towards an “anticipatory governance” model to better address our “creeping” social and environmental problems. Such
an approach would include greater use of commitment devices, measurable targets, future-orientated institutions and collaborative decision-making. This approach somewhat aligns with "agile governance" as proposed by the World Economic Forum, which is defined as being "adaptive, human-centred, inclusive and sustainable policymaking, which acknowledges that policy development is no longer limited to governments but rather is an increasingly multi-stakeholder effort. The future may need to see a shift towards a more collaborative and negotiated style of decision-making, although the potential for a consensus-based model may be reduced by increased diversity in New Zealand’s population and tensions over resource use.

The unprecedented scale of change predicted for the coming decades in many areas requires new thinking about traditional governance models, including the need for future-focused institutions, contemplation of greater centralisation of some functions, and consensus-based and durable commitment mechanisms.

3.6 Concluding comments

In this chapter we have considered the context in which reform of the resource management system would have to occur, and have drawn out some lessons. This sets the scene, and is presented in lieu of a traditional problem definition. We consider that a focus on problems is not enough. This is for several reasons.

First, problems across the system are extremely complex and interrelated, and it is difficult if not impossible to pin down exact chains of causation. It often relies on an assessment of counterfactuals – the extent to which the present system has “caused” an issue or whether an alternative would have made any difference. There comes a point where we get no further by arguing about who or what is to blame for our current predicament.

Secondly, not all problems are cut from the same cloth. Sometimes things presented as problems are, at least to some extent, value-based choices (such as debates about public participation or effects-based planning) rather than problems to be “fixed.” Some may simply represent some people’s dissatisfaction with choices that have affected them negatively rather than a consensus or even majority view that something systemic has gone wrong (e.g. nimby issues in urban intensification).

Thirdly, system reform needs to be cognisant not only of present challenges, but also of the measures under way to address (or potentially exacerbate) them. A substantial variety of work is being undertaken by a government with an extremely active policy agenda for resource management, and it would be naïve to ignore it. Most importantly, a system review needs to find a common thread to unify, mould, and guide existing work. It needs to work with iterative reform, while at the same time not being a slave to it.

Fourthly, a focus only on present problems is to ignore two equally important contextual matters: the past (lessons we can learn from previous mistakes, as well as the cultural, historical and ideological background from which the current system has emerged) and the future (which poses challenges as well as opportunities that the system will need to engage with). It is in this spirit that we now turn, in the following chapters, to what a future system should be aiming for.

For example, the Water and Soil Conservation Act 1967.

For an excellent account of this period, see G Palmer “The Resource Management Act—how we got it and what changes are being made to it” (2014) RM Theory & Practice 22. See also the valuable historical account of Catherine Knight in Beyond Manapouri: 50 years of environmental politics in New Zealand (Cantebury University Press, 2018).


Environmental Defence Society Inc v New Zealand King Salmon Co [2014] NZSLR 593. On this case, see Chapter 4.

See the Waka-tū-Tauru Raupātū Claims (Wakato River) Settlement Act 2010.


See generally the wide range of environmental reports at www.mfe.govt.nz, as well as Working Paper 1 from 29.

These can be treated as adverse outcomes in their own right, or as causes of other adverse outcomes (eg health issues from poor quality or no housing, or from a lack of disposable income for healthy food and leisure, wasted time travelling in cars etc).

For example rights to prospect for, explore for and mine Crown minerals are allocated in a more structured way.

For example tendering for rights to occupancy coastal space, which is targeted at the needs of the aquaculture sector.

See MA Brown Last line of defence: Compliance, monitoring and enforcement of New Zealand’s environmental law (EDS, 2017).


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


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


A Kazaglis et al Net zero in New Zealand: Scenarios to achieve domestic emissions neutrality in the second half of the century (Vivid Economics, 2017).

Such as the establishment of a national Climate Change Adaptation Fund, similar to the Natural Disaster Fund administered by the Earthquake Commission, see J Boston and J Lawrence The case for new climate change adaptation funding instruments (Institute for Governance and Policy Studies and New Zealand Climate Change Research Institute, 2017).

World Economic Forum Harnessing the fourth industrial revolution for the Earth (2018).


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

Ibid.


D Graham-Rowe “Can nanotechnology provide cheaper solar energy?” Guardian (20 September 2011).


Ibid.

Ibid.

Ibid.

See B Della Ria “Could this be the end of wire fences?” (18 July 2017) Stuff <www.stuff.co.nz>.


PART 1 - NORMS

4: WORLDVIEWS AND ENVIRONMENTAL ETHICS
4.1 Introduction

While the context of reform needs to be kept firmly in mind, the true foundation of a future system must be our worldviews and ethics. As New Zealanders, what do we want? How do we feel about our environment and our place within it?

This chapter begins an exploration of the normative components of the resource management system (what the system should be aiming for), which is the first step within the project’s conceptual framework. As a society, we must decide on a coherent set of resource management principles we ought to pursue through our system of laws and institutions. While this might sound like common sense, it hides fiendish difficulties.

In this chapter we consider the big picture ethical questions. These can be described loosely as our worldview or a normative theory. They are about the basic ways in which we see ourselves in relation to our surroundings and the natural world.

In Chapter 5, we then consider the principles that emerge from our worldview(s). Principles are not in themselves the answers to difficult questions of resource management. Yet they are useful guiding norms that nudge us in directions that are consistent with the ways in which we see the world. Principles are not, however, static. They can change in response to fundamental changes in our worldview, or in response to contextual (such as environmental or social) changes. They also have complex and difficult relationships with each other. Sometimes entirely new principles can emerge in a short space of time.

4.2 Worldviews and ethics

A normative legal theory, which can be described as expressing a particular worldview, is one that says what the law should be. Normative approaches to resource management are therefore linked to discussions of what is right and wrong (ethics).

This section first outlines some features that make the debate over environmental ethics especially difficult. It then considers broad categories of normative theories/worldviews, and some positive and negative features of each. Reference is made mainly to environmental rather than resource management ethics, as this is the way most debate has been couched in the literature.

Difficulties with ethics in the environmental context

The environment/resource management is a particularly tricky area of ethics. The planet (and of course New Zealand) has a finite carrying capacity that must at some point be reached. Both development and environmental health are thought of as “good”, so it makes sense that both underdevelopment and environmental degradation are thought of as “bad”. Yet one often must come at the expense of the other. This is different from an area like criminal ethics, where (despite arguments over definitions and exceptions) it is fairly simple to characterise crimes like murder as bad. There is no point at which there is too little murder.

An ethic that seeks to pursue both unrestrained use and absolute protection of the environment is, obviously, unrealistic. While synergies are possible, history shows we cannot maximise both at the same time. It is therefore tempting to see the ethical question as unanswerable; that there can be no right and wrong. But it is more helpful to recognise that there is a range within which an ethically “right” outcome can exist. Serious theories try to strike and defend a particular balance between resource use and environmental protection that exists between a social floor and an environmental ceiling.

Different theories provide different answers to this question. Some favour resource use, while others favour protection. All require the benefits and costs of use and protection to be weighed, but built into the weighing process are inevitable value judgements that some benefits and costs are more significant than others. For example, while no one would seriously claim that the leaching of chemicals into a river is morally praiseworthy in its own right, some may argue it is worth doing if it enhances a deprived community’s economic wellbeing.

We do not weigh values in a vacuum. In fact, the significance we place on an effect is determined not by the effect per se, but by the character of the person or thing affected. In other words, the question “What weight do we place on the various benefits and costs of this decision?” can be rephrased as “What relative importance do we place on the persons or things for whom this decision has benefits and costs?” For example, some may feel we need to prevent pollution in low socioeconomic areas where residents cannot afford healthcare. The key question is not generally whether a theory favours use or protection, but rather whose interests we value more.

Many different interest groups can be identified. It is useful to consider four ways in which we need to distribute the costs and benefits from resource management decisions. First, they must be distributed among people who are alive here and now. This is often seen as a distributional issue (when we allocate rights to use or possess resources) or one of environmental justice (when we distribute costs along racial or socioeconomic lines). Secondly, benefits and costs must be distributed between those alive today and future generations. This is a question of intergenerational equity or intergenerational justice. Thirdly, we need to distribute benefits and costs between private persons and the wider notion of the “public”. This public good is not simply produced by adding up New Zealanders’ private interests. It is something distinct. Fourthly, we need to distribute benefits and costs between people and nature. This can be described as a matter of ecological justice.

Ethical theories seek to strike a balance between resource use and protection; neither one is ever absolute.
Ethical theories seek to answer four key questions of balance (either directly or indirectly): how to distribute costs and benefits amongst people alive today, between current and future generations, between private and public interests, and between humans and nature.

Resource management decision-making becomes even trickier when we think about the nature of the questions being asked. Most significantly, environmental decisions are focused on what will happen in the future. Future events are inherently unknowable. Sometimes, we may “not know what we do not know”. How we approach risk and uncertainty is a big part of resource management decision-making. There may also be disagreement as to whether a consequence is actually a benefit or a cost, or neutral. Value judgements are widespread when it comes to the environment. Furthermore, despite the sometimes binary nature of popular discourse, resource management decisions are not as simplistic as weighing the economic benefits of using resources against the environmental benefits of protecting them. Protecting native trees, for example, can generate long-term economic benefits from sustainable timber harvesting. And using forests for recreation and scientific study can protect the environment.

**Anthropocentrism and ecocentrism**

Ethical theories provide a moral basis for addressing these difficult features of environmental decision-making. They tell us whether it is right or wrong to value one interest group over another, or to what degree. Western ethical theories can be divided loosely into two camps (see Figure 4.1): those that are primarily anthropocentric (human-focused) and those that are primarily ecocentric (nature-focused).

Under the umbrella of anthropocentrism, it is useful to see a broad spectrum between economic approaches (those that, generally speaking, focus on welfare and efficiency, and which seek to monetise the environment as a measurement tool) and non-economic approaches (those that focus on a broader set of human values). Ecocentricity can also be split into a number of categories (e.g., approaches with spiritual or indigenous underpinnings, or those focused on the intrinsic value of living things). Many theories exist between strict economic approaches and strict ecocentric ones. It should be noted that although Māori values and processes of environmental management and the exercise of kaitiakitanga (loosely, stewardship) cannot be categorised within a Western framework, elements do align more with an ecocentric perspective. In the New Zealand context, the two kinds of paradigm will need to work together.

![Figure 4.1: Broad categories of environmental ethics in Western thought](image-url)

<table>
<thead>
<tr>
<th>Environmental ethics</th>
<th>Anthropocentrism</th>
<th>Ecocentrism</th>
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<tbody>
<tr>
<td>Economic anthropocentrism</td>
<td>Biocentrism</td>
<td>Non-economic anthropocentrism</td>
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<tr>
<td>Animal rights</td>
<td>Others</td>
<td></td>
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Variable oyster catchers
4.3 Economic anthropocentrism

An anthropocentric approach to the environment means human interests are put at the centre of decisions about resource use and protection. People are held to be of overriding importance. Within this, an economic anthropocentric approach defines human interests relatively narrowly: the maximisation of social welfare. Traditionally, this has attracted the label of environmental economics, and has developed from the neoclassical school of economics.

In strict economic approaches, social welfare is generally seen as a product of two things: efficiency and equity. An efficient allocation of resources means there is no way to increase one person’s welfare without reducing another person’s welfare. Some have proposed that net increases in welfare can still be efficient if those benefiting can use their gains to compensate those suffering loss. But because many outcomes can be efficient, economic approaches generally determine which one is optimal by choosing the most equitable. Some may effectively see equity as unimportant (any efficient allocation is acceptable), but others may require that the welfare of those with the lowest welfare be enhanced.

In the environmental context, the most famous (or infamous) expression of an economic approach is that attributed to Ronald Coase, in what has since become known as the Coase theorem. This echoes Hardin’s seminal work on the tragedy of the commons, in that environmental problems are seen to be the result of market failures. In other words, if the negative impacts of a person’s resource use can be shared between many people, but its benefits can be individualised, any person acting rationally (in an economic sense) will cause overall environmental harm. Different solutions to this problem have been suggested; public regulation is one, taxation is another. Those writing in the tradition of the Coase theorem have proposed greater enclosure of resources – in other words, the allocation of defined, divisible and defendable property rights. This is on the assumption that people will look after their own resources from which they benefit personally, and the profits they make from use can compensate those who are harmed by it.

Strict economic approaches like this can be criticised. First, they do not allow the possibility that equity may be better enhanced by an economically inefficient outcome. In some cases (eg the allocation of water rights), equity may need to be an overriding factor. Secondly, they assume the existence of markets with no externalities or transaction costs, and of economically rational actors. We almost always have less than perfect knowledge of the environmental effects of an activity, and markets may fail to internalise what are later realised to be the actual environmental costs of activities. Such approaches to the environment therefore do not reflect many real-world settings. Also, the enforcement of property rights generally occurs only once harm has occurred – it is the ambulance at the bottom of the cliff – yet some costs may be irreversible and in a sense “priceless”. This may be especially so for future generations who will bear the cost but cannot participate in the market.

Furthermore, it would be a mistake to think that all human values can be reduced to transactional or monetary terms. Environmental economics generally treats the wellbeing obtained from the environment as equivalent to that obtained from other economic inputs. As Dr Tim Denne states: “All things which contribute to wellbeing can be traded-off against each other; for example, it assumes we can make trade-offs between a dollar’s worth of degradation in air or water quality and a dollar’s increase in industrial profits.”

The natural world has characteristics and ownership attributes that are fundamentally different to other economic inputs like capital and labour. It cannot be moulded in the same ways. Should the environment really be commoditised – essentially reduced to a form of property? There may be a seductive simplicity about measuring wellbeing in terms of economic metrics like GDP, but in more recent times environmental economists have begun to question whether other metrics need to be given a more prominent role in measuring human progress, despite the clear difficulties in doing so. As mentioned in the previous chapter, the Treasury’s Living Standards Framework reflects this trend towards plurality within an economics framework.

Of course, it would be unfair to paint all self-described environmental economists with the same brush. In recent times, much innovative thinking has occurred in the field of environmental economics. The division between economists and ecocentrists has also blurred, with many quite different framings now available for concepts like natural capital, ecosystem valuation, discounting, and green trading. Some can be described as ecological economists rather than environmental economists, who recognise that the natural world has intrinsic value as well as its instrumental value as a source of resources. Its original aims were to challenge mainstream economics and to adopt a more just, equitable and environmentally benign approach. But to some, this may stretch the label of “economics” beyond its breaking point, and simply become an ecocentric theory.

However, a defining feature of even the “greenest” approach to environmental economics is the methodological tendency to reduce the natural world to monetary or instrumental terms for ease of measurement, even if the end goal purports to be broader than efficiency or an increase in human welfare. This is not to imply that such an approach is bad; imputing a monetary value to nature is much better than assuming it has no value at all. In fact, it might be valued extremely highly, and money is extremely powerful in influencing behaviour. It is simply to identify that it is one lens among many through which people may view the world and think about what is right and wrong.

An economic approach to environmental ethics tends to reduce the natural and physical world to monetary terms. This is only one possible way of valuing the environment and resources within it.
4.4 Non-economic anthropocentrism

Some scholars of environmental ethics have rejected economic approaches. They have retained a focus on human interests – an anthropocentric way of looking at things – but have looked more widely at human values. They have considered that what is in the public interest may not be as simple as combining the interests of private consumers. What we want as economic actors is not necessarily who we are as citizens of a society. The natural world cannot be valued only by measuring people’s willingness to pay. This kind of view gives weight to the interests of future generations, but stops short of recognising that nature has interests or a voice separate from the value that humans see in it.

The methods used by these more inclusive takes on anthropocentrism are broader than those of strict economic approaches. (In fact, the key distinction may be more about how value is measured rather than the extent to which we value something. For example, treating nature as a form of highly valued capital – an economic approach – can produce outcomes that are just as “green” as giving nature legal personhood and rights – an ecocentric approach). Cost-benefit analyses may be useful, but are rejected as the absolute measure of ethics. People are recognised as social, cultural, political and moral agents as well as economically rational and self-interested actors. Valuing the environment is not assumed to bring with it a wish to possess it in an economic sense, and market failure is not taken to be the sole basis of regulation. Environmental issues involving other life forms and future generations pose ethical aims beyond the maximisation of resource consumption, no matter how sustainable that consumption may be.

The implication here is that many competing values must be weighed (not just a single value like social welfare). Some approaches weight them differently. One historically influential line of thinking suggested a “good decision” is that which produces the most pleasure (utility or wellbeing) and the least pain for the most people.

But embracing the chaos and immeasurability of conflicting human values means that it is extremely important to get the process of decision-making right. Therefore this kind of approach generally stresses the importance of participation, transparency, and rational discourse leading to decisions. This can be seen under the RMA and other legal frameworks in New Zealand, where cost-benefit analyses do not give us an automatic decision on plans; that is the role of a broader, values-based statutory purpose statement informed by public input. On this view, environmental decision-making is about deliberative democracy and an informed and engaged population. It also recognises that values may change over time through ongoing community conversations, not just through the independent operation of a market or inflexible economic principles.

A non-economic anthropocentric worldview focuses on the weighing of many human values concerning the environment, rather than its measurement in monetary terms.

It is possible to criticise anthropocentrism. For one, the same basic criticism of economic approaches can be made. While the environment may not be commoditised, it is still seen as a concept serving human interests and measured by human values. Weighing such a large number of conflicting values can cause uncertainty, subjectivity and argument. One New Zealand judicial decision has likened the act of weighing environmental effects as “comparing apples and oranges.” The approach can mean all things to all people and lack durability.
4.5 Ecocentrism

Ecocentric theories of environmental ethics are often described as “deep ecology”. In general terms, ecocentric approaches see the central environmental issue as the attribution of value to human interests versus the interests of nature. Nature is conceived of as a separate entity, with interests or rights that should be separately recognised and defended. Humans are not seen as inherently superior beings. Humans are simply part of a complex web of natural relationships that need to be respected, not just users of resources having instrumental value. Ecological “economists” add ethical concerns to the desire to improve social welfare. To some, that may not be economics at all, and such categories can be fluid.

Environmental justice, concerned with the distribution of environmental harm among people, is here extended to ecological justice, which is focused on the rights of non-human living beings. Some have suggested that traditionally anthropocentric concepts (such as justice) can be useful starting points for ecocentrism. For example, we could include the natural world as an actor within, not outside, the human community of justice. The idea of a regenerative, rather than a linear (or even circular) economy, is a potentially powerful ecocentric model that seeks active improvement. Ecocentrism does not reject economics, but through the concept of ecological economics it is seen more as one of many tools for achieving ethically defensible outcomes than a normative discipline (saying what should happen). Just as we cannot offer a monetary figure to reflect the value of our children, or love, or happiness, so too we are unable to value nature only through an economic lens.

Under the general umbrella of ecocentrism are different perspectives on the scope of nature, and on the best balance to strike between the interests of people and the environment. Two main subcategories are most useful. First, biocentric theories focus on the dignity and rights of the living world. Some animal rights theorists see the ability to feel physical or psychological pain as reflecting intrinsic value. Others have emphasised the wider value of individual plants and animals as centres of life capable of having some idea of their own good. Secondly, broader nature-focused approaches extend rights and dignity to non-living aspects of the natural world, such as long-standing geological or geographical features, or landscapes. Some versions of ecocentrism can look radical, but few demand that people abandon all activities that exploit the natural world. To do so would be inconsistent with our own moral rights as part of an ecological community.

A spotlight on dolphin bycatch

Much of our resource management decision-making is based on the premise that it is an ethically bad thing to make a species extinct. But is it wrong to kill a wild animal if the population of that species is healthy? We commonly kill wild fish, for example, and manage that harvest on the basis of maximum sustainable yield. We rarely frame that activity as a moral choice, as to whether it is right or wrong to kill marine life. But we treat marine mammals differently. The Marine Mammals Protection Act 1978 makes it illegal to hunt (or otherwise harass) a marine mammal without a permit. The legislation followed that in the United States (the Marine Mammals Protection Act 1972) and was in the wake of the anti-whaling movement, which argued that whales had a right to life. The New Zealand Government has since been a strong supporter of the moratorium on whaling and has opposed the resumption of so-called scientific whaling by Japan. Although this position has been partly based on the unsustainability of whaling, which decimated wild stocks, it also reflects the value placed on the intrinsic values of whales as well as abhorrence at the inhumane nature of whale harvesting practices.

Dolphins have been the subject of a more interesting legislative history in New Zealand. There have been regulations designed to protect individual animals (as opposed to a species in general). Pelorus Jack, the Risso’s dolphin that followed ferries in Pelorus Sound during the late 1880s, prompted special regulations under the Sea Fisheries Act 1894 that prohibited the harvest of Risso’s dolphins in Cook Strait and were designed to protect them from hunting (which was legal at the time). In 1956, the Fisheries (Dolphin Protection) Regulations made it unlawful for anyone to take or molest a dolphin in the Hokianga Harbour, designed specifically to protect Opo, a bottlenose dolphin that had befriended humans there.

Dolphins are highly intelligent animals capable of abstract thought and altruistic behaviour. Some have argued that dolphins have such impressive cognitive and social capabilities that they should be given a different legal status from other animals – that of a “non-human” person. So if they are highly intelligent creatures, capable of strong social bonding and suffering (recall the recent story of the orca mother who carried around the carcass of her dead calf for 17 days), is it wrong to kill dolphins? The prohibition on (unpermitted) hunting in the Marine Mammals Protection Act implies this is the case; it equally applies to threatened and non-threatened species. But on the other hand, around 100 common dolphins are legally killed each year in trawl fisheries through a provision that authorises dolphin bycatch. Common dolphins are not generally thought to be threatened. But is it wrong to hunt them and okay to kill them in fishing nets? Should our laws be more morally consistent?
Ecocentrism should be applauded for seeking to shift the balance of environmental management towards true sustainability. But strict brands of ecocentrism can be criticised when accepted absolutely. For one, they provide little explanatory power beyond that of an anthropocentric approach. No matter how it is presented, ecocentrism in practice must reflect human values concerning respect for nature, rather than the values of nature itself. Limits to resource use are imposed by humans on humans. Plants can’t speak, as much as we might like them to. Sometimes the difference between anthropocentrism and ecocentrism can be one of degree. Not all theories actively proclaim themselves as one or the other.

More practically, strict ecocentric approaches may not be politically realistic as an ethic on which developed societies could currently frame their laws. For example, the consumption of meat is not essential to human survival, yet it is highly unlikely that this could be restricted. For another, although ecocentrism might provide some moral impetus towards sustainable development, it does not necessarily provide a blueprint for a sustainable society. Perhaps such theories are most practically useful not to impose an entirely new ethic, but rather to act as a moral push towards better environmental outcomes.

4.6 Te Ao Māori

Māori worldviews – Te Ao Māori – are more closely aligned to Western notions of ecocentrism than to anthropocentrism or an economic worldview. However, they are by no means the same thing. Te Ao Māori is a specific way of seeing the world, developed over centuries and incubated within an integrated social and cultural setting. It remains a powerful worldview amongst Māori in modern New Zealand, but it is not one that forms the foundations of our current system (even though components of it are present). We consider this view after anthropocentrism and ecocentrism not to diminish its significance, but rather because it provides a powerful normative alternative to the Western-based status quo encapsulated in those concepts. However, we note that Māori worldviews are not necessarily more environmentally oriented than progressive Western ones. Such generalisations hide considerable complexity.

Māori values are not homogenous. There is considerable diversity, just as there is within a “Western” worldview. That said, Te Ao Māori has strong common cultural roots. Values are intertwined with intangible or spiritual relationships (whanaungatangata) with the environment, which have been described as an intricate and interconnected web with foundations in a complex cosmology of familial and celestial relationships. There are also important worldly and terrestrial relationships within whanaungatangata. The environment is not seen as a collection of resources to exploit for human benefit, nor as a separate entity to protect; rather, people are seen as part of a cosmological system based on kinship, respect and reciprocity. Every aspect of corporeal and incorporeal life is connected. In Working Paper 3, Dr Robert Joseph said that:

A traditional Māori cultural worldview ... was based on the Māori cosmogony (creation stories) that provided a blueprint for life setting down innumerable precedents by which communities were guided in the governance and regulation of their day-to-day existence. Māori worldviews generally acknowledged the natural order of living things and the kaitiakitanga (stewardship) relationship to one another and to the environment. The overarching principle of balance underpinned all aspects of life and each person was an essential part of the collective. Māori worldviews are therefore ones of holism and physical and metaphysical realities where the past, the present and the future are forever interacting. The maintenance of the worldviews of life are dependent upon the maintenance of the culture and its many traditions, practices and rituals.

Tikanga is central to the Māori outlook. Dr Joseph describes this as “values, principles, ethics or norms that determine appropriate conduct, the Māori way of doing things, and ways of doing and thinking held by Māori to be just and correct”. Further, Hirini Moko Mead has said of tikanga that:

It is difficult to imagine any social situation where tikanga Māori has no place .... Tikanga Māori might be described as the Māori ethic ... Tika means “to be right” and thus tikanga Māori focusses on the correct way of doing things ... From this standpoint it is but a short step to seeing tikanga Māori generally as a normative system.

Tikanga is often regarded by lawyers as “customary law”, but Mead prefers to regard it as “an essential part of mātauranga”. Closely related concepts are tapu (being set apart); mana (prestige); noa (neutrality, free from tapu or any other restriction); manaakitanga (hospitality); take (cause); utu (reciprocity between people and with nature); and ea (satisfaction). Dr Joseph has added whanaungatanga (maintaining kin relationships with humans and the natural world); koha (gift exchange); aroha (charity and generosity); mauri (recognition of the life-force of persons and objects); and hau (respect for the vital essence of a person, place or object). Perhaps the closest the current system has come to formally recognising a Te Ao Māori perspective is in the recent Treaty settlements relating to Te Urewera and Te Awa Tupua/Whanganui River.
A spotlight on Te Urewera

The Te Urewera Act 2014 was established as part of the Treaty settlement for the Tūhoe people. It has, as its central purpose, the goal “to establish and preserve in perpetuity a legal identity and protected status for Te Urewera” for its intrinsic worth, its distinctive natural and cultural values, the integrity of those values, and for its national importance [...]. In particular, the purpose of the Act is (amongst other things) to “preserve as far as possible the natural features and beauty of Te Urewera, the integrity of its indigenous ecological systems and biodiversity, and its historical and cultural heritage”. The Act was unique in its creation of Te Urewera as a legal entity, with “all the rights, powers, duties and liabilities of a legal person”. These are to be exercised and performed on behalf of, and in the name of, Te Urewera by a Board established under the Act. People are actively responsible for enforcing the rights of Te Urewera.

A spotlight on Te Awa Tupua/Whanganui River

The Te Awa Tupua (Whanganui River Claims Settlement) Act 2017 recognises Te Awa Tupua as “an indivisible and living whole, comprising the Whanganui River from the mountains to the sea, incorporating all its physical and metaphysical elements”. Similar to the Te Urewera Act 2014, Te Awa Tupua has all the rights, powers, duties and liabilities of a legal person. The Act goes one step further and identifies a series of kawa, or protocols, known as Tupua te Kawa, which comprises the intrinsic values that represent the essence of Te Awa Tupua. They include that “the River is the source of spiritual and physical sustenance”; the “inalienable connection with, and responsibility to, Te Awa Tupua and its health and wellbeing” held by iwi and hapū of the Whanganui River; and the concept of collaborative decision-making. Persons exercising or performing a function, power, or duty under specified legislation must recognise and provide for Te Awa Tupua and Tupua te Kawa. Decision makers under other specified legislation must have particular regard to them.

The manifestation of Te Awa Tupua is through Te Pou Tupua, an office established “to be the human face of Te Awa Tupua and act in the name of Te Awa Tupua”.

Te Pou Tupua consists of two officials, one appointed by iwi with interests in the Whanganui River, and the other by the Crown. Similar rights, powers and duties (and liabilities) are vested in Te Pou Tupua to achieve its purpose and exercise its functions under the Act. Those aims usually do not emerge from a consensus, but rather from a continually repeating and evolving conversation. A system in which significant parts of the population cannot see their own basic outlooks reflected is unlikely to be durable. At the same time, a system that contains a jumble of inconsistent ethics is one likely to generate conflict, uncertainty and inefficiency. We must seek synergies and nodes of agreement.

Two more concrete thoughts may be ventured. First, New Zealand’s historical and cultural context demands that recognition be given to Māori worldviews. The system cannot be constructed on a blank slate in this regard. Secondly, whether through failures of implementation or something more intrinsic, a largely Western, neoliberal and anthropocentric ethic has failed to achieve the kinds of outcomes we want. That does not mean we need to reject the ethic entirely, or replace it. But it means that we should be open to more ecocentric ideas – including Western ones – if they can orient our outlook in a way that is more likely to get us to where we want to go.

In this sense, we can consciously construct a different worldview as a tool to force change in the system. We cannot expect an ecocentric ethic to generate spontaneously over a timeframe of years when comparable sea changes around concepts like justice, property and human rights have taken centuries. Acceptance requires a change in hearts and minds, which takes time. But ethical change does not have to happen all at once. We are already seeing gradual and incremental change in New Zealand’s predominantly Western system, with its increasing inclusion of Māori values and concepts.

We can even adopt an ethic despite it having components many do not truly believe in. For example, it is possible to confer legal personhood on a forest, not because people think trees are animated by spirits, but because they recognise it as a more effective way of achieving a desirable outcome – the protection of forests within the adversarial legal structures we already have. In a similar way, we have chosen to confer legal personhood on companies through a legal fiction, because we anticipated that such a measure would produce desirable economic outcomes. Companies do not “exist” in the same sense as natural people, but that does not make us stupid for recognising them or giving them rights.

The discussion above highlights the existence of a complex feedback relationship between our aims and our ethics. An ethic can shape our aims (eg neoliberal individualism naturally produces a desire to protect individual human rights), but equally our aims can shape our ethics (eg a realisation that we value our disappearing biodiversity could precipitate a shift towards ecocentrism).

In other words, ethics can be norms (a statement of what is morally right to do) or tools (a way to achieve aims that have been generated spontaneously elsewhere). In reality they are both, in a reciprocal relationship: ethics change outcomes, and outcomes shape ethics. Ethics as tools can even become ethics as norms if people come genuinely to believe in them over time, which may prove to be very important. A resource management system will

4.7 Evaluating worldviews

While criticisms can be made of each, no one ethical theory can be said to be “correct”. Ultimately, one must come to a personal conclusion as to what a society should be aiming for through its resource management system.
have durability only if supported by strong cultural norms. And, ultimately, we must be aware that the ethic we move towards today is as much, if not more, for our children than for ourselves. What do we want them to believe in?

While potential conflicts would have to be carefully worked through, an ethic with a stronger ecocentric element is likely to have greater synergies with Māori worldviews. Greater recognition of Māori worldviews – which are familiar to many New Zealanders – may be one way to facilitate transformational and acceptable ethical change rather than reluctant and abrupt change, or none at all. That said, there are immense challenges here. Māori worldviews are not held by all New Zealanders, and cannot be a replacement for a plurality of ethics. Yet some may see anything less than full recognition of tikanga as fatally flawed, given that the Māori worldview is so interconnected, and may resist elements of it being “cherry picked”. After all, tikanga is a normative system in its own right, not just a handful of principles to be added to a mix of others, and it may well be that “a culture cannot be understood fully in terms of the worldview of another”.

It is not the place of a resource management system to resolve spiritual debates, but spirituality is hard to divorce from the more concrete aspects of tikanga. Some may also object to the “co-opting” of Māori perspectives to apply to all New Zealanders, or resist the segregation of Māori values from Māori decision-makers.

Others may see a movement towards Māori concepts as downgrading the value of potentially synergistic but ultimately different Western concepts like ecocentrism, or ecocentrism itself as undermining the importance of people in our ethical hierarchy. However, as New Zealanders become increasingly aware of the environmental challenges we face, we are optimistic that some normative convergence will occur and will be helpful in shaping both our formal frameworks and our private behaviours. This is already happening to some extent, but will take time and careful navigation. We need to focus on our shared values, not create further divisions.

4.8 Concluding comments

We have begun our analysis with a discussion of ethical approaches because any discussion of the system must be guided by where we are wanting to go. But our choice of ethic is not arbitrary or random; it can be influenced by aims that are generated spontaneously through society’s reaction to significant social, economic and biophysical change. In our view, we are at that point now, and the prominence of the environment in the leadup to the 2017 general election is testament to that.

At this point, an observation may be ventured about the kind of worldview embodied in the current New Zealand resource management system. While some of its provisions reflect strong ecocentric assumptions and ambitions, these exist alongside more traditional instrumental concepts of resource management. In some senses, ethics historically held by New Zealanders can be seen as both ecocentric and “economic”. For example, the affinity we feel with the health of our productive land is not just about its economic value. It is a part of our national identity. Similarly, the foundations of the current system in the late 1980s rested on a marriage between economic rationalism and a strong sense of environmental activism. It is an interesting mix of worldviews. The RMA, for example, has been described simply as “a complex set of values enshrined in law”.

We must be mindful here that resource management is not just about environmental protection. Ecocentrism does not (and arguably cannot), for example, guide the normative direction of the non-natural and non-living parts of our system (eg cultural landscapes, heritage management and aspects of urban planning). References to intrinsic values have, in fact, been avoided entirely in the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 (EEZ Act).

At the same time, purely economic approaches fail to explain the content of New Zealand’s existing law, which goes further than simply remedying market failures or providing for methods of economic valuation. For example, the RMA (and many other Acts) are filled with
wider public values, not just the mechanical outcomes of economic analyses. The law also accepts that there is a public interest in how private land is used; landowners cannot do as they please. Moreover, the origins of the RMA can be traced back to concerns with fairness for future generations, arising from international events that illustrated the fragility and scarcity of natural resources. Looming large over this eclectic mix of ethics is a strong and usually overriding focus on the public interest.

Finally, we must not forget that the practical challenge is even more important – to translate a shift in worldviews into tangible changes. Ethics must make an actual difference on the ground to be worth having, or changing. They must flow down from the lofty heights of philosophy through our principles, our system design, our decision-making process, and the ways in which we live our lives. For example, our ethics can affect what the purpose and principles of our legislation look like, how our institutions are configured (eg guardians), and the kinds of tools we use (eg legal personhood). These are explored throughout the remaining chapters of the report.

Ultimately, we suggest that embedding a stronger sense of ecocentrism across the system is a valuable measure to take us where we want to go, even if we never feel a strong desire to hug a tree or kiss a snail. It is about the system helping to force a change in people’s mindset, which can then influence a change in their behaviour. Alternatively, and in the short term, an ecocentric ethic may simply provide a legal basis for requiring or preventing particular actions. Changes in people’s mindsets may happen over time in response to the ways in which they are compelled or encouraged to behave.

There may also be potential in aligning a stronger ecocentric foundation with Te Ao Māori in a future system. The two are not the same, and there are definite challenges in reconciling the latter with Western legal structures and decision-making responsibilities. In our view it is neither practical nor desirable to say that one or the other should be absolute. They must coexist. However, through the Treaty settlement process and other broader forms of change, we are already witnessing an expansion of Te Ao Māori concepts across the system. We can build upon such foundations to recognise that, for example, the environment is not comprised of resources, but rather taonga to be treasured; our institutions are not regulators and policy makers, but rather kaitiaki and stewards; our water and living creatures are not there just to be used and owned; they have their own mana, mauri and dignity.

Whether such concepts can be used to shape and support broader ecocentric ones may depend on the willingness of Māori to export such worldviews to the wider system (eg whether or not kaitiaki exercising kaitiakitanga are to be exclusively Māori, or whether the idea of taonga is to be defined by New Zealanders as a whole, who may treasure different things in different measure to Māori). In our view, the trick will be to embrace synergies between worldviews that will further the collective enterprise of New Zealanders, and not necessarily tie norms with ultimate decision-making power for particular groups. A positive example can be seen in the concept of Te Mana o Te Wai in the NPS for Freshwater Management: the integrated and holistic wellbeing of a freshwater body, incorporating the values of tangata whenua and the wider community. Similarly synergistic concepts have been used in the proposed NPS on Indigenous Biodiversity; recent Treaty settlement legislation (eg concerning Te Urewera) and the Sea Change – Tai Timu Tai Pari initiative.

A future system will need to contain multiple worldviews. However, embracing synergies between ecocentrism and Te Ao Māori more within a plurality of ethics may provide a positive direction of travel.

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<td>A Te Ao Māori outlook</td>
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<td>Direction of travel</td>
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<td>Retain a mix of worldviews, but shift the balance in one direction or another; OR Radically change the ethic that underpins our resource management system as a whole</td>
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<tr>
<td>Economic worldview</td>
<td>Retain the current place of economics in the system; OR Strengthen an economic worldview; OR Place greater emphasis on the free market and private choice</td>
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<tr>
<th>Ecocentrism</th>
<th>Retain references to nature’s intrinsic value in the system; OR Remove intrinsic value in favour of monetary valuation of relative human interests; OR Embed rights and responsibilities for nature in the system</th>
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<tr>
<td>Te Ao Māori</td>
<td>Retain references to the Māori worldview (eg kaitiakitanga) alongside other kinds of worldview; OR Focus on strengthening Treaty of Waitangi obligations; OR Embed Māori concepts like tikanga as foundational concepts (eg instead of sustainability)</td>
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Figure 4.2: Options for ethics and worldviews in a future system

2. On the myth of the rational actor, see D. O’Neill “Economists: If ways economics gets it wrong” (Icon, 2010).


29. Again, recognised by Coase himself.


31. See also the principle of sustainability: Transforming law and governance (Ashgate, 2008) at 1.

32. See generally the “ecosyntetic” approach of R. L. Revesz, Foundations of environmental law and policy (Oxford University Press, 1997) at 85.

33. On the myth of the rational actor, see D. O’Neill “Economists: If ways economics gets it wrong” (Icon, 2010).

34. See, for example, M. Shively “Economic constraints: Sustainability in practice” (Springer, 2012).


37. See, for example, M. Christensen “valuation of natural assets under the Resource Management Act” (2013) 17 NZJEL 291 at 315.

38. Some people may choose to describe broader anthropocentric approaches (which recognise a non-monetary public interest as “economic”) in the sense that such interests are still assigned value through deliberative and participatory processes. See, for example, M. Christensen “valuation of natural assets under the Resource Management Act” (2013) 17 NZJEL 291 at 316. The terms “economic” and “non-economic” are simply useful labels to recognise two ends of a complex spectrum of theories.


41. See generally the “ecosyntetic” approach of R. L. Revesz, Foundations of environmental law and policy (Oxford University Press, 1997) at 85.


43. See, for example, J. Gowdy “Cost and Biodiversity: The Trade-off” (Harvard University Press, 2009); M. Bramley and J. McNeill “Up the creek and down the river: In-stream ecological values and property rights under the RMA” (New Zealand Centre for Environmental Law, 2013) at 153; D. Pearce “Optimal prices for sustainable development” (Cambridge University Press, 1997) at 32.

44. Ibid at 106.

45. Ibid at 106.

46. Again, recognised by Coase himself.

47. See K. Ott “Solving the demarcation problem” in L. Westra, K. Bosselmann and R. Peart (eds) Joint statement against whaling C48/06, 27 April 2006 at [37]


50. Again, recognised by Coase himself.


52. See also the principle of sustainability: Transforming law and governance (Ashgate, 2008) at 1.


An exhaustive investigation of Te Ao Māori is not possible within the constraints of the project, although that would be a useful exercise in the context of future resource management reform.


See A Turks. “Tangata whenua ethics and climate change” (1997) 1 NZIEL 67 at 71, from 73.


See M Christensen “Valuation of natural assets under the Resource Management Act” (2013) 17 NZIEL 291.

See D Young Values as law: The history and efficacy of the Resource Management Act (Victoria University of Wellington Institute of Policy Studies, 2001) at vi.

For example, the oil shock of the 1970s and the scathing OECD audit of New Zealand’s environmental arrangements in 1980. See D Young Values as law: The history and efficacy of the Resource Management Act (Victoria University of Wellington Institute of Policy Studies, 2001) at 3–5.

See also Chapter 6 on the public interest as a rationale for intervention in a future system.

See Biodiversity New Zealand <www.biodiversitynz.org>.

5: LEGAL AND ETHICAL PRINCIPLES
5.1 Introduction
A society’s basic worldview(s) and ethics provide the normative foundation of its resource management system. But it is important to operationalise worldviews through the recognition or development of more detailed principles – like sustainability, intergenerational equity and precaution. Principles are not always visible on the face of legislation or spelt out in judicial decisions. They often lie more subtly behind the reasoning of decision-makers. This chapter provides a short exploration of key principles that have been developed in the field of resource management, and which could form the basis of a future system. They can look different depending on the worldview one adopts.

5.2 Sustainability
Sustainability is a framework principle in the sense that it sets the broad playing field within which other, more specific, principles operate. In the last few decades, sustainability has become a byword for responsible environmental management. However, sustainability can mean many things. Internationally, the most common formulation has been sustainable development, meaning “development that meets the needs of the present without compromising the ability of future generations to meet their own needs”. It includes a focus on people’s rights to socioeconomic development, not just environmental protection. New Zealand’s various environmental statutes define sustainability in different ways. However, most discussion has focused on the term “sustainable management” central to the RMA and the EEZ Act. For most of its history in New Zealand, this principle has involved a relatively vague balancing of conflicting interests (an overall broad judgement) rather than the clear imposition of biophysical bottom lines, although this has recently begun to change.

Sustainable management encompasses almost all effects of activities on a broadly defined environment (including, under the RMA, impacts on the social, economic and cultural condition of communities). As with the idea of sustainable development expressed in Principle 4 of the Rio Declaration on Environment and Development (1992), sustainable management recognises that environmental protection cannot be considered in isolation from social and economic development. Integrated management is important.

Sustainability provides a framework within which other more detailed substantive principles can be applied. It is essentially about balancing the value of resource use with the value of environmental protection in a way that can be maintained over time. Sustainable development is concerned not only with ensuring environmental protection in the face of development pressures, but also with active recognition of the need to drive socioeconomic development. Sustainable management, in the New Zealand experience of the term, has a narrower focus of protecting the environment. It seeks only to enable socioeconomic wellbeing, not drive it.

Some have complained that sustainability is inherently difficult to apply in the courts, because it involves resolving value-based conflicts. It is also arguable that it does little more than restate the need for some balance between resource use and protection. It is not an operative concept. Some have even seen it more as a buzzword than a principle, and as “pushing and pulling the boundaries of true primary norms”. More important for a future system would be how exactly sustainability is defined. For example, most debates about the purpose and principles of the RMA are not about sustainability as a concept, but rather about which more specific matters get to be listed as matters of national importance. However, some have suggested that other principles should be used as the normative cornerstone of a future system. Resilience and risk management are alternatives that have been floated, recognising that the idea of sustainability is too passive to meet the challenges of an unstable environment and rapid change, has failed to prevent harmful human behaviour in the past, and falsely assumes we can control rather than having to respond to environmental change.
5.3 Environmental justice and distributional equity

The concepts of environmental justice and distributional equity are closely related, but distinct. The purpose of environmental justice is to protect some groups more than others from the costs or risks – the downsides – of resource use. Such groups are usually those who are disadvantaged socioeconomically. Distributional equity (sometimes referred to as intragenerational equity) is about making sure that the benefit of resource use rights are distributed in an equitable way. The allocation of rights to take freshwater, for example, is one example of where distributional equity is relevant. Neither concept is about protecting the environment per se, only about the ways in which the costs and benefits arising from use are distributed among people. They can be thought of as the social dimension of sustainability. However, an ecocentric addition to the principle of environmental justice is ecological justice, in which the natural world is accepted as a participant in the community of justice. In this model, environmental protection is not a separate consideration from the distribution of rights, because nature has its own rights that can be defended.

Within New Zealand’s current system, the concept of distributional equity has been fairly weak. Under the RMA, the market, not equity or justice, is the primary driver for how and by whom most resources are used. The concept of sustainable development promoted in the Brundtland report was intentionally avoided in the RMA due to its association with the distribution of wealth and rights to socioeconomic development. The RMA is not, for example, directly concerned with the creation or defence of property rights, and this has significant implications for the allocation of resources like freshwater. As the Minister for the Environment said on the Resource Management Bill’s second reading, as long as adverse effects are acceptable, “what people get up to is their own affair”. Recently, the courts have begun to question the wisdom of this approach, and the RMA (and other legislation) can allocate specific resources in more structured ways. But, overall, allocative questions have not been fully incorporated into law designed to protect the biophysical environment.

New Zealand’s take on environmental justice is also fairly weak, reflecting a fairly “economic” worldview to the distribution of costs, and the separation of distributional policies (compensation) from resource management decisions. Although effects on the environment include effects on social, economic and cultural wellbeing of people and communities, the law does not specifically require that certain socioeconomic groups be insulated from adverse effects more than others. Compensation is not required. That said, impacts on Māori cultural interests are more strongly safeguarded. Effects on vulnerable communities may be valued particularly negatively in practice, and treated as being of greater magnitude.

A spotlight on fairness in resource management decision-making

Because those with higher incomes can afford to pay more than those with lower incomes, their preferences may effectively be given greater weight. For example, owners of a group of valuable houses might be willing to fund a flood protection scheme which would displace the water to a larger group of less valuable houses in a low income neighbourhood. Simplistic welfare economic analysis might suggest this is an efficient project, with the willingness to pay of the scheme funders (over and above the costs of the scheme) being sufficient to compensate the “losers” for their increased risk of flooding. However, this assumes the value of a dollar to one individual is the same as to another, but it will differ with income. Thus, the Treasury states:

Welfare economics has long recognised that ... the benefit that a poor person derives from another dollar of income, and therefore from another dollar of expenditure, may be higher than the benefit derived by a rich person. Basing a CBA [cost-benefit analysis] on the concept of “willingness to pay” therefore reflects the existing distribution of income or wealth, which may be considered to be inequitable. It is almost inevitable, therefore, that public sector projects have distributional consequences which some people will consider undesirable.

In contrast, the United Kingdom Treasury recommends the inclusion of distributional weights in cost benefit analyses unless the analyst can justify not doing so. [New Zealand Treasury] ... does not recommend that, and instead recommends that where projects or options have significant favourable or unfavourable distributional consequences, that they be analysed separately in terms of their relationship to wider government distributional policies and drawn to decision-makers’ attention.

Both approaches recognise the importance of environmental justice. The differences are in whether unequal distribution of effects should be addressed at the level of each resource management decision or only in aggregate through explicit distributional policies.

Environmental justice and distributional equity seek to distribute the costs and benefits of resource use and protection between groups in present-day society, according to equity or sensitivity to harm. Ecological justice is an extension of this idea, which assigns rights to the natural world (and corresponding responsibilities to humans to defend them).
5.4 Intergenerational equity

The principle of intergenerational equity is about the relative value we give to the interests of current and future generations. It tells us that the latter should be safeguarded to at least some extent. It is a morally charged obligation to future generations to act prudently; a direction not to consider cumulative, long-term effects as inconsequential; and an exhortation to live off the dividends of, rather than erode, our natural capital. It requires the institutionalisation of strategic thinking. Edith Brown Weiss has identified three key components in this concept: conserving the diversity of our resource base; maintaining the quality of our planet; and providing equitable access to our legacy. It is about keeping our children’s options open. The market alone cannot be relied upon to provide for the interests of future generations, because its participants may not act in the interests of those who are not yet born. The principle is generally approached in an anthropocentric way, on the assumption that preserving the ability of future humans to meet their needs will also benefit the natural world. However, the concept of providing for future generations can also be observed within the more spiritually focused approach in Te Ao Māori, and an ecocentric model can recognise nature’s rights to be safeguarded in the future.

When making plans in the current system, the idea of “the future” is to be determined according to the nature of the threat. Environmental damage that is severe, long-term and irreparable is to be given significant weight. Yet the system stops short of providing equal weight to the interests of future generations. The RMA, for example, does not require that we confer on future generations the same ability to provide for their wellbeing as present generations. The needs of future generations is an amorphous concept and extremely hard to predict, but a future system could provide greater guidance. Jonathan Boston has argued for more explicit consideration of future generations in New Zealand governance structures.

Intergenerational equity seeks to distribute costs and benefits of resource use and protection between present and future generations, so that at least the basic needs of future generations are met.

Pt Chevalier beach

5.5 Polluter-pays

The polluter-pays principle states that the costs of pollution should be borne by those who produce it (or are ultimately responsible for its production) or by those who enjoy its benefits. The broader concept of user-pays is equally useful, since pollution is simply one example of using a resource (a receiving environment). The principle can be seen in action, for example, with the establishment of a carbon market under an emissions trading scheme.

The polluter-pays principle responded to concerns that private persons did not have to pay in order to pollute the environment, even though they profited from doing so. Historically, this meant that costs (either remedial or the cost of living with the impacts) were borne by society as a whole or those impacted by the pollution. The principle shifts that burden to the polluter. However, it does not mean that people should have a right to pollute or use resources simply by paying for them (even if payment is made to compensate affected parties). Public restrictions, not the free market, determine if adverse effects are acceptable. As with environmental justice, the principle can be seen as serving a primarily social rather than ecological function; it ensures that the costs of adverse effects, where they occur, are allocated fairly between people. It does not determine whether those effects are acceptable in the first place. However, it can also be seen as a way to achieve ecological outcomes (eg by setting prices or caps at levels that prevent pollution/use or incentivise measures to reduce their impact).

The true costs of resource use are generally not internalised fully in the current system. For example, compensation does not have to be paid for a failure to avoid, remedy or mitigate the wider adverse effects of an activity on the environment or persons. One aspect of the environment while enhancing another can be acceptable, as can be seen in the context of biodiversity offsetting (although these mechanisms are carefully controlled). The environment can sometimes be degraded in the interests of other nationally important agendas. The law also does not require that charges be imposed for the use of public resources.

The principle of polluter-/user-pays seeks to distribute the costs of resource use between private and public interests. It generally places costs on the polluter or user.

5.6 Common but differentiated responsibilities

The principle of common but differentiated responsibilities can be seen as a particular example of the polluter-pays principle. This is prominent in, but not limited to, the climate change context. It states that while all states have common responsibility for global environmental problems, it would be wrong or inequitable to require the same level of response given the different historical contributions of states to the problem and varying
capacities to respond. Because it is a developed state, New Zealand has recognised that it should shoulder a heavier burden in mitigating climate change than countries in the developing world.

The principle of common but differentiated responsibilities seeks to distribute the costs of environmental protection among the international community. It means that New Zealand bears greater responsibility for the costs of mitigating climate change than some other countries.

5.7 Subsidiarity

The principle of subsidiarity is concerned with the question of who makes decisions. It is closely related to matters of institutional design, which are explored in Chapter 9. Resource management decisions can be made by a variety of institutions at a variety of levels of governance. Subsidiarity provides that decisions should be made closest to, and in line with the values of, those most affected by them (the relevant community of interest).

It can be difficult to determine where the appropriate community of interest lies, because many communities have legitimate and conflicting interests. A decision (e.g. authorising a wind farm) can affect national interests (a positive impact on energy supply) in very different ways to local interests (visual amenity impacts or noise pollution). In the current system, the idea of subsidiarity has tended to produce highly devolved decision-making by local government because positive and adverse impacts of most resource uses (and protection) have been felt locally and regionally, and because local government has been given first-instance responsibility for most matters. But the RMA provides for political decision-making power at the planning level to shift as the relevant community of interest changes, and the national level Environment Court has wide-ranging jurisdiction on appeal (even for local matters). Legislation under which decisions are taken centrally, such as the EEZ Act and Climate Change Response Act 2002, can be explained as addressing a more clearly national (or global) community of interest in oceans and the climate.

Some legislation also grants iwi the power to make legally binding decisions. This is particularly noticeable in relation to water and coastal resources. For example, holders of a customary marine title recognised under the Marine and Coastal Area (Takutai Moana) Act 2011 are given the power to grant RMA “permission rights” within a title area, without which an activity requiring a coastal permit cannot proceed. Such powers may to some extent erode legal certainty, transparency and scientific rationality in favour of cultural discretion, but this is seen to be justified in order to recognise an important and separate Māori community of interest that exists alongside – rather than below – national and local communities. Yet these powers usually remain subject to at least some considerations of the wider public interest.

Subsidiarity seeks to locate decision-making responsibilities closest to (and according to the values of) the relevant community of interest. There is a separate Māori community of interest alongside national, regional and local ones.

5.8 Treaty of Waitangi obligations

The unique place of Māori in New Zealand has had a strong influence on its resource management principles. Although the specific content of the Treaty of Waitangi is not itself directly enforceable in domestic law, the principles that have been recognised by Parliament and developed by the courts as reflecting the spirit of the Treaty have become increasingly important over the last few decades. The principles have “become part of the fabric of New Zealand law”. Many have significant implications for the management of natural resources, and most environmental statutes already recognise them in some way. In Working Paper 3, Dr Robert Joseph outlined in more detail some key developments in Treaty jurisprudence over the past few decades.

In all legislation, the Treaty must be considered as an aid to statutory interpretation. Treaty principles impact upon distributional questions (rights of iwi to use particular resources, and for their interests to be protected from others’ uses), but are also concerned more generally with values in relation to how the environment is managed.

The principles themselves can be described broadly as follows: a duty on both Māori and the Crown to act reasonably and in good faith (including a duty to consult); the active protection of Māori interests by the Crown; the making of informed decisions by the Crown; the remediation of past grievances; and the right of the Crown to govern by pursuing its policies in the interests of the whole community. The Waitangi Tribunal has also seen the basic principle as being one of reciprocity, where governance or sovereignty has been exchanged for rangatiratanga or control over resources. However, Treaty principles are always evolving to reflect changing times.

The principles of the Treaty do not demand that the environment be protected strictly. The Treaty is as much about recognising Māori rights to manage and use resources as it is about protecting the environment from use. For example, some traditional practices are allowed to continue through a customary rights framework despite general restrictions in the RMA. The law tends to target Māori participation or (in more limited cases) partnership, rather than attempting to codify Māori environmental values themselves. For example, a local authority under the RMA may choose to confer resource management powers to iwi authorities (subject to certain criteria) or to reach joint management agreements with them – although, significantly, the former power has not yet been used. Specific Treaty settlement legislation addresses distributive issues and can interact with general environmental laws like the RMA. Ultimately, the Treaty is about power, process and redress – the relationship
between two distinct communities of interest – rather than the environment per se.

The principles of the Treaty must be “taken into account” under the RMA. The Waitangi Tribunal has seen the weakness of this direction as “fatally flawed” and recommended an alternative: that all persons acting under it “shall act in a manner that is consistent with the principles of the Treaty of Waitangi”. Geographically specific legislation also protects Māori interests to varying degrees, either in a way that integrates with or stands alongside more general legislative regimes. This includes an increasing emphasis on the importance of co-governance.

Setting aside specific distributional questions (rights to resources), the Crown’s obligation to actively protect Māori values has had an environmentally protective flavour in practice. This is because of the way in which such values have been expressed in laws, and because the Māori worldview is closer to Western ecocentrism. It may also be because Māori have, thus far, been more active as submitters in opposition to developments (although this is changing).

Overall, although the active protection of Māori interests in environmental law is not absolute, and can bow to the wider public interest, it is a strong theme. The Privy Council has observed that decision-makers must have particular sensitivity to Māori issues, since the law contains “strong directions” concerning them. However, arguments continue as to the extent to which Māori interests should be defended by giving stronger powers to Māori themselves. It is an intensely political issue that needs to be navigated with great care.

The principles of the Treaty of Waitangi include active protection, good faith, remediation of past grievances, and informed decision-making. They will be extremely important in a future system.

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5.9 Kaitiakitanga, taonga, mauri, and mātauranga Māori

Māori principles can be seen as valuable ways of thinking about environmental management in their own right, not just as the product of a political process that respects the Treaty of Waitangi, returns mana, or upholds moral obligations towards indigenous people.

It is selling these principles short if we see them just as a form of redress to Māori, in the same way that we sell sustainability short if we see it just as a concession to “environmental” interest groups.

A spotlight on kaitiakitanga

The concept of kaitiakitanga, akin to the idea of stewardship, has been described as “the overriding Māori environmental ethic”, although there can be fraught debates as to whether the concept is one in which only tangata whenua can act as kaitiaki (stewards) or if it can be exercised by others. For example, the Fisheries Act 1996 defines kaitiakitanga as (emphasis added)

- the exercise of guardianship; and, in relation to any fisheries resources, includes the ethic of stewardship based on the nature of the resources, as exercised by the appropriate tangata whenua in accordance with tikanga Māori

Further, the Aquaculture Steering Group described the following elements of kaitiakitanga (in the context of aquaculture reform): mahi tapu – god given and handed down through our tipuna

- founded in whakapapa - the relationship between everything and everybody in the natural world - there is no distinction between people and their environment

- exercised on behalf of, and for the benefit of all who are related through whakapapa

- a set of inalienable responsibilities, duties and obligations that are not able to be delegated or abrogated

- a web of obligations: to the taonga, to the atua and to ourselves and our uri. Kaitiaki have a responsibility to provide for everyone and ensure everyone benefits

- independent of “ownership” in a European sense

- seamless and all encompassing – making no distinction between moana and whenua

- given effect at whanau and hapū level

- expressed in ways that are appropriate to the place and to the circumstances, according to tikanga

- wider and more complex than existing legal definitions

- given practical effect by exercising control over access to resources and sharing the benefits of the use of those resources

- enabled through rangatiratanga, which includes the authority that is needed to control access to and use of resources, and to determine how the benefits will be shared
Kaitiakitanga is central, but there are other concepts through which Māori environmental values may be understood. One is that of the taonga relationship, which is about treasuring both tangible things and intangible/spiritual concepts. Another is mātauranga Māori, or traditional knowledge. This is more than just the knowledge of scientific facts, and it may be said to encompass broader ideas like wisdom and systems of knowing. A third concept is that of mana, meaning life-force, vital essence or the essential quality of something. Several principles, recognising not just tangible but also spiritual aspects of Te Ao Māori, are already specifically reflected in legislation like the RMA. However, some have criticised the manner of their inclusion as a way to “co-opt” Māori values into the political process without corresponding Māori involvement, and as just one among many things to be weighed. That said, synergies and convergence may be possible in a future system. The concept of mana for natural features – as exemplified in Te Mana o Te Wai – may be a tool to bridge any gaps between a focus on people and a focus on nature, as well as respecting cultural concerns. Legal personhood for nature may be another.

5.10 Resource development

Resource management is not just about protecting the environment from use. It is also about making sure that some resources are used, and that they are used in socially and economically desirable ways. Within New Zealand’s neoliberal, free market paradigm in which most principles have developed over the last three decades, it has been largely unnecessary to create principles encouraging resource use. Economic self-interest has promoted such outcomes quite naturally. However, a broad “development” principle can be recognised, even if it is not usually referred to as such. This describes the idea that where a particular kind of use is necessary to realise the public interest, the law should play a greater role in enabling or driving it. It can conflict with other principles discussed above, which tend to (although do not always) promote the protection of resources from use. There are several ways in which the law can implement this principle. First, it can require or incentivise the deployment of activities having publicly important outcomes (such as requiring the provision of public infrastructure such as roads and sewerage systems by public authorities). Secondly, it can partly overcome environmentally protective provisions or process restrictions in other legislation. For example, first-instance decisions on land uses for significant infrastructure are made by the proponents – the requiring authorities – rather than local authorities. Thirdly, it can ensure activities occur in a way that actually delivers publicly important outcomes once they commence (e.g. the maintenance of roads and the provision of water and energy services). The principle certainly does not require that such activities are to proceed irrespective of their environmental cost. It simply provides considerations in favour of some socially important resource uses.

The development principle is a convenient label for a principle that recognises that the resource management system should place value on, and incentivise or mandate, some resource uses that are in the public interest.

5.11 Conservation

The conservation principle goes further than the principle of sustainability. It recognises the need to protect wilderness and the intrinsic value of areas in their natural state. In this sense, it resembles the public trust doctrine, where the state has a responsibility to act as the guardian of the ecological values of public areas.

Outside specific geographical areas, we can still observe a desire to protect some things in a way that is stricter than others. It is less about balance and mitigation, and more about preservation and prevention. For example, some absolute protections attach to specific animals (such as whales and dolphins) rather than their locations or habitats. The protection of the coastal marine area as a whole (and the intrinsic value of water, associated ecosystems, and natural character) is also emphasised comparatively strongly.

However, protection is not always enough. If we are going to exploit the environment, and recognise the errors of previous generations, we also need to be active in improving it. Conservation is equally about regeneration and restoration. There are limits to this, however, as positive measures can cost a significant amount of money; in the current system it mainly occurs through the actions of government agencies with public funding and clear statutory mandates (e.g. in the eradication of pests). A private person cannot generally be forced to improve the environment unless its condition relates fairly directly to the adverse effects of that person’s activity. In Chapters 12 and 13 we consider tools that may help (such as biodiversity offsetting and economic instruments).

Overall, what the conservation principle looks like is particularly dependent on our broader ethic. For example, an anthropocentric ethic that focuses on the value of recreation, or an economic ethic that focuses on the value of scientific research, is likely to protect and enhance areas of quite different character to an ecocentric ethic that values the right of living organisms to thrive.

Related to this idea of protection and enhancement is the principle of non-regression. This is an emerging idea that provisions protecting the environment should not be eroded.
once put in place, or be subject to political ups and downs. This also offers a warning to any reform exercise: we must be very careful not to throw the baby (eg positive case law) out with the bathwater (suboptimal parts of the system).

The conservation principle recognises that protection and enhancement of the environment must be relatively absolute in some geographical areas. It encompasses the principle of non-regression, which states that measures beneficial for the environment should not subsequently be removed or eroded, and the public trust doctrine, under which the state acts as trustee of the ecological health of public areas.

5.12 Precaution

No one can predict the future with complete accuracy. The precautionary principle tells us to take care where we face environmental risk or uncertainty. Where it is unclear whether an adverse effect will occur, that does not excuse a lack of action to address the effect. In lay terms, it is better to be safe than sorry. This goes further than the principle of prevention, which simply holds that it is better to prevent harm than to respond to it after the fact. Precaution is important both when establishing facts (identifying risks) and making judgements (assessing and managing risks).

The precautionary principle has a rich history in international law, with its most famous formulation being in Principle 15 of the Rio Declaration on Environment and Development (1992). This proclaims that "where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation". Precaution is also already a significant part of New Zealand’s resource management system. Under most of our laws, risky activities cannot occur unless expressly authorised. We do not wait to clean up the mess afterwards. But this general principle has many nuances.

Risk identification should be evidence-based and scientifically determined. Identifying what risks exist (what could happen) does not require value judgements (what should happen). When identifying risk, some existing frameworks simply require decision-makers to make evidence-based decisions based on reasonableness and relevance. In other regimes, such as the RMA, there have been more heated debates about the appropriateness of specific legal criteria – precautionary standards and evidential burdens of proof – for establishing risks. Either way, the main concern has been to prevent low probability risks being artificially ignored.

Risk assessment and management, in contrast, require value judgements to be made. They are needed to determine what should happen in response to the risks identified. Under several of New Zealand’s existing laws, such judgements must specifically be informed by the need for precaution. Even under the RMA, which does not overtly refer to precaution, case law has imposed requirements to make decisions in a precautionary manner. This does not mean risk needs to be eliminated, but New Zealand’s approach is fairly protective compared to international ones. Generally, the greater a risk’s probability and magnitude, the more precautionary the response needs to be. Whether remaining risks are acceptable or not cannot be answered in the abstract; it depends largely on value-based policies relating to the kinds of impacts and the character of the local environment in question. For example, a small chance of a low magnitude impact on coastal amenity may be more acceptable in a coastal area that already contains development (such as a port). In some contexts, residual risks can be managed through adaptive management conditions, rather than avoided altogether.

The precautionary principle states that where there is uncertainty as to the adverse effects of an activity, this is not a reason to fail to take action to address them. It includes approaches to risk identification, risk assessment, and risk management.

5.13 Public participation

In New Zealand, as overseas, public participation is a procedural cornerstone of environmental law and is related closely to broader notions of human rights, natural justice, and deliberative democracy. Participation is an important principle, but how it is provided for in decision-making processes is also a key structural component of the system. That is discussed in Chapter 10.

Internationally, the participatory principle is often focused on access to information, the ability to be involved in the process of making decisions, and access to judicial redress. The law generally aims for all relevant views to be considered; for choices to be informed by local knowledge; to provide catharsis for genuinely held rights under the RMA "reflect a social consensus that goes back long before 1991". Wide participation is a safeguard in a regime that can impact significantly on property rights, and in New Zealand can be seen as a backlash to the marginalisation of public involvement in Think Big legislation of the early 1980s.

In New Zealand, the principle has generally operated on the assumption that people can participate to the extent that their interests are affected. As such, broad participatory rights are particularly noticeable when producing plans, policy statements and regulations of general application under the RMA and EEZ Act. Participation is more constrained at the project (consenting) stage because a narrower range of people may be affected. Full public involvement is generally warranted even at the project stage where effects on the environment are more than minor, recognising that the environment is a shared resource in which wider society has an interest. However,
as discussed further in Chapter 10, participation cannot be absolute, and needs careful constraints.

Additional participatory rights are generally accorded to Māori. For example, in preparing RMA plans, councils are obliged to consult (in addition to Ministers of the Crown and other local authorities) iwi authorities and customary marine title groups. Regional coastal plans specifically must be prepared by a regional council in consultation with Māori. Many other provisions recognise the unique status of Māori. This does not mean that Māori interests will trump others, only that Māori involvement is an important end in its own right. However, despite the RMA having provisions with the potential to transform the involvement of Māori, in practice this has generally not occurred. The Waitangi Tribunal has been scathing: “The RMA, and the reform process that led to it, were seen as a beacon of hope for Māori .... Nearly 20 years after the RMA was enacted, it is fair to say that the legislation has delivered Māori scarcely a shadow of its original promise.” Institutional reform relating to Māori interests – a step further than participation – is explored in Chapter 9.

The participatory principle provides that the public have a legitimate interest in being involved in decisions about resources and the environment that impact on them or are of significant public interest. Such rights are not absolute. They must be balanced against the need for efficiency and timely decision-making. Māori should have relatively strong participatory rights because of their status as Treaty partners. Access to information, transparency of process, and access to justice are also important.

5.14 Efficiency

Efficiency is often not thought of as a resource management principle in the same sense as, say, intergenerational equity. Yet it is extremely important, because it is a consideration that may come into direct conflict with other principles (especially public participation). Efficiency is important both in terms of administrative process and the efficient use of resources. As Eli Louka has observed, it is "hard to characterise an excessively wasteful system as effective". The concern can be seen already in the current system, for example in provisions seeking to streamline decision-making processes in the RMA. Efficiency is also a matter to which particular regard must be had under the RMA, and the use of comparable units of measurement is encouraged where possible. The cost and effort incurred by applicants and decision-makers must generally match the scale and significance of relevant effects. Efficiency is also extremely important in other parts of the system, for example in the management of the conservation estate, in land transport planning, and in the funding of resource management activities by local government. The alignment between legislative frameworks can have a bearing on efficiency, as can more mundane matters like simplicity and accessibility of language, process and structure.

However, efficiency is not the primary concern of a system based on a worldview that is not just economic in outlook. Efficiency generally gives way to the public interest that exists in having robust environmental controls, as well as bending to the inevitable costs of some public participation. For example, decisions under the RMA are not currently reduced to cost-benefit analyses in the strict economic sense. Most fundamentally, it is worth bearing in mind that efficiency is not the same thing as cost reduction. An efficient approach simply compares the cost of inputs with the value of outputs, and is therefore inextricably linked to the broader value we choose to place on particular environmental outcomes. A costly system can still be an efficient one if it is good at delivering what we want.

The principle of efficiency is important in resource management. In terms of process, decisions should be streamlined and use comparable units of measurement where possible, but must be balanced against the need for good information, public participation, and the evaluation of values, not just monetary units.

5.15 Concluding comments

Principles are an essential part of the resource management system because they give substance to our worldviews and influence the more specific restrictions and directions in our legislation, institutions and tools (eg plans and economic instruments). They do not have to appear expressly in legislation in order to have influence.

This chapter has described some of the key principles that exist in the current system and/or could inform a new system. To this list of principles we can add compliance with international law, although that is not quite a principle in the same sense. For an analysis of New Zealand’s specific international obligations, we refer readers to Working Paper 2. Care will be needed during any reform process to ensure that they continue to be honoured and implemented in new legal and policy frameworks.

More generally, principles are ultimately all about how we manage relationships and conflicts in public decision-making – between different people and between...
people and nature. Unfortunately, it is hard to observe any meta-principle to manage the relationship between principles themselves, which can come into conflict with each other and look different depending on our basic worldviews. The challenge for system reform is therefore not just which principles to adopt – they are all appropriate in some measure – but also how strict they should be and how they should interact with each other in a coherent way. They should not pull in different directions or undermine each other unless the relationships between them are clear and well-considered (e.g. a hierarchical relationship between conservation and development). Synergies should be pursued where possible (e.g. forms of development that produce conservation outcomes).

Principles are crucial in guiding decisions within the system (whether to approve a plan, grant a consent, or impose a tax). But they are also important in determining what roles the system needs to play in the first place. For example, our approach to distributional equity influences whether the system needs to be proactive in allocating resources like freshwater, or whether it should simply leave allocative choices to the market. Our approach to resilience determines how active the system is in deploying climate change adaptation measures (e.g. managed retreat). And our approach to conservation can shape whether the system enhances the environment primarily on public land, or whether it is more active in pursuing restoration across the board. In Chapters 6 and 7 we explore what the proper functions of the system are – what it needs to do to implement our principles.

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<th>Sub-theme</th>
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<td>Mix of principles</td>
<td>Retain the principles we have in the current system; OR</td>
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<td>Add to the principles we currently have; OR</td>
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<td>Umbrella principle</td>
<td>Retain sustainability as the main driving principle; OR</td>
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<td>Add to or amend our umbrella principle(s) (e.g. to embrace things like resilience, the public interest, sustainable development); OR</td>
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<td>Change our umbrella principle(s) in a more fundamental way (e.g. replacing with a Māori or ecocentric conception)</td>
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<td>Intergenerational equity</td>
<td>Retain the status quo (some reference but little clarification); OR</td>
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<td>Specify that future generations’ needs are subject to the basic needs of current generations; OR</td>
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<td></td>
<td>Place equal or greater value on the needs of future generations of both humans and nature</td>
</tr>
<tr>
<td>Distributional equity and environmental justice</td>
<td>Do not use the resource management system to address social and economic issues; OR</td>
</tr>
<tr>
<td></td>
<td>Ensure the system addresses issues of social and economic development; OR</td>
</tr>
<tr>
<td></td>
<td>Ensure the system addresses human social and economic development issues, as well as ecological justice for nature</td>
</tr>
<tr>
<td>Māori principles</td>
<td>Retain the status quo (some reference to Māori principles); OR</td>
</tr>
<tr>
<td></td>
<td>Strengthen the recognition of Māori values in the resource management system; OR</td>
</tr>
<tr>
<td></td>
<td>Use Māori principles as the foundation for management instead of Western concepts</td>
</tr>
<tr>
<td>Polluter-/user-pays</td>
<td>Retain the status quo (partial internalisation of costs); OR</td>
</tr>
<tr>
<td></td>
<td>More fully internalise the costs of adverse effects (e.g. through taxes and charges); OR</td>
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<tr>
<td></td>
<td>Charge for use of public resources irrespective of the adverse effects of use</td>
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<tr>
<td>Subsidiarity</td>
<td>Retain the status quo (mixed, but with uncertainty as to where national and local interests reside); OR</td>
</tr>
<tr>
<td></td>
<td>Greater centralisation of some responsibilities; OR</td>
</tr>
<tr>
<td></td>
<td>Greater localisation of some responsibilities</td>
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<tr>
<td>Development</td>
<td>Retain a largely market-led and reactive approach to how resources are used; OR</td>
</tr>
<tr>
<td></td>
<td>Provide more guidance as to which resource uses are more or less desirable; OR</td>
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<tr>
<td></td>
<td>Be much more active in directing which resource uses occur and where</td>
</tr>
<tr>
<td>Conservation</td>
<td>Focus mainly on protecting valuable conservation values on public land; OR</td>
</tr>
<tr>
<td></td>
<td>Incentivise environmental enhancement to occur on private land, with associated public funding; OR</td>
</tr>
<tr>
<td></td>
<td>Require private persons to pursue environmental enhancement</td>
</tr>
<tr>
<td>Precaution</td>
<td>Rely on existing provisions and case law concerning precaution; OR</td>
</tr>
<tr>
<td></td>
<td>Strengthen precautionary provisions in legislation (such as the RMA); AND/OR</td>
</tr>
<tr>
<td></td>
<td>Reverse the burden of proof, and strengthen the standard of proof, in permitting processes</td>
</tr>
<tr>
<td>Efficiency</td>
<td>Efficiency is one matter, but not the only one, to consider among many when making decisions; AND/OR</td>
</tr>
<tr>
<td></td>
<td>Make regulatory processes (e.g. planning and permitting) more efficient; AND/OR</td>
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<tr>
<td></td>
<td>Improve efficiency of resource use (e.g. by allocating resources)</td>
</tr>
</tbody>
</table>

Figure 5.1: Options for principles in a future system
ENDNOTES

17 K Bosselman The principle of sustainability: Transforming law and governance (Ashgate, 2008) at 9.
17 K Bosselman The principle of sustainability: Transforming law and governance (Ashgate, 2008) at 9.
17 K Bosselman The principle of sustainability: Transforming law and governance (Ashgate, 2008) at 9.
17 K Bosselman The principle of sustainability: Transforming law and governance (Ashgate, 2008) at 9.
17 K Bosselman The principle of sustainability: Transforming law and governance (Ashgate, 2008) at 9.
17 K Bosselman The principle of sustainability: Transforming law and governance (Ashgate, 2008) at 9.
17 K Bosselman The principle of sustainability: Transforming law and governance (Ashgate, 2008) at 9.
In relation to mining, see Resource Management Act 1991, s 5(5A). In relation to housing supply, see Housing Accords and Special Housing Areas Act 2013. In relation to designations for key infrastructure, see Resource Management Act 1991, s 172.

104 Although local authorities are requiring authorities, as are central government. However, some are private.

105 See, for example, Gas Act 1992, ss 1A, 37, 43F, 45; Electricity Act 1992, ss 1A, 36; Electricity Industry Act 2010, ss 32(1), 42; Telecommunications Act 2001, ss 2, 70.

106 See JF Investments Ltd v Queenstown Lakes District Council EnV Christchurch C48/06, 27 April 2008 at [25].


108 For example, see Forests Act 1949, pt 3A.


110 For example, see Resource Management Act 1991, ss 15A-15B, 38, 57(1), 60(7), 64(3), 64(3), 12(3), NZCPS, pol 3.

111 Consider, for example, the role of the Conservation Act 1987, National Parks Act 1980, and Marine Reserves Act 1987, s 30. See also see J Ruru “Managing our treasured home” [2004] 8 NZEL 234.

112 For example, see Conservation Act 1987, s 6. See also Chapter 7 on the pursuit of positive outcomes.


114 See United Nations Framework Convention on Climate Change 1771 UNTS 107 (signed 9 May 1992, entered into force 21 March 1994), art 3.3: “Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures.”

115 Which in turn emerged from the less ambitious principle of “no harm” and the associated duty to avoid “transboundary harm”, which developed as interstate obligations rather than environmental protections per se. Those, and related international duties like cooperation, are not explored here because they have less relevance to New Zealand given its geographical position.


117 For example, see Resource Management Act 1991, pt 3.

118 Shirley Primary School v Christchurch City Council [1999] NZRMA 66 (EnvC) at [136].

119 Fisheries Act 1996, s 10(1). This kind of obligation may include the provision of environmental impact assessments: see Rio Declaration, principle 17.

120 See McKittric v Christchurch City Council [1996] 2 ELR NZ 84 (PT) at 105-106; Shirley Primary School v Christchurch City Council [1999] NZRMA 66 (EnvC) at [136].

121 See J Forrest “Scientific evidence and environmental litigation in New Zealand” [1998] 2 NZEL 39 at 60.

122 Effective Economic Zone and Continental Shelf (Environmental Effects) Act 2012, s 142; Fisheries Act 1996, s 10(5); Hazardous Substances and New Organisms Act 1996, s 7.


128 Generally, see B Barton “Underlying concepts and theoretical issues in public participation in resources development” in D Zilfinn, A Lucas and B Pring (eds) Human rights in natural resources development (Oxford University Press, 2002).

129 See Rio Declaration, principle 16.

130 Murray v Whakatane District Council [1999] 3 NZLR 276 (HC) at 467.

131 See Watercare Services Ltd v Minihinke (1997) 3 ELR NZ 511 (CA) at 525.

132 B Barton, K Jordan and G Severinsen Carbon capture and storage: Designing the legal and regulatory framework for New Zealand (University of Waikato Centre for Environmental, Resources and Energy Law, 2013) at 78.

133 See G Palmer “The Resource Management Act – how we got it and what changes are being made to it” (2014) RM Theory & Practice 22.


Resource Management Act 1991, s 95A(2).


Ibid, sch 1, cl 2.


Wellington International Airport v Air New Zealand [1993] 1 NZLR 671 (CA) at 675.

Ki Aotea Tenei (Wai 262 Waitangi Tribunal Report, 2011).

See Chapter 14 for options to address both such concerns in planning processes.


See Chapter 8 on legislative design, and Chapter 14 on aligning processes.


Ibid at 293, 303. See also JR Jackson “The role of economics in the RMA” (1999) 3 NZIEL 19 at 32.

For example, the RMA does not refer to precaution specifically, but is clearly informed by the need to take care when authorising potentially harmful activities.
PART 2 - FUNCTIONS

6: THE RATIONALE FOR PUBLIC INTERVENTION
6.1 Introduction
Having considered in Part 1 what the system should generally be aiming for, the remainder of the report is about how we get there. In Part 2 we consider the extent to which the system should be the avenue by which we realise those aims. The system – our set of public interventions – is not the only way in which we can do so. People can also do so through private actions and choices. Where we draw a boundary between public responsibility and private freedom can be contentious. Some may prefer to put it more simply and provocatively – it is about when public intervention goes too far, or amounts to overreach. The functions that the system should and shouldn’t perform (what it does and doesn’t do) is therefore an important question of scope, and one that requires an answer before we consider how we structure the system (Part 3) and what tools it uses (Part 4). We approach this question in two stages. In this chapter we explore why we might want the system to intervene. Chapter 7 then considers what that means for the specific roles the system should play in the future.

6.2 Public intervention and private choice
Public authorities can intervene in a wide range of things. The real issue is whether they should. Are there occasions where we should categorically not use public interventions to influence outcomes, and instead let private persons get on with doing it themselves? If so, what test should we use to determine what those occasions are?

The rationale for having a resource management system can be cast in many different ways. We can give it a constitutional or political flavour – what limits should be placed on government power? Do we embrace a liberal or a disciplinarian (directive) approach to government? Equally, it can be cast as a moral question – when is it right for others to constrain my freedom of choice? We can even give it an economic bent – to what extent should free markets be influenced or “distorted” by restrictions?

People sometimes simplify this tension to one between “planning” (usually referring to command and control type regulation) and “markets” (the ability of people to freely enter transactions concerning resources in which there are property rights). The imposition of urban limits (beyond which a city is not allowed to sprawl) is one example. If I pay the full cost (including infrastructure and environmental impacts) for a property 10 kilometres outside Auckland, why should I not be able to build what I want on it?

There are no absolute answers here. The most dogmatic neoclassical capitalist will recognise some point at which public intervention is justified in managing resources. Similarly, the most dedicated socialist will accept that some private transactions between people will always occur. There are also no static answers to such questions. Whether it is appropriate for the system to intervene changes with varying circumstances over time. What someone thinks was beyond the pale for the system to influence yesterday may now seem sensible and even necessary for it to influence – or even control – tomorrow. Town planning, for example, was initially more to do with military concerns than environmental health.

In practice, however, the really hard debates usually happen only around the fringes of what is acceptable. It is not often that New Zealanders fundamentally question interventions that have, for a long time, been firmly within or outside the scope of the system. Anyone would willingly protect residents living by an industrial facility from toxic smog, because regulation for human health is at the heart of the system. At the other extreme, very few people would accept that heritage protections could be put on a 10-year-old building.

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**Figure 6.1:** The relationship between norms, methods and outcomes. Arrows indicate the direction of influence. Public interventions can cause outcomes directly (such as funding the operations of the Department of Conservation), but it is more common for them to cause outcomes by influencing the behaviour of private persons (such as through regulation or economic incentives). In this project, we are focused on those methods that fall within the system – being our set of public interventions. The upward arrows on the left indicate evaluative feedback loops: the outcomes that we witness can change both our norms and our methods.
Such extreme examples are unlikely to change in the foreseeable future. However, at the fringes we are witnessing shifting attitudes about what the system should do. In the neoliberal enthusiasm of the late 1980s, we saw a contraction of the doughnut in Figure 6.3, but now we seem to be witnessing a gradual expansion. Consider freshwater, for example. In a world in which freshwater is abundant and assumed to be so well into the future, there is a less obvious need for a legal framework to allocate its consumption proactively. Like the air we breathe, the idea is that anyone who wants it can have it, as long as the effects of obtaining it are acceptable. That no longer holds true in parts of New Zealand. Yet there is still intense debate about the extent to which the system should proactively allocate freshwater (and how).

Particular topics like allocation, which exist at the boundaries of the current system, are explored in the following chapter where we look at the specific roles the system should have. Other examples include urban growth and design, environmental enhancement, “amenity” issues, and climate change adaptation. The concern of this chapter, however, is higher level: to consider the general test we should use to determine what those roles are. Instead of asking what should be influenced by the system, we can ask why something should be.

Figure 6.2: Public intervention and private choice in managing resources. Depending on one’s ideological perspective and preference, and as a result of physical and social circumstances changing over time, some issues can shift between the sphere of private choice and public intervention (shown by the orange arrow and fuzzy middle ground).

Figure 6.3: A pictorial representation of the role of the system in achieving our objectives. The black lines represent people’s actions. Our ethics and objectives (the top layer) are, in practice, moulded by a wide range of practical incentives (the middle layer), which then determine outcomes (the bottom layer). The system – the “doughnut” in the middle layer – is simply a way for public intervention to influence people’s actions by providing incentives that would not otherwise exist. The hole in the doughnut represents people’s actions where the system does not intervene. The boundary of the system (the red line) is therefore of crucial importance. This means the doughnut can expand or contract depending on the reasons why we accept public intervention.

Figure 6.4: A simplified illustration of topics that may be inside and outside the scope of the system. The fuzzy patch indicates topics where the grounds for intervention are partly debatable, or may be shifting.
6.3 Starting assumptions about public intervention

An important first question is what our starting assumptions should be. Do we assume that total private freedom of action is the “natural” state of things, and that we only deviate from that to the extent that it is absolutely necessary? That has been the dominant perspective in New Zealand in recent times (especially where economic factors are in play) and a strong assumption of liberal thought more generally. We certainly do not regulate for the sake of it.

However, we also should not presume that the threshold for intervention is extremely high, or something to be inherently resisted. An alternative would be to start with the premise that people are inherently part of a collective enterprise: a society or culture. On this view, the bestowal of many individual freedoms (including defined property rights) is still essential to the wellbeing of society, but private freedom of action is by no means a universal assumption when we live together on a finite resource base (including land). New Zealand’s current cultural paradigm does not reflect this idea; shadows of the “Think Big” projects and closed-door decision-making of the Muldoon era still loom large in the public consciousness of a New Zealand that closely associates neoliberal policies with the defence of personal freedom.

This debate is certainly interesting, and it provides a useful platform for people to air their ideological views. However, the more meaningful question is simpler and less ideologically charged: whether public intervention or private freedom is more useful than the other in any given context. We shouldn’t assume one is better – private persons are not inherently “bad” or greedy, and government is not inherently incompetent or draconian. Each brings a different set of strengths and weaknesses. What we need is not an ideological manifesto but a general rationale for public intervention.

While it would not be a legal test, it is useful to have a shared expectation about when public intervention or private choice is more desirable.

There are many options available. Some may be mutually compatible and form a package. For example, in the context of urban planning, the Productivity Commission has identified three rationales for intervention: to internalise externalities, to provide public goods, and to coordinate land use with water and transport infrastructure. In the sections that follow we briefly canvass and evaluate some possible tests.

One further point should be made explicit here. The real question is usually not whether some public intervention is justified, but rather what form it takes; command and control regulation, for example, is a very different way to influence behaviour than something more passive like an education campaign. We are not thinking of the system as only a set of coercive regulatory powers. It has much more nuanced tools available than that, and these are explored in Chapters 11–13.

6.4 Test 1: Are there externalities?

One traditional “economic” approach to resource management is to say that public intervention is appropriate where negative externalities exist. These are sometimes referred to as “spillover” effects. A negative externality is, essentially, created when a person does not bear the full cost of his or her actions, including causing pollution. That leads to distorted price signals and inefficient markets. For example, I create an externality if I discharge effluent into a river, because the effects are felt and paid for by downstream users rather than myself. If I build a five-storey building that cuts off the viewshaft or creates shading for a neighbour, that also creates an externality. Hardin’s concept of the “tragedy of the commons” can be seen as a problem of externalities, and climate change is a good example of this: the effects of greenhouse gas emissions in the United States or China are felt not just by those countries, but all over the world. Urban planning is a fertile area for externalities, since the proximity of people in cities creates many spillover effects between them.

The task of public authorities is said to be to correct or “internalise” externalities by imposing (at least part of) their true cost on those who created them. This is a way to implement the polluter-pays principle. The idea is that if someone has to pay for an impact (or suffer it him or herself), that person can then choose whether an action is actually worth it or not after taking that impact into account. Bearing the actual costs of one’s actions leads, at least in economic terms, to efficient and therefore optimal outcomes not just for the individuals affected, but for society as a whole. Under this paradigm, government is not in the business of driving particular kinds of resource uses, or shaping people’s behaviours, except to prevent the harm that they cause to those who have not agreed to be harmed.
There are different ways to internalise externalities, but all require a degree of public intervention. By definition, private persons (markets) do not account for them, so externalities are one example of what is generally described as a “market failure”. So, for example, we could calculate or estimate the financial cost of harm and impose it on the person causing it (such as through a tax or charge). We could, alternatively, impose regulation either to prevent the harm from occurring in the first place, or to mitigate it to an acceptable level. In some cases, we could even privatise the components of the environment to which harm is being done (such as common land or water), which would in theory provide an incentive for people to defend their own private property rights and bargain with each other to reach the most efficient outcome. All of these methods have their attractions, but some have significant downsides.

Should we, then, rely on the concept of internalising externalities as our yardstick for when public intervention is appropriate, and hold that anything beyond that is government “overreach”? To flip this on its head, if we cannot see an externality crying out for internalisation, would we be happy for authorities to stand by and do nothing? Is resource management truly about “regulating the effects on the natural environment of development in the built environment” – that is, dealing with externalities?

A lot probably depends on what we think an externality is in practice. The concept is often fuzzy. For example, imagine that you cannot stand the sight of a modernist monstrosity nestled among a row of quaint nineteenth-century villas. Is that a “cost” that is being imposed on you without your consent and needs to be internalised to the owner or developer? How do we even attempt to monetise or measure such costs (or, indeed, benefits) where people’s opinions differ wildly?

What about a scenario in which a river is polluted, but all those living along its banks or using it directly don’t really care (or they are compensated for their loss)? Does someone living at the other end of the country bear the “cost” of that pollution, or have all externalities been internalised?

And what about managed retreat in the context of climate change if, for example, we wish to prevent development in vulnerable areas? If people choose to bear the risk of investing in and developing land that may be under water in 50 years’ time, are there any externalities?

An externality is a useful concept, but some concerns can be raised about using it as a strict rationale for public intervention:

- The language of externalities, especially if used narrowly, could be used to artificially constrain the scope of public intervention when it may still be desirable from a long-term societal perspective. It may tend towards short term management, not long-term strategy. It seems questionable whether proactive measures like subsidising electric vehicles or providing policy support for renewable electricity can be justified as the internalisation of an externality.
- A strict approach to spillovers might also disenfranchise those who may be affected in less tangible or measurable ways (eg effects on future residents or future generations, or effects on the values of Māori). It may also disenfranchise nature itself if we take a strongly anthropocentric approach to externalities. For example, do reductions in water quality truly harm those who value natural amenity, or do they harm the ecosystems that are valued?
- We may not know what the true costs of a person’s actions, which need to be internalised, are – until they are felt. That may be too late to implement the precautionary principle. This is especially the case where cumulative or “slow-burn” environmental issues are at play.
- Internalising externalities is primarily about preventing harm, not improving wellbeing. If we assume that the latter follows from the former, it could pose problems where we need to claw back historical damage that cannot easily be attributed to people’s current actions (environmental restoration).
- As with economic approaches to resource management more generally, there may be a risk that treating harm as a technical or accounting matter means we fail to change our attitudes and ethics concerning environmental wellbeing (which are partly responsible for our behaviour in the first place).

Internalising externalities by pricing them may change behaviour in a positive direction, but it may also give a licence, for those who can afford to do so, to generate socially undesirable outcomes. Is it too radical, for example, to assume that a future “optimal” level of pollution is zero, rather than what people might be willing to accept now in compensation?

A system that only focused on internalising externalities would, essentially, be assuming that the “invisible hand” of market forces – the sum of individual transactions – provides best for all of society’s needs. History is increasingly showing us that this assumption – and the idea of trickle-down economics – is not all it was cracked up to be. It is possible, if we want it to, for the system to do more to pursue social outcomes.

In practice, externalities often cannot be fully internalised. It may not even be desirable to do so.

As such, we also need to ask: To what extent should spillovers be allowed? Simply saying that externalities should be internalised does not provide an answer to that question. We need a more nuanced, value-based test for that (including considerations of environmental and ecological justice).

Restricting the ability for the system to intervene may undermine the integrated management of resources. For example, some have suggested that it is not appropriate for wider issues of public health and social equity to be addressed through resource management (planning) measures. Yet if we do not consider all kinds of outcomes when we manage resources, we may create unexpected adverse effects or avoid potential synergies.
Irrespective of the way in which an externality is internalised (regulation, taxation, cap and trade systems, privatisation, etc), it is reasonably clear to us that stopping spillovers does not account for every role that New Zealanders might want the resource management system to play. Thus we suggest that while the methods by which externalities are internalised can be extremely useful tools to change people’s behaviour, internalisation itself is not the defining envelope within which the system should be constrained.

One general test we can use to justify public intervention is the internalisation of externalities. This reflects an economics-focused way of defining the role of the resource management system, and may be too narrow to encompass what we need it to do.

6.5 Test 2: Providing public goods and coordinating development

When the Rt Hon Simon Upton, on the third reading of the Bill that would become the RMA, said that “the Government’s focus is now on externalities – the effects of ... activities on the receiving environments...”, it reflected the spirit of the times. Faith in the workings of the free market, a concern for environmental bottom lines, and a distrust of direct government management were the watchwords of the day. Yet, even then, that focus did not entirely reflect the subtler texture of the RMA or the wider resource management system that was coming into being around it. That system is not just a regulatory one that stops people creating externalities. It is about reflecting Māori values, recognising the intrinsic value of the natural environment, and providing for proactive urban planning. Crucially, it is also about providing public goods.

The Productivity Commission has quite rightly highlighted the latter as a key role of the urban planning system, and the provision of public goods can be seen as an example of remedying market failure (based on incomplete markets and/or imperfect competition). Planning, funding and delivering network infrastructure (eg pipes in the ground, roads, light rail), social infrastructure (eg hospitals, libraries, schools) and services (eg public transport) are all a key way in which public authorities already directly intervene to manage resources. It is not about protecting resources from use (or internalising adverse effects); it is about using them in a way that has public benefits. This reflects the resource development principle described in Chapter 5.

Because there is a need to align many private actions (eg decisions to develop land) and public intervention (eg land use restrictions) with public goods (eg macro-level transport infrastructure), another reason for intervention is the need for coordination. There is no point in an authority releasing land for development, for example, if it cannot be serviced (with water or transport links). Equally, there is no point servicing land that is not, due to regulatory restrictions, able to be developed. The market cannot generally play this coordinating role without some form of public intervention, because of the sheer scale of coordination needed, and because the provision of public goods cannot be controlled by the market.
6.6 Test 3: Is there a public interest in intervention?

While internalising externalities, providing public goods and coordinating development are undoubtedly core roles of the resource management system, they do not fully address the concerns raised earlier when we considered externalities. Might we desire the system to intervene, in some way, in other situations?

One possible unifying test we could adopt is one of the “public interest”. It is in the public interest to internalise externalities, if we choose to use economics language (eg to prevent polluters benefiting at the expense of others), to provide public goods (otherwise we might not have a road network) and to coordinate development. But the public interest can also be served by intervening for reasons that do not comfortably fit within those categories. For example, requiring environmental enhancement, allocating rights to use public resources, and pursuing outcome-based urban planning are less clearly about addressing externalities, yet they are necessary to implement the principles described in Chapter 5. The concept of the public interest as a basis for intervention (including regulation) is not, in fact, at all unfamiliar to New Zealand’s current resource management system. In places, it is mentioned specifically in our statute book (eg the public interest in an effective, efficient and safe transport network). In others, a focus on a broad public interest is strongly implicit.

The benefit of allowing intervention where there is a public interest is that what the “public interest” means can change over time. For example, it could encompass a set of incentives to encourage the uptake of electric vehicles, funding for community-led environmental enhancement measures, or measures to transition land uses to those that are more sustainable for the country as a whole (eg forestry on erodible hill country). It embraces the principle of resilience, and could proactively shield people from external and non-attributable impacts (such as natural hazards, a changing climate, and global economic shocks). It also recognises that outcomes-based urban planning is not just about guarding against “bads” or providing public goods like infrastructure. It is also about creating a wide variety of future-focused strategies to enhance the wellbeing of communities and to move our collective human endeavour forwards – getting people on bikes, reducing criminal activity, encouraging social connection.

The downside of adopting a public interest test for intervention is that it provides the system with less certainty and more room for argument. People can have legitimate differences of opinion as to whether a public interest currently exists (especially when it clashes with private interests), and there is no easy way to measure how it changes over time. Can anyone specify, for example, exactly when climate change became an issue of public interest? What about housing affordability? And, even now, do we consider food security or the allocation of freshwater to be matters of public interest, or something the market or private dispute resolution should sort out?

If we abandon a specific test based on externalities in favour of one that is based on a much more nebulous and evolutionary concept like the public interest, we recognise that it can be a slippery slope to unreasonably intrusive regulation. That may make some people uncomfortable, and for legitimate reasons; there is, of course, such a thing as regulatory “overreach”. In many cases, a reasonable person will simply know this when she or he sees it, and the system needs to be cognisant of its dangers.

However, there may be dangers in equating overreach with anything beyond the internalisation of externalities. What overreach means may need to change over time, because the public interest itself can change. There can be a degree of public interest in private property, so that is a questionable basis for a distinction. One way of thinking about the public interest is simply as an expression of deliberative democracy; if there is sufficient consensus within a community of interest (such as a district, region or country) that a measure is needed to secure the public interest (a set of community values), then it is appropriate to take that measure. The public interest is here defined by the outcome of a discursive process, not by its substance.

