REPORT OF THE MINISTER FOR THE ENVIRONMENT'S RESOURCE MANAGEMENT ACT 1991 PRINCIPLES TECHNICAL ADVISORY GROUP

FEBRUARY 2012

Contents

Acknowledgements

We wish to record our thanks and appreciation to those staff at the Ministry for the Environment for thoroughly professional assistance. We had the benefit of high quality research papers and briefings which were most helpful.

Biographies on the members of the RMA Principles Technical Advisory Group

Alan Dormer (chair of the TAG). Mr Dormer is an Auckland barrister specialising in resource management and planning law with a Masters in Public Policy. He is an experienced hearing commissioner and has sat in that capacity for eight local authorities.

He has been appointed to several government-led law reform advisory groups. Amongst other roles, he was Chair of the Technical Advisory Group in 2008 to provide advice on the Phase One Resource Management reforms, and in 2010 he was Chair of the Phase Two Urban Reforms Technical Advisory Group and served on the Infrastructure Technical Advisory Group. Mr Dormer is also a past-president of the Resource Management Law Association of New Zealand and in 2009 was awarded the Association's "Outstanding Person" award. He has also been recognised by the NZ Planning Institute for his services to planning with the prestigious A O Glasse Award. He is currently a member of the Ministry for the Environment's Environmental Legal Assistance Advisory Panel and was a member of the Peer Review Panel during the setting up of the RMA Making Good Decisions programme.

Jenni Vernon has significant resource management experience. In addition to being a partner in a substantial Waikato sheep and beef farm, she works as a private consultant in resource management and is an independent hearings commissioner. She has substantial regional council experience, having served on the Environment Waikato council for 12 years, including three as Chair. She is currently the Strategic Planning and Resource Management Team Leader for the Waikato District Council.

Rachel Reese is a Councillor for Nelson City Council. She was elected to council in 2007 and has served one term as Deputy Mayor. Ms Reese holds the Policy and Planning portfolio and is chair of the Council's Economic Development Committee. She is Nelson City Council's representative to the Regional Sector Group of Local Government New Zealand. Ms Reese's work in resource management commenced 12 years ago as a private consultant negotiating resource management plan and consent matters on behalf of clients. She is an accredited Commissioner (Chair) and has conducted both policy (plan development) and consent hearings.

Peter Skelton is a former Environment Court Judge. He is currently an Environment Canterbury Commissioner with portfolio responsibilities for all Resource Management Act processes. From 2000 to 2005 he was the Associate Professor of Resource Management Law at Lincoln University and on retirement from that position he was appointed an Honorary Professor. He was the first Chair of the Environmental Legal Assistance Advisory Panel and is an Honorary Life Member of the Resource Management Law Association and an Honorary Fellow of the Environment Institute of Australia and New

Zealand. He presided as an independent commissioner over the hearings by the Waikato Regional Council into Variation 5 to the Waikato Regional Plan concerning the control of nitrates entering Lake Taupo. He also presided as an independent commissioner over the hearings into a series of applications for water and associated consents in the Lower Waitaki Catchment including the North Bank Tunnel hydro scheme and the Hunter Downs irrigation scheme.

Mark St Clair is a director of Hill Young Cooper, a public policy and resource management consultancy. Mr St Clair has more than 20 years' resource management experience and considerable experience in statutory resource consent applications and policy for both public and private sector clients across New Zealand. He is currently an accredited Hearings Commissioner. He is a resident of Wellington.

Phil Mitchell is the founding director of Mitchell Partnerships, an environmental consulting practice. He has experience in providing environmental advice to both the public and private sectors across New Zealand, and has an in-depth knowledge of New Zealand's environmental legislation and its implementation. Dr Mitchell has undertaken a number of assessments of environmental effects and planning assessments. He is an experienced expert witness and has acted as a Hearings Commissioner and hearings chair on a number of occasions.

Paul Majurey (Ngāti Maru, Ngāti Whanaunga, Ngāti Tamaterā and Ngāti Pāoa (Marutūāhu)) is a senior law partner in the specialist environmental and public law firm Atkins Holm Majurey. He has represented Māori and corporate interests for nearly 30 years on Treaty and environmental law at all levels, including the Privy Council and Supreme Court. He has also advised on and led Treaty of Waitangi negotiations across New Zealand. Mr Majurey is a co-author of environmental law texts and local authority RMA Hearings Commissioner.

Phil Gurnsey is an Associate Planner with Beca in Wellington. He has 19 years experience in resource management at both local and central government through his time consulting in Otago, with Environment Canterbury, at the Ministry for the Environment, and in the Office of the Environment Minister. Mr Gurnsey has a Masters of Regional and Resource Planning and is a full member of the New Zealand Planning Institute. He is on the national committee for the Resource Management Law Association of New Zealand. In addition to having frontline experience in resource consent applications and processing and plan preparation, he has also worked across many policy areas including air quality, climate change, Treaty negotiations, aquaculture, water reform, foreshore and seabed, and local government reform.

EXECUTIVE SUMMARY AND RECOMMENDATIONS

As a Technical Advisory Group, we were appointed:

> … to provide independent advice to the Minister for the Environment on any changes needed to sections 6 and 7 of the Resource Management Act 1991 (RMA) to improve the functioning of the RMA, relative to 20 years' practical experience of its operations; the Government's environmental and economic objectives; and the broader second phase of resource management reforms.

Our primary "Scope of Work" prescribed in our Terms of Reference naturally and properly draws attention first to giving:

> … greater attention to managing issues of natural hazards noting the RMA issues arising from the recent Canterbury earthquakes.

The purpose of the RMA is set out in s.5(1) of the Act as being:

> To promote the sustainable management of natural and physical resources,

a term defined in s.5(2) of the Act.

Sections 6 and 7 then set out a series of "matters of national importance" which must be "recognised and provided for" and "other matters" to which "particular regard" is to be had by those making decisions under the Act.

It can immediately be seen that those matters listed in sections 6 and 7 are overwhelmingly biophysical in character, and although mention is made of Māori issues in three subsections, they contain no significant references to the plethora of social, economic, cultural and health and safety issues referred to in s.5(2). The reason for this lies in what we have in our report described as a fundamental mismatch or disconnect between the stated intentions / interpretation of the Government at the time of the RMA's passage, and the interpretation given subsequently by the Courts. The position of the Government at the time was an economically liberal one in which the market was to be relatively free to undertake activities, so long as certain "environmental bottom lines" (namely those contained in s.5(2)(a), (b) and (c)) were met.

However, the Courts have interpreted the Act as requiring decision-makers to adopt an "overall broad judgment" approach to decision-making. The mismatch or disconnect which we have identified thus sees that "overall broad judgment" being informed by matters of national importance and other matters that do not reflect the broad scope of issues inherent in the scope of sustainable management as defined in section 5 and interpreted by the Courts.

As dictated by our Terms of Reference, our focus has been on determining "whether sections 6 and 7 can be improved to:

- give greater attention to managing issues of natural hazards;
- consider the recommendations from the urban and infrastructure technical advisory groups in a broader context;

- consider the incorporation of the Land Drainage Act 1908 (LDA), the Rivers Board Act 1908 (RCA), and the Soil Conservation and Rivers Control Act 1941 (SCRCA);
- reflect on the provisions relative to the resource management challenges 20 year on; and
- promote consistency of interpretation through clear and modern drafting."

Against that background, it is our recommendation that explicit recognition be given that it is an overall broad judgment that is to be applied, and that the listed matters set out in the current ss. 6 and 7 be amplified by reference to other issues also central to informing an overall broad judgement of what constitutes sustainable management.

We have characterised these matters as a suite of "principles", and combined them into one list which decision-makers are required to "recognise and provide for". New additions include explicit reference to biodiversity; wetland values; the management of natural hazards; economic, urban and infrastructure issues; and taonga species. We have also recommended a number of deletions, to reflect a change in circumstances whereby we consider they no longer warrant particular mention in Part 2 of the RMA, or where they are embodied in the new provisions we have recommended. [1]

In addition to the list of principles, we also propose that Part 2 of the Act includes specific process-related methods to be adhered to by RMA decision-makers. Amongst these are timely, efficient and cost-effective resource management processes; the use of concise and plain language; limits on the specific recognition of the concept of environmental compensation; the encouragement and collaboration between local authorities; and a recognition of private property rights.

Referring particularly to natural hazards issues, which currently find no reflection in s.6 or s.7, it is our recommendation that the Act be amended to more clearly allocate responsibility for natural hazard planning, and that these issues also be referred to in our new s.6.

We were also particularly directed to the situation as regards three largely repealed, but still partially operative statutes – the LDA, RBA and SCRCA. These three remnant statutes are part of a number of Acts which relate to flood management. The powers conferred by these Acts can only be found by diligent searching of repealed legislation. We gave consideration to whether they should be incorporated into the RMA, but on reflection have concluded that being operational in nature, they are more suited for repeal and inclusion within the Local Government Act. We recommend accordingly.

[1] We recommend that a few of the matters currently referred to in ss. 6 and 7 not be carried over into the new s.6. Amongst those is the reference to "the habitat of trout and salmon" in s.7(h); although we do suggest that if it is to be retained, then it be expanded to provide for "areas of aquatic habitats, including eels, galaxiids, trout and salmon".

Our report also refers to a number of matters that arise as a direct result of our recasting of ss. 6 and 7.

Our key recommendations are as follows:

Changes to sections 6 and 7:

- **Section 6 should be reworded as follows (with new defined terms underlined):**

6. Sustainable management principles

(1) In making the overall broad judgment to achieve the purpose of this Act, all persons performing functions and exercising powers under it must recognise and provide for:

(a) The:

(i) natural character values of the coastal environment, wetlands, and lakes and rivers and their margins; and,

(ii) value of public access to and along, the coastal marine area, wetlands, lakes and rivers.

(b) The:

(i) physical qualities of outstanding natural features; and,

(ii) visual qualities of outstanding natural landscapes.

(c) The physical qualities of:

(i) areas of significant indigenous biodiversity;

(ii) areas of significant indigenous terrestrial habitats; and

(iii) areas of significant aquatic habitats.

(d) In relation to climate change:

(i) managing the significant risks of climate change effects; and,

(ii) the benefits to be derived from the use and development of renewable energy.

(e) In relation to Māori:

(i) the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, taonga species and other taonga;

(ii) the exercise by Māori of kaitiakitanga; and,

(iii) protected customary rights.

(f) Significant values of archaeological sites, historic places and historic areas;

(g) The efficient use of natural and physical resources;

(h) The significant benefits to be derived from the use and development of natural and physical resources;

(i) Managing the significant risks associated with natural hazards;

(j) The planning, design and functioning of the built environment, including the reasonably foreseeable availability of land for urban expansion, use and development; and

(k) The planning, design and functioning of significant infrastructure:

(2) For the avoidance of doubt, subsection (1) has no internal hierarchy.

- **A new section 7 should be added:**

7. Sustainable management methods

All persons performing functions and exercising powers under this Act must:

(a) Achieve timely, efficient and cost-effective resource management processes;

(b) In the case of policy statements and plans:

(i) include only those matters within the scope of this Act;

(ii) use concise and plain language; and

(iii) avoid repetition.

(c) Have regard to any voluntary form of environmental compensation, off-setting or similar measure which is not encompassed by section 5(2)(c);

(d) Promote collaboration between local authorities on common resource management issues; and,

(e) Achieve an appropriate balance between public and private interests in the use of land.

Definitions:

- **The proposed changes to sections 6 and 7 would be supported by the following definitions:**

Natural character means the physical qualities and features created by nature, and may include such matters as:

(i) natural patterns and processes;

(ii) biophysical, ecological, geological and geomorphological aspects;

(iii) natural landforms, such as headlands, peninsulas, cliffs, dunes, wetlands and reefs; and,

(iv) places or areas that are wild or scenic.

Archaeological site means any place in New Zealand, including any building or structure (or part of a building or structure), that:

(i) was associated with human activity that occurred before 1900 or is the site of the wreck of any vessel where the wreck occurred before 1900; and

(ii) is or may be able, through investigation by archaeological methods, to provide evidence relating to the history of New Zealand.

[As per Heritage New Zealand Pouhere Taonga Bill]

Historic place

(a) means any of the following that form a part of the historical and cultural heritage of New Zealand and that lie within the territorial limits of New Zealand:

(i) land, including an archaeological site;

(ii) a building or structure (or part of a building or structure); and,

(iii) any combination of land, buildings, structures, or associated buildings or structures (or parts of buildings, structures, or associated buildings or structures).

(b) Includes anything that is in or fixed to land described in paragraph (a).

[As per Heritage New Zealand Pouhere Taonga Bill]

Historic areas means an area of land that—

(a) contains an inter-related group of historic places;

(b) forms part of the historical and cultural heritage of New Zealand; and,

(c) lies within the territorial limits of New Zealand.

[As per Heritage New Zealand Pouhere Taonga Bill]

Mitigation

a) means to lessen the rigour or the severity of effects; and,

b) contemplates that some adverse effects from developments may be considered acceptable, no matter what attributes the site might have. To what extent the adverse effects are acceptable, is, however, a question of fact and degree;

c) but does not include any form of environmental or financial compensation or similar measure, except to the extent that such measure is to be provided on a voluntary basis.

Outstanding natural features and outstanding natural landscapes means features and landscapes that are identified in an operative provision of a regional policy statement as being outstanding on a national or regional scale.

Areas of significant indigenous biodiversity means areas identified in an operative provision of a regional policy statement which have species compositions or habitat **structure or ecosystem functions**, or a combination thereof, that are of significance for the maintenance of biodiversity nationally.

Areas of significant indigenous terrestrial habitats means areas identified in an operative provision of a regional policy statement which have ecological attributes that are regionally significant.

Areas of significant aquatic habitats means areas identified in an operative provision of a **regional policy statement which have** physical, recreational or ecological attributes that are regionally significant.

Natural hazards:

- **A provision requiring decision-makers to recognise and provide for issues around natural hazard risks should be incorporated in s.6 of the RMA – the wording of the provision to be, "managing the significant risks associated with natural hazards:"**

- **Retain the RMA definition of natural hazards. Further work should be undertaken on alignment of the definition across all relevant legislation, in particular to take account of the differing "return periods" for natural hazards.**

- **Amend provisions specifying matters to be considered in preparing RPS and plans to specifically refer to CDEM Group management plans as a matter which must be considered.**

- **Regional councils should have the lead function of managing all the effects of natural hazards. Territorial authorities are to retain their current function in regard to natural hazards.**

- **There should be one combined regional and district natural hazards plan.**

- **This plan should be required to be operative within three years of enactment of the empowering legislation.**

- **Require local authorities to make information about natural hazards available to all other local authorities within their region. This requirement should be drafted to expressly override any constraints arising from other legislation on information sharing, including the Privacy Act 1993 and the Local Government Official Information and Meetings Act 1987.**

- **Section 106 be amended to expressly include liquefaction and lateral spreading, along with any other consequences of the events included in the definition of "natural hazard" in s.2.**

- **Section 106 be amended to reflect the risk associated with any natural hazard, rather than the likelihood of the event.**

- **Section 106 be amended so that the consent authority must refuse consent if there will be a significant increase in the risk associated with any natural hazard.**

- **That the potential to extend the scope of s.106 to include land use consents issued by regional councils be investigated.**

- **That the Government promulgate a NPS or NES on the management of natural hazards.**

Soil Conservation and Rivers Control Act 1948 (SCRCA), Land Drainage Act 1908 (LDA), and River Boards Act 1908 (RBA):

- **Due to the operational nature of the SCRCA, LDA and RBA, their remaining provisions should not be incorporated into ss. 6 and 7 of the RMA.**

- **Repeal and transfer important operational powers currently under the SCRCA, LDA and RBA into existing legislation, preferably the LGA02.**

- **Incorporate existing land drainage/river management provisions contained in the LGA74 and LGA02 as part of a review of the SCRCA, LDA and RBA with the aim of integrating and repackaging them in the LGA02.**

- **Consider a comprehensive review of all flood-related legislation at some point in the future.**

Other recommended changes to the RMA (including key consequential amendments and transitional requirements) to implement the recommendations above are set out in Chapter 6 of this report.

1. INTRODUCTION

1.1 Terms of Reference and scope of our enquiry

We have been appointed:

> To provide independent advice to the Minister for the Environment on any changes needed to ss. 6 and 7 of the Resource Management Act 1991 (RMA) to improve the functioning of the RMA relative to: 20 years' practical experience of its operation; the Government's environmental and economic objectives; and the broader second phase of resource management reforms.

The "Scope of Work" prescribed by our Terms of Reference naturally and properly draws attention first to giving:

> Greater attention to managing issues of natural hazards noting the RMA issues arising from the recent Canterbury earthquakes.

To that end we have considered the extent to which changes to Part 2 of the Act are required to ensure that RMA decision-makers are in no doubt as to the fundamental place of s.5 in implementation of the RMA. We recommend amendments to the Principles of the Act, but even in doing so hasten to point out that no government can legislate for good practice. We regard it as a woeful commentary on certain aspects of RMA practice over the years that the consequences of the Canterbury earthquakes have been so calamitous, but we will leave a detailed evaluation of practice issues to await the outcome of the Royal Commission's findings.

Our attention has also been directed to three largely repealed Acts: the Soil Conservation and Rivers Control Act 1941, the Rivers Boards Act 1908, and the Land Drainage Act 1908. These Acts empower local authorities to address flooding and drainage issues. Our recommendation in this regard is that the remnants of these Acts be incorporated into a new part of the Local Government Act 2002.

We have also been instructed to:

> Consider the recommendation for changes to ss. 6 and 7 from the urban and infrastructure technical advisory groups in a broader context; and to,
>
> Reflect on the provisions relative to the resource management challenges facing New Zealand 20 years on from the RMA's enactment.

Our introduction to these issues (which are addressed at greater length in Chapter 3) follows shortly.

Lastly, we have been requested to consider, whether the drafting of ss. 6 and 7 can be improved, to:

> Promote consistency of interpretation through clear and modern drafting.

This is a matter to which we turn attention in Chapter 3.

1.2 Introduction to sections 6 and 7

The purpose of the Act is set out in s.5(1) as being

> To promote the sustainable management of natural and physical resources

Section 5(2) then goes on to define *"sustainable management"*:

> In this Act, sustainable management means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic and cultural wellbeing and for their health and safety while –
>
> (a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations;
>
> (b) Safeguarding the life-supporting capacity of air, water, soil and ecosystems; and,
>
> (c) Avoiding, remedying or mitigating any adverse effects of activities on the environment.

Our Terms of Reference confine us to an examination of ss. 6 and 7. Their place in the overall scheme of the Act is to assist those persons exercising functions and powers with a statement of the matters of national importance that they are to "recognise and provide for" – s.6 and s.7 – a list of "other matters" to which they shall "have particular regard to" .

Sections 6 and 7 have come to be seen as setting out a hierarchy of considerations which must be "recognised and provided for", or be the subject of "particular regard" by decision-makers in preparing and promulgating policy statements and plans at the national, regional and district levels, and in making decisions on applications for resource consents and notices of requirement (collectively referred to as 'consenting decisions' in this report). Sections 6 and 7 have, particularly over recent times, become the subject of a number of proposals for reform. Indeed, two of the preceding technical advisory groups appointed by the Minister recommended changes to these sections so as to reflect the importance of the provision of infrastructure and a number of urban issues.[2]

We consider it would be helpful to begin our report with some observations regarding the history of Part 2 of the Act.

The original framers of the Resource Management Bill saw the proposed new legislation, in radical contrast to the Town and Country Planning Act it replaced, as being "effects based". That is to say, provided the effects of an activity were consistent with sustainable management; then there should be no impediment to its establishment. The so-called "environmental bottom

[2] Report of the Minister for the Environment's Urban Technical Advisory Group (July 2010), www.mfe.govt.nz/rma/central/amendments/documents/urban-tag-report.pdf, and
Report of the Minister for the Environment's Infrastructure Technical Advisory Group (August 2010), www.mfe.govt.nz/rma/central/amendments/documents/infrastructure-tag-report.pdf.

lines" – those qualities appearing in sub-paragraphs (a), (b) and (c) of s.5(2) – were to be inviolate.

That view of the legislation was most notably expressed by the Hon. Simon Upton in his third reading speech in Parliament and in other well reported lectures and addresses both at the time and subsequently.

However, the Courts have not interpreted the legislation in the way it was promoted by the Government. Over the years, the approach taken by the Courts has evolved in such a way that what now prevails is the application of:

> *An overall broad judgment [which] allows the comparison of conflicting considerations and the scale or degree of them, and their relative significance or proportion in the final outcome.* [3]

It was in these terms that the "overall broad judgment approach"[4] was described by the eminent Principal Environment Court Judge, Judge Sheppard.[5]

In the later decision of *Genesis Power Ltd v Franklin District Council,*[6] Judge Whiting described the role of the existing ss. 6 and 7 as being to:

> *...inform and assist the purpose of the Act. We may accord such weight as we think fit to any competing consideration under Part II, bearing in mind the purpose of the Act. These subsequent sections must not be allowed to obscure the sustainable management purpose of the Act. Rather, they should be approached as factors in the overall balancing exercise to be conducted by the Court.*

Given that the Act was to be "effects based" in the way foreseen by the Government; then it was perfectly appropriate that the Act should go on to prioritise/emphasise certain "environmental" qualities[7] that in the national interest should be protected or preserved. That was to be the role of ss. 6 and 7.

Furthermore, it was appropriate that the list of items to which ss. 6 and 7 were to give emphasis was confined to *"environmental"* issues, as it was those which had to be safeguarded. The role of ss. 6 and 7 was seen as being to flesh out the "environmental bottom lines" provided for in subsections 5(2)(a), (b) and (c).

[3] See e.g. The Stace Hammond Grace lecture in which the Hon. Simon Upton spoke of the, *"considerable speculation about just how far the pendulum had swung away from the old world of balancing uses in favour of controlling adverse effects."* – 1995, Waikato Law Review, 17, p39.

[4] *North Shore City Council v Auckland Regional Council* [1997] NZRMA 59, pp 92-94.

[5] We would wish to acknowledge the helpful insights into the evolution of the Courts' interpretation of s.5, to be seen in Bret Birdsong's paper *"Adjudicating Sustainability: New Zealand's Environment Court and the Resource Management Act"* available online at: http://www.fulbright.org.nz/voices/axford/birdsongb.html.

[6] [2005] NZRMA 541, para 53.

[7] The term "environment" is broadly defined in s.2 of the Act so as to include "social, economic, aesthetic and cultural conditions". When we use the term "environmental" in this report, we do so in the biophysical sense reflecting the matters focused upon in subsections 5(2)(a), (b) and (c).

However, as the original framers' intention has not come to be realised,[8] in particular as the Courts have moved to an "overall broad judgment" approach; the exclusively "environmental" focus of s.6 has come to be seen as failing to enunciate the full range of relevant considerations set out in s.5.

Thus, for example in the report of the Minister's Urban Technical Advisory Group, Prof. Hunt is quoted to the effect that:

> *S.6 of the Act identifies seven matters of "national importance" of which only one, concerning the protection of historic heritage, has any direct bearing on the built environment. S.7 of the Act identifies eleven "other matters", of which only two have a direct bearing on the built environment. These concern the maintenance and enhancement of amenity values, and of the quality of the environment. It has to be said that the RMA attaches little importance to the urban environment.*[9]

If the "environmental" qualities listed in ss. 6 and 7 are not to have in law the primary function of fleshing out subsection 5(2), but are instead a list of issues to which special or specific (to use neutral terminology) attention is to be given in the exercise of an "overall broad judgment"; then it is in our view all the more appropriate they be re-examined periodically to see if their emphasis or focus still reflects the priorities of contemporary New Zealand.

A list of what may have been the environmental qualities regarded as being of national importance may well be compiled somewhat differently today than it was 20 years ago. Indeed, we would imagine that there would be few areas of life or endeavour in New Zealand where one would identify the nationally important issues or, "challenges facing New Zealand" (to quote from our Terms of Reference) in the same manner as they were expressed 20 years ago.

We have been asked in our Terms of Reference to advise on the "provisions [i.e. ss. 6 and 7] relative to the resource management challenges facing New Zealand" and we shall do that in Chapter 3**.** At this point however we take the opportunity of making it explicit that we regard the differences between the original intent and the judicial interpretation of the Act as being of such significance that a revision of ss. 6 and 7 is more than justified.

Indeed, if the Government were desirous of upholding the environmental bottom line approach formerly thought to be the correct interpretation of the Act then significant amendment should be made to the Act, because that is clearly not the law as established by judicial interpretation.

[8] Our report to the Minister does not represent itself as being an academic study. For those who would wish to pursue this debate further, we would suggest reference to two articles which appeared in the Resource Management Law Association Journal in 2002 – *"Adopting Sustainability as an Overarching Environmental Policy":* Skelton and Memon, RMJ, Issue 1, Vol X, and *"Section 5 Revisited: A Critique of Skelton and Memon's Analysis";* Upton, Atkins and Willis: RMJ, Issue 3, Vol X. It is interesting to note that although the latter authors were critical of the former's analysis of the genesis of s.5, their, "reading of the case law largely concurs with [Skelton and Memon's] analysis".

[9] Hunt Prof. J., 2008, Urban Design Controls and City Development in a New Zealand context: Reflections on Recent Experiences in Auckland's Urban Core. Paper presented to the *International Planning History Society International Conference,* Chicago, July 10-13 2008, pp 8, 9, H Hunt cites Peart, R and Oram. R.

On the other hand if the Government is desirous of accepting the Courts' interpretation of a "broad overall judgment approach"; then we regard amendments of the kind we propose as necessary in order to ensure appropriate consideration is given to each aspect of the environment.

If indeed the sections are to contain a list of principles or issues to which special or specific attention should be given in the exercise of an overall broad judgment, rather than have as their primary purpose the fleshing out of the environmental bottom lines; then we are of the view that it is appropriate that they be supplemented by reference to the other "social, economic, aesthetic, and cultural conditions" referred to in the Act's definition of "environment".

Clearly that definition extends the meaning of "environment" well beyond the biophysical. It may have been appropriate to confine s.6 matters to the biophysical under an "environmental bottom line" interpretation of the Act. However, the making of an "overall broad judgment" obviously requires that decision-makers' focus extend to wider considerations.

To that end we endorse earlier proposals to make particular reference to infrastructure and the built environment.

The adoption of the overall broad judgment approach has led quite properly to the Courts holding that on occasion s.7 *"*other matters*"* might assume such an importance that they should outweigh s.6 *"*matters of national importance*"*. As the Court put it in *Wakatipu Environmental Society Inc v Queenstown Lakes District Council:*[10]

> *In the end all aspects go into the evaluation as to whether any issue being considered achieves the purpose of the Act.*

The concept of a hierarchy of matters to be given extra or special consideration has less place in an overall broad judgment approach than in an effects-based regime.

We recommend that rather than the current two lists that make up ss. 6 and 7, there be a new single 'principles' section , for the reasons we further outline in this report.[11]

We remind ourselves that this review is expressed in its Terms of Reference as sitting in the context of a programme, one of the objectives of which is to consider:

> improving economic efficiency of implementation without compromising underlying environmental integrity.

In furtherance of this objective, we also propose to elevate into Part 2 of the Act a number of what are essentially method and process issues in an attempt to improve the "efficiency of implementation".

[10] [2000] NZRMA 59, p90.

[11] Interestingly that too was the recommendation of the Parliamentary Committee on the Resource Management Bill – chaired by the then Minister of Conservation the Hon. Philip Woollaston in August 1990. "However, the Committee decided that a hierarchy amongst the principles would be difficult to determine and that it is more appropriate to allow the circumstances of each case to determine the importance of the matters." [para 6.8].

We recommend that s.7 be recast in a form that gives important method and process issues a strong emphasis, for the reasons we further outline in this report.

New Zealand spends far too many resources on process[12]; and arguably not enough on environmental enhancements. In our view there is much to be gained by adopting improved implementation of the Act at both local and central government levels, and we hope that by elevating into Part 2 such matters as timely processing, environmental compensation and a respect for property rights, greater attention will be given to these issues.

As a result of our proposed changes to ss. 6 and 7, and especially those relating to natural hazards there are a number of other amendments which should be made to other sections of the Act. We address these in Chapter 6.

In addition, in Chapter 7, we draw attention to a number of issues which we have reflected upon during the course of our considerations, but which are outside our Terms of Reference. Accordingly, we make no recommendations in relation to these issues, but would urge that they be addressed as part of other components of Phase 2 of the Government's resource management reform programme ("**Phase 2 RM work programme**").

1.3 Format of our report

Our report is set out in the following series of Chapters:

Executive summary and table of recommendations

Chapter 1 is this Introduction.

Chapter 2 addresses the issue of natural hazards.

Chapter 3 contains our reflections on the role of ss. 6 and 7, and on the relevant resource management challenges facing New Zealand 20 years on.

Chapter 4 specifically addresses our proposed new ss. 6 and 7.

Chapter 5 addresses options to incorporate the Soil Conservation and Rivers Control Act 1948 (SCRCA), Land Drainage Act 1908 (LDA), and River Boards Act 1908 (RBA) into other, more recent legislation.

Chapter 6 sets out other recommended amendments to the RMA (including key consequential amendments and transitional requirements) which flow from the changes we have recommended to ss. 6 and 7.

Chapter 7 reflects on practice in relation to the Act, in the context of our Terms of Reference.

[12] It was concluded in a 2008 Ministry for the Environment report: *"RMA Schedule 1, Processes - Preliminary Analysis of Options for Future Amendments"* – that the preparation of the first generation of plans cost New Zealand local authorities and central government $160 million. That sum did not include the costs incurred by other public agencies and their involvement in the process, nor those borne by landowners and resource users affected by the documents, nor those of community groups or individuals. To these direct costs should also be added the deadweight losses to the economy, and the higher prices paid by consumers of goods and services.