Finally, we observe that overreach is often used to refer to regulation (and often command and control style regulation). In places that seems implicit in the reasoning of the Productivity Commission, which expressed its reluctance to extend “planning” beyond externalities, public goods, and a coordination role. But, as pointed out earlier, regulation is not the only way in which the system can intervene. It can provide subsidies; influence investment decisions through taxation and charges; and offer behavioural nudges, guidance and many other things. Generally, an intervention should be no more intrusive than is required to achieve the public interest.

A relatively broad and flexible test we can use to justify public intervention is where it is demanded by the public interest. This has significant advantages, but it also raises the risk of regulatory overreach. However, it is important to remember that the system has much more nuanced kinds of intervention available to it than command and control style regulation.

6.7 Test 4: Do we need to protect people from themselves?

Is it truly enough for the resource management system to intervene only where the public interest is at stake? How much should we trust private persons to look after themselves when their actions do not negatively impact other people (or the rights of nature)? In other words, do public authorities know best how to make people happy, healthy and successful in their own lives; or is that an unacceptably paternalistic approach?

Again, there is no hard and fast answer here. People may sometimes be better left to make their own mistakes and
face the consequences. But we can observe that laws frequently interfere in private choice, even if the outcomes are not clearly "public" in nature. It’s unlawful for me not to wear a helmet while riding a bike, even though I am primarily risking my own safety. Seatbelts can be thought of in the same light, as can some restrictions on tobacco and alcohol.55 There are many examples of where people do not act rationally, or think long-term, enough to provide for their own wellbeing,56 and where public intervention has been considered desirable to protect people from their own bad choices.

Conceptually, the resource management system is no different (even if much is made of the fact the RMA assumes people know how to provide for their own wellbeing). In some cases, we may need the system to make choices for people if they would otherwise harm their own interests, or even if those choices would be offensive to New Zealanders’ sense of the “good life”. In Hong Kong and Singapore, for example, it is common for people to live in highly dense urban environments, including what are known as “pod” apartments (containing a bed and little else). Should we prevent people making that choice in New Zealand’s central cities, even if it is well considered (and the alternative is a one-hour commute by congested motorways)?57 And should people be able to choose to bear the risk of rising sea levels, flooding, or drought when choosing to live or undertake land uses in places vulnerable to climate change?

That said, if we look harder we may often find an element of public interest lying behind “paternalistic” laws. Climate change adaptation planning contains many elements of public interest,58 and it is in this light that the Parliamentary Commissioner for the Environment has called for greater national direction for it to occur effectively.59 Housing and communities are also not solely private concerns. They are social and intergenerational goods in which physical durability, affordability, human connection and health and safety are extremely important. As climate change intensifies, we may see our food-producing capacity – where we locate different kinds of land use – as being similarly in the public interest.

6.8 Test 5: Distributional choices

There are other aspects of the system that may be harder to characterise as being in the “public” interest. A convenient label for these aspects may be how distributional choices are made. Two prominent examples are how we allocate non-private resources, and how we treat Māori within the system.

Again, much depends on how we define the “public” interest. When we consider how to allocate the right to use resources like freshwater or the occupation of coastal space, we are effectively talking about the partial or at least temporary privatisation of a public resource, which can sometimes be scarce. But how much control do we, as a society, expect to have over those choices? Is the public interest secured by a system that provides a fair process for people to obtain the privilege to use such resources (eg a structured tendering process)?60 If so, then the system is simply playing the role of facilitator or dispute resolver. But should the system go further and expect public resources to be used in a way that furthers the public interest, or by people who are more likely to do so? Much depends on how we approach the principle of distributional equity in a future system (see Chapter 5).

The extent to which the system distributes rights to use (or benefit from) non-private resources – like freshwater – to private persons may or may not be seen as a matter of public interest. Much depends on our worldview and approach to the principle of distributional equity.

Another key aspect of distributional choices is how we treat a separate Māori community of interest when considering how we use resources. Should the system have a role in directly safeguarding the interests of particular groups? New Zealand is an egalitarian society, and the answer must generally be no, unless it be by reason of a group’s vulnerability.61 But are Māori – to the extent they are not especially vulnerable – an exception, given the Crown’s Treaty obligations? The most culturally significant use of water, or marine resources, may not be the most “efficient” from an economic standpoint, or the one that benefits the whole of society the most.

To some, it may be possible to consider the protection of Māori interests and taonga as itself being in the public interest (in that it benefits all New Zealanders in intangible ways), but to others that may be a naïve attempt to brush under the carpet the potentially very real conflicts between the two that could arise in the future. Some interventions may not be needed to safeguard the public interest (in the sense of the whole of society), but still be crucial for the Crown to discharge its Treaty obligations to Māori.62 The extent to which intervention is needed will depend on how one approaches the Treaty and its principles.63 However, a focus only on the public interest is probably an insufficient foundation for a future system. Since the Crown has obligations under the Treaty, a future system must rest on the dual pillars of public interest and partnership with Māori.
The public interest and the protection and promotion of Māori interests are not the same thing, although there may be overlap. How these interact is an intensely political, unpredictable and complex area. However, it means we should not constrain the scope of the system by justifying intervention only on the grounds of the public interest. It must also contemplate intervention in order to discharge the Crown’s Treaty of Waitangi obligations.

6.9 Test 6: Taonga?

Māori perspectives and Treaty obligations are not just the subject of the system (something the system needs to deal with and recognise); they are also something that actively needs to inform what the role of the system is in the first place. In other words, “Treaty principles, notably partnership, need to be ‘mainstreamed’ into [the] planning system”.

So what can Māori perspectives and principles, touched on in previous chapters, tell us about the proper rationale for intervention? For one, they discourage us from imposing fixed or artificial limits on public intervention (e.g., through tests focused on externalities and private property rights). They may also lend support to broad tests focused on the public interest, but they are by no means the same thing. They are, instead, rooted in a uniquely Māori worldview. Some may view kaitiakitanga responsibilities, for example, as something that is to be exercised by kaitiaki (Māori) within their rohe (region) rather than by public authorities more broadly. There may be some concern among Māori that embracing the public interest as a justification for intervention across the system should not undermine the recognition of more specific cultural practices. There is, after all, a distinct Māori system for resource management.

A test for intervention based on the concept of taonga (traditionally translated as “treasure”) may be one way to encapsulate both the public interest and Māori interests. It could encompass not only the management of tangible “things”, but also relationships and values that are “treasured” by all New Zealanders. That idea may take some translating into the context of what will probably remain a largely Western legal system (not least to provide some certainty around what constitutes overreach, and to address potential conflicts between Māori-specific taonga and other taonga), but it warrants further exploration.

The concept of taonga as a test for when a future system can intervene is a challenging and intriguing possibility that deserves further exploration. It would not be the same thing as a specifically Māori conception of taonga, because it would need to apply to all New Zealanders and reflect their wider values. However, it may offer a way to unify the concept of the public interest with Treaty of Waitangi obligations as the general basis for future intervention.
6.10 Which test is best?

Nowhere does New Zealand’s current resource management system specifically state the conceptual rationale for when public intervention can legitimately occur. Instead, it is largely implicit, and often vague. That is part of the problem. Arguments about overreach occur largely in a legal and ethical vacuum. It is increasingly important, as we begin to face new challenges, that we reach a common understanding of when the system should intervene. So which tests, or collection of tests, are the most appropriate in the context of New Zealand’s system? More importantly, which ones are likely to be most appropriate in the future – a generation or more from now?

Generally speaking, the current system seems to employ both regulation and less intrusive forms of intervention where the public interest is at stake. We think that will remain generally appropriate in a future system, because it provides valuable agility while providing a benchmark around which reasonable debates can occur. The system should also reflect the need to safeguard Māori interests and values specifically, in order to fulfil Treaty obligations, even if that cannot easily be described as the same thing as the public interest.

In some situations, authorities may produce interventions that are unreasonable or disproportionate to the public interest at stake (overreach). In other cases, the system may fail to go far enough to reflect the public interest (eg in the context of climate change adaptation). But we do not think that points to a flaw in the underlying rationale. Instead, it suggests that we need greater clarity and understanding around what the public interest means at any point in time, robust democratic, participatory and evaluative process to determine that, and discipline in how it is applied and reviewed over time.

One example of an area where the rationale for intervention is debatable is the management of urban growth. Should we, for example, allow our cities to expand outwards (or upwards) at the whim of the market even if that risks Auckland becoming the Houston of the South Pacific, or some kind of Antipodean Hong Kong? Some may question whether imposing urban limits is appropriate given that housing affordability is already such a large problem. Constraining land supply (development capacity) through an inflexible urban limit can increase prices and reduce housing affordability if people’s incomes do not keep pace. Some may argue that housing should be able to go where people want it to, if they are willing to pay associated costs in full. On that view, the benefits of compact urban form (such as for the climate, social connection, and sustainable infrastructure, among other things) are just an added bonus if that’s what the market chooses to provide. They are an acceptable trade-off, if it does not.

However, it would be wrong to assume that managing urban growth is some kind of ideological battleground between private choice and public intervention. Neoliberal adherents may proclaim market efficiency and competitive land markets when it suits – as in the removal of urban boundaries, or the automatic and sequenced release of land in response to growth pressures – but at the heart of the debate is an overriding political, and social, drive to provide greater housing supply as one way to improve our dire statistics on housing affordability. That driver does not always favour free market choice.

For example, the market has proved unwilling to provide small, modest dwellings in the numbers required. That requires intervention. So too does the provision of trunk infrastructure that private developers rely on. Private land can also be compulsorily acquired by public agencies to aggregate fragmented parcels of land for urban “regeneration” purposes, and it is hard to envisage a more interventionist approach than that.

The key takeaway here is not that the system should necessarily manage debatable topics (like urban growth) in a more interventionist way, or in a more laissez-faire way. It may depend on context. The point is more general – that what the system can and can’t do is not usually determined by consistent ideology at all. Instead, the rationale for intervention expands and contracts at the margins according to what will achieve politically important aims (like affordable housing) the fastest. If public intervention will do so (as under a Housing and Urban Development Authority model), the system expands in some areas. If private freedom will do so (as with the removal of urban limits), it contracts in others. If political will is the true measure of society’s priorities, then the reason for intervention can be described as whatever it is needed to secure the public interest.
6.11 Concluding comments

In this project, we do not seek to fundamentally change New Zealand’s social and cultural fabric. We live in a capitalist economy, a political democracy, and a multicultural and liberal society. Changing those things in a fundamental way, we think, is neither desirable nor possible. If such changes happen, they will happen organically as a result of social change and not from the top. The roles that public authorities play should be a reflection of our society’s actual values, not a theoretical imposition from an ivory tower.

And yet we are in no doubt that system change is needed. This is not because we think society’s expectations are wrong, but because of the increasing disjunct between our society’s aspirations for the future and what the system is actually producing. The system, in practice, does not implement many values that New Zealanders hold, and which reflect the public interest. For example, most would accept that we should enhance the environment, not just prevent further degradation; yet the system provides few widespread or meaningful mechanisms for doing so. Most would accept that we should allocate the right to use public resources like freshwater in a fair way or a way that furthers the interests of the country – and yet we still for the most part embrace systems that give rights on a first in time basis. The system needs to catch up to what the “public interest” means in an age of rapid change. The particular roles that the system will need to perform in order to secure the public interest and discharge Treaty obligations are explored in the next chapter.

We consider that a future system should contemplate public intervention by the system when, and to the extent that, the public interest is at stake and/or where necessary to protect Māori interests and discharge Treaty of Waitangi obligations. In particular, the public interest will increasingly demand improvement and the remediation of past harm, not just the reduction or management of future harm.

<table>
<thead>
<tr>
<th>Sub-theme</th>
<th>Options</th>
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<tr>
<td>Rationale for intervention</td>
<td>To internalise externalities, provide public goods, and coordinate infrastructure provision; OR</td>
</tr>
<tr>
<td></td>
<td>To pursue “the public interest” and discharge Treaty of Waitangi obligations; OR</td>
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<td></td>
<td>Rely on an integrated test like “taonga”</td>
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Figure 6.6: Broad options for a future system’s rationale
As recently as 1989, the Treasury advocated for the removal of all regulatory restrictions on the location of development in the built and natural environments – Legislative options (Working paper produced for the Productivity Commission, 2017) at [13]. For example, see New Zealand Initiative “Land use restrictions caused the housing crisis” www.nzinitiative.org.nz.

At the very least, the existence of markets relies on public intervention; property rights are either meaningless or reliant on private force if there exists no public system for them to be recognised or enforced.

For example, making it hard for invaders to get in and to navigate their way out: see New Zealand Productivity Commission Better urban planning (2017) at 53.

Arguably the reforms of the 1980s and early 1990s represent a more fundamental questioning of the status quo.

That never used to be the case – it was only with a realisation of the full impact of regulation that town planning found some legs, and not until the 1960s and when issues around pasticides became evident that chemical regulation really took off.

As well as being readily accessible to all who need it.

By comparison, we do not have a framework for allocating resources like wind, and when issues around pasticides became evident that chemical regulation really took off.

As with what is “necessary” will differ depending on the theory in question. At its most extreme, government may have a role only in things like criminal law and national defence.

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By comparison, we do not have a framework for allocating resources like wind, and when issues around pasticides became evident that chemical regulation really took off.
For example, consider section 14(3)(c) of the RMA, which states that the Act does not restrict the taking of geothermal water in accordance with tikanga if it does not have adverse environmental impacts.

See Chapters 3 and 5.

See Ngāti Whātua Ōrākei’s submission to the New Zealand Productivity Commission’s Better urban planning inquiry (2017) at 200.

See New Zealand Productivity Commission Better urban planning (2017) at 49.

See D Hikurau Presentation to the EDS Conference (Green Light or Light Green) August 2018.

A common societal understanding does not necessarily mean a specific test needs to be enshrined in legislation, only that the general basis for our laws reflects a common expectation.

As mentioned above, arguably the “public” interest of Māori is a dimension of the broader public interest.

For example, through guidance and evaluation in regulatory impact statements, effective public engagement on policy, and robust evidence in decision-making processes involving technical matters.

Even then, urban expansion is not entirely a “free market” phenomenon, since land use choices are hugely influenced by associated infrastructure planning, which is for the most part determined by public authorities. Greenfields expansion has, historically, been essentially subsidised by a transport system based on roads that has been funded by the whole community through rates and taxes.

Such as the true cost of infrastructure connections and environmental harm.

For example, see the National Policy Statement on Urban Development Capacity.

Supply of developable land is by no means the only issue in play, and the role of the planning system in housing supply and affordability should not be overstated.

Such as through the Kiwibuild programme, now proposed to be incorporated into a new Housing and Urban Development Authority.

Compare the ability under the RMA (from s 229) to regain private land in the form of esplanade strips when subdivision occurs.

If imposing urban limits were a way to decrease housing prices, we would probably not be having a debate about market freedom.
7: ROLES THE SYSTEM NEEDS TO PERFORM
7.1 Introduction

In the previous chapter, we considered the general rationales for why the system should intervene in how New Zealanders manage resources. We preferred a twofold test based on the public interest and the protection of Māori interests (to the extent the two are different). They are necessary to implement the principles described in Chapter 5. In this chapter we apply those tests, producing a list of specific roles that we think the system needs to play. Because the public interest can change over time, so too can the roles performed by the system. Our list can therefore never be an absolute one. However, we still need to consider what the public interest may demand in the foreseeable future, not just today.

In summary, we suggest that a future resource management system should have seven core roles. Each of these is conceptually distinct, and should be exercised to the extent necessary to secure the public interest and recognise Māori interests. This recognises that private and personal freedoms and choices are also important in New Zealand society.

A future system should:
1. Impose environmental bottom lines
2. Manage trade-offs above bottom lines
3. Fund and ensure the delivery of public goods (including infrastructure)
4. Pursue “good” outcomes (not just prevent or manage “bad” outcomes)
5. Protect and promote Māori interests
6. Resolve disputes
7. Allocate rights to use non-private resources

7.2 Should the system impose bottom lines?

One of the least controversial ways in which the system plays a role is to safeguard environmental bottom lines. That is crucial to achieving the long-term public interest in a healthy environment and, indeed, all forms of wellbeing. New Zealanders cannot thrive in an environment that is polluted and degraded. However, this question can still generate debate, for two reasons. First, people can use the term “bottom line” to mean different things. Secondly, we can apply the concept of bottom lines to different kinds of scenarios. Public intervention in some scenarios (e.g., water quality) may be more justifiable than others (e.g., visual amenity). We therefore need a common understanding of what we mean by bottom lines.

A future system needs to impose firm environmental bottom lines. However, people may debate what this means in practice. We need a clearer understanding and expectations as to what this will involve.

What is a bottom line?

In general parlance, a bottom line (or, as some may prefer, a limit) is a point we are not willing to go beyond. The minimum wage is a bottom line. Criminal law generally represents a bottom line of acceptable social behaviour. But in the resource management context, several other things can be said.

- Bottom lines are about preventing or remedying unacceptable harm. They are not about considering or mitigating harm. This reflects the conservation principle.²
A bottom line should be seen primarily as an outcome that has to be met, not any given method or tool (such as a rule or standard) designed to achieve it. That said, bottom lines often need to be associated with firm methods that “bite”, such as rules, in order to actually achieve firm outcomes. Thus while both outcomes (e.g. zero carbon) and the methods used to achieve them (e.g. the cap in a cap and trade system) can be thought of as bottom lines, we should always be aware of the difference between them.

Outcomes-based bottom lines are fixed and firm, even if their specific expression may not be static over time. The fact that specific limits, standards and rules can change does not make the specific outcome sought (e.g. swimmable rivers) any less of a bottom line. This reflects the idea of non-regression.

Bottom lines are not about balancing harm against benefits above a minimum threshold. Once set, bottom lines are agnostic as to what happens above them. That is a conceptually distinct role – making trade-offs – which is explored below.

Similarly, bottom lines are not concerned with actively pursuing benefits above minimum outcomes (even if those benefits do not require trade-offs). Again, that is a different role that we may or may not wish the system to play, and is explored below.

Bottom lines are generally about preventing harmful actions that can be controlled. As such, they focus on harm caused by humans to each other, or by humans to the environment, but not harm caused to humans or the environment by natural events (the occurrence of which is far less controllable, and less culpable). When a volcano erupts, or a forest catches on fire from a lightning strike, we may speak of environmental harm or damage (and a lack of resilience), but we do not speak about bottom lines being breached.

As such, when some people talk about bottom lines, they really mean stopping people doing things that cause unacceptable outcomes, not preventing undesirable outcomes per se. That can cause difficulties where it is hard to attribute harm to people, or where humans may be contributors rather than absolute causes.

The last point raises a subtle but important question. Should our concept of strict bottom lines not just prevent people from causing harm if limits are reached but also force people to take positive action? For example, a traditional view is that breaching a bottom line for water quality in a particular lake can trigger a requirement for people to cease discharging pollutants into it. The system is stopping people from acting. It is reactive. But what about the case of, say, possums, or wilding pines? Do these also involve bottom lines? As a collective, humans are equally culpable for the harm they now cause. But if we set some kind of limit for pest species – numbers we are not willing to go beyond – then that requires people to take sustained and active measures (pest control), not just to stop what they are doing. Similarly, reaching water quality targets requires active measure to fund and deliver waste-water infrastructure. The principle of conservation requires improvement.

The tricky thing, of course, is that obliging people to act will not be effective unless it is accompanied by the resources – whether public or private – to actually do it. Costs can be substantial. A system-wide view of bottom lines cannot, therefore, be considered only to include a regulatory and enforcement role. Bottom lines need to be linked closely to the system’s operational and funding roles, and reflect a firm expectation that humans are agents for positive change as much as they are potential threats. As the Productivity Commission has quoted in the context of climate change, “It is too easy to applaud the government’s willingness to set a heroic goal – without testing the feasibility and desirability of doing what it takes to meet that objective.”

Environmental bottom lines are not about balance or mitigation. They are outcomes-based lines in the sand that need to be defended strictly and vigorously against erosion by cumulative human actions. They are not just about preventing harm; in some cases securing bottom lines is about enhancing the environment to an acceptable state. That requires regulatory action to be firmly linked to predictable and effective funding and resourcing.

How do we set bottom lines?

Another key feature of bottom lines is that they do not appear by magic. There is no textbook that tells us the points beyond which harm is unacceptable. Science, and nature, tell us only cause and effect, not right and wrong. Where bottom lines are set depends on the balance of people’s objectives, which in turn are determined by our worldviews, ethics and principles – the relative value people give to the costs and benefits of harm. Bottom lines are not actually the opposite of balancing. They are, at one level, its product. But it is important that we consciously set bottom lines. Continual ad hoc balancing at the consenting level, in particular, is a recipe both for cumulative effects and development uncertainty, and does not reflect the principles of sustainability or conservation.

It is in this light that we can understand the extremely important – but ultimately insufficient – contribution that the King Salmon decision has made to bottom lines.

Science does not tell us where to set bottom lines. They require hard, value-based discussions. As such, bottom lines do not appear by magic. In fact, there is no clear distinction between bottom lines and the idea of “balance”. Bottom lines are the product of balance. The key choices are when, at what scale, and by whom bottom lines come into being through a balancing exercise.
A spotlight on Natura 2000

The 1992 European Union Habitats Directive provides a useful model for spatial protection of important habitats and could potentially also be applied to outstanding natural landscapes. Under the Directive, member states were required to spatially identify a network of habitats (termed “special areas of conservation” or Natura sites) according to specified scientific criteria. The member network was then assessed, along with those from other countries, by the European Commission for “sufficiency” in order to form a coherent European ecological network.

In the first instance, Natura sites are to be managed to “avoid” deterioration. But measures are also required to maintain or restore the sites to “favourable conservation status”. This is defined as the habitat’s natural range being stable or increasing, the specific structure and functions which are necessary for its long-term maintenance existing and likely to continue to exist for the foreseeable future, and the conservation status of its typical species being favourable (which is similarly defined). It recognises that bottom lines are about improvement, not just preventing further harm.

A direct link has been created between European Union law and in-country planning and permit applications. Member states need to assess the possible effects of a proposed project or plan on the conservation objectives of the Natura site, and if they cannot exclude with certainty that it will not “adversely affect the integrity of” the site, the proposal may not be authorised (similar to the requirement to avoid adverse effects on outstanding natural landscapes under the New Zealand Coastal Policy Statement (NZCPS) and as confirmed in the King Salmon case). There is provision to undertake some projects which will have adverse effects but these must be of “overriding public interest” and for which there are no alternative solutions, and compensatory measures must then be applied.

So what might a Habitats Directive type of approach look like in New Zealand? There is currently no national criteria for identifying important sites, or provision for a national assessment of the sufficiency of spatial protections provided in regional plans and mechanisms for filling gaps. There is also no formalised monitoring or reporting system for the status of the sites. To address this, regional councils could be tasked with initially identifying outstanding natural landscapes, areas of outstanding natural character and a network of significant natural areas (terrestrial, freshwater and marine) through applying statutory criteria established nationally and using scientific and technical advice (not socioeconomic factors). Technical support could be provided to councils to undertake the assessment and identification process and where a council did not have the resources to undertake the task it could be led by a national agency (such as the Department of Conservation).

Councils could then be mandated to submit their full proposals to a national agency by a specified date. The national agency would then be tasked with assessing the proposals collectively on a national level to determine whether all important landscape/natural character/habitat categories/areas throughout New Zealand were adequately covered. Where gaps were identified, the requisite regional council could be required to address them through proposing additional sites. After a public consultation process (at a national level – which could be through a board of inquiry or similar), the national network could be finalised and gazetted. National rules could set minimum standards for the status of areas and regional councils and territorial authorities would determine what actions were needed to meet these standards. Regular reporting by councils on the status of the areas within the national network could be required.
A spotlight on the *King Salmon* decision

*Environmental Defence Society Inc v King Salmon Co Ltd* observed the Supreme Court overturn two decades of case law about how bottom lines in the RMA are to be applied. It involved a proposal to establish a salmon farm in the outer Marlborough Sounds.

Before the *King Salmon* decision, the legal position was that decision-makers under the RMA were to engage in reaching what was generally called an “overall broad judgment” when deciding whether to grant or decline authorisation for a proposal. That meant that a decision-maker was ultimately to have recourse to Part 2 of the RMA (the Act’s broad purpose and principles) when exercising its discretion, even if objectives and policies in lower planning instruments like regional plans or NPSs were much more specific, directive and protective. (Part 2 is protective, but also recognises the importance of enabling people to provide for their wellbeing by using resources.) That approach had been supported by case law since very early on in the RMA’s existence, following a short period of uncertainty after the Act was passed. In *King Salmon*, the Supreme Court returned to the position that the architects of the RMA intended, that in certain circumstances the Act was about defending firm environmental bottom lines. They were not simply something to be considered; they had to be respected.

Central to the *King Salmon* decision was the fact that the NZCPS contained directive and firm provisions concerning the protection of the coastal environment. It was an expression of Part 2, not something that could be overridden by it. Otherwise, what was the point in using such firm language? Since 2014, the Supreme Court’s message has been applied and refined through a number of decisions.

However, within these positive developments lie the seeds of what may be a more fundamental problem with our system. We need to be realistic about what *King Salmon* did not say, and think about whether we need to go further in our pursuit of true bottom lines that reflect the conservation principle.

Recent case law has suggested that *King Salmon* cannot be applied across the board where there are no firm provisions to hang your hat on, and balancing will often still need to happen in many circumstances. In particular, a recent Court of Appeal decision confirms that recourse to Part 2 – the concept of balance – will often be necessary in the context of deciding resource consent applications.

So does Part 2 itself impose bottom lines? It certainly allows them to be set, and contemplates that they will happen. Indeed, the word “while” (meaning “at the same time as”) in section 5 supports an uncompromising approach to protecting the environment by safeguarding its life-supporting capacity, and legitimises subsequent efforts by authorities to do so. However, at the same time, the Supreme Court recognises that Part 2 is not an operative provision. In essence, it sets an expectation that a cascade of subordinate instruments will impose strict protections. But it does not demand that firm bottom lines are generated through planning instruments. Regional plans are not mandatory. Rules are not required, let alone prohibited activity rules. The government could make the NZCPS less protective if it wished. There is nothing really to ensure that instruments like NPSs form a coherent and aligned package.

The important lesson from *King Salmon* is, essentially, that authorities can impose bottom lines if they want, and it is not permissible to undermine a higher level authority’s decision to do so.

That seems to lack ambition for a future system. What bottom lines look like in plans are primarily a product of the political will at any given time to impose them at central, regional and local level. Whether it is the product of inappropriate incentives facing decision-makers, or an inevitable product of an effects-based (rather than prescriptive) system that relies heavily on project-specific discretionary decisions, true bottom lines are frequently not being imposed in advance. That may be changing as political will changes, but we can question whether the law needs to do more.

Our laws may need to be more active and directive in terms of when, by whom, and under what normative umbrella we impose bottom lines. For example, we could include an active obligation on central government to create a single Government Policy Statement on the Environment: a harmonised set of NPSs and NESs based on all environmental issues in which central government has an interest, and which can cascade down into lower level planning instruments.
Should the system impose bottom lines for everything?

One key question still remains: For what kinds of things should we impose bottom lines? We may not wish to do so for all kinds of “harm”. In fact, the very concept of “harm” is ultimately a human construct that is highly dependent on people’s values.39 For example, is a wind farm a harmful blight on the landscape or a majestic symbol of clean energy? Is my sleek, modernist home destroying the historic feel of an old suburban neighbourhood, or is it a wonderful architectural statement? These things may well require rules to provide certainty and resolve disputes, but in our minds that is not the same thing as an enduring bottom line that needs to be firmly embedded in our legal system.

Ultimately, strict bottom lines are required to safeguard outcomes that are in the long-term public interest (whether anthropocentrically or ecocentrically defined) and around which there is a strong degree of value-based consensus. We therefore need to give a robust and honest assessment of the kinds of things we are not willing to trade off, and the points at which harm is truly priceless.40 In our minds, the matters in section 6 of the RMA provide a useful indication. Although this is ultimately a value-based conversation to be had, rather than an answer, some things seem reasonably clear: there are many points at which society clearly does think preventing harm is priceless for reason of public interest, even in the face of potentially significant foregone benefits.

Strict bottom lines are required to safeguard outcomes that are in the long-term public interest and around which there is a strong degree of value-based consensus.

We can start with the simplest – preventing direct harm to human health. The need for bottom lines are generally uncontroversial and necessary where our use of resources has even the smallest potential to make people physically ill or threaten their safety.41 That can be seen in the wake of the Havelock North incident,42 subsequent inquiry,43 and related (and ongoing) government review of the three waters sector.44 In fact, the greatest “environmental” success stories over the past century can be explained by their actual or perceived relationship with human health and safety,45 and that may hold a valuable lesson for how we communicate resource management issues more generally in the future.

However, human health is about much more than direct effects (where pollution makes us physically sick). What about indirect effects on physical health? Or direct effects on mental health? If the provision of a nature area in a city is beneficial to mental wellbeing, is the destruction of habitats – the absence of bird-song outside your window in the morning – harming your health? Is the mere thought of a beloved coastal environment being strip mined detrimental to your mental health, too?

It is hard to identify the point at which human health morphs into the broader concept of human wellbeing, and where that morphs into the concept of environmental wellbeing. Arguably we value our environment – in the sense of all our surroundings and resources we use and enjoy – precisely because it provides us with some form of wellbeing.46 That said, generally a distinction can be made between bottom lines to prevent illness, and environmental wellbeing more broadly. Environmental wellbeing includes the intrinsic value in the functioning of the natural world (especially the living world and ecosystem wellbeing), as well as the useful services it provides to humans (social, cultural, and economic).
That bottom lines should apply to environmental wellbeing in general is unlikely to be controversial. If New Zealanders were asked directly, they would not likely say they were willing to trade basic, long-term ecosystem health and services for short term economic gain measured in terms of GDP. But the environment is a fuzzy concept that spans a wide range of scenarios. For example, the RMA includes communities within its extremely wide definition of the environment. So, should we impose “bottom lines” for issues of urban planning, rural urban boundaries, and amenity concerns? And to what extent should we absolutely protect ecosystems and wilderness beyond what is needed to serve humanity’s wellbeing?

Finally, Kate Raworth in her concept of the “doughnut economy” talks not only about the environmental floor, but also about the social ceiling, within which humanity can live sustainably. Should our system reject a neoliberal focus on imposing bottom lines only for “bads” and embrace bottom lines for social development too? Is it naive to think we can have both in equal measure?

We suggest that a strong case can be made for imposing firm, durable and specific bottom lines, in a proactive way through legislation and high level planning documents, to secure the following outcomes:

- Freshwater quality
- Freshwater flows and volume
- Quality of the coastal and marine environment
- Soil quality
- Climate change mitigation
- Climate change adaptation
- Maintenance and improvement of indigenous biodiversity
- Maintenance and enhancement of wilderness areas
- Biosecurity
- Sustainability of fisheries
- Māori values, taonga and ancestral relationships
- Protection of landscapes
- Protection of human health and safety

All of these things require an ecosystem level, or at least holistic, focus, since all are connected. But the extent to which some other things should attract long-term and inflexible bottom lines (as opposed to a more agile system of trade-offs) may require more considered debate:

- Amenity (visual, noise, etc)
- Urban design
- Housing affordability
- Protection of productive soils
- Land use patterns
- Social development generally
- Population

The risks of bottom lines

We sound a final note of caution in relation to the kinds of things on which the system imposes bottom lines. A system that allows inflexible limits to be set in places, or for issues, that do not align with the balance of society’s values may undermine their long-term durability. It may also risk other bottom lines – for which there is consensus – being eroded if they are closely associated through the same mechanisms.

As such, it may be more productive to ring-fence and go hard on the things that are truly priceless than to treat bottom lines as a list of things we would like now but are not likely (in the face of other considerations) really willing to maintain over time. This has echoes of Martin Williams’ opinion that “we need to focus on what really matters” and Richard Macrory’s view that bottom lines set in primary legislation have a moral (and therefore, we would add, durable) dimension.

A system that allows inflexible limits to be set in places, or for issues, that do not align with the balance of society’s values may undermine their long-term durability. We need to be careful to focus and put limits on the things that are really essential, not treat all our aspirations in the same way.

We also need to have a mature conversation about when (or whether) we want place-based bottom lines or value-based bottom lines. Some – such as for climate – have no real place-based component (it is only total emissions that matter). Other things, like significant natural areas and the conservation estate as a whole are more strongly place-specific. They are not just about ecosystems, but also about unique and irreplaceable wilderness areas. However, bottom lines for domains like water quality and biodiversity are more difficult. Are we more interested in improving indicators across the whole country (in which case the quality of some places can be traded off for improvements in others) – that is, the principle of net gain? Or do we need to be prioritising the values of particular places? The concept of no net loss is an extremely valuable macro-level bottom line (especially in the context of biodiversity), but it is essential we unpick what implications that has for the acceptability of loss in more specific places.

Such normative questions have implications for the tools we use (some of which are explored in Chapters 11–13): whether we expand systems for tradeable permits, allow land swaps, conduct tenure review, focus only on domestic carbon emissions, or use offsets and biobanks. We need to keep in mind that locally treasured environments can often be more important to New Zealanders than an overall scorecard for environmental health. We care about what we connect with, and that often means the things we see, hear and experience on a day to day basis.

A future system requires clarity as to which bottom lines apply across the whole country, and which require specifically local application (and tensions between them).
Bottom lines in a future system

We have devoted some space to considering bottom lines. We believe that setting them is a core role a future system needs to play. Doing so is firmly in the public interest and consistent with tikanga, as well as reflecting key principles discussed in Chapter 5. Conceptually, bottom lines can be expressed in the language of different worldviews – they are crucial to all of them. In economic terms, they are about preserving and enhancing our natural capital; in broader anthropocentric terms, they are a concrete expression of what we consider priceless; in ecocentric terms, they are about defining the rights and interests of the natural world. And in terms of Te Ao Māori, they preserve a core part of a holistic system of familial and celestial relationships that is vital to the wellbeing of the whole.

We think that a future system needs to think about bottom lines in a more progressive way than it currently does. More specifically, it needs to:

- Be much clearer and more honest about the hierarchy of our basic objectives (such as affordable housing and freshwater quality) where they may come into conflict.
- Clarify which outcomes require long-term, durable and strict bottom lines, and which are preferences that may change over time; we should treat these differently.
- Clarify that Part 2 of the RMA (or its future equivalent) itself sets high level bottom lines for truly long-term and essential matters, not just that it allows them to be made if authorities choose to. It should impose obligations to set them at all levels of government.
- Transform general policy bottom lines (ie those that require interpretation through discretionary consenting decisions) into specific and measurable ones (where possible) in planning instruments. Big picture bottom lines – protecting ecosystem integrity – are ineffective if not supported by little picture ones – rules and standards.
- Clarify which outcomes require long-term, durable and strict bottom lines, and which are preferences that may change over time; we should treat these differently.
- Not continue to operate in a way that requires recourse to a general provision like Part 2 to determine bottom lines.
- Be more proactive in reconciling provisions in policy instruments and plans that have unclear relationships between them.
- Be much more rigorous about an integrated approach to bottom lines that cascades down through a vertical hierarchy. A comprehensive suite of bottom lines at the national level should be created (through, eg, a single Government Policy Statement on the Environment) and flow down through all levels of planning instruments. National bottom lines can be targeted at the regional level, to recognise important differences in how they are expressed.

- Take a more strategic approach to bottom lines – not just in the form of static rules and directive policies, but also in the form of binding targets (eg the carbon budgeting approach).
- (The Productivity Commission, for instance, has highlighted that setting a specific target in legislation elevates its status and ensures a long-term view is taken). This would shift our energies away from “holding the line” and towards positive and innovative action to “claw back” historical and more recent damage.
- Ensure that bottom lines are clear, but also incorporate buffer zones as a precautionary approach, and consider how uncertainty and risk (including adaptive management) can impact on the practical achievement of bottom lines.
- Consider carefully which bottom lines are place-based and which are value-based (applying across the whole country).
- Consider the points at which bottom lines bite. Are they an ambulance at the bottom of the cliff, only to be assessed when harm is imminent, or important in preventing activities before harm becomes likely? (eg a prohibition on microbeads, a circular economy more broadly, exploration for oil and gas, or even proscribing/prescribing land uses is about intervening early on to prevent or guide the nature of risk before it is created, not just regulating how it is disposed of once created).
- Link bottom lines more clearly to robust and durable funding sources for achieving them, especially where they are not about preventing action but about requiring it (including the funding of the science that informs bottom lines).

7.3 Should the system manage trade-offs above bottom lines?

From its inception, some (although by no means all) embraced the idea that, above firm environmental bottom lines, the RMA would “let the market rip”. On this view, the Act was to be a quantum leap away from the prescriptive approach to planning taken previously, and reflected an uneasy marriage between two competing trains of thought: the need for environmental protection and a faith in free market economics. That, however, has not proved to be the happiest of marriages. Part of the issue is that the firm bottom lines envisaged were never really implemented in practice. But there is, perhaps, a more significant underlying issue here.

Is it ever reasonable to think we can impose environmental limits and then take a hands-off approach to managing resources? In some senses, our current system is set up to operate in this way. Part 2 of the RMA contains quite a lot of guidance about the biophysical outcomes that are to form bottom lines, and (apart from a fleeting reference to enabling communities to provide for their own wellbeing)
deliberately avoids references to social and economic matters. It also provides no real guidance as to how those matters are to be balanced, because it was not meant to be about balance – only the imposition of firm biophysical bottom lines. Some have seen this absence of balance as producing a bias or blind spot in relation to the positive effects of development. That is a valid concern (subject to protecting environmental bottom lines, of course).

However, while not proclaiming it loudly in Part 2, the Act envisages that balancing will occur, and not just as a way to set firm bottom lines in advance. How else do we explain that it seeks not only to avoid or remedy adverse effects, but also to mitigate them? Or that section 32 (of the RMA) analyses (looking at costs, benefits and alternatives to planning provisions) must consider the potential for restrictions to reduce economic growth and employment? Or even that the first half of the RMA’s purpose (enabling people to provide for their own wellbeing) needs to be there at all?!?

In practice, decisions made under the current system have always balanced many interests and values. This has been used to do two quite different things: first, to erode or not recognise bottom lines (trading off beyond limits) and, secondly, to balance things above bottom lines (where some envisaged the RMA would let the market rip). In that sense it has fallen short of the expectations of both the environmental lobby and free market enthusiasts. As Miller has said, “Everyone learned at least a slightly different lesson” from the RMA. It has something of an inbuilt identity crisis.

**Decisions made under the current system have always balanced many things. This has been used to do two quite different things: to erode or not recognise bottom lines, and to balance interests above bottom lines.**

We have considered the need for more robust bottom lines above. But even if our system contained a hypothetically complete list of precise bottom lines, would there still be a need for the system to balance competing values and interests? In our view, the answer is yes – we cannot just set bottom lines and walk away – for two reasons.

First, not every kind of restriction within the system can be properly described as a bottom line in the sense of protecting a long-term and unchanging outcome. Some things that the system deals with, such as urban design and visual amenity – and place-shaping more broadly – rely on a constant and evolving conversation between participants in a community of interest (including experts). They are better described as a framework of common and predictable rules that can change over time, and can often be characterised as more purely “social” or “planning” issues than “biophysical” and “environmental” ones (although those distinctions are by no means clear ones).

**Nimby (“not in my backyard”) issues concerning the densification of residential communities can be thought of in this light; here, the relative interests of households, neighbourhoods, suburbs and cities need to be continually tested and retested. Similarly, the management of “retail distributional effects” and “centres policy” have been highlighted by some as not being about environmental effects at all, and therefore inappropriate for public intervention.** We agree in the sense that they are not bottom lines, but equally point out that they have well-documented effects on the kind of urban area people live in. It is overly simplistic to say that such measures are about protecting retailers in central cities; the idea is not to pick winners but to provide for a vibrant central area which the public can enjoy.

The costs of all of these interventions are real, but to us it is a question of whether they are worth the benefits. And, as with bottom lines, we need to think about the scale at which we make trade-offs. For example, should we impose a cost on one community (a neighbourhood) to benefit another (a city)? Should we combine and corporatise water utility providers across larger scales (like regions) in order to socialise and cross-subsidise remote or rural communities?

Overall, balancing these matters is a process of democratic discourse and needs the resource management system as a facilitator and normative guide, not an inflexible defender of the status quo. It needs to grease the wheels of change by implementing an evolving public interest in desirable ways or directing pressures to desirable outlets, rather than providing a roadblock to change. Agility is extremely important, and it is unacceptable that council plan changes take, on average, over four years to complete. In short, it would be a mistake to think of these things as bottom lines, even though the RMA currently considers them all to be part of the “environment”.

**A future system has a role to play in facilitating trade-offs between many interests for things where true bottom lines do not exist.**
There is a second reason why it is not enough for the system to set bottom lines and walk away. Even if a firm bottom line is desirable and present (such as for freshwater quality), environmental management above that line is arguably still a matter of public concern. Bottom lines are a minimum, not an optimum. Some communities may choose to trade off aspects of environmental wellbeing for the economic or social benefits development provides. Cities are inherently worse for biodiversity than national parks, but we don’t avoid building cities for that reason. Other communities may choose to impose higher environmental standards than the safety net provided by minimum ones. They may have areas of special local significance, or simply wish to be a leader in sustainable practices (green cities are popular cities). Making such trade-offs may take the form of strict rules and policies, even if they cannot be described as the fundamental, long-term bottom lines we referred to earlier.

Communities may also wish to get the most bang for their buck; even if a proposal does not infringe agreed limits, it may still be undesirable from a resource management perspective if the harm it causes is disproportionate to the benefit it brings. For example, clearing a small patch of urban vegetation for development may not imperil ecological limits, but should the system be powerless to intervene if the public benefit of doing so were small? In our view, beyond setting bottom lines, the system has a role in making these kinds of trade-offs within carefully set parameters, and according to carefully designed normative directions. Thus we suggest that not only should we avoid treating bottom lines as trade-offs; we should also avoid treating legitimate trade-offs as bottom lines. As Dr Tim Denne has suggested, “in the absence of [any] trade-offs, decision criteria can become paralysed.”

A future system has a role to play in making trade-offs where communities wish to balance different wellbeings or to enhance the environment above bottom lines.

A challenge in practice, of course, is to determine where bottom lines end and where the ground for trade-offs begins. That point is by no means obvious, especially since bottom lines themselves are set by balancing many factors. The important things, in our view, are to have a proper debate up front about such things. We should not continue to put off the question so it is determined on a case by case basis. In Chapters 8 and 9 we explore how these two roles – bottom lines and balance – could be more clearly differentiated than they currently are through legislative and institutional arrangements.
A spotlight on urban planning: Bottom lines or balance?

What makes cities unique from a resource management perspective? Is the role of the system fundamentally different in urban contexts from other ones? Recently, there have been calls to treat urban or built environments differently from natural environments, whether through legislative separation, different institutional structures, or amended principles to guide decision-making. That debate has been largely driven by the desire to improve housing affordability, but other issues have also arisen such as traffic congestion; the time, cost and uncertainty around development; and challenges in keeping up with the inherently unpredictable actions of large agglomerations of people.

We need to be careful about the language we use here. What do we mean by "natural", "urban" and "built"? There are many "natural" components in cities, in the sense of things that would exist if humans did not. Air, water, soil and biodiversity do not stop at urban boundaries, and urbanites rely heavily on them for their wellbeing. Similarly, there are many "non-natural" components outside cities (infrastructure such as roads, and people's houses, for a start, but even our vast tracts of farmland are arguably no more "natural" than a suburban park). It is therefore unhelpful to characterise the debate as a spatial one – that one area outlined on a map should be treated differently to another because one is natural and the other is urban. It may also be too simplistic to make a systemic distinction between the "natural" and "built" components of an area. Where, for example, do non-natural and non-built components, like rural landscapes, fit in? Or things – like the local neighbourhood park – that is both natural and built? And are cities really unique because of their capacity for change and dynamism, given that we may need to see significant land use change in our rural areas over the coming decades to deal with all sorts of environmental issues?

Looking at the issue from first principles, we consider that there are really three distinct conceptual questions to answer concerning urban planning, none of which involves making a stark distinction between urban and non-urban, between land and other domains, or between built and natural. The first is about bottom lines: Are the needs and priorities of cities really so different that we are willing to set completely different biophysical bottom lines (such as for water quality) within them and outside of them? If, for example, we were faced with a choice between 50,000 more houses in Auckland or safeguarding freshwater quality in urban streams, would we prioritise the houses? We suggest that the answer is – or at least should be – no. Bottom lines are bottom lines wherever we are, and they are arguably even more important in urban areas because of their potential to impact on the health and wellbeing of large numbers of people. It may often not even be possible to distinguish urban from non-urban bottom lines; the urban sediment that washes into a stream, or the urban waste-water that overflows onto a beach, can often end up in a non-urban area.

So if the kind of bottom lines we want are not what makes urban areas different, what is? That is where our second question comes in. This is about balance and trade-offs. In urban areas, do we strike a different balance between competing interests above bottom lines? Pressures of large numbers of people may mean that some aspects of the environment will never be as "pristine" as outside cities. For example, we may not be willing to forego the housing potential of brownfields land to create large areas of indigenous bush. Large areas of impermeable surfaces may mean that stormwater in cities has larger impacts on rivers and coastal environments than in more remote areas. Generally, expectations may be different. However, we emphasise that this is not an entirely "urban" distinction – it is one that plays out in all spatial contexts. The trade-offs that are made above bottom lines depend on the context and community in question, and they could look as different in different built-up areas (eg a fast-growing one vs one losing population) as they do in urban versus non-urban contexts.

Our third question is also about balance: In cities, should we strike a different balance where things do not have bottom lines per se? This is mainly about tensions between people's social and economic wellbeing that play out spatially (such as amenity impacts, noise, landscape, the location of services, transport routes, etc) rather than a tension between people and their "environment" in the traditional sense of degrading water, air, soil, etc. They are usually about the direct effects of people on each other, and often due to how they use land.

In practice, these tend to be more of a problem in cities because the impacts of people on each other are greater when they live in close proximity. However, we also emphasise that these trade-offs are not uniquely urban. For example, we may not impose true bottom lines (as we are conceiving of them) for all issues of rural amenity, but the system may still have a legitimate role in managing them.

Overall, we consider it risky to treat cities, or the built environment, differently from other places in a conceptual way. The system performs the same basic roles wherever it applies: all areas have bottom lines, trade-offs above bottom lines, and trade-offs where true bottom lines do not really exist. The issue with the RMA is not that it conflates urban and non-urban environments, land and other domains, or built and natural environments, per se. That is simply one prominent expression of the underlying problem: we do not have a clear enough commitment to the things that require true bottom lines, and we do not have a clear sense of how to balance those things that do not. In cities, trade-offs above (or outside) bottom lines may look different, and there may be merit, for example, in a more comprehensive "urban" NPS or set of statutory principles to more actively guide how those are made, perhaps even focused on particular cities.
For some things we require bottom lines, but the current system does not deliver them to the extent needed. For other things we require balance, but the system doesn’t talk about one important side of the equation – the positive effects of resource use and urban renewal. It strains to do both, and the product is confusion, uncertainly and an underwhelming commitment to either. A future system could usefully make a clearer distinction between the two.

7.4 Should the system provide public goods?

As mentioned in Chapter 6, the system needs to ensure the provision of public goods (such as essential trunk infrastructure). This may include infrastructure such as water pipes, roads, railways, schools, hospitals, ports, electricity, and many others, as well as associated services. There is a public interest in all of these, and thus the role falls comfortably within the basic rationale for some form of public intervention.

The provision of public goods is a crucial role that a future system will need to play.

The key question is how far this role goes: what should be public and what should be private? Public provision of essential goods can sometimes be inefficient, but private provision can fail to secure the public interest (and sometimes can also be inefficient). Exactly what makes goods and services “public” – and justifies intervention – is debatable. Demonstrable market failure is one approach. Public goods usually exhibit particular features that means the market does not provide them (or may provide them at excessive cost). They are often non-excludable (it is hard to prevent people using them, and therefore to require people to pay for them), non-rival (one person’s use does not prevent another person’s use), or have network monopoly characteristics (it is not practical or efficient to provide competing networks, eg roads or water pipes). Community preference is another approach. For example, there is no economic reason why schools, hospitals and libraries could not be provided privately (indeed, some are) – people could be charged at the door and subsidised through welfare payments.

Sometimes such things are provided because of a cultural or community expectation that they will be. That can represent more of a redistribution of wealth within a community (subsidising those who could not afford to use services) than a way to deal with market failure per se. A difference in expectation here can cause tensions, and has played out in amendments to local government legislation that have narrowed the role of councils to “core” goods and services. Council funding of speedway events, for example, is no longer seen as an acceptable thing to do.

Whether a good is “public”, and thus requires intervention in some form, can be debatable. One approach is based on market failure, and another is based on community preference for public provision.

There are numerous ways for essential or desirable goods to be planned, funded and delivered. In fact, there can sometimes be significant public interest in the provision of a good but little public interest in public intervention. Private (market) action may be adequate, and the system may be left in a monitoring or watchdog role. For example, we do not ordinarily have public authorities providing basic foodstuffs or rationing its supply. But we do have a system that carefully monitors trends within the Consumer Price Index. Furthermore, sometimes the public interest can be secured by less intrusive forms of intervention than direct public provision of a good (such as through robust competition laws). Hybrid approaches can also be taken; for example, state-owned enterprises and council-controlled organisations operate along commercial lines and can be used as delivery agencies while retaining public ownership and arm’s-length control. Public-private partnerships can be used to leverage off the finance and expertise of the private sector while retaining a focus on achieving public policy goals in one-off developments.

Institutional arrangements for the provision of public goods are explored in Chapter 9.

A public interest in goods and services does not necessarily mean they should be funded or delivered by public bodies.

But the key point for this chapter is that some form of public intervention is justified in order to provide goods and services, to the extent supported by the public interest. We also re-emphasise that it is not enough for the system to provide ways for public goods and services to be adequately funded and delivered (although that is, of course, one important component). The system also has to coordinate or integrate their delivery with associated land use regulation, both spatially (where they go) and temporally (over time). A residential road or water pipe that goes through an area that won’t be opened up for development for another 50 years is a waste of money. So too is opening an area for development without funding or delivering transport links and water supply. Many public goods involve large up-front capital costs, so where they go and when they are provided is an important question. Potential ways to coordinate these roles are explored in Chapters 8 (through legislative integration), 9 (through institutional integration) and 14 (through process alignment).

The system has an important role to play in coordinating development. This includes aligning the planning, funding and delivery of goods and services.
7.5 Should the system proactively pursue positive outcomes?

Bottom lines act as a safety net, to prevent unacceptably bad things from happening. But they do not represent the places where we truly want to end up. We seek to achieve positive changes, not just to prevent harm. Providing public goods and services is one way to do this, since these are important for people’s social and economic wellbeing. However, the system may need to go further.

Making trade-offs and providing public goods: Are those roles enough?

The system’s role in making trade-offs recognises the importance of people’s social and economic wellbeing. However, the system may need to go further. Setting bottom lines, facilitating trade-offs and providing public goods is not enough to secure the public interest: a future system must also actively pursue positive outcomes.

Action by public authorities

Some of this gap can be, and already is, filled by public institutions having particular statutory mandates to act. For example, the Department of Conservation is tasked with advocating for the environment, not just providing public goods (tracks and huts) or restricting what can happen in the conservation estate (bottom lines). The Energy Efficiency and Conservation Authority also runs education campaigns to change people’s behaviours. Regional councils invest in riparian planting. Government policy and funding choices more generally have important roles to play here beyond specific statutory obligations (eg in assisting a transition to electric vehicles or helping community groups with environmental legal costs).

A spotlight on proactively providing for future generations in Wales

The Welsh government has placed future generations at the forefront of policy through the passage of the Well-being of Future Generations (Wales) Act 2015. This innovative piece of legislation sets out seven wellbeing goals which are described in some detail. For example, the goal “A resilient Wales” is described as “A nation which maintains and enhances a biodiverse natural environment with healthy functioning ecosystems that support social, economic and ecological resilience and the capacity to adapt to change (for example climate change).” This expression of a positive future encompasses concepts of enhancement, healthy functioning ecosystems, resilience and capacity to change. It makes the RMA’s section 6 matters, with their emphasis on “preservation” and “protection”, seem somewhat dated.

The Welsh Act places positive obligations on public bodies which “must” carry out sustainable development, a stronger requirement than to simply “promote” in the RMA. The definition of “sustainable development” refers to the process of “improving” economic, social, environment and cultural wellbeing rather than “enabling” people and communities to do this for themselves under section 5(2) of the RMA. In Wales, public bodies are required to set and publish objectives designed to maximise their contribution to achieving each of the seven wellbeing goals, and to take “all reasonable steps” to meet the objectives. Government must publish indicators and set milestones and then publish an annual wellbeing report on progress made towards their achievement. It must also publish a “future trends report” within 12 months of the general election. In addition, there is provision for “local wellbeing plans”.

Duties for public authorities to take action is a good start. But can we do more to push private behaviours in directions that are desirable, and not just respond to harm produced by market forces? This idea can be controversial. The ways in which the system performs this role are crucial, as we need to strike a balance between respecting people’s freedom to choose and the desirability of shaping behaviours to achieve public policy objectives. We need to speak the language of incentives, not coercion. That may ease fears in some quarters about fairness and “scope creep”. Some non-regulatory tools that can be used are discussed in Chapter 13.
Public authorities have a key role to play in taking positive action on behalf of New Zealanders, and in providing funding and resourcing to do so.

**Incentivising synergies in private resource choices**

In particular, we suggest that the system could more actively provide incentives for people to conduct activities in which there are valuable synergies – where multiple objectives can be achieved at the same time. By only responding to market choices (imposing bottom lines, balancing pros and cons, and mitigating resulting harm), the system may miss opportunities to pursue a wider variety of objectives. It could influence, in advance, the kinds of resource uses that the market proposes in the first place.

Looking at it from the perspective of the public interest, more synergies exist than we might expect, and we may even find that the market responds well to the certainty provided by public guidance. For example, it is possible to make a great deal of money from renewable electricity generation, nature tourism, and forestry. We may even find there is greater opportunity for innovation and profit within a circular economy than a disposable society – if we change how we manufacture, package and reuse goods. It is simply a matter of where we choose to focus our energy and investment. We need no longer accept that a project that enhances economic wellbeing must come at an environmental cost, or simply be as environmentally neutral as possible. The system should therefore think not just about “trade-offs” but also about “convergence” and a “race to the top”.

Such questions are particularly significant as we grapple with managing our land uses in a country that is increasingly crowded and facing a changing climate. Should we be more proactive in deciding what kinds of activities (broadly speaking) occur, and where? Should we recognise that prime soils are better used for producing food, despite short term pressures from the market for other forms of development? Or that some areas are simply not suited for intensive agricultural production, even if farmers can turn a profit and not breach absolute bottom lines?

A future system should encourage and incentivise activities in which there are synergistic benefits, in a strategic and planned way.

The extent to which the system should drive synergistic resource uses may depend on the worldview and rationale for intervention that one adopts. There are dangers in straying into the murky defined realm of “social” and “economic” planning. In 1991, development choices were intended to be determined by the market, not politicians or bureaucrats. We still have to be wary of excessive micro-management, as the market remains best placed to provide efficient and innovative solutions. However, we think that it is not objectionable in principle for resources, in which there is a substantial public interest, to be managed more actively *in accordance* with that public interest. Economic resilience, climate resilience, food security and energy security – all positive outcomes – may benefit from the system proactively influencing the kinds of resource uses we conduct (and where, and when we conduct them).

In fact, it is arguable that decision-makers have been stretching the seams of the current system to do this kind of thing for a while now. There are various tools we can use to do this, which are explored in Chapters 11-14. Umbrella strategies (like the Biodiversity Strategy) are one. These can outline ways in which public and private actors can harmonise their actions. Strategic spatial planning (including marine spatial planning) is another. A spatial plan can outline not just, for example, where urban growth pressures are to be accommodated, where associated core infrastructure (like roads, schools and airports) goes, and where protected areas should be (like outstanding natural landscapes). It can also outline where big picture kinds of land uses and other activities are considered appropriate and how they can change over time. It can even consider which resource uses are compatible or mutually reinforcing.

**Channelling efforts into viable alternatives**

Another way in which the system can proactively pursue positive outcomes is by offering viable alternatives to activities that are no longer desirable due to their harmful effects. Creating the kind of change that is required to achieve good environmental outcomes can upset the status quo, and have very real social and economic impacts. For example, if we consider that the balance between the socioeconomic benefits of oil and gas exploration and its environmental risks has shifted in favour of the latter, it is not enough for the system to set a bottom line and walk away. The same thing applies to the use of vehicles running on conventional fuels.

The system has a vital role in actively managing a transition towards *something else* – a practical vision for the future that provides similar levels of social, economic and environmental wellbeing. If it does not, we may become stuck in a politicised cycle focused on the pros and cons of the status quo, not the opportunities and risks we face in the future. It is interesting to consider the proposed Climate Commission in this light – a new kind of institution that is about managing a transition over time to a future that is different.
**Harmonising the pursuit of positive outcomes with the system’s other roles**

There may even be a valid role for government to promote particular sectors or activities which are seen as having a public interest.\(^{126}\) These can be subsidised or incentivised by smoothing the regulatory pathway.\(^{127}\) For example, if we truly wish to embrace renewable energy, might the system be more proactive in determining (or at least mediating a conversation around) where wind farms can go, and not just weigh up the costs and benefits of applications to determine, on an ad hoc basis, where they can’t go? And can a system that seeks to address climate change and reduce plastic waste, while at the same time promoting the extraction of fossil fuels and (potentially) allowing urban sprawl, really be called a harmonised one? Normalising a single, integrated set of resource management principles across all functions of all public authorities – not just “environmental” or regulatory ones – could help.\(^{128}\)

Thinking harder about aligning our objectives at the system level may go some way to addressing complaints about objective overload (eg tackling public health issues, social justice, etc within the resource management system). The bigger issue may be that the resource management system pursues too many conflicting outcomes in an uncoordinated way, not that it pursues too many outcomes per se.

The system’s active pursuit of positive social and economic outcomes should not conflict with or undermine its other roles (especially the imposition of bottom lines). These tensions should be resolved and harmonised early, including by aligning the set of objectives that apply to the whole system. In that way, the system’s distinct roles can be mutually reinforcing.

Below, we offer some thoughts about the extent to which the current system pursues positive outcomes in two key areas: environmental enhancement and urban planning. These areas are closely related, since environmental enhancement has many benefits for cities.\(^{129}\) Both are about improving what we’ve got at the moment, not just preventing and managing harm.

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**A spotlight on environmental restoration and enhancement**

Despite numerous aspirational statements within the RMA and instruments produced under it, environmental enhancement is not something that the current system provides for well outside the conservation estate. The problem is that it requires positive action to achieve, and the tools the RMA offers are overwhelmingly linked to preventing or mitigating adverse effects rather than making people provide benefits.\(^{130}\) So despite a specific direction in the Act for authorities to pursue positive environmental effects,\(^{131}\) the RMA has no real power to change my behaviour unless I am doing something potentially undesirable.\(^{132}\)

That approach may be fine to the extent we are content (and, indeed, willing) to let the environment enhance itself (by simply leaving it alone). Water conservation orders act in this kind of way, as does the Māori concept of rāhui (a temporary ritual prohibition or restriction).\(^{133}\) But in many contexts, active human intervention is required to improve outcomes. We do not save native birds by leaving them alone to be eaten by possums or stoats.

Some of that action is already provided through legislation targeted at particular problems, such as pest management,\(^{134}\) where obligations are accompanied by the funding and resources to facilitate action.\(^{135}\) However, it is much more difficult to enhance environmental indicators, like biodiversity, on private land than on public.\(^{136}\) Here, there can be difficult arguments about fairness and who should pay.

From one perspective, if private persons are bearing the burden of achieving the public interest then that should be recognised through subsidies or compensation.\(^{137}\) However, from another perspective, if “enhancement” is, in reality, the remediation of damage already caused by private actors (eg much of New Zealand was originally forested), then why should the public purse pay? Is it because the government itself is partly responsible, since it may have authorised (or even encouraged) harm in the past (eg subsidising land clearance)?\(^{138}\) Or are payments really about protecting economically important industries? And does it make a difference if a current landowner or operator is the one who has received the benefit of degradation at the expense of the public interest, or if the true beneficiary has been lost in the sands of time?

Another way in which we can enhance the environment is to require those causing harm not just to avoid, remedy and mitigate their adverse effects, but also to provide environmental improvements by offsetting them using the principle of net gain. In that way, we can make use of a reactive system (in which actions are triggered by people’s harm) to cause overall improvements. We consider offsetting in Chapter 12.\(^{139}\)
A spotlight on urban planning: The pursuit of positive outcomes

Pursuing positive resource management outcomes is not just about restoring things like water quality, biodiversity or a healthy climate. Urban planning – how we manage physical resources in cities – is another context in which the system needs to be proactive. Good planning practice goes well beyond the avoidance, remediation and mitigation of adverse effects on the environment; it is about maximising good social, economic and cultural outcomes in their own right.140

It is debatable whether the current system provides a sound basis for this broad “outcomes-based” (i.e. proactive) approach to urban planning. To some, the RMA is little more than a “regulatory” statute (one that addresses “bads”).141 For example, it contains scant references to social, economic and cultural wellbeing or the benefits of urban development and design.142 It is reactive.143 Some have even said that “the concept of sustainable management has failed to provide a philosophical foundation for planning under the RMA”.144

However, in practice, the RMA has never prevented councils from engaging in positive urban planning. District plans, in particular, have always performed that role. This can be explained in different ways. First, “environmental” effects as defined in the RMA are much broader than those on the natural environment.145 The impacts of land use and urban design on people and communities are included too. Therefore many urban planning measures can be justified on the grounds that they are ways by which adverse effects on people can be prevented or mitigated.146 The prevention of “bads” and the achievement of “goods” can often be treated as different sides of the same coin.147

Furthermore, despite its passive appearance, the Act’s direction to manage the use of resources to enable people to provide for their own wellbeing has been treated in practice as a fairly active one when planning cities. It has allowed decision-makers to make land use choices that facilitate or even secure or enhance people’s wellbeing, even where the environmental impacts of different options are indistinguishable or non-existent. Generally, it can be said that the RMA is not inherently deficient in matters of urban planning.148

However, we have sympathy for those who complain that the RMA is not a particularly proactive or inspirational framework for planning our cities.149 A future system needs to be more explicit and specific about what many of its users already practice. If an Act like the RMA is going to be used to actively pursue social, economic and cultural wellbeing in cities in a proactive way, its purpose and principles could usefully be amended to reflect this.150

Increasing resilience

Having environmental bottom lines is a way in which we can strengthen the resilience of the natural world to human activities (and the resilience of humans to harm caused by other humans). But there is also a public interest in enhancing the resilience of people and communities to threats posed by the natural world. After all, the environment is not just comprised of things that can benefit people. It can be a dangerous place.

Primarily, human resilience in a resource management sense is about dealing with natural hazards and environmental change (whether caused by humans or not). This has two elements – the first is civil defence emergency management (planning and response to hazards). However, more relevant for present purposes is the management of human activities to mitigate in advance the risks posed by natural events.151 This is often about the spatial distribution of human activities (especially sensitive ones) in relation to potential hazards – fires, floods, earthquakes and so forth. The system has an important role in enhancing people’s and communities’ resilience to harm, including by preventing inappropriate activities in hazard zones.152 Adaptation to climate change – which manifests itself in the form of many different kinds of hazards – can be understood in this light. Some have highlighted the need to transition from sustainability to resilience as the core principle of the system (see Chapter 5).
A spotlight on addressing risk: Kāpiti coastal hazard lines

The Kāpiti Coast is subject to considerable coastal change with some areas eroding and others accreting. For example, at the small seaside settlement of Raumati, the coast has retreated over 50 metres since 1874. The main cause of this erosion is natural processes, with the "bulge" in the coastline at Paraparaumu deflecting sediment offshore so it does not travel down the coast to replenish Raumati Beach. The situation was made worse by the construction of State Highway 1, which prevented a supply of gravel to the beach and also the construction of seawalls along the coast which have reflected waves and disrupted natural movements of beach sediment. The situation will likely get worse under global warming.

As part of its efforts to manage coastal hazards, the Kāpiti Coast District Council commissioned a coastal hazard erosion assessment that projected the location of the shoreline in 50 and 100 years’ time. The Council used this data to identify "erosion hazard zones", with the 50-year hazard zone affecting about 1000 properties and the 100-year zone about 1800 properties. It was evident that the Council had a very significant coastal hazard risk to manage with much private investment at stake.

When the assessment was released in 2012, the Council advised affected property owners that it would be noting the hazard zones on Land Information Memoranda (LIMs) that were issued for properties. The Council then notified its proposed district plan which included restrictions on building and subdividing within the 50-year erosion hazard zone. Both these actions prompted a vigorous response from property owners who considered that these moves had significantly devalued their properties and they judicially reviewed the Council’s decision. Legal argument focused on the provisions in the Local Government Official Information and Meetings Act 1987, which required LIMs to provide information about potential property erosion, amongst other matters. The High Court found that the hazard information should have been included on the LIMs but in a more qualified manner. Following this decision and after further scientific review, the Council decided not to include coastal hazard information on the LIMs and it subsequently withdrew the coastal hazard management areas from its proposed district plan. It was reported that after these decisions were made, almost a third of affected property owners sold their properties.

This case study raises a number of pertinent questions. Who should bear the loss of property values from increased risk, current property owners of those in the future? Are district councils the best agency to address coastal hazard matters, given the significant impacts on property values and the political pressures this raises for councillors? After all, it is the current residents and property owners who are voting for councillors, not future purchasers. Is there a larger public interest to be managed here that merits central government intervention?

A core role of a future system must be the proactive pursuit of positive outcomes, not just the prevention of bad ones or the provision of public goods. How this is done (the kind of tool used) is crucial, because it has implications for private choice. The system needs to tread carefully. However, a future system could have the following features:

1. Public authorities should have clear mandates, linked to predictable sources of funding and resources, to pursue positive outcomes, not just prevent or manage potentially negative ones.
2. The system should actively incentivise and drive resource use choices in which there are synergies (those that can achieve multiple wellbeings at the same time).
3. The system needs to be active in providing viable alternatives to undesirable activities where removing the latter would have impacts on the public interest.
4. The system needs to be harmonised to ensure that the positive outcomes it pursues are not hampered or contradicted by its other roles (balancing and bottom lines).
5. Spatial planning at a national and regional level offers a mechanism for more actively guiding resource use choices. So too does offsetting harm using the principle of net gain. These are considered in Chapters 11–13.
6. The system needs greater normative alignment between legislation under which local government and other strategic planning occurs (positive and proactive) and legislation under which environmental regulatory planning occurs (reactive), especially in cities. Ways of doing so are explored in Chapter 14.

Informal seawall, Kāpiti coast
7.6 Should the system protect and promote Māori interests?

As discussed in Chapter 6, one rationale for allowing public intervention in a future system should be the protection and promotion of Māori interests. It follows that the system actively needs to do so, in order for the Crown to discharge its Treaty obligations. This is a more specific role than embedding general Māori concepts and practices throughout the system. It is about specifically recognising the Māori people as important actors in the management of resources, and a distinct community of interest within New Zealand. It is also coloured by international instruments like Agenda 21, which recognise the interests and value of indigenous people and practices. Part of this role is extremely hard to achieve through general resource management laws. This is because there is a well-established process for hearing, considering and remediating historical grievances under the Treaty of Waitangi. Each settlement needs to proceed on a case by case basis through negotiation with the Crown. It is not the place of this project to comment on the ownership or control of specific resources, or financial compensation, as these are much wider (not just resource management) questions to be determined through dynamic political processes.

The protection and promotion of Māori interests is not just about adopting Māori concepts in laws and plans. It involves much more difficult questions about partnership and power. However, Treaty obligations are not just about addressing past grievances or informing the settlement process. There are several ways in which our general resource management system needs to play a role in upholding Māori interests. It follows that the system actively needs to do so, in order for the Crown to discharge its Treaty obligations. This is a more specific role than embedding general Māori concepts and practices throughout the system. It is about specifically recognising the Māori people as important actors in the management of resources, and a distinct community of interest within New Zealand. It is also coloured by international instruments like Agenda 21, which recognise the interests and value of indigenous people and practices. Part of this role is extremely hard to achieve through general resource management laws. This is because there is a well-established process for hearing, considering and remediating historical grievances under the Treaty of Waitangi. Each settlement needs to proceed on a case by case basis through negotiation with the Crown. It is not the place of this project to comment on the ownership or control of specific resources, or financial compensation, as these are much wider (not just resource management) questions to be determined through dynamic political processes.

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However, Treaty obligations are not just about addressing past grievances or informing the settlement process. There are several ways in which our general resource management system needs to play a role in upholding Māori interests. The first is protecting Māori, and (speaking generally) their taonga, from harm. For example, the system needs to recognise and protect wāhi tapu (ancestral sites) and Māori relationships with key components of the natural world more generally. That needs to encompass intangible impacts, such as effects on cultural wellbeing. The Crown needs to take its responsibility for active protection seriously. It is not enough to have a general provision in legislation requiring regard to be had to the principles of the Treaty, or deeming the legislation to implement those principles, or for principles to be used as a general aid for interpretation. The system also needs to have effective mechanisms for applying traditional knowledge (mātauranga Māori) from Māori in determining these things, recognising that much lies outside the Western scientific approach.

A future system needs to recognise and protect wāhi tapu (ancestral sites) and Māori relationships with key components of the natural world more generally. That needs to encompass intangible impacts, such as effects on spiritual wellbeing. Mātauranga Māori needs to inform, even if it does not determine, decisions. Yet the Treaty is as much about recognising Māori rights to manage and use resources as it is about protecting the environment from use. In Te Ao Māori the two are inextricably linked. The system needs to enable Māori to undertake practices according to their own cultural and spiritual beliefs, and manage resources consistently with tikanga (customary practices). This requires allowing and empowering Māori to make choices themselves (subject to constraints that reflect the broader public interest, including environmental bottom lines). For example, not only should the system promote kaitiakitanga, but Māori should also be respected as kaitiaki. Because empowering Māori is linked closely with institutional arrangements, this is further explored in Chapter 9.

7.7 Should the system resolve disputes?

A future resource management system will be required to resolve disputes. That is a core role of the law more generally. The system requires enough certainty for people to know what their rights are, and a process by which justice can be served. However, it is worth thinking about public disputes and private disputes as separate concepts, as they are in legal theory more generally. Public disputes arise in relation to the roles we have considered earlier in this chapter – bottom lines, trade-offs, the provision of public goods and the pursuit of positive outcomes. Where there is an element of public interest involved in an issue, disputes between people are generally resolved by a side-wind. The real tension is between different elements of public interest (eg the tensions within the purpose of the RMA). This is reflected in the safeguards in place around negotiated consent orders under the RMA, where the Environment Court must be satisfied that any settlements reached by litigants still comply with the purpose and principles of the Act.

The role of the system in managing private disputes looks very different. Here, the focus is on clarifying the rights of the parties, rather than applying a test relating to the public interest (such as sustainable management). The system is still required, but it performs a facilitative function more familiar in other areas of private law (such as tort or contract law), not an outcomes-driven one. People are free to resolve their disagreements between themselves, and the law is generally agnostic as to what outcome that causes.
However, a challenging question arises when we try to distinguish between the two. Law-makers have tied themselves in knots in recent years trying to make finer and finer distinctions within the RMA based on, essentially, the perceived lack of public interest in some disputes. They have tried to reduce the system’s ability to intervene in those situations. Martin Williams has pointed out that “a great deal of energy, time and cost within our resource management system to date has been devoted to resolving what are really private, rather than public, interest concerns.”

Limited notification and written consent under the RMA (you are only informed if you are affected, and you can’t complain if you have agreed) can be seen as attempts to distinguish the public interest from private, although such activities still require an outcomes-based decision to be made by a consent authority under the purpose of the Act. Permitted activities (you don’t need an authorisation at all) represent one of the few bright lines drawn in the RMA between where the public interest ends and purely private concerns arise. Such rights can even be formally confirmed through the issuing of a certificate of compliance.

However, permitted activities exclude the system from playing any dispute resolution role at all, despite any purely private impacts they might have. There is no middle ground where private disputes can be resolved without invoking lofty concepts involving environmental wellbeing. For example, is the height of the fence I share with one neighbour really something that needs to be litigated under a test of sustainable management? This is not to say that all matters of amenity and urban planning are about dispute resolution and not the public interest, or that everyone will agree on which issues fit where. But it is a conversation worth having.

A future resource management system could, perhaps, more clearly recognise a distinction between resolving public policy disputes and private disputes by providing a private dispute resolution framework that is not governed by principles grounded in the public interest. A civil wrong is not always a public wrong.

7.8 Should the system allocate resources?

The allocation of non-private resources is another distinct, and core, role that a future resource management system needs to play. Not all resources are associated with private property rights. For those things that aren’t, we need some mechanism by which we can decide who can use them and how. In some cases this is because resources are specifically Crown owned, and yet we desire them to pass into private ownership (such as Crown owned minerals or high country pastoral land subject to tenure review). In other cases, it is because resources in their natural state are publicly owned (or not “owned” by anyone) – such as freshwater, the foreshore and seabed, or wild animals – and yet people still wish to use them.

The key question for our purposes is the extent to which the system should play a role not just in managing the adverse effects of their use, or even the use to which they are put, but also in deciding who gets the right to take or otherwise use such resources in the first place. That is a question of allocation. How we answer it is coloured by our worldviews, our approach to distributional equity, and the grounds on which we think the system should be able to intervene.

Allocative frameworks are usually important where a public resource is scarce, or may conceivably be scarce in the future. But allocation is not just about taking things. It is, more broadly, about using resources. For example, we need to allocate rights to use the limited assimilative capacity of receiving environments (like a waterway’s ability to deal with nutrients), not just rights to extract resources from them (freshwater). If a catchment can cope with only a certain nutrient load (before infringing a bottom line), we need somehow to allocate that load between different dischargers.

The allocation of public resources is a conceptually distinct role to those we have identified so far in this chapter. It poses significant challenges. For example, in allocating rights to take freshwater we are not just asking whether hydroelectric generation is more important than agricultural irrigation, but also, for example, whether Māori interests should trump non-Māori interests or whether Farmer A (an existing user) should be preferred to Farmer B (a more efficient and ecologically minded new entrant). This is partly about fairness, something New Zealanders tend to feel very strongly about.

Allocative issues are most intensely controversial and political if the question is not just allocation but reallocation (the transfer of existing or previous rights from one person or use to another). Some may feel that an incumbent user should be favoured, others will not. Timeframes are important, too. Some rights have been granted for significant periods of time – would it be fair to derogate from those rights? Controversy can also arise if there has been over allocation beyond bottom lines already, and users have to determine the proportions in which allocations should be returned (de-allocation).

Allocation is a distinct role the system needs to play, and one that poses controversial challenges. It involves debates not just about environmental values, but also about fairness.

When allocating rights to take or use public resources, the system can be doing quite different things. We need to determine which one we want it to do, because that may have ramifications for how the system does so. First, it may be in the public interest simply to allocate resources to those who can pay for them, in order to generate a return. For example, we can run bidding or tendering processes, or impose resource rentals. If the Crown owns resources (such as petroleum, gold or...
A future system could treat allocative questions as, essentially, an economic transaction. If people were made to pay for the enjoyment of non-private resources, that could be used for the benefit of New Zealanders or even channelled back into measures designed to enhance the resource being used.

Secondly, it is in the public interest to provide some kind of framework for resource allocation that gives certainty to users and a clear pathway for resolving disputes. On this approach, the outcome (who gets to use a resource, and who benefits from it) is less important, as long as there is clarity as to who benefits and a process that all can use to get to it. We have touched on this dispute resolution role above, and we could think about allocation as being simply one expression of that.

In practice, this probably best describes the approach of the resource management system we have now (at least under the RMA). The NPS for Freshwater Management is a reflection of this ethos; it grapples with issues over water quality and minimum flows, but not with allocative issues. Although the RMA does not really care how resources are allocated, it still goes ahead and does it anyway. A resource consent decision creates a legally defensible and sometimes exclusive right to use scarce resources (and sometimes for a long time – up to 35 years). Usually, the first person to apply for a resource consent is allocated the right to exploit a public resource needed for it (a first in, first served model).

A first in, first served approach to allocation gives some clarity (in that we all know we need to get in before someone else), but has significant downsides. Applications can be incomplete or rushed. There is an incentive to apply for a greater amount of the resource than is actually needed. And if rights cannot be broken up or traded, this can cause inefficient uses of public resources. But if they can be traded, it can provide the person who happened to be first in time with a windfall. Furthermore, this approach to allocation does not consider the opportunity cost; a different use may have been more desirable from a public policy perspective even if the successful proposal had acceptable adverse effects. It can also lock in sub-optimal uses for long periods of time.

A future system could more actively influence allocative decisions by establishing an overarching set of principles or resource-specific principles, or facilitating the development of regionally or locally based principles, for decision-makers to implement.

Thirdly, the system could make allocative choices based on the public interest. In other words, we could embrace more structured and competitive processes by which alternative uses are compared, and rights granted to a proposal that would best achieve pre-determined public policy objectives. For example, the system might explicitly prefer use by a farmer with a robust farm management plan, or even earmark/reserve a resource for a particular kind of use that would serve the public good in the future.

A more proactive approach has already been taken under some statutory regimes – such as in the allocation of quota under the Fisheries Act. Some minerals are also allocated proactively through a structured block offer (bidding) process. There are also signs that the RMA in its current form could be creatively stretched to accommodate this kind of approach and, over time, more proactive and structured allocative mechanisms have been added to the Act. Since 2005 regional councils’ functions have explicitly included the allocation of freshwater, energy and the assimilative capacity of public-receiving environments, including into the future, where appropriate.

However, structured mechanisms for allocation do not appear to be much used, and are not clearly based on any overriding allocative principles (such as equity, the public good, or cultural value). Furthermore, while under the RMA regional councils can impose rules to allocate resources, there is no mention of the development of allocative policies. This should, perhaps, come as no surprise because there is very little normative guidance in the Act’s purpose and principles on the subject. How is a council meant to allocate a resource based only on a direction to manage it in a way that enables people to provide for their own wellbeing? Every prospective user can be said to be doing that! Elected institutions, often lacking in political will, are therefore expected to perform a crucial task in a normative vacuum. Nor has the gap been filled by central government; despite some policy work on the issue, allocative functions remain firmly at the regional level. If we accept that the role of the resource management system is to allocate resources in a way that pursues positive substantive outcomes, it may require the formulation of a set of consistent principles by which comparative decisions could be made.
uses in accordance with the public interest, to multiple uses where synergies are possible, or even to particular groups irrespective of the use to which it will be put. For example, freshwater could be proactively reserved for hydroelectric generation or phased away from intensive agricultural operations in inappropriate areas. The system has been grappling with such conflicts for many years, but largely on a reactive basis and by using the language of adverse impacts on existing interests rather than proactively preferring future uses. Effectively, that is more about dispute resolution than positive planning. However, the active support of particular kinds of resource use is not an easy fit within the neoliberal foundations of the current system. Does this need to change?

A future system could be more proactive in picking winners – allocating resources to particular kinds of activities in which there is a strong public interest.

The system also needs to consider Māori rights to use and control resources, not just to make decisions in relation to their adverse effects. Some steps have been taken, whether through the Treaty settlement process (such as fisheries and aquaculture rights) or more generally (such as the recognition of customary rights under bespoke marine and coastal legislation), but long-standing issues remain live, notably around the ownership of freshwater.

A future system will need a durable mechanism to grapple with such questions, or at least to incorporate the results of separate political processes.

Overall, the RMA is not really designed or equipped to pursue allocative (or re-allocative) outcomes in a proactive way. It is a gap that is left to be filled by other statutes in the system. This helps to explain why we have some sector-specific statutes over and above the RMA; the Crown Minerals Act 1991 and the Fisheries Act provide frameworks for allocating scarce resource rights in sectors where a proactive approach has been deemed essential. Some Treaty settlement legislation also fulfils this role.

A future system could put in place more proactive measures to allocate and reallocate non-private resources in a way that furthers the public interest.
A spotlight on allocation of coastal space: Aquaculture

During the 1990s there was a sharp acceleration in the growth of the aquaculture industry. With a first-in, first-served allocation system and no coastal occupation charges, there was a strong incentive to apply for “free” valuable space ahead of others. This led to a “gold rush” of applications prompting the government to place a moratorium on processing applications in 2002. In January 2005, a new regime came into force which required all new farms to be located within aquaculture management areas (AMAs). It was envisaged that councils would spatially define such areas in their regional coastal plans as a sectorally focused form of marine spatial planning. Space within AMAs could then be tendered. Under the aquaculture Treaty settlement, 20 per cent of space was to be provided to iwi. There was also provision for private plan changes enabling an aspiring marine farmer to propose an AMA. Although several councils attempted to do so, no new AMAs were created under these new provisions. Private proponents did not come forward. The process proved to be costly, uncertain and politically controversial. Some councils, such as Northland Regional Council, identified areas off-limits to aquaculture in the event a private plan change application were to be made.

The lack of new space under these provisions prompted further law reform and in 2011 the requirement for locating a marine farm within an AMA was removed. Aquaculture reverted to being treated in a similar way to other activities in the coastal marine area, albeit with a requirement to undergo an undue adverse effects test in regards to wild fisheries. Councils were equipped with a broader range of tools to allocate space, in an attempt to prevent a recurrence of the gold-rush scenario.

This did not resolve all the problems experienced by the industry in accessing space, as some of the sites permitted in the early days of marine farming were proving unsuitable for the activity, particularly for the cold-water salmon species farmed in the Marlborough Sounds. The seawater in shallow and enclosed sites was warming, fish were dying and eutrophication of the seabed was occurring. It became clear that both environment quality and farm productivity might be improved if the farms were relocated. However, the legislation did not envisage farms moving, with any relocation being treated as a new application. Central government determined not to leave this matter to the council to resolve, even though it was going through a plan review process at the time. Instead it established a non-statutory advisory panel process with the intention of using new powers inserted into the RMA which enabled the Minister of Aquaculture to directly amend regional coastal plans via regulation. The panel recommended three sites, which at the time of writing are still being considered by the Minister.

The aquaculture experience provides some interesting lessons for future design of marine allocation systems. First, single-sector marine spatial planning exercises are likely to prove controversial and seem less likely to succeed. This is because many parties cannot see benefits for themselves in a process that is designed to provide for one sector only. Integrated marine spatial planning, such as that undertaken for the Hauraki Gulf, can provide for a range of outcomes that are more inclusive.

Secondly, the marine environment is fluid and constantly changing, and will be even more so in the future with the impacts of climate change. Increased storminess (increasing land-sourced inputs), seawater warming, ocean acidification, and changes in ocean current flows will mean that locations that were suitable for activities in the past will not necessarily be so in the future. The current spatially fixed consenting regime, which we apply to land, may become increasingly unsuited to the marine environment.
7.9 Concluding comments

In this chapter we have considered the roles that a future resource management system should play. In summary, we suggest that the system should have the following core roles, based on a general test of the public interest and (to the extent it is different) the need to safeguard Māori interests:

- Imposing bottom lines
- Managing trade-offs above bottom lines
- Funding and delivering (and coordinating) public goods (including infrastructure)
- Promoting "good" outcomes (not just addressing "bad" outcomes)
- Protecting and promoting Māori interests
- Resolving disputes
- Allocating rights to use non-private resources

Identifying the system’s core roles is an important step. However – returning to a point we flagged at the beginning of this chapter – for those things that we have concluded are within the scope of the system, not all kinds of interventions are alike. We are not faced with a simple choice between coercive regulation and letting the market rip. Inclusion within the system simply marks the point at which some public intervention can occur as opposed to none.

Some interventions will be more direct, or intrusive, than others. For example, the system has a legitimate role in managing how land is used because there is a public interest in it. But that does not justify the unconstrained use of compulsory acquisition powers or detailed prescriptive regulation governing what needs to happen on it. After all, land is often privately owned, and interventions can be much subtler than that. In Chapters 11–13 we consider the kinds of tools a future system could use when performing its core roles.

The purpose of Chapters 6 and 7 has been to outline the broad envelope of roles within which it is appropriate and necessary for the system to intervene in some manner. We have now built up a picture of what the system is aiming for (the norms on which it is based) and the roles that public intervention (rather than private choice) should play in pursuing those aims – what the system needs to do. The next step is to consider the structural features of the system – its bones or architecture – through which those roles can be performed. This has three components, which are considered sequentially in Part 3: legislative design, institutional design, and public participation.

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| To internalise externalities, provide public goods, and coordinate infrastructure provision; OR | To pursue the "public interest"; OR Rely on a test like "taonga"
| Rationale for intervention | |
| Roles of a future system | |
| Imposing bottom lines; AND/OR | Making trade-offs above/outside bottom lines; AND/OR Providing public goods; AND/OR pursuing broader positive outcomes; AND/OR |
| Pursuing positive outcomes; AND/OR | Protecting/pursuing Māori interests; AND/OR Allocating non-private resources |
| Approach to bottom lines | |
| Retain the status quo based on King Salmon; OR | Clarify that the RMA requires (not just enables) the imposition of bottom lines; AND/OR Require central government to produce a comprehensive suite of bottom lines across all domains |
| Approach to trade-offs | |
| The system is agnostic as to the trade-offs that are made above or outside bottom lines; OR | The system has a role to play in making trade-offs above bottom lines; AND/OR The system has a role to play in making trade-offs where true bottom lines do not exist |
| Approach to positive outcomes | |
| Rely on public authorities to pursue positive outcomes; AND/OR | Incentivise private persons to pursue positive outcomes; AND/OR Require private persons to pursue positive outcomes, not just prevent negative ones |
| Protecting Māori interests | See Chapters 5 and 9 concerning principles and institutions. |
| Approach to dispute resolution | |
| Treat all resource management disputes under legislation focused on the public interest like the RMA; OR | Separate recognition of public and private disputes within statutes like the RMA; OR Separate legislation for resolving public interest and private disputes |
| Approach to allocation of non-private resources | |
| Use a first in time approach for allocation; OR | Adopt a more structured approach to allocation based on economic considerations (eg auctioning, tradeable permits); OR Introduce principles for allocation (eg equity, cultural use, efficiency, public interest) |

Figure 7.1: Options for roles a future system should play
The only mandatory planning instruments are the NZPCS, regional coastal regulatory and enforcement functions equally need to be linked to durable and predictable funding streams (see Chapter 13).


See Chapter 5.

To the extent that impacts on the biophysical environment can be distinguished from impacts on humans.

For example, the carbon cycle and climate can be altered by “natural” events, as can events like algal blooms.

See Chapter 5.

Of course, a breach of bottom lines can also be accompanied by a requirement that harm be remedied. Pest control can be seen as a form of remedial action for past decisions (for example, releasing possums), but it is much more difficult, if not impossible, to assign responsibility to any particular person or group.

Costs for things like pest control are enormous (for both the Department of Conservation and council(s), as are the costs of water treatment infrastructure. See Department of Conservation “DOC’s 2018 Budget explained” <www.doc.govt.nz>.

Regulatory and enforcement functions equally need to be linked to durable and predictable funding streams (see Chapter 13).


See Chapter 5.


Ibid art 6, cl 3.


Whether a plan change, a resource consent, or something else.

In cases where a decision-maker cannot exercise discretion, such as where an activity is prohibited by a rule or standard, the same issues do not arise.

See New Zealand Rail Ltd v Marlborough District Council [1994] NZRMA 70 (HC).

Contrast Shall O New Zealand Ltd v Auckland City Council WR/94, 2 February 1994 (PTT) at 10, in which the centrality of bottom lines was recognised.

Section 67(3)(b)(i) of the RMA requires a regional plan to “give effect to” the NZPCS. See Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd [2014] NZSC 38, [2014] NZLR 593 at [127]-[128].


See Chapter 5.

See Turners & Growers v Far North District Council [2017] NZHC 764 at [46].

Transpower New Zealand Ltd v Auckland Council [2017] NZHC 281 at [94].


Ibid at [130].

Ibid at [146].

Nor does Part 3 of the Act, which simply requires some form of authorisation to be obtained (which then invites the exercise of discretion based on Part 2 of the Act).

The only mandatory planning instruments are the NZPCS, regional coastal plans, regional policy statements and district plans. A generally protective approach to the coastal environment, reflected in King Salmon, is by no means echoed across the wider system.

Resource Management Act 1991, ss 68(1), 76(1). In practice, rules are invariably found in all plans.

The principle of non-regression (that we can only strengthen, not weaken, our frameworks) is not obvious in the current system. On non-regression, see Chapter 5.

There is potential for conflict between the NPS for Freshwater Management and the NPS on Urban Development Capacity, for example.

The Environment Court does not proactively set policies or bottom lines (it largely has a review role), and has little role in the production of national level instruments.

For example, the potential for disproportionate representation of sectoral interests in regional councils, and multiple (and potentially conflicting) objectives pursued by local government.

For example, progress is being made in limit setting under the NPS for Freshwater Management, and progress continues towards an NPS on Indigenous Biodiversity: see Ministry for the Environment “Developing a national policy statement for indigenous biodiversity” (2018) <www.mfe.govt.nz>.

For example, killing possums is “harming” an element of the living environment. However, it is not generally seen in this light, because we assign greater value to the indigenous flora and fauna that possums harm.

With an additional “buffer” zone built in as a precautionary approach, to ensure those bottom lines are not infringed due to uncertainty around impacts.

See New Zealand Productivity Commission Better urban planning (2017) at 278, which cites “the need for a clear set of limits and standards within which development can occur, to ensure the integrity of natural systems, maintain standards of environmental quality for human health, and recognise community preferences”.

In which an outbreak of campylobacter in 2016, due to contamination of a local water supply, caused several deaths.


Air quality improvements in urban areas are one example. Also notable is the human health overtones of the “swimmability” debate around freshwater quality.

On anthropocentrism and ecocentrism, see Chapter 4.

See generally K Hughley, R Cullen and G Kerr “Public perceptions of New Zealand’s environment: A focus on water and its management” (Lincoln University, paper presented to the New Zealand Association of Economists Conference, Auckland, June–July 2010); K Hughley, G Kerr and R Cullen Public perceptions of New Zealand’s environment (Lincoln University, 2010). In this spirit, the Treasury has developed a Living Standards Framework based on multiple wellbeing’s (not just economic factors) to underpin future budgets (see Chapter 11).

The Productivity Commission has suggested, in the context of urban planning, that we need to “balance the objectives of regulation against respect for individual rights and freedoms, and with the objectives of an efficient and vibrant local economy.” New Zealand Productivity Commission Better urban planning (2017) at 51.


See Chapter 5 on the principles of sustainable development and sustainable management. See also D Young Values as law: The history and efficacy of the Resource Management Act (Victoria University of Wellington Institute of Policy Studies, 2010) at 61.

Landscape is a broad concept, and careful thought needs to go into where bottom lines end and trade-offs begin. In our view, some bottom lines are required.

Including resilience and protection of people from natural hazards. Earlier, we noted that bottom lines are about human impacts on the environment rather than vice versa, but humans can exacerbate the impacts of natural hazards by living and working in inappropriate locations.

On a population policy, see Chapters 3 and 9.

Dissatisfaction with the former kind of restriction has resulted in alarming progress is being made in limit setting under the NPS for Freshwater Management, and progress continues towards an NPS on Indigenous Biodiversity: see Ministry for the Environment “Developing a national policy statement for indigenous biodiversity” (2018) <www.mfe.govt.nz>.


See New Zealand Productivity Commission Low emissions economy (Final report, 2018) at 221, citing R McIlroy Regulation, enforcement and governance in environmental law (Bloomsbury, 2014) at 264.

So too are firm protections through water conservation orders. However, there are still debates around the proper place of land swaps and tenure review concerning the conservation estate: see, for example, the contentious Ruataniwha Dam proposal in Hawke’s Bay, which required a swap of conservation land: Hawkes Bay Regional Council “Ruataniwha storage scheme” <www.hbc.govt.nz>.

See Chapter 5 on the conservation principle.
59 The alternative is to allow our targets and budgets to be met by engaging in more efficient measures in other countries. The Parliamentary Commissioner for the Environment, in Zero Carbon Act (2018) at 12-13, suggests a focus on domestic emissions is appropriate to get our own house in order.

60 See M Brown Banking on biodiversity (EIDS, 2017).

61 See Chapter 12.

62 The Supreme Court in King Salmon (at [130]) bemoaned the uncertainty of outcome created by abandoning the specific directions of the NZCPS in favour of an overall broad judgment. However, that uncertainty of outcome is prevalent in an effects-based system that relies on project level interpretation of general and potentially conflicting policies.


64 New Zealand Productivity Commission Low emissions economy (Final report, 2018) at 218-219.

65 See Chapter 5.

66 For example, dedicated funding for strategic environmental assessments (for particular industries or issues) rather than relying on, or testing, evidence from a citing the submission of C Miller.

67 For example, Simon Upton said that the RMA would impose “lightly targeted controls that have minimum side effects” (4 July 1991) 5 NZPD 3020.

68 It was a complaint of the Technical Advisory Group on the RMA’s purpose and principles that under the Act there was a balanced list of things to be weighed. However, that was assuming that a balancing approach, rather than a bottom lines approach, was the correct one. See Report of the Minister for the Environment’s Resource Management Act 1991 Principles Technical Advisory Group (2012).


70 See New Zealand Productivity Commission Better urban planning (2017) at 96.


72 Ibid, s 3(2)(a).

73 If the Act was purely about bottom lines, and we did not need to consider the social and economic implications of that, would it not be sufficient to define sustainable management in a more biophysically focused way?

74 In consenting decisions, we often see extensive discussion of costs and benefits, not just assessments of whether biophysical harm will occur.

75 That has been exacerbated recently through bespoke legislation that alters the application of s 12 in specific areas (such as under the Housing Accords and Special Housing Areas Act 2013, the Point England Development Enabling Act 2017, and proposed Housing and Urban Development Authority legislation).

76 See New Zealand Productivity Commission Better urban planning (2017) at 122, citing the submission of C Miller.

77 See Ibid at 12, 265.

78 See the previous section of this chapter on bottom lines.

79 For example, the placement of a park in an urban landscape, or noise restrictions. Landscape is also a complex interplay between biophysical, social and cultural concerns (see Working Paper 1).

80 Effects of dispersed retail developments, often through big box malls in suburban or peri-urban locations.

81 Policies designed to ensure that central cities thrive.

82 See New Zealand Productivity Commission Better urban planning (2017) at 107, 212-213.


84 For example, people in a low-density suburb may have purchased their property with the expectation it would remain that way. That is a real cost and should not be bottled or ignored, even if it is not preventable or compensated.

85 See Chapter 9.

86 We also emphasise, however, that land use planning can have impacts on the matters referred to as bottom lines (such as water quality due to nutrient runoff from agricultural use, climate impacts of locking in a dispersed urban form based on car travel, and need to be defended, balanced. Land use planning is therefore not just about trade-offs.