2. NATURAL HAZARDS

2.1 Natural hazards

2.1.1 Introduction

The Canterbury earthquakes have brought into question how the RMA addresses natural hazards. Our Terms of Reference state that one focus of the review of ss. 6 and 7 should be on whether the sections can be improved to give greater statutory direction to managing issues of natural hazards noting the RMA issues arising from the recent Canterbury earthquakes. Natural hazards are natural events which will or may have negative impacts on people, property and other aspects of the environment. New Zealand is susceptible to a large number of natural hazards including earthquake, tsunami, erosion, volcanic and geothermal activity, landslip, subsidence, sedimentation, wind, drought, fire, and flooding. Effective planning for and management of natural hazards through resource management plays a critical role in reducing the negative impacts of natural hazards. Natural hazards management is a function of local authorities under the RMA but it is not currently provided for under ss. 6 or 7. Our review confirms there are challenges regarding the interpretation and implementation of natural hazard legislation, and other issues can take priority over natural hazards in planning and resource consent decisions.

2.1.2 Legislative framework

The RMA provides for natural hazard management policy, planning and decision-making in New Zealand. Although not explicitly referred to in the RMA, natural hazard planning generally (but not exclusively) focuses on risk reduction. Risk reduction involves identifying and analysing long-term risks to human life and property from natural hazards; taking steps to eliminate these risks where practicable (avoidance) and, where not, reducing the likelihood and the magnitude of their impact (mitigation).[13]

The management of natural hazards is explicitly provided for in a number of sections of the Act, including:

- Section 2: interpretation – defines the term “natural hazard”;
- Section 30: functions of regional councils – control the use of land for the purpose of the avoidance or mitigation of natural hazards;
- Section 31: functions of district councils – control the effects of the use of land for the avoidance or mitigation of natural hazards (policy, consents, building);
- Sections 59–62: regional policy statements; and,

[13] Ministry for the Environment (2010), Quality Planning Website – Natural Hazards, http://www.qualityplanning.org.nz/plan-topics/natural-hazards/appendix-1.php#Mitigation_Measures.

- Section 106: consent authority may refuse subdivision consent in certain circumstances, including where land is likely to be subject to erosion, subsidence and slippage.

Natural hazards are not specifically provided for in ss. 6 or 7 of the RMA although 'the effects of climate change' is listed in s.7. Climate change effects are predicted to increasingly exacerbate natural hazards, including increasing the future frequency and severity of hazards such as flooding, drought, and erosion.

We are mindful of the broad context of the legislation relevant to natural hazards. The Acts listed below provide a useful legislative context for the treatment of natural hazards under the RMA. They set out different aspects of natural hazard management from those contained in the RMA, where natural hazards are addressed in relation to how they interact with the sustainable management of New Zealand's natural and physical resources. A brief synopsis of these Acts is as follows:

- The **Civil Defence and Emergency Management Act 2002** (CDEMA) provides for the comprehensive management of hazards and risks, and emergency response and recovery, through coordinated and integrated policy, response and recovery, and through coordinated and integrated policy, planning and decision-making processes at the national and local level. It sets out the duties, functions and powers of central government, local government, emergency services, lifeline utilities and the general public.

  The underlying philosophy of the CDEMA is the '4 Rs' (Reduction, Readiness, Response, Recovery) to mitigate or avoid the impacts of hazards. As referred to above, RMA planning generally (but not exclusively) falls under 'reduction';[14]

- The **Building Act 2004** provides for the regulation of building work, the licensing regime for building practitioners, and the setting of performance standards for buildings. It manages natural hazards in relation to the construction and modification of buildings. Key sections of the Act are ss.35, 37 and 71–75; and,

- The **Local Government Act 2002** (LGA) provides the general framework, obligations, restrictions and powers under which local authorities operate. Key sections of the Act are ss.10, 14, 93-97 and 163. The Local Government Amendment Act 2010 encouraged councils to focus on core services as part of ensuring that council activities and decisions match the priorities of the ratepayers who pay for them.[15] It added Section 11A to the principal Act which identifies the avoidance or mitigation of natural hazards as a core service a local authority must have particular regard to in

[14] Ministry for the Environment (2010), Quality Planning Website – Natural Hazards http://www.qualityplanning.org.nz/plan-topics/natural-hazards.php. CDEM recognises reduction as identifying and analysing long-term risks to human life and property from hazards; taking steps to eliminate these risks where practicable and, where not, reducing the likelihood and the magnitude of their impact.

[15] Rodney Hide 2010, Decisions for better transparency, accountability and financial management of local government – the Local Government Act 2002 Amendment Act, p3.

performing its role. Other core services include network infrastructure, public transport services, solid waste collection and disposal, libraries, museums, reserves, recreational facilities, and other community infrastructure.

Other relevant legislation includes:

- The Environment Act 1986: sets out the functions of the Parliamentary Commissioner for the Environment (s.16) and Ministry for the Environment (s.31), including obligations in the management of natural hazards (see s.17, s.32);
- The Soil Conservation and Rivers Control Act 1941: makes provision for the conservation of soil resources, the prevention of damage by erosion and to make better provision for the protection of property from damage by floods;
- The Land Drainage Act 1908: establishes drainage districts and boards and powers of local authorities relating to watercourses and drains;
- The Forest and Rural Fires Act 1977: provides for the safeguarding of life and property related to fire in forests and rural areas; and,
- The Earthquake Commission Act 1993: makes provision with respect to the insurance of residential property against damage caused by certain natural disasters.

2.1.3 Natural hazard management in the RMA

Currently natural hazards are not specifically provided for under ss. 6 and 7 of the RMA. Nevertheless natural hazard management is a function of local authorities. A key aim of this review is ensuring that we have appropriate and sufficient provisions in the RMA to manage the risks associated with natural hazards.

We have considered the issues regarding the management of natural hazards in New Zealand. There is evidence to suggest that some issues take priority over managing the risks associated with natural hazards when making resource management decisions. We have considered a number of these, for example:

- Current and direct impact issues – these are typically prioritised in planning rather than taking steps to reduce long-term hazard risks. A recent hazard event can change this and lead to risk avoidance measures. This is illustrated by the decision not to allow development in the Te Matai Road area of Palmerston North following floods in 2004;[16]
- Private property rights – Local Government New Zealand contends, in relation to the management of flood risk, that even where hazard avoidance provisions are contained in RMA planning documents there is a failure to implement them due to the dominance of private property rights

[16] Glavovic, Saunders, Becker (2010), *Land-use planning for natural hazards in New Zealand: the setting, barriers, 'burning issues' and priority actions*, p692.

over matters of public interest.[17] Glavovic et al also suggest that "private property rights are held virtually sacrosanct" in land-use planning.[18] A more reflective and authoritative view however emerges from such cases as *Falkner v Gisborne District Council* in which Barker J held, "The RMA is simply not about the vindication of property rights, but about the sustainable management of resources";[19]

- Land development – The recent events in Christchurch have highlighted the lack of priority accorded to natural hazards relative to providing land development opportunities. It may be argued that development was given priority over the management of natural hazards. There is a lack of evidence as to whether this is happening on a wide scale. We anticipate that analysis of this issue will be better informed once the Canterbury Earthquakes Royal Commission has reported further; and,

- Resourcing – It has been found that multiple community needs and Government legislative requirements coupled with a limited rating base and staff resources, lead some councils to assign a lower priority to flood management activities.[20]

We, along with other commentators,[21] consider that while the law may be adequate to empower local authorities to effectively plan for natural hazards, it is not being effectively implemented for a variety of reasons, including:

- A lack of statutory recognition in Part 2 of the RMA;[22]

- Limited local planning capability;

- Shortcomings in governance and inter-governmental cooperation – including a lack of effective coordination between district and regional councils, and the activities of planners and emergency management staff; and,

- Underutilisation of available tools – there is little awareness of the range of tools available and many are not used to their full potential.

We are not advocating a no risk statute, but we consider that the RMA must be sensitive to the potential for risk to people and property to ensure communities can make well informed and active decisions about the risks they are prepared to carry.

[17] Local Government New Zealand. (2007) *Flood risk management - a position statement from local government*, p5.
[18] Glavovic, Saunders, Becker. (2010) p702.
[19] [1995] 3 NZLR, at 632.
[20] Local Government New Zealand. (2007) *Flood risk management - a position statement from local government*, p4.
[21] Glavovic, Saunders, Becker. (2010) p689.
[22] Section 7(i) does refer to "the effects of climate change", however. Climate change effects will increasingly exacerbate natural hazards, including the future frequency and severity of hazards such as flooding, drought, and erosion.

Recognising and providing for natural hazards management in s.6 would mandate natural hazard planning in the RMA and recognise the importance of natural hazards in resource management.

Recommendation: A provision requiring decision-makers to recognise and provide for issues around natural hazard risks should be incorporated in s.6 of the RMA – the wording of the provision to be, "*managing the significant risks associated with natural hazards*:"

2.1.4 Definitions

The definition of a natural hazard differs across legislation.

Section 2 of the RMA defines a natural hazard as: [23]

> *... Any atmospheric or earth or water related occurrence (including earthquake, tsunami, erosion, volcanic and geothermal activity, landslip, subsidence, sedimentation, wind, drought, fire, or flooding) the action of which adversely affects or may adversely affect human life, property, or other aspects of the environment.*

The Building Act and s.106 of the RMA characterise hazards in terms of the particular effect they have, or the physical conditions imposed, e.g. erosion, slippage or flooding. The RMA and the LGA02 include a hazard definition that describes the type of hazard itself (e.g. cyclones, floods, earthquakes, tsunami etc.) the action of which adversely affects or may adversely affect human life, property, or other aspects of the environment. The Building Code refers to physical conditions likely to affect the stability of buildings, building elements and site work (e.g. earthquake, wind, water and other liquids) while the Civil Defence Emergency Management Act 2002 defines a hazard as something that may cause, or contribute substantially to the cause of, an emergency.

Aligning the definitions of 'natural hazard' across all relevant legislation may facilitate integrated management and assist with interpretation. However, we recognise that the different purposes of each piece of legislation may mean that retaining the existing definitions is appropriate. For example, the RMA addresses, inter alia, the effects of activities on the environment but the Building Act deals with natural hazards in relation to the construction and modification of buildings.

We also note that the RMA definition as it stands may not cover all hazards (in particular, man-made hazards) unless they result in a natural hazard such as subsidence. For example, would a fire in a coal mine or a landslip caused by earthworks be considered a natural hazard or not? Or would contaminated land be considered a natural hazard? Is it appropriate for these types of hazards to be covered by a definition of a natural hazard? These questions do not seem to have caused many problems in resource management to date and we consider that this is not an issue that needs to be addressed at this stage.

[23] Notably, the Building Act definition covers a narrower range of events, being limited to erosion, falling debris, subsidence, inundation and slippage.

Recommendation: Retain the RMA definition of natural hazards. Further work should be undertaken on alignment of the definition across all relevant legislation, in particular to take account of the differing "return periods" for natural hazards.

2.1.5 Alignment with other Acts

Civil Defence Emergency Management Groups (CDEM Groups) are a core component of the CDEM Act 2002. A CDEM Group is a consortium of the local authorities in a region working in partnership with emergency services, amongst other things, to prepare CDEM Group Plans.[24]

Sections 66 and 74 of the RMA state that local authorities shall have regard to management plans and strategies prepared under other acts when preparing or changing any regional or district plan. A CDEM Group plan is such a plan but such is the importance of civil defence that we are of the view that it should be specifically referred to. There may be an opportunity to strengthen the requirement for local authorities to have regard to CDEM Group Plans in preparing and amending their plans and equally regional policy statements (refer ss. 61(2)(a)(ii), 66(2)(c)(i), and 74(2)(b)(i)). However, if Group Plans were specifically referred to in the RMA it would potentially elevate their importance over other types of plans such as transport, biosecurity and conservation plans.

We are also aware that the standard of CDEM Group Plans varies across the country and that some capacity building in this area may be required.[25] Given that variation, some greater degree of statutory obligation may encourage practice improvements. In addition, as noted above, the CDEM Act relies on the RMA to provide the "Reduction" aspect of the '4 Rs' and in our view sufficient emphasis should be afforded this planning function.

Recommendation: Amend provisions specifying matters to be considered in preparing RPSs and plans to specifically refer to CDEM Group management plans as a matter which must be considered.

2.1.6 Functions of local government

Sections 30 and 31 of the RMA outline the functions of regional councils and territorial authorities, including in relation to natural hazards. These functions are described broadly and are as a result quite similar. To set clear responsibilities, s.62 requires that regional policy statements (to which

[24] Under the Civil Defence Emergency Management Act 2002, every CDEM Group must prepare and approve a Civil Defence Emergency Management Plan (CDEM Plan). These plans must state and provide for:

- the local authorities that have united to establish the CDEM Group;
- the hazards and risks to be managed by the Group;
- the civil defence emergency management necessary to manage hazards and risks;
- the objectives of the plan and the relationship of each objective to the National Civil Defence Emergency Management Strategy;
- the apportionment between local authorities of liability for the provision of financial and other resources for the activities of the Group, and the basis for that apportionment;
- the arrangements for declaring a state of emergency in the area of the Group; and,
- the arrangements for cooperation and coordination with other Groups.

[25] Ministry of Civil Defence and Emergency Management, National Summary Database of National CDEM Capability Report 2012 [unpublished].

regional and district plans are required to give effect)[26] state "the local authority responsible ... for specifying the objectives, policies, and methods for the control of the use of land ... to avoid or mitigate natural hazards or any group of hazards".[27]

In theory, we consider that this is an appropriate approach to ensure that the risks relating to natural hazards are dealt with in the right plan and by the right local authority. In practice, however, we had some concerns about the extent to which regional policy statements fulfil their functions in relation to natural hazards under s.62.

We have reviewed an analysis of second generation RPSs and are of the opinion that while practice in this area is improving, the slow pace of change through the RPS process means that change to the existing framework is required.

The Taranaki second generation RPS, made operative in January 2010, details specific implementation methods for natural hazard policies to be used by the regional council and territorial authority. For example, the regional council will maintain and where appropriate, extend river level and flow, rainfall and wind, and volcanic seismic monitoring systems to monitor risks associated with natural hazards and territorial authorities may take into account the location, nature and potential extent of natural hazards when providing and planning for the provision of essential lifeline utilities within each district. [28]

We compared this to the first generation West Coast RPS made operative in 2000. The implementation methods outlined in this RPS do not clearly specify what the regional council and territorial authorities are responsible for in relation to natural hazard policies.

In the Canterbury region, the 1998 Regional Policy Statement had short-comings. An assessment of the RPS following the Canterbury earthquakes found that the policies contained in it were "somewhat obtuse" and that there was lack of clarity in role definition. The report also found that Canterbury's Proposed RPS (notified in June 2011) contains far clearer policies. [29]

This improved practice has been supported by 2005 legislative amendments requiring that district and regional plans "give effect to" regional policy statements. Prior to 2005, the Act required only that plans "not be inconsistent" with RPSs.[30] It is too early to see the full impact of these amendments on council practice as second generation district and regional plans are not yet operative. In our view, waiting for practice to change is not

[26] According to ss. 67(3)(c) (regional plans) and 75(3)(c) (district plans).

[27] Resource Management Act, s.60(1)(i) and 60(1)(i)(i). The Court of Appeal, in *Canterbury Regional Council v Banks Peninsula District Council* CA 99/95, also noted that, "It follows that the control of the use of land for the avoidance or mitigation of natural hazards is within the powers both regional councils and territorial authorities".

[28] Taranaki RPS 2010, pp98-100.

[29] Enfocus. (November 2011) *Management of Earthquake Risk by Canterbury Regional Council and Christchurch City Council*, Canterbury Earthquakes Royal Commission http://canterbury.royalcommission.govt.nz/documents-by-key/20111118.1015, pp 2-3.

[30] Resource Management Amendment Act 2005, ss. 41 and 46.

acceptable given New Zealand's natural hazard risk profile and its variable prioritisation in RPS, regional plan and district plan reviews.

Integrated management is particularly critical to successful planning for natural hazards. The evidence establishes that local authorities have not adequately coordinated their efforts, and the planning framework is fragmented and incomplete. Uncertainty as to roles and responsibilities, and barriers to information sharing, has contributed to this failure.

The starting point in managing natural hazards is the RPS, and for this reason, and those noted above, we consider it desirable that the RMA should be amended to give regional councils the lead function of managing all the effects of natural hazards (while retaining the usual ability to delegate to territorial authorities as and when appropriate). Nonetheless, territorial authorities should also retain their function relating to natural hazards in order to ensure that local issues and specific matters such as subdivision control continue to be addressed.

One combined regional and district natural hazards plan should be prepared under s.80 to address natural hazards on a region-wide basis. This may either be a standalone document, or included as part of comprehensive regional and district plans that incorporate other matters where this would be appropriate to promote the integrated management of natural hazards.

Furthermore, the plan should be required to be operative within three years of enactment.

Recommendation: Regional councils should have the lead function of managing all the effects of natural hazards. Territorial authorities are to retain their current function in regard to natural hazards.

Recommendation: There should be one combined regional and district natural hazards plan.

Recommendation: This plan should be required to be operative within three years of enactment of the empowering legislation.

2.1.7 Natural hazards information

We have identified a gap in local authority functions in relation to collection and provision of information on natural hazards. Section 35(5)(j) of the RMA requires local authorities to include "records of natural hazards to the extent that the local authority considers appropriate for the effective discharge of its functions". Availability of adequate information, and in some cases inaccessible or poorly distributed information, has hindered the implementation of legislation to manage natural hazards.

The Canterbury Fact Finding Report[31] found that while there was known generic information on liquefaction and lateral spreading during the study period, for most of that period, more specific information on liquefaction and lateral spreading risk was not shared and was not specifically factored into zoning and consenting decisions.

[31] Hill Young Cooper Ltd. (2011) Canterbury Fact Finding Project, pp 5-8.

The Quality Planning website identifies that regional councils may hold information at a scale that can be used by territorial authorities for resource consent applications, but the territorial authorities may not be aware of this information. Conversely, a territorial authority may have obtained useful information about hazards which could also benefit the regional council but may not have shared it. [32]

We consider that the legislation needs to be strengthened and guidance provided to local authorities to ensure information is gathered and made available.[33] We note that this issue may be addressed by regional councils through methods in the regional natural hazards plan.

Recommendation: Require local authorities to make information about natural hazards available to all other local authorities within their region. This requirement should be drafted to expressly override any constraints arising from other legislation on information sharing, including the Privacy Act 1993 and the Local Government Official Information and Meetings Act 1987.

2.1.8 Special provisions regarding the refusal of subdivision consent

Notwithstanding the provisions of any plans, s.106 of the RMA enables territorial authorities to refuse subdivision consent if:

- Land "is or is likely to be subject to material damage by erosion, falling debris, subsidence, slippage, or inundation from any source"
- "Any subsequent use that is likely to be made of the land is likely to accelerate, worsen, or result in material damage to the land, other land, or structure by erosion, falling debris, subsidence, slippage, or inundation from any source".

The section provides a backstop to local authorities where plans do not adequately provide for management of natural hazards in particular cases. Previously this section *required* local authorities to refuse subdivision consent on these grounds, but was amended to make refusal discretionary in 2003.[34] It may often be appropriate for local authorities to allow the subdivision of hazard-prone land. For example, where subdivision is required for farm land, not for a dwelling, and part of that land is not hazard prone, it may be appropriate to grant subdivision consent. Section 106 now allows council discretion in this area.

There are four key issues in relation to s.106:

[32] Ministry for the Environment. (2010), Quality Planning Website – Natural Hazards http://www.qualityplanning.org.nz/plan-topics/natural-hazards.php.

[33] This may have funding implications for regional councils.

[34] Resource Management Amendment Act 2003, s.44.

- Currently, consent may only be refused in relation to several specific natural hazard risks. It is not comprehensive or aligned with the definition of natural hazards;[35]

- For land to be "likely to be subject to" damage of the type described, there must be an actual occurrence, continuous or recurrent. An increased risk of the occurrence (or an increase in the likely adverse effects) does not satisfy the test for refusal of subdivision consent.[36] The Courts have interpreted this in two parts, as follows:

    - *"is likely to" – Case law establishes that likely does not mean more likely than not but only a real and substantial risk: Commissioner of Police v Ombudsman [1985] 1 NZLR 578n (CA);[37] and,*

    - *"be subject to" – There is some conflicting case law on whether land is "subject to" something if there is present knowledge of what is a real and substantial risk in the future. In the High Court case of Bosworth v Rodney CC HC Auckland A350/81; M4/82, 24 February 1983, the Court found that in relation to a known risk of erosion there must be an actual occurrence, continuous or recurrent – an increased risk of the occurrence does not of itself satisfy the test.*

      In Maruia Soc Inc v Whakatane DC 8/3/91, Doogue J, HC Rotorua CP162/88, partially reported at (1991) 15 NZTPA 65 the Court took the view, in relation to whether land was subject to inundation, that there was nothing in the words "subject to" that bound decision-makers to take into account only things that could be substantiated by history. The fact that a future event was likely was enough.

      However, the Court declined to apply s 106 in Kotuku Parks Ltd v Kapiti Coast DC EnvC A073/00, as, although a rare major event causing extensive inundation or erosion could occur any time on the particular coastline at issue, it is not standard practice to design for such extreme events. The application of sound engineering practice to a subdivision's design was enough to satisfy s.106.

    This means that land at risk of a natural hazard may not meet the test of being likely to be subject to the damage specified in s.106, as the natural hazard itself may not be likely (for example, liquefaction might only be likely if an earthquake actually occurred);

[35] Table outlining natural hazard risks enabling subdivision consent refusal, compared to definition:

Natural hazard risks (s.106)	Full list of natural hazards according to s.2 definition
• erosion • falling debris • subsidence • slippage • inundation from any source	any atmospheric or earth or water related occurrence (including earthquake, tsunami, erosion, volcanic and geothermal activity, landslip, subsidence, sedimentation, wind, drought, fire, or flooding) the action of which adversely affects or may adversely affect human life, property, or other aspects of the environment

[36] Simpson Grierson. (2009) Liability risks for councils re coastal hazard information (legal opinion), p9.

[37] Brookers commentary on the Resource Management Act 199, para A106.02.

- In its current form, the section only allows local authorities to refuse subdivision consents. It could be expanded to cover other resource consents as well, such as land-use consents issued by regional councils. This would provide a broader backstop to local authorities to refuse a consent in a wider number of cases; and,

- As noted above, the section no longer requires consent authorities to refuse consent, but only enables them to do so due to the change in wording from 'must refuse' to 'may refuse'.

It could be recommended that the list of risks justifying refusal of subdivision consent in s.106 be updated to reflect the definition of natural hazards in the RMA.

We consider that the wording "is likely to be subject to" should be changed to account for natural hazards which are less imminent but still present a significant risk. For example liquefaction as a result of an earthquake as discussed above. While, in an ideal world local authorities that have adequately provided for natural hazard risks in their plans, as required by ss. 30 and 31, should not need to use the s.106 provision at all, this is not the case in practice. Zoning precedes development and in many cases by years. We note that the Fact Finding Report into the Eastern Suburbs of Christchurch found that the majority of the land in the study had been zoned for residential purposes by 1962, whereas, reports on liquefaction risk were published in 1991. We are also acutely aware that subdivision is in most cases a controlled activity in district plans. When coupled with the difficulties of rezoning land from residential to a hazard zone, a mechanism such as s106 is in our view needed, but we do consider that the current wording of s.106 could be improved upon.

In that regard we have identified two alternative approaches to the wording of s.106 as follows:

- Retain the existing "may refuse" wording, but alter the "is likely to be subject to" wording to enable consent authorities to consider a broader range of eventualities. To align with the proposed new s.6(e), the provision should relate to the risk associated with any natural hazard, rather than simply the likelihood of an event. This would also better align with the definition of "effect", which covers "any potential effects of low probability which has a high potential impact"; and,

- Reverse the presumption, by providing that a consent authority must refuse consent unless the proposal would not significantly increase the risk associated with any natural hazard [arising from the current use of the subject site].

Recommendation: Section 106 be amended to expressly include liquefaction and lateral spreading, along with any other consequences of the events included in the definition of "natural hazard" in s.2.

Recommendation: Section 106 be amended to reflect the risk associated with any natural hazard, rather than the likelihood of the event.

Recommendation: The wording of section 106 be amended so that the consent authority must refuse consent where there is a significant increase in the risk associated with any natural hazard.

Recommendation: That the potential to extend the scope of s.106 to include land-use consents issued by regional councils be investigated.

2.1.9 Central Government direction on the management of natural hazards, outside of legislative change

At present there are no national policy statements (NPSs) or national environmental standards (NESs) dealing with the management of natural hazards except for the New Zealand Coastal Policy Statement which is required by the RMA.[38] Other government guidance includes information on the Quality Planning website, and publications like *Coastal hazards and climate change: a guidance manual for local government in New Zealand* published by the Ministry for the Environment.

National policy statement

Developing an NPS on natural hazards would provide national guidance to local authorities on the management of natural hazards. It could reinforce consistency and limit confusion.

This option could resolve some of the interpretation and implementation issues identified with natural hazards legislation. Depending on the composition of the NPS, this option could give greater priority to natural hazards in planning and resource consent decisions.

National environmental standard

An NES could provide guidance to local authorities on more technical standards, methods or requirements for the management of natural hazards. NESs could set criteria, methods and rules for the management of natural hazards. It could include agreed methodologies on risk assessment for natural hazards.

The RMA does not currently provide direction on a planning horizon for natural hazards, except for coastal hazards which are dealt with under the New Zealand Coastal Policy Statement 2010 (NZCPS). The NZCPS requires decision-makers consider coastal hazards over a 100 year timeframe.[39] Save the *Bay v Canterbury Regional Council* [2001] C6/2001, *Bay of Plenty Regional Council v Western Bay of Plenty District Council* [2002] A27/02 EnvC, and *Skinner v Tauranga District Council* [2002] A163/02 all provide discussion regarding the appropriate risk period to plan for when preparing regional and district planning documents. These cases point to a 100-year planning horizon for coastal hazards.

There may be an opportunity to provide national direction on planning timeframes around natural hazards in the form of an NES. An NES could be developed to provide direction to decision-makers on the planning horizons

[38] Note: some work has already been done on a NPS on flood risk and a NES on sea level rise but these have not progressed.
[39] NZCPS, Policy 10(2)(a), Policy 24(1), Policy 25, and Policy 27(2)(b).

for natural hazards. To allow for diversity in the effects and occurrence of natural hazards, timeframes should be developed for hazard types as appropriate.

We are of the view that the systemic failure to plan for the recent Canterbury events, which have in part lead to the review of ss. 6 and 7, need correcting. We note that the Enfocus report referred to "a lack of clarity about the level of risk that should be planned for..."[40] and that greater central government direction may also be warranted. We agree. The introduction of an NPS on natural hazards and an NES on natural hazards risk assessment should be promulgated.

Recommendation: That the Government promulgate a NPS or NES on the management of natural hazards.

[40] Enfocus. (November 2011) *Management of Earthquake Risk by Canterbury Regional Council and Christchurch City Council*, Canterbury Earthquakes Royal Commission, p15.

3. ROLE OF SECTIONS 6 AND 7

3.0 Introduction

This chapter sets out our discussion in relation to our rationale to amend the current ss. 6 and 7 of the RMA. It contains our reflections on the problem with the status quo and on what principles-based resource management is. It is based on our conclusion that decisions under the RMA are decided using an overall broad judgement rather than meeting biophysical bottom lines.

In this chapter we look at the guidance that should be provided relevant to resource management challenges facing New Zealand 20 years on since the RMA's inception, within the context of the Government's environmental and economic objectives and the broader second phase of resource management reforms.

Significantly, this review sits within the Government's Phase 2 RM work programme. The objectives of the programme are to consider:

- providing greater central government direction on resource management;
- improving economic efficiency of implementation without compromising underlying environmental integrity;
- avoiding duplication of processes under the RMA and other statutes; and,
- providing for efficient and improved participation of Māori in resource management processes.

This chapter traverses the issues identified in the first two points in particular. Chapter 7 of this report reflects further on these matters.

An important matter we wish to highlight is that the RMA is principles-based legislation. In terms of adopting a principles-based approach we turn again to the views of the Environment Minister at the passing of the RMA into law in 1991. The Hon. Simon Upton[41] highlights the history of the formation of the RMA in his paper in the Waikato Law Review. He outlines the various machinations of Part 2 prior to the Bill becoming law. It is clear from his paper that a principles-based approach was adopted in the drafting of the RMA from the outset. He also provides a reasoned justification for the current construct of Part 2 of the RMA, and it is a commanding read. He notes that: [42]

> *a statement of principle is concerned not with delimiting the outer margins of statutory instrument but spelling out its motivating core.*

[41] Hon. Simon Upton. (1995) "The Stace Hammond Grace Lecture: Purpose and Principle in the Resource Management Act", *Waikato Law Review,* vol 3 1995, at 17-55.
[42] Ibid, p23.

It is within this context we now traverse the problem with the status quo.

3.1 The problem with the status quo

As we discussed in Chapter 1, s.5 of the RMA has yielded decisions in the Courts that there is a broad definition of sustainable management that gives no primacy to bio-physical effects but embraces instead, a broad "integrated" approach in which ecological, economic, social and cultural values are given equal consideration.

Given that the overall broad judgement approach is required by the Courts in the interpretation of Part 2, we note there are several problems with the approach as it is currently represented in ss. 6 and 7.