88 For example, consider the Waitakere Ranges, where the community fought for example, the placement of a park in an urban landscape, or noise restrictions. Landscape is also a complex interplay between biophysical, social and cultural concerns (see Working Paper 1).

89 We leave open the question of what those parameters should be. However, there is the need for predictability as to how those trade-offs will be made, and planning instruments should make the relationship between policies clear and understandable.


92 Although there are many ways to improve outcomes, including water sensitive urban design and living walls.

93 This has implications for legislative design (whether we need a separate statute applying only to urban areas) and the normative direction contained in statutes’ purpose statements.


95 Ibid at 39. Note that this is not limited to urban public goods.

96 Ibid at 44.

97 See generally R Thaler and C Sunstein Nudge: Improving decisions about health, wealth and happiness (Penguin, 2009).

98 Housing is an interesting example; in that it is usually provided privately, but is of such fundamental importance that public intervention often occurs (eg planning provisions for affordable housing, the direct provision of state housing, policy interventions to make land for housing available, and health and safety standards).

99 Local Government Act 2002, ss 10(1)(b), 11A.

100 This raises the slightly different question of the role of local government, which is not about resource management per se and which we therefore do not address directly.

101 For example, entirely privately, and through state-owned enterprises, council-controlled organisations, Crown agencies, local government, and public-private partnerships.

102 For example, see the Electricity Industry Act 2010, pt 3.

103 In particular, the limited funding mechanisms available to local government to provide core (eg three waters) infrastructure.

104 See Chapter 5 on the conservation principle and development principle.

105 At least in terms of the RMA, the positive effects of resource use were seen as a passive part of the equation; they were to be enabled by the Act, rather than pursued by regulatory tools.

106 See G Severson “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. Under administrative law, conditions must relate to a resource management purpose, fairly and reasonably relate to the activity consented rather than ulterior concerns, be intra vires the powers of the consent authority, and not be unreasonable. The RMA now specifically requires conditions to be linked to adverse effects (s 108AA).

107 Compare Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012, s 63(1).


109 See H Cooke “Government subsidy for electric vehicle mechanics, electric milk truck, and charging stations at supermarkets”Stuff (17 January 2018) <www.stuff.co.nz>.


112 See Chapter 9.

113 Ibid, s 3(1).

114 Ibid, s 2.

115 See New Zealand Productivity Commission Better urban planning (2017) at 96.

116 Which can be seen in the idea of product stewardship schemes under the Waste Minimisation Act.

117 For example, green infrastructure and water-sensitive buildings contribute to all kinds of wellbeing.


119 For example, in the context of climate change adaptation, land is managed not to prevent or balance human impacts on the biophysical environment, but rather to safeguard people’s social and economic wellbeing in the face of threats from the biophysical environment.

120 Both the Court of Appeal and Supreme Court have hinted that the merits of applications close in time may sometimes be compared, on the understanding that one of them might better promote sustainable management. See Central Plains Water Trust v Synlait Ltd (2019) NZCA 619, [2010] 2 NZLR 363 (CA) at [89]; Synlait Ltd v Central Plains Water Trust [2010] NZSC 32, [2010] NZRMA 257; Ngai Tahu Property Ltd v Central Plains Water Trust [2009] NZSC 24; Central Plains Water Trust v Ngai Tahu Properties Ltd [2008] NZCA 71, [2008] NZRMA 209 (CA) at [90]-[91]. Furthermore, it has been held that using a resource in one way (such as land for commercial purposes) that could otherwise be used for other, more valuable, purposes (industrial use) can be regarded as having an “adverse effect” on the environment: Queenstown Central v Queenstown Lakes District Council (2013) NZHC 815 at [91]. Foregoing an alternative opportunity to use a resource in a different way is quite a radical conception of what an “adverse” effect is under the RMA.

121 For example, the Sea Change – Tai Timu Tai Pari Marine Spatial Plan. See Chapters 11 and 14.
For example, forestry and recreation; energy production and waste disposal.

The current system already requires the provision or consideration of
alternatives to a limited extent (for example, where products are banned under
the Waste Minimisation Act 2008).

See, for example, the proposals in the Tapuati Roa: Make Way for Taranaki
Strategy—Taranaki Regional Council “Taranaki Regional Economic Development
Strategy” (August 2017), <www.makawkey.co.nz>; and measures to incentivise
electric vehicles or investigate the use of hydrogen as an energy source.

See Chapter 9.

See Chapter 5 on the development principle. The current system does so
already in some cases, such as renewable electricity generation and (miniscule)
petroleum extraction.

For example, Martin Williams has suggested that the benefits of forestry for
climate change mitigation could be recognised by more generally permitting
(not restricting) forestry as a land use: see M Williams Resource management

The Biodiversity Strategy is an example of this broader set of principles,
although limited to the topic of biodiversity. On an integrated resource
management strategy, see Chapter 11.

For example, resilience through green infrastructure, connection with nature,
open space, urban cooling and so forth: see City of Melbourne Green city

See Resource Management Act 1991, s 108AA; 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(1) BRMB 110.


Ibid, pt 3 and s 108AA(A); P Investments v Queenstown Lakes District Council
Envtl ChrishchurchCAB 2006, 27 April 2008 at [40].

JC Mould “Te Aka online Māori dictionary” <www.maiicipation.co.nz>. On
Ruahiu see: Chapter 12.

Through plans and strategies made under the Biosecurity Act 1993.

For example, see Department of Conservation “DOC’s 2018 Budget explained”
<www.doc.govt.nz>. See also Chapter 12.

It can also be difficult on Crown land where there are private interests (such as
pastoral leasehold land).

On subsidies, see Chapter 13.

In Europe and the United Kingdom, payments are made to farmers to secure the
“public interest” in landscape protection: see BBC “Switzerland’s farmers become

Another mechanism for enhancement is the requirement to provide esplanade
reserves in the event of subdivision: see Resource Management Act 1991, from s
220.

See New Zealand Council for Infrastructure Development (now Infrastructure
New Zealand) Integrated governance, planning and delivery: A proposal for local
government and planning law reform in New Zealand (2015) at 34.

New Zealand Productivity Commission Better urban planning (2017) at 93.


See New Zealand Productivity Commission Better urban planning (2017) at 97; Parliamentary Commissioner for the Environment Managing change in paradise: Sustainable development in peri-urban areas (2000); R Rea ‘Urban design and
reform of the RMA’ (April 2009) Resource Management Journal 16; New Zealand Council for Infrastructure Development (now Infrastructure New Zealand)
Integrated change governance planning and delivery: A proposal for local government
and planning law reform in New Zealand (2015).

New Zealand Productivity Commission Better urban planning (2017) at 258, citing C Miller Culture and capability within the New Zealand planning system (2016).


For example, reverse sensitivity provisions and basic zoning rules.

For example, the setting aside of green space in a city through a district plan
can be seen as providing a positive outcome for social wellbeing or, alternatively,
as preventing the adverse effects that would have resulted had green space not
been provided for.

It is interesting to consider what could be achieved by the new section 18A(2)
(1) of the RMA (which provides that plans must include only matters relevant to
the purpose of the Act), since it is inherently debatable what the scope of that
provision is.


For those who think this raises echoes of the Minister for the Environment’s
Technical Advisory Group report on the purpose and principles of the RMA, which essentially advocated a balancing approach rather than bottom lines, this is not what we are meaning. Rather we mean that the RMA does not
be agnostic about social, economic and cultural wellbeing to the extent that it does
not infringe firm biological bottom lines.

Although there are also important things to consider about the kinds of regimes we put in place for natural hazards recovery, and lessons to be learned from the
Canterbury experience about funding, process, institutional arrangements, and
legislative design.

See Chapter 6 on the public interest and protecting people from their own choices.

R Poet Castles in the sand: What’s happening to the New Zealand coast? (Craig

Coastal Ratepayers United Inc v Kapiti Coast District Council (2017) NZHC 2933 at [8].

Kapiti Coast District Council v Coastal Ratepayers United Inc (2015) NZHC 3516. In this
case, the Court upheld the Council’s decision to include information on the land
information memoranda but considered that the way the Council had shown the
information was too stark and it needed to include clearer qualifying statements.

J Long “Kāpiti Council wins fight over property hazard line battle” Stuff (2017)
<www.stuff.co.nz>.

See Chapter 5 on the principles of the Treaty of Waitangi.

Agenda 21, United Nations Conference on Environment and Development, Rio

For example, see the Māori Fisheries Act 2004, preamble. This is about
returning control of particular resources to iwi via the granting of property or
resource use rights.


See Resource Management Act 1991, s 8; Exclusive Economic Zone and
Continental Shelf (Environmental Effects) Act 2012, s 12; Conservation Act 1987, s
4; Climate Change Response Act 2002, s 3A. See generally R Roast “The Treaty of Waitangi and environmental law” in R Harris (ed) Handbook of environmental law (Royal Forest and Bird Protection Society of New Zealand, 2004) at 513.

Huakina Development Trust v Waiako Valley Authority [1987] 2 NZLR 188 (HC) at
210.

See Chapter 5; Treaty Tribes Coalition v Urban Māori Authorities [1997] 1 NZLR 513 (PC) at 517.

There can be debate as to whether the concept is one in which only whena
whenua can act as kaitaiki, or if it kaitakatinga is broader in scope.

See generally G Severinsen “Bearing the weight of the world: Precarition and the

See Environment Court Practice Note 2014, Appendix 2, pt (7).[1987]

For example, the turbuous provisions about boundary activities and deemed
permitted activities under the Resource Legislation Amendment Act 2017 (see

M Williams Resource management system: Reform or transform? (April 2018)
Resource Management Journal 3 at 5.

Trade competition effects are another: see Resource Management Act 1991, pt 11A.

Resource Management Act 1991, s 139.

Other than narrower private law remedies like nuisance, which can be expensive
and difficult, and often require the services of lawyers to determine the legal
position through case law.

When we use the term “public” this is really shorthand for “non-private”. We
certainly do not limit the concept to Crown (or local government) ownership. We
also include resources over which ownership is contested (freshwater) or is not
currently possible (the common marine and coastal area).

Assuming, of course, that the effects of the use are assessed as acceptable.

See Chapter 4.

See Chapter 5.

See Chapter 6.

See Chapters 11-13 for allocative tools.

Reflecting the user- or poluter-pays principle.

Although allocation in some non-consumptive contexts can be controversial
even where there is Crown ownership; for example, the allocation of rights
to enter national parks or stay in huts where visitor numbers are capped or
controlled.

For example, bidding through the block offer process under the Crown
Minerals Act.

Some marinas pay a coastal occupation charge and others do not, for example.

Charging for water is not only an allocative mechanism (determining who gets to
use it). It can also be used as an incentive for efficient use (see Chapter 13).

Resource Management Act 1991, s 123. In practice, this can be even longer,
given how section 124 of the RMA has played out (giving the ability for a consent
holder to continue to operate after expiry).

For criticism of this model, see A Monmon and P Skelton “Institutional
position through case law.

Resource Legisla" (April 2009) Resource Management Journal 16; New Zealand
Sustainable development in peri-urban areas (2007)...

resource use rights.

as preventing the adverse effects that would have resulted had green space
not been provided for.

resource use rights.

resource use rights.

resource use rights.

resource use rights.

resource use rights.
As pointed out earlier, the merits of applications close in time may sometimes be compared, on the understanding that one of them might better promote sustainable management; see Central Plains Water Trust v Synlait Ltd [2009] NZCA 609, [2010] 2 NZLR 363 (CA) at [89]; Synlait Ltd v Central Plains Water Trust [2010] NZSC 32, [2010] NZLRMA 257; Ngai Tahu Property Ltd v Central Plains Water Trust [2009] NZSC 24.

For example, see the provisions on coastal occupation under Part 7A of the RMA. See also Chapter 12.

One commentator has noted "the "ingenuity" of councils in using a framework like the RMA to "make the allocation of resources a necessary means of controlling effects" (see New Zealand Productivity Commission Better urban planning (2017) at 107).

For example, see Ministry for the Environment Water programme of action: Water allocation and use (2004).

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


Marine and Coastal Area (Takutai Moana) Act 2011.


Regional councils may allocate resources where appropriate.

For example, determining who gets to extract minerals under the Crown Minerals Act is determined quite separately to the question of whether the environmental impacts of doing so are acceptable.

For example, under the Māori Fisheries Act 2004.


A similar example is the South-East Marine Protection Forum which focused on identifying marine protected areas along the south-east coast of the South Island and failed to reach agreement.

PART 3 – STRUCTURES

8: LEGISLATIVE DESIGN
8.1 Introduction

In Chapter 7 we considered the seven core roles that a future system will need to perform. However, the reality is that these roles will be performed not within the “system” generally, but within particular statutory frameworks having different purposes and design features. How we split up our statutes to perform these overall roles is an important question, since legislation forms the backbone of the rule of law.¹

Legislative design is the first of three “structural” pillars of a future resource management system we are exploring in the following three chapters. The other two are institutional design and public participation. The place of structural features in this work is represented below.

| Part 1: Norms | Legislative design
|               | The architecture to enable our aims to be achieved
|               | Institutional design
|               | Public participation
| Part 2: Functions | The interventions that influence behaviour
|               | Strategic tools
|               | Regulatory tools
|               | Non-regulatory tools
| Part 3: Structures | Harmonising our tools
|               | Three models for a future system
| Part 4: Tools | Three models for a future system
| Part 5: Drawing the threads together | The rationale for public intervention

Figure 8.1: Structure of this report

8.2 What is legislative design?

To many people, resource management legislation is synonymous with the RMA. That is understandable, given its name. Yet the RMA doesn’t deal with everything. Alongside it we have the Local Government Act (which, among other things, concerns the funding and delivery of infrastructure necessary for the development of land), the Land Transport Management Act (which does a similar thing for land transport infrastructure), a bevy of conservation legislation (which imposes additional requirements for activities on conservation land) and hazardous substances legislation (which imposes rules on the storage, transport, and so forth, of hazardous substances). In fact, we have dozens of other key resource management statutes (or hundreds, if we count the many obscure and specific acts that lead a nebulous and largely forgotten existence on the fringes of the system).²

Because all these statutes are part of one system,³ there can be complex relationships between them. Changing one can have flow-on effects on others.⁴ As such, we are fully justified in asking: Why do we have so many (or so few) statutes? Why are they split up in the ways that they are? Why do the relationships between them look like they do? And should they be arranged differently?

Legislative design is a highly topical issue in resource management at the moment, with some questioning the future place of the RMA given the alarming number of carve-outs and workarounds that have occurred and have been proposed.⁵ But we are not limiting the inquiry to how we might give the RMA a makeover, or how we might improve relationships between existing acts. We are, instead, returning to first principles. In doing so, we are encouraged by the general direction in the Legislation Act 2012 to facilitate “the progressive and systematic revision of the New Zealand statute book so that . . . it is arranged more logically”.⁶

This chapter moves from the general to the specific. First, we ask what “good” legislative design means. From this, we produce a series of design principles. We then describe the current system and consider whether, and how, it could be changed or improved. The chapter is not intended to provide a blueprint for reform, and does not claim to consider every single statute. Rather it attempts to provide a framework – a way of thinking – to enable us to have a more considered conversation about legislative design.

Recently we have been hearing calls for the topic of “urban planning” or the “built environment” to be separated from the RMA and put into a new statute, or to be carved off in some other way.⁷ Prior to the 2017 general election, the National-led Government went one step further:⁸

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

In a similar vein, Local Government New Zealand and Infrastructure New Zealand have floated options that would see the land use planning components of the RMA integrated with the infrastructure components of the Local Government Act and Land Transport Management Act into a single Planning Act, with the remainder of the RMA transmogrified into an Environment Act.⁹ This is in response to a legitimate complaint that our statutes are “complex, contradictory and disintegrated”.¹⁰ But is that a good idea?

We need to ask some more fundamental questions first. Is legislative design really that important? Does it matter if we have five different acts, or 20 different acts?
Does it really make a difference if we have separate acts dealing with, for example, fisheries management (under a Fisheries Act) and the health of marine habitats (under an RMA)? To some, it may not really matter. After all, there is no single perfect way to arrange our legislation. We need to be realistic about what legislative design is here to do, and not expect a reshuffling of our statutes to be a solution to substantive problems.

Combining or splitting up statutes should not be done on an ad hoc basis in response to particular problems. Integrated thinking is important. However, legislative re-design cannot be a solution to problems that require substantive changes.

8.3 Design principles

In the coming sections, we identify and consider seven design principles that we think are important for designing legislation in a future system. Some of these can be distilled from the Legislation Act and the general guidelines of the Legislation Design and Advisory Committee. These by no means form a complete list of principles relevant to the resource management system. Substantive principles have been discussed in Chapter 5 (including sustainability, subsidiarity, accountability, and so forth), and these are also important when designing legislation.

Resource management legislation should be coherent, certain, accessible, durable, integrated, tailored, and efficient.

Design principle 1: Coherence

Above all, the structure of our resource management legislation needs to form a coherent whole and fit well together. This captures the idea that an overall model needs to make sense. We cannot make random, unthinking or spur of the moment design choices and expect them to work. A system is coherent if it has “clarity and intelligibility” or is “logically ordered”.

This can be looked at in different ways. One way is to imagine a sort of jigsaw puzzle, where the boundaries of one act about the boundaries of another with no overlap or gaps. Another way may be simply to make sure the interactions between statutes are clear (in which case the way they are divided is not really that important). A third, and more complicated, way is to look through different “lenses” when considering how to divide our statutes. There are many different lenses we could use (which we explore below) but the important point for coherence is that we need to choose one or more compatible lenses and use them consistently across the whole system.

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

Design principle 2: Certainty

Once we have laid out the basic building blocks (statutes) in a coherent way, we need to make sure the relationships between those statutes are certain and precise. Some kinds of uncertainty are unavoidable, and even desirable, in the resource management system if this allows for agility and change. However, fundamental uncertainty as to how statutes relate to each other is not a good thing.

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

It is important to recognise, however, that constructive tensions within the system can be valuable where they are intentional and serve a logical purpose. The guidelines of the Legislation Advisory Committee expressly contemplate that statutes may be intentionally conflicting, as long as it is clear how they operate together. For example, we can observe that both the RMA and the Conservation Act 1987 apply to conservation land, but that they may conflict. One may allow an activity, the other may prohibit it. This can be helpful; it can encourage constructive dialogue between different authorities that wear different hats. Clear legislative separation can also be valuable to implement checks and balances on institutions wielding public powers. For example, the Department of Conservation has obligations under the Conservation Act that are quite different and potentially conflicting with obligations of ministries and councils under other legislation.

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

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

**Design principle 3: Accessibility**

Our suite of legislation should be designed in a way that is intuitive and accessible to those who use it. People need to understand why statutes are arranged as they are, partly in order to determine easily whether they are affected by them.

On the face of it, this principle also tends to support the idea that fewer statutes are better. A system seems more accessible if one has to consider a list of 20 statutes rather than 200. But this raises a more fundamental question: accessible for whom? For example, a local authority may find the system most accessible if it were comprised of a statute that contained every provision relevant to local government responsibilities and powers. If we had the interests of applicants at heart, we would probably have an act that dealt with the ins and outs of all forms of permitting. Enhancing accessibility to one kind of person can erode accessibility to others.

Overall, the structure of the system should encourage public understanding and acceptance of the law. Any person should be able to look at the system and say, “I understand why it has been designed that way; it makes sense.” We shouldn’t find laws (or regulations under them) in obscure, unexpected or controversial places. They should be found in statutes where their content fits comfortably within a well-defined and meaningful statutory purpose. As the Chief Justice has stated, the RMA is “meant to engage communities, not alienate them” and “impenetrability and complexity in [the Act] is not a good thing”.

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

**Design principle 4: Integration**

Integration is an important principle in the context of legislative design. The resource management law reform process that led to the enactment of the RMA integrated a large number of statutes. In many people’s minds, this may translate to “the fewer statutes we have, the better”. However, we should not immediately assume that a drive for integration in a substantive sense should translate to full integration in legislative design. The principle does not require us to enact “one statute to rule them all”. Matters can be integrated or connected across the system in ways other than inclusion in the same statutory framework. The principle simply tells us to recognise and be sensitive to the connections between matters dealt with under different statutes within the same system. In fact, there are several good reasons to separate statutes. All of them relate to a single observation: the key consequence of having different statutes is that we have different purpose statements.

First, people (regulators and regulated) need to know how to act. Thus it needs to be reasonably clear from the purpose of a statute what is expected of them under it. There should not be so few statutes as to make it unclear what exactly each one does. Some may argue that the RMA itself is guilty of this, in its wide and contestable definition of sustainable management.

Secondly, having distinct statutes and clear purposes on which institutions can rely when making decisions can lessen the risk of their roles being watered down. For example, we have a Parliamentary Commissioner for the Environment not to slavishly agree with the EPA, or with the Environment Court, but rather to offer its own, potentially conflicting, perspective under its own statutory mandate.

Thirdly, a statute that has a well-defined purpose of its own may prove more resistant to inappropriate or unintended interference. It is more obvious if amendments are proposed to erode a highly protective statute than if amendments are made to a more complex statute in which protective considerations mix with exploitative ones. Conversely, it can also be easier to make desirable...
amendments if policy makers are able to focus on a particular defined by a single statute. It can be difficult to make amendments to complex schemes in larger statutes without disrupting their coherence (as seen with amendments to the RMA).

On the other hand, it can be easier to forget that a wider system exists if we are only looking at one of many interrelated statutes within it. There is a risk that amending statutes individually, as silos, can lead them to grow apart and form less of a coherent whole over time. For example, some have complained that the initially coherent system for land transport infrastructure provided by the RMA, Local Government Act and Land Transport Management Act has been eroded through separate amendments that led each in different directions.

What we need is a mechanism by which we are constantly reminded that the relationship between the parts of the system is as important as the content of each part. This does not necessarily mean that we need a single strategic umbrella statute, in the nature of a resource management constitution, to which all other acts are subordinate (although that is one option). It simply means that the system as a whole needs to be normatively or strategically aligned by design. Statutes all need to contribute to a common set of principles or objectives. Furthermore, our suite of legislation should be structured in a way that makes it clear how any normative conflicts between acts are to be resolved. For example, we would not want one act to seek to reduce the emission of greenhouse gases to zero and another one to promote the extraction of fossil fuels that could have the opposite effect. The Legislation Act encourages us to remove inconsistencies.

Design principle 5: Durability

Although “time and events render most statutes obsolete in the end,” the design of our suite of legislation must be reasonably durable. By this we mean that it should be structured in a way that will remain fit for purpose in a future that is bound to be very different from the present. We see three key elements in this.

First, the combined scope of our statutes needs to be broad enough to cope with change (whether socioeconomic, biophysical or technological). For example, in 2019 it seems clear that the system needs to proactively consider how scarce resources are allocated between different people and interests, not just consider how activities may adversely impact on the environment. We can foresee that the system will also need to provide a pathway towards enhancement for already degraded parts of the natural environment, not just the prevention of further harm. Our statutes must be sufficiently broad to do those kinds of things without needing “add-on” legislation.

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

Thirdly, basic design choices need to be removed from the realm of political point-scoring. Constant tinkering with statutes not only reduces the coherence of the system, it also makes it more likely that they will not stand the test of time before there is pressure to overhaul them. This is being seen now with the RMA, and even though they may be necessary, such large-scale upheavals are conducive neither to social cohesion or long-term business confidence. It would be better for us to accept that some things may need to change occasionally or even frequently, and provide an inbuilt legislative mechanism for that to happen. The challenge, of course, is to identify what things should be set in stone and what things should be susceptible to change. The ecological health of waterways is not likely to be one of the latter, but aspects of public participation, residential intensification or urban amenity may be.

Design principle 6: Tailored to New Zealand circumstances

The design of our legislation should be tailored to New Zealand physical and socio-political circumstances. We cannot simply adopt models that have been used overseas, even if they have proven successful. We are a small country by population, reinforcing the idea that a system of legislation need not be overly complex or multi-layered.

One of the most important features of the New Zealand context that needs to be mentioned specifically is that the settlement process for historical grievances under the Treaty of Waitangi, between the Crown and Māori, is still ongoing. New legislation should not be inconsistent with or undermine existing or likely future Treaty settlements. There is a potentially significant challenge in reconciling this principle with those of integration and accessibility, since dozens of bespoke settlement acts may need to interact in different ways with general statutory frameworks.

Design principle 7: Efficiency

The way in which we design our suite of legislation should be efficient. Duplication and overlap should be avoided unless there is a good reason for it. More fundamentally, unnecessary legislation should be avoided. This does not mean that fewer statutes are better; rather, it means that if we do not have to legislate to achieve a solution, then we should not do so. Efficiency also steers us towards considering whether regulations or other subordinate instruments, rather than primary legislation, can be used to provide greater agility and flexibility where change may be needed on a regular basis. The parliamentary process can be expensive and protracted. Statutes should also be designed in ways that encourage efficiency in decision-making processes and administrative support; multiple processes should be avoided where possible, or integrated, connected or aligned in some way.
8.4 How should we split up our statutes?

Looking through different lenses

Design principles offer a framework within which we can evaluate options for splitting up statutes, but they do not demand we do so in particular ways. The next step is to consider different “lenses” through which we can look when dividing them. We referred to this above in the context of coherence. A lens is, essentially, about what our main concern is when we slice and dice legislative boundaries.

For example, consider the RMA, which has an extremely wide scope. It deals with water and air quality, ecosystem health, noise pollution, the development of land, and many other things. It regulates activities based on the impacts they have on the environment, not the sector to which an activity belongs (eg agriculture), the kind of person doing the activity (eg the government), or the area in which something happens (eg cities). For convenience, we can call this kind of statute an “outcomes-based” one. Looking through this outcomes lens, we would divide our statutes according to different kinds of outcome. For example, we could have different statutes seeking environmental, conservation, health, social, and economic outcomes.

Other statutes may be “sectoral”, in that they regulate a particular industry or activity (eg an act regulating mining or an act regulating transport). Still others may be “institutional”, in that they regulate the behaviour of a particular kind of entity (eg an act dealing with local government or with state-owned enterprises). Looking through an institutional lens, we would divide our statutes according to different actors in the system.

Several other lenses are possible (see Figure 8.2). But for a system to be coherent, we cannot chop and change lenses at will. If we have a framework like the RMA, for example, it can undermine coherence if we then introduce an act regulating the environmental impacts of mining, or of urban development, on top of it. What is the point of a broad outcomes-based framework if you have to look elsewhere for extensive additions and exceptions for particular industries?

<table>
<thead>
<tr>
<th>Lens</th>
<th>Explanation</th>
<th>Example</th>
</tr>
</thead>
<tbody>
<tr>
<td>Outcomes</td>
<td>We have particular statutes for particular kinds of outcomes.</td>
<td>One act for the protection and restoration of the natural environment, one for allocating public resources, and another for encouraging exploitation of resources.</td>
</tr>
<tr>
<td>Institutional</td>
<td>We have separate statutes for specific institutions.</td>
<td>One act for local government, one for an EPA, another for the Environment Court.</td>
</tr>
<tr>
<td>Sectoral</td>
<td>We have particular statutes for specific sectors or industries.</td>
<td>One act for agriculture, one for fisheries, another for mining.</td>
</tr>
<tr>
<td>Domains</td>
<td>We have particular statutes for specific domains.</td>
<td>One act for freshwater, one for soil, another for the climate.</td>
</tr>
<tr>
<td>Location</td>
<td>We have particular statutes for specific locations or areas.</td>
<td>One act for urban areas, one for rural areas, one for marine areas, another for conservation areas.</td>
</tr>
</tbody>
</table>

Figure 8.2: Potential lenses through which we can look when designing legislation

Adopting one lens does not mean that we ignore the content of other lenses. For example, an institutional statute is still concerned with outcomes and can be concerned with particular sectors. The Local Government Act, for example, is focused on one kind of institution (local government) and can be described as an institutional statute. While it is still concerned with sustainability outcomes and the transport sector, these relate only to the institution it is concerned with (local government). For example, the Local Government Act does not deal with the outcomes sought by the Ministry for the Environment, or the regulation of a particular sector like fishing.

Similarly, an outcomes-based statute is still capable of dealing with particular sectors and institutions. For example, even the RMA produces plans that deal with different sectors/activities in different ways. The Act also creates (or continues) institutions – such as the Environment Court. However, again, the sectors and institutions contained within it relate only to the outcomes it is concerned with. For example, the RMA does not actively pursue the economic benefits of mining, so is not concerned with institutions that deal with this (such as
minerals enforcement officers). The more general point is that, no matter what lens we use, the basic content of the system is still found somewhere. The lens we use to divide statutes simply determines where that content is found.

Below, we explore different lenses we could use. While we divide our statutes in many different ways, a consistent rationale for doing so needs to be maintained across the whole system if we are to ensure it is coherent. Here, the concept of lenses can be useful.

**Figure 8.3:** An example of applying lenses. Our choice of lens determines how the system’s content is grouped together in statutes. Here we see that we can split statutes along outcomes or sectoral lines.

<table>
<thead>
<tr>
<th>Institution 1</th>
<th>Institution 2</th>
<th>Institution 1</th>
<th>Institution 2</th>
<th>Institution 1</th>
<th>Institution 2</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sector 1</td>
<td>Sector 2</td>
<td>Sector 1</td>
<td>Sector 2</td>
<td>Sector 1</td>
<td>Sector 2</td>
</tr>
</tbody>
</table>

**Figure 8.4:** Part of a suite of legislation created using an outcomes lens. Institutions and sectors are still regulated, but that occurs within statutes that are defined by outcomes.

**

Figure 8.5: Possible statutes produced by looking through a location-based lens

**Lens 1: Location**

If we look through a location-based lens, we would separate our statutes based on the geographical area in question. At its broadest, we could divide New Zealand’s territory into spaces having different fundamental characters. Each act would manage all kinds of outcomes, sectors, institutions, and domains within the area to which it applied.

**Figure 8.3**
To some extent the current system reflects this lens. We have a Conservation Act (and other conservation legislation) that applies only to specific areas. There have also been some calls to remove “urban” areas from the scope of the general RMA regime.

We could go even further by embracing the idea that different local or regional units have fundamentally different contexts and concerns from each other. We could, for example, have an “Auckland Act” (to some extent we already do), a “Westland Act”, or even a “New Plymouth Act”. Local Government New Zealand has recommended the “ability to craft bespoke resource management arrangements at a local or regional level to deal with specific issues”, citing the example of special economic zones. 56

If we look through a location-based lens, we would separate our statutes based on the geographical area in question.

**Lens 2: Domain**

Statutes could, instead, be divided according to particular domains that we wanted to manage or protect. The term “domain” defies universal definition. However, we are treating it as an aspect or component of the natural world that we value.57 Domains are not inherently spatial: for example, soil, biodiversity, and freshwater can all exist within any given space (eg urban or rural). When we speak of domains, we are concerned with managing the environment or resource itself, not the particular ways in which a resource or resources are used by humans. So while “marine” and “fish” can be domains, “fishing” (the act of taking fish) is not (it is, instead, a “sector”). To a limited extent we already use a domain-based lens in the current system (eg we have the Climate Change Response Act).

**Figure 8.6: Possible statutes produced by looking through a domain-based lens**

Domains are generally defined quite broadly (air, water, etc), to reflect the closely connected environmental processes that occur within them. However, it is possible for more specific components of the environment to receive more targeted attention in a separate statute. This can be seen in bespoke legislation concerning marine mammals, wildlife protection, or the ozone layer.58 Conceptually these still justify a “domain” label, because they are concerned with aspects of the environment, not a particular way or ways in which they are used by people.

If we look through a location-based lens, we would separate our statutes according to particular domains that we wanted to manage or protect.

**A spotlight on domain-based legislation: An Oceans Act?**

Unlike for land, freshwater and air (where multiple pieces of legislation were rationalised into the RMA), a similar process has yet to be undertaken for the marine area. The RMA is a broad outcomes-based piece of legislation but has only partial jurisdiction over the sea. There are multiple other pieces of legislation at play, making the achievement of integrated marine management problematic. This has led to previous efforts to develop an oceans policy and also in suggestions that New Zealand might consider an integrated Oceans Act. So, what might such a piece of domain-based legislation look like?

The United Kingdom is instructive in this area, as it recently undertook both legislative and institutional reform to integrate management of its marine area. The Marine and Coastal Access Act 2009 includes fisheries management, marine protected areas (called “marine conservation zones”), marine mammal protection, marine planning, marine licensing, marine pollution and enforcement. It also, somewhat oddly, includes provision for coastal walkways. The Act’s geographical ambit includes both the territorial sea and the exclusive economic zone. The newly established Marine Management Organisation is responsible for all these functions. It operates at arms’ length from government as an “executive non-departmental public body” with its own board similar to the structure of New Zealand’s EPA.

A similar rationalisation in the New Zealand context to develop a marine domain-based piece of legislation could bring together the RMA (to the extent it applies to the coastal marine area), the EEZ Act, the Fisheries Act, the Marine Reserves Act 1971, the Marine Mammals Protection Act, the Maritime Transport Act 1994, and the marine provisions of the Wildlife Act 1953 (seabirds and marine species).

**Lens 3: Sector**

Looking through a sectoral lens, we would divide statutes along the lines of particular sectors, industries or activities. We are applying the term “sector” in a broad sense here – as a particular way or ways that people use a resource, not resources or aspects of the environment themselves (domains). Some sectors are concerned with multiple domains. For example, agriculture uses and impacts on freshwater, soil and air, and electricity generation can use solar energy, wind, freshwater and fossil fuels. Similarly, some domains support multiple sectors (uses). For example, freshwater is used for (among other things) agriculture, municipal drinking supply and electricity generation.
If we look through a sectoral lens, we would separate our statutes according to particular industries or kinds of activities (ways people use resources) that we wanted to manage.

**Lens 4: Institution**

Using an institutional lens, we would enact statutes targeted at particular institutions within the system. These would create or continue institutions, outline their functions, powers and duties, and establish frameworks under which those institutions are responsible for making resource management decisions. To some extent we already have institutional legislation in the current system (eg the Local Government Act, the Environmental Protection Authority Act 2011, and the Environment Act 1986). An institutional lens would produce statutes very different from what we have now, however, because they would subsume much of the content currently contained in other acts like the RMA (eg decision-making on regional and district plans and consents would be contained within a Local Government Act).
Lens 5: Outcomes
If we look through this lens, we would divide our statutes according to the different kinds of outcomes sought. How we identify different kinds of outcome is inherently subjective. For example, some may suggest categories of “environmental”, “social”, “economic”, “cultural” and “health” outcomes (and a separate statute to pursue each). Others may see these as artificial fictions.

We tend towards the latter view. It would be nonsensical to have one statute pursuing cultural outcomes and another pursuing environmental outcomes (they are often the same thing). Similarly, our social wellbeing can be enhanced by planting trees in urban areas and providing walking tracks in national parks; our long-term economic prosperity relies on renewable energy sources that are better for the environment; human health relies on clean water. The list goes on, but the point is that links between statutes split along these lines would simply be too complex and overlapping to manage. One option is to accept that we can have only one truly outcomes-based statute, like the RMA, that combines all these things into a single, albeit nature

compatible lenses

Instead, we can usefully think of lenses as existing in a hierarchy or sequence. We can start by choosing a primary lens (eg a sectoral one), which we apply across the whole system. For example, we could have (among others) a Mining Act, an Agriculture Act, and a Transport Act. Each act would deal with all issues relevant to the sector in question (such as managing the sector’s environmental impacts, any funding decisions, and the allocation of resource use rights). We can then consider what those statutes do not do, and apply a secondary lens (eg an institutional one) to fill those gaps across the whole system. For example, if institutions were needed to operate across multiple sectors, such as an Environment Court or regional councils, it would not be appropriate to include them in any sector-specific act. So we could enact specific statutes – an Environment Court Act and a Local Government Act (among others). But we would not need to enact a separate statute establishing an institution concerned only, for example, with transport, like the New Zealand Transport Agency (NZTA), because that would already fall firmly within the scope of a sectoral Transport Act.

Again, we could then consider what still remains to be done, and apply a tertiary lens (say, a location-based one) to fill any gaps. For example, if a location had a special character that could not be recognised through restrictions on particular sectors or the behaviour of a particular institution, we could enact a specific statute to do so. The

Environmental Protection Act
To protect the natural environment from human activity

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

Auckland Environment Act
To protect the natural and built environment within the Auckland region

Resource Allocation Act
To allocate the rights to use resources of a public nature

Figure 8.11: How not to design legislation

Using an outcomes-based lens, we would divide our statutes according to different kinds of outcomes sought.

Compatible lenses

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

Figure 8.10: Possible statutes produced by looking through an outcomes lens

Environmental Protection Act
Resource Exploitation Act
Environmental Trade-offs Act
Outcomes-based legislation

REFORM OF THE RESOURCE MANAGEMENT SYSTEM: THE NEXT GENERATION – SYNTHESIS REPORT
Urewera may be a good example of such a location that has special treatment in our current suite of statutes.

Applying a hierarchy or sequence of lenses means that most of the content of the system is contained within statutes created using a primary lens. Those statutes are the first cab off the rank, so to speak. Using a sectoral lens as a primary lens would result in sectoral statutes dealing with most things (the environmental impacts of each sector, the allocation of resources used by the sector, sector-specific institutions, and so forth). Statutes created using a secondary lens would therefore have less scope, because their role would be simply to fill any gaps that remain. For example, Urewera would not have a broad outcomes-based statute like the RMA if we started by using a sectoral lens – it would be duplicative and confusing to do so. Our choice of primary lens is therefore extremely important. None of this is to predetermine what lens should be used as a primary lens. The key point is that we need to avoid the random and inconsistent use of lenses if we want to create or maintain a coherent system.

We can usefully think of lenses as existing in a hierarchy or sequence. A later lens fills the gaps left by an earlier one, but does not manage the same things for the same reasons.

Figure 8.12: Primary, secondary and tertiary lenses. Most of the content of the system is contained in statutes that are created using a primary lens. In this highly simplified slice of a hypothetical system, a sectoral lens has been used as a primary lens. Other lenses are then applied only to fill the gaps left by previous ones; here, statutes created using an institutional lens would not address matters already addressed by sectoral legislation (a Local Government Act would not contain provisions relating to transport planning or funding).

<table>
<thead>
<tr>
<th>Lens</th>
<th>Things the system must do</th>
</tr>
</thead>
<tbody>
<tr>
<td>Primary lens (sectoral)</td>
<td>Act 1 (eg Agriculture)</td>
</tr>
<tr>
<td></td>
<td>Act 2 (eg Electricity Generation)</td>
</tr>
<tr>
<td></td>
<td>Act 3 (eg Aquaculture)</td>
</tr>
<tr>
<td>Secondary lens (institutional)</td>
<td>Act 4 (eg Environment Court)</td>
</tr>
<tr>
<td></td>
<td>Act 5 (eg Local Government)</td>
</tr>
<tr>
<td>Tertiary lens (location)</td>
<td>Act 6 (eg Te Urewera)</td>
</tr>
</tbody>
</table>

We can usefully think of lenses as existing in a hierarchy or sequence. A later lens fills the gaps left by an earlier one, but does not manage the same things for the same reasons.
8.5 Describing the current model

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

We will briefly describe the current model, before evaluating it. Dozens⁶⁴ of existing statutes can be described as falling within our resource management system (as we have defined it). Some of these can be described as falling within other systems too (such as the local government or transport systems).⁶⁵ We by no means offer a complete picture of every single relevant statute. However, Figure 8.13 shows what we consider to be the key ones. It also indicates, loosely, whether they can be considered to span other systems.⁶⁶

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Figure 8.13: Key statutes in the current resource management system, showing overlap with other possible systems
The striking thing about this diagram is the sheer number of statutes in the system. Many more exist than are shown. Furthermore, a great many regulations, plans and other subordinate instruments exist within some of these statutory frameworks. It is a fragmented and complex legislative landscape.

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

No single lens described above adequately explains how our statutes have been divided. In fact, all lenses are represented in some form (see Figure 8.14 below). We have institutional statutes (eg the Environmental Protection Authority Act and the Environment Act). We have sectoral statutes (eg the Fisheries Act, the Forests Act 1949, and the Crown Minerals Act). We have domain-based statutes (eg the Climate Change Response Act). We also have location-specific statutes (eg the National Parks Act 1980 and Te Urewera Act). And we have outcomes-based statutes too – we cannot forget the RMA or the EEZ Act, and a handful of other acts fit this bill.

How are we to make sense of this bewildering array of statutes? Although it is by no means perfect – and we have considerable sympathy for the view that the system’s coherence has been eroded over time – we can observe that there is still some underlying order in its design. No single lens is used. Instead, multiple lenses seem to be used in sequence: outcomes, domains, locations, institutions, and sectors. Statutes in each category largely fill gaps left by statutes in the previous one.

### Figure 8.14

<table>
<thead>
<tr>
<th>Outcomes-based statutes</th>
<th>Domain-specific statutes</th>
<th>Location-specific statutes</th>
<th>Sector-specific statutes</th>
<th>Institution-specific statutes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Litter Act 1979</td>
<td>Conservation Act 1987</td>
<td>Housing Accords and Special Housing Areas Act 2013</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Energy Efficiency and Conservation Act 2000</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Gas Act 1992</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Many statutes can be described as falling within the resource management system. Some of these can be described as falling within other systems too, and boundaries are fluid.
The current system is founded on outcomes-based statutes. In other words, outcomes are the primary lens that has been used to divide legislation. These acts generally apply across all locations, institutions, sectors\(^77\) and domains. Those like the RMA and EEZ Act seek a wide range of outcomes (which are collectively described as sustainable management): protecting the environment;\(^78\) enabling the use of resources for social, cultural and economic wellbeing; making trade-offs between competing values; and resolving conflict. Others, like the Waste Minimisation Act, Litter Act, Hazardous Substances and New Organisms Act and Biosecurity Act, also seek broad outcomes that apply to all locations, institutions, sectors and domains. Many of those outcomes overlap with those sought by the RMA.\(^79\) A key point of difference between them, though, is the kinds of tools they employ to achieve them. Those employed by the RMA are usually reactive, whereas the others allow for more proactive measures to be taken for particular kinds of problems or threats.\(^80\)

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

The most notable examples that do exist are the Climate Change Response Act and the Marine and Coastal Area Act,\(^81\) although within domains some more specific resources\(^82\) do receive targeted protection (wildlife, marine mammals and the ozone layer being cases in point). Overall, we have very few purely domain-based statutes, for the simple reason that to do so would undermine the point of having an integrated, outcomes-based framework like the RMA. If we had a statute for every domain, the RMA would become largely redundant. Instead, they fill gaps.

We can observe a third layer of statutes that are divided by location. These apply only in defined areas having additional needs to those already met by outcomes-based and domain-based legislation. We can look at a map and pinpoint such areas. Some location-specific acts are so targeted as to be better described as project-specific acts.\(^83\) Again, location-specific statutes are a narrow range (we do not have a bespoke statute for every location in New Zealand, or for locations already dealt with under outcomes or domain-based acts),\(^84\) but they tend to be more numerous than domain-based statutes.

This can be explained by the notion that few broad domains require regulation for reasons other than the outcomes sought under the RMA,\(^85\) but particular locations often do. In fact, location-specific acts seek a wide spectrum of different outcomes not pursued by the RMA, depending on the character of the location in question. Some seek stricter environmental outcomes (additional protections for the biophysical environment), such as the National Parks Act or Te Urewera Act, which would not be appropriate for all land (especially privately held land) managed under the RMA. Other acts are concerned with the more active pursuit of economic or social wellbeing.\(^86\) Still others are concerned with the active pursuit of cultural outcomes (such as geographically specific Treaty settlement legislation).\(^87\)

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

Location forms a third lens that fills the gaps left by outcomes-based and domain-based legislation.

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

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

Some of our sectoral statutes, such as the Forests Act, impose environmental protections that are targeted at a particular sector (e.g., restrictions on felling, processing and export). This is rare. But more common is legislation that encourages or facilitates the utilisation of resources within a sector. Those outcomes are still firmly within the resource management system, because the system is as much about resource exploitation as it is about protection. But they are not ones with which our more general outcomes-based statutes are concerned. The RMA, for example, is agnostic about whether or not resources are used in the first place, or the kinds of uses to which they are put.

Thus for a limited range of sectors, we have an additional layer of law to drive resource exploitation. For example, the Crown Minerals Act promotes mining and actively allocates mineral rights within the mining sector. The Land Transport Management Act facilitates national level funding and delivery of land transport infrastructure. The Fisheries Act may have a protective sheen, but it is primarily about enhancing the resource’s potential for long-term exploitation (“sustainable utilisation”).

The Gas Act and the Electricity Act have provisions recognising the benefits of using resources. Even the Public Works Act can be seen in this light, because it smooths the way for resource use and development in a range of publicly important sectors (transport, schools, communications, etc.).

Of course, we do not have a bespoke statute for every sector. This is, for the most part, because this kind of legislation is not needed for most sectors. The market, not legislation, generally determines if a particular use of resources eventuates. Society is not overly concerned, for example, if the local corner dairy goes under – we do not enact a “Convenience Store Act” to ensure every neighbourhood has one. Intervention is needed mainly where a sector is seen as delivering an essential public good, and where failure to deliver would be detrimental to public wellbeing.

Overall, we have a smattering of separate sectoral statutes that encourage resource use. They do quite different things than statutes created under other lenses; they fill gaps.

Sectoral statutes fill gaps left by statutes created under previous lenses. They are not needed for all sectors, because they only apply to those in which there is a substantial public interest.

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

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

The treatment of local government and some sectors (transport and three waters infrastructure) is, however, one significant exception to the order in which we apply sectoral and institutional lenses. Usually, a sectoral lens comes first, in that we have separate acts focused on sectors that exploit resources (like minerals and fisheries). Institutions are set up within sectoral acts. Only those institutions that do not fall comfortably within them are governed by separate statutes. For example, we do not
an institutional “NZTA Act” separate to a sectoral Land Transport Management Act.

However, the reverse is true when we consider local government. We do not have a “Water Infrastructure Act” with relevant local government roles within it. Instead, we prioritise an institutional lens by having a Local Government Act that contains sectoral provisions about the funding and delivery of water infrastructure. We return in a moment to the question of whether this legislative design choice is justified.

Institutional statutes tend to fill gaps left by previous lenses, although some sectors (water and transport) are dealt with within the Local Government Act.

Lens 5: Sectors/institutions

Lens 4: Institutions/sectors

Lens 3: Locations

Lens 2: Domains

Lens 1: Outcomes

Figure 8.16 The sequence of legislative design lenses applied in the current system. The widest circle represents the boundaries of the system as a whole. Outcomes-based statutes like the RMA have “first dibs” on the content of the system. Subsequent layers of statutes generally only fill the gaps left by previous ones (represented by layers of crescent shapes) and do not encroach on their territory.

8.6 Interactions between statutes in the current model

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

Because different layers of statutes generally perform different roles (eg sectoral statutes do not generally impose environmental protections), they tend not to overlap. In other words, they do not usually do the same kinds of things for the same reasons. However, doing different things for the same reasons, doing the same things for different reasons, or even doing different things for entirely different reasons can still produce difficult interactions, conflicts and uncertain boundaries that must be managed.

The Environment Court and High Court have recently considered the interaction of the RMA and the Fisheries Act in the Motiti case. The case focused on whether it was a possible for a council to spatially protect parts of the marine environment from the impacts of fishing activity through provisions in its regional coastal plan. The impetus for the litigation was the events following the grounding of the Rena on the Te Tau o Taiti/Astrolabe reef in October 2011, and attempts by the Motiti Rohe Moana Trust to retain a fisheries exclusion zone around the reef once the salvage operation had been completed.

On the face of it, the RMA and the Fisheries Act have overlapping jurisdictions for managing the impacts of fishing on marine biodiversity. Regional councils have broad functions under the RMA for “maintaining indigenous biodiversity,” including that in the marine environment, and can include rules in a regional coastal plan for this purpose. The Minister of Fisheries can impose sustainability measures under the Fisheries Act for the purpose of “avoiding, remediating, or mitigating any adverse effects of fishing on the aquatic environment.” Both acts have sustainability as their core purpose, but for the RMA it is “sustainable management” whereas for the Fisheries Act it is “sustainable utilisation.”

Legislators had turned their mind to the interface between the two pieces of legislation, with section 30(2) of the RMA stating that a regional council must not perform certain functions “to control the taking, allocation or enhancement of fisheries resources for the purpose of managing fishing or fisheries resources controlled under the Fisheries Act 1996.” It was the application of this section that was the focus of legal argument.
The High Court sought to reconcile the two pieces of legislation by concluding that the Fisheries Act was narrower, “focused on biological sustainability of the aquatic environment as a resource for fishing needs” whereas the focus of the RMA was broader encompassing “ecosystems and their constituent parts (including people and communities), and all natural and physical resources”. Therefore, although the control of fisheries under the Fisheries Act would help achieve the broader purpose of the RMA it “does not purport to address, let alone control, all the effects of fishing on the wider environment (including people and communities)”. At the time of writing, this decision is currently under appeal to the Court of Appeal, so the law on the matter has yet to be settled.

The Fisheries Act’s role in managing fishing impacts on marine biodiversity can therefore be seen as a subset of that undertaken by the RMA. This does beg the question as to whether the Fisheries Act should play a role in this area at all. If the RMA already provides a regime for managing the impacts of activities on marine biodiversity, why is there a need for sectoral legislation to do the same thing for a specific activity? It creates an awkward carve out. Interestingly, the Fisheries Act is the only piece of sectoral legislation that creates such a carve out. It can be contrasted with the Crown Minerals Act which creates an allocation regime for minerals, but leaves the management of the environmental effects of the activity to the RMA and the EEZ Act. We observe that relationships between different kinds of statute, where they are discernible, generally fall within one of three camps: a hierarchy (one trumps the other), a clear separation (what one statute does not at all affect what another does) or mutual reinforcement (they deal with different things to a common end). The most difficult and uncertain kind of relationship is often the last one, as the “end” sought may be expressed slightly differently, and decision-makers may interpret that end in varying ways. For example, the idea of sustainability connects the RMA, EEZ Act, Hazardous Substances and New Organisms Act and Fisheries Act, but there is significant divergence in how it is expressed in each. They may head in the same direction, but they end up in slightly different places.

Things quickly become confusing if we try to describe the relationship between different layers of statutes (those created using outcome, domain, institution and sector-based lenses). For example, the relationship between the Local Government Act and the Land Transport Management Act is of a completely different character to that between the Environment Act and the Crown Minerals Act, even though both relationships are between institutional and sectoral statutes. The interface between the RMA and Forests Act has little in common with that between the EEZ Act and the Fisheries Act, although both link outcomes-based and sectoral statutes. Relationships between statutes from different lenses can be strong, weak, non-existent, irrelevant, clear, vague, hierarchical or mutually reinforcing. In short, it’s not worth trying to generalise relationships in these terms.
A spotlight on overlapping legislation: Bryde’s whale shipstrike

Bryde’s whales are nationally critically threatened. The Hauraki Gulf is favoured habitat for the whales, with up to 50 Bryde’s whales regularly using the Gulf at any one time, out of a larger national population of around 150. The Hauraki Gulf is also the location of New Zealand’s busiest port (at Auckland). Geographically, the Bryde’s whales and commercial vessel traffic occupy overlapping water space. This has caused a spatial conflict whereby at least 17 whales are known to have been killed by ship strike at an average of around two a year.110

In 2010, when the issue was publicised by scientists studying the whales, many of the ships coming and going from the Hauraki Gulf were travelling at well over 14 knots. International research indicated that there was a high chance of a whale dying if hit by vessels travelling at this speed, but at less than 10 knots, an impacted whale had a good chance of surviving. For this reason, researchers concluded that in order to reduce the risk to the whales to acceptable levels whilst maintaining safe ship navigation, vessels needed to slow down to speeds of 10 knots or less.111

At least four potential mechanisms can be used to reduce vessel speed to protect whales in New Zealand. The first is for the Minister of Conservation to create a marine mammal sanctuary under the Marine Mammals Protection Act with regulations setting a maximum speed within it. The second is for Auckland Council to change the Auckland regional coastal plan (now part of the Unitary Plan) under the RMA to incorporate a new rule that makes operating a ship at speeds greater than 10 knots within the Hauraki Gulf a prohibited activity. Given Policy 11 of the NZCPS, which requires the avoidance of adverse effects on threatened species, there may well be a duty on the Council to act in this way. The third is for the Minister of Transport to recommend the creation of a Maritime Rule by Order-in-Council under the Maritime Transport Act to restrict ship speed in the Hauraki Gulf. The fourth potential mechanism is to present a proposal to the International Maritime Organisation for a ship routing measure which could be voluntary or mandatory. The advantage of such an international measure is that the restriction would be noted on the relevant nautical charts and would thereby be brought to the notice of overseas vessels entering the country.

This illustrates that there can be many overlaps between legislation, as well as between national and international regimes. This is not necessarily a bad thing, as it can be useful to have several regulatory tools in the toolbox when seeking to address an issue. However, overlap can lead to paralysis, because no agency is obviously in charge of addressing the issue. Agencies are often risk adverse and would prefer, if possible, to leave politically contentious issues to someone else. In the Bryde’s whale example, none of the agencies with regulatory tools at their disposal took action to solve the issue. In this regulatory vacuum, a consortium of Auckland University scientists, the Hauraki Gulf Forum and EDS initiated a collaborative process which resulted in a voluntary agreement to reduce ship speed.112

However, we can describe general relationships between statutes according to the kind of outcomes they seek (protection, balance, utilisation), irrespective of the lens through which they have been created. For example, some sectoral statutes are concerned with protection, others are concerned with exploitation.113 This normative relationship is one of hierarchy.

Statutes concerned with strict protection generally sit at the top. Obtaining a resource consent under the RMA, or a mining permit under the Crown Minerals Act, does not entitle a person to extract minerals in a national park. But balancing legislation usually sits higher in the hierarchy than statutes concerned with utilisation. A new road for which funding has been obtained under the Local Government Act and Land Transport Management Act cannot proceed unless a consent authority grants consent under the RMA, after weighing many matters in the matrix of sustainable management.

<table>
<thead>
<tr>
<th>Protective legislation</th>
<th>Balancing legislation</th>
<th>Exploitation legislation</th>
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Figure 8.17: The normative relationship between protective, balancing, and exploitative legislation is generally hierarchical

Admittedly, it doesn’t always make sense to label a statute as being concerned only with protection, balance or exploitation. That is not an explicit choice Parliament has to make when creating legislation. Some acts (eg the Fisheries Act and Building Act) have components that can fit into multiple categories. The RMA is concerned with both protection and balance.114
Finally, it is worth noting that some of the most important relationships between statutory frameworks exist at the planning and permitting levels, not at the level of primary legislation. Aligning or integrating those relationships can be alternatives to legislative re-design, and are explored in Chapter 14. Notable is the relationship between plans and planning processes under the RMA, Local Government Act and Land Transport Management Act. 115

8.7 Options for a future system

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

1. Should we apply lenses in a different order?
   
   For example, should outcomes continue to be used as a primary lens – producing some form of RMA – or should we instead use sectors as a primary lens – producing a raft of sectoral statutes?

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

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

8.8 Should we apply lenses in a different order?

The most important aspect of this question is what lens we choose to use as a primary lens. Statutes created through a primary lens become the most broad-ranging and, arguably, significant ones in the system. Presently, this is the RMA and a handful of other acts.

We suggest that an outcomes lens should continue to be used first. This is for several reasons. First, we re-emphasise that the key result of having a separate statute (as opposed to a separate part within a statute) is that it becomes defined by its own purpose statement. 116 A key consequence of splitting up our statutes is, therefore, that we also split up our statutory purposes. A purpose section in a modern statute is not just a generic statement about what a statute does or regulates; it seeks a normatively charged outcome. This suggests that the primary way in which we divide our statutes should be according to a clear division of the outcomes they pursue: one purpose for one set of related outcomes. 117 Other lenses would produce a multitude of statutes (such as one for every sector, institution or domain) having the same or very similar purpose statements. This would be inefficient and may be confusing.

Secondly, a system based primarily on broad, outcomes-based statutes is likely to be better at managing cumulative impacts of activities on the natural environment. An act that sought environmentally protective outcomes – for example, to safeguard the life-supporting capacity of the natural world as a whole – is likely to be more effective in recognising the complex interconnections between parts of the environment than an array of separate acts, each concerned with specific domains, sectors, institutions or spaces. In particular, there may be dangers in having separate statutes for the management of land (eg a Planning Act) and other aspects of the environment like freshwater, soil and climate (eg an Environment Act). How we manage land is intimately connected to other domains, and we require consistent principles across them. The trade-off, of course, is that any given sector, institution or location may need to look to multiple statutes (and, potentially, multiple plans and permitting processes). However, given the importance of environmental outcomes, we think that is a trade-off worth making.

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

Outcomes-based statutes like the RMA should form the core of a future system.

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

Domain-based and location-based statutes should generally fill gaps in outcomes-based legislation.

The question of whether we should apply an institutional or a sectoral lens next is more finely balanced. A useful way to explore it is by looking at the structural place of the Local Government Act and Land Transport Management Act in the system.

Forestry, East Coast

8: LEGISLATIVE DESIGN
Sector first or institution first? A spotlight on the Local Government Act and Land Transport Management Act

The Local Government Act is an institutional statute, but it (among other things) deals with the local funding and delivery of three waters and transport infrastructure (which can be regarded as sectors). At the local level, this design choice puts an institutional lens ahead of a sectoral one. The alternative, putting a sectoral lens first, would produce a separate “Water Infrastructure Act” and “Transport Infrastructure Act” dealing with the funding and delivery of those types of infrastructure (the latter of which would likely incorporate the Land Transport Management Act too).

In that model, a Local Government Act would still need to exist – to deal with the many other things for which local government legislation is needed – but only to fill gaps left by transport and water legislation.

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

Are these design choices justified? They force us to navigate difficult boundaries between statutes – the Local Government Act and Land Transport Management Act – when delivering transport networks. Some may consider that these should be integrated, together with the land use components of the RMA, into a single Planning Act or Development Act. But when we are considering resource management statutes concerned with particular sectors or institutions, we are often dealing with complex interfaces between multiple systems – not just the resource management system. Whether we embed sectoral resource management provisions (transport infrastructure) within institutional legislation (a Local Government Act) or instead embed institutional provisions (local government functions) within sectoral resource management legislation (a Transport Infrastructure Act) depends ultimately on the degree of connection those provisions need to have with other systems.

If institutional connections need to be stronger than sectoral ones, it will justifiably result in institutional legislation containing sectoral provisions (like the Local Government Act). If sectoral connections need to be stronger than institutional ones, it will justifiably result in sectoral legislation with institutional provisions. Usually, sectoral connections will need to be stronger, because comparatively few complex systems exist that are centred around particular institutions. Usually, institutions form part of other – sometimes sectoral – systems. For example, the NZTA is part of the transport system; the transport system is not part of an “NZTA system”. That seems to suggest that we should have a dedicated Infrastructure Act (or Planning Act also encompassing land use) and, indeed, that is one option for reform.

Figure 8.18: The local funding and delivery of transport and three waters infrastructure. As shown by the shaded, overlapping area, it is a matter that is highly relevant to two systems.

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

That said, transport is not just a local government concern. In the current model, central government has a keen and legitimate operational and financial interest in land transport infrastructure, including local roads. In fact, the majority of funding for local roads comes from the national land transport fund administered by the NZTA, a central government agency. There is also a much wider transport system, which is largely managed at the national level. But, for obvious reasons, central government funding and delivery of transport infrastructure cannot find a home in local government legislation. So although it would make a lot sense for local and central transport infrastructure to be managed within a single sectoral framework, the trade-off of this would be a weaker connection within the local government system. That is a choice we need to consider carefully.
In the current system, the strength of connection needed within the local government system has, essentially, been accepted as greater than the connection needed within the transport system. This has resulted in the integration of institutional (local government) matters in one Act (the Local Government Act), and fragmentation of remaining sectoral (transport) matters across multiple acts (the Local Government Act and Land Transport Management Act). In the Land Transport Management Act we are left with a sectoral resource management statute that must therefore interface with a separate institutional statute – the Local Government Act – to fund and deliver land transport projects.

We also need to consider the place of the RMA here. Because it is concerned with the impacts of land uses (such as roads) but is not in the business of promoting or requiring resource use in particular sectors, it may be unusual for infrastructure-focused acts to be integrated into one “mega” RMA – unless perhaps the basic character of the RMA were changed (eg split into a Planning or Development Act concerned with land and an Environment Act concerned with other domains). However, the RMA and infrastructure-focused acts still require close connections, because planning land use is critical to the location of transport networks. Thus at present we end up with a trilogy of statutes with quite different purposes – but with close connections – when planning, funding and delivering land transport projects.

Short of entirely removing funding and other transport-related functions from the purview of either central government or local government, a tension between the local government and transport systems looks likely to remain. Each exists for a reason and holds a legitimate place in our suite of resource management legislation. The reality is that systems sometimes overlap and resource management content is drawn into different orbits. One way forward may be better integration and alignment between statutes, rather than the merging of statutes or the redistribution of their parts. The ways in which this could happen are closely connected to how plans are made and how infrastructure is funded, and are therefore explored in Chapter 14 (how to harmonise tools).

More generally, outside the context of the Local Government Act and Land Transport Management Act, we suggest that an institutional and sectoral lens can justifiably be applied in either order. This will depend on the strength of connections that need to be made with other systems.
Figure 8.19: Connections needed within the local government system (red arrows) are, in the current system, considered to be stronger than those within the land transport system (pink arrow), producing an institutional statute containing some sectoral provisions.

Figure 8.20: The current structural relationship between the local government, land transport, and resource management systems. Red arrows indicate stronger connections, pink arrows indicate weaker connections.
The strength of connection needed between components of the local government system, and between land and other domains under the RMA, may mean that legislative separation between the RMA, Local Government Act and Land Transport Management Act is desirable in a future system. Connections can be made through aligning planning processes under each. Some may, however, see the connection between infrastructure planning and land use as more significant. That could see the integration of the infrastructure and land use components of the three acts within a single statute (such as a Planning or Development Act).

8.9 Should we expand or contract the scope of some lenses?

Above, we have considered the order in which we should apply lenses when designing legislation. The next logical question is how wide or narrow each lens should be. For example, we can choose to apply an outcomes-based lens first (producing an act like the RMA), but that doesn’t mean that Act has to pursue all possible outcomes. The lens could be applied narrowly (the Act could pursue only protective outcomes) or broadly (it could pursue social and economic, as well as environmental, wellbeing).

The extent to which our outcomes-based statutes currently seek a broad or narrow range of outcomes is debatable. We will focus on the RMA, as the broadest statute in the system and the one in which this question is most significant. This Act applies across all locations, sectors, institutions and (for the most part) domains. However, there are some outcomes – which are, nevertheless, key to the resource management system – that it does not actively seek. The RMA, being a product of its time, is ultimately an environmental statute, not a resource exploitation statute. It aims only to manage resources to enable people to provide for their own social, economic and cultural wellbeing. Some may see this as a gap in our set of outcomes-based statutes. It goes some way to explaining why we have a limited range of sectoral statutes that then have to fill it (eg a Crown Minerals Act that promotes mining, and a Land Transport Management Act that provides for roading infrastructure).

The Land Transport Management Act and Crown Minerals Act are extreme examples where particular sectors are actively promoted by law. They have targeted statutes because they promote sector-specific outcomes that do not apply across the whole system. However, we can legitimately ask more broadly whether outcomes-based acts like the RMA should be more proactive in pursuing all wellbeings, not just preventing harm to environmental wellbeing while letting people look after themselves.

Seemingly different criticisms of the RMA can be seen as expressions of this more general observation, and these have been discussed in Chapter 7. For example, some may complain that the RMA is not really an outcomes-based or urban planning statute at all (it is reactive to harm), or that it is deficient in matters of allocation. These complaints are not shared by everyone. The Act’s language has been fairly open to interpretation, and in practice it has been used to do a wider range of things (including urban planning and a degree of resource allocation). Ultimately, there is a degree of disconnect between what the RMA was intended to do (by some) and what it has been able to do.

The RMA has been used to pursue a much wider range of outcomes than just impose biophysical limits.

The relevant question for legislative design is whether we should explicitly extend the scope of our outcomes-based statutes like the RMA to pursue positive outcomes. The alternative is that we continue to pursue social, cultural and economic outcomes through an ever-expanding set of resource or sector-specific legislation with complex inter-statutory boundaries. For example, we could enact a Freshwater Allocation Act and an Urban Planning Act to deal with those (alleged) shortcomings of the RMA. Below, we offer two thoughts.

First, the active pursuit of people’s social, economic and cultural wellbeing could be more explicitly incorporated into a broad, outcomes-based statute like the RMA – including in relation to the management of land – as long as this was clearly subject to environmental bottom lines. Our laws need not be agnostic as to how land uses are planned (especially in cities), even if the impacts of land uses are environmentally sustainable and all externalities are internalised. Regulation will not always be the most appropriate tool for pursuing wellbeings, but to recognise the basic outcome as one sought by our laws would at least provide a more solid conceptual foundation for much good urban planning practice that already occurs under the RMA. However, we stop short of recommending a separate Urban Planning Act (a location-based statute) to do this; rural (and other) areas equally warrant the active pursuit of social, economic and cultural outcomes.

The active pursuit of people’s social, economic and cultural wellbeing could be more explicitly incorporated into a broad, outcomes-based statute like the RMA, as long as this was subject to biophysical bottom lines.

Secondly, it may be helpful to align allocative outcomes across all public resources. Deciding allocative questions under a single statutory framework – dealing with rights to freshwater, the occupation of coastal space, rights to use the assimilative capacity of receiving environments, and so forth – would enable us to lock in an overarching set of allocative principles that we currently lack. That could mean combining previously fragmented statutes concerned with allocation (such as minerals and fisheries) into a single framework, although important differences between them – including culturally important features and ownership characteristics – would need to be recognised.
within that framework. Whether that would work may depend on the strength of connection required between allocative matters and other aspects of sectoral regulation (eg if the allocation of fishing rights really needs to be in the same statute as one setting a total allowable catch).

8.10 How should statutes be divided within any given lens?

Above, we have considered whether we could expand the scope of our outcomes-based statutes as a whole (rather than using other, eg sectoral, lenses). But there are different ways in which we could do this. For example, we could integrate the pursuit of social, economic and cultural outcomes into a biophysically focused statute like the RMA. At its most basic, this may see an expansion of the kinds of matters included in ss 6 and 7 of the Act, and the emendation of the word “enable” in s 5 to something like “actively pursue”. Alternatively, we could create a stand-alone statute dealing only with those outcomes, and define its relationship with a biophysical act like the RMA (eg an act with social and economic objectives that was subject to the RMA). We could even create two additional statutes. One could deal with the pursuit of all wellbeings when managing land (a Planning Act). Another could deal with the allocation of public resources (an Allocation Act). These would both be outcomes-based statutes existing alongside the RMA.

Splitting up outcomes-based statutes

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

Figure 8.21: A potential expansion of outcomes-based statutes. The dark blue circle represents the narrowest reading of the outcomes currently pursued by the RMA. The light blue circle represents an expanded set of outcomes – all different expressions of how social, economic, cultural and environmental outcomes could be more actively pursued.

Figure 8.22: Outcomes-based statutes in the current system
A more fundamental question, however, is whether the RMA itself should be split up into acts focusing on different outcomes. Earlier in this chapter, we suggested that a useful way to conceive of outcomes is not in terms of different wellbeings (social, cultural, economic, environmental), but rather in terms of the different things the system must do in order to achieve all of those outcomes (its core roles). These were explored in Chapter 7. In particular, the RMA and EEZ Act are currently responsible for three key roles: protecting resources (imposing bottom lines), balancing multiple wellbeings (making trade-offs), and distributing rights to use some resources (allocation). The question is whether they continue to do so.

Let us go back to first principles. There are some decisions within the resource management system that will always be conflicted or involve the balancing of legitimate values and interests. However, not all decisions inherently involve balance, trade-offs or conflict. In the conservation estate, for example, we do not endlessly agonise over the correct balance between use and protection. We have a statute that – pure and simple – enshrines the pursuit of highly protective outcomes. Of course, there are features of the conservation estate that means this cannot be extrapolated across the whole system (eg it is Crown owned, and private property rights are not a factor), and we obviously cannot and should not turn the whole country into one indigenous forest.

However, in this we can see the germ of a more basic idea: if there is broad consensus that particular kinds of outcomes are essential, then we should stop the hand wringing, balancing and compromising – and simply get on with pursuing them.

It is by no means simple to identify which kinds of decisions require bottom lines and which do not. We floated some ideas in Chapter 7, and emphasised that some distinctions require further debate. There are dangers in treating all kinds of restrictions as involving bottom lines. However, despite some grey areas, what seems clear is that there is an important distinction to be made.

**A separate statute for biophysical bottom lines?**

This has implications for how we design our statutes. The principle of integration tells us to recognise and be sensitive to the connections between matters dealt with under different statutes. So what is the nature of the connection between “protection” and “balance”? It is certainly not like the complex ecological connection between domains. Nor is it like the tight web of connections between social, economic, cultural and environmental outcomes. Instead, the connection between notions of protection and balance is much more amenable to separation and hierarchy. Questions of balance (whether the pros outweigh the cons) can be subject to questions of protection (there are some things that are so important we should never trade them off).

Because statutes, and decisions taken under them, are each driven by a bespoke purpose statement, the separation of statutes is one way we can help establish and maintain effective hierarchies between outcomes and associated accountabilities. The RMA’s purpose and principles have to account for such a wide variety of outcomes (including protection and balance) that, perhaps, we should not be overly surprised that the laudable protective bottom lines it envisaged now look more like a scattering of obstacles than a coherent planetary boundary. It may have suffered from ‘objective overload’. In contrast, we need only look at the impact of unashamedly protective statutes like the Queen Elizabeth II National Trust Act and the Conservation Act, as well as the “system within a system” of water conservation orders, all of which effectively override the broad purpose of the RMA to see the impact that a statutorily separated hierarchy can have. More recently, the EEZ Act has been endowed with a second, highly protective purpose that does not contemplate trade-offs (“to protect the environment from pollution”). Similarly, where there is a clear social and economic need for someone to build and fund roads, we don’t find those outcomes tacked on to the broad purpose of the RMA. Is it time to embrace this same kind of statutory separation between protection and balance?

Even more so than in 1991, we can see that highly protective outcomes – bottom lines – are generalisable across the whole system, not just in defined geographical areas having unique characteristics. Such outcomes are declining across the board. The defence of bottom lines does not have to happen by creating a statutorily separated hierarchy. We could, instead, build on the King Salmon jurisprudence to strengthen a protective hierarchy – bottom lines – within an act like the RMA. That is a path that we are already part way along, and we could simply wait to see where it took us. We may see substantial improvement with the promulgation of more protective NPSs and NESs, and keep intact the good parts of Part 2 jurisprudence. After all, we don’t want to throw the baby out with the bathwater.

However, we find legislative separation an intriguing and attractive proposition given the historical failures of a more integrated framework to protect environmental bottom lines and the limitations of King Salmon. The Parliamentary Commissioner for the Environment, writing in 2013, considered that the idea of balancing equally weighted considerations does not belong in a truly protection-focused act. Legislation that is focused on weighing a wide range of outcomes, especially an act that is reliant on elected institutions to translate that to practical terms, will always be susceptible to central and local fluctuations in political will. Statutory separation may help.
Statutory separation between environmental bottom lines and balancing, and the development of an Environmental Protection Act, may help to protect the former.

Figure 8.23: A separation of “protective” and “balancing” legislation. Statutory separation is one way in which we may enshrine the hierarchy between protection and balance.

A spotlight on an Environmental Protection Act

An Environmental Protection Act would be focused only on protecting those biophysical elements that require firm bottom lines. Under an increasingly ecocentric ethic, it would reflect the intrinsic value of the natural world as well as the instrumental value of resources and the role of the environment in protecting human health. The Act would:

- Have a firm purpose and principles that did not contemplate the consideration of non-protective matters or trade-offs
- Deem that protecting the basic health of the environment is a way of promoting people’s social, cultural and economic wellbeing, not something that is in conflict with it
- Require the proactive identification and imposition of all protections necessary to achieve the public interest in a healthy natural environment now and for future generations
- Be non-regressive
- Operate primarily through the imposition of clear and precise rules and performance standards in subordinate instruments that flow from a clear purpose statement, not through extensive use of discretion and interpretation of policy in the consideration of permits
- Apply to all domains, locations, institutions, and sectors much as the RMA does (including land, and potentially also currently excluded sectors such as fisheries)
- Apply restrictions and regulation not only on the basis of direct interactions with receiving environments (as in Part 3 of the RMA) but also proactively on the basis of activities’ and goods’ potential for harm
- Drive the enhancement, not just protection, of the natural environment
Balancing legislation

An Environmental Protection Act would prevent human activity that threatens the basic integrity of the biophysical environment. Bottom lines are important and of overriding value. However, they are not enough on their own. As we have explained in Chapter 7, they are a minimum, not an optimum. To complement an Environmental Protection Act, a separate statute could be enacted to facilitate appropriate trade-offs between all forms of wellbeing (above biophysical bottom lines) and enhance the natural environment. This could be called a Resource Stewardship Act.

To complement an Environmental Protection Act, a separate statute – a Resource Stewardship Act – could be enacted to provide a framework for balancing wellbeings above biophysical bottom lines, as well as enhancing the natural environment.

How could such a statute make trade-offs as well as enhance the environment? Twenty years of balancing under the RMA has certainly failed to do the latter, and making trade-offs is a conceptually different role to the active pursuit of positive environmental outcomes. The prevailing mindset at the moment is that if we use a resource, we must accept some environmental (or social) cost. However, a way forward may lie in how proactively the system guides resource use. In Chapter 7, we considered some ways in which the system could be more active in pursuing positive outcomes, and some of these could be contained in a statute also concerned with making trade-offs. In particular, we suggested that the system could be aligned so that the positive outcomes being pursued in one place do not clash with trade-offs being made elsewhere. Instead, they could be mutually reinforcing. If we can embrace activities that have synergies between social, cultural, economic and environmental wellbeing, then trade-offs can become improvements. This could be achieved in different ways, which are explored in chapters 11-14. For example, the environmental impacts of an activity could be offset using a principle of net gain (requiring overall improvement, rather than just mitigation). Legislation could explicitly recognise the benefits of good urban planning (including introducing nature into cities), green infrastructure, and water and energy sensitive design. The system could even be more active in supporting particular kinds of activity in which multiple wellbeings are seen to converge (eg renewable energy), by providing encouragement in policy guidance, smoothing the regulatory pathway, or providing for deployment in spatial plans.

Some of these are not easy prospects, since they raise the spectre of economic and social planning, and government picking winners. However, the key point for legislative design is that it may be easier to identify and pursue synergies within a statute dealing with both trade-offs and improvement than in separate statutes pulling in different directions (one trading off environmental wellbeing and the other seeking environmental enhancement). Such a statute should therefore think not just about reactive “trade-offs”, but also about proactive “convergence”. This would go some way to answering some critics’ complaints that the RMA lacks clear goals. It is only a small conceptual step from having effects-based laws that react to adverse impacts to having effects-based laws that promote positive impacts.

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**Figure 8.24:** Two roles of a Resource Stewardship Act. Decisions could be as much about promoting synergies between different wellbeings as they are about resolving conflicts between them. The red line represents bottom lines imposed by a separate Environmental Protection Act.
A spotlight on separate balancing legislation: A Resource Stewardship Act

This Act could be concerned with balancing those aspects of wellbeing (social, economic, cultural and environmental) that do not need to be protected absolutely through biophysical bottom lines. It would manage the contested space between an environmental floor and a social ceiling.

By “balancing” we do not just mean trading off the benefits and costs of protecting resources against the benefits and costs of using them. Where trade-offs and compromises have to be made, the Act would need to do so, as the RMA currently does. But the Act could also seek more proactively to guide – although not prescribe – the ways in which resources should be used. It would promote uses that enhanced all wellbeing simultaneously, thereby furthering the public interest and reducing the need for trade-offs and conflict. In that way we could hope to reverse the race towards environmental mediocrity created by just imposing bottom lines, and signal positive directions for future investment.

A separate Resource Allocation Act?

We cannot meaningfully talk about balancing legislation nudging resource uses in certain directions without tackling how we allocate rights to the resources themselves. Earlier in this chapter, we suggested that allocative questions could be dealt with proactively under outcomes-based legislation like the RMA – if we think that those outcomes can be generalised across the whole system. If not, we could deal with the allocation through multiple resource-specific statutes, recognising that each has its own peculiar characteristics and issues (such as minerals and fisheries). We could continue this trend by having a “Freshwater Allocation Act”, for example.

Assuming, for now, that we can generalise allocative outcomes across all non-private resources (fisheries, freshwater, coastal space, etc), we need to consider the kind of outcomes-based statute in which allocation should be addressed. We could include it in protective legislation (an Environmental Protection Act), balancing legislation (a Resource Stewardship Act), or a stand-alone “Allocation Act”.

Allocative questions kick in only once we determine what we are willing to allocate and what we are not, and are generally about choosing between different people’s social, economic and cultural wellbeing rather than the wellbeing of nature. It is about fairness between people. However, in another sense, allocation is inextricably linked to environmental protection. This is because in many places we are likely to be already breaching bottom lines. If we are to claw our way back up into the black, so to speak, how do we allocate the cost of doing so among those responsible for it? For example, if a catchment is already overallocated, in what proportions or according to what criteria should we reduce existing users’ allocations to meet minimum flows? An Environmental Protection Act might need not only to set bottom lines, but also chart a workable pathway to meet them. The latter is ultimately an allocative question, not a protective one, but it may be hard to separate the two without a complex inter-statutory boundary.

However, allocating rights above bottom lines would seem a strange task for an Environmental Protection Act. Should we, then, address this in a balancing statute? Or, alternatively, should we create a stand-alone Allocation Act? If we kept an RMA-type model (concerned only with the adverse effects of an activity), we could comfortably enact a separate Allocation Act to allocate resource rights outside balancing legislation, just as the separate Crown Minerals Act does so already for minerals. There would be a two-stage process: (1) obtaining resource use rights under the Allocation Act (confirmation that the proposed use were optimal), and (2) securing consent under a Resource Stewardship Act (confirmation that environmental effects were acceptable).

Alternatively, balancing legislation could compare proposals seeking to use the same resource and determine which one was “best”. The idea of “best” could mean many different things (eg the least impact on the environment, or the greatest enhancement of social wellbeing, or the best convergence of all wellbeing). In that case, allocative questions would probably need to be determined under the same process that weighed the social, economic and environmental costs and benefits of activities.

In a future system we could have a separate Allocation Act to allocate non-private resources like freshwater, or we could incorporate allocative decision-making into more general, outcomes-based legislation concerned with the adverse environmental effects of activities.

The place of domain-based statutes

As identified earlier, not all domains have been integrated fully into the RMA (or EEZ Act). Some domains (or, more accurately, parts of them) and some sectors have their own targeted statutes. Notable among such domains are the climate (under the Climate Change Response Act) and aspects of the marine and coastal area (under the Marine and Coastal Area [Takutai Moana] Act). Furthermore, specific components of some domains have separate statutory frameworks (such as wildlife, marine mammals and the ozone layer). These are concerned with protection and balance, and they do not pursue outcomes that are fundamentally different from those sought under the RMA (sustainable management). They simply have more specific expressions of this idea.

The question for legislative design is whether this smattering of domain-based acts outside the RMA (and EEZ Act) can be justified. There are some compelling reasons to try to integrate such statutes in a future system. Is not the idea behind integrated management that we should consider impacts on all domains within
a single framework? However, there are other factors to consider. Would an Act like the RMA become excessively long, complicated and inaccessible if a statute like the Climate Change Response Act or Ozone Layer Protection Act were integrated into it? Does an emissions trading scheme form a coherent and quite separate code? We are used to treating climate change as a world apart, but we need to think hard before adding extra layers of domain-based legislation (eg a Zero Carbon Act) with all the inter-statutory boundaries that creates.\textsuperscript{184}

The Marine and Coastal Area (Takutai Moana) Act was the culmination of an extremely difficult conversation around cultural and public interests in the foreshore and seabed. Do we want to reopen that issue? Statutes protecting particular components within domains – like marine mammals (under the Marine Mammals Protection Act), and wildlife and native plants (under the equally creatively named Wildlife Act and Native Plants Protection Act) also use some quite different tools to those under the RMA.

Figure 8.25: A model in which domain-based statutes are more fully integrated into outcomes-based legislation

A future system could integrate domain-based legislation into more general outcomes-based legislation like the RMA, but could be kept separate if the kinds of tools or approaches used under each were an inappropriate fit for general statutory frameworks.

The place of location-based statutes

Location-based statutes generally perform roles that are not already provided for in previous layers of legislation. Most of them are protective: for example, we have a plethora of statutes protecting national parks, reserves, marine reserves, and other conservation areas. These are, importantly, not \textit{carved out} of general frameworks like the RMA. Location-based acts impose \textit{additional} requirements and restrictions in particular areas. As such, the RMA’s coherence is not threatened by this raft of protective statutes, and there may be good reason to keep them distinct. Some may see them as adding a valuable layer of place-based integration, and being sensitive to the unique connections within local ecosystems and communities.\textsuperscript{185} However, it is still worth asking whether the sheer number of such statutes could be rationalised. Many already tend to revolve around the Conservation Act, with extensive cross-references being made. Some have even suggested that a more general environmentally-focused statute (like the RMA or a separate Environment Act) could incorporate conservation and heritage legislation.\textsuperscript{186}

In a sense, the EEZ Act is also geographically-specific, because it applies only past the 12 nautical mile limit of the coastal marine area. There are compelling reasons to have some distinction in the management of the exclusive economic zone; for example, it is arguably beyond the capabilities of regions to administer, it may have more of a central than regional government interest in its management, it can get by with a simpler framework due to its low density of people and fewer applications, and it has different arrangements under international law. However, these features can arguably be reflected in different planning, institutional and funding arrangements, rather than requiring an entirely separate statute or markedly different principles underpinning the regime. A separate statute doing the same basic things on each side of an artificial line may threaten good ecosystem-based management, and requires complex boundary provisions.
In contrast to protective legislation, a potentially troubling trend from a design perspective has been for location-specific statutes promoting development to erode more general legislation. For example, the Housing Accords and Special Housing Areas Act has essentially overridden parts of the RMA in defined locations designated as special housing areas. Under the previous government there was talk of legislation that could impose “special economic zones” to get around the RMA’s restrictions on significant projects. Ignoring the (troubling) merits of such measures, we suggest that this design trend should be halted and reversed. If we need to change the balance between social and environmental wellbeing in cities, or between the wellbeings of different groups, that debate should be conducted in a more general way and enshrined in general legislation.

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

Currently, some of our resources (such as fisheries, forestry and built resources) are managed, at least in part, outside outcomes-based statutes like the RMA. Most sectoral acts do not currently escape obligations under outcomes and domain-based ones (a miner needs a mining permit as well as resource consents, and a builder needs authorisation under the RMA and Building Act) but some do (a fisher does not need a resource consent under the RMA). There should, in theory, be little overlap or confusion, and sectoral acts can justifiably remain separate to the extent they promote particular ways of using resources (subject, of course, to environmental restrictions in other acts).

In some sectors this theoretical separation translates well to practice. Maximising the social and economic benefits of many kinds of resource use does not rely on the resource being protected from use. For example, refraining from digging up gold today will not increase the total amount of gold we have tomorrow. For the promotion of these sectors, it makes some sense to retain bespoke legislation with a development focus. However, for living resources, exploitation does rely on a degree of protection. For example, over-exploiting fish stocks today means we will have less fish on our plates and in our ports tomorrow. Here, sectoral statutes concerned with the exploitation of a resource can equally be seen as domain-based statutes concerned with its protection. The thing that distinguishes them, though, is that protection is sought for very different reasons. We don’t protect kiwi in order to eat more of them, but that is exactly what we do for fish.

This can create tensions for legislative design. There would be excessive overlap, inefficiency and confusion if we restricted the taking of fish in both the RMA and the Fisheries Act. But by including restrictions on catch in sectoral legislation rather than protective legislation we essentially accept that the connections between the protection and exploitation of fish need to be tighter than the connections between the protection of fish and the protection of marine ecosystems in which they live. This may be for historical reasons – fisheries have always been managed in this way. It may be that,
like hazardous substances legislation, a stand-alone framework recognises the highly technical and specialised nature of decisions. Inter-statutory connections still exist, of course; but they are liable to be weaker and more confusing than those within a statutory framework that are guided by a common purpose.

The protection of some resources within a framework focused on their exploitation may not be the best way to improve ecological outcomes or achieve holistic ecosystem-based management.

The forestry sector is in a slightly different position. The Forests Act is sector-specific, but it is primarily focused on protective outcomes that would not be too out of place in more general outcomes and domain-based legislation. Originally conceived as a framework for the Crown to manage its forest land, it has been denuded by the partial privatisation of the sector. It is now mainly an amalgamation of environmentally protective provisions (restrictions on felling, processing and exporting native timber) and climate change provisions (forest sinks). Whether protective provisions could be integrated into broader outcomes-based legislation may depend on the kinds of restrictions that it imposed (eg the RMA does not impose restrictions on export). Similarly, although the Energy Efficiency and Conservation Act is not overtly concerned with the protection of the environment, its provisions would not be out of place in a balancing statute concerned with promoting activities having social, economic and environmental synergies.

It may be possible to integrate sector-specific statutes concerned with protection into more general outcomes-based frameworks.

Finally, we observe briefly that the construction sector is regulated both under the RMA and the Building Act. The Building Act is at least partly a resource management statute, because buildings are a physical resource that are actively managed. But it does not aim to prevent construction in the interests of protecting the environment. Instead, it is overwhelmingly about safeguarding people’s social wellbeing – their health and safety – by regulating how buildings are constructed. We don’t want buildings to collapse, or for people to suffer from the effects of asbestos.

However, the RMA is also concerned with the potential impacts of activities on people’s health and safety, and restricts the use of land (including for building) partly for this purpose. Local government plays a significant role in decision-making and implementation under both. Sustainable development is also one component of the Building Act’s purpose. This, as well as the preservation of heritage, are key principles of the Act. In short, the conceptual distinction between the acts is by no means a clear-cut one.

On a practical level, however, separation seems to make sense. No matter the overlap, the inclusion of a detailed, prescriptive or even performance-based Building Code under an effects-based act like the RMA may be an alarming and overwhelming prospect to many; attempts by local councils to control the design of building interiors under the RMA has been seen by some to be crossing a firm philosophical line. There are many things in the Building Act that are not really about resource management at all, but which still require a close connection with other provisions concerning the construction sector. In this sense, including some resource management provisions in sectoral legislation like the Building Act is a bit like incorporating local transport infrastructure funding into the Local Government Act (discussed earlier in this chapter); we place related provisions where the strongest links are required.

Furthermore, the Building Act is arguably of quite a different character not just because it is prescriptive, but also because it is less about the resolution of conflicting values than the RMA. In deciding whether a building is well constructed we may often need to weigh public safety against private cost, but we do not need extensive public debate about ethically charged trade-offs between nature and economic growth.

However, even if we retain a separate sectoral statute for construction, we need to be vigilant about aligning our resource management objectives at the system level. Construction standards relating to energy efficiency, carbon neutrality, recycled materials, green infrastructure and living rooftops are crucial to the pursuit of environmental enhancement rather than just the mitigation of adverse effects, and should closely reflect or even mirror the values (and statutory wording) contained within more general outcomes-based legislation.

It is more sensible to separate building legislation from more general resource management legislation, although the outcomes sought by each should be aligned.

The place of Treaty settlement legislation

One of the most difficult areas of legislative design, which cuts across all of the lenses discussed above, is the role of Treaty settlement legislation. We now have a significant, and expanding, body of bespoke statutes. While these tend to be location-based (because iwi and hapū possess mana whenua over defined areas), they usually address a wide range of matters and seek a wide range of outcomes. Acts are concerned with protection, exploitation, allocation, recognition, powers and participatory rights. Furthermore, settlement acts do not only deal with resource management matters.

Such statutes have developed against a legislative landscape with regimes like the RMA at its heart. Any proposal to fundamentally change the structure of our general laws thus poses a real challenge, because settlement legislation feeds into them in a variety of general and specific ways. A future system needs to uphold the hard-won rights contained within settlement,

8: LEGISLATIVE DESIGN
but does this mean that the basic design of legislation they interact with must remain static? Is it possible or desirable to integrate an ever-expanding body of settlement legislation into more general frameworks, so that users do not have to consult and piece together multiple layers of statutes? Such questions are especially pertinent as New Zealand moves towards a post-settlement environment.

It is important that a future system uphold existing Treaty settlement legislation, but there may be improvements in how they are integrated into more general frameworks.

8.11 How should statutes in a future system interact?

It may be worth considering whether an overarching and strategic framework statute – an Environmental Strategy Act – should be enacted to form the normative glue by which statutes remain in close and harmonious relationships with each other. For example, it could ensure that the “environmental” components of a Building Act were well aligned with the protective outcomes sought under protective and balancing legislation, and that resource management and local government legislation were never led in wildly different directions. It could even be given some form of constitutional protection (eg entrenchment). Any consideration of a resource management constitution may need to determine the role of Māori or status of the Treaty of Waitangi. This could, for example, provide for a more generalised set of tangata whenua co-management and co-governance options than are currently available.

One option for a future system is to enact an overarching piece of strategic legislation – an Environmental Strategy Act – that influences all other resource management statutes. This could even be given some form of constitutional protection (eg entrenchment). Such overarching legislation would need to do more than just influence subordinate instruments (like plans) and other decisions (like permits, funding etc) under lower statutes (like the RMA). The purposes, principles and tools of those more targeted statutes would also need to be geared towards change. We do not dwell on how particular purpose statements should be worded, as that depends on other legislative design choices (eg whether we keep or split the RMA). However, our current set of statutory purposes generally fails to drive change in a particular direction. With some notable exceptions (eg the Climate Change Response Act) they tend to use fairly passive language. An Environmental Strategy Act could provide for the development of a single New Zealand Resource Management Strategy, which is discussed further in Chapter 11.

8.12 Concluding comments

In this chapter we have considered how resource management legislation is designed. It by no means contains a complete account of the current system, or a specific and firm set of recommendations for a future model. Instead, it has sought to construct a framework from first principles, within which we can think about questions of legislative design in a more considered way.

We started by identifying key design principles and different lenses through which we could separate or integrate statutes. Above all, we think that our suite of legislation needs to be coherent. We then assessed the current system, and suggested that the basic way in which it is structured remains sound. In particular, we should continue to find statutes defined by the kinds of outcome sought – some form of RMA – at the heart of the system.

However, there may be room for improvement and change. In particular, there may be merit in exploring what could be achieved by separating legislation focused on the protection of the natural world (bottom lines) and legislation providing for the weighing, and active pursuit, of all wellbeings (balance). We need to consider where we provide for allocation and the proactive pursuit of positive outcomes, and whether there is potential for rationalising or integrating domain-based, sectoral, or geographically-specific legislation in some way.
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<th>Sub-theme Options</th>
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<tr>
<td><strong>General approach</strong> Status quo; OR Greater fragmentation of legislation; OR Greater integration of legislation</td>
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<tr>
<td><strong>Relationships between system’s statutes</strong> Spatial or subject separation (no overlap – eg RMA vs minerals); OR Hierarchy – specify that some statutes override others (eg urban development legislation overriding purpose of RMA); OR Mutual reinforcement (eg greater focus on sustainability in land transport legislation)</td>
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<tr>
<td><strong>Splitting up the RMA</strong> Do not split the RMA up; OR Split up into “planning” and “environment” legislation; OR Split up into “urban” and “non-urban” legislation; OR Split up the RMA into multiple sectoral, OR domain-based, OR location-specific statutes</td>
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<td><strong>Adding to the RMA</strong> Clarify that the RMA is about positive planning, not just about managing adverse effects (eg adding to s 6 matters to reflect urban development benefits); AND/OR Keep the infrastructure planning and funding components of other statutes separate from RMA (or successors, such as a Planning Act), while improving cross-references; OR Integrate the infrastructure planning and funding components of the Local Government Act and Land Transport Management Act into the RMA (or successors, like a Planning Act, or a separate Infrastructure Act)</td>
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<td><strong>Allocation legislation</strong> Retain sector-specific allocation statutes (eg minerals, fisheries) alongside domain-based allocation under the RMA (eg water, coastal space); OR Integrate allocative statutes into a separate act for all domains and sectors (eg water, minerals, fisheries etc); OR Integrate all allocative statutes (eg minerals, fisheries) into the RMA</td>
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<td><strong>Outcomes-based statutes</strong> Retain separate legislation (eg RMA, EEZ Act, Waste Minimisation Act, Biosecurity Act); OR Combine some statutes (eg RMA and EEZ Act); OR Integrate multiple statutes into the RMA (or successors)</td>
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<tr>
<td><strong>Domain-based statutes</strong> Retain status quo (eg separate statutes for climate, marine mammals, wildlife etc); OR Integrate some domain-based frameworks into the RMA (eg climate); OR Integrate multiple domain-based frameworks into the RMA</td>
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<td><strong>Location-based statutes</strong> Retain existing statutes and add new location-based statutes (eg urban development legislation, Kermadecs legislation); OR Integrate some existing location-based statutes into the RMA; AND/OR Integrate conservation-focused statutes into a single protected areas act (eg national parks, marine reserves, reserves etc)</td>
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<td><strong>Sectoral statutes</strong> Retain separate sectoral statutes (eg for forestry, fisheries, minerals); OR Integrate sectoral statutes into outcomes-based legislation (eg RMA or successor, and an Allocation Act)</td>
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<tr>
<td><strong>Treaty settlement legislation</strong> Retain separate Treaty settlement legislation; OR Integrate relevant parts of specific settlement statutes into more general statutes like the RMA, alongside original settlement legislation; OR Integrate settlement legislation into more general statutes</td>
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<tr>
<td><strong>Overarching legislation</strong> Retain separate statutes with no overarching legislation; OR Add a strategic, integrative statute that influences lower statutes like the RMA, Local Government Act, and others; AND/OR Protect the content of an overarching statute as a “constitutional” document, eg through entrenchment</td>
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**Figure 8.28**: Options for legislative design in a future system
As an extreme example, consider the Lincoln Road Mill Dam Act 1865, which in its long title enables "John Cracroft Wilson Esquire CB his heirs executors administrators and assigns to maintain a Dam across the River Heathcote in the Province of Canterbury and to divert the waters of the said River".

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

For example, some have complained that changes to the purpose of the Local Government Act and the Land Transport Management Act have reduced the coherence of the overall system for providing land transport infrastructure.


Legislation Act 2012, s 3(a).

New Zealand Productivity Commission Better urban planning (2017) at 426.


Ibid at 9. On fragmented planning approaches, see Chapter 14.

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


This has the drawback of often being unrealistic. If you prevent overlap or gaps in one sense you usually create it in another sense, because most things in the real environment are multi-layered or multifaceted. For example, the bright line (12 nautical miles from the shore) drawn juridictions under the RMA and the EEZ Act ignores the reality that activities and their effects straddle boundaries. The EEZ Act therefore requires complex provisions managing "boundary activities".