3.1.1 Structure and length

The current ss. 6 and 7 are drafted on the basis of a biophysical bottom line approach. Although there is a (descending) weighting of matters defined by the language of ss. 6 and 7, the case law suggests that the hierarchy is not absolute. It seems the weight given to the current ss. 6 and 7 matters depends on the degree to which they each promote sustainable management in the circumstances. In some cases they appear to be treated as objectives in their own right.

We note that the original drafters saw the RMA as operating within a market context, where the protection or promotion of non-environmental values was largely the role of the market. As such, ss. 6 and 7 do not cover the full range of issues important for the application of section 5. They focus almost exclusively on the environmental factors that should be taken into account in decision-making rather than acknowledging the full range of environmental, social, economic, cultural, and health and safety considerations raised in the Act's purpose statement.

Commentators have also criticised the number of ss. 6 and 7 matters requiring consideration and the increasingly ad hoc nature of the list as changes have been made over the years. [43]

Questions arise around:

- Whether the large number of ss. 6 and 7 matters adds unnecessary complexity for decision-makers and makes decision-making more difficult, and whether the approach to be taken to weighing matters within, or between, sections is clear;
- The impact of changes that have been made to the list and how, if at all, these have affected interpretation in relation to s.5 (for example s.7(j) in relation to economic well-being);

[43] Initial criticism came from consultation on the Bill in the early 1990s (Review Group on the Resource Management Bill (1991)); court decisions indicate recognition that additional guidance will assist decision-makers; recent commentary (e.g. Counsell, Evans and Mellsop (November 2010); and Treasury (2011), which commented that Part 2's structure, "does not convey the type of balancing across multiple goals that is required for decision-making under the RMA".

- With s.5 in mind, what role ss. 6 and 7 may have in terms of matters that relate to social, economic and cultural well-being and the evolving resource management challenges for New Zealand; and,

- Implications for the way the RMA functions as a whole system from changes to ss. 6 and 7.

3.1.2 Lack of flexibility

The current Part 2 offers little in the way of flexibility to address new resource management issues facing New Zealand. The debate on whether a particular matter is a s.6 or s.7 issue in the current construction of Part 2 diverts focus away from the fundamental issue where proper focus needs to be – whether it promotes the sustainable management of natural and physical resources.

Sections 6 and 7 have been amended several times since 1991. These amendments include:

- moving the reference to historic heritage from s.7 to s.6 (2003);

- adding s.6(g) which looks at customary rights / activities (2011);

- adding the "ethic of stewardship" as s.7(aa) (1997); and,inserting references to energy and climate change in three places in s.7 (ss. 7(ba), (i), and (j)) (2004).

-

These changes have all occurred through separate processes to respond to issues as they have arisen since 1991. Two of the changes in particular have had the specific impact of potentially incorporating economic values more explicitly within the Act's matters to consider.

- Energy and climate change: Two of the new s.7 matters are intended to have a bearing on decisions to progress certain types of infrastructure. The new s.7 matters require decision-makers to consider, in exercising their powers, "*the efficiency of the end use of energy*" (intending a broad definition of "efficiency"), "*the effects of climate change*", and "*the benefits to be derived from the use and development of renewable energy*"; and,

- Iwi development: Recent changes to the understandings and legislative framework sitting around s.6(g), ("the protection of protected customary rights") and potentially the Māori provisions more broadly, may be used to support iwi decisions to develop resources. The Marine and Coastal Area (Takutai Moana) Act 2011 has explicitly stated that a customary rights group may derive commercial benefit from the exercise of their protected customary rights. Development objectives are otherwise silent in ss. 6 and 7.

In general terms, these changes reflect movement in government and community values over the past 20 years. The clear intention of the Government was to promote those values and therefore it has affected the

balance of matters intended when ss. 6 and 7 of the RMA were initially designed.

Flexibility is required if the economy is to be responsive to changing times. A system needs to change also with changing public perceptions. This flexibility needs to be counter-balanced with the perception that this flexibility in itself may be a disadvantage as variations may result from changing governments. There is also the need to provide long-term direction to such issues as resource allocation.

3.1.3 Lack of clarity

Aspects of the current ss. 6 and 7 of the RMA lack clarity, resulting in uncertainty for RMA users and in final decisions being made in the Courts in a timely and cost-effective manner. Court decisions can provide greater clarity, but decision-making through the Courts is costly as well as reinforcing an adversarial approach. In addition, the case-specific approach means decisions may have limited relevance for future situations. While some consider that case law has now provided a reasonable degree of certainty, commentators and/or the Courts have identified lack of clarity in the following areas:

- The RMA confers potentially competing/conflicting responsibilities to identify places and sites to be covered by ss. 6 and 7 (e.g. biodiversity). Different decisions can be made within planning instruments and subsequently by the Courts on consenting matters;[44]
- Key words and phrases are either not defined in the legislation, or not clearly defined. For example, “natural character” and “inappropriate subdivision, use and development”. Nor does the legislation provide methodologies or guidance for decision-makers on how to decide what to assess under ss. 6 and 7. Some examples include “outstanding natural features and landscapes”, “significant indigenous vegetation”, and “amenity values”; and,
- Phrasing in s.6 is inconsistent, which does not aid interpretation. “Protection”, “preservation” and “maintenance and enhancement” are all used in different clauses.

The most significant issue however is that the overall broad judgment approach which has been established by the Courts is not clearly articulated in the Act itself.

3.1.4 National versus local interest

A significant practice issue emerging is the inconsistent consideration of national, regional or city-wide interests in local decision-making. These wider interests often sit within the spheres of social and economic well-being and are not always well articulated as part of the broader sustainable management picture compared to other ss. 6 and 7 matters. It is noted that in the absence of NPSs and NESs that could help clarify the wider context, ss. 6 and 7 do not articulate the balancing of national and local considerations well.

[44] For example, Meridian Energy Ltd v Central Otago District Council and Otago Regional Council [2009] C103/2009 (Project Hayes).

There are matters of national importance stipulated (as per the head note and lead in to the current s.6), but we query whether the judgement was truly obvious that providing for renewable energy is any less a matter of national importance than protecting indigenous biodiversity – it depends on the circumstances having regard to the overall broad judgement required by s.5.

Local matters and adverse effects as guided by ss. 6 and 7 can often be the default focus of plan making, resource consents, and submissions to those processes. This can mean proposals are less ambitious or innovative than they might otherwise have been, or are subject to additional cost from mitigation creep or the growing trend for effectively requiring environmental compensation, in order to avoid site specific adverse effects, and thereby ease the resource management process. This practice may mean that some potential benefits are not readily achieved through the current resource management process, such as:

- avoiding adverse cumulative effects at a regional or national level;
- more efficient use of physical resources and previous investment; and,
- enabling wider benefits.

We note the RMA provides better mechanisms for expressing the national interest. NPSs and NESs have an agility not afforded by the current blunt objectives in ss. 6 and 7. As noted above, the sections contain language that is inherently subjective and therefore liable to variable interpretation. For example, references to "inappropriate" subdivision, use and development in ss. 6(a), (b), and (f). At issue has been the reluctance of the Government, until recently, to use the NPS and NES instruments.

We also note that intervention is also possible on matters of national significance (s.141B(2)). This provides the Minister with full discretion to decide when a proposal is of national significance. However, call-in intervention does not of itself resolve the issues of the legal status of such projects compared to the current s.6 matters.[45]

3.1.5 Problem definition

In light of the discussion above, we have identified three main problems with the current ss. 6 and 7. We conclude that the evidence supports the following problem definition:

1. There is a mismatch or disconnect between the overall broad judgement approach, and the current identification of matters of national importance in s.6 and the hierarchy of matters provided for in ss. 6 and 7.
2. There is difficulty in interpreting the RMA:
    a. How to approach Part 2 as a whole;

45 See, for example, *Unison Networks Ltd v Hastings District Council* (W11/09):
"[155] Under s.l50AA(6)(b) we are required to "have regard to the Minister's reasons for calling the matter in under section 141B", and that we have anxiously done. The legislative directive, however, is to have regard to as distinct from (say) to take into account, etc."

b. How to interpret each sub-section and some key words within them;

c. Where the responsibility for final policy decisions lies (i.e. with the executive or councils, or with the Courts); and,

d. A lack of clarity within the legislation itself as to the role of the other Part 2 provisions in facilitating the overall broad judgement approach required under s.5.

3. The list of matters in ss. 6 and 7 does not reflect contemporary New Zealand's current resource management values or priorities nor give sufficient reflection of all the matters that encompass the principle of sustainable management.

Within this understanding of a range of problems we now consider the alternatives available to us.

3.2 The alternatives

In Chapter 4 we outline that we are of the view that an amendment to ss. 6 and 7 is appropriate. We outline why this is the case. As we indicated in our Introduction, if the Government is content with the overall broad interpretation of the Act enunciated by the Courts, then we regard amendments to ss. 6 and 7 as necessary in order to ensure appropriate consideration is given to each aspect of the environment. If, on the other hand, the Government were desirous of reverting to the biophysical bottom line approach; then significant amendment should be made to the Act and s.5 in particular, because that is clearly not the law as established by judicial interpretation.

In Chapter 6 we express our view that these amendments alone will not achieve better environmental outcomes and we contemplate a number of supporting initiatives to address the system as a whole.

Table 1: Summary of options

Option	Overarching options
1. *Status quo – no change*	Retain ss. 6 and 7 as they are. This would mean no change to contents or operation.
2. *Delete ss. 6 and 7*	This option would involve deleting the sections and all matters listed, without replacing them or introducing any alternative.
3. *Include matters to be considered in an alternative location rather than in ss. 6 and 7*	The matters could be moved into a variety of locations, including: • Into the functions in Part IV, or by specifying which document (Part V) • Into NPSs. This option should also consider the role of NPSs and their importance, and how to manage the interaction between NPSs • Into new / other mechanisms, internal or external to the RMA (e.g. schedules, spatial plans)
4. *Restructure ss. 6 and 7*	Key options for re-structure are: • Look at how stem sentences might more clearly set out what sections mean • Align structure / contents with s.5 (e.g. by having a part about enable and a part about protect) • Clarify the hierarchy and potentially re-weight • Remove the hierarchy between sections
5. *Amend the lists of matters in ss. 6 and 7*	Key options for amending the lists in ss. 6 and 7 are: • Adding new matters • Deleting existing matters • Re-wording the existing matters to improve clarity
6. *Increase support for the achievement of Part 2's sustainable management purpose through the legislative framework* *(status quo plus)*	Ss. 6 and 7 could be elaborated on or supported through the legislative framework, by: • Incorporating matters in different parts of the Act or through instruments, such as the functions in Part 4; specifying which document in Part 5; NPSs; NESs; other mechanisms such as schedules or spatial plans; regulations under section 360; definitions; and/or national databases or schedules (e.g. for ONLs or natural hazards) • Providing a guide to Part 2 as a whole (for example through NPSs and NESs) • Clarifying who does what (Parts 4 and 5, including the role of the Courts in the various stages of decision-making

Option	Overarching options
7. *Support delivery / implementation* *(status quo plus)*	There are a range of non-statutory interventions which could assist delivery: • Providing non-binding guidance (e.g. template plans) • Providing funding / resourcing / information / expertise to support decision-makers • Looking at the role of Ministerial powers (s.25) and how these might support RM processes better (e.g. call-ins)
8. *Align with other Acts*	Options for achieving better alignment across Acts are largely out of scope for this review, although they have been considered. One general option is to develop an integrated planning Act incorporating functions from a range of different Acts (for example, the Building Act 2004 and the Public Works Act 1981).

By way of further background to our deliberations we now turn to our reflections on what principles-based resource management is. We now consider its continued place at the heart of our resource management law and the following is a reflection of our findings.

3.3 A principles approach

3.3.1 What is principles-based law?

The phrase "principles-based law" describes the phenomena of high-level objectives and principles being stated in Acts. A recent discussion paper by Consumer Affairs has this to say about the approach: [46]

> *Principles-based law refers to including relatively high-level objectives and principles in Acts of Parliament, without delving into over-prescriptive details. The advantage of principles-based law is that its purpose and objectives are clear, and affected parties have the opportunity to determine how they will comply with the principles without necessarily having to follow detailed and intrusive rules. The intention is that principles-based law is outcomes focussed and easier to comply with for businesses in particular. The intended outcomes for consumers/citizens and businesses are clearer.*
>
> *Modern New Zealand legislation tends to be principles-based, with carefully crafted "purpose" sections and rules that apply at a relatively general level. The function of purpose sections is to provide a guide to interpreting the law for its users, as well as for the courts when they are required to apply the law. Regulations and other delegated legislation which sit below the primary Act of Parliament are then used, as necessary, to set out more prescriptive and detailed rules.*

[46] Ministry of Consumer Affairs. (2010) *Consumer Law, a discussion paper* (see http://www.consumeraffairs.govt.nz/legislation-policy/policy-reports-and-papers/disscussion-papers/consumer-law-reform-a-discussion-paper/5.-principles-based-law).

We looked at this definition in light of the principles as presently contained in the current ss. 6 and 7 of the RMA. In Chapter 1, we outlined our views on the proper function of the current ss. 6 and 7 – they are there to edify the purpose statement in s.5 of the Act.

In some cases there may be a substantial overlap – for example, "maintenance and enhancement of the quality of the environment" with "maintenance and enhancement of amenity values".

We note that the Courts will not ignore the purpose statement in preference to the principles. However, we consider that the statement of purpose, being only a précis, may sometimes not accurately cover the whole scope of the Act, and individual provisions may go beyond it (for example, those relating to water conservation orders).

A core issue with highly aspirational principles is whether there is a corresponding provision saying that the existence of principles does not create legal right (e.g. as applies with the privacy principles under the Privacy Act 1993) or that the failure to take them into account or have regard to them does not give rise to a legal remedy.

The Ministry of Consumer Affairs has also spelt out some advantages and disadvantages of principles-based law: [47]

> *The advantage of principles-based law is that its purpose and objectives are clear, and affected parties have the opportunity to determine how they will comply with the principles without necessarily having to follow detailed and intrusive rules.*
>
> *There are risks with principles-based law. It may be seen as loose and ineffective if affected parties do not accept the principles and respond to the law by trying to minimise their compliance. It may also be more expensive in terms of compliance costs if businesses have to work out their own compliance programmes on a case-by-case basis, rather than simply following prescribed rules.*
>
> *Tensions may arise between the principles or objectives and the specific provisions in the law when they are applied to particular circumstances. How the courts deal with the tensions which might arise may create uncertainty which is unexpected, even if a just or fair result is achieved.*
>
> *Some lawyers in particular dislike law which includes high-level statements of purposes and principles and prefer detailed and prescriptive law where everyone knows exactly what the rules are because they are spelled out precisely. Australian law tends to follow a more prescriptive approach rather than being principles-based, so Australian Acts are often longer and more detailed than equivalent New Zealand Acts. Sometimes the prescriptiveness of more detailed law can become self-fulfilling because more distinctions and gaps appear as the law becomes more prescriptive, and new levels of detail are required to ensure the law anticipates those distinctions and gaps.*

We consider that a principles-based approach is still the right approach to be adopted for the RMA. Current Government policy favours a reasonable degree of devolution of responsibility and power to the regions and a hands-off

[47] Consumer Affairs, Ibid.

approach. This subsidiarity approach – where central government should only perform those tasks where the decision making is in the national interest – fits more comfortably with a principles based approach. [48]

Table 2 compares the features of principles-based drafting and detailed drafting. Our focus in resource management is on outcomes not outputs or processes. We consider a detailed drafting approach would not achieve the outcome of sustainable management. It would not provide for the weighing required in an overall broad judgement approach. It would be too rigid and inflexible in reaching good outcomes.

Table 2: Features of principle based drafting and detailed drafting compared[49]

Principles-based approach	**Detailed approach**
• Statements of principle easier to read and understand in the abstract but leave unanswered questions and challenges in application • Leave more scope for the exercise of discretionary judgment and opportunity for creativity so not as appropriate for areas of law where initial certainty is important • May give more administrative discretion which can be both a good and bad thing • More likely to have unforeseen effects due to their wider scope • Best approach for a regulatory environment to remain relevant and effective in a rapidly changing, sophisticated, global environment • Requires regulator to follow up with supervisory framework	• Greater certainty but can bury or obscure the principle on which the provision is based • Less scope for Courts, law enforces, and administrators to use discretion and have flexibility • Invites a literal interpretation, including rule of interpretation that a list is exclusive (as a presumption only) • Complete precision is never attainable

Having agreed that we must continue to adopt the principles-based approach for the RMA, we turned our attention to what principles should be adopted and how they should be expressed.

[48] Hassan and Sargisson. (1996) Resource Management Law Reform Group (1988), Working Paper 13 *Objectives for Resource Management: Why, What and How*, also identified that providing principles and objectives within legislation can support devolution by allowing government to provide direction without hands-on control.

[49] Adapted from Burrows and Carter. (2009) *Statute Law in New Zealand*, 4th Edition, Lexis Nexis.

3.3.2 Examples of principles-based law

In the first instance we explored the need for New Zealand environmental legislation to reflect international law appropriately and whether there were principles we needed to reflect. There are about 1,000 environmental law treaties in existence today; no other area of law has generated such a large body of conventions on a specific topic[50]. We took guidance from Ministry officials and noted that the RMA is not bound for the purpose of ratifying any declaration or treaty. Binding treaties such as the Kyoto Protocol, Montreal Protocol, and Rotterdam are ratified by other legislative arrangements.

In our inquiry, we explored other examples of principles-based legislation in New Zealand law. Environmental related legislation that contains principles based approaches, in addition to the RMA, include the:

- Heritage New Zealand Pouhere Taonga Bill 2011 cl. 3 and 4;
- Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill 2011 cl. 10 – 14;
- Building Act 2004 s.4;
- Fisheries Act 1996, ss. 9 and 10;
- Hazardous Substances and New Organisms Act ss. 4 – 8; and,
- Local Government Act 2002 s. 14.

The Environment Act 1986, Conservation Act 1987, Ozone Layer Protection Act 1996, Climate Change Response Act 2002, Fiordland (Te Moana o Atawhenua) Marine Management Act 2005, and Environmental Protection Authority Act 2011 are not principles-based – rather they create entities and prescribe functions – they are examples of detailed legislation. We also had regard to other New Zealand legislation.[51]

[50] Of particular relevance is:

- the Rio Declaration (the statement of environmental principles which surrounded the conference);
- the UN Framework Convention on Climate Change (which helped set framework for the Kyoto Protocol); the Convention on Biodiversity (protects species endangered from pollution and habitat destruction);
- the Non-legally Binding Authoritative Statement on Forests;
- the 1971 Convention on Wetlands of International Importance especially as Waterfowl Habitat ("Ramsar Convention"); and,
- the 1982 United Nations Convention on the Law of the Sea ("UNCLOS").

For more information on our international obligations, see http://www.mfe.govt.nz/laws/meas/.

[51] Care of Children Act 2004 ss. 4 and 5; Corrections Act 2004 s.6; Human Assisted Reproductive Technology Act 2004 s.4; Insurance (Prudential Supervision) Act 2010 s.4; Local Electoral Act 2001 s.4; Plumbers, Gasfitters, and Drainlayers Act 2006 s.32; and Policing Act 2008 s.8.

Our attention was drawn to a recent statement by Justice Arnold in relation to the Care of Children Act 2004:[52]

> *Plainly Parliament did not engage in a meaningless exercise in including s 5 in COCA. . . . Even if the section simply identified principles that the courts had previously applied, the fact that they are set out in s 5 does give them added significance. . . s 5(e) makes it clear that protection of a child's safety is mandatory and second, ... s 5(b) gives particular emphasis to the maintenance of continuing relationships with both parents. . . this means that there is some priority or weighting as between the various principles[(as suggested by Henaghan [2008] NZLJ 53)]. . . What s 5 does, then, is provide a structure or framework for consideration of what best serves a child's welfare and best interests, with a partial indication of weighting as between principles. While the principles are not exhaustive, s 5 should assist in achieving some degree of consistency and transparency in decision-making, as well as promoting informed decision-making. But that cannot disguise the fact that the assessment is an evaluative one, involving the identification and weighing of all factors (whether referred to in s 5 or not) relevant to the particular case. These include, of course, the views of the affected child.*

Overall we were of the view that the modern drafting and construction of the Heritage New Zealand Pouhere Taonga Bill 2011 (cl. 3 and 4) and the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill 2011 (cl. 10 – 14) provided us with the best direction. The information provisions of the Fisheries Act and the EEZ Bill were also interesting.

We explored extracts from principles-based environmental law in Australia, Canada and the UK. They clearly resemble the different legislative constructs and arrangements. The Commonwealth and states mix made it difficult to interpret in the New Zealand context. However, it was clear there is no one formula. The Queensland Sustainable Planning Act 2009 provided the best promise and direction for a drafting formula.

Looking through the various environmental treaties and legislation we identified that there were general principles which environmental law should consider, as follows:

- Principle of sustainability;
- Right to remedy;
- Proportionality and subsidiarity;
- Property rights;
- Regulatory efficiency;
- Transparency, information, participation and access to justice;
- Common but differentiated obligations;

[52] B v K [2010] NZCA 96 [page 16].

- Sovereignty over natural resources and the responsibility not to cause damage to the environment of other states or to areas beyond national jurisdiction;
- Polluter pays principle;
- Source principle;
- Precautionary principle;
- Principle of recycling or resource recovery; and,
- Principle of "zero tolerance".

It is our view that in general these principles pervade the current construct of the RMA in one form or another (for example, s.5 encompasses the principle of sustainability and s.32(4)(b) of the RMA embodies the precautionary principle). The question we asked ourselves however was, "Is the right weighting given to them?"

3.4 What principles?

We have therefore come to the point where we agree that principles should be recognised and provided for in ss. 6 and 7 – but what principles?

A planning principle is:

- statement of a desirable outcome derived from;
- a chain of reasoning aimed at reaching; or,
- a list of appropriate matters to be considered in making a planning decision.

While planning principles are stated in general terms, they may be applied to particular cases to promote consistency. Planning principles assist when making a planning decision – including:

- where there is a void in policy;
- where policies expressed in qualitative terms allow for more than one interpretation; or,
- where policies lack clarity.

As such a list of principles will aid the interpretation of s.5.

In reading the 1991 'Randerson Report' we were taken by the fact that many of the resource management issues are constant. However, we are aware that 20 years on, constraints on the natural and built environment have given rise to new issues (e.g. the affordability of housing, climate change, over allocated water resources, and limits for water quality being exceeded). The resource

management issues facing New Zealand are now more complex in terms of the problems they pose.

The state of the environment report *Environment New Zealand* 2007[53] had this to say about our environment:

> *New Zealanders' relationship with the environment is a defining feature of our national identity. We frequently use images of our natural scenery and rural heritage to present New Zealand to the rest of the world. Māori have a particular relationship with the environment as tangata whenua (people of the land).*
>
> *Increasingly, New Zealanders perceive the environment to be not only our iconic wilderness and rural areas, but also the urban areas where most of us live and work.*
>
> *New Zealand's natural environment is fundamental to our economic and social well-being. Our stunning landscapes, forests, and productive agricultural and horticultural land generate a significant part of New Zealand's wealth. Careful stewardship of our natural landscapes and resources is therefore important: both tourism and our primary production sectors rely on New Zealand's 'clean and green' reputation internationally.*

Most recently the briefing to the incoming Minister for the Environment[54] expressed the view that:

> *New Zealand faces the challenge of continuing to grow as it approaches limits to the natural resources upon which a large part of our economy relies. Growth within limits – green growth – requires New Zealand to manage its resources in a way that benefits current and future generations.*
>
> *To achieve this, we need a resource management system that is responsive in dealing with the issues of the day, but can also adapt seamlessly over time to emerging pressures and changing values. A dynamic system is one that can leverage interactions between the economy and the environment in a positive way.*
>
> *Over the past few decades, the resource management system has evolved through new legislation, institutions, and multiple amendments to address new and emerging issues. However, when the system is viewed as a 'whole', this evolution has resulted in inconsistencies and misalignment between core legislative frameworks. The priority over the coming term should be to redirect piecemeal changes to the system towards a system-wide approach that results in better integration and alignment.*

The resource management issues we face relate to air quality, climate change, biodiversity, soil contamination, water quality and quantity, landscapes, and the state of our oceans. While major sources of environmental pressure, include agriculture, transport, tourism, waste management, household consumption, and energy production and consumption.

Our review of the current provisions of ss. 6 and 7 reflects that many issues are missing. There is little or no reflection of issues specific to urban areas where the majority of us live, work and play. There is also no reference to

[53] http://www.mfe.govt.nz/environmental-reporting/soe-reports/.
[54] http://www.mfe.govt.nz/publications/about/briefing-incoming-minister-2011/.

infrastructure and surprisingly no reference to natural hazards. Our rationale for the addition of matters we see as missing follows.

3.4.1 Urban planning and the built environment

The report of the Urban Technical Advisory Group (UTAG) in July 2010 clearly identifies the need for greater guidance in Part 2.

These recommendations are: [55]

- *The RMA (s.6) be amended to include recognition of the importance of urban outcomes and that a National Policy Statement be prepared that includes direction on housing affordability in all considerations under the Resource Management Act." (Principal Recommendation 3, at 1).*
- *"Explicitly recognise the built and urban environment within the RMA by addressing the quality of the design and planning under matters of 'National Importance', modifying the definition of 'Environment' to specifically include the built environment, and extending the definition of 'amenity values'". (Principal Recommendation 15, at 4).*

Towns and cities[56] (see definition in footnote) are:

- Integral to national economic competitiveness, productivity and prosperity, including environmental, economic and social well-being[57];
- New Zealand's international gateways;
- Where 86% of New Zealanders live[58];
- Centres of social services and knowledge production – health, tertiary education;
- Places that offer great freedom of choice (about how to live, work, play) and provide deep labour markets[59]; and,
- Able to offer solutions to the environmental pressures of population and economic growth and increasing resource consumption.[60]

The evidence suggests that inconsistent understanding of and support for good urban planning and design occurs throughout New Zealand, but the symptoms of the problems (e.g. housing affordability) are experienced most acutely in

[55] www.mfe.govt.nz/rma/central/amendments/documents/urban-tag-report.pdf.

[56] A town or city is a deliberate critical mass and density of people, human-made structures and activities to leverage environmental, social, economic and cultural benefits [adapted from UNEP (2011) Towards a green Economy]. This definition can be extended to include the network infrastructure that supports them.

[57] Mare (2008), *Labour Productivity in Auckland Firms*, Motu Working Paper 08-12, p33.

[58] Statistics New Zealand (2004), *New Zealand: An Urban/Rural Profile*, accessed at http://www.stats.govt.nz/browse_for_stats/people_and_communities/geographic-areas/urban-rural-profile-update.aspx.

[59] Mare (2008), *Labour Productivity in Auckland Firms*, Motu Working Paper 08-12, p33.

[60] UN HABITAT (2011) *What Does the Green Economy Mean for Sustainable Urban Development?* UN HABITAT Expert group meeting, 17-18 February 2011, Nairobi; World Bank (2010) *Cities and Climate Change: An Urgent Agenda*, The World Bank, Washington; UNEP (2011) *Decoupling Natural Resource Use and Environmental Impacts from Economic Growth*: A report of the Working Group on Decoupling to the International Resource Panel, United Nations Environment Programme.

our large towns and cities. This is especially the case in those areas undergoing the greatest change, particularly areas with sustained growth. Supporting evidence includes:

- that district plans often do not offer sufficient justification or support to give urban design recommendations weight in the decision-making process under the RMA;[61,62]
- the benefits of good urban planning and design are missed because the qualitative nature of urban design assessment (e.g. amenity) is sometimes over-ridden in decision making by quantitative considerations (e.g. traffic counts, parking space numbers, or wind speeds); and, [63,64]
- there is variation and inconsistency of what constitutes good urban planning and design, leading to uncertainty of outcome(s) and delays for both applicants and councils.[65,66]

The mechanism of litigation and case law to legitimise good urban planning and design can deliver interpretation that responds to individual circumstances. However, this approach is laden with uncertainty, cost, policy gaps and fragmentation, limited applicability elsewhere, exclusiveness and sluggishness.[67]

We note that the issues around affordability of housing are the current focus of an inquiry by the Productivity Commission. Of relevance we note the following reference to the RMA: [68]

> *As a planning statute it is complex and fragmented, providing an uncertain regulatory framework that acts as a barrier to growth.*

We agree with the Commission but consider the issues are more about practice than they are of statutory interpretation. Nevertheless, the poor practice may in part be driven by the lack of reference in the current ss. 6 and 7 to urban matters. Lack of high-level direction results in inconsistent approaches to decision-making, and poor understanding of the role that planning and design plays, in the functioning of the urban environment.

We therefore reach the same conclusion as the UTAG that reference to the built environment should be included in Part 2. Where we differ is on how, and the extent to which, this is to be achieved.

[61] Ministry for the Environment. (2010) *Urban Design Panels – A National Stocktake*, p17.
[62] Ministry for the Environment. (2008) *Review of Urban Design Case Law*, p6.
[63] Ministry for the Environment. (2010) *Urban Design Panels – A National Stocktake*, p18.
[64] Morrison and Sumits. (2001) *Creating a Framework for Sustainability in California: Lessons Learned from the New Zealand Experience*, Pacific Institute for Studies in Development, Environment and Security, California.
[65] MWH. (2009) *Urban design Stock-take of Resource Management Plans and Policies.*
[66] Ministry for the Environment. (2010) *Urban Design Panels – A National Stocktake.*
[67] Ministry for the Environment. (2008) *Review of Urban Design Case Law*, p3.
[68] Productivity Commission. (December 2011) Housing affordability inquiry: Draft report, p92.