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

On the general principle, see ibid at 9.

Ibid at 10.

Ibid at 9.

Conservation provisions are usually more protective.

See generally Parliamentary Commissioner for the Environment Making difficult decisions: Mining the conservation estate (2010). Institutional design is considered in Chapter 9.

A new act may have to interact in some way with many existing acts, not just the one from which it has been carved out.

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

For example, the Climate Change Response Act deals with climate change, whereas NEISs under the RMA (ss 104E-104F) can also deal with climate change. The closure of oil wells is managed both under the RMA and under health and safety laws.

For example, regional councils and territorial authorities for land use under the RMA.


Legislation Act 2012, s 3(a).

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


Some have complained that the relationship between the RMA, the Local Government Act and the Land Transport Management Act is unnecessarily complex; see TM Lenihan and J Bartley Review of Māori planning futures: Review of the Productivity Commission's "Better urban planning" draft report (Nga Aho and Papa Pouanamu, 2016) at 36.

See Chapter 3.

See Chapter 14 on the alignment of planning and permitting processes.

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

Compare the idea of objective overload discussed in Chapter 9 in the context of institutional design.


On this point, note the recent policy decision taken by the government to ban future offshore oil and gas exploration. Of course, there are much more nuanced arguments to be considered here, but our point is a more general one: we need to think about how different statutes can reinforce or undermine each other's objectives.

Legislation Act 2012, s 3(a)(i).


See Chapters 6 and 7.

See Chapters 6 and 7.

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


See the distinction between bottom lines and trade-offs discussed in Chapter 7.


See Chapters 5 and 7.

Legislation Act 2012, s 3(a)(i).


See Chapter 14. For example, resource consent, conservation concession, and mineral permit processes can be aligned. For attempts to do so for conservation concessions, reserves swaps, private plan changes and resource consents, see Ministry for the Environment Resource legislation amendments 2017 – Fact sheet 12 (2017).

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


Some may contend that the Local Government Act is mainly about the expenditure of public money and not institutions per se. But while its financial components (and associated accountability) are central to it, the statute is still "institutional" in nature because it only deals with financial (and other) matters associated with local government.

The RMA itself gives special treatment to the generation of renewable electricity (an unusual sectoral distinction), and plans refer to activities like farming.


Crow Minerals Act 1991, s 99A.

On this general idea, see C Miller "An alternative view on the future of the RMA" (2015) 196 Planning Quarterly 8.


See Chapter 2.

Although much of the Local Government Act does not fall within the resource management system, and the Environment Act is not completely about institutions.

For example, the concept of Te Mana o Te Wai (now recognised in the NPS for Freshwater Management 2014).

See Chapter 7 for a discussion of whether the RMA is equipped to pursue positive social and economic outcomes.

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

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

There may in fact be hundreds, if we were to include geographically specific or project-specific legislation.

There is no definitive list of “systems”, of course, but some are commonly used (such as the local government system and the transport system).

The diagram is not intended to reflect relationships or overlap between statutes, only their place within various systems. It is indicative only.

Furthermore, many statutes have bearing on the resource management system within or as part of it directly (eg the Health Act 1956, official information legislation, and the Senior Courts Act 2016).

For example, any given regional council can produce multiple plans under the RMA.

For example, the Housing Accord and Special Housing Areas Act 2013 and the Point England Development Enabling Act 2017. See also Chapter 3.2.

Almost purely— the Environment Act 1986 is not named after an institution, and has some other non-institutional content as well.

The Conservation Act 1987 and Reserves Act 1977 can also be seen as location-based statutory duties, although they apply to wide areas of the country.

In that they apply to all sectors, locations, institutions and domains. The RMA and EEZ Act can also be explained as location-specific acts, in that they deal with defined and separate spaces (within and beyond the 12 nautical mile limit of New Zealand’s territory respectively).

New Zealand Productivity Commission Better urban planning (2017) at 128 (see finding F5.15).

Despite its name, this can, alternatively, be seen as an outcomes-based act, as it deals with outcomes broader than those sought by Heritage New Zealand.

This is primarily concerned with a single sector— mining — but also has general provisions to deal with the exploitation of seabed resources other than minerals.

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

Although not all outcomes apply to all sectors. For example, the RMA deals with issues of allocation of public resources, but not fisheries or Crown owned minerals.

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

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

The RMA allows for methods other than rules and policies to be put in place through plans, but other regimes contemplate and provide specific legal authority for earlier intervention. For example, the Waste Minimisation Act provides for product stewardship schemes, the Litter Act obliges authorities to provide receptacles for litter, and the Biosecurity Act imposes obligations to actively intervene to stop incursions before they occur at New Zealand’s borders, and to eradicate pests (see Chapter 12).

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

Or, alternatively, “parts of the environment that we value”, depending on the ecocentricity of one’s views.

For example, the Point England Development Enabling Act.

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

The outcomes sought by the RMA are primarily about the protection of the biophysical environment, which can be thought of as the sum of all domains.

Such as the Housing Accord and Special Housing Areas Act.

Arguably the Marine and Coastal Area (Takutai Moana) Act 2011 also fits this description, to the extent it recognises specific customary marine title areas.

Compare also a general proposal for special economic zones: Local Government New Zealand local government funding review 10 paint point plan: Incentivising economic growth and strong local communities (2015).

Although that is ultimately a matter of perspective. For example, the Climate Change Response Act fills a “gap in the RMA only because that gap has been consciously treated in (ie carved out from) the RMA.

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

Although a partial exception is Schedule 4 to the Crown Minerals Act, which identifies particular areas in which access for mining is restricted (rather than being contained across multiple protective acts like the Reserves Act and National Parks Act).

See generally Attorney-General v The Trustees of the Motiti Rohe Moana Trust (2017) NZHC 1429.

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


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

See Chapter 5 on the resource development principle.

One further example is the Electricity Industry Act 2010, which (among other things) requires Transpower to act as the operator of the national grid.

Such as under the RMA, the EEZ Act, and the Hazardous Substances and New Organisms Act.

Similarly, the Environmental Risk Management Authority (now disbanded), had its main role under the Hazardous Substances and New Organisms Act.

For example, regulating climate change under the RMA while also limiting carbon emissions under the emissions trading scheme.

For example, managing water infrastructure for its environmental impacts and its social benefits.

For example, promoting petrol extraction for economic benefit while restricting the emission of greenhouse gases for environmental wellbeing.

The Trustees of the Motiti Rohe Moana Trust v Bay of Plenty Regional Council (2018) NZEnvC 240; Attorney-General v The Trustees of the Motiti Rohe Moana Trust [2017] NZHC 1429

Resource Management Act 1991, s 3(10)(g).

Fisheries Act 1996, ss 8, 11.


For example, obtaining a mining permit does not excuse a miner from meeting RMA obligations.

For example, the system for obtaining fishing rights does not impact on the system for funding land transport infrastructure.

For example, a climate change NES under the RMA (if one were to be promulgated) and the emissions trading scheme under the Climate Change Response Act would both seek to mitigate climate change.

S Behrens and R Constantine Large whale and vessel collisions in northern New Zealand (Report for consideration by the Scientific Committee of the International Whaling Commission, 2008).

R Pearl Brake’s whale voluntary protocol case study (Unpublished report prepared for the Sustainable Seas National Science Challenge, EDS, 2017).

Ibid.

For example, an outcomes-based statute like the RMA seeks to protect the environment, for the most part, so too does the Forests Act—a sectoral statute. Other sectoral statutes, like the Crown Minerals Act, Land Transport Management Act and Fisheries Act, are concerned with promoting or driving resource exploitation. Institutional statutes can be either protective (think of the Environment Act) or concerned more with resource use (the Local Government Act).

Although, as described in Chapter 7, both those roles could be improved.

On difficulties in the relationship between these statutes, see Local Government New Zealand A “blue skies” discussion about New Zealand’s resource management system (2019) at 28.


Ibid. Of course, we could still have a statute concerned with the sustainable management of the mining sector, and another statute concerned with the sustainable management of the transport sector, and so on. These are still based on outcomes. But it would be inefficient and confusing to have multiple statutes having the same or similar purposes. There would also be a risk that the statutes were interpreted in different ways, and some sectors favoured over others. It would be more efficient and less susceptible to combine those statutes into a single one dealing with the sustainable management of all sectors.

Or just a single “infrastructure Act”.

And the RMA, for that matter— although the separate place of outcomes-based statutory has been considered earlier.

For example, the Crown Minerals Act, Gas Act, and Fisheries Act.
121 For example, there is no EPA “system.” The EPA is an institution that forms part of the resource management system.
122 See Chapter 15, Model 2.
123 For example, the Local Electoral Act 2001, the Local Government (Rating) Act 2002, and the Local Government Borrowing Act 2011.
124 Or, in the case of Auckland, within bespoke local government legislation.
125 For example, infrastructure strategies are embedded within councils’ long-term plans.
126 Some may be of the view that this position is not necessarily a natural state of affairs, and that (given the right funding and financing tools) local government responsibility for the funding of local roads should be more comprehensive.
128 Which is concerned with things like safety, policing and licensing.
129 It is curious that the public transport, a regional (or, delegated, local concern is regulated under the Land Transport Management Act rather than the Local Government Act.
130 Interestingly, the Land Transport Management Act has not been integrated with other components of the transport system (such as the Land Transport Act 1998), and forms a stand-alone sectoral statute concerned primarily with resource management matters. It is, however, beyond the scope of this report to comment on the integration within the transport system.
131 If central government took a greater role in three waters infrastructure, a similar kind of sectoral statute may be required for that too (see Chapter 15, Model 2).
132 See Chapter 14.
133 Some have suggested that responsibility for transport should be located solely within regional unitary authorities (a matter of institutional design), in which case the need for a much stronger case for integrating transport legislation into local government legislation. This proposal also suggests integrating the land use components of the RMA into such legislation, which effectively sees the connections between infrastructure and land use manage as more significant than the connections between land and other environmental domains. See New Zealand Council for Infrastructure Development (now Infrastructure New Zealand) integrated governance planning and delivery: A proposal for local government and planning law reform in New Zealand (2015).
134 Much the same reasoning can apply to the EEZ Act.
135 See Chapter 3.
136 The Crown Minerals Act (s 1A(1)) promotes exploitation.
137 For example, we do not promote agriculture in an Agriculture Act in the same way we require local authorities to build supermarkets in the same way we require local authorities to build water infrastructure.
138 See the section in Chapter 7 on the pursuit of positive outcomes, and the proposals in Chapter 7.2.
139 Environmental wellbeing in many cases can produce social, cultural and economic wellbeing (eg in the provision of green space in cities and clean water). However, some land uses decisions that impact on social wellbeing do not have a strong biophysical component (such as how streets are connected to enhance mobility and social connection, or how mixed-use zones can encourage economic collaboration and creativity).
140 See New Zealand Productivity Commission Better urban planning (2017) at 96.
141 Whether that would make a difference in practice would remain to be seen.
142 As discussed, urban planning already occurs under the RMA, and complaints around urban planning are more likely to be raised in the process (timeframes) and whether environmental considerations should be weakened to make development of land easier, not whether the RMA is conceptually equipped to pursue social and economic wellbeing in a proactive way.
143 The distribution of private resources is the role of the market. This still begs the question: Should public resources be privatised? There are competing views on this complex question. See New Zealand Productivity Commission Better urban planning (2017) from 42.
144 On the desirability of allocative principles, see B Barton “Private property rights and the public interest” in R Pa'ea (ed) Beyond the RMA: An in-depth exploration of the Resource Management Act (EDS, 2007).
145 For example, some minerals are Crown owned, whereas fish are not. The coastal marine area is partly privatised, but mainly not owned by anyone. Property rights in freshwater are hotly contested.
146 Fisheries legislation is not just concerned with allocation. It also sets bottom lines of its own (eg total allowable catch and sustainability measures). So integrating allocative questions may also require the integration of other aspects, or risk sevenging important connections within sectoral frameworks. For minerals management, it is also questionable whether the release of acreage for exploration under the Crown Minerals Act could conceptually find a home within broader legislation, because finite minerals cannot be managed “sustainably”.
147 To ensure that bottom lines were still met, this could usefully be accompanied by a stronger and clearer definition of the term “while” in section 5 of the Act. However, see below for an alternative proposal for how bottom lines could be achieved through legislative separation.
150 New Zealand Productivity Commission Better urban planning (2017) at 12.
151 For example, it can be hard to distinguish between environmental and social bottom lines, and between bottom lines for the natural and built environments (eg heritage, landscapes, cityscapes), and to assess how “significant” an outcome is (significant for whom?)
152 See Chapter 7.
154 As discussed in Chapter 7, we also need to “balance” different considerations when setting where bottom lines should be in the first place. However, the point is that, once bottom lines are set according to a clear protective direction, they should not then be undermined by subsequent trade-offs.
155 Although that can be explained by other failures of implementation, too conflicted incentives for some institutions, a lack of national direction imposing bottom lines, and a lack of resourcing for plan reviews and compliance, monitoring and enforcement.
157 New Zealand Productivity Commission Better urban planning (2017) at 12.
158 For example, the obtaining of consent under the RMA does not remove the need to obtain concessions under the Conservation Act, and a plan change under the RMA does not remove the effect of an open space covenant under the Queen Elizabeth II National Trust Act.
159 A clear statutory direction – such as the primacy given to ecological protection under the Crown Pastoral Land Act 1996 – can be a helpful basis for legal action if authorities fail to interpret a statute correctly.
160 Section 10(1)(c). The primary reason for this is to implement strict international agreements relating to dumping and the discharge of harmful substances in the marine environment.
162 See Chapter 7.
163 Parliamentary Commissioner for the Environment Submission to the Minister for the Environment for improving our resource management system (Discussion document, 2013) at 9.
165 Compare the spotlight on Natura 2000 areas in Chapter 7.2.
166 In that bottom lines should not be determined when a tipping point is reached (by assessing the consent that breaks the camel’s back), and should not be protected in a reactive way only when issues appear (by promulgating a patchwork of NPSs and NEIs).
167 Exactly what should be protected is a difficult question (see Chapter 7.2). However, a good starting point would be the general matters in Part 2 of the RMA.
168 In that standards could not become less protective over time (although the ways in which they were met could change). On non-regression, see Chapter 5.
169 See Chapter 7.2.
170 See Chapters 11-13 on tools for environmental enhancement.
171 To give greater protection to the environment, to protect existing uses, and to protect impacts on people’s economic and social and cultural and medical wellbeing. This is essentially what the RMA already does in its balancing role.
173 See Chapter 7.
174 For example, by imposing duties to act on public authorities, encouraging resource users in which there are social, economic and environmental synergies, and providing alternatives where harmful activities are prohibited.
175 Compare Resource Management Act 1991, s 7(1).
176 For example, by indicating where wind farms can go, not just where they can’t. This is a step further than the general positive policy guidance provided for integrating allocative questions may also require the integration of other aspects, or risk sevenging important connections within sectoral frameworks. For minerals management, it is also questionable whether the release of acreage for exploration under the Crown Minerals Act could conceptually find a home within broader legislation, because finite minerals cannot be managed “sustainably”.
177 Compare Resource Management Act 1991, s 7(1).
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180 Compare Resource Management Act 1991, s 7(1).
181 We would not have to enact a separate act. Instead, we could enact a separate part concerned with allocation within balancing legislation (like Part 7A of the RMA). We would, however, probably have to expand the purpose of the Act to include allocative outcomes more explicitly than at present.
Using regulation to make an initial allocation of public resources does not preclude the subsequent use of pricing and trading mechanisms for reallocation (see Chapters 12-13).

Otherwise, there would be a risk of misalignment: allocation legislation preferring one activity, but balancing legislation preferring another – with the result that neither one could occur.

Climate change mitigation can be addressed through many quite different frameworks: regulatory statutes dealing with air emissions and land use planning, sectoral statutes dealing with forestry, construction legislation dealing with buildings, emissions trading legislation, and transport planning legislation. It would be misleading to say that the Climate Change Response Act is the only legislation that tackles – or is capable of tackling – climate change mitigation.

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For example, under the Crown Minerals Act, Electricity Act, Gas Act, and Land Transport Management Act.

In a similar way, as discussed earlier, that connections between local government financial planning and the local funding of transport infrastructure need to be closely linked.

Although the connections between the taking of fish and the health of overall ecosystems can hardly be described as less complex.

See the spotlight on the Motiti case earlier in this chapter.

Crown forestry assets are managed under the Crown Forest Assets Act 1989.

See Energy Efficiency and Conservation Act 2000, s 5. This statute is equally explicable as pursuing the social and economic benefits of energy security.

Including issues of access and durability.

For example, consent can be required for buildings that block light or have an inappropriate footprint or envelope, and the Act also considers risks in relation to natural hazards. Restrictions can also be imposed based on how a building looks, its minimum floor size, provision of balconies, etc.


New Zealand Productivity Commission Better urban planning (2017) at 110. Even regulating balconies and parking spaces has been seen by some to be socially rather than environmentally driven, and beyond the pale of what the RMA is meant to do.

Such as the licensing of building practitioners.

Although that is still possible under section 4 of the Building Act, when considering principles relating to energy efficiency and water conservation.

See Chapters 11 and 14 on the idea of a harmonising resource management strategy applying to all other resource management statutes.

9: INSTITUTIONAL DESIGN

Parliament Buildings
9.1 A framework for institutional design

Introduction

This chapter is about the kinds of public institutions we have in the resource management system. Institutional design is the second “structural” component of the system. It is closely related to the first (legislative design), because changing our institutions can be an alternative to changing legislation. For example, some have suggested that a separate RMA, Local Government Act and Land Transport Management Act could be administered by the same government department, to ensure any amendments in future are well coordinated. Particularly relevant to questions of institutional design are the principles of subsidiarity, the Treaty of Waitangi, and efficiency.

In this chapter we first outline a general framework for thinking about questions of institutional design, including exploring the general characteristics that institutions can have. We then consider what characteristics our institutions may require in the future when performing the system’s seven core roles. Many resource management debates centre around institutional arrangements. Some are listed below in Figure 9.1.

The institutional landscape in the current system is extremely complex. A range of institutions was described in Working Paper 3, and many more exist. A great deal of thought went into institutional reform in the late 1980s, much of which remains with us today. However, as the Productivity Commission has pointed out:

Currently, the stewardship of the system is unclear and fragmented across a number of Ministers and departments, with no clear leader or contact point within central government. The Ministry of Transport administers the Land Transport Management Act. The [Ministry for the Environment] administers the RMA. The Ministry for Business, Innovation and Employment administers the Housing Accords and Special Housing Areas Act 2013, and has a broader interest in affordable housing and the planning system as it affects business. The Department of Internal Affairs administers the Local Government Act and the Local Government (Rating) Act 2002.

What is the proper role of central and local government?

What is the Environmental Protection Authority really there for?

Should we amalgamate councils?

What role should the Ministry for the Environment play?

When should we use council-controlled organisations?

How independent is the Department of Conservation?

Should the government be able to replace elected councillors?

Is a climate commission a good idea?

Should we use boards of inquiry?

Is it a good idea to have an Environment Court?

Should we integrate regional councils and territorial authorities?

Figure 9.1: Some difficult questions concerning institutions in New Zealand’s resource management system
Different institutional characteristics
How do we measure, explain and rationalise this complexity and diversity? We can approach it through a public law lens by thinking about the separation of powers and appropriate checks and balances. For example, there are sound constitutional reasons for creating officers of Parliament – like the Parliamentary Commissioner for the Environment – rather than executive agencies.5

However, there is much more to our resource management institutions than checks and balances on the exercise of public power. Their characteristics need to be different – and carefully balanced – in order to produce good outcomes. For example, we may find a locally accountable body is less likely to ensure that national interests are secured, and an institution that spreads its subject focus too widely may risk diluting its effectiveness. The principle of subsidiarity means that we need at least some central and some local government institutions.6 Beyond that, many different institutional settings may be possible.7

Providing checks and balances on the exercise of public power is one, but not the only, reason we split up our resource management institutions.

A framework for questions of institutional design
Before considering what change could be desirable, we think there is value in establishing a common foundation for thinking about questions of institutional design. Appreciating a more general context can colour the answers we give to specific issues. For example – do we have an Environment Court purely because it provides a desirable independence at a national level? Or is it partly to make up for a lack of capacity within councils? If we remedied the latter, would the former become less important? Over the following sections, we consider institutional design in three steps:

Figure 9.2 A constitutional framing of our public institutions. Although not focused on resource management institutions, this shows one way of thinking about the degree to which institutions are connected to central government.8
1. What kinds of institutions are available for us to adopt?
2. What characteristics are important, and when should we use them?
3. What kinds of institutions should we have in a future system?

The first two steps are about generating a common understanding of what key options we have, and understanding why we have them. The third step looks at which kinds of institutions we desire, and which functions we could give to them.

We begin by considering the options we have for institutions. But how do we do this in a useful way? One option would be to create a list of all possible institutions that come into our heads – a mega-brainstorming exercise. That could look something like this:

Coastal Commission
Ministry for the Environment
Environment Court
Taranaki Catchment Board
Parliamentary Commissioner for the Environment
National Transport Council
National Drinking Water Authority
Department of Infrastructure and Public Works
Hamilton City Council
etc

That is not overly helpful. There is a potentially infinite number of specific institutions we could adopt. Some we may already have, others could be modelled on overseas examples, and some could be imagined out of thin air. The hypothetical list above has all three. This takes us no further to understanding why we might desire some institutions, but not others.

We need to look, in a systematic way, at different possible combinations of characteristics that our institutions can have, before we decide which combinations we may want. Characteristics can be selected in either a coarse or a fine-grained way. The trick is to drill down far enough to identify materially different characteristics. We also need to measure them. Overall, we think that the following kinds of characteristic (and ways to measure them) are material, although it may well be possible to include others.
1. **The degree of an institution’s independence**

An institution can be independent of political influence (such as the Environment Court) or politically accountable (such as Ministers and regional councils).

![Institutional Independence Spectrum](image)

2. **The degree of an institution’s centralisation**

An institution can be central, in that it functions across the whole country (such as a government department) or locally (such as a district council). Both central and local institutions can be accountable or independent.

![Centralisation Spectrum](image)

3. **The extent of an institution’s subject focus**

An institution can focus narrowly on specific resources or domains (such as the Queen Elizabeth II National Trust, concerned with open space) or have a wide focus (such as the Ministry for the Environment).

![Subject Focus Spectrum](image)

4. **The extent of an institution’s geographical focus**

An institution can focus narrowly on a specific geographical area (such as the Fiordland Marine Guardians) or on a broad area (such as the Department of Conservation).

![Geographical Focus Spectrum](image)

Note that geographical focus is a different characteristic to the degree of centralisation. The latter captures the idea that there can be a nationwide division into locally controlled units (district councils are local, but they exist uniformly across the country). The former captures the idea that some institutions are responsible for an additional layer of interventions in particular areas that are treated differently from the rest of the country. An institution can be local but have a broad geographical focus (such as a district council, which manages all land in a district), or it can be central and have a specific geographical focus (such as the Queen Elizabeth II National Trust, which focuses on specific covenanted land).

5. **The nature of an institution’s task**

An institution can have different kinds of tasks. Among other things, it can create policy, impose regulation, or enforce decisions.

![Task Spectrum](image)

6. **The formality of an institution’s creation**

Some institutions can be formally created (such as by statute), while others are created in a more informal way (such as by Cabinet decision).

![Formality Spectrum](image)

7. **The nature of an institution’s mandate**

An institution can have a protective mandate (such as the Department of Conservation), or it can have an exploitative mandate and seek to secure the benefits of resource use (such as the Ministry for Primary Industries). The word “exploitative” is not intended to have any negative connotations. It simply means driving resource use, as opposed to “protection”, which here means preventing particular kinds of use.

![Mandate Spectrum](image)

8. **The extent of an institution’s power**

An institution can have binding powers (such as a Minister who imposes a NES) or recommendatory powers (such as the Parliamentary Commissioner for the Environment inquiring into an environmental issue).

![Power Spectrum](image)

Figure 9.3: Spectra of institutional characteristics
This framework can produce a huge number of different sets of characteristics.\(^9\) Of course, that does not mean that we should have a separate institution for each unique combination. There are several reasons for this.

First, some combinations may not be particularly useful. For example, we cannot realistically have an informally created Environment Court.\(^9\) Some combinations are even nonsensical; we cannot really talk about an advocacy agency having “binding” powers.

Secondly, some combinations may be controversial or even unpalatable. For example, do we desire one single centralised and independent institution for environmental enforcement or for the provision of water services? Do we want an independent Climate Commission with binding powers to set carbon budgets? Those are conceivable and conceptually viable options produced by the framework, but are bound to provoke disagreement.

Thirdly, particular combinations of characteristics may be viable and even desirable, but it would be extremely inefficient if we responded by creating entirely separate institutions to reflect each one. This can sometimes produce a tension between the need for efficiency and accessibility on the one hand (the fewer institutions we have, the less administrative duplication and points of contact for the public there are), and the benefits of separation on the other.

We need to think very carefully about this tension when designing institutions. Desirable characteristics (eg a balance between independence and accountability) can be reflected through either well-considered internal design of an institution (such as a council-controlled organisation)\(^9\) or through the separation of institutions that interact with each other in a defined way. 

Desirable institutional characteristics can be reflected through either well-considered internal design of an institution, or through the separation of institutions that then interact with each other in a defined way.

Desirable institutional characteristics can be reflected through either well-considered internal design of an institution, or through the separation of institutions that then interact with each other in a defined way. 

When each is useful, or desirable, in different measure. We then turn to the kinds of institutions we may desire in a future system.

**Independence and accountability**

The independence of an institution refers to the degree to which it is free from control or influence by politically accountable institutions (or constituents directly). The Environment Court and the Parliamentary Commissioner for the Environment are examples of highly independent institutions. The other side of the coin is accountability: the degree to which voters can choose to elect or remove members of an institution.\(^15\) Councils and Parliament are examples of highly accountable institutions. Increasing independence or accountability will, by definition, weaken the other. We can have both in balance (and in various ways), but we cannot maximise both of them at the same time. Independent and accountable institutions offer different things, but it is the balance between them that is most important when looking at the system as a whole.

For its part, the Productivity Commission (albeit only in the context of regulatory institutions) has considered that independence is appropriate where:\(^16\)

- A substantial degree of technical expertise, or expert judgement of complex analysis is required
- Public confidence in impartiality is important
- A consistent approach is desired
- The oversight of government power is involved

We do not disagree. But we can, perhaps, paint a slightly different picture if we focus on accountability as a starting point. In a political system defined by open democracy, we consider that direct accountability is generally appropriate when decisions involve values, or at least where there is a contest or significant lack of consensus over values. That accountability is most important where an institution has (or can have) regulatory powers to bind those who do not consent to being bound,\(^17\) rather than recommendatory powers only. For example, Ministers have binding powers under the RMA and are directly accountable, whereas the Parliamentary Commissioner for the Environment has recommendatory powers only and is appointed. Directly accountable institutions in the current system are fairly limited in range; they are largely comprised of Ministers and councillors (regional councils and territorial authorities).\(^18\)

That makes sense – we cannot hold an infinite number of elections in a small country like New Zealand.

This does not make the need for independent, expert and transparent advice to accountable institutions unimportant.\(^19\) That is essential to make sure that they identify the actual value-based questions to be addressed, especially where the background is technically complex;\(^20\) there is a risk that politicians respond "mechanically to constituent pressure".\(^21\) It is also not always easy to disentangle value-based judgments from technical questions, and some fluid institutional arrangements reflect this.\(^22\) For example, there is a real, but not total, separation between Ministers and ministries, and between councils and their staff.\(^23\) Councils and Ministers can choose to reject technical advice, and public servants can
make recommendations in relation to value judgments. There is also a big grey area in which value judgments and objective assessment of evidence interact where the Environment Court is making decisions on plans. 24

However, there are risks in having unaccountable persons determining value-based questions. Scientists and judges have no particular moral claim to tell us what we should do, and are less accountable to communities for their choices. 25 As Eli Louka has observed, “most decisions on environmental matters have to be made based on political considerations”. 26 That said, we suggest that highly independent institutions have most significant value in three distinct cases.

The first is where values are not at stake (a role is purely technical or expert, such as in the provision of scientific knowledge to inform decision-making), 27 or where there is broad and durable social consensus over values (such as nuclear-free), or where a firm and specific political position and direction has been taken on values (such as genetic modification). Here, independent institutions are about the implementation of values, not the determination of values. Some may put forward another reason that independent decision-makers are valuable: the need for stable and durable policy where long-term interests are at stake or predictable investment signals are needed. Climate change is the classic example, although many “creeping” environmental problems fit this bill (including freshwater quality). However, as laudable as that aim is, we must remain pragmatic. A degree of consensus over values really needs to be a pre-condition of truly independent decision-making. If values remain disputed, then the imposition of an independent decision-maker is likely to represent nothing more than the mouthpiece of a politically accountable body, and be vulnerable to subsequent interference as electoral cycles roll on. 28

Secondly, a degree of independence is valuable where it is necessary for economically efficient management, but where the public interest is still at stake (as in the case of council-controlled organisations and state-owned enterprises). The extent to which the public interest is at stake, or at least how successful an entity has proved to be in achieving the public interest, may determine how independent it is allowed to be. For example, operationally independent council-controlled organisations are less independent than a private entity like Fonterra, 29 but that does not prevent occasional calls for the government to intervene to restructure the latter. 30

However, we think there is (somewhat paradoxically) a third case in which independent institutions are important: they can actually increase accountability. Institutions are only truly accountable if the people they are accountable to are informed about their performance. That is not an easy thing to achieve, but giving investigative and recommendatory powers and duties to independent institutions can provide the information, transparency, and understanding about the activities of Ministers and councils for people to make informed choices at election time. Such institutions act not just as advisors and educators (like council staff or the Energy Efficiency and Conservation Authority), but also as watchdogs. 31 The Parliamentary Commissioner for the Environment is a good example. So too is the proposed Climate Commission, and the more recently proposed Infrastructure Commission. 32

Institutions with at least some degree of independence are much more varied in New Zealand’s current system than fully accountable ones. They range from wholly independent (the Environment Court) to very close to government (such as the Ministry for the Environment, which has a free and frank advisory role to the Minister as well as a policy and regulatory support role). In between, we find many Crown agencies, autonomous or independent Crown entities, trusts, state-owned enterprises, council-controlled organisations, and other bespoke institutions. As the Productivity Commission has pointed out, “independence is not a binary condition: institutions can be more or less independent in a range of ways”. 33 It is a complex continuum.
However, an effective balance between independence and accountability in the system can be achieved in two broadly different ways: by carefully designing interactions between elected and non-elected bodies, or by integrating elements of independence and accountability within a single body. An example of the former – where separate independent and accountable institutions interact – is the relationship between councils and the Environment Court in planning matters under the RMA (based on appeals). Another is the watchdog role of the Parliamentary Commissioner for the Environment in relation to government. An example of the latter – integrating independence and accountability in one institution – is the internal structure of council-controlled organisations (in which local government has the ability to appoint board members but where day to day decision-making is undertaken independently). There is a range of specific institutional forms that can combine these characteristics, and others can always be invented.

The proposed Climate Commission is a good example to illustrate this point. In order to set targets for greenhouse gas reduction, both the Commission (which is independent) and the responsible Minister (who is accountable) are proposed to have important roles. The Commission recommends carbon budgets and the Minister sets them, thereby reducing politicisation of the budget setting process while retaining ultimate public accountability for decisions. Each institution has characteristics that are complementary – the independent Commission has recommendatory powers, while the accountable Minister has binding powers. The interplay between the institutions is crucial, and would not be achieved by creating a single institution that combined elements of each.

Independent and accountable institutions offer different things, but it is the balance between them that is most important when looking at the system as a whole. In particular, independent institutions are most valuable where decisions are about implementing (rather than determining) values, where efficient management is important, or where they are necessary as a check and balance on accountable institutions.

Central and local

When, and to what extent, should an institution be centrally or locally controlled? Ultimately, the answer to this question is determined by recourse to the principle of subsidiarity, which assigns responsibility according to where the relevant community of interest lies. The concept of a community of interest, is however, a slippery one that can be interpreted in many ways. It is a value-based judgment.

Some may embrace a presumption in favour of devolved (lowest level) decision-making. The localism movement, aptly named, is an example of this. New Zealand does not embrace local governance to the same extent as the Swiss, but a fairly devolved approach to subsidiarity has been a cultural and political expectation for resource management in New Zealand since the fallout of “Think Big” projects, the National Development Act 1979, and broader distrust of central government intervention that led to fundamental legislative and institutional change in the late 1980s. It is in this spirit that the Productivity Commission states that “unless there are good reasons not to do so, decisions should be taken at lower levels of government close to the people affected” and “in most cases local governments are in a better position to take account of local preferences and circumstances, especially where the effects of planning are also local.”

That is a sound presumption in favour of devolution (and may be coloured by the particularly local context of urban land use planning), but it leaves much to be decided around what exactly “good reasons” for central (and regional, or even district) intervention are. For example, for many years air quality was considered to be the preserve of regional decision-making. After all, seldom does air pollution spill across regions, so what exactly is the national interest in it? Is it because the healthcare system, responsible for dealing with the fallout, is largely funded nationally? Or is it about our shared values as New Zealanders, that no Kiwi is to be left behind?

Central government forays into urban land use planning are even more recent. Again, only in limited cases do urban issues extend spatially beyond a district or region, and councils can already work together to solve them. So what is the national interest in our cities? Housing affordability only? Or economic and social wellbeing more broadly? The Productivity Commission has added that “people most affected by decisions gain greater power to make those decisions, which is not only more just but also more conducive to better decisions (because they have more at stake).” Although undoubtedly true, this again just restates the real question (who is most affected, and how do we measure that), and is not necessarily an argument in favour of devolution.

Part of the difficulty is that questions about devolution involve arguments over fairness. The costs of an activity are not always felt at the same spatial scale as the benefits (or to the same degree). Renewable electricity generation is a good example: a wind farm may be seen to impact adversely on the amenity of a local landscape, but it contributes electricity to the national grid. Tourism is another: a small town with a limited rating base may incur cost of tourist infrastructure but not reap a proportionate benefit.

A further difficulty is the ethical conundrum of how to measure the relative value of benefits for the many against costs for the few. There may be a strong national or regional interest in an outcome, but what if the local interest is stronger? And how do we tell? The greatest good for the greatest number (a form of utilitarianism advanced by Jeremy Bentham) can lead us to some dark places, but so can unconstrained nimbysism.

A third challenge is that “effects” are not always spatially defined at all. For example, local people may be most tangibly affected by an open cast mining operation in...
their district (both positively and negatively), but the psychological and moral impacts can reverberate across the country. In the same way that we do not tolerate the mistreatment of animals anywhere in New Zealand, a person in Northland may think the idea of open cast mining on the West Coast (especially in the conservation estate or where it impacts threatened flora or fauna) is abhorrent, even if he or she never sees it. These effects are even harder to measure and compare.

Such questions are largely intractable and can be subject to endless debate. Adopting a utilitarian approach – the greatest good for the greatest number – would probably translate to significant central control at the expense of localism, and the incurring of local harm for the benefit of the state. Federal systems have a different solution – they often seek to define responsibilities of federal and state actors in a constitution. We tend to fudge the question in New Zealand by centralising powers when it becomes urgent to do so, not by having a conversation in advance about where dominant communities of interest should reside. Often the more important question, practically, is who gets to decide where responsibilities lie.

Under current settings in New Zealand, it is central government that effectively decides where communities of interest exist. This can be on a durable basis (as in, for instance, the case of central decision-making in the exclusive economic zone, the conservation estate, and the land transport network) but in most cases it is on an ad hoc basis (eg by the discretionary development of NESs and NPSs, intervention in local planning processes, call-in of proposals of national significance under the RMA, and ad hoc contributions towards infrastructure that is unaffordable for local government on its own). The introduction of planning standards in the 2017 amendments to the RMA continues this approach; the standards are ostensibly about harmonising different formats and definitions in plans, but in reality introduce another avenue for the government to impose substantive policy and regulation when it deems necessary. There is, of course, nothing inherently wrong with that. But it does continue the confusion about what subsidiarity really means in the New Zealand context, and whether it is a constitutional feature or the plaything of central government. This difficulty can be exacerbated by mismatches in funding; if responsibilities are truly accepted as being local, then local institutions need the means to fund them. Spiralling local infrastructure costs are bringing into sharp focus the need to decide whether some infrastructure responsibilities are truly local (and, if so, they need a more durable funding base than at present), or whether they should be handled more at a regional or national level or through a partnership model.

This leads us to the other key factor in determining whether institutions should be central or local (or somewhere in between): the efficiencies that can be obtained by exploiting economies of scale. Where values, money or crucial services are not at stake, or where the community of interest is neither clearly local nor national, this often produces national institutions. We do not, for example, have local chapters or versions of the Parliamentary Commissioner for the Environment, even though the Commissioner is able to inquire into local issues.

But even where communities of interest are arguably local, and local values are at stake, it can make sense for reasons of efficiency and resourcing for institutions to make decisions at a spatially wider level. For example, a district council – not a “street council” – makes decisions about the design of a cul-de-sac, even though those affected will be primarily those who live on that street. There are economic limits to localism, despite its benefits. At a broader scale, this may produce efficiencies from coordination of activities (different institutions working together), including through shared services. For example, the three Wairarapa territorial authorities produce a combined district plan, and Manawatu-Wanganui has combined its regional policy statement, regional plan and district plans into a “One Plan.” But the drive for efficiency can also produce more integrated institutions with roles across a wider area. Wellington Water, for example, is a council-controlled organisation that is jointly owned by multiple councils in the Wellington region and operates across territorial boundaries to provide water services. Schools and hospitals are also provided nationally by central government, even though there is a strong local community of interest in them.

Efficiency gains and coordination can be arguments in favour of local government amalgamation more broadly (including the use of unitary regional level authorities). A drive for efficiency may, however, come into conflict with expectations around devolved decision-making and subsidiarity. We first need to decide where the relevant community of interest resides in a particular role (eg the provision of public goods like transport or water infrastructure), and only then consider whether potential efficiencies override that. If we can save money, time and resources by locating decision-making responsibility at higher level institutions, should we still do so if those affected are mostly local? Sometimes the answer may be yes. The use of a national water services provider – as in Scotland – is one example of where this seems to have met with success, and Infrastructure New Zealand has floated the idea of systemic local government amalgamation (regionalisation) rather than the removal of specific functions to a central agency. Another example is the use of national planning standards (or a similar templating tool) by central government to harmonise terminology and formatting in plans across the country.

The principle of subsidiarity is important when determining how local or central institutions should be for a particular role or task. Decisions should be taken by those reflecting the appropriate community of interest. However, the efficiencies that can be gained by exploiting economies of scale are also important.

Subject focus
To what extent should an institution focus on a particular subject, or spread its focus across different subjects?
Currently, we have some institutions that cast their eye quite broadly – the Minister (and Ministry) for the Environment, for example, is responsible for many policy functions across the natural environment (freshwater, climate change, waste, air quality, soil, biodiversity and so forth). Many of those topics (but not all) are mirrored in the responsibilities of regional councils. Others have a narrower focus – for example, the EPA has a grab bag of quite specific substantive and administrative functions under multiple statutes.

Partly this question of how focused institutions should be depends on how we think about a “subject”. To some, for example, “conservation” or “hazardous substances” may be quite specific, but to others quite broad. There are different ways to conceive of a subject, and they can overlap; we can mean domains, spaces, sectors, issues, or something else. Boundaries can be drawn in different places; for example, in the wake of the Havelock North drinking water incident, some have floated the idea of a dedicated drinking water regulator in New Zealand. The focus of such a body could, in some ways, be broader than, for example, a regional council under the RMA, because it would take on health regulation as well as environmental regulation. But in other ways its remit could be narrower, in that it would not be concerned with, for example, air or soil quality. However, setting aside such questions of definition, when is it generally desirable for an institution to have a relatively broad or narrow focus? We offer several thoughts below.

As discussed in Chapter 2, fragmenting different subjects across institutions is bound to introduce artificial distinctions. It can produce tensions, overlaps, and unintentional outcomes. For example, we shouldn’t be surprised if a climate change institution pursuing a zero carbon economy is less effective when we also have a mining institution promoting the extraction of oil and gas. Similarly, a transport body that doesn’t talk to an urban planning body or a financial planner is bound to run into problems – a road that has no houses on it, or a street that can’t be paid for. The decisions of a dedicated land use regulator can also have significant cumulative effects on freshwater quality and greenhouse gas emissions. In short, a narrow subject focus can create silos within a system that cries out for holistic thinking and coordination. This is a risk even within institutions if they are fragmented according to statutory responsibilities.

**A spotlight on project teams**

Councils write a huge number of plans: long-term plans and annual plans, pest management strategies, flood management plans and asset management plans, regional and district plans, and transport plans. Those are often produced by different parts of the same organisation – finance teams, policy teams, engineering teams or transport teams. These teams are often in separate departments, reporting to different members of the executive team and different committees of council. Often these teams work in relative isolation from each other.

Some councils have created central “policy” teams – for example Taupō District Council has a policy team that works across different legislation (notably the RMA and Local Government Act). This allows the council to deploy policy resources efficiently to meet fluctuating workloads. Multi-purpose policy teams can have different challenges, as some processes require specialist knowledge which is difficult to develop on a generalist team. Multi-purpose policy teams also need to be careful not to become siloed in a different way (generalists versus specialists).

However, agile project teams can be useful within institutions. Specialists from across an organisation can come together to work on a project (eg a plan). Private sector companies use this process to deliver projects effectively and it contributes to ‘silo busting’. It could also help lead to more integrated plans as an alternative to legislative integration.
New Zealand is also a small country, and too many institutions can dilute the pool of qualified staff needed to make them discharge their functions well. Complexity and accessibility are other important concerns. We can empathise with a layperson who cannot easily tell which institutions to direct their concerns towards (a district council, a regional council, an Environment, a Ministry for the Environment, a Department of Conservation, a Parliamentary Commissioner for the Environment, and so forth).

So should we instead have institutions that look across all things “resource management”? A single ministry, regional council, and Environment Court responsible for transport planning, urban land use planning, conservation management, genetic modification, waste reduction, fisheries and so on? Not necessarily. Separate agencies can act as valuable checks and balances on each other (as long as the relationships between them are clear).

Objective overload is also a significant risk. Some key subjects in a wide-ranging institution might also be promoted or demoted due to short term political priorities. We may get inundated with generalised policy speak promoted or demoted due to short term political priorities. For example, one subject is relevant to more than one objective. We manage by focusing it only on a specific objective, even if that means considering multiple subjects. For example, one objective may be a zero carbon economy, so we could have an institution managing all subjects having a bearing on climate change (land use, transport, point-source greenhouse gas emissions, subsidies for electric vehicles, carbon capture and storage, forestry operations, energy policy and so forth). The trouble here, though, is that each subject is relevant to more than one objective. We manage transport not just to mitigate climate change, but to provide social connectivity, safety, economic productivity and public access. We manage our urban form and land uses for an even wider variety of objectives. By unifying institutions in one way, we invariably fragment them in others.

Currently in New Zealand we have a complex arrangement of different institutions that seeks to balance all of the concerns above. Some institutions (like the Ministry for the Environment and councils) are wide ranging, but have administrative units set up within them to focus on particular areas. These can change from time to time with little fuss. Some (like Land Information New Zealand and Te Puni Kōkiri) are more targeted in their concerns, but participate in wider umbrella initiatives (like the natural resources sector) to harmonise their approach with others. At the operational level, some institutions can be quite focused because the tools available to them are similarly targeted (such as the Queen Elizabeth II National Trust).

Overall, we observe that a wide subject focus is crucial at a strategic and national level. This is because all parts of the system are interconnected, and we require an effective system steward to have active oversight and prevent the need for frequent first principles reviews triggered by periodic crises. Arguably this feature is lacking at the moment. There may be merit in moving to formalise an umbrella organisation, with appropriate resourcing, to oversee its various parts (transport, fisheries, climate, local government, conservation, “environment” more generally, Māori interests, forestry, agriculture and so forth). Cabinet should not be relied on as the place that these concerns come together, although some have suggested that it would be wise to integrate related ministerial portfolios like spatial planning and immigration. At the policy and operational levels, there is value in having institutions with more targeted focuses (especially in priority areas), as long as they operate within a framework that recognises common goals, clarifies a hierarchy of goals, and effectively connects institutions at all levels in a durable way.

Geographical focus

To what extent should institutions focus their attention on particular geographical areas? This is a slightly different question to how central or local institutions should be. The latter question applies across the country (eg the functions of regional or district councils, or where a Housing and Urban Development Authority should be deployed). The former is about whether particular areas should be treated differently from the rest of the country in terms of their institutional arrangements.

On the one hand, it is important that we recognise that many places in New Zealand are unique, and may require targeted interventions based on their characteristics. Some of these may not be possible within general frameworks, even if they provide significant latitude for bespoke solutions (eg councils can do many things under the Local Government Act, and district plans look very different across the country). Some place-based interventions may also require more than just targeted legislation that places obligations on existing institutions. They may create entirely new institutions that are tailored to the needs of an area. The Fiordland Marine Guardians, the Te Urewera Board, the Waikato River Authority, the Canterbury Earthquake Recovery Authority, and even Auckland Council are examples of where specific place-based institutions have been created by legislation on top of the general resource management system. There have even been calls for the resource management system to recognise that some cities are unique and warrant targeted attention in their institutional arrangements, and
for collaborative groups to be tailored to the needs of specific areas or catchments.82

On the other hand, there are significant risks in taking this approach too far. Complexity, accessibility, and predictability are some. Efficiency is another. In a small country, can we really justify a proliferation of different kinds of institution in different places? It is challenging enough navigating the differences in how nationwide institutions like councils create and implement planning instruments, without having to contend with fundamentally different kinds of institutions. The occasional outlier may need to occur – for example, the Treaty settlement process provides fertile ground for valuable experiments to occur (eg the creation of legal personhood produces an “institution” in its own right). But rather than creating an avalanche of bespoke entities, we may be better off considering which models can usefully be rolled out on a wider basis. Should we, for example, create guardians (or legal personhood) for all significant natural areas across New Zealand? Co-governance arrangements for sites of cultural significance? Collaborative groups for particular kinds of issues across the country? Or off-the-shelf options for governance and planning arrangements to be triggered in the aftermath of major natural disasters, rapid urban growth, or freshwater pollution?83

Overall, we suggest that the formal creation of a geographically focused institution can be useful where the context of an area is truly unique. However, we should resist the temptation to throw new institutions at problems, just as we should resist the temptation to throw new legislation at them. If existing institutions are not performing in one area, it may be an early warning sign that others may warrant a closer look rather than a truly “one-off” situation. Furthermore, it should be clear how geographically targeted bodies relate to the more general framework of institutions within which they sit, and bespoke arrangements should generally be an addition to, rather than a substitute, for that framework.

The formal creation of a geographically focused institution can be useful where the context of an area is truly unique. However, we should resist the temptation to throw new layers of institutions at particular problems as they arise.

**Tasks**

Our resource management institutions can be tasked with taking different kinds of action. As shown below, these are fairly discrete categories. We describe these as “tasks”, which should not be confused with the idea of “roles” described in Chapter 7. In performing any given role, such as setting bottom lines, an institution can be charged with multiple tasks (eg policy, regulation, and enforcement). Similarly, any given task can be relevant to more than one role (eg funding is important for providing public goods as well as setting bottom lines).

As a whole, our package of institutions need to perform all of the tasks listed in Figure 9.4.84 As such, the key question is not which characteristics our institutions have, but rather the extent to which multiple tasks should be the responsibility of a single institution, or distributed across different ones.

In the current system, we can observe that some kinds of task are integrated within an institution while others are separated across many. Notably, local government performs almost all of them in some way,85 and is responsible for most public interventions that can be described as truly devolved.86 Other institutions are more targeted in their tasks. For example, the Ministry of Transport is concerned with transport policy, but operational decisions are made by the NZTA.87 The EPA exercises mainly regulatory and dispute resolution functions, while the Ministry for the Environment is tasked with policy, regulatory and funding functions. The Environment Court is an interesting case; it has a dispute resolution and enforcement task, but it is quite unique within the judiciary in that (effectively) it also has policy and regulatory tasks.88

There are advantages in integrating multiple tasks within a single institution, especially aspects that can be considered part of a single policy or development cycle. Thus, it is desirable that the creation of policy (eg objectives and policies in a regional plan) closely informs what regulatory instruments look like (eg planning rules and standards and consenting conditions), which in turn are closely connected to their enforcement. Having the relevant people sitting within the same offices can be helpful to make links and clarify intentions. Policy creation and dispute resolution tasks are extremely difficult to separate in the resource management context, since disagreements between people are largely resolved indirectly by making decisions on public policy.89 Funding powers also need to be closely linked to operational decision-making (eg there is no point planning a road unless it can be paid for), and both need to be linked closely to policy development (eg strategic spatial planning) and regulation (eg land use restrictions).90

However, there are also advantages (and sometimes necessities) in separating tasks across different institutions. Some of these follow naturally from the need to separate institutions for other reasons. For example, it is difficult to task a single institution with both funding and delivering infrastructure if we already accept that financial and operational control will be shared between central and local institutions.91 Other advantages of separation are more generally applicable. For example, it is often desirable to separate operational responsibilities

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**Figure 9.4:** Tasks that resource management institutions can perform
(eg building roads) from regulatory ones (restricting the environmental impacts of doing so) and enforcement ones (taking action if regulations are breached). There can be risks in self-regulation and enforcement (the fox guarding the henhouse, where you can authorise your own activities). That said, the actual risk may depend on other things: the effectiveness of internal divisions within an institution, whether regulatory and operational mandates are conflicting, and the availability of review or appeal rights.

Furthermore, it is arguable that an institution responsible for creating policy and regulation at the beginning of the policy cycle should not be tasked with enforcement or dispute resolution at the end of it. This reflects an idea central to the separation of powers more generally, that those responsible for creating the law should not be those responsible for interpreting and applying it. Although resource consent decisions are essentially a regulatory role, they are also about implementing values rather than determining them. We can see a recognition of these risks in a trend towards the use of independent commissioners for consenting decisions within councils, and the use of good practice guidelines in depoliticising enforcement decisions (although a recent report highlights continuing problems with political interference in enforcement activities).

Sometimes whether we choose to separate or integrate tasks is based on very finely weighted considerations. For example, territorial authorities have responsibilities for providing water services to their communities, but can choose to do so through the creation of a council-controlled organisation. That creates an immediate separation between regulatory and operational tasks (council and council-controlled organisation respectively). We consider institutional arrangements for the delivery of water services further later in this chapter.

Our institutions can undertake different kinds of tasks, from policy, to regulation, to enforcement. The key question is the extent to which multiple tasks should be the responsibility of a single institution, or distributed across different ones. There are advantages and disadvantages of both integrating and separating tasks.

Formality of creation

Resource management institutions can be created in different ways, on a spectrum from formal to informal. Their features and the way they operate can also be formally prescribed, or informally sketched out. The most formal way for an institution to be created is through targeted primary legislation. For example, the Ministry for the Environment, the Department of Conservation and the Parliamentary Commissioner for the Environment are established by statute. So too are the Queen Elizabeth II National Trust, the EPA, regional land transport committees, and the Te Urewera Board. There are many more examples.

Other institutions have been created in less formal ways. For example, most government departments and ministries do not owe their existence to legislation (although legislation can specifically recognise their existence when assigning roles). Sometimes legislation simply creates the ability to establish a particular kind of institution (and sets out how it must subsequently operate) rather than creating it directly. For example, councils are empowered to establish council-controlled organisations, and the RMA anticipates that a collaborative planning process, if used, will produce collaborative groups.

The formality by which an institution is created does not necessarily depend on how big or even how “powerful” it is. For example, the Ministry of Business, Innovation and Employment is not created by statute, but the comparatively small and recommendatory Parliamentary Commissioner...
for the Environment is. Wellington Water is not specifically created in legislation, but the Fiordland Marine Guardians are. Part of this might be explained by the trend in more recent times to race to legislative solutions, and therefore specifically create entities via statute.

However, there are two more pressing rationales for enshrining an institution in legislation. First is where its specific position and durability in the system is important to achieve our long-term objectives. Second is where it is likely to require protection from outside pressure. Legislation can provide legal recognition for a strong and defensible mandate, strengthening the will of those leading an institution to stand up to pressure across political cycles. Thus, while there is substantial flexibility for an institution like the Ministry for Primary Industries to be reshaped and restructured, or for a council-controlled organisation to be created or disestablished, others (like the Environment Court or Parliamentary Commissioner for the Environment) have much firmer grounds to resist radical institutional change. Part of this is about recognising that higher-level objectives around environmental protection are susceptible to economic and social pressures in the short term, and that we require formal and durable institutions to defend them against incremental or cumulative erosion. (That applies also to the durability of co-governance arrangements and cultural recognition created through the Treaty settlement process.) These measures are often associated with a desire to safeguard independence in our protective institutions; the Ministry for the Environment and Department of Conservation, for example, are (and need to be) close to an accountable Minister, but can still point to specific functions in statute to defend broader stewardship and advocacy work. The independence of an entity like the Parliamentary Commissioner for the Environment, which reports to Parliament rather than government, is even more obvious.

Resource management institutions can be created in different ways, on a spectrum from formal to informal. Formality of creation is important where an institution’s specific position and durability in the system is important to achieve our long-term objectives, and where it is likely to require protection from outside pressure.

**Mandate**

Institutions can have very different mandates when managing resources (see Figure 9.5 below). Public intervention is not just about protecting resources, or just about using them. The system needs to provide for both. So how should we arrange our institutions to do so? Again, the key question here is not whether our institutions should do one or the other, or somewhere in between, but rather whether we should separate institutions so that they have distinct, or combined, mandates.

On the one hand, our resources need to be managed in an integrated way, and combining protective and exploitative mandates within a single agency can promote that. For example, a single agency focused on fisheries management can be well placed to understand the complex interactions between protection and sustainable yield. Institutional integration can also promote synergies, because the exploitation of a resource in one way may sometimes produce environmental benefits in another. For example, an agency focused on electricity generation that has both exploitative and protective mandates may choose to develop green energy that can achieve both. A system based on separate mandates can produce conflict, fragmentation, misalignment and confusion. For example, one agency charged with pursuing a net zero carbon New Zealand could be undermined by another that is charged with exploiting the economic benefits of fossil fuel extraction or promoting urban sprawl based on motorway construction.

However, on the other hand, there are risks in combining quite different mandates within an institution. It can produce objective overload and a race to a meaningless policy middle – where neither mandate is fulfilled properly. As the Productivity Commission has noted, “A clear mandate can help promote accountability, compliance, focus, legitimacy and predictability.” More dangerously, combining mandates may in practice see a non-transparent prioritisation of policy goals within an institution, rather than the equal pursuit of all of them or a robust public debate about which ones should come first. In particular, short term priorities are likely to be susceptible to exploitative pressures, and a protective mandate (along with secure resources to follow through) needs to find a strong and directive home within dedicated institutions that will defend them. There are risks in allowing even a benign and benevolent fox to guard the environmental henhouse.

We observe that the broader principles embedded in the system are crucial in how we assign mandates to institutions. If we have principles that are vague and emphasise trade-offs, we may well end up with either separate institutions that clash (eg the NZTA and the Department of Conservation in Environment Court litigation) or integrated institutions that are susceptible to reaction, hand-wringing and inertia. Both outcomes are undesirable. A firmer expression of principles offers more direct guidance as to how separate institutions interact – eg which one is subject to another – and how we can make different mandates compatible rather than conflicting. For example, we still need to develop and use resources to provide for stormwater infrastructure, and there is value in having focused institutions providing that public service, but this can be done in a way that protects the environment (eg mandating water sensitive urban design rather than

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**Figure 9.5: Potential mandates for resource management institutions**

<table>
<thead>
<tr>
<th>Protective</th>
<th>Neutral</th>
<th>Exploitative</th>
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just the provision of stormwater services). A normative framework that seeks synergies can support institutions that do the same (subject to protective agencies defending bottom lines). A future system could seek to avoid frequent and prolonged litigation between public institutions by harmonising mandates much earlier in the policy and development process.

Institutions can have very different mandates when managing resources, from protective to exploitative. Integrating mandates within an institution can promote synergies and integrated management. However, there are risks in combining quite different mandates within an institution, notably that one may get weakened in practice.

Power

Our institutions can have varying degrees of power. Some make final, binding decisions (like the Environment Court); others make decisions that can be reviewed or appealed (like councils); still others have only advisory or recommendatory power (like the Parliamentary Commissioner for the Environment). The degree of power that an institution has is closely correlated with its other characteristics and cannot be considered in isolation of them.

First, the task an institution performs is relevant to its power. Imposing regulation inherently requires greater power than advocacy, for example. However, power can be exercised in many different ways. The power to create policy (eg through an NPS), or to make decisions to fund and plan infrastructure, is not necessarily less significant than the binding power to impose regulation (rules), take enforcement action, or resolve disputes.

Secondly, an institution’s degree of independence or accountability is crucial to the degree of power it exercises. In fact, the most important tension is not between independence and accountability per se, but rather the degree of power that is given to independent and accountable institutions. It is generally appropriate for value-based decisions (policy and often regulation) to be ultimately determined by accountable institutions. It is generally appropriate for other decisions (whether purely technical or the implementation/application of values) to be ultimately determined by independent and expert institutions. Debates about the proper role of the Environment Court, boards of inquiry, and independent commissioners can be considered in this light.

Thirdly, an institution’s degree of centralisation is significant. We do not always assign responsibilities to either central or local authorities; we frequently assign them to both. For example, regional councils make decisions concerning freshwater quality, but those can be influenced by central government through NPSs, call-in procedures, or other means. Many things can also be appealed to a national level Environment Court. As with independence, the distinction is often not between central and local per se, but rather the relative degree of power that is assigned to central and local. Traditionally, at least under the RMA, most of the power to initiate intervention has been highly devolved, but ultimate power has remained centralised. As such, there is little certainty as to what power is truly local, and what can be intervened in by central government.

Fourthly, as touched on above, a final decision-making power needs to be associated with a particular mandate. Inertia, confusion and inefficiency can result from a system that allows decisions to be made by those with either a neutral mandate or multiple ones, or where the relationship between institutions with conflicting mandates is not clear or connected. There needs to be a clear and consistent hierarchy of power, based on which mandates we think are most important. That is critical to a normatively aligned resource management system. As discussed in the following chapter, that is particularly significant for institutions charged with imposing bottom lines.

Checks and balances on power are also extremely important. We do not simply give ultimate power to the most appropriate kind of institution and walk away. The system needs to make sure that those institutions exercise it in ways that were intended, and are held to account. Sometimes that can be achieved by sharing power, or by creating a hierarchy of power. For example, some powers are held under the RMA by the Minister for the Environment, and others by the Minister of Conservation. While the Environment Court has the power to confirm and change local plans, it cannot proactively create them; there is a separation between those who propose and those who decide.

Checks and balances can also be achieved by surrounding those in a position of power with watchdogs, even if they have little power themselves (such as the Parliamentary Commissioner for the Environment or a Climate Commission). This recognises that there is significant power not just in institutions, but in an informed and engaged electorate that can change their behaviours based on independent and trusted advice. As we touched earlier in this chapter, independent institutions can be used not just as alternatives to accountable ones, but as a means to enhance their accountability. But this idea also works in reverse; accountable institutions need to act as watchdogs over independent ones. For example, Parliament watches over the performance of the Parliamentary Commissioner for the Environment, two Ministers look after the EPA, and the Minister of Transport is responsible for monitoring the performance of the NZTA.

Our institutions can have varying degrees of power. Whether we want an institution to have a significant degree of power in any given situation will depend on its other characteristics (eg whether it is central or accountable). It can be valuable to have institutions that have no decision-making power, but which exist to hold to account those that do.
Eight key kinds of characteristics determine what resource management institutions look like: independence, centralisation, subject focus, geographical focus, task, formality of creation, mandate, and power. Desirable choices for each characteristic will vary depending on context, and the relationships between different institutions.

9.3 What characteristics should our institutions have?

So far, we have considered the different characteristics that our institutions can have, and the general circumstances in which it may be desirable to adopt them. In the following sections we explore more specifically what kinds of institutions we may need in the future to perform the seven core roles of the system explored in Chapter 7. We consider which characteristics would be desirable for institutions that:

- Impose bottom lines
- Make trade-offs
- Provide public goods
- Proactively pursue positive outcomes
- Protect and promote Māori interests
- Resolve disputes
- Allocate non-private resources

The thoughts offered below by no means form an exhaustive analysis. Because of the sheer number of institutions in the system, the many combinations of characteristics that are possible, and the many ways in which institutions can interact, this warrants a much larger and more detailed piece of work than we can provide here. However, we reiterate our view that there is value in starting from first principles, and in applying questions in a systematic way. Thinking about the basic roles that our set of institutions need to play is one way of doing so.

Bottom lines

We have many different institutions in the current system that can be said to impose bottom lines of one kind or another. To a large degree, though, this is done by institutions that have functions under the RMA, and that is our focus here. These include the Ministers for the Environment and of Conservation,86 regional, district and unitary councils,87 independent commissioners,88 the Environment Court,89 and boards of inquiry.90 A similar (albeit much simpler) model exists under the EEZ Act, where regulations and national policy are made on the recommendation of the responsible Minister, and consents are decided by the EPA or boards of inquiry.91 These institutions have a variety of different characteristics. Their degree of independence, and centralisation, are two characteristics that warrant close attention.

Our current institutions represent a delicate balance between independence and accountability. That is usually achieved by separating accountable institutions from independent ones, and therefore the interplay between them is an extremely important feature of the system. For example, highly accountable councils create and make first-instance decisions on plans and consents that impose bottom lines,92 but these are reviewed and can be overturned through merits appeals to a highly independent Environment Court. In contrast, an independent board of inquiry93 makes recommendations on a proposed NPS, but the decision is ultimately taken by an accountable Minister.

As with the system as a whole, we suggest that both independence and accountability are needed in some measure for setting bottom lines, and that generally this is best done by separating our independent and accountable institutions.94 However, we see merit in exploring how independence could be strengthened, particularly at the national level. This is for two reasons.

First, a degree of independence is appropriate where there is a consensus over values, and where decision-makers implement rather than determine them.95 For some subjects there may not be sufficient consensus in New Zealand as to where firm bottom lines should be set (and where trade-offs should begin), but we suggest that we are fast moving towards that point (particularly for freshwater). The fact that the environment was such a significant feature of the 2017 election signals that, as a nation, public opinion is converging around the need for limits and improvement. That may warrant a more consistent, independent voice in setting bottom lines in advance, through regulations and plans, than the current model, which is largely driven by surges and troughs in political will.96 Arguably an arm’s-length (or even more independent) EPA could be more active in this space as New Zealanders’ values over bottom lines converge.97 That reflects the nature of the EPA’s existing roles in administering the emissions trading scheme and genetically modified organisms, which are largely about implementation of value-based decisions already made. It may need to be driven by firmer and more specific legislative purposes and principles in order to do so; Part 2 of the RMA covers too much ground and allows too many trade-offs to form a guide for independent bottom line setting,98 while the objectives of the EPA in its own founding legislation lack sufficient ambition.99 An EPA would also need to recognise important regional and sub regional differences (eg the characteristics of catchments), and local institutions may still need to play a prominent role.100

In the same spirit, a future system could formalise the already common practice of using independent decision-makers (eg commissioners or the Environment Court, or even an expanded EPA)101 to make decisions on individual projects (eg through resource consents or similar).102 Infrastructure New Zealand’s concept of a Planning and Environment Commission can be understood in this light; that is about independent decision-making on projects.103 Project level decisions should, if planning instruments are sufficiently clear,104 be about implementing values (determining if bottom lines would be breached) rather than determining them (where bottom lines should be set). The sooner can depoliticise bottom lines, the better.
That would include the use of mechanisms to ensure and to defend the independence of those institutions. Secondly, a degree of independence is valuable where its purpose is to enhance the accountability of elected institutions. In Chapter 5 we said that the interests of future generations need to be firmly embedded in decision-making across the system. This is not just a matter of including future people in statutory principles or criteria; it also has a bearing on institutional design. In particular, short term political cycles make long-term, future-focused decisions less likely. Climate change decisions are a good example of this. Despite having good knowledge of the causes and implications of climate change for decades, decision makers at local, national and international level have been reluctant to make decisions today to decarbonise the economy because of the short term cost, without taking full account of the long-term benefits or the long-term costs that not making those decisions would incur on future generations. Accountability is important, but elected institutions’ long-term focus needs to be watched closely by an independent body that is not on a short term political cycle.

A potential option here would be to expand the model provided by the Parliamentary Commissioner for the Environment and, more recently, the proposed Climate Commission and Infrastructure Commission, and create a more widely focused and independent Environment or Resource Management Commission. This could be charged with recommending targets and budgets for environmentally damaging actions broadly (which would vary according to the domain, and to reduce complexity could even have branches incorporating the roles of a Climate and/or Infrastructure Commission), and with reporting on the government’s (and councils’) progress towards meeting them. It could be responsible directly to Parliament, or its independence safeguarded in other ways (eg as an independent Crown entity). This step would recognise that setting some bottom lines is still an inherently political process, but also that elected institutions need to be held accountable to their promises, and constantly tested on their progress towards broad goals that transcend politics and the short term concerns of elected bodies.

Both independence and accountability are needed in some measure for setting bottom lines, and this is best done by separating our independent and accountable institutions. To the extent that decision-making on bottom lines is about implementing shared values rather than determining them, there may be a greater role for independent institutions. There may also be a role in a future system for a wider ranging independent watchdog, in the form of a Resource Management Commission.

A spotlight on the Future Generations Commissioner in Wales

In Wales, a “Future Generations Commissioner” has been appointed who acts as a guardian for the future generations in Wales and is also tasked with encouraging public bodies to take greater account of the long-term impact of the things they do. The Commissioner has advice, research and recommendatory roles not unlike that of the New Zealand Parliamentary Commissioner for the Environment. However, the Commissioner also has the power to review public bodies and they must take all reasonable steps to follow the course of action recommended by the Commissioner, unless there is a good reason not to do so. The Commissioner is also required to publish a “future generations report” before each general election. This Welsh Act represents a new generation of sustainability legislation and is something that New Zealand could take inspiration from. It could even be given a more ecocentric flavour by providing for the future interests of the natural world.
The degree to which institutions responsible for setting bottom lines should be central, regional or local is also a difficult question. We currently have a mix of all of them. A lot of this is about determining where communities of interest and the appropriate knowledge reside, and that requires an open conversation rather than an answer. However, what we do suggest is that greater clarity is desirable. For example, currently central government creates bottom lines under the RMA on an ad hoc and reactive basis through NESs, NPSs and other regulations, while the rest are left to be set at regional and local scales. Is it time for central government institutions to be more proactive in identifying areas in which there is a national interest, and in producing a single, integrated instrument setting bottom lines for all of them? In other words, do we need central institutions to have more duties, not just powers, to set bottom lines? And an obligation to ensure that they are being implemented at regional and local levels? Currently, for example, no government agency comprehensively checks to make sure that regional and local RMA plans give effect to NPSs. That is left to the courts – based on the willingness and ability of the community to litigate.

Furthermore, to the extent that the need for bottom lines is no longer a debate about values – if we accept that we need some bottom lines irrespective of the cost – then there may be less need for localism. Some may say that local democracy is mainly about reflecting community values and preferences (things that make a community unique), rather than doing things locally for the sake of it. If bottom lines are about implementing shared values (such as a nuclear-free position) then economies of scale may suggest that independent institutions responsible for doing so should be centralised (as with the EPA, the Parliamentary Commissioner for the Environment and the proposed Climate Commission). However, if values remain contested, or we require local knowledge and understanding, then accountable institutions at the local or regional level may be more appropriate – as long as they are informed and held accountable by independent ones and are driven by strong mandates to set bottom lines. A mixed local-regional-central forum is another possibility – regional land transport committees are about transport planning and funding, but the concept of different levels of government working together as a single “institution” could be broadened to have a regulatory role (eg a mixed-membership hearings panel for plans under the RMA).

Central government could take a more proactive and comprehensive role in setting environmental bottom lines in a future system.

A national regulator: A spotlight on the Victoria Environmental Protection Authority

The Victorian EPA began operating in 1971 under the Environment Protection Act 1970. It is an independent body corporate with a governing body appointed by government. The EPA currently has around 460 employees and a budget of around A$100 million. It is an active enforcer, having undertaken 1,796 inspections, issued 13,096 fines, 273 pollution abatement notices and 153 clean up notices, and undertaken 11 prosecutions during the 2016–17 year. It is generally regarded as the most successful EPA model in Australia.

In its early years, the Victorian EPA was primarily a pollution control authority and it focused on cleaning up air and water pollution through licensing and policing emissions from factories. Gradually its work broadened and encompassed the efficiency of resource use throughout the entire supply chain. The focus of the EPA has been firmly on pollution and waste, however, and it has not been directly involved in land use decision-making (although it may be consulted).

The EPA was reviewed in 2016, and changes to its structure, purposes and functions are currently in process. Some have already been effected through the Environment Protection Act 2017. This establishes the objective of the EPA as being “to protect human health and the environment by reducing the harmful effects of pollution and waste.” This can be contrasted with the current objective of the New Zealand EPA, which is much vaguer: “to undertake its functions in a way that “contributes to the efficient, effective, and transparent management of New Zealand’s environment and natural and physical resources; and enables New Zealand to meet its international obligations.” The Victorian model demonstrates the success of an EPA which has a clear purpose and tight focus on dealing with serious environmental risks.

The other characteristics of institutions responsible for setting bottom lines can be traversed more briefly. Formality of creation via statute is important to safeguard the role of an institution against short term economic and social pressures. It is also important that a holistic, or ecosystem, view be taken of bottom lines. This is because most bottom lines relate to the natural and living world. An institution’s subject focus, especially at the national level, therefore needs to be broad, in that it should cover all domains, but also be focused, in that its vision is united by the concept of ecosystem-based management. On the other hand, there may be some merit in having institutions focused on particular domains (such as the coast) as an overlay to more holistically focused institutions. That can be an alternative to, or a reinforcement of, legislative separation for the management of domains (eg an Oceans Act).
A spotlight on the California Coastal Commission

The California Coastal Commission, established in 1972 and operating under the California Coastal Act 1976, provides a useful model of a dedicated agency which focuses on complex environmental challenges in a particular spatial area – the coastal zone. This includes land up to several kilometres inland and the coastal marine area out to three nautical miles (which is the extent of the state government jurisdiction). The Commission has 12 voting members, six of whom are locally elected officials and six of whom are appointed by the state government from the public at large. Three ex officio (non-voting) members represent state government agencies, serving to link the work of the Commission with other government initiatives.

The Commission works with local government to assist with their long-range planning and to confirm that their plans conform with the Coastal Act and other state government requirements. Once a local plan (similar to a district plan under the RMA) is approved, local councils are authorised to approve coastal development permits. The Commission retains appeal authority over some significant local council decisions, and directly makes decisions over development applications within the coastal marine area and on public trust land. The Commission is small – with a budget of around US$20 million a year and just 145 employees. It is able to make decisions that are locally unpopular but are in the broader public interest. It provides a useful model for how an additional oversight layer can be provided over planning and consenting in sensitive areas under high development pressure.

Some institutions (such as the Te Urewera Board) may need to be geographically focused to the extent that bottom lines look fundamentally different in a particular area. At the same time, we need to take care that our institutional arrangements do not become incoherent or overly complex for users. The power to set bottom lines obviously needs to be binding, but which institution is given that power ultimately depends on other factors (eg its independence or accountability). As discussed above, the separation of recommendatory powers in an independent commission may be as important as locating binding powers with a Minister or council.

Whether an institution that sets bottom lines should embrace multiple tasks – policy, regulation, enforcement, funding, operations, etc – is closely linked to its degree of independence. Policy work has a substantial values component to it and requires accountability, but do we need to separate it from institutions concerned with other, more independent, tasks – such as enforcement? There are several options for the enforcement of bottom lines under the RMA (or a future equivalent, like an Environmental Protection Act).150

In particular, the options outlined in Figure 9.6 question whether responsibilities for enforcement should be local or central (or mixed), and independent or accountable.151 Greater centralisation of enforcement tasks could provide administrative economies of scale and reduce local political influence, but risk severing the valuable institutional link between policy, regulation, and compliance and potentially losing local knowledge. A dedicated agency may even have a specific subject focus on enforcement, and integrate enforcement functions across multiple other frameworks. In our view there is a strong case for greater independence in enforcement, as this does not involve questions of values. However, we leave open whether that should be through internal divisions in councils or complete institutional separation at the local or national level.

<table>
<thead>
<tr>
<th>Option 1: local</th>
<th>Option 2: mixed</th>
<th>Option 3: central</th>
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</thead>
<tbody>
<tr>
<td>Retain the status quo – councils remain responsible for enforcement</td>
<td>Central government enforcement agency (Ministry or EPA) to act alongside councils</td>
<td>Centralising enforcement functions in a government agency (such as a ministry or EPA)</td>
</tr>
<tr>
<td><strong>Bolster capacity and capability of councils</strong></td>
<td></td>
<td>Councils would play no role in enforcement</td>
</tr>
<tr>
<td><strong>Measures to protect against political influence in enforcement decisions</strong></td>
<td><strong>Bolster capacity and capability of councils</strong></td>
<td>Create capacity and capability within relevant agency, including local branches</td>
</tr>
<tr>
<td><strong>Internal separation of enforcement unit within councils, or use of independent commissioners</strong></td>
<td><strong>Measures to protect against political influence in enforcement decisions</strong></td>
<td></td>
</tr>
<tr>
<td></td>
<td><strong>Internal separation of enforcement unit within councils, or use of independent commissioners</strong></td>
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</tbody>
</table>

Figure 9.6: Options for enforcement of bottom lines
A future system could provide for greater centralisation, or shared responsibilities, for the enforcement of environmental bottom lines.

Making trade-offs

In contrast to setting bottom lines, the idea of making trade-offs above limits (or where limits do not really exist in the same sense, such as for urban amenity) may benefit from quite different institutional arrangements. As such, we see merit in exploring a potential separation between institutions responsible for setting bottom lines and those responsible for making trade-offs, which could reinforce the legislative separation for these roles floated in Chapter 8.

In particular, trade-offs require a significant focus on accountability. They are heavily dependent on the resolution of values, and communities ultimately need to be responsible, through their representatives, for making those judgments. However, in doing so it is extremely important that decision-makers are well informed by independent advice (including by scientists and planners), and that communities of interest are appropriately reflected. In this light, there may be merit in exploring the establishment of a dedicated, independent science institution, and/or one dedicated to mātauranga Māori, to act as a repository of knowledge and information to inform accountable decision-makers when making resource management trade-offs. Such institutions could be used to conduct strategic environmental assessments on industries, activities, or areas, rather than relying only on contestable evidence on an ad hoc basis. They could synthesize the astonishing amount of expert and other evidence presented to the Environment Court, rather than letting it disappear into the ether after the resolution of a particular case. The EPA could be expanded to perform such a role. That would not be a replacement for council staff (local people know local conditions), or expert evidence, but could achieve efficiencies.

Greater independence could also be useful to constrain the extent to which trade-offs are unnecessarily politicised. At the local level under the RMA, that is currently achieved by (usually) having two distinct and sequential processes – one in which an accountable council makes decisions on a plan or consent, and then one in which an independent Environment Court either confirms or overrides those decisions. Although it cannot create plans, and is not a planning authority in that sense, the Court does make value-based trade-offs under the rubric of sustainable management. That is what the Act demands of it. Some may see this as a valuable check and balance on local government, or as a crucial expert oversight role. After all, trade-offs are not just value-based, and involve substantial expert assessment. Technical input, legal rigour and fair process are crucial. Others may see it as the imposition of values by an institution that is not accountable to the local communities being affected by a plan or project. In reality, it is probably a bit of both. While we do not comment on whether they are better, alternatives are possible. The system can recognise accountability, while still pursuing the benefits of independence, in other ways. Making it harder – albeit not impossible – for an independent body’s recommendation to be rejected means that accountable decision-makers may be less likely to use decision-making processes as a way to make political hay. For example, the use of an independent hearings panel to hear submissions and make recommendations to council on Auckland’s Unitary Plan offers an interesting model. There, the ability to appeal council decisions has been dependent on the extent to which its decisions departed from the panel’s recommendations. There is a strong incentive to accept independent recommendations, but at the same time truly contentious value judgments can still be pushed back on by an institution that represents its community. The model has not been without criticism, but has also been positively received by many. Variations on this model exist, some of which emphasise even greater role for an independent hearings body.

Making trade-offs is a values-based exercise, and requires a significant focus on accountability. However, independent institutions can have important roles in providing advice and in constraining the politicisation of issues.

Whether such trade-offs should be made centrally or locally is another controversial question. By definition, and (we would argue) in contrast to environmental bottom lines, there is huge room for debate as to how we balance different values and interests. Much depends on how we define communities of interest. A future system may need to do so in a clearer way. In particular, if central government has a legitimate interest in the trade-offs being made at the local level (such as with renewable energy projects like wind farms, or with activities impacting on climate change), that may need to occur more proactively through the planning process. Spatial planning is a good candidate for greater central input in a proactive and strategic manner.

A future system could define relevant central and local communities of interest in a clearer and more predictable manner.

Again, the other characteristics of institutions responsible for making resource management trade-offs are touched on only briefly, although undoubtedly much more could be said. While a broad subject focus (i.e. the social, economic, cultural, environmental wellbeing generated by using and protecting all sorts of resources) risks objective overload, there are arguably greater risks in artificially narrowing the scope of the things that can be balanced. It is, simply, a necessary but extremely difficult role for institutions to perform. That can be helped by providing institutions with a clear set of matters to consider, and (more importantly) policies outlining a clear sense of the relationships between them. The mandate that institutions have in carrying out this role is also significant. Making trade-offs is not just about protection, and institutions may
therefore require a different normative direction than that currently provided for in the RMA.\textsuperscript{160} A focus on wellbeings more generally, for example, seems appropriate. That said, trade-offs should not just push us as close to bottom lines as we are allowed to go. Institutions’ mandate should also include a focus on pursuing synergies that achieve all wellbeings, including the pursuit of activities that enhance environmental wellbeing.\textsuperscript{161}

Delivering public goods and services

The delivery of public goods and services is a distinct role from imposing bottom lines and making trade-offs. Here, institutions need to be proactive in providing tangible things (water pipes, roads, power lines, libraries, etc) rather than just creating and acting within reactive regulatory frameworks. Currently, there is a complex array of institutional arrangements in place for the provision of public goods and services in New Zealand. Many are bespoke and respond to the challenges of particular resources and sectors. For example, some social infrastructure like schools, hospitals and prisons are funded and delivered directly by the Crown, while others like water services,\textsuperscript{162} libraries, parks and recreational facilities are funded and delivered by local councils. The national electricity grid is managed by a state-owned enterprise (Transpower). There is complex structural separation of electricity generators (some, but not all, state-owned), distributors and retailers.\textsuperscript{163} Land transport infrastructure is funded and managed through the interaction of several different institutions.\textsuperscript{164} We do not attempt to canvass all of these in any detail, and instead focus on what general kinds of institutional characteristics may be useful in a future system.

Independence and accountability are particularly debatable characteristics in the context of institutions providing public goods. At the national level, several specific issues can be thought of in this light: the sale of shares in Crown assets, the use of public-private partnerships to deliver things like schools and prisons,\textsuperscript{165} and the proposed creation of an arm’s-length (but Crown owned) Housing and Urban Development Authority to provide infrastructure in defined project areas. More generally, the legacy of inefficient and direct government involvement in infrastructure projects in the Muldoon era has cast a long shadow. Since the late 1980s we have had a system that in many (but by no means all) areas relies on either the careful regulation of private providers (eg local electricity networks), or arm’s-length or commercialised models for public delivery (eg the NZTA and various state-owned enterprises). The desirability of this model partly depends on one’s political persuasion, but in general provides valuable gains in efficiency.

Issues over independence and accountability are equally contentious where goods and services are provided locally. Some have supported greater independence in performing this role, through the extensive and mandatory use of council-controlled organisations.\textsuperscript{166} In particular, this debate over independence has played out in recent times in the context of the three waters sector (the provision of infrastructure and services related to drinking water, waste-water and stormwater).

Some goods and services, by nature of their size, distribution, or national significance, require centralisation (such as the national power grid or state highway network). Some lend themselves towards regionalisation (such as regional land transport networks). Others may depend on historical circumstance, cultural expectations, how we define communities of interest, and concerns about efficiency. For example, schools and hospitals could be provided by local government, but in New Zealand they are not. On the flipside, libraries and museums could be provided centrally, but generally they are not. There is probably little appetite for change on these fronts. One commentator has suggested that integrating responsibility for urban functions (including infrastructure) at a city level increases efficiency and effectiveness (with the caveat that responsibilities all need to be funded and financed adequately).\textsuperscript{167}

A prominent example of tensions between centralisation and localisation is in the provision of local land transport infrastructure. Local government is currently heavily (although not entirely) reliant on funding from central government (the NTZA) to provide this, and funding priorities are determined through a complex process involving regional land transport committees. Arguably, those are less institutions in their own right than they are mechanisms for different institutions (central, regional and local) to come together to decide how to spend money. Some may argue that local and regional transport networks have no significant national community of interest, and should therefore be controlled by local
government. Others may disagree. However, in practice, if we embrace a local community of interest in roads, it may be naive to expect regular central government \textit{funding} for development (transfers) not to come with a corresponding degree of central \textit{control}. Therefore a key question, and one that recurs for almost all kinds of local government roles (not just transport, and not just the provision of public goods), is whether councils need to be funded in fundamentally different ways. An alternative – although one that for many people will not go far enough to solve the underlying funding problem – is to create efficiency gains through shared services or local government amalgamation. This is explored further below in the context of three waters.

We can also pose some further questions about the characteristics “public goods” institutions should have. First, when should an institution have a \textit{subject focus} that is narrow, or broad? A narrow focus may encourage an institution to focus on its core business. For example, we do not task the Ministry of Education with building prisons, or require Watercare to provide roads. But on the other hand, a broadly focused institution – such as a local council, a Housing and Urban Development Authority or a broadly development focused council-controlled organisation – may be incentivised to think more holistically and avoid silos where close connections are needed with the provision of other public goods. It may also more easily allow the socialisation or sharing of costs between different kinds of public goods where they are equally important but not equally profitable (eg the revenue from charging users for one service, like water or recreational events, could be used to subsidise another service, like public parks).

Secondly, should we separate tasks across different institutions? The separation of regulatory and operational tasks may be generally desirable, but equally important is the connection between funding and operational tasks when providing public goods. In particular, this raises the question as to whether an institution that provides a public good should be financially self-supporting – that is, fully responsible for the funding of operations it conducts – or instead cross-subsidised by the funding role of other institutions. Again, the tension between local and national in the context of land transport infrastructure can be thought of equally as a tension between a local \textit{operational} task (councils deliver local roads) and a central \textit{funding} task (the NZTA provides funding for local roads). In other words: should local roads be delivered by councils but subject to negotiated funding from the NZTA?

We can even think of the broader tension between national and local delivery in this light. In the face of increasing costs for local infrastructure that are not linked to local government’s core funding source (rates), should local government be obliged to approach central government cap in hand for important community projects they can no longer afford? Instead, do we fundamentally change local government funding arrangements (to be less dependent on rates)? Or do we try to address the problem by seeking efficiency gains and economies of scale through widespread amalgamation and shared services models?

Thirdly, it is worth touching briefly on the mandate of an institution that provides public goods. In that capacity, such institutions are primarily about \textit{using} resources, not protecting them. That is both desirable and unavoidable – we do not magically acquire roads and water pipes by \textit{stopping} people doing things. Using resources requires an exploitative mandate, and institutions need to be in no doubt that this is what they are there for.

However, it is important to remember that we can also use resources for \textit{purposes} that are protective. For example, waste–water treatment plants are there to protect human health and the environment, not just to get rid of waste. We can also use resources in ways that are protective. We therefore suggest that those responsible for providing public goods should have a clear mandate to plan and deliver them in ways that achieve synergies. The system should avoid, as far as possible, institutions coming into conflict with other public institutions having opposing mandates (such as through Environment Court litigation following a consent application). That is a recipe for wasting tax payer and rate payer money, and lining lawyers’ pockets.

We already see this to some extent within the current system; for example, local government has a focus not just on the social and economic wellbeing generated through transport networks, but also on their environmental sustainability. There are also some environmental considerations embedded in the Land Transport Management Act. However, we are left wondering whether we can go further, by harmonising the mandates we give to our institutions. If infrastructure design incorporated protective considerations early on in the design process (through a broader mandate or even co-development with other relevant institutions), could we reject inappropriate proposals and focus on viable ones? For example, do we need to be more directive in requiring water sensitive design and greening for infrastructure in cities, which has multiple benefits for communities? Some communities are doing this anyway of their own volition, but should the system be more proactive in doing so?

Again, crucial to doing all this is to ensure that such synergistic mandates are made possible through adequate funding. To deliver on a mandate that is both exploitative and protective may require more money. But in the future could we, perhaps, use more of the money we spend on arguing about it to actually do it?

Current institutional arrangements for the provision of public goods and services are varied, and some depend upon historical circumstances. Where the relevant community of interest resides is crucial, as are questions of efficiency (both economies of scale and efficiencies from adopting commercial institutional models). The funding tools available to different kinds of institutions, and incentives, are extremely important.
A spotlight on the provision of three waters services

Institutional design issues in the three waters sector are wide ranging, multi-faceted and closely connected, and raise questions about almost all key characteristics we have identified above. The sector therefore warrants a dedicated focus here. A first principles review into three waters is also currently being undertaken in much more detail by the government (and others). Among others, issues include whether we should have a national, regional or local providers of water services; whether there should be a separation of regulatory, funding and operational tasks; the degree of subject focus that is appropriate (an institution for all three waters or just drinking water and/or waste-water); and the formality of an institution’s creation (eg multiple council-controlled organisations or a formally created Crown entity).

Currently, arrangements for providing water services vary across the country. (This is also true across the Tasman, where Australian states do things very differently and have had a turbulent history of rapid and frequent reform.) Most water services in New Zealand are provided by territorial authorities that own and manage huge networks of pipes, treatment plants, drains and associated facilities to provide people with reliable and safe drinking water, the removal and treatment of waste-water, and the diversion of stormwater. Different arrangements are in place in Auckland and in Wellington. In the former, a separate council-controlled organisation, Watercare, is responsible for drinking water and waste-water. In Wellington, Wellington Water (a council-controlled organisation owned by multiple councils across the region) was established to manage (although not own) all three water services. Central government plays no direct part in the provision of water services.

Numerous problems have emerged in recent times, making many people question whether fundamental reform is needed in the sector. Many issues, or at least proposed solutions to them, relate to institutional arrangements (in particular, their implications for a more sustainable funding model). A lot of it comes down to money. For example, the following issues all raise questions about who is best placed to provide infrastructure and services, and their ability to do so:

- Health concerns over drinking water following the incident in Havelock North and subsequent inquiry
- Environmental concerns about waste-water overflows into rivers and the coastal marine environment
- Concerns about a lack of investment in ageing infrastructure (and the risk of failure)
- Concerns about how infrastructure provision is inhibiting urban development and growth
- Concerns about resilience of infrastructure in the face of natural hazards

Here, we are concerned only with the features of institutions tasked with providing public goods and services, not those responsible for other roles (eg setting environmental bottom lines, making trade-offs above them, or allocating resources). Those other roles are also crucial for improving outcomes in the three waters sector.

Independence and accountability are two important elements of institutions providing water services. Because there are already clear pathways for it to happen, this debate often takes the form of whether services should be funded and provided by councils directly (high accountability) or through a council-controlled organisation (greater independence).

Auckland’s Watercare and Wellington Water are two examples of a council-controlled organisation model, although there are significant differences between them. Generally, council and council-controlled organisation models offer different things.

Although it is also a model that could be used, seldom do commentators go so far as to suggest the complete privatisation of water services. The risks (or at least perceived risks) involved in privatisation may prove politically unpalatable, and a degree of public control is generally seen as necessary to secure publicly important outcomes. The government has ruled out full privatisation as an option in its review, and it is generally thought to be prudent to prevent the pursuit of profit or the payment of dividends even for models placed on a commercial footing like council-controlled organisations and state-owned enterprises. Independent institutions may require robust economic regulation to prevent the abuse of market power.

However, debates over independence and accountability do not need to be about just the role of councils versus the role of council-controlled organisations. As in Melbourne, it would be possible for very localised water utilities to be set up in parallel with, but not affiliated with, local government. While these local institutions could be highly accountable (as with institutions like district health boards), most appetite seems to be for these to be independent (or at least arm’s-length), and majority owned by the Crown. They could be locally focused Crown entities or state-owned enterprises.

It would also be possible for water utilities to operate across wider or narrower geographical scales. At one extreme, we could have a single, national level water utility. That has been done in Scotland. At the other extreme, we could have a large number of local utilities. In metropolitan Melbourne, for example, there are three separate arm’s-length water retailers (as well as an overarching bulk supplier, in the form of Melbourne Water). In between, utilities could operate at many different spatial scales. We could have regional institutions, or sub regional ones. The right scale may depend on what we think sensible boundaries are - for example, catchments, local communities, the...
availability and accessibility (and equitable distribution) of reservoirs and other crucial infrastructure, the total or density of population (or projected population) available to support investment required, and economies of scale more generally. Furthermore, assets do not have to be owned by the same institutions responsible for the delivery of services. For example, the assets managed by Wellington Water are owned by several different councils at both regional and local levels. There are both risks and opportunities in using centralised or localised models.

In Figure 9.7 below, we outline broadly the options for institutional design available according to their independence (horizontal axis) and degree of centralisation (vertical axis). It may be that more than one could be adopted (e.g., treating Auckland and/or other large cities differently). 

In making choices about institutional design in the water sector we need to think about many factors. In particular, it is not possible to have a meaningful discussion about whether water providers should be local or central, or independent or accountable, without considering how they are funded. In fact, funding arrangements are at the heart of the choices we face.

Some may argue that local government should not be responsible for water services, simply because councils may (especially if their rating base is comparatively small or they are experiencing rapid growth) struggle to afford to maintain and construct core infrastructure. The latter statement may be undeniable, but the former does not necessarily follow. It is one option. But instead of removing this role from councils, the alternative is to change how local government itself is funded. That is likely to involve much deeper reforms than just widespread local government amalgamation or the use of shared services models. Those can achieve efficiencies through economies of scale and better planning where networks are linked across administrative boundaries. Both can help – after all, scale matters for some local functions – and that approach has been recommended by some. But there are more matters than resource management ones to consider when amalgamating councils, and we therefore do not address the amalgamation question directly. More fundamentally, amalgamation and the use of shared services (whether through jointly owned council-controlled organisations or not) may not address the underlying issue: councils rely heavily on rates – a form of land tax – to fund public goods. But rates do not necessarily mirror the costs of providing

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<tr>
<th>Independent</th>
<th>Arm’s-length</th>
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<td>Central</td>
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<td></td>
<td>Single state-owned enterprise</td>
<td>Single Crown entity, like the NZTA or Scottish Water</td>
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<td>Limited number of state-owned enterprises</td>
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<td>Regional</td>
<td>Private provision</td>
<td>Regional council-controlled organisations established by regional councils</td>
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<td>Sub regional council-controlled organisations established by regional councils</td>
<td>Crown entities for each metropolitan area</td>
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<td>Local council-controlled organisations operating across district/city boundaries</td>
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<td>Local</td>
<td>Local council-controlled organisations</td>
<td>One Crown entity for each city/district (or other small unit, such as a project-based Urban Development Authority or Tāmaki Regeneration Company)</td>
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Figure 9.7: Options for institutional design in the three waters sector, based on independence and centralisation
public goods (especially where there is high growth or demand), and there is a limit to what ratepayers can (or are willing) to fund. That problem can be acute where a rating base is small and dispersed. Councils and council-controlled organisations can also charge users for water services (through volumetric charging and connection fees), but there are issues with that mechanism too.

We suggest that from a wider system perspective there are three core issues that need to be resolved before we decide on future institutional arrangements (some of which are intimately connected to choices of funding mechanisms, discussed in Chapter 13). Aside from these, we can ask more broadly whether our institutional arrangements for three waters needs to be uniform across the country, or whether we can treat some areas (eg Auckland) as needing bespoke arrangements.

1. **Where does the relevant community of interest lie in controlling three waters services?**

   If there is no discernible local community of interest in the provision of water services, then greater efficiency and economies of scale would suggest they should be provided at larger scales (regional or national levels). On the one hand, there appear to be very few local, value-based, questions to be answered. Pipes do not look different in Rotorua and Alexandra. Water quality standards should be no different in Wellington and Christchurch. Arguably water services play less role in shaping unique local communities than schools do, yet the latter are a firmly central responsibility.

   On the other hand, is there a cultural expectation in New Zealand that water will be provided locally? Is that due to historical circumstance, and needs to be retested? And would that prevent regional control? There are also the broader financial and existential implications to consider. If councils rely on water charges for revenue, or it is a huge part of what they do, are we severely limiting what they can do for their communities by taking that away? Perhaps not, if we rethink how local government is funded more broadly. There are measures we can take to better enable local government to meet the costs of three waters services, but we first need to ask if it is really a local service being provided. Form should follow function.

2. **To what extent do we want to charge users the true cost of the services provided to them?**

   The costs associated with water services can be significant. While institutions certainly need the ability to fund them in a sustainable and predictable way, we also need to remember that water is a public good. Where costs per capita are high or there is deprivation (or even arguably in principle), it would be wrong to generate profits or expect dividends to be paid by a water utility. That can be enshrined in law, or policed by an economic regulator. But should we seek to recover costs from users (and offer separate and targeted welfare support – such as rates rebates – for those who cannot pay), or instead subsidise water use in the same way we subsidise healthcare, medication and education? That has implications for institutional design, as councils, for example, are in a good position to socialise all sorts of costs when making long-term and annual plans. General revenue from rates can be used to “subsidise” any charges received from water users, making the cost of water services appear lower. However, if we want the actual costs of services to be internalised (and potentially make efficiency gains), then greater independence may be more desirable.

3. **At what scale should we socialise the costs of water services?**

   There can be significant variation in the “true” cost of water services provided to individuals or properties. Even if we expect users as a whole to bear the full costs of services provided to them, that does not mean that each user bears his or her actual cost. As with all services, charges can be socialised across various scales. This tension is most noticeable between urban and rural areas; the cost of infrastructure per capita can be significantly more in the countryside than in the city. This has implications for institutional design: the larger the customer base, the greater an institution’s ability to cross-subsidise and level out charges across its area of activity. Thus we need to ask a value-based question: to what extent do we want to subsidise water services for those who impose larger costs? Spatially larger utilities, and those that encompass larger and both high and low-density populations, can have both overall efficiency gains and the ability to more evenly distribute costs amongst users.