3.4.2 Infrastructure

There is no specific reference to infrastructure in the current ss. 6 and 7 of the Act. This has been repeatedly raised as an issue of concern to some groups, who assert that the lack of a specific reference to infrastructure is hindering its provision. The report of the Infrastructure Technical Advisory Group (ITAG) in January 2010 clearly identifies the need for greater guidance in Part 2. This rests on an assumption that less development is taking place either because the operation of the Act is stopping or scaling back existing projects, or because developers are choosing not to progress projects due to the perception of an unfriendly regulatory environment.

The Hill Young Cooper and Enfocus report estimated that 90 per cent of significant infrastructure projects successfully progress through the RMA.[69] A range of cases exist where infrastructure projects have been halted, limited or unnecessary mitigation imposed as a result of ss. 6 and 7 conflicts.[70] Such examples contribute to the perception that infrastructure is insufficiently well provided for in the RMA. These cases also fail to reflect proposals stopped in their tracks during feasibility assessment because of concerns how they would be treated under the RMA. [71]

Our views are supported by feedback from some government agencies to the Ministry for the Environment that suggest Courts and local authorities have become more willing to require high levels of mitigation and environmental compensation (over and above that already offered by an infrastructure provider) to address submitter concerns regarding ss. 6 and 7 matters.[72]

We are mindful of Hill Young Cooper and Enfocus's report which also identified that the inclusion of ss. 7(i) and 7(j) – about climate change and renewable energy –had some positive impacts for renewable energy projects. However, they have also commented that "the extent to which these positive impacts have influenced the decision of the Court has varied". For example, for wind farms in Makara, ss. 7(i) and (j) were seen to overcome adverse environmental effects, as compared to Project Hayes, where the benefits of wind power were recognised but considered to be outweighed by s.6 matters.

We reach the same conclusion as the ITAG that reference to infrastructure should be included in Part II. Again, where we differ is on how this is to be achieved.

[69] Hill Young Cooper and Enfocus. (September 2010),"Providing National Guidance on Infrastructure through the RMA" 1991. Report prepared for MfE and MED, p38.

[70] For example, Board of Inquiry into Contact Energy's 'Hauāuru mā raki' - Waikato Wind Farm Proposal, *Meridian Energy Ltd v Central Otago District Council and Otago Regional Council* [2009] C103/2009 (Project Hayes); *Motorimu Wind Farm Limited v Palmerston North City Council* [2008] NZEnvC 279 (26 September 2008); Board of Inquiry into NZTA's applications for the proposed Waterview Connection Proposal; Board of Inquiry into the Minister of Corrections' proposal for alterations to a Designation to provide for a men's prison at Wiri; and *Unison Networks Ltd v Hastings District Council* (W11/09).

[71] Hill Young Cooper and Enfocus, Ibid, p51.

[72] For example, *Motorimu Wind Farm Limited v Palmerston North City Council* [2008] NZEnvC 279 (26 September 2008), where the Environment Court accepted a range of mitigation measures proposed by the Council, and a substantial reduction in the number of wind turbines proposed for the Motorimu wind farm; Waterview connection, where additional costs to government of mitigation measures are estimated by the New Zealand Transport Agency to be in the tens of millions of dollars.

3.4.3 Natural hazards

As we have outlined in Chapter 2 there are challenges around interpretation and implementation of legislation to manage natural hazards. In this regard we consider there is a significant challenge in appropriately aligning natural hazard risk against other principles. The absence of reference to natural hazard management must be rectified.

3.4.4 Private property

We consider that apart from s.85, the RMA is devoid of reference to the fundamental principle of private property rights.

One does not have to go far to come to the conclusion that environmental regulation imposes a cost on landowners. As Professor Philip Joseph has identified:

> *The protection of property rights is constitutional in character, is deeply historical (flowing from the Magna Carta), and is inherent in the notion of liberty itself… Environmental controls affect both the use and exchange values of a landowner's property. Such controls must be weighed against the need to protect property rights.* [73]

Some contend that environmental regulation under the RMA imposes a disproportionate cost on landowners. It is clear that private interests can bear the costs of public regulation, with outstanding natural landscape areas and metropolitan urban limits being high profile RMA examples. Sections 85 and 185 of the RMA recognise, for limited purposes, the concept of a regulatory taking. These sections recognise that a district plan or a designation authorising public works may prevent the reasonable use of an owner's land or estate in land. We consider this appropriate. We apprehend that any recommendation to include reference to property rights in Part 2 of the RMA may be viewed by some as at least mildly controversial, and because we have not drawn our wording out of thin air, we wish first to retrace its legislative history.

The RMA's legislative genesis can be traced back well before the presentation to Parliament in 1989 of the initial Bill. Extensive public consultation and preparation of a number of discussion papers had taken place from 1988 onwards. One of these was *"People, Environment, and Decision Making: The Government's Proposals for Resource Management Law Reform"*, Ministry for the Environment, December 1988. The draft of the new Bill referred to:

> ensuring an effective balance between individual rights and public interest.

By the time the Bill went to Parliament in 1989, this expression had evolved into a principle of achieving:

> An appropriate balance between the public interest in achieving the purpose of this Act and any private interests in the reasonable use of private or public property.

[73] Joseph, P. (2001) "Property Rights and Environmental Regulation" found at: http://www.qualityplanning.org.nz/pubs/3657.pdf.

The Select Committee, which reported back in 1990 after hearing extensive evidence and submissions, recommended no change to this provision. That year's General Election saw the defeat of the Government, and the elevation to Cabinet of the Hon. Simon Upton, who was Minister for the Environment during the passage of the Bill through the new Parliament.

One of the new Minister's first steps was to appoint a committee to review the proposed legislation as it stood in the form to which it had evolved prior to the election. This committee, variously known as the 'Randerson Group', or the 'Review Group'[74], in due course published a discussion paper and later its formal recommendations.

The Randerson Group examined and revised Part 2, still retaining the former Government's reference to the "appropriate balance..."

We consider it appropriate now to reinstate this provision. If practice has shown us anything over the last 20 years, faint regard is being given by decision-makers to private property rights when imposing restrictions on them for the better public good. Our own experience leads us to the view that there is certainly a degree of unnecessary over-regulation in RMA plans. Examples include:

- Heritage zone provisions which apply to a 14 year old Lockwood;
- 1.2m limits on heights of front fences;
- Visual streetscape rules which apply to rear lots not visible from the street;
- Controls on 'notable trees' without the plan containing any criteria on what is 'notable';
- Blanket protection on all houses built prior to 1940;
- Blanket protection on all indigenous vegetation regardless of size;
- Requiring proponents of commercial/industrial development to assess the likely number of employees/hectare in the year 2031;
- Rules requiring lounge rooms to face the street;
- Requiring proponents of new buildings to show how they are designed to enable the building to be easily adapted to new uses in the future;
- The application of significant natural area rules to areas of gorse identified as native vegetation following upon an analysis of aerial photographs; and
- Use of permitted activity standards that negate practical implementation – e.g. earthworks volume thresholds set so low that no development can proceed without a consent.

The consequences of rules such as these were well spelt out by the Court in New Zealand Association of Radio Transmitters Inc v Wellington City Council

[74] This Committee was chaired by Mr Anthony Randerson (now a Judge of the Court of Appeal), the other members were Prue Crosson, Guy Salmon, Ken Tremaine and Brent Wheeler.

[2012] NZEnvC 8, a case in which the Wellington City's proposed height limits on amateur radio masts were set aside.[75]

We would not expect the introduction of our proposed s.7(e) to prevent all future examples of such poor practice/abuse of the system. We fear that too often those seeking to impose such controls fail to understand the impact of their proposed regulation upon the ability of "people and communities to provide for [their own] well-being". We anticipate that our proposed amendments will lead to more focus on achieving sustainable environmental outcomes, rather than the use of unnecessary regulations. We are also hopeful that the inclusion within a method-orientated s.7 of a recognition of property rights, would serve at the very least as a reminder of the need to keep controls to a level proportionate to sound environmental regulation, and perhaps provide those impacted by bad practices, a stronger foundation from which to make an appropriate submission.

3.4.5 Economic growth

The Government has identified six policy drivers that form the core of its economic growth programme:[76]

- Reviewing regulation and red tape;
- Delivering better, smarter public services;
- Education and skills;
- Innovation and business assistance;
- Reviewing the tax system; and
- Investing in productive infrastructure.

With respect to these points we deliberated for a long time over whether the notion of economic growth or well-being of the nation was already embodied sufficiently in s.5(2) of the Act. We also discussed whether the powers afforded to the Minister in s.147(5(a) in relation to proposals of national significance and their subsequent consideration in s.149P(1)(a) by the Board of Inquiry was an alternative. We considered these alternatives afforded

[75] In allowing an appeal against an overly restrictive Wellington City plan provision concerning the height of amateur radio masts the Court said:

> *In considering costs and benefits, the term costs is not necessarily confined to monetary costs, but in this instance it is informative to know what they might be. From evidence in other cases, the Court is aware that for the year beginning 1 July 2009 the deposit fee for an application to the Wellington City Council for a limited-notification resource consent was $5,000.00 That covered up to 30 hours work for a planner/advisor, eight hours administration, and $830 for disbursements. That fee is required to be paid at the time of lodging the application and if further Council officer time is required, that will be charged at the relevant charge out rate. If a hearing is required, Councillor time is charged at $85.00 per hour for a chair, and $68.00 for a member. If independent Commissioners are appointed for the hearing, they are charged at actual cost.*
> *We assume that most amateur radio applications would be dealt with on a Limited notification basis, but if they were fully notified, the deposit fee would be $12,500 with the same possible further charges.*
> *So it is almost certain that an operator wishing to erect a mast that will be fit for purpose will be faced with costs of not less than $5,000.00, and quite possibly considerably more, to obtain the necessary resource consent. How that might compare to the capital cost of a new set of radio equipment, we do not know.*

[76] The Treasury Budget Policy Statement 2011: http://www.treasury.govt.nz/budget/2011/bps/02.htm.

insufficient weighting to the benefits of proposals. In particular there are a limited number of proposals using the pathway offered in Part 6AA of the Act.

We considered that a full reflection of principles of sustainable management should be embodied in the principles of any new construct.

In this regard we examined the report of the Minister for the Environment's 2009 TAG considering the first phase of resource management reforms. That TAG identified that ss. 6 and 7 are now, "*rather a hotch-potch collection of sentiments, all directed at "environmental*" issue… rather than the economic, cultural and social questions which are also central to sustainability issues which lie at the heart of the Act"[77]. Indeed, the provisions are largely silent on economic matters as a whole which must also be weighed by decision-makers in making the overall broad judgement required.

A catalyst for our establishment and for the Phase 2 RM work programme is to improve the economic efficiency of implementation without compromising underlying environmental integrity. For its part, Treasury is calling for a radical policy review across the board aimed at boosting the economy. In its briefing to incoming Ministers, the Treasury[78] said lifting growth and productivity would require reforms in "*education, welfare, tax, regulation, science and innovation, infrastructure and the management of natural resources*". It has said the RMA should be reformed further to ensure appropriate consideration of economic objectives and incentives for better local level planning.

We have looked for a solution. Our attention was drawn to the inclusion of reference to economic development in the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Bill (EEZ Bill), currently before the Parliament, which contains a marine consenting process not dissimilar to that for resource consents. Despite this similarity, the purpose of the Bill is not "sustainable management" as in the RMA, but rather it "seeks to achieve a balance between the protection of the environment and economic development". The Environmental Protection Authority (EPA) will be responsible for the marine consent approval process and enforcing and monitoring compliance with the legislation. In applying this balancing test the EEZ Bill proposes that the EPA may grant an application "if the activity's contribution to New Zealand's economic development outweighs the activity's adverse effects on the environment".

We considered that economic matters in some form should be included in our proposed list to provide a rounding of the principles. We are concerned that lack of economic considerations would give greater weight to the purely biophysical environmental matters in making decisions under the RMA. We also considered whether we had said enough already with the inclusion of reference to the built environment and infrastructure. Another factor we weighed was the possible perception that the inclusion of economic matters relating to New Zealand as a whole could dominate the overall broad judgment approach required by s.5. We concluded that this could happen.

[77] Minister for the Environment's Technical Advisory Group. (2009) *Report of the Minister for the Environment's Technical Advisory Group*, Ministry for the Environment.
[78] http://www.treasury.govt.nz/publications/briefings/2011.

We consider the approach adopted for the EEZ Bill would not fit well in the RMA framework, where the overall broad judgement of s.5 should prevail.

For these reasons we have decided that plan and policy makers should recognise and provide for the significant benefits of the use and development of natural and physical resources. In this regard, it is important that our nation's environmental legislation does not inhibit the creation of an innovative and competitive business environment. Such a business environment requires policies and institutions that reward such behaviour and recognise such benefit. We note that the Government is moving towards setting sustainable limits on the use of key natural resources, such as water. An overall broad judgment approach should recognise transparent costs and benefits. For example, the potential benefit of increased allocative efficiency by 5% in water-scarce catchments is estimated at $100 million.[79]

For businesses, most notably in the primary sector, this will mean a need to innovate to maximise opportunities and productivity in an increasingly resource constrained world. It is an appropriate time to better recognise these benefits and opportunities in the Act and to strike a more open test of whether or not it is recognising both economic opportunities and protection of the environment in achieving the overall broad judgement approach. A direct inclusion of reference to benefits from use and development would recognise the overall broad judgment required by the Act.

3.4.6 Air, water and soil

Air, water and soil may be missing from the current ss. 6 and 7 but they are well represented in s.5(2)(b), and as such we consider no further reflection is required as they are comprehensively addressed in s.5 by virtue of which they are integral to the definition of sustainable management.

3.4.7 Planning practice

At the heart of most issues associated with the performance of the RMA is practice. There is no upfront guidance on performance expectation or practice direction. Many of these matters are already embedded in the Act – for example, section 21 – avoiding unreasonable delay in defined circumstances. The inclusion of such principles was common in most of the overseas "planning" statutes we investigated, for example, the Environment Protection and Biodiversity Conservation Act 1999 – Australian Commonwealth; and the Sustainable Planning Act 2009 – Queensland; and also within some New Zealand statutes – for example, information provisions in the Fisheries Act.

These generic principles are relevant in the overall construction. We consider a better articulation of principles is therefore in declaring more overarching direction for those with functions, powers and duties under the Act.

As well as referring in a revised s.6 to a number of environmental issues we are also recommending a new s.7 which places emphasis on a series of method and process matters. In Chapter 4 we provide the rationale for the inclusion of each provision we have sought to include in the revised s.7. In

[79] Ministry for the Environment. (2011) Regulatory Impact Statement National Policy Statement for Freshwater Management.

Chapter 7 we express our view that the revised s.6 alone will not achieve better environmental outcomes and we contemplate a number of supporting initiatives to address the system as a whole.

3.5 What weighting?

There is a current prima facie hierarchy in Part 2 where the s.6 values carry more weight than other matters listed in s.7 subject to the requirement of "achieving the purpose" of the RMA.