   This is not the place to pre-empt the much more in-depth consideration of such matters being undertaken in the government-led three waters review. Readers should also be directed to significant work that has been done by Local Government New Zealand. However, we refer specifically to a “middle-ground” option that has been floated by Infrastructure New Zealand, in which water (and, indeed, transport) infrastructure and services would be provided on a not-for-profit basis by regional-level council-controlled utilities. That would recognise a regional community of interest, a degree of value-based and independent decision-making (in that councils retain arms-length control), some economies of scale, and the ability to socialise costs across significant sections of population. It would not necessarily preclude the subsidisation of services by local (or even central) government, but would also allow for user charging.
A spotlight on Watercare

Watercare is an entity that largely operates within the existing legislative framework for council-controlled organisations (albeit with some Auckland-specific tweaks) that could be replicated over larger areas – perhaps at a regional level – to deliver greater efficiencies in the delivery of water and waste-water services.

Watercare has statutory responsibility for providing water and waste-water services to customers within the Auckland region. Prior to the amalgamation of local authorities in Auckland in 2010, it was a wholesale provider in the water and waste-water business, with its major customers being the six local councils or water retail companies (such as Metrowater) which each operated local networks and on-sold Watercare’s services to households and businesses in the Auckland region.213 Upon amalgamation, Watercare took on responsibility for both bulk and retail supply across the region.214

The new Watercare was responsible for $11.8 billion in assets, and turned over annual revenue of $466 million.215 Infrastructure New Zealand points out that since amalgamation of councils in Auckland, capital investment has occurred in the Franklin and Rodney districts that both councils could not afford before amalgamation.216 It has allowed costs to be socialised across wider areas.

As the designated “Auckland water organisation” under the Local Government (Auckland Council) Act 2009, Watercare has a range of unique powers and obligations which allow it to deliver those services under its current council-controlled organisation model to meet the demands of the growing population it serves.

Watercare acts independently of Auckland Council, but has responsibilities to give effect to relevant aspects of a long-term plan, and must act consistently with relevant aspects of any other plan or strategy of the Auckland Council to the extent specified in writing by Council’s governing body.217 It must also provide a statement of intent, which includes a narrative on how the organisation will contribute to Auckland Council’s and, where appropriate, the government’s objectives and priorities for Auckland.218

Proactively pursuing positive outcomes

In Chapter 7 we discussed how the pursuit of positive outcomes requires proactive measures, not just the creation of reactive frameworks based on assessing the adverse effects of activities. It is a fundamentally different kind of role to setting bottom lines and making trade-offs between positive and negative effects. We also touched on this in Chapter 8 in the context of legislative design, suggesting that the RMA may fall short (for example, as an outcomes-based urban planning statute). But what kind of institutions do we need to pursue positive outcomes, not just prevent bad ones?

Many such institutions already exist. They are particularly noticeable where public authorities have been given specific statutory mandates to seek improvements to the status quo. For example, the Department of Conservation is tasked with advocating for the environment, and the Energy Efficiency and Conservation Authority runs education campaigns to change people’s behaviours. The Queen Elizabeth II National Trust proactively facilitates the voluntary protection of open space. Although the RMA does not provide specific mechanisms for doing so, councils are also exhorted to enhance the environment.219

All of these involve more than just the provision of public goods – they are about improving outcomes in which there is a public interest.

We can think of an institution’s role here as on a spectrum. At one end, an agency takes concrete action itself (eg the Department of Conservation’s advocacy role), and at the other it facilitates action if private persons wish to do so (eg the Queen Elizabeth II National Trust makes it easier to formalise voluntary measures). In between, institutions may encourage people to take action (eg the Energy Efficiency and Conservation Authority), or direct people to act in certain ways. Examples of the latter are few and far between, because our institutions operate in a system where regulatory intervention (making people do things) is linked strongly to the adverse effects they create (eg mitigation and offsetting). In other words, it is hard for institutions to make people take action to achieve positive outcomes unless they are doing something harmful. The system is responsive, not directive.

But do we need institutions to do more in this area? Do we need them to drive a wider variety of outcomes – or even particular activities – that are deemed desirable? We think there is merit in exploring this. In particular, we think that two kinds of outcome require a more proactive approach, and could be assisted by a degree of institutional change across the whole spectrum outlined above. As discussed in Chapter 7, the first is urban planning, and the second is environmental enhancement.

Concrete action by public authority (eg Department of Conservation advocacy)  
Forcing private persons to act  
Encouraging private persons to act (eg energy efficiency education campaigns)  
Facilitating private persons to act if they wish (eg QEI National Trust covenants)

Figure 9.8: A spectrum of how public authorities can pursue positive outcomes
Urban planning requires the pursuit of positive outcomes, not just the prevention of harm. We have previously described how the current legislative framework could better reflect this. But what about the institutions responsible for urban planning? Do they need to be fundamentally redesigned? There is significant overlap here with the role of institutions in making trade-offs, because how those trade-offs are made is intimately linked with the positive outcomes we wish to achieve (positive outcomes often come at the cost of something else). For example, a council may impose a compact urban form in order to make a positive contribution to climate change, but that may impact on the price, and thus sometimes the affordability, of land for housing.

Urban planning institutions in the current system are already proactive in their pursuit of positive outcomes. A quick look at any strategic document of a city council anywhere in New Zealand will tell us that, as will the Local Government Act. Reform may therefore, to some extent, simply be about recognising that more explicitly in legislation like the RMA, and clarifying what common urban planning principles are. In other words, a positive planning mandate of urban planning institutions (councils) could usefully be formalised in legislation. As with trade-offs, the positive urban outcomes that institutions pursue are often values-based. Accountable institutions like councils (informed by robust and independent technical advice) are generally appropriate for determining questions where value judgments are required.

But what about our institutions’ degree of centralisation? Central government, in particular, has historically been less than engaged in matters of urban (and broader land use) planning except on a highly reactive basis, but regional councils across the country also show varying levels of engagement in urban matters. Are urban issues really still purely local (especially in the case of Auckland, which due to its size and economy has significance for the country as a whole)? Do we need to centralise or regionalise some decisions about how our cities (and land uses more broadly) are shaped and the outcomes they pursue? If so, which ones? We do not explore such questions in detail here, but suggest that central government could usefully engage much earlier in the process. That could involve many things, for example:

- A mandatory review and feedback role for the Ministry for the Environment (or equivalent central government institution) with respect to district/unitary plans
- A duty (not just a power) to create comprehensive formal statements of government urban policy (such as NPSs) in advance, not just in response to particular problems (eg housing or development capacity)
- A formalised process for national or regional (or multi-regional) spatial planning to occur, comprising representatives from local, regional and central government
- A clearer mandate for central government involvement in positive urban outcomes (at present, the Ministry for the Environment)
- An umbrella organisation comprising various relevant ministries, meaning that central government speaks with one voice on matters of urban and land use planning
- A chief planning advisor, in the same way we have a chief science advisor
A spotlight on environmental enhancement

A reactive approach to resource management (preventing harm or balancing it against other benefits) seems unlikely to achieve the improvements to the natural environment we desire. We can steer trade-offs in positive directions – for example, a net gain approach to offsetting, and the concept of biobanking, may help. However, ultimately, the system – and institutions within it – need to be more proactive in pursuing positive environmental outcomes. Potential harm should not be the only trigger for improvement.

In some cases this may mean our institutions simply need to be well funded and resourced to pursue firm mandates themselves (eg the Department of Conservation’s advocacy role, and its and regional councils’ pest management functions). However, there are three other ways by which active steps can be taken.

First, as with the Queen Elizabeth II National Trust, institutions can facilitate people to make environmental improvements if they wish. Could we make better use of that in New Zealand? We would not have to use formal measures to the same extent as the Trust (legally enshrining open space covenants on property titles); the broader point is that institutions should make it easy for positive action to occur. For example, some may wish to address climate change, but not know how, or think that their contribution will not make a difference. A person might want to help plant trees, but not have the actual saplings. Some people may have great ideas but no money. An institution working with – and not just funding – communities can make that kind of thing easier. Institutions can also nudge people towards positive behaviours without taking away their freedom of choice.227

Secondly, institutions can work to change people’s hearts and minds. Some people may call this an “education” or “advocacy” task. The Energy Efficiency and Conservation Authority is already charged with doing this, as is the Ministry for the Environment.228 But can we go further – highlighting to New Zealanders in accessible ways that we can all do our part to improve our environment? Should we embrace public service messaging about “100% Pure New Zealand” at home as much as we do overseas? Enviro schools is a positive initiative,229 but what about fundamentally changing the school curriculum to shape the thinking of a new generation of New Zealanders? We cannot forget that our education institutions are a crucial part of the resource management system.

Thirdly, and perhaps most controversially, we can be more directive as to what activities people should do, and where. Institutions can allow or direct things to happen in places that provide positive outcomes for the country, not just in ways that prevent degradation. But taking a more directive approach to resource management does not mean coercion. It might, for example, mean the creation of a strategic central government spatial planning agency that sketches out key transport infrastructure, biodiversity corridors, limits to urban sprawl, where wind farms are most suitable, and so forth. It would not make people do things, but it would set out with more certainty where people should do things.230

Hauraki Gulf islands
A spotlight on the Sea Change – Tai Timu Tai Pari Marine Spatial Plan process

The Sea Change – Tai Timu Tai Pari project is an example of a strategic planning process primarily aimed at achieving positive outcomes through environmental restoration (of the Hauraki Gulf). Its vision was a Hauraki Gulf that is “vibrant with life, its mauri strong, productive and supporting healthy and prosperous communities”. The project sought to achieve such positive outcomes by adopting a holistic lens to identify the strategic drivers of environmental decline and measures to address them. The scope of the project included all activities impacting on the ecological health of the marine area including fishing and land use. It also sought to provide for expanding sectors such as aquaculture. The resultant plan is non-statutory and contains a mix of goals, objectives, policies, actions and spatial delineations.

The structure of the Sea Change project was novel in that it brought together co-governance and collaborative models for a specific project. The 16-person governance body (“project steering group”) comprised eight mana whenua representatives selected through a tikanga Māori process and eight representatives of government entities. These included Auckland Council, Waikato Regional Council, Thames-Coromandel Council (representing territorial authorities more broadly), the Department of Conservation, Ministry for Primary Industries and the Hauraki Gulf Forum. The plan itself was developed by a collaborative grouping comprising four mana whenua and 10 stakeholder representatives (“stakeholder working group”). The final plan was agreed by all members on a consensus basis and then adopted by the co-governance body. Once the plan was finalised (after three years) these two groupings were dis-established.

So to what extent does the protection and promotion of Māori interests require institutional reform? There are three things to consider here. First, to some extent the role can be discharged by existing institutions that are subject to sufficiently strong directions to do so. Such directions are found in, for example, the provisions in the RMA concerning ancestral relationships, taonga, and wāhi tapu. In crude terms, that is about trusting institutions that are there for other reasons – whether Crown or local government – to protect Māori interests on behalf of Māori while performing those roles. Such directions could be strengthened, and to do so is consistent with the Crown's duty of active protection. But relying solely on this approach does not allow Māori to shape their own identity and destiny, in the same way that local chapters of a government department do not truly reflect local communities of interest. In New Zealand, a distinct Māori community of interest exists alongside, and not beneath, central and local ones. The real institutional issues here are about power to exercise values, not about values per se.

Secondly, decision-making institutions themselves can be modified to be more reflective or representative of Māori interests. This does not give Māori full agency, but ensures that their voice is heard – not just that their interests are considered. Those are quite different things. However, there is a huge spectrum of options in this category. At one end would simply be strengthened participation and consultation rights. Consultation is a core element of Treaty principles – and must be meaningful. But such measures cannot really be described as institutional ones. At the other end are measures like Māori wards for local government, and Māori electorates for parliamentary elections. In between are a vast range of potential options, like advisory bodies (eg the Māori Advisory Committee under the EEZ Act and the Independent Māori Statutory Board which promotes issues of significance to Māori to Auckland Council), advisory and advocacy agencies (such as Te Puni Kōkiri), and partial decision-makers (eg Māori appointees to a board of inquiry).
A spotlight on Te Mata Peak

In 2017 the Hastings District Council granted a non-notified consent for earthworks on Te Mata Peak to construct a walkway. However, aside from landscape concerns, the site where the earthworks were carried out is of paramount significance to the tangata whenua. The Chairman of Ngāti Kahungunu, Ngahiwi Tomoana, said “it was like a stab to the heart”.

Problems of this nature do not arise from an inadequacy of the RMA, but from its implementation by institutions. In principle, the RMA provides protection for such places. In practice those implementing the Act need to be aware of the cultural values which can be impacted by an activity. Improved implementation requires a changed mindset within councils and their staff, and development of capacity. Had an identification of cultural impacts been competently assessed and included in the impact assessment required for the consent application, the significance of the cultural impacts would have been realised. That would have impacted on the notification decision, and the substantive decision to grant consent.

The example of Te Mata is repeated frequently across the country, but seldom with the same level of publicity. Ways to reduce and eventually eliminate these problems include:

- Increased capacity within iwi and hapū entities for RMA implementation
- Increased capacity within councils for understanding and responding to Māori cultural issues
- Effective guidelines and information for council officers, applicants and tangata whenua
- Identification of sites and landscapes of significance to tangata whenua in RMA planning instruments, along with effective policies for their protection

Thirdly, we can create, recognise or strengthen Māori institutions as decision-makers in their own right. This is about recognising Māori agency, and the Treaty partner’s rights as kaitiaki and rangatira to manage or control resources according to tikanga. This could be about allowing Māori institutions to exercise customary rights to use resources in culturally significant, or traditional, ways. This has been recognised to some degree in the Marine and Coastal Area (Takutai Moana) Act 2011, for example, and may sometimes require the relaxation of more general restrictions on resource use. It could also be about recognising rights to actively manage particular areas or taonga (eg wāhi tapu sites). That may go some way towards the vision of Da Cunha: “what we must guarantee for the future generations is not the preservation of cultural products, but the preservation of the capacity for cultural production.”

However, arguably more significant would be a move towards enabling Māori institutions to determine broader questions of environmental protection in accordance with tikanga. This is fraught because it is a question directly about power sharing or transfer, and there is usually a significant public interest existing alongside a Māori interest. For example, while the RMA allows for the delegation of some council powers to Māori, that has not in practice been embraced. However, a more recent provision for joint management agreements, which provide for power sharing between council and iwi or hapū has been taken up. Some have called for a model that embraces Māori more as decision-makers than just as participants or the objects of decision-making. For example, Dr Robert Joseph has expressed a view that the RMA is “a right to culture model in that [it is] not aimed at granting political authority to Māori but rather focus on stewardship, the ‘relationship’ of Māori with their environment, and effective participation in decision-making that may impact on them”.

That said, we are already witnessing a move towards greater (rather than total) power for Māori through partnership institutions. This has been partly, although not entirely, driven by bespoke arrangements reached under Treaty settlements. For example, the governance arrangements for Te Urewera and the Whanganui River, coming out of the settlement process, have been radical and transformative, but broader work has been ongoing (such as in Mana Whakahono a Rohe under the 2017 RMA reforms). Māori are developing an increasingly powerful political and economic voice in New Zealand, and that is being reflected in an increasing recognition of the value of partnership and co-governance in how resources are managed. That trend may continue in a future system, albeit subject to the public interest in environmental protection.
A spotlight on the Waikato River Authority

The Waikato River Authority was established under the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010.244 It is a bespoke institution and the result of the settlement process between the Crown and Waikato-Tainui, set up to facilitate the co-governance and co-management of the Waikato River catchment. It is responsible for the Vision and Strategy relating to the river, and is the trustee of the River catchment. It is responsible for the Vision and co-governance and co-management of the Waikato River. But outside of this, and as we move into a post-settlement world, what should broader co-governance and partnership arrangements look like? Where should our efforts be directed?

The Authority does not replace the Waikato Regional Council, but takes on significant powers under the RMA. The vision and strategy is deemed to be part of the Waikato regional policy statement, and prevails over most instruments made in the RMA if they are inconsistent, as well as triggering reviews of resource consents.245 The document must also be given effect to under other legislation such as the Conservation Act.246 Its integrated river management plan must also be had regard to by the regional council when making or reviewing plans, and there is provision for it to exercise decision-making powers on plans under the RMA through a joint-management agreement.247

There are three characteristics of the Authority that warrant attention, in that they differ significantly from characteristics of institutions under more general legislation. First, it is less directly accountable, even though it is charged with making value-based decisions. It operates at arm’s length of councils, the Crown, and iwi, even though its board is appointed by them. It is also less accountable to the communities typically recognised under the RMA, in that half of its board are appointed by iwi. It can hold meetings behind closed doors.248 Secondly (at least in terms of its RMA functions),249 it is more centralised. Iwi and councils represent local interests, but the Crown is responsible for nominating three of 10 board members and the Authority provides an annual report to the Minister for the Environment. In effect, that provides a more direct pathway by which central interests can shape regional level RMA plans. Thirdly, the geographical focus of the Authority (a river's catchment) is narrow compared to more general institutions. Finally, the Authority has binding power (which is really what makes its other characteristics significant).

The Waikato River Authority can be contrasted with a pre-settlement entity such as the Hauraki Gulf Forum. Instead of an equal split, the Forum has only six tangata whenua representatives out of a total of 21 members (the other being from local and regional councils and government departments). Instead of being selected by iwi/hapū themselves, the tangata whenua representatives are appointed by the Minister of Conservation, although after consultation with tangata whenua and the Minister of Māori Affairs.250 The Forum has no binding powers, but brings together iwi/hapū with local/regional/central government entities to share information and jointly consider management issues affecting the Hauraki Gulf.251 It is therefore an integrating rather than management body. A recent review has indicated that the Forum has not been a successful model,252 and there have been proposals to restructure it to be more in line with the Waikato River Authority (although with some modifications to incorporate community representation).253

The key question in our minds is which of the three kinds of institutional pathways described above (and represented in Figure 9.9) we should focus on in a future system. Embracing the latter two are, to some extent, inevitable – given that co-governance and the transfer of decision-making power is an increasing focus of bespoke Treaty settlements like that concerning the Waikato River. But outside of this, and as we move into a post-settlement world, what should broader co-governance and partnership arrangements look like? Where should our efforts be directed?

One commentator has suggested the Waikato model could usefully be rolled out more broadly.254 Already there is a trend towards this basic kind of model (e.g. in the co-governance framework established under the Pare Hauraki collective settlement).255 In Working Paper 3, Dr Robert Joseph outlined his view of a more radical move towards power sharing or transfer.256

Institutions must protect and promote Māori interests in a future system, but there are different ways in which that could occur. To some extent the role can be discharged by existing institutions that are subject to sufficiently strong directions to do so. Alternatively, institutions could be modified to be more reflective or representative of Māori interests. Another option would be to recognise or strengthen Māori institutions as decision-makers in their own right, or provide for greater partnership.

We do not attempt to provide an absolute answer to this question. It is, in essence, a political one, and one that must evolve organically. But we suggest that a future system should provide a flexible arena within which all these options can expand or contract without the legal

Figure 9.9: Options for institutional design to protect and promote Māori interests

Strengthen directions for existing institutions
Modify institutions to allow a greater Māori voice within or to them
Strengthen Crown-Māori partnership institutions
Create, or give power to, Māori institutions
framework requiring constant tinkering or being at risk of falling apart entirely. Coherence is also important; while we must recognise Māori rights to manage resources, and respect the differences between iwi and hapū (as with different local communities), an endless series of bespoke institutional arrangements can produce a system that is complex, fragmented, unclear and inaccessible. The variety of institutional arrangements that emerges will ultimately be determined by political concerns, but these are consequences to consider.

Finally, we need to think carefully about the institutional characteristics that we should embrace, especially when giving more agency to Māori and partnership institutions. Careful thought is essential, especially because the protection of Māori interests is very seldom separate to the other roles the system must perform. Therefore the institutional arrangements discussed above – in relation to setting bottom lines, making trade-offs, and pursuing positive outcomes – may need to be altered when we apply a Māori interests lens to them. We offer some food for thought below.

**Accountability**
If an institution making value-judgments is required to be accountable, to whom should it be accountable and in what measure? And to what extent should the system prescribe the ways in which Māori and partnership institutions should be responsible to the people they speak on behalf of?

**Independence**
Is there a distinction to be made between value-based Māori questions and “independent” Māori advice, and should that be reflected through the separation of institutions?

**Centralisation and localisation**
To what extent should Māori and partnership institutions reflect the “Aotearoa” perspective, or that of local iwi and hapū? And when should iwi authorities or hapū be responsible for making decisions?

**Subject focus**
Given the integrated and holistic nature of Te Ao Māori, is it jarring for Māori and partnership institutions to be separated according to particular subjects (land, air, water, economic development, housing, etc)?

**Geographical focus**
When should Māori and partnership institutions be focused on particular places of special significance, rather than on the whole of their rohe?

**Mandate**
Is it artificial to give a specific mandate (eg environmental protection) to a Māori or partnership institution in light of the integrated focus in tikanga on connection and familial relationships?

**Power**
To what extent should Māori have ultimate decision-making power where the public interest is at stake? Do we pursue a consensus building approach to partnership, or a hierarchical one?

**Formality of creation**
To what extent should we enshrine Māori institutions in Western style legislation, or allow them to evolve under more fluid concepts like tikanga?
A spotlight on iwi authorities

During the development of the RMA and the Local Government Act a parallel statute was also being developed, the Rūnanga A Iwi Act. This statute was to provide details for the structures, constitutions and operations of iwi organisations, and their formal connections and relations to local governments and the RMA. The legislation was enacted and repealed on the same day in 1991. Leaving aside the question of whether this would have been beneficial legislation for Māori, it would have clarified how local government should engage with iwi. In its absence and the absence of any other comparable legislation, the nature of iwi engagement has been unclear and is often problematic. The RMA definition of an iwi organisation is not helpful in this context.

In some areas there is little or no ambiguity about which is the relevant iwi to engage with (but even in those areas there can still be localised dispute). In other areas it is very unclear and often highly contested. For example, in Northland there are hundreds of hapū, some with populations greater than many iwi. In practice, engagement with hundreds of hapū is not usually possible. How should councils determine which to engage with? What criteria are relevant when deciding this?

This is an area for which improved statutory definitions, processes and standards could be developed. In some places, such as Auckland City, the “mana whenua” recognised are those with Treaty settlements. While this ensures that the entities have a legal personality and constitutions providing for accountability to beneficiaries, a tikanga based solution is an alternative. A requirement that there are processes agreed to by iwi specific to RMA implementation, which require the iwi organisation to ensure that beneficiaries are appropriately informed and included in relevant decisions, could be considered as a means of satisfying hapū anxieties. Whatever the solution, the problem is a real one for both councils and tangata whenua in many regions and could usefully be addressed in system reform.

Resolving disputes

How we manage resources is fraught with disagreements. Disputes can range from the lofty (how ambitious our climate change targets should be) to the mundane (my neighbour’s fence is a few centimetres higher than it should be). The law must be capable of resolving all of them. To do so, it requires institutions. In most other areas of the law, disputes are resolved by two key kinds of institutions: policy disputes through accountable representatives (and ultimately the parliamentary process), and legal disputes through the courts. Legal disputes are about how the law is applied and what it means, and are therefore generally resolved through independent – and central – judicial institutions that have no value-based mandates.

The resource management context is slightly different, in that there is a much fuzzier distinction between disagreements over policy and disputes over how the law is applied. Institutional arrangements reflect this. Decisions on plans, for example, can be seen equally as the application of the RMA or as the creation of policy. Consent decisions commonly end with a conclusion that an outcome is demanded by the sustainable management purpose of the Act, but behind that is almost always significant evaluation and judgment. Even a provision described as a “policy” may sometimes turn out to be a rule to be enforced rather than a value proposition to be weighed. That fuzziness is not a bad thing. It is the reality of environmental decision-making. As such, we have all sorts of institutions with different characteristics involved in making all kinds of decisions – courts, councils, Ministers, boards, commissioners, and Crown agencies.

But in a future system, should we draw a sharper distinction between a policy role and a legal dispute resolution role? The answer has implications primarily for the situations in which we use accountable or independent institutions – notably councils and Ministers as opposed to commissioners and courts – but it also affects how local institutions should be, and what their mandates are. Values-based policy questions may be local, but the pure application of such policies should not require values and therefore need not be local. And an institution responsible for creating a policy may need to be driven by an environmentally protective mandate, but one responsible only for applying it need not be.

That said, part of the current fuzziness is because our system is highly effects-based and contextualised. Policies in planning instruments (and the RMA itself) are general and can conflict, so even low level decisions (eg on consents) in practice often need to be more about determining policy questions (weighing many considerations) than “applying” the law. That has its benefits (greater contextualisation based on actual effects of a proposal), but also its downsides (eg extensive arguments about whether the Environment Court should be allowed to make value judgments on behalf of communities). A more prescriptive and directive system (in which plans were characterised more by permitted and prohibited performance standards rather than discretionary criteria) could go some way to making a sharper distinction between policy creation (for elected institutions) and its application (for independent ones). So too could a system in which policies were clearer, firmer, more specific, and more hierarchical. Formally removing consenting powers from councils, in favour of independent commissioners and the Environment Court, may even provide an incentive for councils to make that happen in plans.

It may be possible in a future system to draw a sharper distinction between a policy role (for accountable institutions) and a legal dispute resolution role (for independent institutions).

As discussed in Chapter 7, there may also be a narrow class of effects or activities that are not really about securing the public interest, and which do not require...
value-based policy decisions to be made. In some cases – the height of a fence or the colour of a letterbox – we may simply require certainty to address differences between neighbours. That would be much more firmly in the realms of dispute resolution, and fertile ground for independent, national level and normatively neutral institutions (such as a Disputes Tribunal). It would, however, be a difficult distinction to draw.

**Allocating non-private resources**

As discussed in Chapter 7, a future system needs to provide a framework for how non-private resources are allocated. Arguably the most pressing question here is not institutional, but normative (the principles guiding how allocation occurs). However, it still matters who is responsible for making decisions.

In the current system, various kinds of institutions are responsible for allocation, depending on the resource. There is now a market for fisheries quota to be traded, but initial allocations we made at the national level. Similarly, rights to Crown owned minerals are (unsurprisingly) allocated by central government. However, the allocation of the most controversial non-private resources is currently managed by regional councils. This includes freshwater and coastal space. Freshwater allocation has proved to be the most notable flashpoint in recent years, as the resource becomes scarcer in some parts of the country.

It would be possible for many different kinds of institutions to allocate resources (including freshwater). Their ideal characteristics will, however, depend on what we think the allocative role is all about: whether it is about determining values or simply applying them; whether it is about resolving private disputes or pursuing the public interest; and whether we see a national interest in the uses to which resources are put beyond the adverse impacts that they cause.

Accountability and independence are key features. Accountable institutions are vital in determining values, whereas independent ones are most useful in applying pre-determined values. The extent to which we adopt each for allocating resources may therefore depend on the extent to which we are able to enshrine specific value positions (eg a set of precise allocative principles) in legislation, or at least in regulations and plans. It is somewhat ironic (although not wholly surprising) that accountable institutions (Ministers and councils) often shy away from making value-based decisions about allocation, yet independent ones (courts) are more willing to step into that breach and engage with values.

Generally speaking, we see merit in our laws and policies being more proactive in setting principles for allocative decisions beyond the general purpose and principles of the RMA. That will be hugely challenging, because so many interests are involved; the public interest is overlaid with significant private conflicts as well as Māori rights and claims. But if any of this proves politically achievable, then arguably there should be some role for independent institutions to apply those principles at the stage of individual applications. At the other end of the spectrum of ambition, if economic efficiency (or financial return) is accepted as the only real concern, methods like auctioning could also legitimately be overseen by an independent institution.

How centralised institutions should be is also a key question. As with all of the system’s roles, the degree to which allocative institutions are central or local depends primarily on where the relevant community of interest resides. That, in turn, can depend on the resource in question. Fisheries, for example, requires consideration at the national level, as do many minerals. Resources like freshwater are more difficult.

There is an unquestionable national interest in freshwater bottom lines – increasingly firm guidance under the NPS for Freshwater Management attests to that. There is also a regional interest in the environmental management of freshwater, and regional councils are well placed to address those given their jurisdictions reflect catchment boundaries. But allocation is different from setting bottom lines or making trade-offs. So, is there a national and regional interest in to whom water is allocated above minimum quality standards and flows? Is there even a public interest, or is this primarily about resolving conflicts between private persons? Different people may have different answers to those questions.

There may be a public interest in how public resources are used, although not necessarily in who specifically uses them. This distinction is not always clear, admittedly. For example, we can see a public interest in whether water is used for different big picture uses (eg agriculture or hydroelectric generation), but that public interest becomes less obvious as we get more specific. So, for example, is there a public interest in whether scarce water goes to horticulture or agriculture? Or sheep farming versus dairy farming? Maybe there is – especially if we are using allocation as a tool or proxy to address wider environmental issues associated with land uses. At the very least we see room for greater involvement by accountable national institutions in setting overarching allocative principles, and for defining the arena in which regional and sub regional institutions can make decisions.

But what about whether water goes to dairy farmer A or dairy farmer B, whose operations and impacts look very similar? That is arguably more about resolving private interests, and the public interest has little to say about it. The answers to these questions have implications for institutional design. Institutions pursuing the public interest need to represent or reflect their “public” as a whole (whether national, like the Environment Court, or local, like councils). But those concerned with dispute resolution need not be – they can be more targeted at the people involved. In many areas of the law, for example, mediation involves no interests but those of the parties.

In particular, if there is a strong sub local community of interest in allocative questions (eg at individual catchment or sub catchment level), then that can affect the decision-makers we may choose to use. For example, a number of water zone committees have been set up in Canterbury,
being groups comprised of local interests that make recommendations on the catchment level content of regional plans.264 While the regional community of interest is not excluded – final decisions are still made through the regional council planning process – it recognises that some sections of the public should have a stronger voice than others.

Running through all of the discussion above is a key distinction between the power to make ultimate decisions about allocation, and the power to make recommendations. That is particularly crucial in the context of collaborative groups – institutions comprised of carefully selected stakeholders that work together to a common end. Collaborative groups are not just about dealing with the allocation of resources, but they can be particularly useful in contexts like it where tensions can be high and there is little specific normative direction to guide decision-making. We shine a spotlight on collaborate groups in the following chapter, in the context of public participation.

If collaborative groups are solely about dispute resolution – sorting out the differences between private stakeholders – then there can be little objection to giving them the power to reach whatever agreement the parties see fit.265 In essence, it is a proactive form of mediation. In that case, it is essential that all stakeholders are represented and adequately resourced. However, that is rarely the case. In most collaborative processes the public interest provides a backdrop against which discussions occur. Collaborative groups generally aim to do one or more of three things:

1. Reach consensus (or at least reach as much common ground as possible) to resolve conflicts that would later arise in more formal or adversarial settings
2. Advise ultimate decision-makers by exploring issues that they are close to and have intimate knowledge of
3. Enable communities to create or co-design their own planning instruments rather than having to respond to plans created by others

In most cases, the ultimate power of decision still rests with other institutions, because the public interest runs deeper than just the interests of the stakeholders involved. Allocative choices are rarely only about dispute resolution. However, even if powers are recommendatory, these groups can provide extremely valuable contributions by defusing tensions early on, encouraging stakeholders and communities to “own” their plans, and giving final decision-makers a degree of confidence that their recommendations will be broadly acceptable.267 They can also enhance the transparency of decision-makers, because the public can easily determine the ways in which a decision has departed from recommendations.268

It would be possible for many different kinds of institutions to allocate resources. Their ideal characteristics will, however, depend on what we think the allocative role is for. Accountable institutions are important for deciding values (a principles-based approach to allocation), but independent ones could facilitate technocratic exercises (such as auctioning). Institutions’ degree of centralisation may depend on the nature of the resource in question. Collaborative groups are one possible way forward for allocative questions, although they have their risks.
9.4 Concluding comments

In Chapter 9 we have considered how institutional arrangements might be altered in a future resource management system, based on the characteristics that may be useful to perform the system’s core roles. As with all aspects of the system, some options may be radical (eg the establishment of an independent agency with a role in contributing to bottom lines) while others may involve smaller scale, iterative change (eg the continued establishment of co-governance and co-management organisations for particular places or resources). Some institutional changes are likely to occur over the short term: for example, the establishment of a Housing and Urban Development Authority, an independent infrastructure advisory body, and a Climate Commission are well underway. It is important that these and other reforms are considered within the context of potentially wider system reform, and that we focus on their characteristics, relationships with other institutions, and the overall degree of fragmentation and complexity within the system.

We end this chapter with a few brief words on some characteristics that all institutions should have in equal measure. First, all institutions require clear and predictable funding streams. Core funding is especially important for those having a degree of independence from politically accountable institutions (who quite rightly hold the discretionary purse strings), or where local institutions are reliant on central funding. Funding arrangements should not be allowed to create perverse incentives. Funds also need to be proportionate to the roles an institution is expected to play. That is particularly a problem for local government, given significant increases in the cost of core infrastructure over recent times, an ever-larger array of responsibilities, and constrained sources of funding (notably rates and debt).

Capability is just as important as funding, and the two are related. Institutions rise and fall on the strength of the people within them. That is partly about technical expertise and experience, but includes capability in matters relating to the Treaty of Waitangi and mātauranga Māori more generally. We need to be mindful that New Zealand is a small country, and a proliferation of institutions can affect our ability to staff them appropriately. Although it is much harder to influence in a reform exercise, the culture and leadership of those directing institutions is crucial to their performance. We need to recognise the limits to what institutional design can achieve; a lot will always come down to the people involved.
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<thead>
<tr>
<th>Sub-theme</th>
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<tbody>
<tr>
<td>Direction of travel</td>
<td>Retain current institutional arrangements; OR</td>
<td>Add new institutions and/or redistribute functions between existing ones; OR</td>
<td>Fundamentally change our institutions (e.g., local government)</td>
</tr>
<tr>
<td>Setting bottom lines</td>
<td>Retain the status quo; OR</td>
<td>Greater use of independent institutions (e.g., EPA and Resource Management Commission); AND/OR</td>
<td>Greater use of central institutions; AND/OR</td>
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<td></td>
<td>Greater use of domain-based institutions (e.g., a dedicated water or drinking water regulator)</td>
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<tr>
<td>Making trade-offs</td>
<td>Retain the status quo; OR</td>
<td>Greater use of independent institutions as advisors or decision-makers when making trade-offs (e.g., Planning Commission or Independent Hearings Panels); OR</td>
<td>Greater use of accountable institutions to make value-based decisions (e.g., reduce the role of the Environment Court)</td>
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<tr>
<td>Providing public goods</td>
<td>Retain the status quo; OR</td>
<td>Greater use of independent institutions (e.g., council-controlled organisations, state-owned enterprises); AND/OR</td>
<td>Greater regionalisation or centralisation (e.g., regional level Crown entities, local government reorganisation, shared services); OR</td>
</tr>
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<td></td>
<td>Shifting functions to existing organisations (e.g., from national to regional level transport planning)</td>
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<tr>
<td>Protecting and promoting Māori interests</td>
<td>Strengthen the directions/mandates of existing institutions to protect Māori interests; AND/OR</td>
<td>Creation of more “partnership” institutions (e.g., co-governance and co-management); AND/OR</td>
<td>Transfer of powers to Māori institutions</td>
</tr>
<tr>
<td>Resolving disputes</td>
<td>Retain the status quo (private disputes resolved by institutions concerned primarily with the public interest); OR</td>
<td>Separation between institutions concerned with public interest (e.g., councils) and only private interest (e.g., disputes tribunal)</td>
<td></td>
</tr>
<tr>
<td>Allocating non-private resources</td>
<td>Retain the status quo (differs by domain), with RMA allocative decisions taken by councils; OR</td>
<td>Greater localisation through collaborative processes; OR</td>
<td>Greater centralisation and/or independence in allocating resources (e.g., EPA or commission using common principles or market tools)</td>
</tr>
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*Figure 9.10: Options for institutional design in a future system*
As described in Working Paper 3, we define institutions for the purposes of the report as an entity where some form of public intervention is required to maintain its position in the system, it does not need to make “decisions” per se, but it does not include the general public. Collaborative bodies lie somewhere on the cusp of this distinction. Similarly, we note that Māori can comprise both participants and institutions, and the distinction is not always clear. Participation is addressed in Chapter 10.

For example, local government reform and the creation of environmentally focused central government institutions like the Department of Conservation, Ministry for the Environment, and Parliamentary Commissioner for the Environment. Generally, see C Knight Beyond Manapouri: 50 years of environmental politics in New Zealand (Canterbury University Press, 2018).

See Legislation Design and Advisory Committee Legislation guidelines (2018) at 20.3.

Furthermore, local government exists for reasons other than resource management ones.

On the development of our institutions over time, see C Knight Beyond Manapouri: 50 years of environmental politics in New Zealand (Canterbury University Press, 2018).

Source State Services Commission.

That is not quite the same thing as their degree of independence and accountability – local government is here shown as being further from central government, and yet it has a higher degree of accountability than (for example) autonomous Crown entities or state-owned enterprises.

The Department of Conservation is not necessarily concerned with preventing or restricting resource use. It also encourages the recreational and scientific use of conservation land, and is tasked with some forms of development, like huts and tracks.

Potentially infinite, in fact, given that most spectra are continuous rather than offering a finite number of discrete choices.

For sound constitutional reasons, government cannot simply do that by decree.

Similarly, both central and local control co-exist in the membership of regional land transport committees which (combine central, regional and local representatives); since 2016 there has been a mix of regionally elected councilors and centrally appointed commissioners comprising Environment Canterbury, and the Department of Conservation performs multiple tasks (eg policy, regulatory and advocacy tasks).

As noted above, efficiency and cost reduction are not the same things. For example, some may see the number of local authorities in New Zealand as inefficient and duplicative, but others may see their reflection of local democracy as a price worth paying.

This definition is necessary, because all institutions are accountable to someone; private companies are accountable to shareholders.

New Zealand Productivity Commission Better urban planning (2017) at 240.

This idea of consent is important to distinguish such institutions as the Queen Elizabeth II National Trust, which facilitates binding covenants at the consent of a landowner but is not accountable.

As well as unitary authorities.

That in itself has institutional design implications. For example, judicial review is an institutional safeguard – the High Court can strike down decisions for failing to consider relevant information, for considering irrelevant things, or for unreasonableness.

Training is also important: for example, through the Making Good Decisions programme (see Ministry for the Environment “About the Making Good Decisions Programme” <www.mfe.govt.nz>).


Especially in the context of uncertainty and risk, where value-based questions can be shrouded in mathematical and scientific language.

See, for example, Local Government Act 2002, s 42.

That is a logical product of the “sustainable management” purpose of the RMA, which blends value-based and technical concerns.


Setting aside the more fundamental arguments around ontology and the objectivity of science.

For example, there have been calls for the EEZ Act to be amended following the refusal of mining proposals, and some question the independence that comes from ad hoc appointments to boards of inquiry under the RMA.

Council-controlled organisations and state-owned enterprises are directed by their respective statements of intent, negotiated and agreed with their owners.

J Moor “Shane Jones tears strips off Fonterra and says the chairman should ‘catch the next cab out of town’” Stuff (13 June 2018) <www.stuff.co.nz>.

As the Productivity Commission put it, we need “strong monitoring and oversight arrangements” for regulatory institutions: New Zealand Productivity Commission Better urban planning (2017) at 51.

TVNZ “Independent entity to be created to provide ‘certainty’ for industry” (17 August 2018) <www.tvnz.co.nz>; see also New Zealand Council for Infrastructure Development (now Infrastructure New Zealand) Integrated governance, planning and delivery: A proposal for local government and planning law reform in New Zealand (2015) at 5.

New Zealand Productivity Commission Low emissions economy (Final report, 2018) at 181. The Commission cites different ways to secure independence within institutions, such as “the ability to adjust the regulatory settings and rules (regulation independence); the ability to undertake functions without interference (operational independence); funding arrangements that protect the regulator from external pressure (budgetary independence); and formal distance from the Executive and security of tenure for governors and senior management (institutional independence).”


For example, the Board of Te Urewera (see Te Urewera Act 2014, s 16).

See Ministry for the Environment Our climate your say: Consultation on the Zero Carbon Bill (2018). This presents different options for a Commission, but the discussion here reflects the preferred one.

See Chapter 5.


See The New Zealand Initiative’s visit to Switzerland (2017).

See Chapter 3; C Knight Beyond Manapouri: 50 years of environmental politics in New Zealand (Canterbury University Press, 2018).

New Zealand Productivity Commission Better urban planning (2017) at 57.

Ibid at 68.

For example, through the development of the NPI’s on Urban Development Capacity, Housing Accords and Special Housing Areas legislation, and most recently, the proposal for a Housing and Urban Development Authority.

Regions are capable of high level urban planning through their regional policy statements. Auckland provides an exception, where urban issues (including transport) increasingly concern neighbouring regions like the Waikato area.

The Housing and Urban Development Authority proposal leaves significant doubt over this question, since it allows a central government authority to intervene in urban areas for a potentially huge variety of reasons (see New Zealand Government Urban development authorities Discussion document (2017); www.hud.govt.nz/urban-development/ housing-and-urban-development-authority).

New Zealand Productivity Commission Better urban planning (2017) at 57.

J Berent An introduction to the principles of morals and legislation (1789).

For example, in the introduction of a Housing and Urban Development Authority, or changing the governance arrangements for Auckland.

For example, through the government’s Housing Infrastructure Fund (which provides opportunities for interest free loans for high growth councils’ infrastructure investments to support housing development), and the Tourism Infrastructure Fund (to support mainly small local authorities facing infrastructure pressure from tourism).

The Productivity Commission has been tasked with inquiring into the issue of local government funding more broadly: New Zealand Productivity Commission “Local government funding and financing” <www.productivity.govt.nz>. On funding, see Chapter 13.

Environment Act 1986, s 16.

Community boards exist too, but have few powers other than those delegated to them: see Local Government Act 2002, ss 49-54.

The Auckland Unitary Plan also combines these things.

Many schools are even zoned to restrict non-locals from enrolling. A nod to the local interest is that much to do with the governance and operation of schools is done by boards of trustees.

See generally New Zealand Council for Infrastructure Development (now Infrastructure New Zealand) (Integrated governance, planning and delivery: A proposal for local government and planning law reform in New Zealand (2015) at 50-51. Issues of amalgamation go well beyond the resource management context, however. Other

Ibid at 46.

Ibid at 13; Scottish Water “About us” <www.scottishwater.co.uk>.


Resource Management Act 1991, from s 58B.


For example, under the Hazardous Substances and New Organisms Act, the RMA, and the EEZ Act.
One idea behind a Housing and Urban Development Authority is that it would integrate those planning functions in a single institution and a single master planning process. See www hud govt nz urban development housing urban development authority.

Ecotrust level impacts often span different subjects.

Allocation does not have to occur by integrating institutions. It can be through careful alignment of statutes and mandates that drive their behaviour, and by offering fora for them to work closely and collaboratively.

Acknowledgement: Helen Marr, Perception Planning.


Assuming the need for independence, accountability, and subsidiarity.

For example, there may be a temptation for local government to underspend on water infrastructure in favour of more politically visible areas. In the Netherlands, water management is such a crucial area that there are institutions (water boards) that focus solely on water management (except drinking water provision) and form a separate pillar of regional government.

New Zealand Productivity Commission Better urban planning (2017) at 51.

Such as climate, waste, and freshwater.

See Ministry for the Environment “Natural resources briefing to incoming Minister” <www.mfe.govt.nz>.

See Queen Elizabeth II National Trust <www.qeiinationaltrust.org.nz>.

Personal communication with Professor Spiro Pollalis, 2018 United Nations Sustainable Infrastructure Conference, October 2018. In New Zealand we see this in some portfolios already (eg environment and economic development), but this is not necessarily a durable connection. On spatial planning, see Chapters 11 and 14.

For example, in a more formal, structured and permanent manner than ad hoc informal groupings of agencies like the natural resources sector.

Fiordland (Te Moana o Awehau) Marine Management Act 2005; pt 3.


Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, s 22.

State Sector (Canterbury Earthquake Recovery Authority) Order 2011 (now revoked).


For example, Water Zone Committees set up in Canterbury to inform the decisions of the Regional Council: see Environment Canterbury “About the Water Zone Committees” <www.wacan.govt.nz>.


Some may argue that advocacy is not as crucial as the others.

Councils create policy under the Local Government Act and RMA, impose regulations through plans and regional policy statements, collect waste and provide water and sewage services, and resolve disputes on plans and consents (at first instance).

Although, of course, regional councils are separate from territorial authorities (except unitary authorities and the Auckland Council). Furthermore, other institutions exist that are associated with, but not the same thing as, local government (such as Watercare, Auckland Transport, other council-controlled organisations, and independent hearings commissioners).


In making decisions on planning objectives, policies and rules, as well as resource consents, under the RMA.

See Chapter 7.

On alignment between strategic, regulatory and funding tools, see Chapter 14.

For example, regional land transport committees are fora to bring central, regional and local together, but significant power rests with central government as the controller of much of the funds. A more durable (although not permanent) arrangement has been reached through the partnership between Auckland Council and the government in the Auckland Transport Alignment Project.

Although councils have both operational and regulatory roles, these roles are generally separated within their internal structures.

For example, the Department of Conservation has both regulatory and operational roles, but they are generally exercised under the same general mandate (conservation). In contrast, councils have both regulatory and operational roles, but the mandates are arguably more distinct (environmental protection and infrastructure/economic development).

This generally aligns with the idea that those creating laws should be accountable for, and those implementing it should be independent.

That distinction is blurred in the RMA, where significant policy decisions can be made through consenting decisions if the matters being considered are finely balanced or pull in different directions.

As well as the ability for an applicant or submitter to require an independent commissioner to hear an application: Resource Management Act 1991, s 100A.

MA Brown Last line of defence: Compliance, monitoring and enforcement of New Zealand’s environmental law (2016). New Zealand’s environmental law.

Better urban planning.

Although sometimes we do – for example, in the exclusive economic zone and conservation estate, and with hazardous substances and genetically modified organisms. For all of these, the system assigns functions to central government only.

Through many different means: the Environment Court, boards of inquiry, the ability for a Minister to create NPISs and NEISs, the authorisation of requiring authorities, and the imposition of water conservation orders.

See Chapter 5.

For example, local government is subject to quite different (and not always harmonious) mandates under the RMA, Local Government Act and Land Transport Management Act 2003.

For example, the NZTA and the Department of Conservation.


Other mechanisms are also possible, such as the independent hearings panel process in Auckland for the Unitary Plan (see Chapter 10.3).

Some have asked whether a Climate Commission should be a binding decision maker or mere advisor: see New Zealand Productivity Commission Law emissions economy (Final report, 2018) at 232.

Technically (for NEISs and other regulations) through order in council by the Governor-General on the recommendation of the relevant Minister.

Through rules and rule-like policies in plans and regional policy statements.

Through resource consent conditions (and refusal to grant consent).

Through rules and rule-like policies in plans and regional policy statements, and conditions on resource consents.

Through resource consent conditions (and refusal to grant consent).


Although consents can be directly referred to the Environment Court or decided by boards of inquiry, and the planning process for the Unitary Plan in Auckland was more nuanced (see Chapter 10-3).

Or similar review body: see Resource Management Act 1991, s 46A.

As opposed to creating institutions with elements of both (eg an arm’s-length Crown entity, or a council comprised of some elected and some independent members).

See earlier in this chapter at 8.3.

Particularly at the national level, given that the Environment Court already acts as an independent check and balance on councils. However, even at the local and regional levels, the Environment Court is not itself a planning authority and can only respond to what is put in front of it through appeals.

See also a proposal that regional councils’ environmental regulatory functions be given to branches of the EPA: New Zealand Council for Infrastructure Development (now Infrastructure New Zealand) integrated governance, planning and delivery: A proposal for local government and planning law reform in New Zealand (2015) at 5 and 77.

See Chapter 7, especially concerning King Salmon.

Environmental Protection Authority Act 2011, s 12 (to contribute to the efficient, effective, and transparent management of New Zealand’s environment and natural and physical resources).

Although they, too, could be more independent (eg commissioners appointed by regional councils, or joint hearings panels comprised of some elected and some independent persons).

Boards of inquiry are an interesting case, in that their degree of independence or where no true bottom lines exist. These decisions are inherently value based and require greater accountability (including local accountability).

Infrastructure New Zealand has also suggested using the EPA to decide questions of detailed design for infrastructure projects, but using an independent commission to decide the broad envelope of acceptable effects.
If adequately funded, it could take on or partner with the Ministry for the Environment and Statistics New Zealand in their reporting role under the Environmental Reporting Act 2015.

An independent institution could even set broad bands of acceptable bottom lines, and accountable ones could specify exactly where they lie.

Well-being of Future Generations (Wales) Act 2015 (UK), s 18(a).

Interestingly, the Welsh government took inspiration from the New Zealand system when developing its natural resource management structure. See V Jenkins “Sustainable management of natural resources: Lessons from Wales” (2018) Journal of Environmental Law 1 at 9.

For example, through a government policy statement combined with NISs.

In the same way that the government is required by law to create an NZCPS.

Some may disagree, of course, believing in the inherent benefits of localism.

For example, an independent hearings panel or the Environment Court, or even a national level Environment Commission.

There may also be a case for separating protective mandates (setting bottom lines) from exploitative ones (economic development).

Similar cooperative arrangements can be seen in the boards of entities set up under Treaty settlements, such as the Waikato River Authority.


Environmental Protection Act 2017 (Vic), s 6(1).

Environmental Protection Authority Act 2011, s 12.

See Chapter 8.


Many institutions already have capability and capacity in this regard - councils, Crown research institutes, ministries, and Crown entities. However, part of the problem is the lack of flow of information within the system.

See Chapter 7.

At its most extreme, communities in the United States and Canada make use of direct democracy to vote on propositions that allow or do not allow developments that breach standards.


For example, see New Zealand Productivity Commission Better urban planning (2017) from 389.

For example, to ensure renewable electricity projects go somewhere suitable.

See Chapter 11.

For example, by artificially excluding the impacts of activities on climate change.

See Chapters 7 and 8.

Compare Chapter 7.5.

Drinking water, waste-water and stormwater.

See Electricity Industry Act 2010.

The NZTA, regional councils, and territorial authorities (which all participate in regional land transport committees). In Auckland, there is a council-controlled organisation – Auckland Transport.

See New Zealand Social Infrastructure Fund “What are public private partnerships?” at www.nzst.co.nz.


On funding, see Chapter 13.

For example, see New Zealand Council for Infrastructure Development (now Infrastructure New Zealand) integrated governance, planning and delivery: A proposal for local government and planning law reform in New Zealand (2015).

See Chapter 13. The Productivity Commission has been tasked with looking into that question in detail.

In 2013, provisions were added to the Local Government Act to encourage councils to use shared services models. One way to do so is through the creation of a jointly owned council-controlled organisation such as Wellington Water. A variant could be for the Crown to be a joint owner as well as councils.

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Infrastructure New Zealand has floated the idea of mandatory regional transport agencies owned and controlled in this way (with powers reflective of relative shareholding: see New Zealand Council for Infrastructure Development (now Infrastructure New Zealand) integrated governance, planning and delivery: A proposal for local government and planning law reform in New Zealand (2015) at 57.

For example, by creating jointly owned council-controlled organisations that operate across multiple districts or regions.

Local Government Act 2002, s 14(10).

Land Transport Management Act 2003, s 96(1)(a).

For example, creating vertical and rooftop green areas, or using wetlands to filter stormwater, providing benefits for biodiversity, water quality, amenity, open space, natural hazard resilience and other things. See generally City of Melbourne Green our city strategic action plan 2017-2021 (2017).

This does not include floodwater, or the distribution of natural water for industrial or agricultural use.

This is not limited to institutional design matters, although that seems to be a significant component of it. See Department of Internal Affairs “Three Waters review” at <www.dia.govt.nz>; L Stevens, K Poutasi and A Wilson Report of the Havelock North drinking water inquiry: Stage 2 (2017), Local Government New Zealand Improving New Zealand’s water, waste-water and stormwater sector (2015).

For example, see Queensland Water connections: Celebrating the Queensland Water Directorate’s first decade (2013).


See Wellington Water “Our story” at <www.wellingtontwco.co.nz>.


In that communities can vote councillors out of office.

Although not entirely independent; councillors still appoint directors and provide a statement of expectation.

Including in their formality of creation, stormwater responsibilities for Wellington Water, and ownership of assets.

See generally New Zealand Council for Infrastructure Development (now Infrastructure New Zealand) integrated governance, planning and delivery: A proposal for local government and planning law reform in New Zealand (2015) at 55. The latter offer expert governance, commercial rigour, insulation to council from financial risk, and a tight focus.

Although close economic regulation is required to manage natural monopolies (ensuring prices are reasonable and sufficient). On the Victorian model, see Essential Services Commission “Water prices, tariffs and special drainage” at <www.esvc.gov.au>.

For example, that prices will go up, and that water is a public good.

For example, not to run at a profit. In the case of Watercare, see Local Government (Auckland Council) Act 2009, s 57(1).

N Mahuta Address to the Building Nations Symposium (August 2018).

See, for example, New Zealand Council for Infrastructure Development (now Infrastructure New Zealand) integrated governance, planning and delivery: A proposal for local government and planning law reform in New Zealand (2015) at 57.

For example, in Melbourne, charges must be approved by an economic regulator (the Essential Services Commission).

As with the Tamaki Regeneration Company.

Through Scottish Water, a Scotland-wide statutory corporation: see Scottish Water “About us” at <www.scottishwater.co.uk>.

Whether fairly independent (eg through multiple Crown entities or council-controlled organisations), or accountable (eg through direct provision by territorial authorities).


Whether accountable (by transferring functions to regional councils) or independent (by setting up council-controlled organisations or regionally focussed Crown entities).

Such as existing waste-water treatment plants.

New Zealand Council for Infrastructure Development (now Infrastructure New Zealand) integrated governance, planning and delivery: A proposal for local government and planning law reform in New Zealand (2018) at 5 and 12, where it is recommended that New Zealand should have a number of councils somewhere between 10 and 20 (essentially, regional level), supported by much more localised boards with limited powers.

See Local Government Act 2002, pt 3. The New Zealand Initiative has suggested there are valuable lessons to be learnt from the Swiss example of extreme devolution: see The New Zealand Initiative Go Swiss: Learnings from the New Zealand Initiative’s visit to Switzerland (2017).

For example, where there is significant greenfields growth in cities, or where there is pressure from large numbers of tourists.

Including political limits – there is significant pressure to keep rates low.

In that substantial capital costs need to be met up front for new developments and upgrades of ageing infrastructure, and recouped slowly over time. In some areas those charges may need to be substantial to meet initial costs.

Although some may be more obvious – such as whether to fluoridate the water supply.
203 For example, regional GST, a local bed tax for tourist hotspots, value uplift capture, etc.
204 For one take on communities of interest and local government, see New Zealand Council for Infrastructure Development (now Infrastructure New Zealand) (Integrated governance, planning and delivery: A proposal for local government and planning law reform in New Zealand (2010)) at 14.
205 A Housing and Urban Development Authority may also be in a position to socialise costs in the short term, if it is responsible for multiple kinds of infrastructure.
206 See Chapter 5 on the user-pays principle.
207 Economic regulation becomes important the more independent an institution gets; to ensure that effective monopolies are managed well for the public good. Political interference in pricing (to keep costs down) can be an issue, as it has been in Victoria.
208 For example, rents are much higher for supermarkets in central Auckland than in rural Manawatu, but generally the prices of goods in them do not fluctuate significantly.
209 To service rural or peri-urban areas, pipes need to be much longer per capita. This is exacerbated where a predominantly rural base on the fringes of a city is expected to pay for development to service large urban growth, as around Sunbury north of Melbourne.
210 To encourage competition and innovation (even if there are effective monopolies in their own areas), as they can benchmark each other – comparisons can be made between broadly similar institutions. This is the case in Melbourne, where there are three separate metropolitan water retailers.
211 For example, see, for example, www.lgnz.co.nz/our-work-
our-policy-priorities/3-environment/ignz-water-summit-2018/.
214 With the exception of the Franklin district, where retail services continued to be managed via a franchise agreement with United Water International Pty Ltd.
215 With the exception of the Franklin district, where retail services continued to be managed via a franchise agreement with United Water International Pty Ltd.
217 Local Government (Auckland Council) Act 2009, ss 88(l) and (2).
218 Local Government (Auckland Council) Act 2009, s 91(5).
219 Resource Management Act 1991, s 30(1)(c). For example, some councils offer financial incentives to landowners for planting riparian areas.
220 As discussed above in the context of trade-offs, this can be achieved in a variety of ways – council staff, the input of expert independent evidence, or the use of an independent panel for review.
221 Such as in the Greater Christchurch earthquake recovery efforts, under the NPIs on Urban Development Capacity, through housing subsidies, and as an interested party in project-based litigation. Less formal measures, such as the Urban Design Protocol, have been more proactive: see Ministry for the Environment “New Zealand urban design protocol” <www.mfe.govt.nz>.
222 Such as spatial planning for the “golden triangle” between Auckland, Hamilton and Taupō.
223 That already occurs, but in a variety of different and informal ways (such as through strategies created under the Local Government Act). On spatial planning, see Chapter 11.
224 Or, alternatively, an oversight organisation concerned with resource management more broadly.
227 As with some policies in the NZCPS as interpreted in the Resource Management Act 1991, ss 33(2)(b) and 36A.
228 See the spotlights in Chapter 4.
229 For other functions, the Authority is less centralised than the more general approach; for example, in influencing national level conservation management plans.
230 Hawaiki Gulf Marine Park Act 2000, s 16(2)(a).
231 Ibid, s 17.
233 P Beverley, Y Payne and M Moloney Hawaiki Gulf Forum governance review and recommendations (Hawaiki Gulf Forum, 2016).
234 As well as the establishment of the Pare Hauraki Collective Cultural Entity. See Office of Treaty Settlements “Summary of the Pare Hauraki Collective Redress” <www.govt.nz>.
235 As the establishment of the Pare Hauraki Collective Cultural Entity. See Office of Treaty Settlements “Summary of the Pare Hauraki Collective Redress” <www.govt.nz>.
237 Resource Management Act 1991, ss 33(2)(b) and 36A.
239 See the spotlights in Chapter 4.
240 As on co-governance generally, see P Salmon and D Girintransport (eds) Environmental law in New Zealand (4th ed, Thomson Reuters, 2015) at 691, 380-381.
242 See the spotlights in Chapter 4.
243 See the spotlights in Chapter 4.
244 See the spotlights in Chapter 4.
245 For more information on the Environmental Standards Advisory Committee see <www.oag.govt.nz>.
246 See the spotlights in Chapter 4.
248 For other functions, the Authority is less centralised than the more general approach; for example, in influencing national level conservation management plans.
250 Local Government (Auckland Council) Act 2009, ss 88(l) and (2).
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257 As with some policies in the NZCPS as interpreted in the King Salmon case (see Chapter 7).
258 Instead, it should be driven by interpretation of the policy itself, and the intention of the policy maker.
260 See Chapter 7.8.
262 On allocative tools, see Chapters 12-13.
263 Arguably that should be done in a more direct way, by addressing land uses themselves.
264 As generally Environment Canterbury “About the Water Zone Committees” <www.ecan.govt.nz>. Since their powers are recommendatory only, this does not displace a regional community of interest in water allocation. Furthermore, these are not just about water allocation – they are about water management more generally.
265 In the same way that the regular courts (but not the Environment Court) perform this function.
266 A good example is the Land and Water Forum, a collaborative group that was set up to advise the Government on freshwater and land reform, and which comprised key stakeholders and experts (in small and large groups) rather than representatives of the “public” per se. The Forum has produced extremely valuable work through four reports and various pieces of advice to the government: <www.landandwater.org.nz>. The Forum is now in abeyance.
267 For example, see the collaborative planning track described in the RMA (sch 1 pt 4).
268 As generally Environment Canterbury “About the Water Zone Committees” <www.ecan.govt.nz>. Since their powers are recommendatory only, this does not displace a regional community of interest in water allocation. Furthermore, these are not just about water allocation – they are about water management more generally.
269 In the same way that the regular courts (but not the Environment Court) perform this function.
270 As are other measures, see Chapter 3.
271 New Zealand Productivity Commission Better urban planning (2017) at 51. See also Chapter 13.
272 Ibid at 51.
273 Or similar commercially-focused entities jointly owned by councils and the Crown.
10: PUBLIC PARTICIPATION

Britomart, Auckland
10.1 Introduction

The third key structural element of the resource management system is public participation. Again, participatory arrangements are closely linked to two other structural components: legislative design and institutional design. Participation occurs differently under particular statutory frameworks (as each usually has a distinct process for decision-making), and is facilitated by particular institutions (such as appeals to the Environment Court or hearings by an independent hearings panel). Public participation is also closely linked to the kinds of tools we use and the processes by which they are created or decided – notably regulatory ones like plans and permits (see Chapter 12). These elements can work together in many different ways when considering overall models for a future system.

Some form of public participation is widely recognised, both in New Zealand and overseas, as being extremely important. Allowing people to be involved has many benefits. It can improve the quality of decisions, provide catharsis for people holding strong views, protect the legitimate interests of private persons as well as allowing the voice of public interest groups to be heard, and lead to greater acceptance of outcomes. It is particularly important where competing values must be weighed, and where the potential impact on individuals is large.

However, participation cannot be absolute or endless. Being able to participate does not grant a licence to prevent outcomes from being realised or to defeat the public interest through the defence of private interests. Participatory processes can also be extremely costly and time consuming. Against this inescapable background of legitimate tensions, the status of public participation in New Zealand environmental law has fluctuated over the years, often in response to the changing social and political context. There are conflicting views as to its necessity and its desirability.

In this chapter, we begin by considering what public participation means in the context of resource management. At first glance, it seems obvious. However, the phrase hides a complex spectrum of ways in which different kinds of people can be involved in decision-making. We then consider the advantages and disadvantages of public participation. As the extent of participatory rights grows larger, its benefits may grow, but so too may its costs. Innovative approaches are possible, but a legitimate tension between benefits and costs is a reality that is always encountered at some point. At some point costs will outweigh benefits, or there will be a diminishing return on increasing participatory rights. But the exact point at which that happens usually requires a value judgement. Those who focus on benefits are usually not the ones who must bear the costs, and those who
focus on the costs are usually not the ones who reap the benefits. As such, the two seldom coincide. At the end of the chapter, we offer some thoughts on options for a future system.

10.2 What is public participation?

Public participation has an interesting history, and one coloured by social and ideological change. But what do we mean when we speak of public participation in modern times? Like “democracy” and “justice”, it is often a term that is used loosely to refer to a great many different things. In simple terms, public participation refers to the involvement in a decision-making process, of a public nature, by those who are affected by a decision but do not make it. I do not participate in a public decision if I choose to go for a swim in a river, but I do if I make a submission on a resource consent application that would affect my ability to do so. This definition may outline some boundaries for what is and is not participation, but they remain fuzzy boundaries. At one extreme, I arguably “participate” if I am notified of a public decision to make a district plan operative. At the other extreme, I arguably “participate” if I am charged with developing a plan through a collaborative process or a community-led initiative. There can be grey areas where active “participation” morphs into a species of decision-making or into a passive absorbing of information. Within these fuzzy boundaries, public participation can mean a variety of things. The public doesn’t always mean “everyone”. It can mean quite narrow groups of people (eg consultation rights sometimes apply only to public authorities or to tangata whenua). It can mean everyone in the known universe – were Mars to be settled at some point in the future, that would not stop colonists with a good wi-fi connection from making a submission on the Stratford District Plan. (On a more prosaic level, an expat Kiwi living in London can also do so.) And in between these extremes, it often means people who are directly affected. A “decision” is also a slippery concept – central government is constantly producing discussion documents on aspects of policy relating to resource management, and inviting submissions. These often reflect general thinking and options rather than decisions per se, and are quite different to the formal plans that are required to be notified under the RMA. Yet both are processes in which it is meaningful to talk about the public being involved.

Similarly, the concept of participation can come in many shapes and sizes. Although it does not capture every possible way in which a person may contribute to a decision, the International Association for Public Participation (IAP2) has produced a helpful spectrum of ways in which people may participate, from weak to strong, and which is “quickly becoming an international standard” (see Figure 10.1 below). According to the IAP2, the level of public participation a decision should attract depends on three factors: the goal of the public engagement, the promise made to the public, and the techniques employed to achieve public participation.

At the weaker end of the spectrum, public participation may be used to inform the public. This is to provide the public with balanced and objective information so they can understand the problem, alternatives, opportunities and/or solutions. The decision-maker is promising the public they will be kept informed by utilising techniques such as fact sheets and websites.

The next step on the spectrum is consultation. The goal here is to actively obtain public feedback on analysis, alternatives and/or decisions. The promise by the decision-maker is to keep the public informed as well as to acknowledge and listen to their concerns and aspirations, and provide feedback on how the public input influenced the decision. Methods such as focus groups, surveys and public meetings are utilised to achieve this. New Zealand case law is clear that consultation, in the context of a statutory duty, does not equate to or require negotiation.

The submission process under the RMA could be considered a statutory form of consultation in this sense, in that members of the public have the opportunity to provide feedback on a proposal in order to influence

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**Figure 10.1:** The IAP2’s public participation spectrum

<table>
<thead>
<tr>
<th>Inform</th>
<th>Consult</th>
<th>Involve</th>
<th>Collaborate</th>
<th>Empower</th>
</tr>
</thead>
<tbody>
<tr>
<td>Provide public with information</td>
<td>Obtain feedback</td>
<td>Work directly with public throughout the process</td>
<td>Partner with the public in each aspect of the decision</td>
<td>Decision making by the public</td>
</tr>
</tbody>
</table>

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Wellington International Airport Ltd v Air New Zealand [1993] 1 NZLR 671 is New Zealand’s leading case that affirms the statutory duty to consult does not equate to negotiation. So long as the decision-maker held a meeting with those they were required to consult with, provided the relevant information, entered the meeting with an open mind, took due notice of what was said and waited until they had had their say before making the decision, then the decision can properly be said to have been made after consultation.

The submission process under the RMA could be considered a statutory form of consultation in this sense, in that members of the public have the opportunity to provide feedback on a proposal in order to influence...
Public participation under the RMA comes with a set of strong legal rights, particularly in the development of plans.

**A spotlight on representation in plan-making processes**

Although plans are open for wide public submission under the RMA and Local Government Act, this does not mean that the submissions received reflect the broad range of public interests. Some people are much more likely to submit than others. An analysis of the 5900 submitters on the Auckland Unitary Plan who provided an address (out of a total of 9300 submissions) found that Rodney and Ōrākei residents were more than ten times more likely to lodge a submission than those living in Henderson-Massey or Mangere-Ōtāhuhu. A more detailed analysis of the demographics of submitters found that those with higher incomes and those of retirement age were much more likely to submit. A similar analysis of submitters on Auckland Council’s 2015–2025 Long Term Plan found that men, New Zealand Europeans and people aged 55 or older were much more likely to submit. A novel way to address this problem, and incorporate a more representative public view in decision-making processes is through the use of citizen juries. Members of the jury are randomly selected from the relevant population. They jointly hear submissions and evidence, deliberate and reach a conclusion. Such juries have been extensively used overseas for topics ranging from disposal of nuclear waste (South Australia), obesity (Victoria), global climate change (United States) and setting priorities for health research (Bristol, UK).

In 2014 the Vancouver City Council established a citizens’ assembly to develop a Grandview-Woodland Community Plan. The process was initiated by the Council mailing a letter to 19,000 local households inviting them to volunteer for the Assembly. The invitation was also made available at various public locations around the community. More than 500 people volunteered in response. The 48 members of the Assembly were then selected through a random civic lottery. The Assembly heard from a variety of speakers and conducted special walking tours of the area. It held public meetings and members attended community workshops. The Assembly finalised its planning recommendations on a consensus basis within nine months. The plan is not legally binding but has considerable moral authority.

In the New Zealand context, such a jury could be established, for example, through randomly selecting between 10 and 20 participants from the relevant district or region. The jury could sit in on the public hearings of the proposed plan provisions and then meet to deliberate and provide recommendations to the council. The council could be required to take the recommendations into account. Use of a citizen jury would help to ensure that a broad range of community views was reflected in the process, rather than it being dominated by self-selected parties and those with the loudest voice or most resources.

Simply providing the opportunity for members of the public to make submissions will not likely result in the broad range of interests being expressed. A future system may need to adopt a more proactive approach to public participation.

Public participation that seeks to involve the public in a decision is next on the IAP2’s spectrum. Here, a decision-maker aims to work directly with the public. Its promise is to ensure that the concerns and aspirations of the public are reflected in the alternatives developed, and to provide feedback on how the public input influenced the decision. This is often achieved through mechanisms like community workshops and deliberative polling.

The next step on the spectrum involves collaborating with the public. The goal is to partner with the public throughout the decision-making process in order to develop alternatives and identify preferred outcomes.
This level of public involvement promises that the decision-maker will look to the public for advice and innovative ideas in formulating solutions. It is expected to incorporate such advice and recommendations into a decision as much as possible. Common participatory methods employed include citizen advisory committees and consensus-building exercises.

The strongest level of public participation aims to empower. This places the final decision in the hands of the public. Here, the promise by authorities is simply to implement what the public decides. Mechanisms to achieve this include citizen juries, ballots or referenda (direct democracy), and delegated decisions. Some collaborative processes may also fit this description, although whether a participatory process is truly "public" depends on how wide and how representative the people involved are. It may be difficult to legislate for who gets to participate in such processes.

Interestingly, the international definition of "collaboration" is a weaker concept than some collaborative processes that have recently evolved in the New Zealand context. In the latter, iwi and stakeholder representatives can directly develop a policy or plan, collectively approve it through a consensus process, and then present it to the statutory agencies for implementation. This approach falls partway between the fourth (collaborate) and fifth (empower) elements of the IAP2’s spectrum, and is a local innovation.

A spotlight on collaborative processes

“Collaboration” is a word that is now frequently heard around resource management issues in New Zealand. The Land and Water Forum (established in 2008) was a trail-blazer in applying a multi stakeholder collaborative process to national freshwater policy. The approach was subsequently applied to the development of a marine spatial plan for the Hauraki Gulf through the Sea Change – Tai Timu Tai Pari process initiated in 2013. There have been other regional collaborative initiatives around the country.

The 2017 amendments to the RMA provided for an alternative collaborative track for plan making. This involves a quite complex process where the council appoints a collaborative group and provides a terms of reference. The group is then to report back with consensus recommendations. These are publicly notified and submissions are heard by a review panel also appointed by the council. The council then considers the recommendations of the review panel, and to the extent that the council decides to depart from them, the decision matters are open to a merits appeal to the Environment Court. This complex legal process raises the issue of whether collaborative processes can realistically be legislated for.

Once of the most contentious issues is how the members of the collaborative group are selected. The Land and Water Forum (which resulted from a civil society initiative) operated an open-door policy for a time, where all interested stakeholders were able to be involved in the plenary (resulting in a total of 58 organisations). A more workable “small group” was subsequently established which totalled 22 members. Where gaps in representation were identified in both groupings, the Chair actively recruited participants.

The Hauraki Gulf collaborative process, which was agency-iwi initiated, invited pre-identified stakeholder groupings to identify their own representatives through a series a workshops. Gaps in representation were not directly addressed. The RMA process provides for the relevant council to select the membership, albeit with one member to be chosen by iwi authorities. There are no requirements as to sector coverage or representation, leaving open the possibility of a council “stacking” the group with favoured members.

Another key consideration is the weight given to the consensus recommendations of the collaborative group. The Land and Water Forum provided recommendations to the Minister for the Environment, who could then decide whether to adopt them or not. In practice, only some of the recommendations were implemented. The Sea Change – Tai Timu Tai Pari consensus group (Stakeholder Working Group) presented a completed non-statutory plan to an interagency and iwi governance group. Implementation has been patchy and slow. Under the new RMA process, the collaborative group’s recommendations are open to public submission and consideration by a review panel and the council before potential adoption.

If collaborative processes are to be formalised in a future resource management system, careful thought will be needed to the key questions of when in the process they should be convened, how members will be selected and what will happen to the consensus recommendations. The current RMA collaborative plan making track seems overly complex, as well as having flaws, and to our knowledge has yet to be used by any council.

Collaborative processes have become well established in New Zealand resource management decision-making but remain largely non-statutory. A future system could formally recognise such processes.

Sea Change Tai Timu Tai Pari field trip
10.3 The benefits and costs of public participation

If public participation had only benefits and no costs – or vice versa – our system would look quite different. The reality is that it has both. It is extremely difficult to determine how significant a benefit or cost is, and when one outweighs the other. It is not helpful to think of participatory arrangements as a “problem” per se.19

In modern times it has been, in our view quite correctly, assumed that some degree of public participation in resource management decision-making is a very good thing. This is reflected in the values espoused by the IAP2, who see participation as:

- Based on the idea that those who are affected by a decision should have a right to be involved in the decision-making process
- Involving an expectation that the public’s contribution will influence a decision
- Promoting sustainable decisions, by recognising and communicating the needs and interests of all participants, including decision makers
- Seeking out and facilitating the involvement of those potentially affected by or interested in a decision
- Seeking input from participants in designing how they participate
- Providing participants with the information they need to participate in a meaningful way
- Communicating to participants how their input affected the decision.20

That is a glowing appraisal of involving the public in decision-making in a general sense. And it is quite true – public participation has much to offer the system. It increases the transparency of decision-making so that everyone who is affected knows what is happening and can be on the ground when it does. It provides additional information and knowledge to decision-makers, as locals often know the most about the nature and extent of local impacts. It also helps to provide checks and balances in the system. The RMA, in particular, relies on this; opponents of a proposal may bring additional technical evidence which tests that provided by the developer (who has a vested interest in the outcome) and may also challenge the decision-makers’ findings.

Participation can also provide catharsis, by providing an opportunity for people to tell their story and air their grievances. If people feel the process has been fair, and their concerns have been heard and properly considered, they are more likely to accept the outcome. In its most extreme form, public participation is a form of direct democracy where the community gets to make the actual decision, such as through a binding referendum (or, to a lesser extent, through a collaborative process). A community is more likely to own the outcome of such a process, even though some parts of it may grumble.

The underlying idea is that public participation enables decisions to reflect the interests and concerns of affected or interested parties, and is important for the “democratisation of social values and better planning and fulfilment of public needs”.21 Public participation is often considered an essential part of democratic governance in environmental matters.22 It helps to realise principles of fairness and equity, while fostering better social relationships and increasing the opportunities for social learning. Its importance is enshrined in the Rio Declaration, with Principle 10 stating that “environmental issues are best handled with the participation of all concerned citizens, at the relevant level”.23 The concept is underpinned by three pillars: the right to information (transparency), the right to participate in decision-making processes, and the right to justice.24

Public participation has much to offer the resource management system, supporting better decisions and promoting transparency and fairness.

Participation as an information-gathering tool

Public participation is valuable as an information-gathering tool. Decision-makers are able to access a wider information base if a participatory process is carried out, accessing local knowledge, experience and expertise. This adds to the overall pool of knowledge and the quality of information influencing a decision. Local information allows decision-makers to have a better understanding of the complex and dynamic socioecological systems and social processes of the local community, allowing a solution to be tailored to the local context.25 Public participation allows public values and preferences concerning the matters at hand to be ascertained. The very nature of resource management decisions means they often involve a value trade-off or some form of cost-benefit analysis. A decision is more likely to meet the needs of the local community if these values and preferences of the community are taken into account.

Participation and durability

Tailoring a decision to the local environment, according to community values and preferences, will produce a decision that better meets the needs of the community, in turn increasing the decision’s durability. Furthermore, including the public in the decision-making process can often result in the public gaining a sense of ownership over the decision – they will be more willing to accept a decision if they perceive themselves to have had a hand in its creation. Finally, by engaging with the public early in the process, the decision-maker may gain valuable insight into any potential issues that may arise, enabling them to be addressed earlier and reducing the risk that they escalate into more serious issues further down the track. The greater the consensus achieved earlier on in the process, the more durable the final decision is likely to be.
**Improved relationships**

Public participation can improve relations between the public and administrators by helping to foster an element of trust between them; the public have greater trust in the authority to make the right decision and the authority has greater trust that its final decision will enjoy a relatively smooth uptake. This trust can flow through to future dealings between the parties rendering difficult decision-making and future conflict resolution more achievable. Participatory processes in themselves provide a mechanism by which disagreements can be worked out in a regulated and controlled manner, thereby subduing conflict.

**Social learning**

Public participation in decision-making processes promotes social learning. Just as a decision-maker benefits from the information it receives from the public, the public can benefit from the reverse flow of information that occurs. For members of the public to actively participate, they must first be educated on the matter. The better the flow of information between the decision-making authority and the public, the better the process and subsequent decision.

**Fairness, equity and legitimacy**

Public participation reflects democratic principles: it provides individuals with the opportunity to influence a decision. It is predicated on the assumption that the decision-maker has entered the decision with an open mind and a willingness to consider differing points of view. A key aim of wide consultation is to reduce the power of key stakeholder groups to capture the process (due in part to their powerful networks and/or rights as landowners). Good public participation provisions should provide equal opportunity for all citizens to participate.

A public participation process that is seen as fair helps to legitimise a final decision. The multidimensional nature of decision-making typically results in there being winners and losers. The merits of the decision become less of an issue if the decision is publicly viewed as having been reached via fair process. Members of the public will be more willing to accept a decision if they feel they were given a reasonable opportunity to influence it.

However – and at this point we find ourselves transitioning from the benefits of participation to its costs and challenges – establishing a fair process can be a difficult thing to achieve. Members of the public must first be made aware that they can participate, and understand the process for doing so. Some sectors of society may even need to be encouraged or incentivised to participate in the first place, and in recent years there has been increasing appreciation of the need for authorities to use innovative engagement techniques (including social media). Involvement requires access to information, and education, which is often not readily available. Participation can be onerous, and an individual participant may be disadvantaged by the limited resources they have access to, compared to organised interest groups.

### A spotlight on addressing unfairness in environmental litigation

Providing a right of appeal to the courts is not normally sufficient to ensure fair process and robust decision-making. Court processes favour those with greater resources and expertise who can outgun other parties due to an “inequality of arms”. This in turn can lead to “bad decision-making and lingering resentment.” To help address this issue, some funding is currently available to not-for-profit groups, through the Environmental Legal Assistance Fund, to advocate for an environmental issue of public interest in the Environment Court or boards of inquiry. But the fund is limited (with a total annual budget of $600,000 and maximum amount per application of $50,000) and is not available to individuals. Expanding the fund could help improve the fairness and robustness of our system.

An alternative approach has been adopted in Australia, where a network of Environmental Defenders Offices provides free legal advice to individuals and community groups, and where the case is in the public interest, their lawyers represent clients in the courts. Another potential mechanism is to provide an independent “counsel assisting” to ask questions of the applicant and to test the evidence on behalf of the public.

The ability of the Environment Court to require undertakings as to damages or security for costs, as well as to make a costs award against an unsuccessful party, is an additional disincentive for an individual or group to become involved in court level proceedings. Making it clear that these would only be awarded in exceptional situations or making provision for granting a “protective costs order” at the initiation of the litigation in order to provide surety to a party that they would not be liable for costs if they were unsuccessful could assist with de-risking the process.

Achieving a fair process is even more difficult when an issue involves specific stakeholders. The “public” typically refers to a general collective of unorganised individuals who may have an interest, but not necessarily a direct interest, in a final decision. They very rarely bear the cost of the decision. “Stakeholders”, on the other hand, will be directly affected by the decision. Allowances may need to be made for greater participation of directly affected stakeholders.

### Decision quality

Public participation can enhance the quality of decisions by providing wide input, including by experts and by those with knowledge of communities. It has been argued that “decisions based on wider values and experience tend to be qualitatively superior in terms of environmental performance and protection”. This may be particularly
important when dealing with complex “wicked” problems. But some argue that involving the public in decision-making processes merely produces ambiguity and delays decisive action. Decision-makers open themselves up to a flood of information. There is no guarantee it is good quality information. Public input can be based on a misunderstanding or misinterpretation of a proposal or of the scientific evidence. Where decisions involve complex matters, it has been posited that “the views of the public should not be given much weight in [environmental] policy because the average citizen does a very poor job of handling probabilities and contingencies yet these are central to the decision”. This may be through a lack of foresight, or the difficulties general members of the public have in conceptualising the whole decision in their mind.

Consultative processes can become “talking shops” that take up a lot of time and fail to produce any substantive outcome. Furthermore, participatory processes can create rather than solve conflict particularly when they become dominated by narrow interest groups. Ultimately, decisions made through a process of consultation tend towards the “middle”. They rarely succeed at producing bold changes as there is too much concern for proper process and due consideration. Whether that is a good or bad thing is up for debate.

Consultation fatigue

Extended public participation runs the risk of creating “consultation fatigue” amongst the public. This is particularly the case if participants perceive little gain in return for their efforts. The public are often misguided into believing consultation means consensus, which is not often the case. This can lead to feelings of dissatisfaction when the decision goes against them. Given the costs associated with participation, it can be frustrating for members of the public if they see no influence or change resulting from their input. Too many separate and overlapping processes may be confusing and frustrating, and actually cause people to reduce their engagement.

Participation for “ulterior” purposes

A drawback of providing for extensive participatory rights is that participants may endeavour to manipulate the system for ulterior purposes. This is most evident in the case of trade competition, when commercial competitors may try to use their participatory rights to delay or stymie the activities of a trade competitor. There is the problem of the “squeaky wheel” syndrome where the loudest voices carry the greatest weight and where a small, vocal minority expresses views contrary to those of the large, silent majority. There is also the issue of “nimbyism” – people and communities seeking to protect their property or neighbourhood from the impacts of development that would benefit the broader public. Nimbyism is much maligned; the issue is more nuanced than nimbyism being simply “bad”. It is about recognising the point at which the public interest properly overrides the private interest. That will always be open to a degree of debate.

Time and cost

The most obvious downsides of extensive public participatory rights are the time and cost it involves. Collaborative processes are particularly resource intensive, although they can also foster a sense of ownership of an outcome (if one eventuates). It can also take many years for a plan to become operative under the RMA, and millions of dollars can be expended along the way. For example, Plan Change 13 to the Mackenzie District Plan took 10 years from notification to having legal effect. This is largely because of the extensive participatory rights that are provided for under Schedule 1, which can include pre-consultation (for some persons), written submissions, cross-submissions, pre-hearing mediation, council hearing, rights of appeal, more mediation and then a second de novo hearing in the Environment Court followed by appeals on matters of law to the higher courts. This begs the question as to whether all these steps are really required to enable the public to effectively participate in plan making, especially where many important decisions are already made by those directly elected by affected communities or their delegates. Plan-making processes must be timely and adaptive to respond to rapidly changing social, economic and environmental conditions.
A spotlight on the Auckland Unitary Plan Process

Due to the length of time normally taken to finalise a RMA plan (a 2008 review found an average time of 5.6 years), and the complexity of issues in Auckland, the Local Government (Auckland Transitional Provisions) Amendment Act 2013 provided for a streamlined process for the preparation of the Auckland Unitary Plan. The process effectively replaced the council hearing with that of a Hearings Panel and constrained the circumstances under which an appeal could be lodged with the Environment Court. The council prepared the proposed plan and notified it for public submission and further submissions. The Hearings Panel, whose members were jointly appointed by the Ministers of the Environment and Conservation, then heard the submissions through public hearings. The recommendations of the Panel were then considered by the Council. Merit appeals by submitters were only allowed to the extent that the Council departed from the Panel’s recommendations. Appeals on matters of law were also permitted.

The single-hearings process significantly shortened the time it took for the plan to become operative, with the proposed plan notified in September 2013 and most of the plan becoming operative in November 2016. Members of the public retained their right to make submissions and be heard and some appeal rights were retained although considerably proscribed. However, the tight timeframes imposed and greater formality of the Hearings Panel process made it more difficult for less well-resourced parties to fully participate, with many submitters being "burned off" during the process.

There are several challenges with one-stage hearings under the RMA. The first is the blurring of the line between the executive and judiciary with government-appointed panels and boards of inquiry. Members are appointed on a case by case basis and do not have the judicial independence of Court members. There is the potential for politically motivated appointments to influence the outcome. Second is the need to test evidence. Council hearings are less formal and cross-examination is not permitted. This means that evidence is not rigorously tested but members of the public feel more comfortable presenting their case. The Environment Court provides a more formal setting where there is cross-examination. If these two processes are converged, there is either a risk that the evidence is not rigorously tested (in the event that cross examination is not allowed), or that submitters refrain from participating (due to the formality of the hearing).

There have been suggestions that the Auckland Unitary Plan process should be rolled out more widely to other parts of the country to speed up plan-making processes. If this were to be contemplated, careful consideration would need to be given to who hears the evidence and makes a decision. And additional mechanisms would need to be provided to ensure that members of the public and community groups have an equal ability to present their case as more well-resourced submitters.
Balancing costs and benefits

Facilitating public participation is a fairly onerous task. It requires a significant investment of resources that could be allocated elsewhere in the decision-making process. From the perspective of the decision-maker, public participation is worthwhile if it delivers quality information. Conversely, it is only worthwhile to members of the public if their input actually influences the decision. Achieving effective public participation, which justifies the allocation of resources, is a difficult prospect. Some of the benefits and costs of participation are summarised in Figure 10.2 below.

### Advantages

- More information is made available to decision-makers
- Decisions are easier to implement and more durable
- Decisions will better meet the needs of the community and provide a sense of ownership, especially in relation to plans
- Decisions are seen as more legitimate; the process is more likely to be seen as fair
- Provides more equality in the ability of parties to influence a decision
- Improves relationships amongst parties
- Fosters an element of trust
- Promotes social learning

### Disadvantages

- Requires significant investment of resources and time
- May reduce decision quality if the public are poorly informed
- Can enhance conflict if not well managed
- Can produce ambiguity and prevent decisive action
- Can delay decisions being made
- It is difficult to provide a fair process in practice
- There is usually a strong disparity between the resources of individuals and organised interest groups
- Can result in consultative fatigue

### Figure 10.2: Advantages and disadvantages of public participation

Public participation provides many important benefits but can also incur significant costs. The challenge for a future system is to incorporate participatory processes that deliver benefits that outweigh their costs.

### 10.4 Public participation in the current system

The current system was premised on an expansive approach to public participation. In part, this was simply a recognition of the benefits of participation described above. In part, it was a reaction against the centralised and exclusionary approach to resource management decision-making in the Muldoon era. In any case, it resulted in the central statute in the system – the RMA – offering wide rights for the public to be informed of, make submissions on, be heard on, and appeal planning and consenting decisions.17 Subsequently, participatory provisions have been narrowed and expanded based on political preference and the pressures of the time.

In recent times, that has seen substantial narrowing of rights. In particular, provision for public participation has been pared back as part of an agenda to “simplify and streamline” the RMA and local government planning processes. Since 2009 these have included provisions to address frivolous and vexatious objections, the reintroduction of the ability for security for costs to be awarded (which had been removed in 2003), providing for direct referral to the Environment Court or a Board of Inquiry (and thereby excluding a more informal council hearing), and reversing the presumption that the resource consent application should be notified.18

At its inception, the RMA provided for very extensive public participation rights but these have been narrowed substantially in recent years.

A key question is where the balance should lie between providing for the public and potentially affected parties to have a say and ensuring that processes are not unduly lengthy or costly. There are clearly merits in the public having broad public participation opportunities in plan making processes which set the public outcomes sought and (in the RMA context) the rules framework which is applied to individual consents.19 It is less clear that someone from Invercargill, for example, should have a say in a localised consenting issue in Auckland.

### Participatory rights under key New Zealand statutes

In Appendix 3 of Working Paper 2 we looked at six New Zealand statutes to identify how public participation is provided for in practice, and for what purposes. Each statute in our current system takes a different approach to public participation. Rights can vary hugely depending on the nature of the regime. The RMA, for example, provides for substantially larger participatory rights than the Fisheries Act.

It is somewhat curious that we provide for extensive participatory rights under the RMA but not in other areas of public life. Does the funding of pharmaceuticals or the development of foreign policy affect us less than the height of a building on the other side of town? Why, in resource management, are we not content with electing people to...
make value-based decisions on our behalf, or simply for safeguards around transparency to be provided? Why do we go much further under the RMA by allowing people to submit, to be heard at hearing, and to appeal?

One reason may be that the system is perceived as having the power to take away rights, not just provide benefits. It is regulatory in nature, in contrast with other planning processes which are about “providing things” (such as new infrastructure under the Local Government Act and Land Transport Management Act). Participatory rights are therefore partly provided in recognition of the power the resource management system has to erode people’s rights (notably property rights). Or perhaps it is the “closeness” of physical and natural features – the local river, the shape of your street, the view out your window – that makes public “ownership” of these issues so much more pronounced? If we see or experience something every day, we feel like we are responsible for looking after it.

Extensive participatory rights are provided for in the RMA, in part, because it gives decision-makers the power to erode people’s property rights.

10.5 Māori participation in the resource management system

New Zealand’s resource management legislation has generally made special provision for the participation of Māori in decision-making. A range of statutory mechanisms have been used for this purpose (see Figure 10.3). There are many references to the role of iwi authorities in plan-making processes under the RMA, but there is no direct obligation to consult iwi (or any other parties) on resource consent applications. For example, when preparing policy statements or plans councils must “take into account” relevant planning documents recognised by an iwi authority or prepared by a customary marine title group if lodged with council.50 Iwi authorities and customary marine title groups must be consulted when preparing proposed policy statements and plans including enabling iwi authorities to identify resource management issues of concern and indicating how those issues have or are to be addressed.44 If a collaborative planning process is established, at least one member of the collaborative group must be chosen by iwi authorities to represent the views of tangata whenua and the “advice” of iwi authorities must be sought on a proposed policy or plan prepared after the collaborative group has reported.46

Dr Robert Joseph notes that these provisions have “not empowered iwi” in practice and that a “major challenge has been the weak impact of iwi management plans”.46

More recently, provisions introduced through the Resource Legislation Amendment Act 2017 enable iwi to initiate the negotiation of a Mana Whakahono ā Rohe (iwi participation agreement) with council. A Mana Whakahono ā Rohe can set out how an iwi authority may participate in plan making processes, be consulted on resource consent matters and work with councils to develop and agree on monitoring methods, amongst other things.57 This provides a more proactive role for iwi in establishing bespoke arrangements, which can be tailored to the particular needs and aspirations of the parties concerned. Dr Joseph notes that these new provisions are “a promising opportunity for empowering iwi and hapū rangatiratanga and recognising mātauranga and tikanga Māori”.48

Under the Local Government Act a council is also required to “provide opportunities for Māori to contribute to its decision-making processes” and to consider ways to “foster the development of Māori capacity to contribute to the decision-making processes of the local authority”.49 This acknowledges that not all Māori entities will have the capacity to effectively engage in such processes, and may need assistance. The Land Transport Management Act has similar provisions. The EEZ Act takes a different approach, with the establishment of a Māori Advisory Committee to provide advice directly to consent authorities.50 The Fisheries Act takes the traditional direct consultative approach. It requires the Minister of Fisheries to consult with Māori on the setting of sustainability measures and the total allowable catch. In addition, the Minister must provide for “the input and participation of” tangata whenua with a non-commercial interest in the stock or effects of fishing on the aquatic environment having particular regard to kaitiakitanga.51

The Marine and Coastal Area (Takutai Moana) Act creates a new set of rights for Māori in decision-making processes affecting the seabed and foreshore. If a resource consent application is made for an activity that is likely to have more than minor adverse effects on the exercise of a protected customary right it cannot be granted unless the rights-holding group gives consent.52 Resource consent applications and conserved permissions (such as creating a marine reserve) within customary marine title areas cannot be granted unless the title-holding group grants permission.53 A customary marine title group can prepare a planning document “in accordance with its tikanga” and if one is lodged with management agencies they must take it “into account”.54 No protected customary rights or customary marine titles have yet been granted under this Act so the effectiveness of these provisions has yet to be tested.

The Marine and Coastal Area (Takutai Moana) Act also overlays more general Māori participation rights on marine conservation processes under other Acts. For example, for marine reserve applications, marine mammal sanctuary proposals, publicly notified concession applications and marine mammal watching permits any affected iwi, hapū or whānau must be notified and invited to provide advice to the Director-General of Conservation who must pay “particular regard” to their views.55

A future resource management system could build on this range of mechanisms, recognising that a requirement to consult with Māori is unlikely to be sufficient on its own to enable effective participation. Support and capacity building is likely to be needed. Furthermore, a partnership model as envisaged under the Treaty of Waitangi may require a move towards revised institutional arrangements rather than participatory provisions, as discussed in Chapter 9.

10: PUBLIC PARTICIPATION

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Mechanism for Māori participation | Examples of use
--- | ---
Written approval/permission | Marine and Coastal Area (Takutai Moana) Act 2011
Māori advisory body | Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012
Bespoke participation agreements | Resource Management Act 1991 (Mana Whakahono ā Rohe)
Strengthen Māori capacity to participate | Local Government Act 2002, Land Transport Management Act 2003

Figure 10.3: Statutory mechanisms used to facilitate Māori participation in resource management decision-making

A variety of mechanisms has been used to enable Māori to participate in resource management decisions. Some of these, such as the obligation on councils to consult or notify, place Māori in a passive role. More recent approaches have enabled ōiwi and hapū to initiate engagement and more actively protect their own interests.

10.6 Key questions and options for reform

A more nuanced approach to public participation may be required in a future system, based on a careful examination of what the functions of participation are, how we best provide for these and how we can ensure that the right form of participation occurs at the right stage in the process (and in the right form). We also need to consider how to provide for participation in an efficient manner to minimise process delays and submitter burnout.

Function of participation

We may need to get away from a black and white approach where people think erosion or enhancement of participatory rights are “good” or “bad” in their own right. Instead, we need to ask what function participatory rights are performing in the system, and if those functions can be performed by other components more effectively and efficiently. We can consider two key functions that are quite different in nature: providing information to decision-makers, and providing a check and balance on developers and councils.

Do we need to rely on the public to provide information to decision-makers? Part of this role could potentially be undertaken by a well-resourced Public Defender’s Office which would become party to proceedings in the public interest, testing the applicant’s evidence as well as the correct application of the law. An alternative (or complementary model) would be to make greater use of amici curiae (independent “friends of the court”). A third approach may be to have an institution (such as an expanded EPA) dedicated to strategic environmental assessment (or an auditing role) and providing independent evidence for large projects. However, even with such institutions in play, we would probably still need public participation to provide information and knowledge about community values and local impacts. Only those directly involved are likely to be able to reflect these perspectives.

What about relying on public participation for a check and balance on developers, as was envisaged when the RMA was enacted? This function could more clearly be performed by other parts of the system, such as with an active and independent litigator such as a Public Defender’s Office, or a check by the EPA to ensure that decisions met environmental bottom lines. However, if we put all our eggs in this one basket, there is a risk that the agencies may fail to perform adequately, or may have their activities circumscribed by budgetary reductions imposed by future governments. The withdrawal of the Department of Conservation from its advocacy role under the previous administration is an example of how statutorily based public interest champions can have their teeth blunted by a reduction in funding and imposition of political restraints. The broad public participation provisions in the RMA enabled the Department’s advocacy role to be at least partially filled by environmental NGOs such as EDS and Forest & Bird, albeit with limited resources. We should think very carefully before taking away this broader check and balance role.

Two key purposes of participation, the provision of information to decision-makers and providing a check and balance on developers and councils, could potentially be provided (at least in part) by other elements of the system.

Supporting participation

Should we just enable or should we promote public participation? This may depend how we approach the purpose of participation. Is it about ensuring people are not excluded from decision-making process? If so, we need to recognise that the costs of participating, especially at court level, do exclude people from the process. We need to think about how we help resource and de-risk participation. But we need do little else. If people can participate but choose not to, then there’s nothing wrong if our aim is simply not to exclude them.
But what if we rely on participation for information and to discover community values? In this case, we need to be more active in ensuring it happens. If the system fails to incentivise participation, then the system is deficient, because we miss out on essential information. This may require more novel mechanisms to engage with wider sections of the community such as proactive engagement through community workshops and drop-by sessions. More innovative mechanisms such as citizen assemblies and juries can help ensure that a more representative range of views are captured.

How do we promote participation by those with silent voices such as nature itself, future generations, or future residents of growing cities? We might consider creating specific advocacy institutions that are not conflicted. We may also need to ensure that groups that represent these interests have standing and resources to participate in a meaningful way.

Active promotion of public participation will likely be required for all relevant voices to be heard. This may necessitate the use of novel mechanisms.

**Extent of participation rights**

For what kind of matters would we want to see extensive participatory rights and for what matters should they be more circumscribed? We might expect to see more participation provided for where values-based policy is being formulated (eg a regional policy statement) than in decisions applying those values (eg a resource consent). We might also expect to see more extensive public participatory rights where regulations are being imposed that can take away rights (as under the RMA) and fewer for decisions about the expenditure of money to provide public benefits (such as under the Local Government Act and Land Transport Management Act).

How should we treat participatory rights in the context of national and local interests? Generally, we have provided more participatory rights at the local level (eg appeal rights on a district or regional plan) than at the national level (eg no appeal rights for an NPS or NES). It can get more complicated when it comes to rights to participate in matters having very local (neighbourhood level) impacts. This is especially fraught in matters of urban planning, such as the height of a neighbour’s fence. Should the directly affected neighbour be the only one to have a say, or should we hear the voices of potential future residents rather than just those already living there?

The extent of participatory rights will differ depending on the type of decision being made and the scale of potential impacts. Values-based policy and the imposition of regulations which impact property rights will merit greater participation.

**Subject matter of participation**

On what kind of matters should people be able to participate, and in what ways? Different kinds of decision – discharges, coastal occupation, urban amenity – do not necessarily justify the same degree of participation. Some have broader public impact, others more narrow local implications.

We may need to consider the extent to which public participation is warranted depending on the objective sought by a decision. For example, if we have a separate statute with a clear purpose, leading to clear, overriding restrictions to protect biophysical bottom lines, we may not need extensive public participation. It is largely a technical decision as to whether a proposal exceeds the bottom lines. But where decisions are balancing social, economic, cultural as well as environmental interests, there may be a greater need for broad public participation. Allocation decisions are also fraught, as described in Chapter 7. Does the public need a say in who obtains a right to use a public resource, if biophysical bottom lines are protected?

**More public participation | Less public participation**

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<thead>
<tr>
<th>Formulation of values-based policy</th>
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<td>Regional and local level matters</td>
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<td>Regulations which directly affect property rights</td>
<td>Matters that do not directly affect property rights</td>
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<td>Weaker policy and planning provisions</td>
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<td>Balancing of a range of interests</td>
<td>Applying technical criteria</td>
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<td>Environmental quality</td>
<td>Allocation</td>
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**Figure 10.4: Matters that may affect the extent of public participation required**

Decisions with broader public impact merit greater public participation than those with localised impacts. Less public participation may be warranted when there are strong regulations in place to protect biophysical bottom lines.

**Timing of participation**

It is important to determine at what point in time people should be able to participate. Should the public be involved in formulating policy (eg collaborative process), in responding to policy (eg submitting on plans) and/or in objecting to policy (eg legal proceedings)? Arguably all three stages are important, but may require different approaches.

It is less clear the extent to which the public should be involved in responding to particular projects (eg when a developer applies for resource consent). In this case, if we are to lessen participatory rights, we may need to change the nature of plans. Much more certainty may need to be built into plans if people are to predict what
they mean for particular projects and for their property and communities. If we make efforts to front-end participation – at the plan-making stage – it could be possible to avoid the need for extensive and duplicative participatory processes for consents. If it is clear from the plan what kinds of development are envisaged, and what is and is not allowed, then that could be people’s opportunity to submit.

The failure of current plans to achieve such certainty has arguably contributed to the current status where community members are frustrated at not being able to affect practical outcomes on the ground (in terms of non-notified projects which were not foreshadowed in the plan) and developers are frustrated at the delays caused by extensive public participation rights when activities are notified.

If more certainty is built into plans, there will be less need for participation in consenting decisions, as the outcomes will be more predictable.

Role of appeals

There is a fundamental difference between first instance participation and appellate participation. The ability to appeal or be involved in appellate proceedings, on the merits, is arguably not just a larger extent of participation. It is a separate layer of participation. At first glance, it seems inefficient. The same people can present the same submissions, on the same things, using the same evidence, twice on the merits.

So why do we have appeals? The reasons is partly related to institutional design. In a system in which subsidiarity is currently expressed through strong devolution to local government, Environment Court merits appeals are one way to ensure the national interest is properly recognised and that there is consistent application of the Act’s purpose. It is a national level check and balance that is apolitical; it is a supervisory role. It also means that any lack of capacity and capability at council level can be remedied at court level.

The ability to lodge merits appeals to an appellate court is not merely a duplication of the first-instance hearing but provides an important independent check and balance on devolved decision-making.

But if we removed some power of councils to make decisions, and referred more to the court (or a branch of a national EPA), that could undermine subsidiarity. Equally, if we removed the power of councils and the Environment Court and refer everything to a ministerially appointed board of inquiry, that could undermine both subsidiarity and the Court’s supervisory role.

This approach has meant that we largely lack merit appeal rights in relation to central government decision-making. That creates its own series of challenges when such decision-making directly impacts on local and regional matters. A case in point is the Fisheries Act, where environmental matters (which are under the purview of the RMA for other activities) are for fisheries determined by the Minister of Fisheries with no right of appeal. It means that those with property rights directly affected (quota owners and commercial fishers) and those whose local/regional environment is affected (local residents and marine users) have no ability to challenge the merits of the decisions on appeal. This has led to the use of judicial review as a way of resolving substantive issues, a tool that is poorly configured for the task.

This indicates that merit appeal rights could potentially be provided for under the Fisheries Act, or alternatively (and perhaps preferably) such decisions should be made under broader environmental legislation such as the RMA which is better configured for that type of decision-making. This would leave allocation decisions (e.g., access to quota and setting allowable catches) to be made separately in a similar manner that current occurs for minerals under the Crown Minerals Act.

A spotlight on appeals under the Fisheries Act

Unlike under the RMA, there is no provision for merit appeals against decisions by the Minister of Fisheries on sustainability measures under the Fisheries Act. This has resulted in multiple judicial review proceedings being lodged in the High Court which have sought to overturn the Minister’s decisions on technical legal grounds, irrespective of the merits of the decision. A case in point is the litigation surrounding the protection of the critically endangered Māui dolphin. In 2001 the Minister put in place a set net ban along the west coast of the North Island to protect the dolphins. The decision was successfully challenged via judicial review by the fishing industry on the basis that the Minister had been misadvised about the level of bycatch that would result in the extinction of the dolphins. The Minister reconsidered the matter and reached the same decision, but the protection of the dolphins was delayed for two years as a result.

In 2008 the Minister sought to extend the protection zone for the dolphins. This was again judicially challenged by the fishing industry and the Minister’s decision was overturned on a technicality, on the basis that he was misadvised about the reliability of one Māui dolphin sighting. The Minister reconsidered the matter and the extension came into effect in 2011, but only after a further three-year delay. This delay was significant given that at the time there was estimated to be only 55 surviving adult animals of the subspecies remaining.56 Providing for a merits appeals may provide a more considered check and balance on decision-making in interests of achieving the best outcome, rather than matters being determined on legal technicalities.

Designing participatory processes

How prescribed should participatory processes be? There may be both advantages and disadvantages in having...
a general participatory process that can be tailored to different circumstances – such as under the special consultative procedure under the Local Government Act. Similarly, there are advantages and disadvantages of having a specific and prescribed process like the RMA Schedule 1 process. The latter enables the process to be tailored to the context. The latter provides more rigidity, but also more certainty that participatory rights will be protected and for how people can engage.

Participatory rights are very different under different statutory regimes. This is not surprising, as different statutes do different things. Some may warrant extensive public participation, others a lesser amount. For example, there is extensive room for public participation in plan-making under the RMA, but less for allocation decisions under the Crown Minerals Act. There can also be extensive engagement under both the RMA and the Local Government Act, sometimes on similar matters (such as in an informal spatial plan that then needs to be translated through an RMA process to a district or regional plan). Not only are there multiple participatory processes across statutes, but there can also be several different options within each act (e.g., there are four potential plan-making processes under the RMA). On top of all this there is a multitude of central government discussion documents that people are expected to submit on.

There is a multitude of different participatory rights under various statutes and a future system could usefully rationalise and simplify these.

Arguably we could seek greater simplification in process. When pared down to their core there are essentially four elements to our participation processes of which variant combinations suit different types of processes.

**Proposal not yet developed**

1. Informal consultation (community meetings, drop-in sessions, surveys, etc)/citizen assemblies/collaborative processes

**Proposal developed**

2. Notification and written submission
3. Public hearing of submission

**Decision made on proposal**

4. Appeal of decision to higher body

**Figure 10.5: Stages in statutory participation processes**

Many applicants are keen to avoid public notification of their proposals because of the risk of costly appeals. This has resulted in a shrinking proportion of applications being publicly notified, now down to only 2 per cent. The lack of public input means that councils may be missing out on an important source of information, and this can result in poorer quality decision-making (as described in the Te Mata Peak case below). An alternative approach would be to provide for a category of consent which is publicly notified and where written submissions can be made and considered by council, but where there are no hearing and/or appeal rights.

**Non-notification of resource consents can result in poor decisions due to the council being unaware of Māori and/or public concerns. To address this, non-notification could be replaced by a category of consent which is publicly notified but where submitters do not have hearing or appeal rights.**

**A spotlight on (non-)notification: The Te Mata Peak walkway decision**

In August 2017, Craggy Range Vineyards Limited applied to the Hastings District Council for a resource consent to subdivide its land and construct a 2.4 kilometre long walking/mountain bike track on Te Mata Peak. The District Plan identified the Peak as an outstanding natural feature as well as being of significance to Ngāti Kahungunu, with Te Mata being the physical embodiment of their ancestor Rongokako. Consent was granted in October 2017 without any public notification or consultation with Ngāti Kahungunu on the basis that the effects of the track would be less than minor.

In December, after the track had been constructed creating visible scars on the Peak, both iwi and members of the public expressed concerns about the track. Protests opposing the track were staged outside the winery. After commitments to remove the track and reinstate the Peak to its former state were reneged on, EDS lodged proceedings in the High Court challenging the non-notification decision with support from the Waimarama Marae.

A subsequent review of the Council’s non-notification decision found that the application lacked information about the track’s effects on cultural values associated with Te Mata Peak and that the council had not sought further information on this point. This meant that the decision to grant consent had been taken in the absence of adequate information on cultural effects. If the consent had been publicly notified, the council would have been aware of iwi and public views about the track, and as a result would have had a broader information base on which to found a more robust decision. Consent may not have been granted as a result. This highlights that excluding public participation from decision-making processes can lead to poor decisions.

**A future system could potentially combine public participation processes across several statutes.**
### 10.7 Concluding comments

In this chapter we have considered the role of public participation in the resource management system: what it can mean, its advantages and disadvantages, how it is treated in the current system, and how it could be approached in a future system. Much depends on the purpose for which we want the public to engage. Sometimes institutional reform can be an alternative to participatory rights. Again, many options are possible for change (see Figure 10.6 below).

In the following chapters, we consider the tools that a future system could use. People never “participate” in the abstract, so participation is inextricably linked to the process for producing particular tools under particular statutes – such as regulations, strategies, plans and permits. Because those (and legislative and institutional design) options remain live, we do not yet offer options for participation that relate to specific tools or statutes. How those elements could work together is considered when we develop models in Chapter 15.

<table>
<thead>
<tr>
<th>Sub-theme</th>
<th>Options</th>
</tr>
</thead>
<tbody>
<tr>
<td>General direction of travel</td>
<td>Retain the status quo (or rationalisation of multiple participatory processes); OR Strengthen participatory rights; OR Weaken participatory rights</td>
</tr>
<tr>
<td>Point of engagement under the RMA</td>
<td>Retain the status quo (participation at planning and permitting stages); OR Participation occurs more at permitting stage, reduce involvement at planning stage; OR Participation occurs more at planning stage, reduce involvement at permitting stage</td>
</tr>
<tr>
<td>Extent of participation</td>
<td>Retain current rights of submission and appeal (and add notification appeal rights); OR Provide appeal and submission rights, but curtail the ability to appeal (eg the Auckland Unitary Plan process); OR Remove appeal rights but allow wider rights to be notified and submit</td>
</tr>
<tr>
<td>Topic</td>
<td>Retain the status quo; OR Strengthen participation (eg appeal rights) for some topics (eg climate change policy, fisheries restrictions); OR Remove participation for some topics (eg submission and appeal rights for issues of amenity)</td>
</tr>
<tr>
<td>Purpose of participation</td>
<td>Retain public participation as a way to provide information and a check and balance on developers; OR Rely on the auditing role of an independent institution to provide a check and balance on developers; AND/OR Rely on an institution like the EPA to provide independent information</td>
</tr>
<tr>
<td>Supporting participation</td>
<td>Ensure robust funding and resourcing for meaningful public participation; OR Actively incentivise participation through novel engagement mechanisms; OR Create and resource institutions that represent aspects of the public interest (eg future generations) or nature</td>
</tr>
<tr>
<td>Extent of rights</td>
<td>Facilitate participation at the stage where values-based decisions are being made (eg policies and strategies); OR Facilitate participation at the stage where decisions have more immediate impact on people (eg consents); OR Restrict participation to situations in which people are directly affected.</td>
</tr>
<tr>
<td>Role</td>
<td>Restrict participation when applying bottom lines; AND/OR Allow participation when balancing various forms of wellbeing; AND/OR Restrict participation when allocating resources</td>
</tr>
<tr>
<td>Appeal rights</td>
<td>Allow appeals only for local and regional level decisions; OR Allow appeals for national level decisions</td>
</tr>
<tr>
<td>Process</td>
<td>Limit the number of participatory processes in the system; AND/OR Allow a general process that can be tailored to different circumstances; OR Prescribe the process by which participation occurs</td>
</tr>
</tbody>
</table>

Figure 10.6: Options for public participation in a future system
ENDNOTES

1 For example, notification, submission and appeal rights in relation to a regional plan under the RMA.

2 See Chapter 15.

3 See R Paehlke “Democracy and environmentalism: Opening the door to the administrative state” in R Paehlke and D Torgerson (eds) Managing Avianca: Environmental politics and the administrative state (Broadview Press, Toronto, 2005) for a seminal argument that environmentalism and democracy can go hand in hand.


5 IAP2 Public participation spectrum (February 2017) at <www.iap2.org>.

6 Wellington International Airport Ltd v Air New Zealand [1993] 1 NZLR 671.


12 For example, some collaborative groups may be “cherry picked” or not reflective of broader society.

13 Although it does not have to be implemented by authorities, a collaborative process has been undertaken by the Land and Water Forum. See also the Stakeholder Working Group in the Sea Change – Tai Timu Tai Pāri process.

14 For example, the Canterbury Water Management Strategy and the Te Korowai process in Kaikoura.


17 R Peart Turning the tide: Integrated marine planning in New Zealand (EES, 2018).


19 See Chapter 3.


23 Principle 10 of the Rio Declaration states “At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.”

24 AA Sumudu et al Emerging principles of international environmental law (Transnational Publishers, 2006).


26 Ibid at 2420.

27 S Kös Public participation in environmental adjudication: Some further reflections (Opening address at the Environment Adjudication Symposium, Auckland, 11 April 2017).

28 Iwi and hapū groups, incorporated societies, and community groups.

29 The group must either already be engaged in the proceedings by being a party to the case (when the case is before the Environment Court), or have lodged a submission with the EPA (when the Minister for the Environment has directed the matter to a board of inquiry or if it is a proposal of national significance to the Environment Court), or be a section 274 party or a party to the court proceedings (when the local authority has directly referred the application to the Environment Court).


31 S Kös Public participation in environmental adjudication: Some further reflections (Opening address at the Environment Adjudication Symposium, Auckland, 11 April 2017).

32 Ibid.


34 T Dietz and PC Stern Public participation in environmental assessment and decision-making (National Academies Press, 1980) at 54.

35 For example, a fundamental principle of environmental management is intergenerational equity (see Chapter 5). The principle requires long-term thinking of how to best manage resources sustainably so they will still be available for future generations. This can be a difficult concept for people to embrace when they are faced with measures that seek to limit their immediate interests in or rights to use resources.


39 See Westfied (New Zealand) Ltd v North Shore City Council [2005] NZSC 17, [2005] 2 NZLR 587 at [46] where the Supreme Court described the purposes of public participation under the RMA as two-fold: “... first, to recognise and protect as appropriate the particular rights and interests of those affected and more general public interests and, second, to enhance the quality of the decision-making.”


42 Resource Management Act 1991, s36A.

43 Ibid, ss 88(2A), 66(2A) and 74(2A).

44 Ibid, sch 1, cl 38.

45 Ibid, sch 1, cl 40(1)(a). The collaborative planning provisions were only recently introduced via the Resource Legislation Amendment Act 2017 and have yet to be utilised.

46 R Joseph “The Treaty, tikanga Māori, ecosystem-based management, the RMA and power sharing for environmental integrity in Aotearoa New Zealand – possible ways forward” in G Severinson and R Pearl Reform of the resource management system: Working Paper 3 (EES, 2018) at 34.


49 Local Government Act 2002, ss 14(1)(d) and 81.

50 Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012, s 18.

51 Fisheries Act 1996, s 12(1).

52 Marine and Coastal Area (Takutai Moana) Act 2011, s 65.

53 Ibid, ss 66 and 71.

54 Ibid, ss 85-91.

55 Ibid, ss 48 and 49.

56 R Peart Voices from the sea: Managing New Zealand’s fisheries (EES, 2018) at 122.

57 Infrastructure New Zealand has identified the disadvantages of this: see New Zealand Council for Infrastructure Development (now Infrastructure New Zealand) Integrated governance, planning and delivery: A proposal for local government and planning law reform in New Zealand (2015) at 36.


PART 4 - TOOLS

11: STRATEGIC TOOLS
11.1 Introduction

Having considered the norms, functions and structures of the system, in Part 4 we turn to the tools that it could use. "Tools" is a broad label we are using to describe public interventions that are intended to influence human behaviour directly – both public institutions and private persons. They are interventions that bite in some way. In this sense, tools are different from other types of themes addressed so far, being:

- Norms, like sustainability or Te Ao Māori – which are not in themselves public interventions (although they influence what interventions look like)
- Functions – the roles the system needs to play, but which require tools to actually implement
- Structures – the legal and institutional architecture within which tools are used, but which in themselves do not influence people’s behaviour

Where tools fit into the logic of the project’s conceptual framework is shown below in Figure 11.1.

![Figure 11.1: Structure of this report based on four themes](image)

Tools are a theme where the system becomes very real for people. They tell us what we can, cannot and should do in relation to resources and the environment. But it is important not to equate tools with regulation. Similarly, we should not equate regulatory tools with prohibitions and prescription. A future system will need to be much more creative than that. A huge variety of tools can be used. Just a handful are shown in Figure 11.2 below, to give a sense of the breadth of this topic.

![Figure 11.2: Examples of tools that can be used in a resource management system](image)

A project of this nature is not the appropriate place to identify or give detailed accounts of all tools. What it seeks to do is outline the range available, categorise them in a meaningful way, and sketch out how we might use a wider variety of tools effectively and harmoniously in the future.

As shown in Figure 11.3 below, different tools can be placed on a broad spectrum according to the amount of freedom of action people enjoy. At one end we can place command and control regulation – if people do something, or fail to do something, they are sanctioned. Little freedom remains to them. That is particularly the case if regulation is prescriptive – outlining the detailed steps that must be taken, rather than setting an outcome and allowing people to decide how best to achieve it.

At the other end of the spectrum we could place soft mechanisms like education campaigns. Here, people retain substantial freedom of action, and may even be unaware that their behaviours are being influenced. In between is a wide array of interventions.
Different tools can be placed on a broad spectrum according to the amount of freedom of action people enjoy. It is not just about regulation.

Different tools may be more or less appropriate depending on the statutory framework in question: we may not, for example, expect to see a detailed Building Code or emissions trading scheme under a statute like the RMA. However, in this part we do not structure our analysis of tools according to the boundaries of particular statutes, because legislative design choices could look quite different in a future system.

Different kinds of tools may also be more or less appropriate depending on the role the system is playing. For example, bottom lines require translation into firm regulatory restrictions to be an effective safety net, whereas the pursuit of positive outcomes may require a less coercive set of measures. For some, we face difficult choices (eg resources can be allocated through regulation, auctioning, tendering, or a first in time approach).

We see three key categories of tools, and this reflects the structure of the following three chapters: strategic tools, regulatory tools, and non-regulatory tools. A strategic tool is an overarching instrument that guides public decisions over time without being binding on people as a matter of law. Regulatory tools are instruments that require people to do (or refrain from doing) certain things, and can be subject to enforcement and sanction if they do not. Non-regulatory tools are those that influence people’s behaviour without compulsion (such as funding, economic instruments and nudges). These categories have quite different characteristics, and warrant focused attention.

Before we look at strategic tools, a few words should be said about the cross-cutting concept of “plans” and “planning”. The general field of “planning” can mean different things to different people, with much overlap between concepts: land use planning, urban planning, resource planning, environmental planning, structure planning, master planning, spatial planning, local planning, community planning, regulatory planning, financial planning, strategic planning – the list goes on. Sometimes a planning instrument is not even a plan – when it is a strategy, a regulation, or a policy statement. If it is not done in a very specific context, it can be confusing to use general terms like plans. Starting from first principles, we prefer to regard plans as a coherent and inter-connected collection of different tools, which are worth unpicking in their own right to see how they are combined into particular instruments (eg into a “regional plan”).

Plans can be seen as a tool in their own right. Alternatively, they can be seen as a mechanism for combining different kinds of tools into a coherent instrument.
11.2 The concept of a strategic tool

A strategic tool is an overarching instrument that guides the actions of public authorities over time without being binding on people as a matter of law. These are still “tools” in the sense that they do “bite.” But they bite primarily by influencing the behaviour of public authorities who are then directed to implement strategy using other tools (eg regulation, funding, etc). Strategy does not generally bite on private persons. For example, the Auckland Plan is a strategic document that does not direct private persons to do anything; it influences the decision-making of various public authorities who may then employ other tools to influence private behaviour. It is important to start discussion with strategic tools, because they influence how other kinds of tools are deployed.

Our norms and future challenges demand that a reformed system drive positive change over time. We live in an environment where bottom lines have already been breached and require recovery, and where the future holds both threats to be countered (such as climate change) and opportunities to be pursued (such as technological change). The system needs strong strategy – a way to get to a more desirable state.

Some have criticised the current system for not being strategic (forward-thinking) enough. Central to these are complaints that the RMA is too focused on managing adverse effects on a reactive basis rather than being focused on achieving positive outcomes. As discussed in Chapter 7, this is a legitimate complaint, even though some strategic planning has been able to occur under it. Other complaints include that institutions are not sufficiently future focused (eg we do not have a futures commission or the like).

That said, the current system is by no means devoid of strategy. For example, some have pointed out that the Local Government Act and the Land Transport Management Act are strongly future focused. Central and local government often produce strategies under more general (or no) statutory frameworks. The issue is more that, currently, strategy happens on an ad hoc and piecemeal basis, and that the links between strategic and other kinds of tools (eg regulation) are not always strong.

11.3 Strategic tools and the system’s core roles

A future system could, and should, embrace strategic tools in performing most of its core roles (described in Chapter 7). This is because most of those roles require change to happen over time.

<table>
<thead>
<tr>
<th>Core role of the system</th>
<th>Why strategy is important</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bottom lines</td>
<td>We have already breached bottom lines, so we need to drive change to “get back into the black”.</td>
</tr>
<tr>
<td>Trade-offs</td>
<td>We need a strategic framework to drive positive change over time by seeking synergies; otherwise trade-offs will become a race towards bottom lines.</td>
</tr>
<tr>
<td>Pursuing positive outcomes</td>
<td>A future system needs to drive positive change, not just respond to and minimise potential harm.</td>
</tr>
<tr>
<td>Protecting and promoting Māori interests</td>
<td>Treaty obligations are not static. Aside from the dynamic settlement process, which contemplates significant change for Māori, the Treaty is an evolving document. What Treaty obligations mean changes over time. A move towards active partnership requires a strategy – not just ad hoc changes.</td>
</tr>
<tr>
<td>Providing public goods</td>
<td>Public goods (like infrastructure) often have long-term and intergenerational impacts, and are about securing positive changes in wellbeing (including increased resilience). The inevitability of technological change also makes a future focus important.</td>
</tr>
<tr>
<td>Allocating non-private resources</td>
<td>Allocation can be strategic in that it may contemplate reallocation to achieve public policy objectives. Responsibilities (including the reduction in rights) also need to be allocated over time (eg relative obligations to get back above bottom lines in relation to nutrient discharges).</td>
</tr>
</tbody>
</table>

Figure 11.4: Relationship of strategy to core roles of the system

11.4 Types of strategic tools

In the following sections we consider some strategic tools we could adopt in a future system. Strategies are often talked about in general terms, as documents that outline a vision for the future and steps to get there (such as biodiversity strategies, climate strategies, etc). However, we can think about strategic resource management tools in more specific terms than that.
A New Zealand resource management strategy

Just as the resource management system as a whole (including legislative design, institutions, etc) is usually analysed in silos, so too does resource management strategy seldom get looked at in a holistic way. It is more common to have strategies relating to economic development, energy, conservation, local and regional infrastructure, climate and so forth. We have no shortage of those. And yet these things are intimately related – it is why we use a “system” label in the first place. It is also why we have stressed the need for an overarching integrative framework for resource management in previous chapters – whether normative (an agreed statement of ethics, principles and objectives), legislative (in the nature of an umbrella statute, or even constitutional-type instrument), or institutional (a whole-of-system steward at the national level, or an independent resource management commission). Of course, more targeted strategies still have a role (as do more targeted pieces of legislation), but they need to be aligned with an overall vision – and with each other. Existing strategies are by no means always in conflict. But some have risks of inconsistency (even those developed within the same statutory framework),18 and there are only weak mechanisms to ensure that they work synergistically beyond informal dialogue between relevant government agencies.19

A future system could require the government to promulgate a single, overarching resource management strategy. This could have three defining features:

1. It would be mandatory
2. It would be integrated across all domains, sectors, spaces and institutions
3. It would have a clear and firm legal pathway to implementation under all relevant statutory frameworks

Such an instrument could be mandated and created under the auspices of an umbrella piece of legislation described in Chapter 8, with its development led by an accountable government system steward20 potentially alongside an independent resource management commission (discussed in Chapter 9). It would lose much of its effectiveness if its application were limited to the hierarchy of instruments under an RMA-type statute, or just “environmental” or “land use planning” institutions. The point is that it would transcend the boundaries of statutory frameworks and spatial jurisdictions.

A formal resource management strategy could seek synergies across local and regional jurisdictions, sectors and domains, and proactively deal with conflicts and trade-offs arising at the national level. It would not shy away from a hierarchy of objectives where win-win outcomes were not possible. It would also address all the roles the system needs to perform – how we secure bottom lines across all domains, the principles to underpin trade-offs and allocative choices, how to enhance the environment, how to safeguard and further the interests of Māori, and how to provide public goods. It could even integrate more systemic issues outside the traditional remit of the resource management system, such as tax incentives, the education system, and – the topic many are reluctant to talk about – population policy.21

Domain-, sector- or space-based strategies (eg for biodiversity,22 infrastructure,23 tourism24 or urban growth) would still be desirable to add focus and to champion particular issues,25 but would need to be developed within the context of a broader strategy. These things are all connected. In particular, domain-based sub-strategies relating to the natural world would need to be guided by a whole ecosystem-based focus. Presently, an ecosystem focus is lacking, especially in the marine area where multiple statutes artificially fragment management.26

An integrated strategy should have strong and direct legal influence across other statutory frameworks (strong vertical integration), not just a laundry list of aspirations to pursue if more targeted statutes allowed it. But it could also be a tool to outline the concrete ways in which those are going to be achieved through the tools of more targeted laws (eg the tools in the RMA, fisheries, conservation, transport and climate legislation, etc).27 For example, the climate change component of strategy may require firm links to specific statutes concerned with land use, forestry, energy, transport, investment, emissions trading and construction. Finally, while it would be a national level instrument reflecting a national community of interest, a strategy would require input from and consultation with multiple levels of government, iwi and stakeholders, and be reviewable on a revolving basis. This could work in a similar way to, and be aligned to respond to, the current approach to environmental reporting (overall assessments interspersed with domain-based ones).28

A less ambitious, but nevertheless positive, step in the direction of integrated strategy would be the compulsory creation of a government policy statement under the RMA. We already have this concept under the Land Transport Management Act. It could link, or even integrate and replace, existing national level tools under the RMA (such as NPSs, NESs, regulations and National Planning Standards). Replacing the array of potentially conflicting instruments may provide greater certainty of outcome for councils, courts and all users of the system.29 It would align policy and regulatory tools. Such an instrument could also proactively require government to set, over time, a comprehensive range of environmental bottom lines in which there is a national interest (and a way to meet them), rather than the current reactive approach to creating them via NESs and NPSs.30

Under the RMA (or future equivalent), central government could express its expectations and requirements through an integrated government policy statement rather than relying on ad hoc, fragmented and overlapping instruments.

As discussed in Chapter 8, statutes themselves must be geared towards the realisation of an overarching

11: STRATEGIC TOOLS
strategy. Key to that would be strategically worded purpose statements across our legislation, as these are what guide most decision-making in practice. Strong purpose statements are powerful signals and directions to decision-makers to do things in a particular way, and can be thought of as strategic tools in their own right. For example, the Welsh Well-being of Future Generations Act 2015 places positive obligations on public bodies to carry out sustainable development, which is about “improving” rather than just enabling economic, social, environment and cultural wellbeing. Authorities must take all reasonable steps to meet such objectives.

Some statutes in the current system pull in different directions with no reference to a wider strategy. This can happen over time as amendments to individual statutes take place within institutional and policy silos. The scale of the resource management challenges we face, however, may require a more coordinated system. An obvious example is the tension between the Crown Minerals Act, which actively encourages the exploitation of petroleum resources, and the Climate Change Response Act, which seeks to reduce the emission of greenhouse gases. But there are others: housing, urban development, local government and environmental legislation can lead to an uneasy coexistence. Conflicts will always be present, of course, in a system that partly exists for the purpose of resolving them. But they could be resolved through an overarching strategic framework rather than pitting different statutory frameworks against each other (or, worse, treating them as unconnected islands and hoping for the best).

Statutory purpose statements can be powerful strategic tools. If the system is to drive change, it needs to do so through statutes that are premised on the need for it and which mutually reinforce each other.

**Targets and budgets**

Strategic tools are not just general statements of what needs to happen over time. They can be much more specific and tangible. One is the concept of a target. Targets are strategic, in that they drive change – we need to get to indicator X by time Y. They send a clear signal that change will need to happen over a predictable and stable timeframe. A plan for meeting targets can even be staged, and ramped up over time. They may (or may not) also be regulatory in nature (in that they may, or may not, be binding on public authorities or private persons). The current system does not prevent targets being set – for example, the NPS for Freshwater Management provides for this to happen. However, targets are not required to be set in a systematic way. This, perhaps, is not surprising given that our laws are normatively geared much more towards management than change per se. In contrast, in Wales, the government must publish indicators and set milestones, then publish an annual wellbeing report on progress made towards their achievement.

Targets can be related either to the reduction of harm or to the achievement of improvements. They require precise and measurable metrics, which means that meaningful indicators need to be set. While it does not set targets per se, the Treasury’s Living Standards Framework will provide a variety of indicators based on multiple wellbeing (not just economic ones like GDP), and could be one basis for the development of targets.

As one would expect from the word itself, targets also need to be targeted. They need to relate to particular domains, sectors, or spaces. But they need to be set within a framework that considers the system as a whole; otherwise the pursuit of one target could come at the expense of another. We may need to curb our ambitions in one area to realise more important ones in another (eg in renewable energy generation or housing affordability vs local amenity concerns).

Targets may also be more suitable for some of the system’s roles than for others. They make a great deal of sense for where environmental limits have already been exceeded (such as freshwater quality) or where current behaviours mean that they are likely to be breached (as with climate change). They also make sense in the context of pursuing positive outcomes (such as with urban planning and environmental enhancement). However, it may be more difficult to set targets for other roles, such as allocation or dispute resolution.

A closely related concept is that of a budget. This represents a total quantum of harm that is acceptable over a period of time, and allows tough allocative choices to be made within it (eg who gets to create emissions). Budgets can reduce over time to provide a meaningful, yet predictable and gradual, transition towards the meeting of a target. They provide flexibility as to how a target is met. However, a budget is a narrower concept than a target, in that it is primarily about allowing and distributing a maximum amount of harm. It can work, for example, for greenhouse gas emissions, or for nutrient discharges into freshwater, but is less applicable where the challenge is ramping up improvements (eg pest control) rather than ramping down harm. Budgets as a commitment device in zero carbon legislation may be hard to apply more broadly across the environmental management system. However, the concept deserves consideration for more general application.
A spotlight on targets and budgets under proposed zero carbon legislation

Under the government’s proposed Zero Carbon Act, a target would be introduced for net zero emissions by 2050. There are still open questions as to how that would work (eg if it could be revised over time, who would be responsible for setting it, and whether it would be enforceable). But setting a target in primary legislation has benefits, including “discouraging changes of ambition in response to short term considerations” and showing “Parliament’s long-term commitment to reducing emissions and provide clarity to New Zealanders about its policy objectives.”

Associated with the target would be an emissions budget. This is a quantity of emissions allowed over a particular period of time – proposed to be five years. It would be accompanied by changes to the emissions trading scheme, and a plan for how the government intends to comply with the budget. It would need to be accompanied by other tangible measures, but it provides a predictable policy framework within which that could happen.

Investment strategies

Money is an extremely important strategic driver of change. In Chapter 13 we consider the funding tools that could be used in a future system to provide public goods, as well as the role of economic instruments in influencing behaviour. But there is a broader strategic sense in which money is important. Public money can be used to drive significant change over time. At the micro-level, this might be things like a council replacing petrol vehicles with electric ones, or choosing to lease energy efficient or green buildings. A future system could provide a consistent set of legal directions outlining how all public authorities are expected to behave and invest when discharging their functions, not just what their functions are. Government investment can catalyse or stimulate private sector innovation and create markets. Once money is invested in an outcome, the private sector can then become its greatest champion.

At a grander scale, this might be about how large public funds are invested (eg the New Zealand Superannuation Fund’s choice to divest from fossil fuels). At the grandest scale of all, the entire government budget process can be guided by the desire to achieve outcomes that take us towards the future we want – and not just in GDP or economic terms. In Working Paper 3, Dr Tim Denne pointed out that “increasingly, alternative indicators to GDP are being explored, which incorporate the wider set of goods and services which contribute to wellbeing”. Professor Tim Hazledine also suggested that there are other possible metrics of wellbeing.... Why not measure “Gross National Happiness” instead of GDP? But ... the discussions we are having about environmental policy suggest a rather more nuanced approach is needed. Why look for summary measures at all, given their flaws and inadequacies? Instead, make it our purpose to improve matters where we know (or can argue that we know) what good goals are: zero net carbon emissions, swimmable rivers and lakes, a predator-free New Zealand, sustainable resource management, and so on – all within a moral, not narrowly economic, framework of stewardship?”

This is not just about particular agencies pursuing their own dedicated policy agendas. It is about government as a whole prioritising spending and investment according to a wide set of objectives.

Spatial planning

In recent years, the concept of “spatial planning” has received much attention. However, it can mean different things to different people, and it is important to pin down what we mean by the term. In its most basic sense, spatial planning is about determining what goes where over time based on measurable triggers (such as price differential between urban and non-urban land). If a spatial plan has a strategic element, it is about what goes where over time. For example, an urban growth strategy may contemplate the “release” of peri-urban land for urban development over time based on measurable trade-offs from occurring, as it covers a wide range of indicators, but it makes them more visible than they have been in the past.
required in a system (eg emissions standards and pest management), and is therefore not a replacement for the broad resource management strategy discussed above. That said, it is often seen as a useful way to integrate or align various sectoral or domain-based regimes that have spatial implications – in particular, to ensure that there is alignment between land use plans and the infrastructure required to service the planned land uses. It could be seen as a key component of a broader resource management strategy.

Spatial planning can – and does – occur under the current system. Below, for example, we shine a spotlight on the bespoke Auckland Plan, which is generally considered to be a spatial plan in the sense we have described. However, the current system also provides for spatial planning beyond this example, and for that reason it can be confusing when some criticise the system for its lack of spatial planning. For example, strategic spatial plans can be, and have been, developed by councils under the general auspices of the Local Government Act (often in the context of managing urban growth at a regional or cross-district level), such as Western Bay of Plenty’s Smart Growth Strategy or the Greater Christchurch Urban Development Strategy. Furthermore, there is nothing that prevents a regional policy statement, NPS, regional plan or district plan under the RMA from being both strategic and spatial. The NPS on Urban Development Capacity requires some councils to create a future development strategy that aligns the release of land with infrastructure provision and funding. So what is wrong?

There are several ways in which spatial planning – as the term is most often used – is not embedded in the current system:

1. It does not perform a horizontal integrative function, because spatial plans are created under siloed statutory frameworks that have distinct purposes and little formal influence over others, rather than being an umbrella instrument.

2. It does not perform a vertical integrative function, because spatial plans seldom have legal influence on lower level regulatory and funding decisions.

3. Spatial plans are (with the exception of Auckland) not mandatory, and therefore tend to be relatively reactive to pressures (such as urban growth) once they become obvious or manifest.

4. The system does not provide for national level spatial planning, so is not a viable mechanism for mediating between central, regional and local interests.

5. If it occurs under the RMA (eg through a regional policy statement) there is a risk that planning will be effects-based (focused on preventing or managing adverse effects) rather than proactively planning for positive effects. It is debatable whether the RMA is fatally flawed in this regard, as described in Chapter 7, but the RMA being overly focused on managing negatives is a valid concern.

The Productivity Commission, in the urban context, has proposed the development of what it calls regional spatial strategies. Similarly, Infrastructure New Zealand has floated the development of regional spatial plans with 30 year time horizons, informed by unitary plans and accompanied by institutional reform – unitary regional level councils. Where a system is fragmented across different statutes, institutions and processes (as in the current system), the concept of a spatial plan can be a powerful integrating tool as well as a strategic one. Its integrative potential – its place in our broader suite of interventions – is discussed in Chapter 14, where we consider how our tools can be harmonised.

A spotlight on spatial planning: The Auckland Plan

As part of the 2009 reorganisation of local government in Auckland, the Local Government (Auckland Council) Act 2009 required the new Auckland Council to prepare and adopt a spatial plan for Auckland. The purpose of the plan was described as “to contribute to Auckland’s social, economic, environmental, and cultural wellbeing through a comprehensive and effective long-term (20- to 30-year) strategy for Auckland’s growth and development.” The plan was to set a strategic direction, outline a high level development strategy, enable coherent and coordinated decision-making regarding the future location and timing of critical infrastructure, services and investment, and provide a basis for aligning the Council’s plans and funding programmes. The legislation provides more detail about what needs to be included in the plan relating to the existing and future location and mix of activities and critical infrastructure, services and investment.

In addition, nationally and regionally significant recreational areas and open-space, ecological areas, landscapes, areas of historic heritage value and natural features are to be identified.

The plan is adopted by Council under the special consultative procedure set out in the Local Government Act. This requires the council to “provide an opportunity for persons to present their views to the local authority in a manner that enables spoken (or New Zealand sign language) interaction between the person and the local authority, or any representatives” but no appeal rights. The Council adopted the first Auckland Plan in 2012. This has recently been replaced by “Auckland Plan 2050”. Although intended to provide a strategic and integrative framework for Auckland, the legislation makes only weak links between the Auckland Plan and the RMA regulations in the Auckland Unitary Plan or Council budgeting under the Local Government Act long-term plan. Council staff report that the Auckland Plan has been influential in these later documents. But should these things be left to chance, or should we be linking up strategic spatial planning with other types of planning in a more formal and directive manner?
A spotlight on marine spatial planning

Marine spatial planning is an approach that has increasingly been applied in countries around the world to better manage the pressures and conflicts arising from human use of the sea. It is a deliberative, forward-looking and cross-sectoral exercise that seeks to reconcile competing considerations in the marine space. Marine spatial planning has become increasingly popular with initiatives now in at least 65 countries. All member states of the European Union are now required to establish marine spatial planning by 2021.

New Zealand’s first marine spatial plan was completed in December 2016. It was the result of a three-year Sea Change – Tai Timu Tai Pari project that focused on addressing the growing spatial resource conflicts and ecological degradation associated with the Hauraki Gulf. The project was innovative in a number of respects including through establishing a co-governance structure; tasking a group of mana whenua and stakeholder representatives with producing the plan on a collaborative basis; addressing both catchment and marine issues in an integrated manner; and integrating mātauranga Māori and Western science.

This was possibly the most ambitious marine planning exercises to be undertaken in New Zealand. The integrated planning process enabled a focus to be placed on the strategic drivers of environmental decline in the Hauraki Gulf, something that had not previously occurred. The plan itself sets out a roadmap for action to reverse this decline, while providing for use. In particular, significant new areas were identified for both aquaculture and marine protected areas. The implementation of the integrated plan has provided challenging in the context of New Zealand’s fragmented oceans governance regime, however. The plan is non-statutory and its relationship with existing marine management regimes is unclear. This raises the question of whether such integrated marine planning should be included as a formal part of a future resource management system.

Spatial planning already occurs in the current resource management system, but it could be deployed more widely, in a more integrated and strategic way, and with greater legal influence over more detailed decision-making.

11.5 Concluding comments

In this chapter we have considered the place of strategy in a future resource management system. It is by no means a comprehensive account of strategic tools, and does not delve into what specific content strategies should contain. Its main message is that a future resource management system needs to be future focused and integrated at the highest levels. Resource management strategy is not just about driving particular kinds of change within the RMA (although that would be a good start).

Strategic tools do not need to be general or vague, or a laundry list of aspirations. We have briefly canvassed several possible kinds of tools: a single, overarching resource management strategy, encompassing cross-cutting but mutually-reinforcing strategies for particular domains, sectors and spaces; a suite of legislative purpose statements that are geared towards change rather than management; a wider deployment of targets (and, where applicable, budgets); the use of investment to drive desirable change across all wellbeings (not just economic); and the formalisation of future-focused and legally influential spatial planning. These tools need to be harmonised with each other, as well as with other kinds of regulatory and non-regulatory tools explored in the following chapters. How we might harmonise our tools is explored in Chapter 14.
endnotes

1 Although various tools have been mentioned in passing in the context of these themes, such as spatial planning, permits and offsetting.
2 Such as statutory purpose statements.
3 For example, setting bottom lines is a core role, but requires tools like rules and standards to implement.
4 For example, splitting up the RMA into protective and balancing legislation will have no effect unless the legislation uses tools like statutory purpose statements, rules, policies, economic instruments etc.
5 Others include permits/consents, financing mechanisms, education, property rights, tradeable permits, targets, prohibitions, performance standards, consent orders, tenure review, natural capital accounting, taxes, behavioural nudges, offsetting, collaborative processes, direct government action, investment strategies, building codes, fee/foe schemes, rates rebates, taxes, biobanks and so forth.
6 New Zealand Productivity Commission Better urban planning (2017) at 54.
7 See Chapter 8.
8 See Chapter 7.5.
9 That said, there can be overlap between categories. For example, regulatory elements (objectives) and non-regulatory elements (other "methods"). It is therefore a useful, but not an absolute, distinction.
10 For example, a regional plan can contain regulatory elements (rules), strategic elements (objectives) and non-regulatory elements (other "methods").
12 See Chapter 3–5.
13 See Chapter 3.
18 For example, tensions between the NPS for Freshwater Management and the NPS for Climate Change Adaptation; tensions between climate change obligations and petroleum mining under the Crown Minerals Act; tensions between renewable electricity strategy and the protection of natural landscapes.
19 The best the RMA gets, for example, is to require decision-makers on plans to take into account management plans and strategies prepared under other acts (eg see section 66), and for consent authorities to have regard to any other relevant and reasonably necessary matter (eg see section 104).
20 Not just an "environmentally" focused ministry or agency, but one that was concerned with all aspects of resource management.
21 See, for example N Jackson "Does New Zealand need a population policy" (Plenary presentation to the Biannual Population Association of New Zealand Conference, Wellington, June 2013).
25 For example, the 2010 Infrastructure Technical Advisory Group report recommended the adoption of a national integrated water strategy; we now have the Essential Freshwater initiative; and we may see a formal integrative strategy for climate change under a Zero Carbon Act.
26 For example, through the RMA, EEZ Act, and non-regulatory tools discussed below.
27 Including other strategic tools like targets, emissions budgets, and regulatory and non-regulatory tools discussed below.
28 Environmental Reporting Act 2015.
29 Compare the United Kingdom National Policy Planning Framework, created to align fragmented and conflicting planning policies. See Ministry of Housing, Communities and Local Government (UK) National Planning Policy Framework (July 2018).
30 See Chapter 7.
31 And can colour judicial review decisions even if no appeal rights are available.
32 See Chapter 8 on legislative design. See generally J Rutter and W Knighton Legislative policy targets: Commitment device, political gesture or constitutional outrage (2012).
33 Well-being of Future Generations (Wales) Act 2015 (UK), s 3(1).
34 Ibid at 21.
35 Simpson Grierson The statutory framework of New Zealand’s local government sector: Is the key legislation working properly? (Simpson Grierson, 2016).
36 Section 1A.
37 Section 9.
38 For example, the Housing Accords and Special Housing Areas Act; proposed Housing and Urban Development Authority legislation; the RMA, and the Local Government Act.
39 Whether climate targets should be binding on government – in the sense of being enforceable in the courts – is a live issue under the proposed Zero Carbon legislation.
42 Which one depends on the baseline from which we start.
45 There are different options for what that target would be: see ibid.
46 Ibid at 21.
47 Compare Federal Sustainable Development Act 2008 (Canada), s 5.
50 Including people, activities, infrastructure and nature: see European Conference of Ministers responsible for Spatial/Regional Planning Spatial development glossary (2007).
51 The NPS on Urban Development Capacity requires councils to provide adequate development capacity (serviced land), and to monitor indicators like housing affordability, prices and rents (see policies P86 and P87). It is questionable whether this is a “plan”, in the sense that it triggers obligations for planning rather than being a plan itself.
53 For example, the Waikato Regional Council has taken steps to spatially plan geothermal resources in its regional policy statement: see www.waikatoregion.govt.nz/council/policy-and-plans/regional-policy-statement/optsheets/geo/thermal/.
55 Unless a spatial plan is embedded in a regional policy statement under the RMA, in which case it must be given effect to in district and regional plans.
58 An alternative is to integrate statutes and institutions themselves. However, as discussed in Chapters 8 and 9, there can be valid reasons for separating them.
60 Ibid, s 79(3).
61 Ibid, s 79(4).
63 Regard was required to be had to the Auckland Plan when considering the Unitary Plan: see Local Government (Auckland Transitional Provisions) Act 2010, s 145(2).
12: REGULATORY TOOLS
12.1 Introduction

The defining feature of regulatory tools is that they have teeth – they can result in sanctions on people if they do not comply. They tell people what they can and cannot do. In keeping with the New Zealand system’s free market foundations and the basic tenets of liberal democracy, regulation usually defines what people can do by stipulating what they cannot do. Sometimes, however, regulation also imposes positive obligations by stipulating what people have to do.

Because regulations explicitly tell people what they cannot do (including with their own property), they tend to give rise to issues that are not as prominent when considering other tools. For example, a person is much more likely to have strong feelings about the Auckland Unitary Plan – an instrument made under the RMA which (among other things) imposes regulatory restrictions on how he or she can use private land – than the Auckland Plan, which is much more strategic and high level. However, regulatory tools are not just “regulations” in the traditional sense. There are many ways in which people can be compelled or coerced into acting or refraining from acting. In this chapter we explore some of these.

Regulatory tools have teeth – people can be sanctioned if they fail to comply with them.

12.2 Property and other rights

The concept of “rights” is ultimately a regulatory tool, although it is not usually called by this name. If one person is granted a legal right, then any infringement of it by another person can lead to compulsion and coercion (eg through court action). But rather than public authorities forcing or preventing people from doing things, it is about allowing (and relying on) the holders of rights to defend them, and providing the legal means for this to happen. The dividing line between property rights and other kinds of rights is by no means clear (which can be seen in debates about the nature of rights under a resource consent).

Property rights, environmental human rights and rights for nature

There can be different reasons for private persons to be assigned rights in the resource management context. Perhaps the most controversial is to incentivise people to protect and use resources wisely or sustainably. This assumes that if people have a property or other stake in a resource (or aspect of the environment), they will manage it in a way that reflects both their own interests and that of society as a whole. It is a way to avoid a “tragedy of the commons”. As discussed in Chapter 4, this idea has been encapsulated in what has become known as the Coase theorem. Essentially, people’s incentives for degrading public or communal resources are changed by privatising those resources, assuming they will manage them responsibly if they own them. It is about giving people dominion and ownership over resources, and was the theory underpinning the creation of individual transferable quota in fisheries. However, we do not think that extensive privatisation and faith in the market is the right approach to reform. In Working Paper 3, Dr Tim Denne pointed out that the conditions necessary for the optimal operation of markets are often not met, and the neoclassical ideal
of the rational economic actor is often not the reality. Professor Tim Hazledine, meanwhile, has his tongue firmly in cheek when he tells us to “make sure everything is clearly and unambiguously owned by someone – and it doesn’t matter who owns them – and the incredible power of the Coase Theorem simply zaps externalities out of existence”. Furthermore, not all public resources are capable of privatisation.

An alternative to privatisation is to give people rights to the protection (rather than use) of the natural world. There has been some experimentation with this idea internationally, through the idea of environmental human rights (the right to a healthy environment, a right to clean water and so forth). It has even been enshrined in some countries’ constitutions, and in the Stockholm Declaration (1972). Again, this is a tool that reflects an anthropocentric perspective: if using a resource would harm people’s rights, and people choose to exercise those rights, then the system would defend them against incursion. Some have warned that this has risks: it can lead to a dilution of sustainability, a justification for development, and an individual and property-focused “anthropocentric reductionism”. In other words, it can be dangerous and unrealistic to provide even a general right to a healthy environment if this is not accompanied by related environmental obligations and duties.

If giving rights to people is not sufficient to achieve our objectives, then it is natural to start thinking instead about imposing restrictions on them. However, before we do, it is worth flagging that there is a more unconventional way in which we can use the concept of rights. This is to give rights not to people – even vulnerable people – but rather to nature itself. This requires nature (or an aspect of it) to be treated as an entity capable of having rights, so one way forward is to grant it legal personhood. This is not a new idea, but it has been slow to happen in practice. In New Zealand, strides have been taken in the last few years, albeit largely driven by the Treaty settlement process rather than an ecocentric overhaul of a Western system. The Te Urewera Act and the Te Awa Tupua (Whanganui River Claims Settlement) Act have introduced the concept of legal personhood to our legal system, although the spiritual and cultural elements of them mean they are not comfortably described as a simple “rights for nature” model or a “tool”. That said, they reflect a potentially valuable way forward that melds Western and Māori perspectives while reducing tensions over property rights (as a natural feature can essentially “own” itself and have co-governance structures responsible for its stewardship). This approach is “fundamentally subversive of economic orthodoxy” but not necessarily incompatible with the plurality of worldviews needed in a future system. Some have highlighted the need for rights of nature to be accompanied by firm duties for people to act on its behalf, as rights alone are no use to a tree that cannot speak.

Could this kind of model be deployed more widely, to recognise personhood for other natural entities – such as mountain ranges, lakes, forests, wetlands, or coastal areas? There may be challenges. The examples of Te Urewera and Te Awa Tupua were achieved within the context of Treaty settlement legislation, where the predominantly interested parties were the Crown and Māori. They form part of an existing narrative, which has influenced policy and law-making since at least the mid-1970s. A continuation of this process could form a stepping stone to expanding rights for nature, but that would involve complex arguments of governance, especially for elements of nature like biodiversity that exist on private land.

Property and other rights are important regulatory tools, even if they are not usually thought of as such. Although the privatisation of resources is not a sure-fire way to ensure responsible stewardship, the ideas of environmental human rights and rights for nature are other ways in which the system can use rights to protect the environment.

**Rights and resource use**

Rights do not have to be as absolute or lofty as those envisaged under the Coase theorem or legal personhood frameworks. Some form of more prosaic and limited rights are necessary in a future system, because people require a degree of certainty that they may use resources for a viable period of time (eg to take water, to build a road, or to lay a water pipe). In other words, clear rights to use resources are necessary to generate the social, cultural and economic wellbeing that comes from their use, not just as a mechanism for ensuring environmental sustainability. Such rights should be reasonably clear and predictable, and not be undermined unduly. It is not just private investment and business confidence that is at stake, it is also the public good that comes from significant developments of infrastructure, housing and public amenities. Sometimes this will relate to a defined project (eg constructing a wind farm), and sometimes to an ongoing activity (eg farming). However, in either case rights cannot be absolute. There may be associated obligations (eg offsetting requirements), or the right itself can be specifically constrained (eg time limited). Furthermore, rights must not be allowed to threaten environmental bottom lines, especially where activities are ongoing and cumulative effects only become apparent over time. As such, it may in some contexts be prudent to shift from the language of “rights” to those of “privileges”, to highlight that rights conferred are only vis a vis other people, not the environment. Limits to privileges need to apply irrespective of whether privileges are formalised through an actual permit or not (ie if they are permitted activities). There should be no expectation that a privilege causing harm will continue in such a scenario simply because it has existed in the past.

Some rights will be necessary in a future system to provide investment certainty. However, such rights need to bow to environmental bottom lines, and may be better characterised as privileges.
Relative rights: The issue of allocation

The tools in which rights (or privileges) are enshrined vary according to the resource in question. For land – often a “private” resource – many rights are conferred by real property law and property titles/licenses, with an additional layer of rights being conferred by regulatory permits. For non-private resources, like air, freshwater, and the coastal marine area, rights are primarily embedded in plans (permitted activities) or permits (eg consents, certificates of compliance, and mining permits). These are, primarily, legal declarations that an activity meets the purpose of the legislation under which they are granted (which usually relates to the public interest) and can continue for a specified period of time. Sustainable management is one example (under the RMA), where rights are usually granted on a first-in-time basis. The permitting process effectively doubles as an allocative process; the first person to make a complete application has priority rights to the resource (to use it directly and/or to use its assimilative capacity). That is somewhat unintentional, sub-optimal, and “bureaucratic” mechanism for allocation.

One of the growing criticisms of our existing resource management system is that while it deals with sustainable management of resources, it does not provide sufficient direction as to the allocation of many of those resources between different classes of activities, or towards the highest and best use. However, more direct tools for allocation are available. Some are non-regulatory (such as auctioning), but it would be possible for a future system to use regulatory tools to allocate resources. One mechanism would be to create a regulatory plan that determined the total amount of a resource available for allocation (environmental bottom lines, plus trade-offs a community wishes to make above it), and either allocated proportions of resources directly to different kinds of uses (eg water to renewable electricity generation and irrigation) or to specific users, according to a set of principles. Laws could, alternatively, set out a competitive process by which different applications could be compared. The latter is what already happens under the Crown Minerals Act for minerals like petroleum, when more than one firm is interested in obtaining rights. In the RMA context, we could ask: Which proposal would best promote sustainable management? A particularly interesting case is Victoria, Australia, where because of the potential for the use of carbon capture and storage technology, subsurface space has to be allocated between existing petroleum interests and new carbon storage interests. A targeted law introduces a test partly based on the “public interest”. In theory, for those resources under its jurisdiction, the RMA is fully capable of being more proactive already. Regional councils have been given an allocative function, and a competitive attribute-weighted tendering process for coastal space is already specifically provided for and has been used for aquaculture. A problem, however, as discussed in Chapter 7, is that the RMA itself offers no guidance in its purpose and principles as to what the allocative principles should be. Similarly, the courts have sometimes seized upon the opportunity to claim the RMA allows different applications to be compared, but in our view the Act provides a fairly shaky foundation for that kind of thinking. The political courage at central and regional level to proactively allocate resources by creating relevant principles and putting tools in plans has been largely lacking, except where it can be couched in the familiar language of protecting existing rights and interests from adverse effects. To us, that is understandable; it is the place of legislation to provide some kind of consistent normative framework.

Adding to the complexity of allocative tools is the prospect of reallocating a resource once a right has been granted. The use of regulation to reallocate a resource is, however, likely to be fatally fraught. The current position is that a later consent cannot interfere with the conditions of an earlier consent, and that existing consented rights form part of the “existing environment” against which new proposals must be assessed. There is a robust principle of non-derogation. That said, it may be important in a future system to ensure that the rights granted in the first place have reasonable time limits on them. An alternative whereby price signals are used to facilitate reallocation (tradeable permits) is likely to be more palatable, but may require robust restrictions to ensure that locally significant environmental indicators are not degraded.

A third kind of allocative issue – which we may call de-allocation – is even more difficult. Many resources have, for one reason or another, already been overallocated. The result is that people hold rights that, collectively, allow bottom lines to be exceeded. The most prominent example is the ability of waterways in intensively farmed areas to cope with nutrient runoff. Establishing a plan to return above bottom lines therefore involves allocating relative responsibility for doing so to many existing rights holders. People tend to be more averse to losing existing rights than making equivalent gains, adding to the problem. The RMA is not well equipped to deal with this job, and it is a dilemma that is well outside the comfort zone of traditional environmental economics. The principle of common but differentiated responsibilities may be relevant here, as fairness is extremely important. But what fairness looks like can be very hard to define.
A spotlight on freshwater

In May 2018 the Land and Water Forum recommended a stopgap regulatory measure to “hold the line” on freshwater quality. When a catchment is overallocated, high emitters of nitrogen that contribute most to overallocation must reduce, while at the same time providing some upward movement for those with no or little discharge – provided the overall result does not collectively contribute to a threshold being exceeded.36

A spotlight on collaborative processes

Collaborative processes – local people planning locally – have utility not just for the allocation of non-private resources, but they offer a potentially useful way forward where arguments over fairness are prominent. That is particularly the case in the context of freshwater allocation.37 One of the key recommendations of the Land and Water Forum’s 2010 report A Fresh Start for Fresh Water was the establishment of collaborative processes during the development of national and regional strategies and regional plans, and through limit and priority setting.38 The Canterbury Water Management Strategy was developed through collaborative processes, and it has been implemented through amendments to the Canterbury Regional Policy Statement and plan changes to the Canterbury Land and Water Regional Plan.39 The RMA now contains a specific collaborative planning track.40

As Justice Hammond has stated, “When the needs of proprietors are known in advance the ideal rule is to allocate water resources in proportion to their particular needs”.41 In other words, it is helpful for people to sit down and share what their needs are, before deciding how they are going to coexist in harmony. In addition, collaboration is useful where issues are complex and/or poorly understood, and where there are strongly held opposing views. Evidence from case studies of collaborative approaches demonstrates that they can create higher quality, creative, and durable agreements, which are more successfully implemented due to increased public buy-in and reduced conflict.42 They encourage greater front-end participation, can improve community awareness and shared understandings, and result in community-designed outcomes that are mutually beneficial.43 When it comes to allocative issues, they can provide crucial understanding about what is driving demand for the use of resources, and where that demand can be supplied from, as well as those existing interests which rely to a greater or lesser extent on the continued supply they have previously enjoyed. The outcome of a collaborative process may even result in synergies, whereby (through greater information exchange) participants realise opportunities to work together to address allocation issues.

However, those processes also do not come without risks. Power imbalances in collaborative processes, especially those relating to allocation, can arise where it is not possible to proportionally represent all stakeholders in discussions, where sponsoring local authorities are aligned with politically powerful groups, where “group think” exercises produce inaccurate information, and in the presentation and use of science.”44
Another important aspect of allocative tools is how Māori interests are to be catered for. In particular, arguments over rights to use freshwater loom large, and are unlikely to be resolved entirely through collaborative processes. The Land and Water Forum recognised that issues regarding Māori rights and interests in water, and the implications of policies which have led to the general underdevelopment of Māori land, may be exacerbated if general policy action is taken prior to the resolution of those rights and interests. It is also important to remember that allocative questions – the right to use the resource – are different to broader questions of co-governance and power sharing. For example, Dr Robert Joseph is of the view that the current post-settlement situation in relation to the Whanganui River "is a far cry from the recommendation made by the Waitangi Tribunal that the river in its entirety be vested in the tribes" and that Māori do not directly gain benefit from the use of the resource. Māori components of allocation ultimately represent a vexed political question, but one that will likely need to be resolved before a more proactive system-wide approach to allocation is possible.

Māori interests may need to be resolved before a regulatory or principles-based approach to the allocation of some resources can be deployed widely. This is vexed question, and one that is ultimately reliant on political will.

A spotlight on Porotī Springs

Porotī Springs, west of Whāngarei, are in a block of Māori land which was given reserve status in 1895. In 1960, the Springs were formally gazetted by Order-in-Council as a water supply for the local hapū. However, in 1967, through the enactment of the Water and Soil Conservation Act, that newly affirmed authority of the hapū effectively disappeared with the power of decision-making on water takes being placed with local authorities. One consequence was that the hapū needed to apply for permission to use their own water.

From the late 1960s, council use of the water for public reticulation in Whāngarei, and then also for horticulture irrigation, greatly increased. In 1983 and 1987, during a time when council had no limits on the quantities of water extracted, and the hapū had little input into or influence over management, the headwaters of the Springs were run dry. This resulted in unacceptable ecological and cultural impacts.

With the enactment of the RMA came the potential for more effective tangata whenua input into decision-making over management of the water of the Springs. In practice, however, this has not happened. Existing water rights for council and irrigation takes were renewed under the new law. More recently, a further water right for a water bottling operation was granted. While the hapū could argue cultural issues against these consents (eg that they would have adverse effects on cultural wellbeing), their other rights and interests in the water, including any claim in the nature of a property right, could not be considered.

The issue of Māori interests and rights in freshwater is now a matter before the Waitangi Tribunal, and will need to be addressed by central government. Recently, government purchased the water bottler’s consent so it could be part of a future Treaty settlement. This may be an indication of how the government will respond to Māori water rights issues in the future. However, at this time most of the hapū’s concerns with the water takes from the Porotī Springs water remain unaddressed and unresolved.

12.3 Regulatory restrictions

Command and control regulation – which dictates specifically what people can and cannot do, and prescribes or proscribes certain ways of doing it – is often what people first think of when they consider regulatory tools. It is often criticised as being inefficient, draconian, and stifling of innovation. It is also arguably alien to the historical development of tikanga Māori, in which people were “taught from a young age what was tika (right, correct) and they, in effect, governed themselves”. Regulation is not appropriate for all roles the system must play, for example, in pursuing positive outcomes (picture a regulation that forced every person in New Zealand to plant a tree).
However, firm and specific regulation is an essential feature of a future system. In particular, environmental bottom lines will require expression through such regulatory tools in order to be effective as a safety net and prevent free-riders. What is striking about the current system, with its devolved and effects-based foundation based on sustainable management, is that few activities are prohibited outright. While there are some notable exceptions – such as in the context of the conservation estate, marine mammals, or biosecurity, where command and control regulation is employed with more rigour – more common (as under the RMA and EEZ Act) is for regulation to trigger an effects-based and discretionary assessment whereby many factors are weighed and interpreted. There can be a reluctance to impose hard limits, and it has been said that the RMA is more about “dialogue … than dictat.”

Contextualisation and discretion certainly have their place in the system, but it is not in defending bottom lines, even if they represent “slow-burn” or “creeping” environmental issues where impacts are not immediately apparent. There, we must implement a strong precautionary approach. And although bottom lines should ultimately be outcomes-based rather than activity-based, and constantly evaluated, that does not mean they need to be vague or open to constant interpretation at the project level. It is alarming that the imposition of bottom lines in the landmark King Salmon decision relied on an extensive argument and interpretation of a “rule-like” policy in the NZCPS. Where were the actual rules? How much money and time was wasted by all parties litigating something that should have been patently obvious on the face of a plan?

Desirable outcomes need to be translated into precise and predictable restrictions on particular activities or actions. That could involve greater use of prohibited activity status or rāhui, and standardised default conditions on particular types of consent (in the same way that prescriptive regulations apply to hazardous substances). Interestingly, the more protective of the dual purposes of the EEZ Act (“to protect the environment from pollution”) is linked to strong regulatory prohibitions on marine dumping (dumping is banned unless it is of a kind expressly allowed in regulation).

This kind of approach could be taken further. In 2018, for example, the Land and Water Forum recommended an amendment to the NPS for Freshwater Management to require regional councils to ensure that once a limit is fully allocated, additional use is a prohibited activity. A new NES for Freshwater Management has been floated to provide clear and specific regulatory intervention, including prohibiting or further restricting certain activities (concerning the draining of wetlands, piping of urban streams, intensive winter grazing, hill country cropping and feedlots). We should also not shy away from regulating particular sectors and products as long as that flows from a strategic effects-based assessment focusing on outcomes for domains or ecosystems. We have the potential to do so under existing legislation for products (to prohibit them or provide for life cycle management), although those tools are underutilised. A future system should also not shut down the idea of an NPS or NES on intensive agriculture, just as we already have national level instruments on other sectors (plantation forestry and renewable electricity generation). As a nation, do we have the courage to say where we cannot put cows – rather than assessing mitigation measures on a case by case basis?
Of course, the hope would be that, because of other incentives embedded in the system, we never even come close to the regulations protecting bottom lines. But if we do, they need to stand strong.61

Environmental bottom lines will require expression through clear regulatory restrictions in order to be effective as a safety net.

A spotlight on Water Conservation Orders

Water Conservation Orders are a somewhat unusual addition to the protective tools available under the RMA. They were first brought into the statutory framework in 1981 through an amendment to the Water and Soil Conservation Act 1967 and were carried through into Part 9 of the RMA in 1991. The concept behind Water Conservation Orders is the need to protect the outstanding amenity and intrinsic values of waterways through maintaining their flow. Once such an Order is in place, councils must ensure that their policies and plans are not inconsistent with it and resource consents must not be granted if they are contrary to the Order. The Part 9 provisions are not subject to Part 2 of the RMA and therefore arguably establish their own purpose, which is more protective than that of “sustainable management”.62

Any party can apply for an Order63 and the bulk of the applications have been by Fish & Game (with the Department of Conservation only having made one application). Thirteen rivers and two lakes have so far been protected, thereby maintaining their instream flows. Although applications can be made to revoke or amend Water Conservation Orders after two years, none have as yet had their protection reduced.64 This indicates the durability of this protective mechanism once in place. Despite these impressive achievements, this mechanism has limitations when it comes to protecting water bodies. Water Conservation Orders cannot be used to enhance (rather than protect) values of rivers and also do not apply to land uses that may affect rivers such as intensive dairying or forestry harvesting.

In a reform process it is pertinent to ask what utility such a tool might have in the future. The benefits of the Orders include enhanced certainty for all parties. They establish clear environmental bottom lines for river flows that must be met. On the other hand, they have only provided partial protection, concentrating on flows and not on all the impacts on the water bodies. Their application has also been patchy and ad hoc. Would it not be better to undertake a national process to identify all outstanding water bodies and protect them in one go? Could such an approach be usefully applied to other outstanding areas? Should we in a future regime, for example, make provision for Marine Conservation Orders, or perhaps Conservation Orders more generally, that could be applied to any outstanding area or feature?

A spotlight on rāhui

Rāhui is a Māori concept that uses constraints on activities and locations in order to give time for an imbalance or other problem to be corrected. Rāhui are seldom permanent, and are usually ended when the problem they address is resolved. A rāhui may, for instance, be a temporary prohibition on harvest of a species when it has become scarce in a location. A permanent rāhui may be imposed, for instance, on food gathering at a battle site or place specifically associated with death. Temporary rāhui, as a way of paying respect, are often imposed after events such as a drowning.

Rāhui has no direct current recognition in statute, although mechanisms such as temporary fisheries closures can be used as a means of enforcing a rāhui. Other mechanisms, like marine reserves, are less consistent with rāhui in that they have indefinite duration. This reflects a Western tradition of spatial separation of wilderness and human activity. Rāhui is also a tool to secure cultural practices, not just “environmental” ones as understood in the Western sense. As such, the concept of rāhui could in some cases present some tensions between Western and Māori ways of thinking.

Performance standards are a less prescriptive form of regulation, in that they outline the specific standards an activity is obliged to meet, but not the ways in which they are met. As such, this approach can encourage innovation and experimentation – what the private sector does best. The Building Code, for example, makes use of performance standards, and a future system could arguably be more active in embedding “green” performance standards in specifications for buildings and infrastructure.65

Another interesting possibility is the use of accords, or negotiated regulation. These represent rules that are negotiated between a regulator and a regulated community, but are still binding. That can encourage buy-in (or even championing) by sectors, and provide an integrated approach for associated funding of positive outcomes. However, it is crucial that restrictions (particularly for bottom lines) are not weakened in practice through negotiation, or subsequently through dispute resolution tools like mediation. The public interest is more than just a bargain struck between sectoral or stakeholder interests.66

12.4 Duties and obligations

Regulatory tools can be used to make people do things, not just to restrict or prevent actions. For obvious reasons, there is a significant distinction to be drawn here between public authorities and private persons. In a liberal democracy, it is often beyond the pale to use command and control style regulation to force private persons to do things.67 It is much more acceptable – and, indeed, common – to compel public authorities to act, as long as adequate resourcing is provided for them to do so.68
**Duties on public authorities**

Public authorities need to be obliged by statute to discharge regulatory functions (to influence or control people), including those relating to the imposition of bottom lines, the facilitations of trade-offs, the allocation of resources and the resolution of disputes. But they can also be compelled to take positive action in their own right – such as the provision of public goods and the pursuit of positive outcomes (such as pest management and ecological enhancement activities). The delivery of three waters infrastructure and services is a good example of a duty imposed on public bodies.

**A spotlight on three waters**

“Three waters” services are by and large the responsibility of territorial authorities. They are obliged to provide them by virtue of the Local Government Act, where they are considered to be a core function. Both territorial authorities and regional councils now also have responsibilities to ensure sufficient development capacity (following amendments to the RMA in 2017) for housing and business land, which includes consideration of the provision of adequate storm water infrastructure to support the development of the land. For waste-water, there are added requirements on district councils under the Local Government Act to assess the provision of waste-water services in their districts.

Issues with the provision of water services arise not because of a lack or weakness of legal duty. Rather, we need to think about how those duties are implemented, the influence of funding and institutional incentives, and the relationship between different statutory frameworks. Institutional matters have been addressed in Chapter 9, and funding is addressed in Chapter 13. A particularly important duty imposed on public authorities is to monitor and report on the state of the environment. Traditionally, this has been perceived as relating to biophysical domains (air, water, soil, etc), but its significance is wider than that. Many social and economic indicators – such as the price of land – are relevant to the management of resources, and need to inform decision-making. Importantly, monitoring needs to be sensitive enough not just to describe the environment, but also to assess the positive or negative impact of public interventions. It needs to be long-term and consistent. Monitoring and reporting provide transparency and a degree of accountability for institutions responsible for the indicators being measured.

Currently, environmental monitoring is done largely by councils under the RMA, with reporting responsibilities lying with councils and central government. A number of improvements could be made in how the system provides for monitoring and reporting, as outlined by Dr Marie Brown in Working Paper 3. “Due to patchiness and poor utility”, states Brown, monitoring “is likely to underestimate the gravity of environmental problems”. The size and resourcing of councils is also significant. There are variations in collection techniques and data quality. The introduction in 2015 of a national reporting framework with six-monthly domain-based reporting cycles is a major step forward. However, Brown also commented that while “stronger reporting and accountability structures must surely help build commitment and resilience, [they] are unlikely to be sufficient to alone ensure more than marginally better outcomes”. We also need substantive duties to take corrective action in response, not just to monitor. One option for a future system would also be to locate environmental monitoring and reporting responsibilities within a centralised agency, which is common overseas. This could be independent, to address issues with underfunding due to political prioritisation.
Duties on private persons

Meaningful change will require private persons, as well as public authorities, to take positive steps. Yet imposing a duty on private persons to act is much more challenging in what will remain a relatively libertarian political culture, and the tools we need to focus on will be largely non-regulatory. That said, some kinds of regulatory tools can be used to compel people to provide positive outcomes, not just prevent or manage their negative effects.

The first kind of such tool is where positive private action is conditional on negative effects. For example, the system can compel an applicant to provide information and a robust assessment of environmental effects, and pay for public (and sometimes other parties') costs, but only if he or she chooses to make an application. Those are examples of conditional duties that do not necessarily result in improvements. However, a more substantive opportunity is provided by offsetting.

A spotlight on offsetting

Offsetting, generally speaking, allows a person to cause harm in one area or context in exchange for improvements in another. The original harm remains, so it is not the same thing as mitigation, but it is still linked to the harm and therefore firmly within the neoliberal ethos of the RMA. In New Zealand, biodiversity offsets have been those discussed most, and guidance on best practice has been produced. The guidance has discussed the potential use of offsets under the RMA, the Crown Minerals Act and the Conservation Act. It is crucial that offsets are enforceable through regulatory conditions, even if they are treated as a positive effect rather than the mitigation of a negative one.

Offsetting can be a disastrous road to environmental degradation if offsets are not proportionate to the harm caused. Local Government New Zealand has supported the tool but only where no viable alternatives are available, and subject to careful constraints. However, using the principle of net gain when offsetting means that, in theory, harm in one place is more than compensated in another. It can require overall improvements while still using harm-based triggers. In a future system we could also take a strategic and integrated approach to offsetting by adopting a biobanking framework, in which biodiversity offsets are provided in a more coordinated way to create, for example, functional ecological corridors rather than random islands of improvement. If we adopt an eco-centric view, we could say that net gain is about providing restitution for the historical grievances of the natural world. Taking a broader anthropocentric outlook, we are simply pursuing the things we value as a society. On an economic view, we would say that we are enhancing our stock of natural capital.

Case law has provided useful constraints on the use of offsets (eg the extent to which we compensate like for like), and valuable work has been done as part of the collaborative development of an NPS on Indigenous Biodiversity. Local Government New Zealand has also recently released guidance on offsetting under the RMA. However, it remains a controversial topic, because offsetting can allow the degradation of one area in favour of another. It is difficult to know how much value we should assign to site or location-specific indicators versus regional or national level indicators. Some forms of harm can never be offset. In fact, depending on if we take a universal or a local perspective, we can see offsets as either pursuing positive enhancement or allowing negative trade-offs. Some have seen offsets as potentially inconsistent with strong ecocentrism, as trading off the wellbeing of one ecological system for that of another has ethical implications.

Secondly, it may sometimes be acceptable to impose active obligations to act on private persons, as long as it is accompanied by the resources and support for them to discharge them adequately. We can look the context of biosecurity as a potential starting point for such measures.
The Biosecurity Act 1993 provides an instructive example of how a piece of legislation can compel proactive action by private parties to address an environmental challenge (managing pest incursions). Amongst a range of tools, the legislation enables regional councils to develop regional pest management plans. These identify the pest(s) to be eradicated or managed, the objective sought, the principal measures to be taken to achieve the objectives (including rules), and sources of funding to implement the plan.\textsuperscript{95}

As well as prohibiting or regulating activities, the rules contained in the plan can require a person to take proactive actions to determine the presence of the pest, monitor its presence and eradicating or manage the pest and its habitat (amongst many other things). The plan may (but is not required to) provide for the payment of compensation for losses incurred by any party as a direct result of implementation of the plan.\textsuperscript{96} The Act provides for two main ways of funding implementation, including providing compensation. The first is through the imposition of a levy, authorised by an Order-in-Council, and likely imposed on parties contributing to the pest problem or likely to benefit from the implementation of the plan. The second is through the use of general or targeted rates.

The plan-making process is initiated by a proposal produced either by council or another party. After taking a large range of matters into account, including consultation, the council can approve the making of a plan. The council then makes the plan, approves it and publicly notifies it. A person who provided a written submission (in the event that there was public consultation) or is likely affected by the plan can apply to the Environment Court which then hears the matter. After the Court makes a determination (if an application is made to it), the Council finalises the plan which then becomes operative.\textsuperscript{97} Despite the potential of such plans to have quite far reaching implications for private parties and property rights, the plan-making process has no requirements for public participation, and no right of appeal. This is likely due to the need for speed in taking action against some pest incursions. A lot is at stake – including the country’s economic wellbeing.

The approach taken in the Biosecurity Act, which contemplates private parties being compelled to act to address an environmental risk, as well as addressing flow-on compensation and funding requirements as an integrated package, could potentially be applied to other environmental risks where proactive measures are required. Could such an approach be valuable in addressing coastal hazards, for example, where one property owner’s action or inaction may increase the risk for others. What about for restoration of habitat for endangered species? Could landowners be compelled to replant key areas to contribute to local or regional corridors?

In a libertarian political context, it is challenging to force people to take action through regulatory means if it is not linked to adverse effects that they are causing. However, offsetting using a principle of net gain provides one option for requiring private action, and firmer duties may be possible if the resources are provided for people to comply with them.

So far in this chapter we have canvassed three kinds of regulatory tool: what people can do (legal rights); what they can’t do (restrictions); and what they must do (duties). However, regulation can also provide incentives by signalling what people should do. This may not sound like a regulatory tool, which by definition is about compulsion or coercion. How can we encourage people to act through regulation? One way may be to establish the prospect of regulation in the future if less coercive or voluntary measures are not successful (eg legislating but not bringing provisions into force). This conditional regulation can be a powerful incentive for firms to up their game over time.\textsuperscript{98}

Furthermore, we can provide a regulatory environment that is friendly to the deployment of desirable activities relative to undesirable ones (eg by cutting red tape). Of course, this idea can be misused; for example, by establishing streamlined processes for permitting developments that infringe bottom lines (as in some proposals for “special economic zones”). But the prospect of jumping through additional hoops for undesirable activities (eg such as fossil fuel intensive activities) could push people to apply for desirable alternatives (eg low carbon ones). This is the basic kind of thinking underpinning the use of controlled and non-complying activity status under the RMA,\textsuperscript{99} but it could be taken further by streamlining processes for categories of activity that have been pre-determined (eg through a robust strategic environmental assessment or spatial plan) to be desirable in a particular place or to have valuable synergies. It may, for example, become quicker to consent green infrastructure, a proposal to enhance urban green space, or deploy renewable electricity projects.\textsuperscript{100}

That kind of process distinction may be a controversial prospect for a framework like the RMA, which is based on managing the adverse effects of activities rather than encouraging positive ones.

The prospect of future or conditional regulation can encourage people to act voluntarily, and regulatory processes can be made simpler or easier for desirable activities relative to undesirable ones.

\textbf{12.5 Regulatory plans and permits}

“Plans” and “planning instruments” are often, although not always,\textsuperscript{101} the place where various kinds of regulatory tools come together in the resource management system. We have, so far, focused on various kinds of regulatory tools rather than plans per se, as plans can hide a great deal of diversity, and because they do not encompass all kinds of regulatory tools.\textsuperscript{102} However, given the centrality of
There are many issues to consider when thinking about regulatory plans, and space constraints mean we cannot consider all of them here. One key conceptual question, however, is the kind of “planning” on which regulatory restrictions are based. This is often reduced to the coarse distinctions between “effects-based” and “activity-based” planning. Effects-based planning is about providing restrictions based on the kinds of adverse effects that result from any activity. Activity-based planning is about identifying and regulating the impacts of particular kinds of human activities.

<table>
<thead>
<tr>
<th>Advantages</th>
<th>Disadvantages</th>
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</thead>
<tbody>
<tr>
<td>Effects-based planning</td>
<td>Can be agile and allow innovation within environmental bottom lines</td>
</tr>
<tr>
<td>Can work well if the outcome is well defined and the effects thresholds are well connected to the outcome sought</td>
<td>Can lead to an inappropriately narrow view on a particular site or activity, ignoring off-site or cumulative adverse effects</td>
</tr>
<tr>
<td>Activity-based planning</td>
<td>Can be easily seen what the desirable activities are in an area, and provides certainty</td>
</tr>
<tr>
<td>Can make it easy to see what the desirable activities are in an area, and provides certainty</td>
<td>Difficult to navigate if the plan doesn’t deal with an activity specifically (in which case the fallback position must be effects-based assessment anyway)</td>
</tr>
<tr>
<td>Difficult to make prescriptive plans future focused, and as a result they can become out of date when the economic environment or technology changes</td>
<td>Often not agile and flexible enough to accommodate innovation</td>
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</table>

In reality, both of these forms of planning coexist in the current system, and they are not polar opposites. Neither is prescribed in the RMA, for example, and plans show a great deal of diversity, despite the overall intention of the Act that restrictions would be effects-based rather than activity-based. An entirely effects-based system has proved impractical, especially for managing land use. The question is whether we should have more consistency in embracing one more than the other. A greater focus on positive outcomes seems desirable, rather than focusing just on adverse effects, but a mix of effects-based and activity-based restrictions may be appropriate to achieve that if it can maximise certainty for users.

A future system is likely to require both an effects-based and activity-based approach to planning.

Secondly, a key question to consider is the extent to which we should rely on plans – or, alternatively, permits – as the place where regulatory tools really bite. Put another way, should we have greater specificity and prescription/proscription in plans, or provide for greater contextualisation and discretion through the consideration of permit applications? Each has pros and cons. We should not prevent activities unless they actually risk causing adverse outcomes, so a project’s detailed design context is important to consider. Arguably sensitivity to context is also more consistent with tikanga Māori. That said, excessive reliance on ad hoc consents has produced cumulative effects and in practice led to the infringement of environmental bottom lines over time. There is also an efficiency and process issue here, in that over-reliance on permits to implement restrictions necessitates robust public participation at the project level, as it is only at that point that the implications of regulation become obvious. Doing so risks putting off making hard policy trade-offs until proposals are developed, and they then have to be relitigated multiple times.

Greater predictability and precision could be injected into plans in a future system, with less reliance on contextual decision-making at the permitting level.

Thirdly, the process by which regulatory plans are produced is crucial. Plan-making and plan-change processes are intimately connected to (and even dominated by) two other themes: the participatory opportunities that occur within them (eg notification, submission and appeal rights – including the rights of Māori) and the institutions that are involved (eg ministries, councils and the Environment Court). These matters have been discussed in previous chapters, and we consider how these themes could work together in Chapter 15. A project of this breadth is not the appropriate place to go into the minutiae of planning and permitting processes and timeframes. But it is worth highlighting here the notable tension between the need for agility and decision-quality. Good decisions take time, but the time and resource that currently goes into plan making is unacceptably long. As such, this tension often manifests in debates over whether appeal rights should be constrained or removed. A good decision may take time, but we can still halve that time if we have one decision instead of two.
If we were to dispense with planning appeals, however, two things would need to be safeguarded: the proper representation of relevant levels of government, and adequate resourcing and robustness in decision-making. Different options may be possible in a future system to achieve this. For example:

- The Auckland Unitary Plan model for a single-stage merits hearing by an independent hearings panel. 113
- The single-stage independent hearings panel model proposed by the Productivity Commission for urban planning. 114
- A single-stage hearing by a mixed-membership committee or board, with representatives from councils, Environment Court, commissioners, and iwi.

Within each, the system could differentiate between processes for changing environmental bottom lines (eg under a separate Environmental Protection Act), which would be much more robust and precautionary and with greater independent input, 115 and processes for revisiting trade-offs, which would be more agile and sensitive to changes in community need. Similarly, plans could be made at different spatial scales under any of the above options, depending on where the community of interest lay and how a future system provided for local government arrangements. 116 All should provide for public notification and the ability to submit and be heard, as well as robust participation of Māori. One other thing to consider would be the extent to which central government should be directly involved in the plan making process, rather than creating its own separate instruments (like NPSs) and then reacting to plans that attempt to implement them. 117

Alternative plan-making processes could be embraced in a future system, such as using a single stage hearings panel rather than relying on a first instance hearing followed by appeal rights.

One final thing to consider here is the number of plans and alternative planning and permitting processes we have within any given regulatory framework. Some have complained that the original simplicity of the RMA, for example, has been undermined by the introduction of multiple planning tracks. Aside from the original “Schedule 1” process, we now have a streamlined process and a collaborative process. If it wishes to regulate directly, central government can use general regulation-making powers, NESs, or National Planning Standards. For consents, we have direct referral to the Environment Court and call-in procedures where council decision can be bypassed, and a separate designations regime. We also have a bespoke planning process for the production of the Auckland Unitary Plan. And this is just under the RMA; we also have separate planning and/or permitting processes under multiple conservation statutes, mining legislation, marine and coastal legislation, and the Building Act. 118

Is this too complex? Is it time to rationalise, or at least connect these planning and permitting processes even if we do not integrate statutory frameworks themselves? Or are we simply realising that one size doesn’t fit all, so there needs to be flexibility to provide an appropriate response to a specific situation?

12.6 Compliance and enforcement

Regulatory tools, by definition, have an element of coercion or compulsion. This means they must have a mechanism for enforcement and sanction if they are not complied with. Otherwise, there is little point in regulating. In order to know if there has been non-compliance, it is also crucial that effective monitoring of regulated activities occurs. This kind of monitoring is quite a different thing to the general duty to monitor the state of the environment referred to earlier in this chapter. 119 It has a much more specific purpose, and needs to be particularly robust given the potentially punitive nature of its consequences for individuals.

Enforcement is not just important to ensure private persons are complying with their responsibilities. Public authorities also have their own regulatory obligations (such as councils holding resource consents, or statutory duties to provide infrastructure) and meet health standards when supplying water services). They need to be held to account as well. 120 In the context of three waters, we need to think especially carefully about incentives for compliance by public service providers.

Enforcement action (especially if it results in financial penalties) may be counter-productive if the underlying cause of non-compliance is more systemic (such as inadequate funding mechanisms or institutional incentives to minimise investment). 121 An effective system of compliance enforcement is one that best achieves the goal of compliance (including rewarding and enabling), not one that favours particular tools (eg warnings, abatement notices, prosecution, fines).

In Working Paper 3, Dr Marie Brown considered how a future system could approach enforcement, building on a previous EDS report that highlighted some alarming shortcomings in the current system. 122 We will not reproduce that analysis in full here, and refer readers to both of those pieces of work. While enforcement is not limited to the RMA, most attention is focused there due to its significance.
A spotlight on compliance and enforcement in the current system

The current resource management system is a mosaic of different approaches to compliance and enforcement. The Ministry for Primary Industries and Department of Conservation have centralised enforcement roles in their respective jurisdictions. But the RMA devolves most responsibility for enforcement to councils. The Ministry for the Environment has a role in the provision of leadership and guidance. Practice is highly variable. This relatively devolved model of enforcement contrasts with many other jurisdictions that provide for full or partial responsibilities to be centralised at a state or national/federal level (eg Australia).

At present, the RMA provides for a “graduated” system of compliance and enforcement. It has a suite of different measures to be applied depending on the circumstances. In this sense it is best thought of as a spectrum, as shown in Figure 12.2 below. Which measures to apply, and whether to take any action at all, is wholly within the domain of the relevant council to decide.

A number of issues have been pointed out with the current model, including:

• Council approaches vary in terms of the priorities and resources given to enforcement activities, monitoring and investigation practice, enforcement decision-making processes and use of enforcement actions.

• Resources for enforcement are very limited in some councils (as they are in the Department of Conservation), and many activities which require monitoring (such as permitted activities) are not able to be monitored.

• There is a lack of data on council enforcement practice.

• Enforcement is a technical discipline (it is not about determining values), but one that is often carried out in a highly politicised context; underfunding is often intentional due to the political unpopularity of the function in some areas.

• There are regulatory barriers to effective cost recovery for enforcement activities (especially for permitted activities).

• The wider economically focused role of the Ministry for Primary Industries has the potential to conflict with enforcement objectives in the context of indigenous forestry.

Some options for reform are relatively modest, involve iterative change, and focus on the changes to tools and best practice. Options that have been floated include:

• Developing national direction under the RMA, perhaps in the form of an NPS or NES

• Developing and implementing national-level best practice guidelines (which has now been done)

• Central government facilitating sector capacity building including by supporting training initiatives

• Making stronger links between planning and enforcement to ensure rules and consent conditions are coherent and compliance can be clearly determined

• Developing publicly available prosecution or enforcement policies

• Creating engagement protocols between staff and elected representatives to depoliticise decision-making

Other options, at least under the RMA (or future equivalent), may be more transformational. These relate primarily to institutional reform, and the reallocation or sharing of RMA enforcement powers between local and central government. These were outlined in Chapter 9.

Effective compliance and enforcement of regulatory tools is an essential component of a future system. A number of improvements may be possible here, from using existing mechanisms better (eg the development of national direction under the RMA), to significant structural change (relocating enforcement functions to different institutions).
12.7 Concluding comments

In this chapter we have considered regulatory tools that could be used in a future resource management system. These are not just about command and control or prescriptive regulation. They encompass the conferral of rights (property or environmental human rights), frameworks for allocating resources, performance standards, product stewardship schemes, offsets, duties and many other kinds of tools. In particular, firm and precise regulatory tools are vital for the protection of environmental bottom lines. Robust approaches to enforcement are also essential. In Chapter 13, we consider the role that non-regulatory tools could play in a future system.
1 Although that is a matter of perspective. From one point of view, regulation is actually very seldom about what people cannot do with their own property. Instead, it is almost always about what affects people are not permitted to have on other people.


3 G Harlin “The tragedy of the commons” (1968) 162 Science 1243.

4 See also S Sorrell et al Reducing barriers to energy efficiency in public and private organisations: Final report (European Commission JOULE III Programme, 2000).


6 Article 1 describes a right that humans have to adequate conditions of life in an environment of a quality that permits a life of dignity and wellbeing.

7 K Bosselman The principle of sustainability: Transforming law and governance (Ashgate, 2008) at 111, 114.

8 Ibid at 127.

9 See C Stone “Should trees have standing? Towards legal rights for natural objects” (1972) 45 S Cal LR 450. Stone argued that legal systems should recognize natural right to stand in court to prevent instances where environmental damage is caused but no party can sue.

10 This has been done internationally in Ecuador’s 2008 Constitution (Chapter VII, Title 2); through a 2017 court decision in India concerning the Ganges River and one of its tributaries; and in Colombia in relation to the Rio Atrato. See generally C Iorns Magallanes “From rights to responsibilities using legal personhood and guardianship for rivers” in B Martin, L Te Aho and M Humphries-Ki (eds) Responsibility: Law and governance for living well with the Earth (Routledge, 2018).

11 This has echoes of the “bioculturalism” that has driven similar measures in Colombia.

12 We have shown spotlights on Te Urewera and Te Awa Tupua/Whanganui River in Chapter 4.


14 See generally C Iorns Magallanes “From rights to responsibilities using legal personhood and guardianship for rivers” in B Martin, L Te Aho and M Humphries-Ki (eds) Responsibility: Law and governance for living well with the Earth (Routledge, 2018).

15 That is part of the rationale behind the concept of a certificate of compliance, which is a formal statement under the RMA that an activity does not require a resource consent.


17 That is reflected in the current system to some extent, although existing uses for land use are treated differently.

18 Compare fisheries rights contained in quota.

19 The RMA itself proclaims that people are free to use their land in any way they wish unless expressly restricted in a planning instrument, but land use consents are a tool by which rights are granted in the face of plan restrictions.

20 Mining permits are an interesting case. Overseas, the terminology used is often “historical costs” rather than “permits”, recognizing that the mineral is owned by the state.

21 In that a consent does not create a right to property in the resource (eg water), but instead simply amounts to a right to carry out the activity under the regulatory regime of the RMA: see Hampton v Canterbury Regional Council (2015) NZCA 509 at [9].

22 Fleetswing Farms Limited v Marlborough District Council [1997] 3 NZLR 257 (CA) at 261.


24 See Chapter 7 on allocation. Minerals and fisheries are exceptions, as they have sector-specific regimes for allocation.


26 Resource Management Act 1991, pt 7A.


28 Judge Sheppard has been of the view that this is possible, and that it is not what the RMA envisaged: see D Sheppard Reaching sustainable management of freshwater (paper presented to RMLA Conference, Christchurch, September-October 2010) at 12.


32 That may need to vary according to the activity and public interest in question. For example, renewable electricity generators have highlighted the need for very long-term certainty.

33 Dr Tim Denne explains: “From an efficiency perspective, historical costs are ‘sunk’, ie they are unavoidable regardless of what happens in the future. The concern is only over avoidable costs and benefits, those which would be affected by the decision to hand. The question is thus simply over whether the cost of remediation exceeds the benefits. However, an alternative view might be that the historical contamination is important because it is not ‘right’ or ‘fair’ for it to have occurred”. See T Denne “Resource management law reform and economics” in G Severinsen and R Paarl Reform of the resource management system: Working Paper 3 (EDS, 2018) at 165.

34 See Chapter 5.

35 We could, for example, consider historical contributions to the problem, level of existing rights, degree of sunk investment; record of good farming practice etc.


37 See generally J Sinner and N Berkett Collaborative planning for freshwater: the challenge of a new paradigm (2014) 10(2) Policy Quarterly at 69.

38 Land and Water Forum A fresh start for fresh water (2010) at 49.


41 Central Plain Water Trust v Ngāi Tahu Properties [2008] NZRMA 200 (CA).


43 Ibid at 11.

44 Ibid at 11.


47 R Joseph “The Treaty, tikanga Māori, ecosystem-based management, the RMA and power sharing for environmental integrity in Aotearoa New Zealand – possible ways forward” in G Severinsen and R Paarl Reform of the resource management system: Working Paper 3 (EDS, 2018) at 24. Dr Joseph also comments that oral traditions underpinning tikanga means it is aใกล.

48 See Chapter 7.2.

49 See Chapters 5 and 7 for criticisms of the sustainable management paradigm as being implicitly about making trade-offs.

50 For example, restrictions in relation to the movement of risk goods, didymo, and kauri dieback.

51 D ‘Young Values as law: The history and efficacy of the Resource Management Act (Victoria University of Wellington Institute of Policy Studies, 2001) at 59.

52 As they are with the (often) economic impacts of biosecurity breaches.

53 See Chapter 5.

54 In that activities should not be prevented if they do not have the kinds of potential effects we wish to prevent.

55 As in, for example, the prohibition on plastic microbeads and the proposed prohibition on single use plastic bags under section 23 of the Waste Minimisation Act.

56 For example, under the Hazardous Substances (Disposal) Regulations 2001.

57 Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012, ss 10(1)(b), 20(3). This is in order to implement international obligations under the London Dumping Protocol.

58 Land and Water Forum Advice on improving water quality: preventing degradation and addressing sediment and nitrogen (May 2018) at 12. This was in addition to a moratorium on land use intensification through either a directive change to the NPS for Freshwater Management or a direction to prepare a plan change, or an NES.

Through product stewardship schemes and regulations under the Waste Minimisation Act.


Ibid, s 201.

New Zealand Conservation Authority, Protecting New Zealand’s rivers (2011).

For example, through innovative certification schemes like LEEDs and ENVISION. See United States Green Building Council “LEED” <www.usgbc.org>; Institute for Sustainable Infrastructure “Envision: driving success in sustainable infrastructure projects” <www.sustainableinfrastructure.org>. The New Zealand Green Building Council is active in this space.

For example, this is recognised in the mandatory approval by the Environment Court of mediated consent orders under the RMA. Parties to litigation are not free to come to any agreement they wish.

Most duties to take private action are conditional. For example, if you earn money, you must pay tax. Relatively few duties are absolute. An obvious example is if you fail to provide adequate care for a child in your care, or fail to fill in the census, you are liable for the omission.

On funding, see Chapter 13.

See Biosecurity Act 1993, s 100H; Conservation Act 1987, s 6.

See Local Government Act 2002, s 130.

And water supply and waste-water infrastructure.

Resource Management Act 1991, ss 30(1)(b) and 31(1)(b).

Reflected in the NPS on Urban Development Capacity and in the need to monitor housing affordability and urban land prices.

TI Willis Scientific and biodiversity values of marine reserves: a review (Department of Conservation, 2013).

Resource Management Act 1991, s 35(2); Environmental Reporting Act 2015.


See BECA Stock take of RMA monitoring across selected agencies (2012).


Or at least limit the opportunity for two hearings.

See the spotlight on the Auckland Unitary Plan in Chapter 10.3.

New Zealand Productivity Commission Better urban planning (2017) at 389.

However, it would be more agile where bottom lines needed to be raised.

For example, if local government were amalgamated into fewer regional-level unitary councils, a plan would, logically, be regional.

Central government can, at present, require a wayward council to prepare a plan (or a change to a plan) or review a plan. If not satisfied with the result, it can require a council to vary the proposed plan. See Resource Management Act 1991, ss 25A and 25B.

As well as under bespoke Treaty settlement legislation, which often feeds into more general regimes.

That said, more general monitoring can be used to monitor the impacts of permitted activities (where consent is expressly not required), and enforcement is still necessary for breaches where people require consent but have not obtained it.

As such, we also need effective means for monitoring the state of infrastructure: see New Zealand Council for Infrastructure Development (now Infrastructure New Zealand) (Integrated governance, planning and delivery: A proposal for local government and planning law reform in New Zealand (2015)) at 23.

Even the enforcement of an agency’s enforcement function is important!

Institutional design for three waters was considered in Chapter 10, and funding is considered in Chapter 13. See also New Zealand Productivity Commission Better urban planning (2017) from 297; Department of Internal Affairs “Three waters review” (2018) <www.dia.govt.nz>.

MA Brown Last line of defence: compliance monitoring and enforcement of New Zealand’s environmental law (EDS, 2017); see also Ministry for the Environment Compliance, monitoring and enforcement by local authorities under the Resource Management Act 1991 (November 2016).


MA Brown Last line of defence: compliance monitoring and enforcement of New Zealand’s environmental law (EDS, 2017). The Ministry now has an oversight unit to provide such leadership.


A national strategy has since been devised and internal reporting has altered.

13: NON-REGULATORY TOOLS
13.1 Introduction

While regulatory tools are important for defending bottom lines, imposing regulatory minimum outcomes is a recipe for long-term environmental and social mediocrity. There are limits to how much regulation can drive positive change. We need to influence, not just coerce.1 That is the place of non-regulatory tools, which we explore in this chapter.

In particular, economic incentives can prove extremely powerful in shaping people’s behaviours while avoiding the backlash that can sometimes come with regulatory prescription. Many such tools exist, and this is not the appropriate place to explore them all in detail. Instead, as with other sections of the report, we seek to provide a way of thinking about the place of such tools in a future system.

One note needs to be made on the relationship between regulatory and non-regulatory tools. Some tools that are generally thought of as non-regulatory (particularly economic incentives) still require a regulatory framework around them. For example, taxes can provide powerful incentives, but they must ultimately be enforced through recourse to regulation. The “cap” in a true cap and trade system is also a regulatory tool, supported by a regulatory framework defining and defending property rights that can be created and traded. The key feature of a non-regulatory tool is that it carves out a space within which people are free to choose.

Non-regulatory tools will be important in a future system, not least because regulatory tools have limitations in driving the pursuit of positive outcomes by private persons. Economic instruments will be particularly important.

13.2 Economic incentives for public authorities: Funding

Economic incentives refer broadly to the power of money to affect people’s behaviour – both private persons and public authorities. In this section we consider the latter. In particular, money – often referred to in this context as funding – enables public authorities to act. How institutions are funded – where the money comes from – is especially important where they are subject to specific regulatory directions to act. There needs to be enough of it, at the right time, and it needs to align with the institutions’ incentives.

When we consider how we pay, we are really asking a bigger picture question: who should pay. For example, relying on debt to provide infrastructure for growth distributes costs across generations, whereas relying on land taxes like rates burdens existing residents. Private persons can be made to pay for services they receive (eg volumetric charging of water, or fees for the processing of a resource consent), or costs can be spread across the community or country (eg through general taxes). This link between how and who also means that funding tools are inextricably connected to institutional arrangements, and these can be alternatives for reform. For example, in Chapter 9 we noted that water services could be improved either through institutional reform (eg transferring responsibility to a Crown entity) or by keeping responsibilities with councils and changing how they are funded.

Distributional equity and the user-pays principle are important considerations in determining who should fund the roles that the system performs.2 Generally, public authorities can be expected to pay to the extent that there is a public interest, and vice versa.

Funding policy and regulatory services

Some forms of regulation are necessary because of the actions of specific people, such as consent holders, who should therefore bear the burden of associated processing, monitoring and enforcement costs.3 This is consistent with the polluter-pays, user-pays, and beneficiary-pays principles.4 It also costs a great deal of money to develop policy and regulation, such as strategies, policy statements, and plans. Associated state of the environment monitoring is expensive too.5 Much of this applies throughout the country or the relevant region/district, and is in the public interest. As such, it is appropriate for it to be funded through general channels that reflect the whole regulated (and monitored) community (ie a general pool of funds distributed through central and local government budgeting processes).6

However, the public cost of undertaking general planning functions can be considerable, especially for small councils where core funding relies on a small (and sometimes shrinking) rating base. These councils have the same basic planning responsibilities as large urban authorities. Some may suggest the solution is amalgamation, or at least standardisation of plans would also be possible – whether mandatory (through a template under national planning standards)7 or as an “off the shelf” model councils could choose to adopt if they wished.

An alternative option would be for greater central financial assistance in planning. After all, central government already provides funds for other council functions, like the provision of local roads. Is it time to recognise a national interest in local and regional planning, and resource it accordingly? In some areas, and as with roads, that may need to come with a corresponding degree of central control over how planning is done. For example, Local Government New Zealand has floated the idea of allowing struggling councils to escalate tricky issues to a Crown agency if they chose to.8 Linking government funding to council performance has risks; it should not be used as a back door to push political agendas, to blur the line between “good” planning practice and the expression of local values, or as an alternative to the use of due process through instruments like NPSs.9 However, it does not seem unreasonable for central government to fund local planning to the extent needed to implement national level
For land transport, there is shared responsibility between operating costs at $60–$90 million. Measures to ensure compliance with drinking water standards have been predicted to be $305–$567 million. In 2014, the Auditor General pointed out that by 2022 the gap between local government expenditure on the renewal of assets and depreciation could be between $6 billion and $7 billion.

As discussed in Chapter 9, how we fund water and transport infrastructure (the tools we use) should generally be a secondary question to who is best placed to provide it (where the relevant community of interest lies). Currently, local authorities provide water infrastructure. For land transport, there is shared responsibility between local, regional and central government.

Funding the pursuit of positive outcomes

Because much of New Zealand’s resource management system is devolved, a similar story of cash-constrained councils appears when we look at the system’s other roles, notably in the provision of positive outcomes – where councils get out and do things themselves rather than restricting what others can do. For example, regional councils may wish to assist farmers in planting riparian strips to improve water quality, and are obliged to spend significant sums managing pests. But such funding issues are also relevant to central government agencies, which need to spend significant amounts of money to deliver positive outcomes – from subsidising electric vehicles, to providing community grants and education campaigns, to maintaining the conservation estate.

Central government is not as constrained as local government in its sources of funding. But fluctuating political priorities and pork-barrel politics mean that flows of money through the budget process can be haphazard. The influence of this on the Department of Conservation’s advocacy role is a case in point that was mentioned earlier. It is to be hoped that a living standards budget may provide greater stability, but that may be overly optimistic.

Funding is also crucial for the provision of public goods, notably infrastructure and related services. Particularly important in a future resource management system will be the mechanisms by which we fund and plan transport and water infrastructure, as these are central to people’s social, economic and cultural wellbeing generally, and are required to service both greenfields and brownfields land in growing cities. We know that the funding requirements for these public goods are enormous – both to service new urban growth and for the renewal of existing ageing infrastructure. These costs look set to increase in the future. For example, waste-water upgrades needed to give effect to the NPS for Freshwater Management have been estimated to cost $1.4–$2.1 billion, with ongoing operating costs at $60–$90 million. Measures to ensure compliance with drinking water standards have been predicted to be $305–$567 million. In 2014, the Auditor General pointed out that by 2022 the gap between local government expenditure on the renewal of assets and depreciation could be between $6 billion and $7 billion.

As discussed in Chapter 9, how we fund water and transport infrastructure (the tools we use) should generally be a secondary question to who is best placed to provide it (where the relevant community of interest lies). Currently, local authorities provide water infrastructure. For land transport, there is shared responsibility between local, regional and central government. In Chapter 9 we touched upon alternatives to current institutional arrangements (such as council amalgamation, shared services, or transfer of functions to national bodies), and factors that might influence our choice.

Irrespective of our institutional choice for the delivery of water services, it is essential that any institution be adequately funded. This includes local government (if that is the preferred option). The Productivity Commission has been tasked with investigating local government funding more generally, and the government is considering funding in the context of three waters over the course of 2019. This is not the place to pre-empt those more detailed exercises. However, we do point out that alternative funding tools exist, and that there appears to be a need to broaden the range of tools available to local government to provide core services, particularly infrastructure. Currently, local government can make use of the following tools:

- General rates (a tax on land)
- Targeted rates
- Lump sum contributions
- Fees and charges
- Interest and dividends from investments, and proceeds from asset sales
- Borrowing (a principal source of finance for large infrastructure projects)
- Development contributions
- Financial contributions
- Grants and subsidies
- Fuel tax

In practice, these have had limitations. Servicing rapid population growth is causing issues in some places, declining ratepayer bases pose problems in others, and some are having to support infrastructure and services for immense numbers of tourists from limited core funding. Most local authorities responsible for water and waste-water fund their services primarily through rates, rather than charges based on actual use. That said, some councils adopt user-charging approaches, and some use targeted rates. Central government has also provided funds directly, but largely on an ad hoc basis.

There are significant funding pressures and constraints on local government, which has significant implications for the delivery of core goods and services.

Some commentators have identified issues not just with the constraints on the types of tools available to local government (not enough money), but also with the kinds of incentives that result from their use – pointing out that they do not always align with some broader strategic aims. In particular, there can be strong political incentives on councils not to increase rates, especially if they are being used to service new development and the benefits are not apparent to existing residents who are paying for it (and who are the ones voting in local elections). This is not necessarily an inappropriate incentive; it is arguably unfair.
to expect existing residents to pay a huge amount more in
the short term to benefit new residents. But it can lead to an
institutional bias in councils against growth, and therefore
resistance to the timely and proactive provision of serviced
land for residential development. It can be a disincentive to
supply the development capacity that in high growth areas
is needed to support affordable urban housing.28

In practice, due to political constraints on rates increases
and constraints on borrowing, there may be a temptation
for some councils to prioritise spending on things the
community wants at the expense of the renewal of
some kinds of essential infrastructure – notably water
infrastructure. Some councils have adopted a "run to fail"
approach for underground assets, not investing
in upgrades until there are problems (such as sewage
overflows or public health problems such as with
inadequate treatment of potable water). Different reasons
have been given for this, but at its core it may reflect
a tension between the short term political incentives
on councils and the need to maintain intergenerational
public goods. Infrastructure New Zealand has said that
"these spending trends raise questions about local
government asset planning, depreciation practices, and
capital expenditure management".29 Funding through
direct democracy – whereby residents vote on particular
propositions for development – could have similar risks in
preferring short term benefit.

It is arguable that funding incentives on local
government – such as a reliance on rates – have led
to sub-optimal outcomes.

These issues have led to proposals for institutional
reform (eg removing responsibility for drinking water

Stormwater pipe, Akaroa
and waste-water infrastructure to a more independent agency), or for alternative core funding and financing tools for councils that incentivise investment in growth and renewal (or at least do not hinder it). Options floated include a regional GST (or a regional portion of existing GST), a portion of income tax, and a direct and predictable transfer of funds from central government. These could more closely tie the funding of growth and renewal to its benefits - increased economic activity at both local and national levels. The New Zealand Initiative points out that in Switzerland:

Because there are local, cantonal and federal taxes for both personal and company incomes in Switzerland, each tier of government participates in increases in tax revenue ... [and] the way that local and cantonal government are funded determines their behaviour. In Switzerland, they are rewarded for positive economic outcomes. When a village, a city or a region grows, their budgets automatically grow too. Out of this growth, new infrastructure can be funded.

Borrowing, including through the Local Government Funding Agency, can allow more intergenerational spread of costs. However, debt is a financing tool and no replacement for an underlying ability to fund; after all, debt somehow needs to be paid back from somewhere (and with interest). Thus core funding from some sort of general tax will be needed for the provision of public goods, because not all the public goods and activities should (or, in some cases, can) be fully charged to users. That is part of the reason the goods and services are "public". We do not, for example, charge people for the use of a local road when they back out of their driveway, or for entering a public park (even though we arguably could). Access has a moral or public interest dimension.

But a general tax does not have to be, and currently is not, the only funding mechanism we can use. Indeed, the balance that any institution strikes between different funding sources in a future system will depend not just on what yields the most revenue, but also on whom we want the ultimate costs to fall.

There are two general ways in which costs can be distributed by using different tools: between current and future communities; and between people who benefit and do not. Broadly, how different kinds of tools do that is outlined in Figure 13.1 below. The picture is more complex than a simple dichotomy between rates (burdening existing residents) and debt (spreading costs across generations). The options below exist irrespective of the institutional arrangements we choose to adopt, although some would naturally follow from some institutional choices more than others.

<table>
<thead>
<tr>
<th>Tool</th>
<th>Distribution of ultimate cost</th>
</tr>
</thead>
<tbody>
<tr>
<td>National general tax or regional/local portion of national tax</td>
<td>[on current users/beneficiaries]</td>
</tr>
<tr>
<td>Targeted national level tax</td>
<td>[ ]</td>
</tr>
<tr>
<td>Direct central government funding</td>
<td>[x]</td>
</tr>
<tr>
<td>Competitive or ad hoc central government grants</td>
<td>[ ]</td>
</tr>
<tr>
<td>Regional/local income tax or GST</td>
<td>[x]</td>
</tr>
<tr>
<td>Targeted regional/local level tax</td>
<td>[x]</td>
</tr>
<tr>
<td>National level debt/borrowing</td>
<td>[ ]</td>
</tr>
<tr>
<td>Regional/local level debt/borrowing</td>
<td>[x]</td>
</tr>
<tr>
<td>User charging</td>
<td>[x]</td>
</tr>
<tr>
<td>Regional/local rates (land tax)</td>
<td>[x]</td>
</tr>
<tr>
<td>Public-private partnerships</td>
<td>[x]</td>
</tr>
<tr>
<td>Value uplift capture</td>
<td>[x]</td>
</tr>
</tbody>
</table>

Figure 13.1: Distribution of costs under different funding and financing tools
The mix of funding tools we use in a future system is important. We do not have to adopt just one at the expense of others. Much will depend on our approach to distributional equity and intergenerational equity.

There are two general ways in which costs can be distributed by using different funding tools: between current and future communities; and between people who benefit and do not. The mix of tools we use may depend on our approach to distributional equity and intergenerational equity.

A spotlight on development contributions

One tool used increasingly to help fund growth-related infrastructure is development contributions. First established under the Local Government Act 2002, development contributions have become a welcome tool in local authorities' responses to greenfield growth by connecting the increase in demand for bulk infrastructure services (such as three waters) to the development that is generating that demand, and ensuring developers are paying a reasonable contribution towards those costs (and that these are passed on to users). In the three waters space, this has predominantly been used to contribute towards new or expanded water and waste-water mains required to service new development, as well as the stormwater infrastructure required to accommodate the change from greenfield to brownfield. Development contributions for infill and more intensive development of existing brownfield sites have also assisted in funding infrastructure upgrades for those areas, albeit not at a pace to keep up with the impact of growth.

A spotlight on water services

Watercare’s fundamental obligation under the Auckland Council Act is to "manage its operations efficiently with a view to keeping the overall costs of water supply and waste-water services to its customers (collectively) at the minimum levels consistent with the effective conduct of its undertakings and the maintenance of the long-term integrity of its assets". This “minimum cost” obligation also means that Watercare cannot pay a dividend or distribute any surplus to Auckland Council as its shareholder – all proceeds must be reinvested into its business. The role of Auckland Council as ultimate shareholder has been limited by statute to reflect the importance of that continuing obligation and to protect Watercare from political pressure.

A choice for any tool will also be how hypothecated - earmarked - funds are. We can, for example, charge users of public goods but use those funds for other things than the public goods for which they have been charged. Institutional design is one way of creating such boundaries, in that an institution dedicated to providing one public good (eg water) generally has to use funds for that purpose. However, funds can still be hypothecated within more broadly focused institutions. For example, revenue from road tolling can be required to be injected back into the provision of transport services, and the government has confirmed that a tourist levy will be split between the conservation and tourism sectors. Such choices are influenced by a variety of factors, but central to them are whether we want one kind of public good to be cross-subsidised by revenue from another source, and whether measures needed for long-term wellbeing need to be shielded from short term pressures.

In the case of three waters, where incentives have historically driven underinvestment, greater hypothecation may be useful to ensure a consistent and future-focused funding stream. For example, some have pointed out that funds can currently be diverted within councils from objectively necessary and intergenerational infrastructure upgrades to “pet projects”. That may be a hyperbolic choice of words (if a community wants a project, there is nothing wrong with that, and councils must weigh up many factors), but it does reflect the hard choices that are having to be made by councils in a context of constrained funds.

A future system will need to consider whether to tie particular sources of revenue with particular kinds of expenditure (hypothecation of funds).
A spotlight on water services

Watercare does not presently receive any funding from Auckland Council or central government. Almost half of its funding is received from revenue, 19 per cent from borrowing, and 35 per cent from infrastructure growth charges. This reflects an approach that emphasises user charging over charging the broader public. Water services are not subsidised by general rates or other sources of council funding. Actual costs are therefore reflected in service charges. However, the revenue can be socialised across the catchment of existing and future water customers – any single user doesn’t necessarily pay the costs he or she imposes on the system.

Revenue is gathered from Watercare’s customers, who pay contractual charges under Watercare’s customer contract for the provision of water and waste-water supplies. They include both a fixed annual charge for domestic customers and, for those customers with water meters, a volumetric charge per 1000 litres of water. Watercare also has a range of service charges which apply to administration and testing costs. Non-domestic customers pay a volumetric charge only, along with other administration and servicing charges. This approach is unique to Watercare amongst major metropolitan water and waste-water providers in New Zealand.

In Auckland, new connections attract infrastructure growth charges, which are unique to Watercare as part of their customer contract. This is a contribution towards the capital investment Watercare makes in bulk infrastructure to provide services to new or existing customers who increase their demand on its services. Through the charge, the cost of increasing the capacity of its bulk infrastructure is paid for by those who increase demand on the system now, rather than by existing customers or future generations. The charge applies to all property owners or developers applying for new connections to Watercare’s networks, and to existing non-domestic customers who increase demand for water and waste-water.

The charge is subject to rights of reconsideration and objection (in the same way as development contributions) by independent commissioners who are subject to a charter. The charge is another demand management tool, allowing Watercare to be able to see where increases in demand may result (or are occurring) and respond accordingly. In the case of existing customers, a decision can be made to reduce usage so as to avoid additional charges or meet the additional costs of their increase in demand for services. However, consistent with its fundamental obligation, Watercare cannot charge for demand that does not exist. At present, Watercare only charges a portion of the cost of growth-related infrastructure rather than the full amount that can be recovered by an infrastructure growth charge, although its intent is to increase its infrastructure growth charge over time to recover more of the cost of growth-related infrastructure from the growth community. Watercare recognises the need to balance its intention to align the costs and benefits of growth-related investment with the broader public good it generates.
Three further things can be noted briefly here. First, funding tools are not just about distributing the costs of public goods in a fair way. They also have powerful influence on how people behave, and can potentially be leveraged more to drive positive behaviour than just provide an equitably distributed source of revenue. This aspect, and the relationship between public funding and private economic incentives, is explored further below. Secondly, charging users is not just about obtaining revenue (eg tolling to fund a road) or influencing behaviour (tolling to reduce congestion on a road). It also has a more value-based component: Do we charge users simply because the public expects some kind of return from the use of a non-private resource (eg water bottling)? This is also explored further below. Thirdly, it is crucial not just that appropriate funding tools are available and used; it is also important for those tools to be well aligned with regulatory tools. That is particularly the case with infrastructure funding and land use regulation, and is explored in Chapter 14.

Funding tools can have significant implications for how private persons behave. They must also be closely linked with regulatory tools (eg land use plans).

13.3 Economic incentives for private persons

Money is a powerful enabler for public authorities to provide various goods and services, and there needs to be enough of it to do so. However, as outlined above, the kinds of funding tools available (eg rates) can also influence institutions’ behaviours. In other words, tools designed to collect revenue can have side effects.

Money can have even more significant impacts in shaping the behaviour of private persons. This poses risks where negative or inconsistent behaviour change is an unintended consequence of tools designed for other purposes. For example, in Working Paper 3 Dr Theo Stephens commented that New Zealand’s tax system, which is designed primarily to collect revenue, charges very little for depletion of natural capital (royalties on oil and minerals only), and allows deductions for expenses incurred in achieving its depletion while much of the economic benefit is captured in non-taxable capital gains. This creates irresistible economic incentives for private interests to undermine the protection functions of plans and rules.
How we might align our tools in a future system is discussed in Chapter 14. But the key point here is that the intentional use of economic incentives provides a powerful opportunity for a future system to influence private action without relying on coercion.

Economic incentives are about sending price signals. They can do two things: encourage behaviour by making it less costly, or discourage behaviour by making it more costly. Unless carefully framed within a regulatory envelope (such as the cap in a cap and trade system), they are not generally appropriate for defending environmental bottom lines. These are priceless and require regulatory protection. As Dr Tim Denne observes:64

The environmental outcome [of a green tax] is uncertain as it is not known in advance whether the economically optimal position for a firm is found by reducing waste or emissions significantly or if the economic activity is sufficiently valuable, or control measures sufficiently costly, that emissions will continue.

Reducing harm and pursuing positive outcomes

Where economic incentives come into their own is in the making of trade-offs (to make sure the negative elements of our choices are weighed according to their true costs, eg by taxing environmental harm), in driving technical innovations and alternative solutions (eg low carbon vehicles in response to a carbon price), and in encouraging private persons to proactively pursue positive outcomes (such as subsidising environmental enhancement projects). Private action is needed to complement the actions of public authorities, but there are limits to how far we can use regulation to do so. Economic incentives can do so at least cost because they provide flexibility to firms and individuals in how they respond.65 Economic instruments are also able to be used for the system’s allocative (and re-allocative) role, by creating markets for rights to use non-private goods.66

Economic instruments can be used to change people’s behaviour in ways that regulatory tools cannot. They can also be used as mechanisms for allocating (and reallocation) resources.

In Working Paper 3, Dr Tim Denne conducted a thorough investigation of economic instruments that could be used in a future system. Rather than repeating that here, we refer readers to that analysis, and present a summary below in Figure 13.2.67

It is worth noting briefly here that some economic tools are not designed to change people’s behaviour per se, but to provide a way to determine if behaviour should be changed. One of these is the economic concept of cost-benefit analysis, which Denne explored in detail in Working Paper 3 and which he defines as “a formal process for estimating and compiling the costs and benefits of a project or policy to calculate a net contribution to total wellbeing”.68 Cost-benefit analysis allows the pros and cons of activities to be identified, measured, and compared in monetary terms. This could in theory be an alternative to other tools like prescriptive regulation when deciding whether a project should go ahead. Some have seen it as the best tool available.69 Others have suggested it is a useful way to quantify trade-offs only where they are small scale and within our moral comfort zone,70 and as long as they are undertaken by appropriate trained experts.71

However, although much depends on the method by which costs and benefits are valued,72 cost benefit analysis still belongs to an economic worldview that allows trade-offs if the price is right. It is a useful tool for a future system, particularly if it incorporates robust and transparent approaches to discount rates,73 environmental justice,74 ecosystem valuation and natural capital, but is no replacement for the ethical considerations embedded in a statutory purpose or principles and safeguarded by public authorities. It is not an appropriate mechanism to defend bottom lines.

One can also question its usefulness in driving positive behaviour, or in seeking synergies when making trade-offs.75 This is because there is often a bigger picture question to be asked than whether the costs of a particular project presented to a decision-maker outweigh its costs. As one commentator has put it, we need to think about not just whether we are doing the project right, but also whether we are doing the right project.76 This has echoes of the late Bishop Manuhia Bennett’s comment that tikanga is “doing things right, doing things the right way, and doing things for the right reasons”, and that there is often an ethical component to environmental decision-making that our tools must reflect.77

However, if we already know that we wish to change people’s behaviour, economic instruments can be used as a way to do so. Depending on whether or not one sees market freedom as the starting point for resource management, they can be characterised as either a measure to correct market failure or as an efficient form of public intervention to drive either the reduction of negative behaviour (like pollution) or positive behaviour (like environmental enhancement). They can provide incentives to find innovative solutions that regulation may not. Care needs to be taken in a future system to make sure that regressivity – tools’ disproportionate impacts on the poor or vulnerable – does not occur or is corrected in separate distributional policies (eg subsidies).78

It is worth highlighting specifically that user-charging, touched on earlier as a tool to fund public goods, also has a potentially powerful influence on behaviour. Making people pay for something generally causes them to use it less or to find alternatives.79 For example, volumetric charging for water services allows providers to manage demand through economic levers which are not available to those who charge a fixed price per year.
<table>
<thead>
<tr>
<th>Tool</th>
<th>Description</th>
<th>Examples</th>
</tr>
</thead>
<tbody>
<tr>
<td>Charges</td>
<td>Instruments that impose a cost on activities, inputs or outputs. They can be described as fees, levies, taxes, prices, etc but can be regarded as a tax if they are not connected to the provision of a service. Charges can provide incentives to reduce or prevent impacts, but generally they do not provide certainty over the outcome. The RMA allows the use of some economic instruments, although it does not particularly encourage or facilitate these mechanisms. Few councils have imposed pricing as a demand management tool.</td>
<td>The waste disposal levy under the Waste Minimisation Act(^{82}) Congestion charging A regional fuel tax A carbon tax Volumetric charging for freshwater</td>
</tr>
<tr>
<td>Tradeable permits</td>
<td>Tradeable permits introduce markets where previously there were none. They can be “cap and trade” (incentivising the efficient reduction of harm) or “credit based” (incentivising generation of benefits). The former provides certainty of outcome, but not certainty of price. Trading regimes do not necessarily reduce harm; they drive the most efficient use of resources within a regulatory envelope of acceptable harm (ie what permits allow). Trading schemes work best when the location of emissions or other discharges does not matter. That poses some issues for some forms of harm, such as to freshwater. The transfer or trading of permits under the RMA is currently constrained. Consents are transferable between landowners (consents run with the land), but not between types of activity or locations.</td>
<td>The emissions trading scheme under the Climate Change Response (Emissions Trading) Amendment Act 2008 and amendments The Nitrogen discharge permit trading scheme at Lake Taupō under the RMA The United States acid rain programme (cap and trade) The United Kingdom packaging and renewables systems (credit based)</td>
</tr>
<tr>
<td>Subsidies</td>
<td>Subsidies provide financial rewards for particular activities or outcomes, and can be used to drive positive behaviour. There can be concerns over efficiency when particular activities rather than outcomes are subsidised. Subsidies are widely used in New Zealand in an ad hoc way to incentivise actions that provide positive outcomes (social and environmental).</td>
<td>Various central government contestable funds The Waste Minimisation Fund The Community Environment Fund The Freshwater Improvement Fund The Fresh Start for Fresh Water Clean-up Fund Subsidies for installation of insulation and clean heat Grants under s 47 of the Waste Minimisation Act</td>
</tr>
<tr>
<td>Deposit refund schemes</td>
<td>These involve the payment of a deposit when a product is purchased, which is repaid when the product is returned after use. This system can provide a strong financial incentive for returning products to a centralised facility to better ensure product reuse, safe disposal or recycling. It can incentivise manufacturers to use more recycled goods as inputs and reduce outputs.</td>
<td>Container deposit schemes</td>
</tr>
<tr>
<td>Feebates</td>
<td>Feebates involve people being charged a fee (charge) if their behaviour or performance falls below a set level, or being provided a reward (subsidy) if they exceed it. However, feebates can impact disproportionately on the poor (eg if they cannot afford to meet performance standards) and have perverse outcomes.</td>
<td>A feebate for vehicle fuel economy or carbon dioxide emission intensity</td>
</tr>
</tbody>
</table>
as distributional issues were addressed. Management (rather than just focusing on supply), as long as could tools for demand and be used in a future system, as could tools for demand management (rather than just focusing on supply), as long as distributional issues were addressed.

Some form of charge – a “green tax” – could be used as a distributional issue. The prospect of having to offer funds for remediation in advance incentivises preventative measures.

It is felt by some that a future system should make more use of economic instruments to drive changes in behaviour than the current one does. However, the fact that many of these meet the broad definition of a “tax” provides a barrier to discretionary implementation; they require specific enabling legislation. Taxes and financial tools aimed at environmental behaviour change are rare in New Zealand. For example, differential and targeted rates can be used by councils to reflect that some groups benefit or cost more than others when receiving services, but not to reflect the environmental outcomes they cause. In particular, although the RMA has encouraged the use of economic instruments, the specific tools (or legal ability) to implement them have not been forthcoming. This echoes other shortcomings of the RMA in providing tools to achieve positive outcomes, such as urban planning and environmental enhancement.

Some form of charge – a “green tax” – could be used more in a future system, as could tools for demand management (rather than just focusing on supply), as long as distributional issues were addressed.

While subsidies are routinely used by both central and local government, they tend to be targeted, often in a time-limited way, at encouraging particular activities that are considered to contribute to a particular set of outcomes. They are seldom used to reward outcomes themselves in a long-term or consistent way. Subsidies for environmental outcomes are less a structural feature of the system than they are discretionary application of government money to implement a particular policy agenda. The latter is not a bad thing, although it means subsidies are arguably not used to their full effect. An outcomes-based use of subsidies could be embedded in a future system, and could encourage a “race to the top” if implemented through a competitive approach (eg grants to those who cause most improvement per dollar).

A spotlight on subsidies and charges

The reason for using a subsidy rather than a charge might be based on some assessment of the existing nature of rights. If it is perceived that firms have a right to pollute, then paying them to reduce their emissions might be more appropriate. However, if firms do not have such a right – rather the community has a right to clean air – then using a charge is more appropriate. This raises difficult ethical issues over when something (be it a specific authorisation, established practice, or implicit encouragement) should be treated as a “right”, a “privilege” or as simply an existing state of affairs.

Putting a price on ecosystem services and natural capital ensures that environmental harm is appropriately valued. Much depends on methods of valuation, and in an ecocentric view it may be inherently objectionable to commoditise the natural world in this way.

A higher discount rate means effects further in the future are devalued relative to the present. Using a zero or negative discount rate increases the value of future costs and benefits, potentially better reflecting intergenerational equity.

In the context of tradeable permits, there are good reasons for restrictions. That is because for many of the kinds of activities restricted under the RMA, location matters. For example, we would not allow the market to cause the complete degradation of one river while enhancing another one, even if that would maximise the efficient use of resources. Furthermore, many dimensions of interconnected ecosystems defy fragmentation and measurement in commodity units, and raise ethical issues. As Dr Theo Stephens has said, “In any exchange, a characteristic not counted is protected only by chance, which facilitates its loss.” One area where innovations have occurred is in catchments, because in some cases it is the total harm within a catchment that is most important rather than in particular sites within it (taking water or, for some things, using it as a receiving environment). Thus we have seen, for example, some trading occurring for nitrogen discharge rights in the Waikato region. But there are significant barriers to creating markets for rights to take water, in that it raises ethical and political questions of ownership that (particularly for Māori) have not been resolved.

Tradeable permits have potential to enhance efficiency, but need to be subject to careful regulatory constraints.
Tradeable permits are a way to avoid allocative decisions being locked in stone. That allows for more efficient use of the resource, and for new entrants to enter the market (alleviating some fairness and intergenerational equity). Transfer was already available under the RMA, but that was little uptake amongst permit holders. This was said to be not surprising, as only a small number of water bodies had at that time been identified as fully allocated. Options for removing barriers to trading include allowing the temporary transfer of consents, standardising transfer processes and a registry, creating a waiting list, and creating national/regional water markets.

A market for permits might also mean that where initial allocations do not achieve the highest and best use, corrections may occur over time without the need for further regulatory input (eg through the review of consent conditions). In that way, investors could have greater certainty while regulators could focus review on environmental rather than distributional issues. However, transfer rights may be of limited applicability in smaller catchments.

Tradeable permits can also result in market domination where one or a small group of entities buy up the bulk of the permits and thereby control access to the resource. In the case of fisheries quota, four main corporate entities control large holdings, and those wishing to harvest the fish have to pay to “lease” the right to fish from them on an annual basis. Would we also countenance the corporatisation of freshwater rights if that is what the market produced?

Overall, economic instruments can reduce some forms of harm at lower cost than purely regulatory interventions, because they provide flexibility in how outcomes are achieved. They could be used more in a future system, although subject to carefully considered regulatory parameters and only above regulatory bottom lines.

**Allocation**

Above, we have focused on using economic tools to drive positive behaviour change. But tradeable permits are not so much about incentivising changes in behaviour as they are about maximising the efficient use of resources within a regulatory envelope of acceptable harm. In other words, they do not necessarily reduce harm; they simply make sure we get the most bang (social and economic benefit) for our buck (total acceptable harm).

Trading regimes do this by allowing the reallocation of rights to use resources (creating a secondary market). This has efficiency benefits, in purely economic terms. The ability to buy and sell rights in this way may also allow a smoother mechanism for the redistribution of rights to achieve distributional equity. Rather than eroding existing rights by taking them (regulation), a market price could be paid or contributed to by the government to, for example, subsidise new entrants in which there may be a public interest (eg micro-hydro schemes), or to provide future redress under the Treaty of Waitangi.

However, creating a market framework for reallocating rights does not deal with the question of how to allocate the rights in the first place. Allocation is a fundamentally different role to the pursuit of positive public outcomes. In Chapter 12, we considered the potential for regulatory tools to allocate non-private resources like water, and highlighted that the RMA allows for structured and competitive processes to allocate rights to use resources (although they are seldom used). At the moment, resources are usually allocated to those who apply for the right first.

However, economic instruments are alternative ways to allocate if we know in advance how much is available. For example, an auctioning process can be used whereby people bid for the right to use a particular amount of water. A tendering process based on purely financial considerations can also be used. That could help to fix a common criticism of the RMA: that it does not properly consider opportunity cost (what else a resource could be used for), and ensure that resources are directed to their most efficient use (in monetary terms). However, it comes with downsides. A focus on monetary value could lead to non-monetisable aspects of resources being undervalued, and a push towards rather than away from environmental bottom lines. Furthermore, there are ethical issues. Should resources go primarily to those who are able to afford to pay for them? Does the notion of the public good, or equity, also play a role? It is possible that regulatory and market mechanisms could both be used (eg regulatory allocation for some purposes, and auctioning or tendering for the remainder).
A spotlight on tendering in the coastal environment

Regional councils have had little ability to control allocation for aquaculture activities under the dual system of the Fisheries Act and the RMA’s first-in, first-served model. Alternative methods were considered, but largely rejected, by councils, as it was concluded that the RMA’s allocation model did not sufficiently enable councils to devise alternatives (such as balloting). A moratorium on new allocation was put in place in November 2001, and reforms in 2004 introduced a single process for aquaculture planning and consents, through designated “aquaculture management areas.” These were abolished in 2011, and marine farms can now be established outside of them. The first in time approach was reinstated, although regional councils can now provide for alternative allocation methods in regional coastal plans. However, these have not been forthcoming, with industry choosing to focus its efforts on national action (eg a proposed NES for aquaculture dealing with reconsenting of existing marine farms) and specific regulations for relocation.

Allocative issues also arise in relation to Māori rights and interests. Māori claims to commercial aquaculture were fully and finally settled in 2004, with allocation of 20 per cent of existing and new aquaculture space. The process for achieving this through regional agreements has proved fraught, despite some progress. Any future system will need to respect this ongoing process when using allocative tools.

Tendering for rights to take, remove, reclaim, and drain in the coastal and marine area has existed since 1991. The RMA provides a process whereby the Crown can sell exclusive rights to apply for coastal permits, where there is likely to be competition. This has only happened twice, both times in the context of aquaculture in the Marlborough Sounds. Does this suggest that the tendering process in the RMA is not an effective tool? Applicants seem to prefer to seek exclusive rights through the normal consenting process, by which allocation is largely achieved as a side-wind to the consideration of a project’s adverse effects.

Auction and tender arrangements have been used successfully for the allocation of radio spectrum in New Zealand, and some have asked whether wider tendering mechanisms could supplement or replace the first in time regulatory approach under the RMA. Tendering is a relatively low cost way to find out the value potential users attach to resources and where it can be used most efficiently. However, financial approaches to tendering do not consider equity of access or wider values, such as cultural considerations. As with tradeable permits, there is also the risk of corporatising rights in a few large users, forcing out others (including, without specific protection, Māori) and undermining overall community wellbeing.

Charging for the use of resources

There are several reasons that a resource management system can impose charges for the use of resources. Several have been mentioned already: to fund public goods and services (eg volumetric charging for water); to facilitate trading and therefore efficient use (eg the holder of a discharge permit can sell it); to change behaviour (eg a tax on carbon or a levy on waste), and to allocate resources (eg rights to use a resource goes to the highest bidder). However, there is another reason that a future system could impose charges: to ensure that some of the benefit obtained from using a non-private resource returns to the public.

This is quite a different rationale for imposing a charge. It is not necessarily linked to the need to fund something (although it can be), or designed to change behaviour (although a charge can discourage inefficient uses and change demand). It is also not designed to allocate (since imposing a charge for something does not in itself determine who gets to pay that charge if many are still willing to pay it). Charging for resources – sometimes called a resource rental – can simply reflect that private use of a public resource should come with an expectation of some public benefit.

Sometimes this is not controversial (eg the payment of royalties for Crown owned minerals has a long history). But for some resources, where it is not connected to the provision of a service (such as huts in the conservation estate) or the need to influence behaviour (eg drive efficient use), it can provoke debate. Charging for water has proved particularly controversial, as has charging for coastal occupation rights. A resource rental in fisheries was abolished in 1994.

As we mentioned in Chapter 7, resources like water are not just things that are waiting to be privatised, and, where they are privatised, it is reasonable for New Zealanders to expect some kind of return. Alternatively, if we were to give legal personhood to nature, we could say that nature is getting paid for providing its own services (perhaps a “minimum wage” for the natural world) and the government is acting as its custodian. A more difficult question is to whom payment should be made, given it raises questions of ownership or at least (effectively) property rights. That is disputed territory, especially in relation to Māori interests.

Another tricky issue is determining exactly when a private activity provides sufficient public benefit already, without the need to impose an additional resource rental. For example, some may say that there is considerable economic benefit for all New Zealanders from agriculture. Is this reason to shield such activities from additional charges for the public resources it uses? It may depend on whether we take an ecocentric or anthropocentric view of “public” benefit. But if some are charged but not others, we need to be honest about what that means, and the grounds on which we do it. For example, what is
the difference between water bottlers and irrigators? Charging some and not others would effectively be subsidising some sectors, or groups, from New Zealand’s bank of natural capital.

Equity is also important here. There is an argument that charges should only be applied to new rights, because the value of (eg an existing water permit) is already reflected in the price of the land to which it is attached. It would, effectively, be double-charging. However, on the other hand, it could be argued on a case by case basis that existing users are those responsible for the allocative issues we now face, and that new entrants should not be unduly penalised because of this. A future system would need to consider carefully how to equitably transition to a framework where charges are imposed.

A future system could be more active in charging for the use of non-private resources, even if they were not scarce or associated with a specific need for revenue. That would recognise that the public has an interest in obtaining a return from such resources. However, widespread charging may face practical and political challenges.

A spotlight on resource rentals

The concept of resource rentals (a price) for water became an issue during the 2017 general election, with the then Labour Environment spokesperson Hon David Parker suggesting a resource rental for water bottling companies which extract water from aquifers and other freshwater supplies. Bottling plants would be charged one cent for every litre of water extracted. Farmers and other irrigators would be charged one or two cents per 1000 litres of water extracted.

The purpose of such a rental is to provide a return to the community by extracting some of the value conferred on users from granting exclusive access to a community resource; and to ensure that the value of scarce resources is reflected in decisions on their use. Rentals could take the form of a pre-determined dollar payment per unit of the resource, or require permit holders to annually return a fraction of their right to be potentially allocated to the community.

The benefits of a resource rental were well canvassed during the debate around the 2017 general election. However, it is interesting to note how little those views have changed since the mid-2000s when these ideas were first being discussed. As Scherzer and Sinner suggest, collecting resource rent helps to protect against inefficient allocation of the resource. The theory goes that the resource should be allocated to those uses that create the most value (including intangible value), thereby maximising net benefit and avoiding an allocation scenario where the use of the resource creates value that is lower than the highest value use.

Charging rent is a way to alleviate pressure on an overallocated resource from competing users, thereby achieving more efficient use (again, in theory). By setting a rental value, a local authority establishes an approximation of what a resource is worth to the community (including concerns such as biodiversity and recreational use), thereby forcing competing uses to decide whether they are willing to pay that much to use it. This is said to avoid misallocation of resources. The Ministry for the Environment has suggested that requiring the payment of a resource rental may also make it more palatable to grant private access to community resources, and that it may increase incentives for efficient use (depending on how users respond to the increase in cost of access).

A spotlight on coastal occupation charges

Prior to the RMA, charges for the use of the coastal environment were levied under the Harbours Act 1950 by a variety of regulators, including Harbour Boards and the Marine Division of the Ministry of Transport. Other charges were levied under special Acts of Parliament relating to the coastal marine area. The result was an ad hoc charging regime which was applied inconsistently. During the mid-1990s, a report was commissioned to review charging regimes and concluded that coastal charges could valuable employ the market mechanism of supply and demand, both to allocate coastal space in a manner that acknowledged its scarcity and to promote allocation of the resource to its best use. The report concluded that the existing system should be discontinued and replaced by some form of user or occupation charge, applying as an adjunct to the coastal planning regime and appropriately tied to local circumstances.

The Resource Management Amendment Act 1997 provided regional councils with the express powers to charge for occupation of coastal space. Regional councils must now include statements in their regional coastal plans as to whether charging will be employed, and consider the balance of public and private benefits when determining whether or not to employ a regime. At present, Environment Southland is the only regional council to have introduced coastal occupation charges, although Marlborough District Council has introduced draft provisions in its Proposed Environment Plan. Explanations put forward for not introducing charging regimes include that while it is generally considered appropriate to charge, the risks at this point in time are too high due to lack of clarity in the legislation, a number of barriers to implementation, and issues regarding equitable implementation.

Others include (rather unbelievably) uncertainty around what coastal occupation charges are; the low level of coastal occupation in a district; uncertainty over future ownership and management of the foreshore and seabed; and the likelihood of a lengthy plan change process holding up other priorities.
13.4 Non-economic incentives

People are complex beings, and their behaviour is governed by many different things. Economic incentives rely on the ‘extrinsic’ motivation of people wishing to be financially rewarded or not punished for their actions. But money is not the only thing, or sometimes even the main thing, that matters, because people are not just (or even) rational economic actors. We also want to be “(or to be seen as) good citizens and nice human beings”. People’s ethics, for example, are important not just as the underpinnings of a top-down, formal system that influences them (eg through regulation), but also as an intrinsic motivator. As discussed in Chapter 4, the system may have some power to change society’s ethics over time. But it can also facilitate the expression of pre-existing ethics (eg formalising voluntary measures through open space covenants on private land). It can also make people more conscious of ethics they already have (eg by noting the synergies between energy efficiency, cost savings, and the public good) or ethical behaviour that is expected of them (highlighting the existence of a social contract, such as via the “Tiaki Promise” initiative).

But more prosaic considerations than ethics often govern how people behave. For example, when choosing whether to drive or bike to work, ethics may be less important to some than the impact a helmet can have on one’s hair. In a future system, we need to be conscious of the limitations of lofty principles and aware of the opportunities to shape behaviour change through more modest means. Not everything needs to be a grand solution.

The concept of “nudging”, often referred to as a sub-discipline of behavioural economics, has grown in popularity in recent years, led by work by US academics Richard Thaler and Cass Sunstein. It is based on the idea of “libertarian paternalism”: where possible, people should retain freedom of choice, but should be encouraged to behave in ways that furthers their own (and the public) good. For example, Dr Tim Denne has pointed to an experiment in Norwegian hotels that reduced food waste by 20 per cent simply by providing smaller plates to guests. Recycling can be encouraged by providing larger bins relative to bins going to landfill. A picture of a pair of eyes above an honesty box increases the likelihood people will pay. Resource management is one area in which nudging has great potential, as intrinsic motivation is crucial where private persons are those who need to take action on the ground.

Nudging works by providing subtle interventions based on key elements of human psychology, such as:

- Knowledge asymmetry: people’s behaviour is sometimes caused by a relative lack of access to knowledge (eg that electric vehicles now have a fairly long range, or that savings can be made by using less electricity). Simply making people aware, through education campaigns, can sometimes change their behaviour.

- Ease of action: people take actions when it is easy, or easier than alternatives. If an act is desirable, we can change the default setting; people can be required to opt out rather than opt in (eg Kiwisaver), or at least be required to think about it (eg being forced to choose one option by ticking a box). We can place recycling bins in highly visible locations, or require people to insert a card to turn the electricity on (as in hotels).

- Attractiveness: if something is enjoyable or they get benefit from it, people are more likely to do it. For example, we can provide “electric only” parking spaces close to shop entrances, and dedicated road lanes, to encourage the uptake of electric vehicles.

- Timeliness: people are more likely to remember to perform an action if they are reminded to do it just beforehand.

- Cognitive dissonance: if people’s behaviour is inconsistent with their views or beliefs, they can change the latter over time to reduce the inconsistency.

- Visibility and feedback: if consequences are highly visible, people are more likely to prevent or address them (eg responding to power meters that change colour according to intensity of energy use or cost).

Perhaps most significantly, people like to be seen to be doing the right thing (especially in comparison to others in the same group). At the macro level, we even define “clean, green New Zealand” in relation to the rest of the world to whom we market ourselves. Sometimes the “right” thing may be a secondary consideration to beating the competition or keeping up with the Joneses.

Figure 13.3: A poster produced by Greater Wellington Regional Council appealing to people’s intrinsic motivations

That may sound like a disappointing indictment of humanity, but it also provides a practical opportunity. If the system facilitates comparisons and competition in social virtue and social shame as the market already does for prices, it can incentivise a low cost race away from bottom lines. No one wants to be singled out as the only person on the street who does not recycle, or compared unfavourably to a neighbour in terms of energy or water use. The scorn of a friend may mean much more than the risk of enforcement action by public authorities. Voluntary green certification schemes can also drive
improvements in the private sector. This has echoes of tikanga, which, according to Dr Robert Joseph, “sets top-lines, describing outstanding performance where virtue is its own reward” but also where compliance and action is “driven by whakamā (shame), mataku (fear of spiritual retribution) or community acceptance [or] ostracism …”.

Some forms of nudging can be criticised for being underhand and manipulative. However, the private sector already manipulates people – entire marketing departments are employed to do so – and in some cases that is good for neither the individual nor the public interest (eg in the marketing of sugary foods to children). Furthermore, even the status quo still nudges us – it is simply that it is often an accidental or unintentional nudge.

So what does this mean for a future system? The use of behavioural incentives is not easily expressed through the overarching formal structures of a system comprised of laws and institutions. Taxes, regulations and trading require legal frameworks to implement, but many behavioural insights are about encouraging public authorities to be creative in their approaches. We cannot legislate for that. It is a matter of leadership and practice.

That said, a future system could do several things to mainstream behavioural insights beyond the small government community of practice that is emerging in New Zealand. It could require authorities specifically to consider soft mechanisms for behaviour change as alternatives to regulation (except for bottom lines). It could also provide institutional pathways through which behavioural insights are used (eg a dedicated government advisory agency, a core unit of a system stewardship institution, or an operational agency that implements nudges on the ground). Perhaps most importantly, it could require close consideration of the behavioural side effects of other tools.

Non-economic incentives can be used to change people’s behaviour, including through the use of behavioural “nudges”. Such measures could be deployed in a more systemic and creative way in a future system, if used with care.

A spotlight on the unintended impacts of economic incentives

It is unwise to consider price signals in isolation of people’s broader motivations. Imposing economic incentives – commoditising harm – can erode the moral element of people’s choices, and “when a matter has moral or ethical dimensions to it, then barging in with crude economic incentives can generate unintended consequences”.

Professor Tim Hazledine points to one example in Working Paper 3 that illustrates the risk of under charging for undesirable behaviour:

Ten day care centres in Haifa, Israel, were having trouble with parents turning up late in the afternoon to pick up their children, thereby forcing staff to stay late as well. So they tried a little experiment. Leaving four centres as the control, six of the centres imposed a fine on late parents. Result: tardiness doubled in those centres! The fine was treated as a fee, as a price now willingly paid by many parents who had conscientiously turned up on time before. Worse, when the fine/fee was then dropped, lateness persisted. It seems that, when a day care centre has shown willingness to commodify lateness by putting a price on it, any moral stigma simply evaporates, never to be recovered. Once the prosaic realm of the market is entered there can be no return to the fine territories of virtue and conscience.

On the other hand, imposing modest charges can sometimes act as a signal of right and wrong, and trigger more of a moral than economic response. In short, human behaviour is difficult to predict. A future system could provide room for experimentation by offering support, expertise and flexibility for small scale trials of behavioural nudging. We need to open the toolbox more if we are to encourage people to want to do positive things of their own volition.

13.5 Concluding comments

In this chapter we have considered the non-regulatory tools that could be used in a future system to enable or influence behaviour. The funding mechanisms available to public authorities are of critical importance. This is particularly so for local government, which faces significant costs over coming years to upgrade ageing infrastructure, provide infrastructure for (in some areas) rapid growth, and support growing visitor numbers. Institutional reform may address issues to some extent, but more fundamental reform of underlying funding structures may be a complementary, or alternative, way forward. Economic and behavioural tools are also a key component of a future system. This is particularly because we need to drive positive outcomes, not just the prevention of further harm. Regulatory tools have limitations in this regard, but we can use financial incentives and behavioural insights to encourage people to do their part.
1 See R Thaler and C Sunstein Nudge: Improving decisions about health, wealth and happiness (Penguin, 2009); C Sunstein Why nudge: the politics of libertarian paternalism ( Yale, 2014).
2 On these principles, see Chapter 5.
4 See Chapter 5.
5 See Chapter 12.
6 From all pooled sources of incomes, including rates and tax.
7 For example, the three Waiarapa councils have a combined district plan: Masterton District Council "Wairarapa Combined District Plan". <www.mstn.govt.nz>.
8 This could be a modest intervention – to standardise some definitions, for example. It could also be more significant – for example, to provide a consistent format for plans.
9 Local Government New Zealand A "blue skies" discussion about New Zealand’s resource management system (2015) at 39. That may be a useful prospect not just for funding reasons, but also for political principles (eg to facilitate meaningful regional change and adaptation measures).
10 Although the use of a truly independent national level funding agency may mitigate such concerns.
11 See Taranaki Regional Council "Riparian management" <www.trc.govt.nz>. This can be thought of as returning above bottom lines, rather than enhancement per se (see Chapter 7.2).
12 In implementing pest management plans under the Biosecurity Act.
13 See Chapter 10.
14 See Chapter 11.
15 This increases the supply of development ready land for housing, which is one way to drive prices down.
18 H Wyn "Funding pressures affecting three waters infrastructure" (Paper presented to the Local Government New Zealand Water Summit, 30 May 2018).
19 Although there comes a point where disamenities of scale mean small institutions (by area or population) are too inefficient or not viable, even if there is a local community of interest. In those cases, some institutional change may be required. This does not necessarily mean amalgamation, but it may mean some transfer of functions. See generally New Zealand Council for Infrastructure Development (now Infrastructure New Zealand) Integrated governance, planning and delivery: A proposal for local government and planning law reform in New Zealand (2015) at 12.
20 With the exception of Watercare, which has its own bespoke arrangements in relation to Auckland Council, and although private developers often provide local infrastructure on a council’s behalf.
21 See Land Transport Management Act 2003.
22 See Chapter 9.4.
24 Local Government Act 2002, s 103(2). Local authorities are creatures of statute and can only tax in accordance with their statutory powers: Carter Holt Harvey Ltd v North Shore City Council [2006] 2 NZLR 787 (HC).
25 Local Government New Zealand Water 2050: Cost and funding (June 2018).
26 For example, through the Housing Infrastructure Fund, Tourism Infrastructure Fund, and Provincial Growth Fund. The Auckland Transport Alignment Project is a longer-term partnership, but is still not built into the system.
27 Instead, it is prospective residents from other parts of New Zealand or from overseas, whose movements cannot be controlled by local authorities.
28 Although it is not the only thing that is needed.
30 See Chapter 9.
31 More than the competitive and ad hoc grants that have been made in the past, such as through the Housing Infrastructure Fund.
32 Although there may still be substantial resistance to any additional taxes, as well as political pressure to keep taxes low. We also need to be aware of any risks that financial incentives for growth on accountable institutions come at the expense of their protective roles. That may reinforce the need for greater independence in setting environmental bottom lines, as discussed in Chapter 9.
33 The New Zealand Initiative Go Swiss: Learnings from the New Zealand Initiative’s visit to Switzerland (2017) at 10.
34 See Local Government Act 2002, s 101(3).
35 For example, councils could still be funded by a national tax (eg a regional or local portion of GST), but it would be wholly odd if a national agency were funded from local rates.
36 For example, income tax or GST.
37 For example, a tourist levy.
38 For example, the Housing Infrastructure Fund, Provincial Growth Fund, or project specific funds like that for the Lake Taupō Protection Project.
39 For example, a regional fuel tax, a targeted rate, a differential approach to general rates, or a bed tax.
40 For example, bonds or loans.
41 For example, bonds or loans.
42 For example, the volumetric charging of water, road tolling, public transport fares, or charging for access to national parks. Development contributions can be seen as a form of user charging, even though it is a coarser measure than, say, volumetric charging. Pay measures for user charging need to be used with care. For example, a petrol tax for funding roads may not reflect the true use of roads, as electric vehicles do not use petrol.
43 This reflects the idea that beneficiaries (not necessarily “users”) pay. People benefit in that the value of their land goes up from proximity to publicly funded goods. For example, rapid transit has increased property prices near central Auckland stations by up to 20 per cent (Infrastructure New Zealand correspondence, 25 October 2018). See generally Transport for London Land value capture (2017); New Zealand Government Urban development authorities: Discussion document (2017).
44 See Chapter 5.
45 For example, the renewal of ageing water assets and local roads may be disproportionately funded by existing users/residents than by future users/ residents, but the construction of new infrastructure to service growth may be funded more by those set to benefit from it.
46 For example, a main road in an urban area may be used mostly by locals, but also by visitors from other regions and countries.
47 For example, infrastructure connections to lifestyle blocks on the fringes of an urban area.
48 For example, those with lower incomes or those who cannot drive a car.
51 For example, in some contexts full user charging for infrastructure may be prohibitively expensive.
52 Local Government (Auckland Council) Act 2009, s 57(7)(a).
53 Ibid, s 57(1)(b). See also Watercare Services Limited “Our commitment to you” <www.watercare.co.nz>.
54 Although not necessarily; for example, some council-controlled organisations can pay a dividend to their council owner, which can then be used for a variety of public purposes.
56 Although that may not necessarily prevent the cross-subsidisation of water from more general funding sources, it means that if revenue exceeds costs then it should be reflected in a reduction of charges rather than profit.
58 Local Government Act 2002, s 101(3).
60 Watercare Services Limited “Our charges” <www.watercare.co.nz>.
62 Ibid.
65 Ibid. This is both in terms of timing (when measures are taken) and in terms of who pays (rights can be traded). On efficiency, see S Kerr and D Marx “Transaction costs and tradable permit markets: the United States lead phasingdown” in RG Newell and KR Rogers The market-based lead phasingdown (Resources for the Future Discussion, 2003).
66 For example, we already have one such market for the assimilative capacity of the climate, through the trading of rights to emit greenhouse gases.

67 Figure 13.2 shows broad categories of economic instruments, and it hides considerable diversity and sub-categories.


69 Ibid.


71 Professor Tim Hazledine has pointed out that “the New Zealand Treasury does issue a sensible and accessible Guide to Social Cost Benefit Analysis, but seems unable to mandate its use even within central government, never mind local authorities”. Ibid at 161.

72 Monetary valuation can be measured in ways other than market prices, such as people’s revealed and stated preferences. This can include people’s willingness to pay or to accept compensation, and more sophisticated techniques like choice modelling. Valuation can be sensitive to the value of non-use (existence value and use by future generations). See M Lauri-Plant et al “How to value biodiversity in environmental management?” (2015) 55 Ecological Indicators 1-11.

73 In that it does not place less value on outcomes simply because they will happen in the future. Dr Tim Denne has pointed out that discounting is potentially inconsistent with inter-generational equity. T Denne “Resource management law reform and economics” in G Severinsen and R Paarl Reform of the resource management system: Working Paper 3 (EDS, 2018) at 168. The Stern Review has recommended a very low discount rate in the context of climate change: see N Stern The economics of climate change (Treasury, 2006).

74 The distribution of costs among different people and groups, especially the poor and vulnerable.

75 See Chapter 7.


79 Depending on how “elastic” demand is. For some things, there comes a point where increasing price has little effect on demand (eg everyone needs some drinking water).

80 Arguably changes to protect nature could be regarded as payment for the services of the natural world.


83 A cap is a regulatory restriction on the supply of units, of essentially rights, to cause harm or damage. Units are expected to end up with those who value them most.

84 This encourages desired activities or outcomes by allowing people to create allowances. For example, the United Kingdom’s packaging recycling system is based around tradable recovery notes, which are generated when a volume of waste is recycled and can be used to show compliance with targets.

85 Although some trading (eg of nitrogen) can be done on a catchment basis.

86 K Guerin “The nature of wellbeing: How nature’s ecosystem services contribute to the wellbeing of New Zealand and New Zealanders” (Department of Conservation, 2015).

87 Local Government New Zealand has suggested that a discount rate be negative where natural ecosystems are rare or irreplaceable: see Local Government New Zealand A “blue skies” discussion about New Zealand’s resource management system (2015) at 39.


91 As Dr Tim Denne has pointed out, “ecosystem services analysis is regarded as having not progressed to a stage where there is an accepted framework for analysis”; see also L Roberts et al “The nature of wellbeing: How nature’s ecosystem services contribute to the wellbeing of New Zealand and New Zealanders” (Department of Conservation, 2015).

92 For example, we already have one such market for the assimilative capacity of the climate, through the trading of rights to emit greenhouse gases.

93 Figure 13.2 shows broad categories of economic instruments, and it hides considerable diversity and sub-categories.


99 Resource Management Act 1991, s 24(1). The original section 32 of the RMA encouraged councils to have regard to other means, including “… the provision of information, services, or incentives, and the levying of charges (including rates)”.


101 See Chapter 7.

102 For example, international experience has shown that building more roads does not ease congestion in the long-term: it simply increases the number of people who use them. See generally C Montgomery Happy city (2013); E Glaesser Triumph of the city (Pan, 2011).

103 For example, subsidies through the Provincial Growth Fund for planting trees, in order to assist in meeting the Billion Trees target. See www.radionz.co.nz/news/political/37772/government-to-invest-185m-in-tree-planting.

104 For example, by rewarding a level of performance, as under a feasible scheme.


106 See Chapter 7.2 on location-based bottom lines.


109 Although not where local impacts are significant, such as local turbidity or discolouration.


112 A challenge for new allocation is how to preserve intergenerational equity (see New Zealand Government Essential freshwater: Healthy water, fairly allocated (2018) at 20).

113 S Barton The nature of resource consents: Statutory permits or property rights (July 2009) at 7; citing Ministry for the Environment People, environment and decision-making: the government’s proposals for resource management law reform (December 1988) at 30 and 38.


115 Although it may encourage people to look for alternatives to causing harm in the first place.

116 In practice, there may be a risk that as rights increase in value, under-utilised permits are used more, leading to worse outcomes.

117 Which would infringe the principle of non-discrimination.

118 See Chapter 7.

119 And other frameworks, like fisheries and minerals.

120 See Chapter 7.8.

121 Depending on how things like ecosystems are valued.


124 Resource Management Act 1991, s 165G.


127 See generally The economics of ecosystems and biodiversity: Ecological and economic foundations (Earthscan, 2010); SF Thrush et al “The many uses and values of estuarine ecosystems” in JR Dymon (ed) Ecosystem services in New Zealand – conditions and trends ( Manaaki Whenua Press, 2013) at 226-237.


129 See T Denne and L Wright Evaluating the costs and benefits of introducing a container deposit system for New Zealand: Summary of analysis (Covdoc, 2016).


131 As Dr Tim Denne has pointed out, “ecosystem services analysis is regarded as not having progressed to a stage where there is an accepted framework for analysis”; see also L Roberts et al “The nature of wellbeing: How nature’s ecosystem services contribute to the wellbeing of New Zealand and New Zealanders” (Department of Conservation, 2015).
131 Ibid at 22.
132 See Chapter 7.8 on the different rationales for allocation.
133 For example, charging for entry to national parks.
134 A payment needs to be relative for that to happen, such as in the context of auctioning.
135 Where connected only to water itself (eg taking for irrigation), rather than water services (eg drinking water or waste-water).
136 As much as laws may assert that water rights are not property rights (as under the RMA), that does not make a huge conceptual difference.
137 One argument is that water, when bottled, can be exported overseas rather than being used in New Zealand.
138 Sometimes that may be appropriate (eg in charging overseas visitors but not New Zealanders for access to national parks).
139 Although mistakenly, because there is no (or at least should not be an) expectation that existing rights will be renewed.
140 Acknowledgement: Aidan Cameron, Barrister, Bankside Chambers.
144 Ibid at [5.62].
145 Ibid at [5.62].
146 Resource Management Act 1991, s 64A(2).
147 See, for example, Tasman District Council Section 32 report on Draft Plan Change 56 at 14.
148 See, for example, Gisborne District Council Proposed Variation 15 to the Proposed Regional Coastal Environment Plan at 9.
150 Ibid at 152.
151 Under the Queen Elizabeth II National Trust Act 1977.
152 For example, in advertising campaigns by the Energy Efficiency and Conservation Authority.
153 See Local Government New Zealand “Tiaki promise makes the call for greater guardianship of New Zealand” (Press release, 1 November 2018).
154 R Thaler and C Sunstein Nudge: Improving decisions about health, wealth and happiness (Penguin, 2009).
156 See Chapter 4.
157 Although care must be taken, as it is equally true that negative behaviour from the majority can normalise it.
159 Department of Prime Minister and Cabinet “Behavioural insights” <www.dpmc.govt.nz>.
160 See Chapter 9.
162 Ibid.
PART 5 – DRAWING THE THREADS TOGETHER

14: HARMONISING OUR TOOLS
14.1 Introduction

The purpose of this project is to take a first principles look at the resource management system in New Zealand and outline options for reform. It has looked at the system in four substantive parts: norms (what the system should aim for), functions (the roles it should play in doing so), structures (designing legislation, institutions and public participation), and tools (how to influence people’s behaviour). We now turn to how all of these things could work together in a future system.

It is not our intention in this part to provide a summary of what has already been discussed. Instead, we draw the threads together in two stages. In this chapter we consider how we could harmonise the different kinds of tools discussed in Part 4. In Chapter 15, we then consider how all themes – norms, functions, structures and tools – could work together to form three potential models for a future system.

We have considered three different kinds of tools in Part 4 of this report: strategic, regulatory and non-regulatory. We need all of these in a future system, and there is an important relationship between them. The relationship between strategic and other forms of tools generally needs to be vertical (one of hierarchy). There is no point in having a strategy if that is not then closely followed and supported by tools dealing with regulation, funding, and behaviour change (although any strategic planning must also be realistic, and informed by available funding tools). At the same time, regulation and non-regulatory tools have little prospect of achieving our goals if not underpinned by a coherent strategy (where we are going and how we are getting there).

Regulatory and non-regulatory tools also need to work in harmony with each other. If the financial component of a plan falls through, for example, then the remaining regulatory component may not be enough to achieve the objective sought. In particular, this plays out in the context of urban growth where changes in land use regulation (eg zoning) and funding of the public infrastructure required to service it need to happen at the same time. Neither one works without the other.

Strategic, regulatory and non-regulatory tools need to be well aligned with each other.

The tools in the current system are fairly fragmented, partly because they are deployed under different statutory frameworks that have been treated as silos. In the urban growth context, attention has focused on how three core acts work together: the RMA, the Local Government Act and the Land Transport Management Act. According to one commentator, these acts are “subject to different legal purposes, processes and criteria, and operate over different time frames. While there are legal links between plans and decision-making processes to help alignment, the three planning Acts were never designed to work together as a complete planning system”. And yet the issue is actually much wider when we consider alignment between the tools under many other frameworks that make up the resource management system. There are two key ways in which harmonisation is important: normative and procedural.

14.2 Normative alignment of tools

The current system

Having tools that are normatively aligned means that, as a package, they complement each other in pursuing a coherent and compatible set of goals. They do not pull in different directions. It is arguable that at the moment “there is a lack of common purposes and goals across the planning framework” and the purposes of some statutes have grown apart over time through legislative amendment.

Even the tools used under a single framework – such as the RMA – can suffer from a lack of clear purpose. For example, it is arguable whether “sustainable management” provides for positive urban planning rather than just the management of harm, or what the word “while” (“at the same time as”) in section 5 really means for the defence of environmental bottom lines. We can criticise central government in being tardy in making use of national direction tools under the RMA, but the ones that have now been made represent a mixture of disconnected norms. Only one NPS (as well as the NZCPS) is truly “protective” (the NPS for Freshwater Management), and most are actually concerned with development (eg the provision of infrastructure and urban development capacity). These are not ultra vires the RMA, but they are a rather curious collection given the original intention of the legislation. NPSs and NESs have a patchy coverage of issues of national importance, and arguably do not reflect a sensible approach to prioritisation. It is acceptable, for example, that central government progress on the outdoor storage of tyres has outpaced regulatory limits for freshwater or intensive agriculture.

Most significantly, there is little clarification as to how the high level policies in each relate to each other, making implementation extremely difficult in more integrated and comprehensive instruments like regional policy statements. Decisions on how to balance nationally important interests are being made at the local level, often in an ad hoc way and certainly with no view to a strategic national outcome. We have previously mentioned the desirability of a comprehensive and integrated statement of national policy/regulations under the RMA (a Government Policy Statement), recognising that central government is a core actor, rather than just an intervenor, in resource management.

The current system could be better aligned in a normative sense, so that the relationships between its aims were made clearer and more consistent.
We now have several NPSs made by central government under the RMA. One, on the topic of electricity transmission, is highly targeted at a sector, and has no wider application to most difficult decisions made under the Act. The NPS for Renewable Electricity Generation provides for renewable energy infrastructure and operation. While this NPS is in part in place to achieve environmental goals (eg the reduction of greenhouse gases), the resources that are used (eg geothermal heat, or water) and the adverse effects of activities are not addressed in detail. Only one policy in that NPS acknowledges there may be “residual adverse effects”. There is nothing to address the tension between the use and protection of those resources.

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

A need for normative alignment does not mean that all of our statutes need the same purpose. As discussed in Chapter 8, there can be legitimate reasons for that not to be the case (eg to safeguard bottom lines), and we cannot brush tensions between them under the carpet. Some frameworks already deal with this; for example, obtaining a resource consent under the RMA does not remove the need to obtain additional permission under protective conservation legislation or under marine and coastal area legislation. However, a future system could ensure more broadly that the tools used for one purpose do not undermine those used for another purpose, unless that is an intentional outcome. It also means that the system can proactively look to embrace tools that have synergies (can achieve multiple outcomes at the same time). A few options for doing so are discussed further below, although many more may be possible.

However, in order to align the system’s tools, we need to know what we are aligning them towards. And because resource management presents many tensions, we need a realistic hierarchy of goals rather than just a statement of things that would be nice to have. In Chapters 4 and 5 we discussed ethics and principles in particular, our choice of worldview – economic or broader – is important here. A strictly economic approach to resource management sees efficiency and social welfare as the primary consideration, and puts faith in the market as the best way to achieve that. Intervention is needed only in the event of market failure (eg to internalise externalities). Alternatively, a focus on the wider public interest justifies intervention in broader circumstances. Our choice of worldview has implications for the tools we use (or do not).

One example of such a tool is the use of a regulatory urban limit or boundary. Some have advocated for the removal of such measures and a rejection of a planned (eg compact) urban form, instead arguing for “competitive land markets” where developers can develop wherever they like as long as they pay the full costs associated with it (including environmental and infrastructure costs). If we adopt a narrow economic view on the rationale for
public intervention, this has some merit. But on a broader view, it has significant downsides or risks. However, we also note that ideological positions over efficiency are not really the primary driver behind such arguments. Digging deeper, they are really driven by political imperatives around housing affordability. Here, the proof may be in the pudding; if the regulatory approach of the Unitary Plan and related measures prove effective (or play their part) in improving affordability outcomes in Auckland through the supply of developable land and associated infrastructure, then such free market proposals may lose traction. In the meantime, there are risks in throwing the resource management baby out with the housing unaffordability bathwater. Choices about urban form are not easily reversible, and great care needs to be taken if we remove all restrictions.

Efficiency is not the only outcome a future resource management system should aim for. This has implications for the kinds of tools we use.

**The integrative power of an overarching strategy**

There are different ways to encourage normative alignment in a future system, depending on the scale at which we wish to do so. We have floated the idea of an overarching piece of legislation under which other relevant statutes would operate, and/or the integration of policy functions in national level institutions to act as effective stewards (eg a central government agency) and watch dogs (eg a Resource Management Commission). Others have suggested greater statutory integration of the spatial components of the system (eg land use and infrastructure) by merging components of the RMA and other acts, an additional strategic layer of legislation relating more specifically to spatial planning, or the use of domain or sector-specific advisory bodies at national level (eg an Infrastructure Commission).

Aside from legislative and institutional changes, a future system could encourage alignment through its use of tools. At the more modest end of the scale could be the mandatory production of a comprehensive Government Policy Statement under the RMA (or future equivalent) that integrates and fills gaps in our current suite of NPSs and NESs. That would have influence only within the framework of the RMA, so may not be enough. For example, Infrastructure New Zealand has pointed out that "a nationally significant project may be a priority in the Auckland spatial plan but have no recognition under the RMA or the [Land Transport Management Act's Government Policy Statement] on land transport" and that "a regionally significant project may have priority in a [regional land transport plan] but not be funded in the local council's long-term plan".

A more useful tool may be an overarching spatial plan – whether national or regional (or both) – that has a specific and legally mandated pathway to implementation through regulatory and funding tools made under other statutory frameworks. In other words, it could be a higher level version of the Auckland Plan with more direct legal effect and legislative cross-referencing.

However, we may need to go still further, as not all tools we wish to align may be spatial (in that they cannot be marked out on a map). The system is not just about the integrated management of urban growth or infrastructure. There may thus be an important role for the kind of overarching Resource Management Strategy we discussed in Chapter 11. This could then express its
spatial components through a spatial plan, which could be a more direct and proactive way to align central, regional and local interests and recognise that there is a national community of interest in some aspects of land use planning as well as the “commons” like water and air.25

A future system could better align its different goals through an overarching resource management strategy. A spatial planning process could also help align the spatial components of different statutory frameworks.

Alignment and economic tools
A degree of normative alignment may be able to be achieved through a harmonious choice of regulatory and economic tools. While it warrants further exploration, it is particularly interesting to note the synergistic potential of attribute weighted tendering as a tool to allocate non-private resources. This is where prospective users bid for exclusive use of resources (eg freshwater) based on a variety of factors (including, but not limited to, money). It could achieve several things at once: raising revenue (for funding related or other initiatives), providing a return to the public (and/or Māori, depending on ongoing conversations about property rights) without the controversy of another “tax”; providing economic incentives for efficient use of the resource (it would be competitive); and allowing for the consideration of non-financial factors like equity and public interest. It could even mean that decision-making on different resources, or different areas (eg catchments) could be based on different attributes or different weightings. The challenge would be determining what those were, and who got to decide.

On a grander (and longer-term) scale, a future system could contemplate fundamental changes to the tax system. That could be more than just judicious use of targeted “green” or “Pigouvian” taxes to change behaviour (eg a tax on carbon emissions), or a reform of local government funding (eg a regional portion of GST). In essence, we could restructure how New Zealanders contribute to public coffers by embracing synergies between the tax system’s two main effects: revenue-raising and behavioural incentives. Green taxes have a side effect of raising money (although not enough for general funding), while general taxes have a side effect of driving behaviour (although not always in desirable ways). In Working Paper 3, Dr Theo Stephens sketched out what an “environmental footprint tax” could look like. We refer readers to that analysis, and summarise the basic idea below. Others in New Zealand and overseas have also highlighted the opportunities for changing underlying financial signals in a future system rather than just dealing with its symptoms.26 A distortionary tax system is not necessarily a bad thing. Embedding incentives within the tax system could encourage behaviour to become durable societal norms, not just a regulatory obligation.

That said, such measures are highly disruptive of the status quo and may be difficult to find a political mandate for. It may take time, and be a staggered journey rather than a sharp transition. Nevertheless, it is timely to consider such issues as the Tax Working Group prepares to provide its final advice to the government on reform of the tax system as a whole.27

Economic tools could be used in a future system to align the basic incentives on private persons with the broader goals the system is trying to achieve. One far-reaching idea would be to change the basis of the tax system so that it both raised revenue and provided positive incentives for environmental enhancement.

A spotlight on an environmental footprint tax28
Some have suggested that the resource management system has failed to maintain natural capital because its regulatory tools put environmental protection in direct conflict with vested interests that seek economic benefits – gained by activities that deplete natural capital.29 It also distorts investment away from human capital and towards environmentally damaging, high volume, and low value-added production that results in capital gains, high levels of pollution and biodiversity loss. The system encourages us to exploit our riches without replenishing them.

An environmental footprint tax is a form of land tax. It would determine tax liability based on the environmental footprint of a land use: a measure of what natural capital is present on a parcel of land. The tax levied on a property would be calculated as footprint depth (expressed in dollars) multiplied by the land area. Tax rates would increase with uses that were more depleting of natural capital, and could even provide rebates for net positive ecological outcomes. A footprint tax could enable improved environmental outcomes by implementing the polluter-pays principle, while allowing a shift from traditional sources of revenue like income tax and GST.

Hypothecation
Finally, it is worth touching on the potential for greater hypothecation of revenue to produce alignment. Hypothecation means that particular sources of revenue are linked or earmarked to particular uses. Whenever a tool raises money, we need to think about what we do with it. Of course, if we were to implement something like an environmental footprint tax, the system could not realistically constrain how funds had to be spent. Its benefit would be in embedding behaviour change, and raising general funds for an elected government to spend how it sees fit through the normal budget process.

However, some have also suggested that the system should not link targeted charges/taxes, or the proceeds of tendering/auctioning, to specific uses (eg using charges on freshwater to improve the quality of freshwater). The argument is that financial resources would not go to their most efficient use.30 However, a future system would also have to be aware of the tension between efficient outcomes and the public interest. Much may depend on who has the
power to spend the money, and the risk of politicisation. For example, if we did not link funding sources with particular uses, would we continue to underinvest in crucial public goods like waste-water infrastructure? Or would we underfund measures to improve freshwater quality? Some hypothecation already occurs in the system, whether due to institutional boundaries (Watercare cannot use its revenues to fund roads, for example) or because of intentional earmarking of funds (eg a levy on waste is used for waste reduction measures).31

14.3 Procedural alignment of tools

Above, we have touched on some ways in which a future system could align its tools in a normative sense – to support each other’s goals rather than undermining them. Some – like an environmental footprint tax – are more radical than others. But it is also important that tools be aligned in a procedural way. Even if they support each other’s goals, they still need to interact with each other in an efficient, effective and timely way. The desire for better alignment of tools is behind many proposals for legislative redesign.

It is important that the tools in a future system align well in a procedural sense – that they interact in clear and timely ways.

Overlap between tools

Arguably the most difficult issue here is how to align strategic, regulatory and funding tools to manage urban growth, and we turn to that in a moment. However, there is another more conceptual question to be addressed: Is it acceptable to have tools that overlap? This can be relevant where we have multiple regulatory tools available. For example, under the RMA, when should central government intervene through an NPS, NES, general regulations or National Planning Standards (or all of them)?32 Is it desirable to have multiple participatory processes for related matters (eg a local government strategy, a regional policy statement and a regional plan)?33 And do we need lower level regulatory instruments like RMA plans simply parroting the policies of an NPS, or providing slightly different definitions of the same basic concepts in each district or region?34

Sometimes the answer may be yes – a local or subject focus may be a helpful thing, and subtle differences can still be important ones.

Overlap is also contentious where we face a choice between regulatory and non-regulatory tools. These are sometimes alternatives. For example, the RMA provides a tight regulatory envelope within which permits (eg for discharges) can be traded, and debates over regulatory or economic approaches to the reallocation of water rights is where this choice seems likely to play out in future.

Climate change is another important example. Amendments to the RMA were made in 2004 to prevent councils from considering the impact of activities on climate change.35 This did not remove regulatory jurisdiction from the Act, as central government retains power to regulate under the RMA.36 However, in practice, it has meant that climate change mitigation has been addressed almost exclusively through an emissions trading scheme that puts a price on carbon. Local government is powerless to regulate, and central government (and the courts) have proved unwilling or unable.37 The argument is that adding a layer of regulation – especially locally distinct measures – could upset the price signals under a trading regime, create inconsistency, and amount to double-counting.38 That has some logic, based on an economic approach to internalising externalities (although it may still be questionable whether we should put our eggs all in one basket). It also depends on how we perceive the role of the system: Do we allow communities to reflect their own identity by pursuing
their own “low carbon” future and making their own trade-offs above bottom lines? Is carefully set regulation also necessary to complement carbon pricing, especially where it has synergies (such as preventing inappropriate expansion of intensive agriculture)? It seems increasingly untenable that the country’s primary environmental statute actively avoids references to climate change mitigation in its principles, despite having potential to make a significant contribution through land use change and urban form.39

There may be potential in a future system for regulatory and non-regulatory approaches to climate change mitigation to coexist, and be mutually-reinforcing. In particular, the RMA could be more geared towards addressing climate change mitigation.

Aligning regulatory and funding tools

In Chapter 8, we discussed the relationship between primary legislation in a future system, and deferred consideration of how subordinate tools interact. These tools can operate generally (in which case they are often called “plans”) or in relation to a particular project (in which case they are often called “permits”). We focus first on aligning plans.

A future system needs to ensure that its planning tools interact with each other in an effective, efficient and timely way. The most prominent – although not the only40 – context in which this issue plays out is where cities are growing, and where changes in regulatory land use tools (under the RMA) and tools for planning/funding associated water and transport infrastructure (under the Local Government Act and Land Transport Management Act) need to complement each other. Land use change in greenfields areas (i.e. rural to urban) requires expensive public infrastructure in order to occur in practice. Equally, the provision of infrastructure is ineffective if the kinds of land use it was intended to service are not allowed or do not occur. They need to work in harmony.

The alignment of regulatory and non-regulatory tools (such as land use regulation and infrastructure funding) is particularly important in the context of rapid urban growth.

A spotlight on the NPS on Urban Development Capacity

The NPS on Urban Development Capacity is the only central government policy driving any kind of urban growth planning at local government level. This requires councils in high to medium growth areas to identify how much land is needed for urban growth and to ensure 15–20 per cent more land than is required is zoned and serviced or funded for servicing. However, the NPS’s attempts to integrate the various components and legislation that contribute to urban growth planning (funding, infrastructure, cross-boundary cooperation) are necessarily limited, because a NPS only directs planning under the RMA – it has no teeth to direct infrastructure and financial planning under other statutes.

Currently, RMA plans dealing with the environmental effects of activities (including land use planning)42 tend to be separated from plans concerned with the development and funding of infrastructure, with only weak linkages made between them. This has been touted as one contributing factor to a lack of land supply (and affordable housing); we don’t have enough land supply, and where we do, there is not adequate infrastructure available to service it in a timely way. Significant work has been done on this topic by the Productivity Commission and Infrastructure New Zealand. The latter has highlighted that there is “often poor alignment between strategies, funding, regulation and decision-making to integrate land use and infrastructure development”.43 The Local Government Act and Land Transport Management Act are largely silent as to how their planning processes interact with the RMA. The segregation of those processes is shown in Figure 14.1 (adapted from Infrastructure New Zealand).
Purpose: To enable democratic local decision-making and action by, and on behalf of, communities; and
To meet the current and future needs of communities for good quality local infrastructure, local public services, and performance of regulatory functions in a way that is most cost-effective for households and businesses.

National Policy Statements
- Objectives and Policies of National Significance

New Zealand Coastal Policy Statement

National Environmental Standards
- Air, water, soil, noise contaminants etc
- Monitoring

Purpose: To promote the sustainable management of natural and physical resources

National Land Transport Programme
- Prepared by NZTA every 3 years
- Must give effect to the Government Policy Statement
- Allocates National Land Transport Funds to activities (projects)

Regional Land Transport Programme
- Transport outcomes and objectives for 10+ years
- Prepared by Regional Transport Committees or Auckland Transport
- Prioritised list of projects for consideration for National Land Transport Fund

Activity / Project Funding
- Public transport services
- State highways
- Local roads
- Walking and cycling

Relevant National Policy Statements under the RMA
- National Energy & Conservation Strategy
- Consultation with the NZTA, Local Government New Zealand and representative groups of land transport users and providers

Relevant Regional Policy Statements or Plans under the RMA
- Auckland Spatial Plan
  - Long term 20-30 year growth strategy
  - Separate public consultation for each plan
- Auckland Council Local Board Plans
  - Describes activities and community outcomes for next 3 years
  - Separate public consultation for each plan
- Auckland Council Local Board Agreements
  - Budget and Funding for each financial year

Resource Management Act

Local Government Act

Figure 14.1: Current processes for consenting and funding infrastructure

Public Infrastructure Project
Purpose:
To enable democratic local decision-making and action by, and on behalf of, communities; and
To meet the current and future needs of communities for good quality local infrastructure, local public services, and performance of regulatory functions in a way that is most cost-effective for households and businesses.

Purpose:
To promote the sustainable management of natural and physical resources

Relevant National Policy Statements under the RMA
- National Energy & Conservation Strategy
- National Policy Statements of National Significance
- New Zealand Coastal Policy Statement

Government Policy Statement on Land Transport
- Objectives and Policies of National Significance
- Issued every 6 years
- Includes 3 year investment strategy

National Land Transport Programme
- Government’s 10+ year policy objectives
- Must give effect to the Government Policy Statement
- Allocates National Land Transport Funds to activities (projects)

Regional Land Transport Programme
- Transport outcomes and objectives for 10+ years
- Prepared by Regional Transport Committees or Auckland Transport
- Prioritised list of projects for consideration for National Land Transport Fund

Activity / Project Funding
- Public transport services
- State highways
- Local roads
- Walking and cycling

KEY
- Strong statutory influence (eg give effect to; recognise and provide for)
- Medium statutory influence (eg be consistent with)
- Weak level of statutory influence / consultation processes (eg have regard to: take into account; be informed by)
In practice, the place where many planning tools intersect is late in the piece: at the project level. For example, an infrastructure project may be fully planned and have associated funding, but still require authorisation under the RMA for its environmental effects and for the use of land. Such a reactive approach is well placed to deal with private proposals (where funding and planning decisions occur behind closed doors), but public infrastructure planning is arguably quite a different thing. Although there was an appetite for treating public projects in an identical way to private ones in the laissez-faire ethos of the late 1980s, perhaps that should not be entirely the case. For one, public projects are (or should be) reasonably transparent and predictable – we know (or at least we should know if we do proper strategic planning) that we will need core infrastructure to support urban growth, renewal or economic wellbeing, and generally what this will be and where it should go. Protective regimes can usefully influence how a proposal looks right from the start, to remove inappropriate features (e.g., culverting urban streams, or roads going through ecological hotspots) and pursue synergies (e.g., water sensitive stormwater infrastructure). And yet the RMA is generally designed to act surprised – and often critical – whenever a public project seeks to proceed.45

Local Government New Zealand has recommended “provisions that coordinate land use and infrastructure planning and funding”, including harmonising processes and timeframes.46 This is likely to require more than just inserting general statutory cross-references to “have regard to” other plans. It requires an alignment or integration of process to ensure that connections are made at the right time. At the moment, timeframes are not consistent. District plan processes can take more than a decade, and annual and long-term planning cycles for local government run separately to three yearly cycles for national land transport planning. Decision-making responsibility, processes and appeal rights vary considerably for each.47

It would be possible for connections to be made earlier in the policy and development cycle for land use planning and the associated planning and funding of core infrastructure.

Beyond urban growth and infrastructure
The planning tools produced under the RMA, Local Government Act and Land Transport Management Act form only one part (albeit an important one) of the suite of tools used in the wider system. In Figure 14.2 we provide a simplified illustration of how a wider range of “planning” tools in the current system cross-reference vertically (within statutory frameworks) and horizontally (across different statutory frameworks). Here, we simply highlight the nature of connection (clear and directive; medium strength; non-specific or weak) rather than the point in time at which the connections are made (process). In Figure 14.3, we then provide a brief description of how plans under different statutes interact in the current system.

Motorway construction, Waterview
More generally, several things can be observed about this system. Vertical interactions within statutory frameworks are fairly clear and firm, particularly for tools that have regulatory effect (eg within the RMA). For example, a regional plan has to give effect to NPSs. Planning for infrastructure and mechanisms for funding it are generally also closely connected, although planned works do not always eventuate.

**A spotlight on three waters**

Infrastructure planning and funding for three waters is intended to be considered in unison, in three year cycles with every long-term plan. Annual plans then deliver on that combination of planning and funding in intervening years. In other words, planning the actual infrastructure and funding it are tightly integrated within one legal framework.

Watercare is currently required by Auckland Council to prepare its own asset management plan covering a period of at least 10 years (the equivalent of a long-term plan). Annual plans then deliver on that combination of planning and funding in intervening years. In other words, planning the actual infrastructure and funding it are tightly integrated within one legal framework.

Horizontal connections within statutory frameworks are also generally clear in theory, but in practice can be less so. For example, there is little cross-referencing between different NPSs produced under the RMA, despite their potential to conflict. Furthermore, legislation governing plans seldom refers explicitly to plans under other legislation. Thus vertical connections between instruments produced under different statutes tend to be weaker and less clear (such as overarching strategies or spatial plans produced under the Local Government Act and regional policy statements produced under the RMA). The same applies to horizontal connections between different frameworks (such as financial long-term plans under the Local Government Act and regulatory district plans under the RMA). Under the RMA, decision-makers must simply “have regard” to management plans prepared under other acts.

Where local government has planning functions across multiple statutes, some voluntary integration of processes is already possible. For example, the RMA requires community consultation to be carried out in accordance with the principles of consultation in the Local Government Act. The RMA also states explicitly that requirements to consult with iwi authorities under other legislation (eg Treaty settlement legislation) must be followed.

Furthermore, councils can consult on RMA plans at the same time as matters under other legislation (eg long-term plans under the Local Government Act or pest management strategies under the Biosecurity Act), as long as it is clear that consultation serves those multiple purposes. However, these are all fairly weak connections.

Many planning instruments exist in the current system, and there is a mix of strong, weak and non-existent connections between them.

Legislative integration between infrastructure and land use planning may be one way to strengthen relationships in one context where it really matters: urban growth. For example, some have proposed combining the land use planning components of the RMA with the related infrastructure planning and investment components of the Local Government Act and Land Transport Management Act. That might be called a “Planning Act” or a “Development Act”, and provide for the creation of national and regional spatial plans as well as a national infrastructure plan. As discussed in Chapter 8, this creates integration in one way, but has risks of fragmentation in other ways. The same would be true of the widespread use of a Housing and Urban Development Authority, in that integrating RMA-type planning functions with infrastructure funding powers under a single statute would be integrative, but defining a geographically specific area in which that would apply would create significant fragmentation between areas.
Figure 14.2: Strength of connections between selected “planning” instruments in the current system
<table>
<thead>
<tr>
<th>Statutory framework</th>
<th>Plans made under the statutory framework</th>
</tr>
</thead>
</table>
| RMA                 | • National instruments (NPSs, NESs, general regulations and National Planning Standards) apply directly or must be given effect to in lower level instruments.  
• Regional policy statements must give effect to NPSs.  
• Regional and district plans must give effect to NPSs and regional policy statements.  
• All statutory planning instruments made under other frameworks must be had regard to in RMA planning processes. |
| Local Government Act 2002 | • Long term plans are produced every three years by councils, and set out councils’ strategic priorities over the medium and long-term (at least 10 years) as well as coordinating their activities and spending. They must include financial strategies and infrastructure strategies.  
• Annual plans contain the proposed annual budget and funding impact statement for a particular year, and coordinate activities and spending in the short term. They can vary from what is anticipated in long-term plans. They are linked to the publication of annual reports, which report on council activities and spending.  
• Various funding and financial policies must also be created. |
| Land Transport Management Act 2003 | • A government policy statement outlines a national level 10-year strategy for how funding choices will deliver desirable outcomes, and includes an investment strategy and policy on borrowing. It also includes a statement of expectation in relation to the NZTA, and the activity classes to be funded from the national land transport fund.  
• A three-year national land transport programme is produced by the NZTA, which outlines activities identified in regional land transport plans expected to be funded through the national land transport fund. The programme must give effect to the government policy statement. It must also take into account regional land transport plans, the energy efficiency and conservation strategy, and relevant NPSs and plans under the RMA. It is the mechanism by which the NZTA allocates funds based on both central government strategic expectations and the aspirations of regional and local communities.  
• Regional land transport plans outline the transport priorities of councils and expected expenditure. They are also a mechanism to identify activities (maintenance or new roads) for which funding is to be sought from the land transport fund.  
• Plans must be consistent with the government policy statement, and take into account the energy efficiency and conservation strategy as well as relevant NPSs and plans under the RMA. It is a way for councils to express their wishes for transport funding from central government.  
• Local funding (eg through rates), which informs expected expenditure outside the land transport fund, is determined through annual plans and long-term plans under the Local Government Act. |
| Marine and Coastal Area (Takutai Moana) Act 2011 | • Specific Māori groups can produce plans concerning customary rights in the common marine and coastal area.  
• Regional councils must consider whether planning instruments under the RMA need to be changed to recognise and provide for those plans. |
| Biosecurity Act 1993 | • Under the Biosecurity Act, a pest management policy and plans, as well as pathway management plans (at national and regional level), are developed. This process is separate to the plan making process under the RMA and Local Government Act.  
• There is a requirement that regional pest management plans and pathway management plans are not inconsistent with regional policy statements and regional plans made under the RMA. |

Figure 14.3: A selection of key planning tools in the current system and links between them
<table>
<thead>
<tr>
<th>Statutory framework</th>
<th>Plans made under the statutory framework</th>
</tr>
</thead>
</table>
| Conservation legislation (various)                          | • The Department of Conservation develops many strategies and management plans in order to manage the conservation estate, under multiple statutes. Conservation land also forms part of regions and districts under the RMA, so two layers of plans apply.  
  • While the legal link is not strong, there is dialogue between councils and the Department. Regional and district plans in practice reflect this (eg through “conservation” zoning).      |
| Heritage New Zealand (Pouhere Taonga) Act 2014              | • Heritage is protected through policy and plans under this statute, culminating in the New Zealand Heritage List. These are developed separately from instruments under the RMA.  
  • Territorial authorities must have regard to relevant entries on the New Zealand Heritage List when preparing or changing district plans (in which specific protections for heritage are contained).      |
| Waste Minimisation Act 2008                                 | • Waste management and minimisation plans must be produced by territorial authorities under this statute.  
  • Because waste management is a service that falls under those required under the Local Government Act (and which are planned for through long-term plans and annual plans), the Waste Minimisation Act outlines the relationship between these planning process.  
  • The environmental impacts of waste, and land use questions, are determined through regional and district planning processes under the RMA.      |
| Civil Defence Emergency Management Act 2002                 | • Long term plans under the Local Government Act can incorporate or describe civil defence plans, although processes for their development are separate.  
  • Councils under the RMA also produce plans that are concerned with the avoidance and mitigation of natural hazards.      |
| Crown Minerals Act 1991                                     | • Minerals programmes are developed under this Act largely separately from planning under other statutes.  
  • Minerals management (in terms of depletion and allocation) is carved out of the RMA and cannot be considered by councils.      |
| Fisheries Act 1996                                          | • The management of fisheries (in terms of taking fish), including the development of fisheries plans, is conducted largely independently of other statutory regimes, including the management of habitats under RMA plans and policy statements.      |
| Building Act 2004                                           | • Central government is responsible for the Building Code under this Act, which imposes standards for construction (largely based on health and safety concerns).  
  • Councils have roles in making policies for dangerous and insanitary buildings.  
  • The Code covers largely separate territory to other planning processes (eg under the RMA).      |
| Hazardous Substances and New Organisms Act 1996             | • Central government makes regulations under this statute, which relate to particular substances and organisms and do not restrict the same kinds of actions as under the RMA.      |
| Energy Efficiency and Conservation Act 2000                 | • A strategy for energy efficiency and conservation is produced by central government under this statute.  
  • The strategy does not have regulatory effect.  
  • Links between this and other instruments are not generally strong, although, for example, it must be had regard to when producing land transport plans. Regard must also be had to it when making plans under the RMA.      |
Figure 14.4: One option for a future planning framework, as floated by Infrastructure New Zealand.

KEY
- Give effect to
- Consistent with
- Funding
- New Planning Act process
- New Environment Act process
<table>
<thead>
<tr>
<th>National Environmental Policies</th>
<th>National Environmental Standards</th>
</tr>
</thead>
<tbody>
<tr>
<td>Regional Environmental Policies</td>
<td>New Planning Act process</td>
</tr>
<tr>
<td></td>
<td>New Environment Act process</td>
</tr>
<tr>
<td>National Transport Programme</td>
<td>Regional Transport Strategy</td>
</tr>
<tr>
<td>Regional Transport Strategy</td>
<td>Transport Investment Plan</td>
</tr>
<tr>
<td>Three Waters Strategy</td>
<td>Three Waters Investment Plan</td>
</tr>
<tr>
<td>Tourism and Economic Development Strategy</td>
<td>Tourism and Economic Development Investment Plan</td>
</tr>
<tr>
<td>Urban Development Strategy</td>
<td>Urban Development Investment Plan</td>
</tr>
<tr>
<td>Property and Investment Strategy</td>
<td>Property and Investment Plan</td>
</tr>
<tr>
<td>Regional Facilities Strategy</td>
<td>Regional Facilities Investment Plan</td>
</tr>
<tr>
<td></td>
<td>Local Board Investment Plans</td>
</tr>
</tbody>
</table>

14: HARMONISING OUR TOOLS
One approach to create clearer connections within the resource management system would be legislative redesign: to combine the land use and infrastructure planning and funding components of the RMA, Local Government Act and Land Transport Management Act.

An alternative approach would be the creation of a separate, overarching layer of strategic planning that is then implemented by several lower statutes (eg the RMA and an “Infrastructure Act”, or simply the existing range of statutes). It would need to have legal influence over lower level instruments. That has a certain appeal, although adding another layer of legislation also adds greater complexity.

However, it is not just the RMA or frameworks concerned with public infrastructure that have spatial components. A future system could incorporate plans made under other statutes – such as the Conservation Act and various pieces of marine legislation – into an integrated spatial planning process.

Taking this idea further, it may be possible in a future system to continue to have fragmented legislation – multiple statutes with different purposes – but a much more integrated plan or range of plans. Instead of adding yet another plan to coordinate all the others ones (like the Auckland Plan), different institutions (central, regional and local) under separate statutes could be required to feed into a single plan for each region, in a coordinated way. If processes under each intersected early on, we could get the benefits of legislative separation (eg a stronger defence of bottom lines) while avoiding its risks (planning silos clashing frequently at the project level). It would provide a chance for meaningful, proactive spatial planning at the national level. Central government would also be able to contribute to an actual plan where it saw a national community of interest (including regionally or locally specific provisions), in partnership with Māori and the relevant council(s) and subject to checks and balances from an independent Resource Management Commission. For example, instead of providing vague guidance through an NPS on renewable electricity generation, the government could identify (in partnership with others) the most suitable (and unsuitable) locations for renewable projects nationally and embed those choices in an actual plan.

The production of a single plan (or more limited range of plans) with predictable review cycles could offer an opportunity to reduce consultation fatigue and costs while still allowing robust opportunities for participation. However, that would not necessarily prevent separate plans being created to feed into the formal planning process.

This could be described as a spatial plan, and limited to the components that could be represented spatially (eg infrastructure corridors, urban growth areas, or protected spaces). But it would not need to be confined to high level, non-regulatory strategy (eg it could contain regulatory restrictions on land use, and committed funding sources for specific projects). It could potentially also be of wider application, including non-spatial components (eg discharge standards). The downside of trying to fit too much into a plan, however, is that it may become too large and unwieldy. Furthermore, care would need to be taken with how Māori participatory rights are treated, especially those safeguarded under Treaty settlement legislation and more general legislation. Many refer to existing planning instruments.

An alternative to the legislative integration of statutes relating to urban growth could be the use of an additional, overarching layer of strategic planning. One expression of this could be a national and/or regional spatial plan(s), which could have strategic influence or direct regulatory effect.

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Harmonising permitting processes

Where planning tools contain regulatory components, they often provide for permitting processes to authorise specific projects or activities. This allows decision-makers to exercise some discretion, or to apply a plan to particular contexts. As with plans, permitting processes could potentially be harmonised in a future system. Presently, a single activity can require authorisation under multiple acts. Some interactions are fairly common (see Figure 14.5 below).

Harmonising the system’s permitting processes does not necessarily require legislative integration. Having multiple statutes does not necessarily mean there is a need for separate permitting processes, or even separate permits. Within the RMA, consent applications are often “bundled” into one application and considered as a whole. Efforts have also been made in recent amendments to the RMA to align the timeframes and processes for resource consents, conservation concessions, reserves exchanges, and mineral access arrangements.

Some have called for closer integration of the process for obtaining land use consent and building consent, as these are often both needed to deliver residential development (especially where there is high growth), or recommended an integrated “project” permit rather than a series of different authorisations. An even more radical approach, used in the Netherlands, could be adopted in a future system. That involves retaining multiple pieces of legislation, plans and permits, but providing a “front-of-house” service to applicants and the public. An applicant can make a single application, at which point its respective components are directed by a front-of-house agency to the relevant decision-makers. Following decisions, its components are bundled back together and provided in integrated form – with a single decision – to the applicant.

A future system could provide for greater alignment of permitting processes under multiple statutes. A “front-of-house” service for permitting is one interesting possibility.

14.4 Evaluation

The whole idea behind harmonising our resource management tools is to ensure they are taking us where we want to go, rather than pulling in different directions. A future system will therefore need to be able to determine

| RMA resource consents/designations and Building Act building consents | Land use consents or designations may be required under a district plan. They are mainly designed to address the spatial effects of land uses, not the design of what is built on land. Building consents are required under the Building Act and have a narrower focus (primarily to safeguard the health and safety of users of buildings). Land use consents/designations and building consents are processed and decided separately, although frequently by the same institution (territorial authorities). |
| RMA resource consents and EEZ Act marine consents and dumping consents | Authorisation may be required under both the RMA and the EEZ Act where an activity crosses the boundary between the coastal marine area and the exclusive economic zone. The way in which such activities are processed is addressed in unusual detail through boundary activity provisions in the EEZ Act. However, these provisions are not mirrored in the RMA. |
| RMA resource consents/designations, and conservation concessions | Resource consent applications are decided by regional councils or district councils, but additional authorisations from the Department of Conservation are required in conservation areas. The processes for each are separate. |
| RMA resource consents and authorisations under hazardous substances legislation | There is some conceptual overlap, but little process overlap, between resource consents and hazardous substances authorisations. The RMA can require consent for the use of land involving hazardous substances, as well as their discharge. The Hazardous Substances and New Organisms Act can require authorisation for the use hazardous substances themselves (rather than on managing their effects on receiving environments), such as transport and packaging. Authorisations are granted by different decision-makers (councils and the EPA respectively) under separate processes. |
| RMA resource consents/designations and marine and coastal area permissions | Resource consent may be required for activities in the coastal marine area under a regional coastal plan. Further permission is required from any customary marine title holder in customary marine title areas. |
| RMA resource consents and heritage authorisations | Authorisation may be required under both the RMA (through a regional/district plan) and under the Heritage New Zealand (Pouhere Taonga) Act for the destruction or modification of an archaeological site. |

Figure 14.5: Common interactions between permitting frameworks
whether they are doing so effectively. In other words, the system needs to be self-evaluative, so that it does not require fundamental overhaul every few years. The concept of evaluation was discussed by Dr Marie Brown in Working Paper 3, and we refer readers there for a more fulsome account.

Effective evaluation first requires robust data, because we need to understand the outcomes that are being produced. In Chapter 12 we touched on the importance of state of the environment monitoring and reporting as providing a crucial evidential foundation. However, information is only as good as what we do with it. A future system needs to understand not just the state of the environment, but also determine the extent to which our tools (or lack of tools) are contributing to good (or bad) outcomes. It needs to regularly evaluate both the performance of the tools themselves (whether they are the right ones to be using) and the institutions implementing them (whether they are being used properly). It also needs to provide triggers (see below) for meaningful corrective action if they are not. The institutions implementing particular tools are often best placed to understand how they are working, but an option would be for a future system to provide a greater independent expert role in evaluation – for example, by a Resource Management Commission.

The need for evaluation runs from the lofty level of government strategy right down to the tools used at the project level (such as a review of consent conditions). The current system has many examples of evaluation. However, a 2016 EDS review noted about the RMA, for one, that in practice “rigorous evaluation and monitoring of outcomes has been limited, eroding the potential for adaptive governance and robust implementation”. The Productivity Commission has also suggested that many regulations have not been revisited for many years such that they are now inappropriate. A recent report has highlighted deficiencies in how agencies have monitored and evaluated their effectiveness in enforcing regulatory requirements. Complaints about reviews of plan effectiveness under the RMA, specifically, include:

- a lack of empirical data that clearly demonstrates trends at an appropriate scale
- a failure to clearly link that data with policy intentions to establish attribution
- relying heavily upon the perspective of officers of the agency itself
- often not being subject to external peer review
- the cost of evaluating policy after the fact can be significant and amplified where no thought was put in at the outset as to how the policy would be evaluated
- there is a correlation between the size of agency and degree of monitoring

The current system generally fails to provide systematic triggers for corrective action to be taken where outcomes are not desirable. Where it does, it has tended to focus on procedural elements. For example, “a council that has repeatedly overallocated catchments or allowed inappropriate activities faces few questions, much less sanction”, but lateness in processing resource consents can attract immediate penalties.

A future system should have clearer triggers requiring some form of action to be taken in response.
A spotlight on corrective action in the current system

A key point concerning the current system of state of the environment monitoring in New Zealand is the absence of a regulatory response to the results of evaluation. For instance, where a species is allocated to a higher threat category upon review under the New Zealand Threat Classification System (administered by the Department of Conservation), there is no action required that is specifically set out in statute (e.g., the development of a threat management plan). Where a regional council identifies that a water body of national significance is in a highly degraded state due to human activity, there is no compulsion for immediate action (although this is slowly changing within the NPS for Freshwater Management). A third example is where national environmental reporting datasets identify an emerging or growing risk to the environment. There is no statutory compulsion for a regulatory response from the responsible agency/agencies or a requirement to even set out their intended response in principle.

A future resource management system could look to correct these systemic failings and provide a greater indication of success or failure to the community. The present system appears to often obscure failures and successes, meaning policy development always has an element of “running in the dark” associated with it.

A spotlight on triggers

The idea of a trigger is that we can plan in advance for what happens when undesirable change occurs, not just think about it after the fact. It is about ensuring that meaningful and predictable corrective action occurs. We do this already in some circumstances, such as in the context of civil defence planning and in the use of adaptive management conditions. Regulatory tools inherently rely on triggers of some kind (e.g., the kinds of actions restricted in Part 3 of the RMA) but at the moment this tends to trigger optional processes that involve the exercise of substantial discretion rather than specific, predictable or mandatory measures.

Triggers could form part of a future system whereby plans themselves change in response to some undesirable state of affairs, or at least that some process is mandated (an inquiry or review). Care in setting, as well as monitoring and robust evaluation is essential to the use of triggers. We now have a system of national environmental reporting mandated by legislation, and the ability to set triggers based on consistent indicators. The missing piece of the puzzle is the actual setting of thresholds and the responses that must occur.

Triggers already exist in the NPS on Urban Development Capacity, which requires the provision of adequate urban development capacity by councils. However, a future system could adopt triggers that do not just allow for development, but also ones that restrict it or guide it. Local Government New Zealand, for example, has proposed the use of fast-track measures to allow changes to input controls for nutrient management (e.g., stocking rates) if output controls do not prove effective in reaching bottom lines.

14.5 Concluding comments

In this chapter we have considered how the tools used in a future system could be harmonised in both a normative and a procedural sense. Central to both normative and procedural alignment is the idea of integrated strategic planning – the production of either an overarching strategic plan that filters down clearly to subordinate frameworks, or at least a plan that aligns the spatial components of the system (notably land use and infrastructure). Spatial planning could be done on a national and/or regional basis, and would allow for the regulatory (land use) and funding (infrastructure) components of urban growth and development to be harmonised. Yet we also need to be aware of the need to align the non-spatial components of the system through an overarching strategic document, and to take opportunities to strengthen horizontal links between planning and permitting processes occurring under separate statutory frameworks.

We have also considered some other ways in which normative and procedural alignment could be pursued. Some are more radical than others. Of great significance
will be how climate change mitigation is treated in a future system. So far, this issue has been treated as largely a world apart under the emissions trading scheme, but with the advent of a legislated target and carbon budgeting process, and our international obligations under the Paris Agreement, it might be time to question whether that is going to be enough. Pushing the limits of reform is the concept of an environmental footprint tax – fundamentally reshaping how we raise core revenue and influence behaviour at the same time. In Figure 14.6 below we summarise the high level options for reform that have arisen from the preceding four chapters concerning tools.

<table>
<thead>
<tr>
<th>Sub-theme Options</th>
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<tbody>
<tr>
<td><strong>Strategic tools</strong></td>
</tr>
<tr>
<td>Create an overarching Resource Management Strategy with legal influence over decision-making under other statutes; AND/OR</td>
</tr>
<tr>
<td>Amend statutory purpose statements to focus on the need for change, not just management; AND/OR</td>
</tr>
<tr>
<td>Make greater use of targets and budgets where appropriate; AND/OR</td>
</tr>
<tr>
<td>Create mechanisms that guide investment decisions by public authorities (including implementing a budget focused on multiple aspects of wellbeing); AND/OR</td>
</tr>
<tr>
<td>Implement spatial planning so that it is mandatory, national and regional, outcomes-focused and has legal influence over other statutory decision-making processes</td>
</tr>
</tbody>
</table>

| **Creation of legal rights for environmental outcomes**  |
| Create property rights in the commons to encourage responsible environmental management; OR |
| Create human rights to a healthy environment; OR |
| Create rights (and associated human responsibilities) for aspects of the natural world |

| **Legal rights and allocation**  |
| Use permitting processes as the default mechanism by which rights to use resources are allocated and reallocated (first in time); OR |
| Establish or mandate the use of more structured and competitive regulatory mechanisms for allocation (and reallocation), such as collaborative processes or comparative consent applications; OR |
| Establish a common (or domain-specific) set of principles to inform allocation (and reallocation) decisions; OR |
| Use economic tools to allocate and reallocate rights to resources (eg auctioning, tendering, a market for tradeable rights); AND/OR |
| Safeguard particular sectors, groups or activities by proactively allocating a share of resource to them (such as Māori) |
| Make use of regulatory restrictions that bite earlier to manage the risk of harm rather than respond to it (such as product stewardship schemes) |

| **Regulatory restrictions**  |
| Retain current mix of hard limits (eg prohibited activities and prescriptive regulation) and discretion (eg consenting decisions informed by general policies); OR |
| Make greater use of firm regulatory tools like prohibited activities, rāhui, and water conservation orders; AND/OR |
| Strengthen the ability of the system to impose proactive duties on private persons even where unrelated to adverse effects |

| **Regulatory duties**  |
| Strengthen duties on public authorities to monitor and report on the state of the environment; AND/OR |
| Strengthen the ability of the system to impose proactive duties on private persons where triggered by adverse effects (eg offsetting); AND/OR |
| Strengthen the ability of the system to impose proactive duties on private persons even where unrelated to adverse effects |

| **Approach to planning**  |
| Retain the current mix between effects-based and activity-based planning; OR |
| Greater use of effects-based planning and reliance on discretionary permitting processes; OR |
| Greater use of activity-based planning and reliance on specific planning restrictions |

<p>| <strong>Planning process</strong>  |
| Retain the status quo; OR |
| Embrace greater agility in making and changing plans; OR |
| Embrace greater agility only for some roles (eg trade-offs but not the weakening of bottom lines) |</p>
<table>
<thead>
<tr>
<th>Sub-theme</th>
<th>Options</th>
<th>Options</th>
<th>Options</th>
</tr>
</thead>
</table>
ENDNOTES


2 Ibid at 34.

3 Simpson Griston The statutory framework of New Zealand’s local government sector: Is the key legislation working properly? (2016).

4 With the exception of more targeted tools like water conservation orders, see Chapter 7.

5 See Chapter 7.

6 See the spotlight on King Salmon in Chapter 7.2.

7 There was no NPS in place at all until 2008 (aside from the mandatory NZCPS), 17 years after the RMA was put in place.


9 Acknowledgement: Helen Marr, Perception Planning.

10 Policy C2.

11 Objectives A4.

12 Marine and Coastal Area (Takutai Moana) Act 2011.

13 Or at least a regulatory approach to releasing greenfield land for development over time.

14 See generally New Zealand Productivity Commission Better urban planning (2017), at 351-360.

15 For example, the practical ability of infrastructure providers to service “pop-up” development areas quickly, the ongoing costs of maintenance once a developer has disappeared, difficulties in costing public impacts like the climate change costs of dispersed urban form, burdening future generations of residents with the social impacts of long road commutes, the devaluation of a community’s ability to shape its own surroundings, and the protection of food production and wilderness areas.

16 See the spotlight on urban growth and design in Chapter 6.

17 Such as the NPS on Urban Development Capacity and a potential NES concerned with quality urban intensification.


22 Ibid at 34.

23 Assuming those statutory frameworks remained separate: see Chapter 15, Models 1 and 3.

24 For example, discharge standards, biodiversity protection, and the taking of water.

25 For example, the economic productivity and environmental wellbeing that comes from using land in particular ways, as well as the intersection between land use and nationally funded infrastructure. See generally the submission by Local Government New Zealand on Building competitive cities (Discussion document, December 2010) at 4.


32 See Chapter 12.

33 See Chapter 10.

34 This is what National Planning Standards under the RMA aim to address.


36 Resource Management Act 1991, s 70B.


39 Even if the RMA did not directly regulate the emission of greenhouse gases from point sources (eg through performance standards or technology forcing), that is not good reason to exclude recognition of climate change mitigation from section 6 of the Act.

40 Regional planning concerning discharges is also closely related to planning and funding for stormwater and waste-water infrastructure, since the quality of infrastructure affects the nature of pollution (eg waste-water overflows). Environmental regulatory tools seem unlikely to be effective by themselves unless funding for infrastructure upgrades is addressed at the same time.

41 Acknowledgement: Helen Marr, Perception Planning.

42 See Chapter 7 for a discussion of whether the RMA is about more than addressing adverse environmental effects.


45 That may not be entirely fair, since corridors for infrastructure are still set aside in RMA planning instruments, and notices of requirements can linger in plans for long periods of time without being used.

46 Local Government New Zealand A “blue skies” discussion about New Zealand’s resource management system (2015) at 40.

47 For example, district plans can be changed substantially at Environment Court level from what was envisaged by council at first instance, and the provision of local roads can be changed depending on the funding available from central government.

48 For example, provisions can be inserted directly through a “section 55” process, or through a “Schedule I” process (involving participatory rights and hearing).

49 For example, a road proposal may be identified in a regional land transport plan but not funded.

50 Acknowledgement: Aidan Cameron, Barrister, Bankside Chambers.

51 This asks, for example: what areas require new or replacement assets? What are the ratepayer bases of the catchments? What role can development contributions play?


53 Watercare Services Limited Watercare Asset Management Plan 2016-2036 at 10. This plan has recently been updated with the release of its 2018 water and waste-water asset strategies, which form the core of the plan itself.

54 For obvious reasons, connections tend to be stronger where the express intention is to alter the application of the RMA (for example, under the Housing Accords and Special Housing Areas Act 2013).


56 Ibid, sch 1, s 1B.

57 Ibid, sch 1, s 3C.


59 Ibid at 70.

60 That is, fragmentation between land use planning and broader “environmental” planning. Infrastructure New Zealand has proposed a separate Environment Act to complement a Planning Act.

61 Local Government Act 2002, ss 93, 101A, 101B.


63 Land Transport Management Act 2003, s 68.

64 Land Transport Management Act 2003, ss 14, 16.

65 Marine and Coastal Area (Takutai Moana) Act 2011, s 93.

66 See, for example, Local Government New Zealand A “blue skies” discussion about New Zealand’s resource management system (2015) at 41.

67 Compare the Sea Change – Tai Timu Tai Pari Hauraki Gulf marine spatial plan, which sought to integrate management across multiple frameworks.

68 See Chapter 8.

69 For example, consents under the RMA and concessions under conservation legislation. Some authorisations, such as building consents, do not allow “discretion” in the same sense, and are more about assessing compliance with set standards (eg the Building Code).


See Netherlands Enterprise Agency “Applying for all-in-one permit for physical aspects” <www.business.gov.nl>. However, this is not an entirely integrated process (it excludes water permits).

For example, it appears that the Ministry for the Environment’s National Monitoring System database has not to date been used as the basis for any evaluation.

In that sense, it is different from monitoring compliance with regulatory obligations, the purpose of which is to justify enforcement action if needed.

See Chapter 9.

For example, reviews of consent conditions, the emissions trading scheme, the review of the NES on Plantation Forestry etc.

MA Brown Evaluating the environmental outcomes of the RMA (EDS, 2016).

New Zealand Productivity Commission Regulatory institutions and practices (2014).

MA Brown Last line of defence: compliance monitoring and enforcement of New Zealand’s environmental law (EDS, 2017).


Beca Stock take of RMA monitoring across selected agencies (2012).


Resource Management Act 1991, s 36AA.


But not always. For example, the power to decide notices of requirement for designation lies with the requiring authority or, on appeal, with the Environment Court.
15: THREE MODELS FOR A FUTURE SYSTEM

Ōrere Point
15.1 Introduction

In the previous chapter we considered how various tools could be harmonised to work well together. In this chapter we take the next, and final, step: to consider how all themes – norms, functions, structures and tools – can be combined to form overall models for a future system. In this chapter, we present three high-level possibilities for reform.

At the end of chapters throughout the report, we have presented tables of broad options that relate to particular themes. For example, one option for the theme of legislative design is for a future system to split the RMA into a Planning Act and an Environment Act. These options, ordered by theme, are compiled into a single series of tables in the Appendix. It is hoped that they may prove useful for readers to go through and express their preferences or gut reactions, and to construct the basic bones of their own models if they wish. Not all options are mutually exclusive. Where they are compatible, a future system could embrace more than one option for the same theme. For example, we have suggested that a future system has seven core roles; we do not have to pick one or two.

A great many combinations of options are possible, and therefore many legitimate models can be produced (not just the ones we present here). Furthermore, the three models presented here are not set in stone. Some features will go together naturally, and we consider all three models workable. But we emphasise strongly that they are a starting point for conversation, and will not fall over if some components are substituted for others. In this project, we are not selecting a preferred model, but showcasing how the preceding analysis can be used to produce tangible ones for system-wide reform.

There are some features that seem highly desirable in any future system, and we see no reason to leave them out of one model simply for the sake of covering all possible options. Desirable features include:

- A recognition that norms will be plural to some extent (a system will not just be based on economic, anthropocentric, Māori or ecocentric worldviews, or hinge on one particular principle)
- A strengthening of regulatory bottom lines, to which economically, socially and culturally important resource uses are subject
- Some form of strategic spatial planning to integrate land use and infrastructure planning and funding
- The use of clear triggers that oblige some kind of policy response to unacceptable outcomes (evaluation)

That still leaves us many choices. For each of the three models presented below, we offer a brief description and a high level visual representation of its key features. These are structured primarily around legislative design choices, as that gives the best sense of how a model works, but this is not intended to devalue the importance of other themes. We note that none of these models represents the exact status quo. We assume readers know what this is, and that without some change it will not be acceptable in the future. However, following the description of each model, we provide a visual representation of how existing statutes would be treated (where they would go) in a new system. Other disclaimers must be made, in that the models do not:

- Provide detailed accounts of the whole system, or reflect all the matters discussed in the report. Some components are not easily represented in a visual way, and to cover everything would detract from the big picture differences between the models. Instead, models provide a core around which more detail can be discussed.
- Have snappy titles focused on one defining feature, or the degree of change they represent. To do so may detract from the diversity and nuances contained within them.
- Provide extensive explanation, as the features of each have been discussed in different parts of this report. As such, this chapter is not a substitute for deep engagement with the content of preceding chapters. Many more nuanced reform issues are not easily represented in such simplistic form.

Finally, we reiterate that models are intended to form a starting point for conversation rather than packages that readers must take or leave in their entirety. Even if an eventual model ends up looking nothing like the original presented, it has still served a valuable purpose, and we invite readers to play around with them as one might play with Lego blocks – clipping one part out, clipping another part in, and seeing how well those choices fit together in the context of a whole system. Sometimes, for example, addressing one theme (eg legislative design) may mean that changes to another (eg institutional design) become less important, and changing both may be an excessive response. Some may choose to focus on themes, or options within them, that are less disruptive of the status quo. Low level reform across all themes may, to some, be more palatable than more substantial change in a targeted area (eg reshaping our institutions).
15.2 Model 1

Key features

The most striking feature of Model 1 is the retention of the RMA as an integrated statute at the core of the system for managing natural and physical resources, and for many other structural features of the system to remain the same. Alongside the RMA there would still be the Local Government Act and the Land Transport Management Act, separate legislation for hazardous substances and new organisms, and existing domain and location-specific legislation like the Conservation Act and Climate Change Response Act. However, Model 1 would see the introduction of an additional layer of strategic legislation, in the form of a Spatial Planning Act. This would mandate the creation of spatial plans, with the intention of them guiding integrated decision-making under the RMA, Local Government Act, Land Transport Management Act, and the spatial components of other statutes. The EEZ Act would also be melded into the RMA to form a single statute for the sustainable management of land and sea. Model 1 would also see the expansion of some tools, and the transfer of some institutional responsibilities. The system would remain readily recognisable as the one we have now, but with improvements.

Further exploration

Within the RMA, there would be a firmer distinction made between environmental bottom lines and balancing by more clearly defining the word “while” in section 5 of the Act. That, combined with a proactive obligation on central government to create a comprehensive suite of regulatory bottom lines in an integrated government policy statement (integrating existing NPSs and NESs), could allow for a wider range of principles to be added to sections 6 and 7 of the Act (e.g., the benefits of urban renewal and social wellbeing). This would allow the Act to both set firm bottom lines and provide guidance for how trade-offs were to be made above them – neither of which it does particularly well at the moment. It could become more of an outcomes-based act – and more reflective of good urban planning – than just a reactive environmental effects act. The government policy statement would subsume a mandatory national level climate adaptation plan to be given effect to in lower level instruments. Aside from that, existing plans under the RMA would be retained (regional policy statements and plans, and district plans), although one further option would be to provide for mandatory unitary plans that integrated all of their parts in one document (while keeping separate decision-making responsibilities). There would be greater standardisation of plans across the country through National Planning Standards, and a return
to a single, prescribed plan-making process, except for the use of collaborative processes to “de-allocate” resources where the allocation of rights have already breached environmental bottom lines.

Participatory rights for Māori would be pursued through existing means (such as iwi participation arrangements under the RMA), broader conversations around governance (eg Māori wards for councils and iwi-appointed board members), and bespoke Treaty settlement processes outside general laws. The Crown would engage in greater capacity building to allow this to occur more effectively (such as through the development of iwi planning documents), but there would be no widespread transfer of power to iwi or hapū. However, there would be greater recognition of synergies between Western (including ecocentric) and Māori worldviews (eg tikanga, kaitiakitanga, mana and mātauranga). In particular, subordinate instruments would build on and deploy the type of normative content found in instruments like the NPS for Freshwater Management (eg Te Mana o Te Wai) and proposed NPS on Indigenous Biodiversity.

Although the Local Government Act and Land Transport Management Act would remain separate statutes from the RMA, the model would seek to achieve greater alignment between macro-level infrastructure planning/funding and land use regulation. That is particularly (although not only) important to manage urban growth and renewal, including the flow-on effects that constraints on available land can have on affordable housing. It would do so by adding an additional layer of legislation above these statutes, under which mandatory spatial planning would occur at a national and/or regional level. Alternatively, this could be a “sleeping” framework that only came into operation when needed (eg in scenarios of rapid urban growth or other pressures requiring spatial alignment). Central government could determine this on an ad hoc basis, or in agreement with relevant councils and iwi. Spatial plans would be high level rather than having direct regulatory effect (eg imposing zoning), but crucially they would have to be given effect to in the planning instruments produced under other frameworks that have spatial components (RMA government policy statements, regional policy statements, and district plans; Local Government Act long-term plans, annual plans, and associated instruments like infrastructure plans; and regional land transport plans). A national spatial plan would apply both on land and sea (including the exclusive economic zone), and be used to identify marine national parks.

Processes and timeframes for planning decisions under all three subordinate statutes would be better aligned. There are options for how that could happen in practice. A spatial plan could be the place where separate and pre-existing processes came together to be aligned and then formalised (bottom-up), or the place where initial decisions were made that then would filter down into other processes (top-down). A spatial plan would not be just about managing urban growth or aligning land release with infrastructure provision. It would be an opportunity for central, regional and local government as well as Māori to contribute proactively to significant spatial choices: where wind farms are most suitable, where significant natural and cultural areas and landscapes are, where nationally significant infrastructure should be located, and so forth.³

If it were to have stronger legal influence over subordinate plans (including regulatory ones) the process for producing spatial plans would have to be robust, and include notification and submission rights, as well as a degree of expert and independent input into decision-making alongside central and local government and Māori. This could be a key role for a range of independent advisory and watchdog institutions like the Parliamentary Commissioner for the Environment, Climate Change Commission, and Infrastructure Commission – or an amalgamation of all of them in a single Resource Management Commission. A national spatial plan would be developed by central government and signed off by Cabinet. Regional spatial plans would be signed off by relevant councils and central government.

While merits appeal rights would remain for regional policy statements and plans made under the RMA (or a combined unitary plan), how that would operate in practice would need to be considered carefully, given that these would now need to give effect to a wider spatial plan and not just promote the sustainable management purpose of the Act. If appeal rights for RMA plans were to remain, it may suggest that spatial planning should be driven primarily by the purpose of the RMA rather than other legislation. The Ministry for the Environment could also have a mandatory role in reviewing and providing recommendations on all proposed plans and plan changes made by councils under the RMA, to which the Environment Court on appeal (if any) could have regard.

Targeted Housing and Urban Development Authority legislation would still be introduced, but it would be limited to brownfields sites and would be subject both to a spatial plan and the bottom lines imposed under a rejuvenated Part 2 of the RMA. The authority would primarily be a mechanism to deliver development (through land aggregation, master planning and infrastructure provision) rather than a replacement for regulatory and policy functions under the RMA.

Permitting under regulatory regimes would not be fundamentally changed, although this model would formalise common practice by requiring RMA consents to be decided by independent commissioners (and/or the Environment Court on appeal or direct referral) rather than councils. The Board of inquiry process for consenting would be removed, and appeal rights to the Environment Court in relation to notification decisions would be introduced (as currently proposed in the short term RMA reforms). A framework for biodiversity offsetting (through a biobank) would be implemented. The most significant change would be the introduction of a front-of-house permitting service, by which a single application for complex projects involving multiple authorisations would be lodged with and processed by a single agency (such as the EPA). Decisions on its different components would be farmed out to appropriate decision-makers and then
returned in integrated form. Other tools, such as product stewardship schemes and green building standards would be pursued more vigorously.

Monitoring and enforcement would remain largely as it is now, albeit with a greater direct enforcement role under the RMA by an expanded EPA, and the removal of political influence in enforcement decision-making by councils.

A more systematic system of reporting on the progress of government could be implemented, with report cards provided by a number of independent agencies: the Parliamentary Commission for the Environment, Infrastructure Commission, Climate Change Commission, and others like an Oceans Commission or Freshwater Commission. Alternatively, these could be integrated into a single Resource Management Commission. Most significantly, a legal obligation would be introduced for the government to take positive measures in response to negative indicators. The EPA could take on a more proactive role in performing strategic environmental assessments of particular sectors, and act as a central, open repository of knowledge (including collating evidence from Environment Court and council planning and consenting processes to inform future decision-making).

While the mechanisms for allocation under the RMA would be made more proactive (through greater use of attribute-weighted tendering), separate statutory frameworks for the allocation of fishing and mining rights through central government processes would remain in their current form. The RMA would continue to be the framework within which freshwater and coastal space is allocated, but would be endowed with greater guidance in Part 2 about how allocative choices should be made. It would make greater use of tradeable permit rights (such as for nutrient discharges into a catchment) for the reallocation of some rights, subject to environmental bottom lines. Charging (resource rentals) would be introduced for some private uses (e.g., water bottling for export) and would be applied more generally to users of the coastal marine area. Subsidies would be used more to support actions in which there was a public good.

More targeted outcomes-based statutes like the Hazardous Substances and New Organisms Act, Environmental Reporting Act, Biosecurity Act, and Waste Minimisation Act, and location-based and species-based conservation statutes (such as the National Parks Act, Marine Reserves Act, and Wildlife Act) would be retained. So too would sector-specific frameworks for fisheries, minerals, forestry and construction. However, decision-makers under these could be required to have particular regard to a spatial plan for their spatial components.

Furthermore, the RMA and the EEZ Act would be integrated into a single statute that encompassed management of natural and physical resources out to the edge of the exclusive economic zone and continental shelf. The management of the environmental effects of fishing activity (as opposed to the allocation of quota and setting total allowable harvest levels) would be undertaken under this expanded RMA regime.

A separate statutory framework would remain for the emissions trading scheme, but climate change mitigation would be better integrated into other frameworks (particularly the RMA, through its inclusion in section 6 and the development of an NES). An additional strategic layer of legislation (a Zero Carbon Act) would be enacted to set targets, budgets, plans, and the institutional framework for doing so (an independent Climate Commission). It would also have strong links with and
influence national and regional spatial planning under a Spatial Planning Act, for both climate change mitigation and adaptation.

Local and central government units would remain fundamentally unchanged under the model, with local amalgamation possible under existing processes, and encouragement of greater shared services at a regional level to achieve economies of scale in service delivery. At the central level, informal cross-agency working groups and initiatives would be used more to connect policy silos.

Councils would remain responsible for the provision of three water services, although the use of jointly owned, regional level council-controlled organisations could be encouraged or in some cases mandated. Environmental regulation of drinking water and waste-water would continue to be done by regional councils – but with a greater enforcement role for an independent EPA. Responsibility for land transport infrastructure would remain unchanged (joint responsibilities for councils and the NZTA through regional transport committees), although the planning and funding process would be linked to overarching national and regional spatial planning under a Spatial Planning Act. Funding options would remain largely unchanged, although there would be more systemic and predictable use of performance-based or demand-based funding from central government (eg for tourism infrastructure, regulatory services, and urban growth). There would be greater hypothecation of funds for politically vulnerable activities such as environmental advocacy. There would be no fundamental changes to the tax system, but future budgets would be based on broad indicators (multiple forms of wellbeing).

**Brief assessment**

Model 1 has both advantages and disadvantages. It adds some complexity to a system that is already crying out for simplification, by introducing a separate statutory framework for spatial planning and introducing yet another instrument for which public participation is needed. A broad and binding spatial plan could lead an uneasy coexistence with the retention of appeal rights focused on the narrower purpose of the RMA. It would do little to align the non-spatial components of the system in the way that greater legislative integration or a broader resource management strategy could. The model may not go far enough for Māori, or in addressing systemic issues with the funding and delivery of local infrastructure. More generally, it does not envisage fundamental change or the wholesale replacement of the existing system. To some, this approach may lack ambition, and represent a continuation of ad hoc changes rather than fundamental reform. However, we note that there is a difference between the kind of “tinkering” we have seen recently and well-considered surgical interventions that are the coherent product of a wider review.

Apart from the merits of its particular reform elements, the model has more general positive features. Keeping the bones of the system while improving the connections between its parts is less upsetting to the status quo. We can retain valuable case law, safeguard business confidence, and avoid the cost of a legislative and institutional upheaval. It allows us to add or remove things here and there in a coherent, yet iterative, way. Many measures proposed above are already being contemplated. How key existing legislation relates to new legislation in Model 1 is shown in Figure 15.1 (although this is not exhaustive). A high level sketch of how Model 1 operates is shown in Figure 15.2.
Three models for a future system

Primary legislation in the current system

Primary legislation in a future system

Primary legislation in the current system

Spatial Planning Act

Zero Carbon Act

EEZ Act

Resource Management Act

Resource Management Act

Marine and Coastal Area (Takutai Moana) Act

EEZ Act

Fisheries Act

Fisheries Act

Marine and Coastal Area (Takutai Moana) Act

Biosecurity Act

Land Transport Management Act

Land Transport Management Act

Biosecurity Act

Waste Minimisation Act

Housing and Urban Development Authority Act

Waste Minimisation Act

Climate Change Response Act

Local Government Act

Climate Change Response Act

Climate Change Response Act

Crown Minerals Act

Crown Minerals Act

Hazardous Substances and New Organisms Act

Hazardous Substances and New Organisms Act

Environment Act

Building Act

Building Act

Environmental Reporting Act

Environmental Reporting Act

Various conservation statutes (eg Conservation Act, National Parks Act, Reserves Act, Marine Mammals Protection Act etc)

Various conservation statutes (eg Conservation Act, National Parks Act, Reserves Act, Marine Mammals Protection Act etc)

Various Treaty settlement legislation

Various Treaty settlement legislation

Figure 15.1: What will happen to existing legislation in Model 1
Figure 15.2: Key features of Model 1
Three Models for a Future System

**Key**
- Blue, orange, yellow, and purple boxes denote the "core" frameworks of a reformed system that may be of particular interest.
- Bold text and bold coloured boxes indicate primary legislation; faded boxes of corresponding colours indicate subordinate instruments and tools within that legislative framework. Where relevant, decision-makers are included in (brackets).
- Arrows indicate different relationships between elements of the system.
  - Red arrows: "give effect to," "directly insert," or equivalent.
  - Blue arrows: "be consistent with" or equivalent.
  - Green arrows: "have regard to," simple "input," or equivalent.
  - Black arrows simply indicate the direction of a process without a particular normative instruction.

**ACRONYMS**
- CCO: council-controlled organisation
- DoC: Department of Conservation
- MBIE: Ministry of Business, Innovation and Employment
- MFE: Ministry for the Environment
- RLTC: regional land transport committee

**Planning Act**
- Regional spatial plans (sign off by councils and central government)
- Long-term plans (council)
  - Infrastructure strategy (council, CCOs)
  - Annual plans (council, CCOs)
- Land Transport Management Act
  - Government policy statement (Ministry of Transport)
  - National land transport programme (NZTA)
  - Regional land transport plans (RLTCs)
- Housing and Urban Development Authority Act
  - Urban development plan (Housing and Urban Development Authority)
  - Brownfields only land aggregation powers
  - Subject to Part 2 of RMA
- Fisheries Act (allocation only)
  - Quota management system (Ministry of Fisheries)
- Crown Minerals Act (allocation only)
  - Minerals programmes (MBIE)
- Environment Act
  - Creation of institutions
- Environmental Reporting Act
  - Strategic environmental assessment (EPA)
  - Scorecard for central and local government (Resource Management Commission)
  - Mandatory policy response (cross-government)
  - Environmental monitoring and reports (councils, MFE, DoC)

**Regional spatial plans**
- Public submission, input from infrastructure providers
- Resource Management Commission

**Local Government Act**
- Existing funding mechanisms with addition of more systemic, demand-based central government grants

**Existing funding mechanisms**
- Budget

**Māori interests legislation**
15.3 Model 2

Key features

Model 2 involves a greater degree of structural change than Model 1. The RMA would be split into a Planning Act and an Environment Act, and the infrastructure planning and funding components of the Local Government Act and Land Transport Management Act would be incorporated into the Planning Act. So too would proposed Housing and Urban Development Authority legislation. There would be a separate Allocation Act, which would deal with the current resource allocation functions of the RMA, Crown Minerals Act, and Fisheries Act. Included in the Environment Act would be the protective elements of the Fisheries Act, Forests Act, heritage legislation, and the Environmental Reporting Act. There would be no separate strategic spatial planning act, as this would occur under the Planning Act.

The EEZ Act would remain separate, as would climate legislation relating to the emissions trading scheme, but conservation and species protection legislation would be integrated into a single Protected Areas and Species Act. Local government arrangements would be overhauled, with the creation of regional-level unitary councils, the decentralisation of land transport planning, and the compulsory creation of regional level council-controlled organisations for the provision of water and waste-water services. Unitary councils would do planning, and a beefed-up EPA would deal with environmental regulation.

Further exploration

Model 2’s most obvious point of difference from the status quo is the division of the RMA into aspects focused on the “built” environment and the “natural” environment. This could be a hard split (a Planning Act and Environment Act, as floated by Infrastructure New Zealand) or a soft split (different principles relating to natural and built within the RMA, as suggested by the Productivity Commission). For argument’s sake, we present a hard split. Essentially, Model 2 sees a distinction between a framework targeted at the proactive spatial management of land and one focused on managing the adverse effects of human activities on the natural world. Presently, there is tight integration between land use planning and other environmental domains within the RMA, and fragmentation between land use planning and the spatial components needed to achieve aspects of it (notably infrastructure, for urban growth and renewal).

The natural consequence of this approach is for the spatial components of other key statutes to be integrated into a Planning Act. That would mean integrating the infrastructure planning and funding provisions of the Local Government Act and Land Transport Management Act (or simply combining the entirety of these statutes together to form a Planning and Local Government Act). The purpose and principles of this act would recognise both the value of protection and development of land: a more balanced set of matters than currently under Part 2 of the RMA. It would also include Māori principles beyond the simple recognition of Treaty obligations, recognising that concepts like tikanga and kaitiakitanga are not just about protecting common pool resources, but also managing resources proactively for social, cultural and economic benefit. Because it is not spatially focused, the Building Act and the Building Code under it would remain a separate framework.

No additional strategic layer of legislation would be required. A Planning Act would already cover all things spatial, so there would be no need for an extra umbrella framework that aligned it with other spatially focused statutes (eg infrastructure). National and/or regional spatial plans would be created under the Planning Act, through the integration of more targeted plans concerning land use (eg regional unitary plans, a national climate change adaptation plan, and a national policy on land use), infrastructure planning (eg transport, three waters, and Crown infrastructure), and associated funding.

Regional spatial plans would set out a 30-year vision and strategy for spatial development for each region. They would outline what areas are to be protected and where key infrastructure is to be located, and where urban growth is to occur. Every land use decision would be accompanied by a funding mechanism to allow it to happen in practice. A national spatial plan would be signed off by Parliament. Unitary plans and regional spatial plans would be developed by regional unitary authorities in partnership with iwi, but decided in a single-stage hearing by independent hearings panels chaired by an Environment Court judge and with members appointed by central government, regional authorities, and iwi. There would be no merits appeal rights for plans. A national climate change adaptation plan would be developed under the Planning Act by an independent Climate Commission, but signed off by Cabinet.

An Environment Act would cover activities currently regulated under the RMA not related to land use planning and subdivision, such as freshwater quality and flows, air quality, soil health, and the coastal marine area. It would be directive and protective in its purpose and tools. Environmental regulatory responsibilities (the development of policies, standards and rules, and the issuing of resource consents) would be performed by an expanded EPA. Regulations would not be separate instruments, but would be embedded directly in regional unitary plans. The spatial expression of environmental regulation (eg protected areas) would have to be given effect to in regional and national spatial plans. Overall, there would be a strict hierarchy, in that all plans produced under the Planning Act would need to give effect to rules, standards and policies produced under the Environment Act which would require the creation of a comprehensive regulatory suite of environmental bottom lines for elements of the natural environment.

The Planning Act and Environment Act would both contemplate the granting of permits, although the latter would be much more focused on providing clear regulatory limits and performance standards to be assessed for compliance, rather than allowing a discretionary
assessment of costs and benefits. However, a framework for biodiversity offsetting (through a biobank) would be implemented to achieve net biodiversity gains. Similarly, land use and subdivision permits under the Planning Act would be primarily about assessing compliance with the unitary plan rather than a general legal test like sustainable management. Permits required under the Environment Act would be decided by the EPA, and those under the Planning Act by independent planning commissioners. There would be no appeal rights for permits, except by an independent Public Defender’s Office (which would represent the public interest, and be established under bespoke legislation). However, all but the most minor permit applications would require notification and invite submissions, recognising that there is a difference between information/transparency and the right to dispute a decision in the courts. There would also be a “project consent” process, whereby permits required for regionally significant projects under both acts (and under other relevant legislation, such as the Building Act and EEZ Act) would be assessed in a single process through panels of independent commissioners. Here, the Public Defender’s Office and the EPA would have rights of appeal.

Non-private resources would be allocated through a separate Allocation Act, which would combine the relevant parts of the RMA, Crown Minerals Act, and Fisheries Act under a common set of high level allocative principles. There would be more specific allocative principles for different domains. This would require separate and sequential decisions or processes for activities involving the use of non-private resources: one to determine whether the effects of a proposed activity are acceptable (under an Environment Act and/or Planning Act), and the other to determine who gets to use a scarce resource. Existing mechanisms for proactive allocation would be retained within this Act for minerals and fisheries. De-allocation for already overallocated resources (eg the capacity of freshwater to cope with nutrients) would occur through collaborative processes at various (eg catchment) levels. Other resources (such as water and coastal space not yet allocated) would be allocated through plans developed by collaborative processes under domain-specific principles. These would be decided by regional unitary authorities after the consideration of public submissions. Both would have to be sensitive to and incorporate Māori interests in controlling resources and exercising tikanga, although the detail of that relies on an ongoing political process.

Once rights were allocated, there would be greater use of trading schemes (eg for nutrient runoff or water take rights), subject to environmental constraints. Irrespective of to whom rights were allocated, there would be wider use of resource rentals (charges) to provide a return to the public and/or Māori.

While Treaty settlement legislation would be kept separate, relevant provisions would also be integrated or mirrored within more general frameworks like the Planning Act, Environment Act, and Allocation.
Act. Furthermore, within this general framework for environmental and land use management, there would be more robust mechanisms for assessing the appropriateness of sharing and/or transferring some decision-making powers to Māori outside the settlement process. While this is possible under the RMA at the moment, they are powers that have not been commonly used. While they would not encompass powers to make decisions on instruments like unitary plans and spatial plans, they would require councils and the EPA to assess the potential for sharing and/or the transfer of power in relation to particular kinds of consent application under the Environment Act and Planning Act, as well as planning land use and development in particular areas within a unitary plan (subject to environmental regulation). This would recognise the rights of Māori to exercise tikanga and related metaphorical principles, within a framework that recognises a broader public interest. An independent Māori advisory body, similar to that under the EEZ Act, would be established to provide input to unitary authorities, central government and the EPA when exercising functions under both the Planning Act and Environment Act.

To complement Model 2’s focus on integrated regional spatial planning, there would be a fundamental overhaul of local government structures and their roles. Existing territorial and regional councils would be melded into regional level unitary authorities (and local boards), and would take on the expanded planning roles under a Planning Act. There would be a regionalisation of land transport planning and funding, with unitary authorities responsible for both – including regional portions of the state highway network. Existing funding mechanisms would be retained, but redirected to regional authorities, with the NZTA’s role reduced to an oversight one.

For the delivery of some infrastructure and services, there would be a mandatory creation of asset-owning, regional (or inter-regional) level council-controlled organisations. These would provide drinking water and waste-water services, although stormwater and flood control responsibilities would remain with regional unitary authorities. Within the EPA there would be a dedicated arm for the regulation of drinking water (including both health standards and environmental standards). Council-controlled organisations would be required to give effect to regional spatial plans.

Urban development authorities would be created not in separate legislation, but in a part of the Planning Act. This would empower their creation as project-based state entities to aggregate land, master-plan, fund and deliver both brownfields and greenfields developments where approved by central and regional government. However, their decisions would be subject to both the EPA’s regulatory role under the Environment Act and the directions contained in national and regional spatial plans. They would be an independent mechanism for implementing a spatial plan (including greenfields growth), rather than overriding it for specific strategic purposes (like housing). They could override land use regulation in unitary plans, but not regulation imposed by the EPA under the Environment Act. However, they would be a backstop measure. Trust would primarily be placed in the integrative power of a spatial plan, unified regional level government and related service providers, and appropriate funding mechanisms, to provide for urban growth and renewal (including the provision of development capacity).

The mechanisms for funding local government would be overhauled. Options could vary, but one would be the use of a power to levy a regional GST for transactions occurring within a region. Depending on political appetite for an additional tax, this could be complemented by a proportionate reduction in national level GST or the removal or reduction of land tax (rates). It would be accompanied by a greater use of user charging for services (such as volumetric charging for water by council-controlled water providers), or proxy measures like the so-called bed tax, as well as the ability to capture value uplift generated by public infrastructure projects (eg public transport).

Some other functions would be shifted. Environmental monitoring and reporting would shift to the EPA, as would enforcement of regulatory provisions under the Environment Act and other statutes (eg conservation legislation). Responsibilities under hazardous substances legislation and the EEZ Act would also remain with the EPA. Other independent institutions – a Planning Commission, Infrastructure Commission, Climate Commission – would be created to complement the existing Parliamentary Commissioner for the Environment. They would be active in providing policy advice to government, as well as reporting on government’s progress. In terms of central government itself, a durable and formal cross-agency forum (a system steward) would be established to allow government to speak with one voice on resource management matters. This would develop a national spatial plan, although it would be approved by Parliament.

The EEZ Act could be kept separate from an Environment Act, recognising that the latter requires a much less proactive and complex regime than the former. (That said, there might also be a case for integrating them, since it would be a better fit within an Environment Act that did not address spatial components). Heritage legislation would also be integrated into an Environment Act (or a Planning Act), as would environmental reporting legislation. Similarly, the protective (rather than allocative) components of fisheries and forestry legislation would be included within the Environment Act. More targeted outcomes-based statutes like the Hazardous Substances and New Organisms Act, Biosecurity Act, and Waste Minimisation Act would remain separate, recognising that the kinds of tools they use would be quite different from those used under the “RMA-style” Environment Act. The EPA would take on functions for waste minimisation such as product stewardship schemes and regulations. However, the wide range of geographically specific or species-specific legislation we currently have (eg the...
Conservation Act, Reserves Act, and Wildlife Act) would be integrated into one single statute concerned with protected areas and flora/fauna.

Greater tradeable rights and resource charging would drive efficiency in the use of non-private resources, but there would also be more direct use of economic instruments to drive positive behaviour and disincentivise environmental harm. This would include the deployment of a wider range of targeted green taxes and subsidies for activities achieving public good outcomes.

There would also be greater use of triggers. The imposition of significant regulatory prohibitions under an Environment Act would trigger obligations on government, where in the public interest, to investigate alternatives that provide equal levels of social, economic and cultural benefit (eg alternative energy sources to natural gas). A legal obligation would be introduced to take positive measures in response to negative indicators revealed by independent monitoring by the EPA.

As in Model 1, a separate statutory framework would remain for the emissions trading scheme. The climate-related provisions of the Forests Act would be incorporated into it. But climate change mitigation would be integrated into both the Planning and Environment Acts, allowing regulatory responses to complement the emissions trading scheme. An additional strategic layer of legislation (a Zero Carbon Act) would be enacted to set targets, budgets, plans, and the institutional framework for doing so (an independent Climate Commission). It would also influence national and regional spatial planning under the Planning Act, for both climate change mitigation and adaptation. The Planning Act would provide for a climate adaptation plan at the national level.
Brief assessment

Overall, Model 2 represents a significant overhaul of the current system in many ways, although some frameworks would remain largely untouched. While it would not represent a huge shift in norms, it would see substantial change in terms of legislative design, institutional arrangements, and funding. The regionalisation of local government achieves economies of scale and facilitates crucial regional level spatial planning. By changing the funding base of local government, it acknowledges the limitations that debt and rates have for the delivery of key services, and strengthens regional autonomy. Integrating a fragmented range of legislation into a Planning Act and Environment Act would reduce complexity, and break silos. Perhaps most significantly, the model recognises the importance of closely aligning decision-making that has spatial components, especially the land use planning and infrastructure funding aspects that are so crucial to the management of rapid urban growth. Integrating this all within a Planning Act would avoid the need for an additional layer of complexity in the form of a separate Spatial Planning Act, and "natural" domains would be strictly protected under a separate Environment Act with a firm purpose and clear regulatory boundaries. There would be improved certainty and stability for business. The use of single-stage independent hearing panels, with no appeal rights, would improve the responsiveness of the planning system while ensuring robustness in decision-making.

The model also produces fragmentation and potentially disjunction in other ways, by creating a separation between two aspects that are fundamentally important to environmental wellbeing: land and common pool resources like water, air and soil. A danger is that a more development-focused Planning Act, defined primarily by restrictions on land use, underemphasises the environmental implications of land use. For example, what principles would be used as the foundation for land use decisions that will indirectly and cumulatively impact on the climate (e.g., a dispersed urban form), waterways (agricultural land uses), and landscape? It is not always easy to distinguish between natural and built or between land and other domains. The prospect of fundamental institutional reform for local government would also be controversial. Resource management reform has implications for local democracy, especially since the local government system extends well beyond resource management matters. The removal of broad public appeal rights on planning decisions in favour of a Public Defender's Office could be controversial, with the protection of the public interest reliant on the Office having sufficient funding, expertise and independence. Finally, determining allocative questions through proactive processes based on principles first requires a resolution of Māori interests (especially in relation to freshwater). That is a challenging prospect.

How key existing legislation relates to new legislation in Model 2 is shown in Figure 15.3 (although this is not exhaustive). A high level sketch of how Model 2 operates is shown in Figure 15.4.
Figure 15.3: What will happen to existing legislation in Model 2.
Figure 15.4: Key features of Model 2
**KEY**

Orange, yellow and purple boxes denote the "core" frameworks of a reformed system that may be of particular interest. Bold text and bold coloured boxes indicates primary legislation; faded boxes of corresponding colours indicate subordinate instruments and tools within that legislative framework.

Where relevant, decision-makers are included in (brackets). Arrows indicate different relationships between elements of the system.

Where relevant, decision-makers are included in (brackets). Arrows indicate different relationships between elements of the system.

Red arrows: "give effect to", "directly insert" or equivalent;

Blue arrows: "be consistent with" or equivalent;

Green arrows: "have regard to", simple "input", or equivalent

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

**CCO** council-controlled organisation
15.4 Model 3

Key features
Model 3 also represents fairly fundamental change to the existing system, but in different ways to Model 2. The RMA would be split into an Environmental Protection Act and a Resource Stewardship Act. This split would not be about built vs natural, or land vs common pool resources (like air and water). Instead, the Environmental Protection Act would be concerned with imposing strict bottom lines under a protective purpose, and the Resource Stewardship Act would be about facilitating trade-offs and pursuing synergies in resource use above bottom lines. The Local Government Act and Land Transport Management Act would remain and perform the same functions as they do now. But there also would be an additional overarching act above these four core statutes: the Environmental Strategy Act. That would provide common principles that would have to be given effect to in all other resource management legislation. It would also require the production of spatial plans to align more targeted decisions on land use planning and infrastructure funding made under the four core acts mentioned above. A separate Allocation Act would be enacted, incorporating the allocative parts of the RMA and Fisheries Act (but not the Crown Minerals Act, which would remain separate).

To counteract the fragmentary effect of these reforms (several additional statutes), a number of existing statutes would be integrated into them. Relevant provisions of legislation concerning the exclusive economic zone, climate change, heritage, pest management, environmental reporting, waste minimisation, conservation land, protection of flora and fauna, and protection of fisheries would be contained in one or more of the six core statutes described above, depending on the kind of role being performed. The plans produced under these acts would therefore be more integrated and wider ranging than at present. More specific frameworks such as hazardous substances and new organisms, civil defence, and construction would remain separate. So too would the Marine and Coastal Area (Takutai Moana) Act. The existing Environment Act would be renamed the Environmental Governance Act, and subsume provisions that establish permanent institutions like the Environment Court, the EPA, and a new Resource Management Commission.

There would be significant institutional and funding reform. There would be no local government reorganisation per se, but responsibility for setting bottom lines under the Environmental Protection Act would fall to an EPA with strengthened mandate and greater resources. Transport services would continue to be provided as at present, but the delivery of water and waste-water services would become the responsibility of regional level, arm’s-length Crown entities. That would require bespoke legislation – a Water Services Act – which would also need to be aligned through the spatial planning process mentioned above. An independent Resource Management Commission would also be established, which would provide independent advice to government and hold it to account in relation to environmental bottom lines, and subsume the Parliamentary Commissioner for the Environment and proposed Climate Commission. Local government funding would come primarily from a regional GST, and at a national level the tax system would be gradually reconfigured on the basis of an environmental footprint tax.

Further explanation
Model 3’s most striking legislative design feature is the separation of the RMA into two statutes, and the integration of other existing statutes into them. The legislative split is about differentiating between two fundamentally different roles of the system – bottom lines and balance – rather than Model 2’s distinction between different components of the environment (natural and built, or land and other domains). This would produce an Environmental Protection Act (through which bottom lines would be imposed) and a Resource Stewardship Act (through which trade-offs and synergies between multiple wellbeing would be made above bottom lines).

In some ways this may look similar to Model 2, but there are important distinctions. Both statutes would impose restrictions across the same domains that are currently regulated under the RMA, including land. An Environmental Protection Act, with a highly protective purpose and principles (including Māori concepts), would be directly relevant to urban land use planning. It would encompass the setting of bottom lines for both the natural and built environments (eg heritage) or where that distinction breaks down (eg rural landscapes and in the coastal-marine context). It could potentially even impose bottom lines that were expressed as restrictions on land use (eg urban limits), given the potential for land use planning to have cumulative effects on things like climate change, urban heat, and diffuse discharges. There would be no distinction between “planning” and “environment”; rather both would be subject to bottom lines and a separate layer by which trade-offs were made above them. These have quite different purposes, which means they are amenable to different statutes – in the same kind of way that conservation legislation currently adds an additional layer of management to the more balanced purpose of the RMA.

The Environmental Protection Act would require the production of a comprehensive suite of bottom lines, including place-based ones (where benefits in one area cannot be traded off for costs in another). The Resource Stewardship Act would have a more balanced purpose, explicitly recognising both the benefits of resource use and urban development and the benefits of environmental protection, but actively pursuing synergistic outcomes.

The Local Government Act and Land Transport Management Act would be retained as separate statutes, and continue to apply to the planning and funding of infrastructure necessary to implement land use change (notably stormwater and transport infrastructure). Because responsibility for drinking and waste-water services would be transferred away from local government...
(see further below), a new statute for planning and funding this infrastructure (a Water Services Act) would also be needed.\(^6\)

Fragmenting these statutes means some form of alignment would be needed between them. That would be especially important for their spatial components: we would need to align land use regulation under an Environmental Protection Act and Resource Stewardship Act with infrastructure planning and funding under the Local Government Act, Land Transport Management Act, and Water Services Act, especially in contexts of rapid urban growth.\(^7\) To do so, Model 3 proposes the enactment of a separate, overarching Environmental Strategy Act. This would mandate the creation of national and regional spatial plans, which would have legal effect on decisions made under the other four subordinate frameworks mentioned above. Decision-making processes and timeframes on each would be aligned.

In short, an integrated planning process under these statutes could have the following features:

- After input from central government, an arm’s-length EPA would set regulatory environmental bottom lines across all domains under the Environmental Protection Act. They would be directly inserted by the EPA into regional level unitary plans and oceans plans (see below).
- Central government would produce a national spatial plan under the Environmental Strategy Act. This would have to give effect to the spatial elements of the EPA’s bottom lines, and be informed by key infrastructure planning and funding considerations (including those identified by local and regional actors). It would also be central government’s way of directly influencing land use questions in particular regions where there was deemed to be a national interest (e.g., Auckland’s growth) and aligning it with nationally funded infrastructure (e.g., transport). A national spatial plan would include marine spatial planning, and identify marine national parks.
- Regional spatial plans would be developed under the Environmental Strategy Act in a collaborative process between regional councils, territorial authorities, iwi/hapū, and infrastructure providers, with extensive public engagement. Central government agencies could also have a role, perhaps as contributors and observers (or through bespoke accords with local government) rather than decision-makers. Regional spatial plans would need to give effect to the spatial elements of the EPA’s bottom lines, be consistent with the national spatial plan, and be informed by key infrastructure planning and funding considerations.\(^8\) They would be high level strategic instruments, not regulatory ones. They would apply to land and the coastal marine area.

Kea
Regional councils, territorial authorities, and iwi/hapū would work collaboratively to create a single regional level unitary plan under the Resource Stewardship Act. Territorial authorities would remain responsible for the land use elements of the plan, and regional councils for other domains (as currently under the RMA), but it would be developed in an integrated manner. Unitary plans would have to give effect to the national spatial plan and to the relevant regional spatial plan. They would also contain regulatory bottom lines inserted directly into the plan by the EPA (see above). They would apply to land and the coastal marine area. Central government would also produce oceans plans for regulation in the exclusive economic zone, which would include regulations inserted directly by the EPA to protect bottom lines.

Unitary plans would be subject to a single-stage hearing by a mixed membership (but not entirely independent) hearings panel, comprising an Environment Court judge, expert commissioner(s), and representatives of the Crown, regional council, territorial authority and iwi. There would be no appeals on the merits, but robust judicial oversight would be provided by relevant members within a panel. The relevant minister would decide oceans plans.

A permitting process would be provided for where triggered by provisions in a unitary plan or oceans plan, and permits would be decided by the EPA (for provisions inserted under the Environmental Protection Act) or independent commissioners (for provisions inserted under the Resource Stewardship Act). Permits under the former would be much more geared towards assessing for compliance with clear bottom lines rather than allowing a discretionary assessment of costs and benefits. There would be no rights of appeal, although there would be wide notification and submission rights. The board of inquiry process for consents would be removed.

The Environmental Strategy Act would do more than just provide for the development of spatial plans. Other resource management statutes (not just those with spatial elements) would be required to give effect to it, or a Resource Management Strategy made under it (and signed off by Parliament), alongside the purpose of the more specific act in question. In this way, cross-cutting considerations like climate change mitigation and Māori principles beyond the recognition of Treaty obligations could flow through directly into multiple frameworks (eg transport, land use, urban design, energy, construction). The Act could also be more strongly ecocentric, recognising (among other things) the inherent worth and dignity of the natural world, and conferring legal personhood (and related human duties) on aspects of the natural world. It could be regarded as something of an environmental constitution, cementing the primacy of bottom lines, and would build on the synergistic language used in instruments like the NPS for Freshwater Management to find commonalities in Western and Māori worldviews. A component of the Resource Management Strategy made under the Act would be a population policy, recognising that planning and environmental pressures are closely linked to population change.

Local government institutional arrangements would remain unchanged in Model 3, with amalgamation and shared services achieved (and encouraged) through
existing means. The EPA would have responsibility for setting environmental bottom lines, but territorial authorities and regional councils would remain regulators for making trade-offs above bottom lines for (respectively) land use and other environmental domains. A greater range of broader and more formal partnership institutions between the Crown, local government and Māori would also be established, as we move into a post-settlement world less reliant on ad hoc negotiations based on historical grievances. However, this partnership would not see the wholesale transfer of power to Māori, and would also need to reflect the public interest.

Local government and central government would remain jointly responsible for the planning, funding and delivery of land transport infrastructure as per the status quo (through regional land transport committees). The state highway network would continue to be constructed, maintained and operated by the NZTA. However, some local government functions would be transferred. In particular, water and waste-water services would become the responsibility of asset-owning, regional scale Crown entities, which would operate at arm’s length of government. That would require bespoke legislation (a Water Services Act) under which they would plan and fund water infrastructure, and which would also need to be aligned with land use regulation through the regional spatial planning exercise outlined above. These entities would set user charges, be able to borrow, and require independent economic regulation (eg through a branch of the Commerce Commission or a bespoke regulator).

Furthermore, local government funding mechanisms would be overhauled, with reliance on rates replaced or supplemented by a regional and/or local GST, and more predictable central government contributions based on performance or demand. Greater user charging for public goods and services would be implemented, as well as power to capture value uplift in land caused by the provision of public goods. The model would be fundamentally disruptive of the status quo in that it would introduce an environmental footprint tax as a way to align a key source of government revenue with economic incentives to enhance the natural environment. Part of this, or the ability to levy their own footprint tax, could be given to councils. Reinforcing such incentives would be the more systemic use of government subsidies based on environmental outcome or performance rather than activity.

A separate Allocation Act would also be created. This would incorporate the allocative components of the Fisheries Act as well as the RMA, but not the Crown Minerals Act (recognising that such minerals are Crown owned and thus in a slightly different position). Rights to resources currently managed under the RMA would be primarily allocated through an auctioning system, facilitated by the EPA. Some ability for regulatory allocation may be made to Māori – particularly for freshwater – as this issue plays out further in the political sphere. There would be greater use of trading regimes for resource rights, subject to environmental constraints. De-allocation of resources (where bottom lines have already been breached) would be pursued by re-auctioning rights. Mechanisms for allocation of fishing rights under the quota management system would remain in their current form. Resource rentals or charges would be imposed on a much more comprehensive basis than at present, with revenue raised being returned to improving the state of the resource in question.
This model presents a relatively fragmented approach to legislative design, because it separates statutes according to the distinct roles the system should play. However, other existing statutes would be incorporated into the core framework provided by the statutes outlined above. The provisions of the EEZ Act would be apportioned across the Environmental Protection Act, Resource Management Act, and Allocation Act. So too would the relevant parts of the Climate Change Response Act. Strategic zero carbon legislation would be subsumed within an overarching strategic statute as well as an Environmental Protection Act. Heritage legislation and the pest management components of the Biosecurity Act would be integrated into the Environmental Protection Act. Environmental reporting legislation would be integrated into strategic legislation, and expanded in scope to report on a wider range of indicators (social, cultural and economic). Waste minimisation legislation would be integrated into the Environmental Protection Act, as would a range of conservation legislation related to protected areas (eg the Reserves Act and National Parks Act) and species protection (eg the Wildlife Act and Marine Mammals Protection Act). The Department of Conservation would therefore retain important roles within the Act in managing protected areas and species. The Act would also include the protective elements of the Fisheries Act. It would provide a more integrated approach to marine management.

A Housing and Urban Development Authority would be provided for in a separate Act. That would reflect that its role would cut across various acts relating to land use planning and infrastructure, and that it would have no power to make decisions on environmental bottom lines under the Environmental Protection Act. It would, however, have planning and consenting powers under the Environmental Stewardship Act to the extent there were trade-offs made above bottom lines, if agreed to by both central and local government. It would operate only in brownfields areas, and be able to take on functions relating to the planning, funding and delivery of transport and three waters infrastructure otherwise provided for in the Local Government Act, Land Transport Management Act, and Water Services Act. It could also take on building consent functions under the Building Act, although it would have no power to amend the Building Code.

More targeted frameworks such as hazardous substances and new organisms and construction would remain separate. So too would the Marine and Coastal Area (Takutai Moana) Act, although it would be better cross-referenced within general frameworks with which it intersects. The same would apply to the resource management provisions of bespoke Treaty settlement legislation, such as that relating to the Waikato River, Te Urewera and the Whanganui River. Finally, institutional statutes would be rationalised; the existing Environment Act would be renamed the Environmental Governance Act and subsume separate statutes or parts of statutes that establish permanent institutions like the EPA and the new Resource Management Commission.

**Brief assessment**

Model 3 contains some substantial changes to the current system. In some ways, it adds complexity (eg by creating new statutes and the need for complex relationships between them), and in other ways simplicity (eg in the rationalisation of multiple location-, domain- or sector-based statutes). In particular, it provides for much greater independence and centralisation in the setting of environmental bottom lines. This may be a controversial proposition. Where bottom lines are set may involve significant value judgements, and removing publicly accountable decision-makers like ministers and councils from this process may be challenging. That said, it might improve environmental wellbeing by depoliticising some bottom lines around which there is growing social consensus (eg freshwater quality). The removal of water and waste-water responsibilities from councils may also be politically challenging, although it is a live option in the government’s three waters review. For those attached to the integrated approach of the RMA, or those more enamoured of the “natural vs built” distinction, the separation of the RMA into an act concerned with bottom lines and another concerned with trade-offs, and the continued separation of local government and transport legislation, may be a bridge too far – even with an additional layer of spatial planning. It would certainly disrupt established case law. The question is whether it would do so in a helpful way. How key existing legislation relates to new legislation in Model 3 is shown in Figure 15.5 (although this is not exhaustive). A high level sketch of how Model 3 operates is shown in Figure 15.6 (a a key relating to that figure can be found on the page that follows).
Figure 15.5: What will happen to existing legislation in Model 3
Figure 15.6: Key features of Model 3
See key over page
15.5 The future of reform

We believe that New Zealand’s resource management system is overdue for a first principles review. The current system is not delivering the environmental, social, economic and cultural outcomes we want. It is increasingly complex, incoherent and inaccessible. We are convinced we can do better. That is a conversation for all New Zealanders to be a part of. It is not a technocratic exercise just for lawyers and planners, but one that goes to the heart of our values as a nation and human beings.

Too often debates begin by asking whether we should throw the RMA in the bin. To scrap or not to scrap – that is not the question. The system is more than the RMA, and we need to think about what we keep, not just what we discard. A knee jerk reaction to problems risks treating symptoms rather than tackling the difficult issues, and systemic reform needs to be approached with great care. Unintended side effects wait around every corner.

The present government has showed admirable ambition in tackling many resource management issues, and has a busy work programme to pursue. And yet it is vitally important that there is a common narrative linking these measures – one that always comes back to how the system operates as a whole, and how it will operate in a future that is likely to be very different to the present. Targeted reforms are important, but need to contribute to and be informed by the bigger picture. Now is the time to assimilate the work that is being done and direct it towards the long-term outcomes we want.

In this report, and previous working papers, we have sought to contribute to an already well-established and lively debate about reform. Many groups have shown great interest in how we can manage our country’s resources better. Through the analysis of various themes – the system’s norms, functions, structures and tools – we have sketched out a framework within which big picture questions can be framed, and within which the differences between solutions can be meaningfully assessed. In the Appendix we provide a series of tables containing options for each theme (a compilation of the summary tables at the end of the report’s chapters). Readers are invited to treat these options like Lego blocks, and construct their own models if they wish.

While we have also presented tangible system-wide models for what a reform package could look like, by no means do we claim the last word on this. The models are a conversation starter, rather than packages to adopt or reject wholesale.

The timing of this exercise is fortuitous, in that the government has now signalled its intention to begin its own process for a first principles rethink in 2019. That is welcome news. Whatever form it takes, the key will be to maintain momentum and an ambitious scope. If we do not, the results may be dire. If we do, the opportunities for our children will prove well worth the effort.

KEY for figure 15.6 on previous page

Orange, yellow, brown and purple boxes denote the “core” frameworks of a reformed system that may be of particular interest.

Bold text and bold coloured boxes indicates primary legislation; faded boxes of corresponding colours indicate subordinate instruments and tools within that legislative framework.

Where relevant, decision-makers are included in (brackets).

Arrows indicate different relationships between elements of the system

- Red arrows: "give effect to"; "directly insert" or equivalent;
- Blue arrows: "be consistent with" or equivalent;
- Green arrows: "have regard to"; simple "input"; or equivalent
- Black arrows simply indicate the direction of a process without a particular normative instruction

ACRONYMS

EEZ exclusive economic zone
MBIE Ministry for Business, Innovation and Employment
RTLC regional land transport committee
HUDA Housing and Urban Development Authority
There is a temptation to classify models according to legislative design choices (e.g. splitting the RMA), but that would do a disservice to other characteristics of the model that are equally important.

Potentially in more of a partnership with local government.

See Chapter 7.5.

Although central government would express its expectations to the EPA.

Such as an expanded version of the second half of the RMA’s current purpose, as well as sections 6 and 7.

There may be a case for integrating the Water Services Act and Land Transport Management Act into a single Public Infrastructure Act.

Although spatial planning is not just about managing growth.

For example, planning and funding processes under the Local Government Act, Land Transport Management Act and Water Services Act. A key question would be whether a regional spatial plan should be the thing driving associated infrastructure planning and funding, such as through a long-term plan (“if it is what we want, then how can we service it and pay for it?”) or whether funding processes should be the thing driving spatial planning (“if this is what we can afford, what should we use it for?”). It may be that those processes have to occur in tandem with neither one dominating the other, but they would need to be aligned.

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### APPENDIX: COMPILATION OF OPTIONS BY THEME

#### Worldviews and ethics

<table>
<thead>
<tr>
<th>Sub-theme</th>
<th>Option 1</th>
<th>Option 2</th>
<th>Option 3</th>
<th>Option 4</th>
</tr>
</thead>
<tbody>
<tr>
<td>Worldview</td>
<td>An ecocentric outlook; AND/OR</td>
<td>A broad anthropocentric outlook; AND/OR</td>
<td>An economic outlook; AND/OR</td>
<td>A Te Ao Māori outlook</td>
</tr>
<tr>
<td>Direction of travel</td>
<td>Retain the current mix of worldviews (ie economic, anthropocentric, ecocentric and Te Ao Māori); OR</td>
<td>Retain a mix of worldviews, but shift the balance in one direction or another; OR</td>
<td>Radically change the ethic that underpins our resource management system as a whole</td>
<td></td>
</tr>
<tr>
<td>Economic worldview</td>
<td>Retain the current place of economics in the system; OR</td>
<td>Strengthen an economic worldview; OR</td>
<td>Place greater emphasis on the free market and private choice</td>
<td></td>
</tr>
<tr>
<td>Ecocentrism</td>
<td>Retain references to nature’s intrinsic value in the system; OR</td>
<td>Remove intrinsic value in favour of monetary valuation of relative human interests OR</td>
<td>Embed rights and responsibilities for nature in the system</td>
<td></td>
</tr>
<tr>
<td>Te Ao Māori</td>
<td>Retain references to the Māori worldview (eg kaitiakitanga) alongside other kinds of worldview; OR</td>
<td>Focus on strengthening Treaty of Waitangi obligations; OR</td>
<td>Embed Māori concepts like tikanga as foundational concepts (eg instead of sustainability)</td>
<td></td>
</tr>
</tbody>
</table>

#### Principles

<table>
<thead>
<tr>
<th>Sub-theme</th>
<th>Option 1</th>
<th>Option 2</th>
<th>Option 3</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mix of principles</td>
<td>Retain the principles we have in the current system; OR</td>
<td>Add to the principles we currently have; OR</td>
<td>Fundamentally replace the principles we have</td>
</tr>
<tr>
<td>Umbrella principle</td>
<td>Retain sustainability as the main driving principle; OR</td>
<td>Add to or amend our umbrella principle(s) eg to embrace things like resilience, the public interest, sustainable development; OR</td>
<td>Change our umbrella principle(s) in a more fundamental way (eg replacing with a Māori or ecocentric conception)</td>
</tr>
<tr>
<td>Inter-generational equity</td>
<td>Retain the status quo (some reference but little clarification); OR</td>
<td>Specify that future generations’ needs are subject to the basic needs of current generations; OR</td>
<td>Place equal or greater value on the needs of future generations of both humans and nature</td>
</tr>
<tr>
<td>Distributional equity and environmental justice</td>
<td>Do not use the resource management system to address social and economic issues; OR</td>
<td>Ensure the system addresses issues of social and economic development; OR</td>
<td>Ensure the system addresses human social and economic development issues, as well as ecological justice for nature</td>
</tr>
<tr>
<td>Māori principles</td>
<td>Retain the status quo (some reference to Māori principles); OR</td>
<td>Strengthen the recognition of Māori values in the resource management system; OR</td>
<td>Use Māori principles as the foundation for management instead of Western concepts</td>
</tr>
<tr>
<td>Polluter-/user-pays</td>
<td>Retain the status quo (partial internalisation of costs); OR</td>
<td>More fully internalise the costs of adverse effects (eg through taxes and charges); OR</td>
<td>Charge for use of public resources irrespective of the adverse effects of use</td>
</tr>
<tr>
<td>Subsidiarity</td>
<td>Retain the status quo (mixed, but with uncertainty as to where national and local interests reside); OR</td>
<td>Greater centralisation of some responsibilities; OR</td>
<td>Greater localisation of some responsibilities</td>
</tr>
</tbody>
</table>

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APPENDIX: CONTINUED OVER PAGE >
<table>
<thead>
<tr>
<th>Sub-theme</th>
<th>Option 1</th>
<th>Option 2</th>
<th>Option 3</th>
</tr>
</thead>
<tbody>
<tr>
<td>Development</td>
<td>Retain a largely market-led and reactive approach to how resources are used; OR</td>
<td>Provide more guidance as to which resource uses are more or less desirable; OR</td>
<td>Be much more active in directing which resource uses occur and where</td>
</tr>
<tr>
<td>Conservation</td>
<td>Focus mainly on protecting valuable conservation values on public land; OR</td>
<td>Incentivise environmental enhancement to occur on private land, with associated public funding; OR</td>
<td>Require private persons to pursue environmental enhancement</td>
</tr>
<tr>
<td>Precaution</td>
<td>Rely on existing provisions and case law concerning precaution; OR</td>
<td>Strengthen precautionary provisions in legislation (such as the RMA); AND/OR</td>
<td>Reverse the burden of proof, and strengthen the standard of proof, in permitting processes</td>
</tr>
<tr>
<td>Efficiency</td>
<td>Efficiency is one matter, but not the only one, to consider among many when making decisions; AND/OR</td>
<td>Make regulatory processes (eg planning and permitting) more efficient; AND/OR</td>
<td>Improve efficiency of resource use (eg by allocating resources)</td>
</tr>
</tbody>
</table>

**Rationale for public intervention and roles of the system**

<table>
<thead>
<tr>
<th>Sub-theme</th>
<th>Option 1</th>
<th>Option 2</th>
<th>Option 3</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rationale for intervention</td>
<td>To internalise externalities, provide public goods, and coordinate infrastructure provision; OR</td>
<td>To pursue the &quot;public interest&quot;; OR</td>
<td>Rely on a test like “taonga”</td>
</tr>
<tr>
<td>Roles of a future system</td>
<td>Imposing bottom lines; AND/OR</td>
<td>Making trade-offs above/outside bottom lines; AND/OR</td>
<td>Providing public goods; AND/OR pursuing broader positive outcomes; AND/OR</td>
</tr>
<tr>
<td></td>
<td>Pursuing positive outcomes; AND/OR</td>
<td>Protecting/pursuing Māori interests; AND/OR</td>
<td>Allocation of non-private resources</td>
</tr>
<tr>
<td>Approach to bottom lines</td>
<td>Retain the status quo based on King Salmon; OR</td>
<td>Clarify that the RMA requires (not just enables) the imposition of bottom lines; AND/OR</td>
<td>Require central government to produce a comprehensive suite of bottom lines across all domains</td>
</tr>
<tr>
<td>Approach to trade-offs</td>
<td>The system is agnostic as to the trade-offs that are made above or outside bottom lines; OR</td>
<td>The system has a role to play in making trade-offs above bottom lines; AND/OR</td>
<td>The system has a role to play in making trade-offs where true bottom lines do not exist</td>
</tr>
<tr>
<td>Approach to positive outcomes</td>
<td>Rely on public authorities to pursue positive outcomes; AND/OR</td>
<td>Incentivise private persons to pursue positive outcomes; AND/OR</td>
<td>Require private persons to pursue positive outcomes, not just prevent negative ones</td>
</tr>
<tr>
<td>Protecting Māori interests</td>
<td>See Principles above and Institutional design below</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Approach to dispute resolution</td>
<td>Treat all resource management disputes under legislation focused on the public interest like the RMA; OR</td>
<td>Separate recognition of public and private disputes within statutes like the RMA; OR</td>
<td>Separate legislation for resolving public interest and private disputes</td>
</tr>
<tr>
<td>Approach to allocation of non-private resources</td>
<td>Use a first in time approach for allocation; OR</td>
<td>Adopt a more structured approach to allocation based on economic considerations (eg auctioning, tradeable permits); OR</td>
<td>Introduce principles for allocation (eg equity, cultural use, efficiency, public interest)</td>
</tr>
</tbody>
</table>
### Legislative design

<table>
<thead>
<tr>
<th>Sub-theme</th>
<th>Option 1</th>
<th>Option 2</th>
<th>Option 3</th>
</tr>
</thead>
<tbody>
<tr>
<td>General approach</td>
<td>Status quo; OR</td>
<td>Greater fragmentation of legislation; OR</td>
<td>Greater integration of legislation</td>
</tr>
<tr>
<td>Relationships between system's statutes</td>
<td>Spatial or subject separation (no overlap – eg RMA vs minerals); OR</td>
<td>Hierarchy – specify that some statutes override others (eg urban development legislation overriding purpose of RMA); OR</td>
<td>Mutual reinforcement (eg greater focus on sustainability in land transport legislation)</td>
</tr>
<tr>
<td>Splitting up the RMA</td>
<td>Do not split the RMA up; OR</td>
<td>Split up into “planning” and “environment” legislation; OR</td>
<td>Split up into “urban” and “non-urban” legislation; OR</td>
</tr>
<tr>
<td></td>
<td>Create a soft separation within the RMA (eg different principles for planning and environment); OR</td>
<td>Split up into “bottom lines” and “balancing” legislation; OR</td>
<td>Split up the RMA into multiple sectoral, OR domain-based, OR location-specific statutes</td>
</tr>
<tr>
<td>Adding to the RMA</td>
<td>Clarify that the RMA is about positive planning, not just about managing adverse effects (eg adding to s 6 matters to reflect urban development benefits); AND/OR</td>
<td>Keep the infrastructure planning and funding components of other statutes separate from RMA (or successors, such as a Planning Act), while improving cross-references; OR</td>
<td>Integrate the infrastructure planning and funding components of the Local Government Act and Land Transport Management Act into the RMA (or successors, like a Planning Act, or a separate Infrastructure Act)</td>
</tr>
<tr>
<td>Allocation legislation</td>
<td>Retain sector-specific allocation statutes (eg minerals, fisheries) alongside domain-based allocation under the RMA (eg water, coastal space); OR</td>
<td>Integrate allocative statutes into a separate act for all domains and sectors (eg water, minerals, fisheries, etc); OR</td>
<td>Integrate all allocative statutes (eg minerals, fisheries) into the RMA</td>
</tr>
<tr>
<td>Outcomes-based statutes</td>
<td>Retain separate legislation (eg RMA, EEZ Act, Waste Minimisation Act, Biosecurity Act); OR</td>
<td>Combine some statutes (eg RMA and EEZ Act); OR</td>
<td>Integrate multiple statutes into the RMA (or successors)</td>
</tr>
<tr>
<td>Domain-based statutes</td>
<td>Retain status quo (eg separate statutes for climate, marine mammals, wildlife etc); OR</td>
<td>Integrate some domain-based frameworks into the RMA (eg climate); OR</td>
<td>Integrate multiple domain-based frameworks into the RMA</td>
</tr>
<tr>
<td>Location-based statutes</td>
<td>Retain existing statutes and add new location-based statutes (eg urban development legislation, Kermadec legislation); OR</td>
<td>Integrate some existing location-based statutes into the RMA; AND/OR</td>
<td>Integrate conservation-focused statutes into a single Protected Areas Act (eg national parks, marine reserves, reserves, etc)</td>
</tr>
<tr>
<td>Sectoral statutes</td>
<td>Retain separate sectoral statutes (eg for forestry, fisheries, minerals); OR</td>
<td>Integrate sectoral statutes into outcomes-based legislation (eg RMA or successor, and an Allocation Act)</td>
<td>Integrate settlement legislation into more general statutes</td>
</tr>
<tr>
<td>Treaty settlement legislation</td>
<td>Retain separate Treaty settlement legislation; OR</td>
<td>Integrate relevant parts of specific settlement statutes into more general statutes like the RMA, alongside original settlement legislation; OR</td>
<td>Integrate settlement legislation into more general statutes</td>
</tr>
<tr>
<td>Overarching legislation</td>
<td>Retain separate statutes with no overarching legislation; OR</td>
<td>Add a strategic, integrative statute that influences lower statutes like the RMA, Local Government Act, and others; AND/OR</td>
<td>Protect the content of an overarching statute as a &quot;constitutional&quot; document (eg through entrenchment)</td>
</tr>
</tbody>
</table>
### Institutional design

<table>
<thead>
<tr>
<th>Sub-theme</th>
<th>Option 1</th>
<th>Option 2</th>
<th>Option 3</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Direction of travel</strong></td>
<td>Retain current institutional arrangements; OR</td>
<td>Add new institutions and/or redistribute functions between existing ones; OR</td>
<td>Fundamentally change our institutions (eg local government)</td>
</tr>
<tr>
<td><strong>Setting bottom lines</strong></td>
<td>Retain the status quo; OR</td>
<td>Greater use of independent institutions (eg EPA and Resource Management Commission); AND/OR</td>
<td>Greater use of central institutions; AND/OR</td>
</tr>
<tr>
<td><strong>Making trade-offs</strong></td>
<td>Retain the status quo; OR</td>
<td>Greater use of independent institutions as advisors or decision-makers when making trade-offs (eg Planning Commission or Independent Hearings Panels); OR</td>
<td>Greater use of accountable institutions to make value-based decisions (eg reduce the role of the Environment Court)</td>
</tr>
<tr>
<td><strong>Providing public goods</strong></td>
<td>Retain the status quo; OR</td>
<td>Greater use of independent institutions (eg council-controlled organisations, state-owned enterprises); AND/OR</td>
<td>Greater regionalisation or centralisation (eg regional level Crown entities, local government reorganisation, shared services); OR</td>
</tr>
<tr>
<td><strong>Protecting and promoting Māori interests</strong></td>
<td>Strengthen the directions/mandates of existing institutions to protect Māori interests; AND/OR</td>
<td>Creation of more “partnership” institutions (eg co-governance and co-management); AND/OR</td>
<td>Transfer of powers to Māori institutions</td>
</tr>
<tr>
<td><strong>Resolving disputes</strong></td>
<td>Retain the status quo (private disputes resolved by institutions concerned primarily with the public interest); OR</td>
<td>Separation between institutions concerned with public interest (eg councils) and only private interest (eg disputes tribunal)</td>
<td></td>
</tr>
<tr>
<td><strong>Allocating non-private resources</strong></td>
<td>Retain the status quo (differs by domain), with RMA allocative decisions taken by councils; OR</td>
<td>Greater localisation through collaborative processes; OR</td>
<td>Greater centralisation and/or independence in allocating resources (eg by EPA or commission using common principles or market tools)</td>
</tr>
</tbody>
</table>
## Public participation

<table>
<thead>
<tr>
<th>Sub-theme</th>
<th>Option 1</th>
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<th>Option 3</th>
</tr>
</thead>
<tbody>
<tr>
<td>General direction of travel</td>
<td>Retain the status quo (or rationalisation of multiple participatory processes); OR</td>
<td>Strengthen participatory rights; OR</td>
<td>Weaken participatory rights</td>
</tr>
<tr>
<td>Point of engagement under the RMA (or future equivalent)</td>
<td>Retain the status quo (participation at planning and permitting stages); OR</td>
<td>Participation occurs more at permitting stage, reduce involvement at planning stage; OR</td>
<td>Participation occurs more at planning stage, reduce involvement at permitting stage</td>
</tr>
<tr>
<td>Extent of participation</td>
<td>Retain current rights of submission and appeal (and add notification appeal rights); OR</td>
<td>Provide appeal and submission rights, but curtail the ability to appeal (eg the Auckland Unitary Plan process); OR</td>
<td>Remove appeal rights but allow wider rights to be notified and submit</td>
</tr>
<tr>
<td>Topic</td>
<td>Retain the status quo; OR</td>
<td>Strengthen participation (eg appeal rights) for some topics (eg climate change policy, fisheries restrictions); OR</td>
<td>Remove participation for some topics (eg submission and appeal rights for issues of amenity)</td>
</tr>
<tr>
<td>Purpose of participation</td>
<td>Retain public participation as a way to provide information and a check and balance on developers; OR</td>
<td>Rely on the auditing role of an independent institution to provide a check and balance on developers; AND/OR</td>
<td>Rely on an institution like the EPA to provide independent information</td>
</tr>
<tr>
<td>Supporting participation</td>
<td>Ensure robust funding and resourcing for meaningful public participation; OR</td>
<td>Actively incentivise participation through novel engagement mechanisms; OR</td>
<td>Create and resource institutions that represent aspects of the public interest (eg future generations) or nature</td>
</tr>
<tr>
<td>Extent of rights</td>
<td>Facilitate participation at the stage where values-based decisions are being made (eg policies and strategies); OR</td>
<td>Facilitate participation at the stage where decisions have more immediate impact on people (eg consents); OR</td>
<td>Restrict participation to situations in which people are directly affected</td>
</tr>
<tr>
<td>Role</td>
<td>Restrict participation when applying bottom lines; AND/OR</td>
<td>Allow participation when balancing various forms of wellbeing; AND/OR</td>
<td>Restrict participation when allocating resources</td>
</tr>
<tr>
<td>Appeal rights</td>
<td>Allow appeals only for local and regional level decisions; OR</td>
<td>Allow appeals for national level decisions</td>
<td></td>
</tr>
<tr>
<td>Process</td>
<td>Limit the number of participatory processes in the system; AND/OR</td>
<td>Allow a general process that can be tailored to different circumstances; OR</td>
<td>Prescribe the process by which participation occurs</td>
</tr>
</tbody>
</table>
### Tools

<table>
<thead>
<tr>
<th>Sub-theme</th>
<th>Options</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Strategic tools</strong></td>
<td>Create an overarching Resource Management Strategy with legal influence</td>
</tr>
<tr>
<td></td>
<td>over decision-making under other statutes; AND/OR</td>
</tr>
<tr>
<td></td>
<td>Amend statutory purpose statements to focus on the need for change, not</td>
</tr>
<tr>
<td></td>
<td>just management; AND/OR</td>
</tr>
<tr>
<td></td>
<td>Make greater use of targets and budgets where appropriate; AND/OR</td>
</tr>
<tr>
<td></td>
<td>Create mechanisms that guide investment decisions by public authorities</td>
</tr>
<tr>
<td></td>
<td>(including implementing a budget focused on multiple aspects of wellbeing); AND/OR</td>
</tr>
<tr>
<td></td>
<td>Implement spatial planning so that it is mandatory, national and regional, outcomes-focused, and has legal influence over other statutory decision-making processes</td>
</tr>
<tr>
<td><strong>Creation of legal rights for environmental outcomes</strong></td>
<td>Create property rights in the commons to encourage responsible environmental management; OR</td>
</tr>
<tr>
<td></td>
<td>Create human rights to a healthy environment; OR</td>
</tr>
<tr>
<td></td>
<td>Create rights (and associated human responsibilities) for aspects of the natural world</td>
</tr>
<tr>
<td><strong>Legal rights and allocation</strong></td>
<td>Use permitting processes as the default mechanism by which rights to use resources are allocated and reallocated (first in time); OR</td>
</tr>
<tr>
<td></td>
<td>Establish or mandate the use of more structured and competitive regulatory mechanisms for allocation (and reallocation), such as collaborative processes or comparative consent applications; OR</td>
</tr>
<tr>
<td></td>
<td>Safeguard particular sectors, groups or activities by proactively allocating a share of resource to them (such as Māori)</td>
</tr>
<tr>
<td><strong>Regulatory restrictions</strong></td>
<td>Retain current mix of hard limits (eg prohibited activities and prescriptive regulation) and discretion (eg consenting decisions informed by general policies); OR</td>
</tr>
<tr>
<td></td>
<td>Make greater use of firm regulatory tools like prohibited activities, rāhui, and water conservation orders; AND/OR</td>
</tr>
<tr>
<td></td>
<td>Make use of regulatory restrictions that bite earlier to manage the risk of harm rather than respond to it (such as product stewardship schemes)</td>
</tr>
<tr>
<td><strong>Regulatory duties</strong></td>
<td>Strengthen duties on public authorities to monitor and report on the state of the environment; AND/OR</td>
</tr>
<tr>
<td></td>
<td>Strengthen the ability of the system to impose proactive duties on private persons where triggered by adverse effects (eg offsetting); AND/OR</td>
</tr>
<tr>
<td></td>
<td>Strengthen the ability of the system to impose proactive duties on private persons even where unrelated to adverse effects</td>
</tr>
<tr>
<td><strong>Approach to planning</strong></td>
<td>Retain the current mix between effects-based and activity-based planning; OR</td>
</tr>
<tr>
<td></td>
<td>Greater use of effects-based planning and reliance on discretionary permitting processes; OR</td>
</tr>
<tr>
<td></td>
<td>Greater use of activity-based planning and reliance on specific planning restrictions</td>
</tr>
<tr>
<td><strong>Planning process</strong></td>
<td>Retain the status quo; OR</td>
</tr>
<tr>
<td></td>
<td>Embrace greater agility in making and changing plans; OR</td>
</tr>
<tr>
<td></td>
<td>Embrace greater agility only for some roles (eg trade-offs but not the weakening of bottom lines)</td>
</tr>
<tr>
<td><strong>Compliance and enforcement</strong></td>
<td>Retain the status quo (councils remain responsible for enforcement); OR</td>
</tr>
<tr>
<td></td>
<td>Transfer some functions to a central government enforcement agency (ministry or EPA) to act alongside councils; OR</td>
</tr>
<tr>
<td></td>
<td>Centralise enforcement functions in a government agency (such as a ministry or EPA)</td>
</tr>
<tr>
<td>Sub-theme</td>
<td>Options</td>
</tr>
<tr>
<td>-----------------------------------------</td>
<td>-------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Funding for regulatory and enforcement services</td>
<td>Retain the status quo (cost recovery from permit holders, general funds for planning); AND/OR</td>
</tr>
<tr>
<td>Funding public goods</td>
<td>Retain the status quo (multiple funding sources, with councils reliant on rates), OR achieve economies of scale through shared services or reorganisation; AND/OR</td>
</tr>
<tr>
<td>Influencing private behaviour</td>
<td>Rely primarily on regulatory tools to dictate behaviour; OR</td>
</tr>
<tr>
<td>Harmonising tools</td>
<td>Adopt a Resource Management Strategy to align tools created under separate frameworks; AND/OR</td>
</tr>
<tr>
<td></td>
<td>Implement a layer of strategic spatial planning that has legal influence over other statutory frameworks concerned with land use and infrastructure; OR</td>
</tr>
<tr>
<td>Evaluation</td>
<td>Require all public interventions to be evaluated based on robust monitoring; AND/OR</td>
</tr>
</tbody>
</table>
EDS is leading a project which is taking a first principles look at the resource management system in New Zealand and outlining options for reform. This synthesis report considers the whole system according to themes, including ethics, principles, the proper role of the system, legislative design, institutional arrangements, public participation, and tools. It culminates in three tangible models for what a future system could look like.