We are minded by the 2007 report of the OCED looking at our environment performance.[80] This report examines progress made by New Zealand since the previous (1996) review relative to its established domestic objectives and international commitments regarding the environment and sustainable development. Progress is occurring to address some of the concerns raised by this report. But we feel more could be done to strengthen national policy guidance in the RMA in the interest of promoting a level national playing field and improving regulatory efficiency, and to further integrate environmental concerns into economic and sectoral decisions.

We also refer back to the desire of this review to provide greater central government direction on resource management.

Our main discussion centres on whether the long-term principles set out in government policies should be set out in statute or articulated in a more flexible method – namely NPSs and NESs. We also consider that matters such as presently contained in s.6 should not be ends in themselves.

Our thesis is that the current construction of the RMA is too inflexible to reflect that society's objectives change with time and that central government as elected representatives of the people should be able to use the management process to pursue its aims and objectives. This is not a new notion, as it was contained in the working papers of the Resource Management Law Reform (RMLR) in the late 1980s.[81] We consider that the better approach is not to express objectives of national planning in the statute itself, but rather to rely on NPSs and NESs to deliver greater clarity. This way the objectives would not override the purpose of the Act. They would also not be relitigated in every instance as to their meaning.

We recognise there are risks associated with this approach in that some may perceive matters elevated or diminished, because of the removal of the words "national importance". We seek a change in mindset and for a new construct of s.6 that provides a better overall broad judgement outcome.

Our approach would also prevent the revisiting of ss. 6 and 7 matters through consenting decisions that have already been decided through planning instruments at either a national (NPS), regional (RPS or regional plan) or

[80] OECD. (2007) Environmental Performance Review: New Zealand available at http://www.oecd.org/dataoecd/6/6/37915514.pdf.

[81] Resource Management Law Reform. (1988) Objectives for Resource Management: Why, What and How. Working Paper No 13, p25.

district (district plan) level, because we seek for these instruments to define, for example, outstanding natural features.

We are also mindful of criticism that applying policy on national importance in NPS could be seen as a more "insidious" form of government expressing its direction. However, as did the RMLR,[82] we consider that such methods are not likely to result in these matters being given more weight than is currently afforded to them (everything being subject to the purpose of the Act set out in s.5); but that the ability of central government to give greater direction through the more flexible instrument of the NPS would enable a more reflective approach to be taken rather than one bound by the rigidity of a statute.

In summary what we reflect is a fundamental change in the way principles are expressed. We discuss this matter again when outlining our approach to drafting in Chapter 4.

3.6 Conclusion

In this Chapter we have looked at what constitutes sustainable management.

The current ss. 6 and 7 were intended to inform what the Hon. Simon Upton called the non-negotiable "environmental bottom lines" of s.5(2). As such the existing ss. 6 and 7 provide guidance on what those bottom lines comprised and hence are "environmentally focused". However, as we have been at lengths to point out, the Courts have clearly established that promoting sustainable management requires an overall broad judgement to be made, this being a mismatch or disconnect from the intent. On the basis of the interpretation of the Courts, ss. 6 and 7 are clearly unbalanced.

Although there is a (descending) weighting of matters defined by the language of ss. 6 and 7, the case law suggests the hierarchy is not absolute. It seems the weight given to the current ss. 6 and 7 matters depends on the degree to which they each promote sustainable management in the circumstances. In some cases they appear to be treated as objectives in their own right.

We conclude that the structure and content of ss. 6 and 7 are inconsistent with the judicial decisions on the application of s.5. Judicial interpretation of the language in ss. 6 and 7 extends beyond that originally conceived. Further, several of the s.7 matters are obsolete and rarely, if ever, determinative.

In our view, there is sufficient problem with the status quo provisions of the current ss. 6 and 7 of the RMA to warrant significant amendment. We have considered the alternatives, and consider that if we are to retain the overall broad judgement approach of s.5 then we consider in reaching that judgement it would be better guided by a well-rounded set of principles.

[82] Resource Management Law Reform. (1988) Objectives for Resource Management: Why, What and How. Working Paper No 13, p26.

4. PROPOSED SECTIONS 6 AND 7 OF THE RMA

We are proposing that s.6 be reworded as follows (with new defined terms underlined) and including a number of new or amended definitions to be included in s.2:

6. **Sustainable management principles**

(1) In making the overall broad judgment to achieve the purpose of this Act, all persons performing functions and exercising powers under it must recognise and provide for:

(a) The:

(i) natural character values of the coastal environment, wetlands, and lakes and rivers and their margins; and,

(ii) value of public access to and along, the coastal marine area, wetlands, lakes and rivers.

(b) The:

(i) physical qualities of outstanding natural features; and,

(ii) visual qualities of outstanding natural landscapes.

(c) The physical qualities of:

(i) areas of significant indigenous biodiversity;

(ii) areas of significant indigenous terrestrial habitats; and

(iii) areas of significant aquatic habitats.

(d) In relation to climate change:

(iii) managing the significant risks of climate change effects; and,

(iv) the benefits to be derived from the use and development of renewable energy.

(e) In relation to Māori:

(iv) the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, taonga species and other taonga;

(v) the exercise by Māori of kaitiakitanga; and,

(vi) protected customary rights.

(f) Significant values of archaeological sites, historic places and historic areas;

(g) The efficient use of natural and physical resources;

(h) The significant benefits to be derived from the use and development of natural and physical resources;

(i) Managing the significant risks associated with natural hazards;

(j) The planning, design and functioning of the built environment, including the reasonably foreseeable availability of land for urban expansion, use and development; and

(k) The planning, design and functioning of significant infrastructure:

(2) For the avoidance of doubt, subsection (1) has no internal hierarchy.

We are proposing a new s.7 as follows:

7. **Sustainable management methods**

All persons performing functions and exercising powers under this Act must:

(a) Achieve timely, efficient and cost-effective resource management processes;

(b) In the case of policy statements and plans:

(i) include only those matters within the scope of this Act;

(ii) use concise and plain language; and

(iii) avoid repetition.

(c) Have regard to any voluntary form of environmental compensation, off-setting or similar measure which is not encompassed by section 5(2)(c);

(d) Promote collaboration between local authorities on common resource management issues; and,

(e) Achieve an appropriate balance between public and private interests in the use of land.

These new sections are supported by the following definitions:

Natural character means the physical qualities and features created by nature, and may include such matters as:

(i) natural patterns and processes;

(ii) biophysical, ecological, geological and geomorphological aspects;

(iii) natural landforms, such as headlands, peninsulas, cliffs, dunes, wetlands and reefs; and,

(iv) places or areas that are wild or scenic.

Archaeological site means any place in New Zealand, including any building or structure (or part of a building or structure), that:

(i) was associated with human activity that occurred before 1900 or is the site of the wreck of any vessel where the wreck occurred before 1900; and

(ii) is or may be able, through investigation by archaeological methods, to provide evidence relating to the history of New Zealand.

[As per Heritage New Zealand Pouhere Taonga Bill]

Historic place

(a) means any of the following that form a part of the historical and cultural heritage of New Zealand and that lie within the territorial limits of New Zealand:

(i) land, including an archaeological site;

(ii) a building or structure (or part of a building or structure); and,

(iii) any combination of land, buildings, structures, or associated buildings or structures (or parts of buildings, structures, or associated buildings or structures).

(b) Includes anything that is in or fixed to land described in paragraph (a).

[As per Heritage New Zealand Pouhere Taonga Bill]

Historic areas means an area of land that—

(a) contains an inter-related group of historic places;

(b) forms part of the historical and cultural heritage of New Zealand; and,

(c) lies within the territorial limits of New Zealand.

[As per Heritage New Zealand Pouhere Taonga Bill]

Mitigation

a) means to lessen the rigour or the severity of effects; and

b) contemplates that some adverse effects from developments may be considered acceptable, no matter what attributes the site might have. To what extent the adverse effects are acceptable, is, however, a question of fact and degree;

c) but does not include any form of environmental or financial compensation or similar measure, except to the extent that such measure is to be provided on a voluntary basis.

Outstanding natural features and outstanding natural landscapes means features and landscapes that are identified in an operative provision of a regional policy statement as being outstanding on a national or regional scale.

Areas of significant indigenous biodiversity means areas identified in an operative provision of a regional policy statement which have species compositions or habitat structure or ecosystem functions, or a combination

thereof, that are of significance for the maintenance of biodiversity nationally.

Areas of significant indigenous terrestrial habitats means areas identified in an operative provision of a regional policy statement which have ecological attributes that are regionally significant.

Areas of significant aquatic habitats means areas identified in an operative provision of a regional policy statement which have physical, recreational or ecological attributes that are regionally significant.

4.0 Overview

Our Report represents the first government mandated review of ss. 6 and 7 in the 20 plus years since the RMA was enacted (being some six years longer than the entire life of the Town and Country Planning Act 1977 (TCPA)).

In their 1991 report addressing the then proposed 'matters of national importance'[83], the 'Randerson Group'[84] noted:[85]

> *Section 3 of the Town and Country Planning Act 1977...and its predecessors were recognition that there are certain matters which New Zealanders have long regarded as important elements in the physical, social and cultural environment which ought to be particularly protected. To a considerable extent, they represent preferences which will be more important to some than others. It is a matter of endeavouring to identify particular matters which can be applied with a reasonable degree of certainty and which will be generally accepted by the community as a proper subject for inclusion in such a provision. It is also important to ensure these principles do not become so rigid as to impose unreasonable costs.*

This statement from the group led by one of the country's renowned environmental lawyers (now a Court of Appeal judge) is as relevant in 2012 as it was in 1991.

National priorities change over time. For 14 years under the CPA three of the seven matters of national importance[86] had a rural emphasis.[87] However, none of those three national priorities survived under the RMA. Another significant regime change brought about by the RMA was the amendment of the 'coastal environment protection' requirement threshold from "unnecessary"[88] to "inappropriate".

[83] In clause 5A.

[84] Comprising Mr Anthony Randerson (Chairman) (now Court of Appeal Judge), Prue Crosson, Guy Salmon, Ken Tremaine and Brent Wheeler.

[85] Page 9.

[86] Section 3, TCPA.

[87] Paragraphs (d), (e) and (f) of s.3:

> (d) The avoidance of encroachment of urban development on, and the protection of, land having a high actual or potential value for the production of food:
> (e) The prevention of sporadic subdivision and urban development in rural areas:
> (f) The avoidance of unnecessary expansion of urban areas into rural areas in or adjoining cities:

[88] Section 3(c), TCPA ("the preservation of the natural character of the coastal environment and the margins of lakes and rivers and the protection of them from unnecessary subdivision and development:").

After two decades, we say it is time for a new approach and fresh statement of those RMA principles relevant for the second decade of the 21st century. This may also assist in deferring the day when the RMA is in need of wholesale review or replacement.

The new s.6, set out above, states resource management principles which combine elements of the current ss. 6 and 7 as follows:

- Continues all seven themes in the current s.6;
- Adds four new themes; and,
- Continues five of the 11 themes in the current s.7.

To support the principles approach, we propose a new s.7 of sustainable management methods for all resource management decision-making. This will augment the positive process and practice outcomes achieved under the Resource Management (Simplifying and Streamlining) Amendment Act 2009.[89]

4.1 New section 6 (sustainable management principles)

4.1.1 The new approach

The fundamental reason for our proposed new approach is to reaffirm the pre-eminence of the sustainable management statutory purpose and provide more certainty in the operation of Part 2.

As discussed, the Courts have not interpreted the legislation in the way it was promoted by the Government. Over the years, the approach taken by the Courts has evolved in such a way that what now prevails is the application of:

> *An overall broad judgment [which] allows the comparison of conflicting considerations and the scale or degree of them, and their relative significance or proportion in the final outcome.*[90]

In the later decision of *Genesis Power Ltd v Franklin District Council*[91], Judge Whiting described the role of the existing ss. 6 and 7 as being to:

> *...inform and assist the purpose of the Act. We may accord such weight as we think fit to any competing consideration under Part II, bearing in mind the purpose of the Act. These subsequent sections must not be allowed to obscure the sustainable management purpose of the Act. Rather, they should*

[89] For example:
- The significant improvement in local authority compliance with RMA time periods resulting from section 36AA of the RMA (a reduction in the number of late consents from 31% in 2008 to 5% in 2011, a fall in the number of late consents of approximately 10,000 a year).
- The consenting of major projects such as Tauhara Geothermal Power and the Waterview Motorway Connection in record times under the modified call-in regime.
- The marked reduction in trade competition cases resulting from Part 11A of the RMA (enabling projects such as Countdown Warkworth to be consented in just four months, compared to the six years taken to consent the Pak 'N Save at Wairau Road).
- The removal of consenting requirements for tree trimming, saving some $3 million a year.

[90] *North Shore City Council v Auckland Regional Council* [1997] NZRMA 59, pp 92-94.

[91] [2005] NZRMA 541, para 53.

be approached as factors in the overall balancing exercise to be conducted by the Court.

Given that the Act was to be "effects based" in the way foreseen by the Government; then it was appropriate that the Act should go on to prioritise/emphasise certain "environmental" qualities[92] that in the national interest should be protected or preserved. That was to be the role of ss. 6 and 7.

Furthermore, it was appropriate that the list of items to which ss. 6 and 7 were to give emphasis was confined to *"environmental"* issues, as it was those which had to be safeguarded. The role of ss. 6 and 7 was seen as being to flesh out the "environmental bottom lines" provided for in subsections 5(2)(a), (b) and (c).

However, as the original framers' intention has not come to be realised, in particular as the Courts have moved to an "overall broad judgment" approach; the exclusively "environmental" focus of s.6 has come to be seen as failing to enunciate the full range of relevant considerations set out in s.5. We also consider that there is marked and ongoing inclination by RMA decision-makers to treat the matters of national importance as ends in themselves over and above the purpose of the Act. And, even after two decades of practice and some local authorities moving towards their 'third generation' policy statements/plans, much time and cost is consumed in hearings over, for example, what is appropriate development; whether an area is an outstanding landscape regardless of what the operative plan says; and what are the amenity values of the area.

And, from time to time, there are cases that reflect the tensions inherent in a value laden environmental statutory code implemented and overseen by politicians (central and local government) and the judiciary.[93]

In reviewing the provenance of the RMA, it is useful to remind ourselves of the diverse philosophies vying for legislative recognition under the RMA.

In its December 1990 Discussion Paper,[94] the Randerson Group proposed the following draft Part 2 clauses:

- 4 – Purposes (there were two);
- 5 – Principles (there were nine); and,
- 5A – Matters to be recognised and provided for (significantly, not subject to the purposes) (there were five).

[92] The term "environment" is broadly defined in s.2 of the Act so as to include "social, economic, aesthetic and cultural conditions". When we use the term "environmental" in this report, we do so in the biophysical sense reflecting the matters focused upon in subsections 5(2)(a), (b) and (c).

[93] See, for example, Endnote A (at the end of this Chapter) for a relevant extract from *High Country Rosehip Orchards Limited v Mackenzie District Council* [2011] NZEnvC 387.

[94] Discussion Paper on the Resource Management Bill, pp 48-49.

The following extracts summarise the approach:[95]

> *"(8) Clause 5 is intended to be explanatory of clause 4 in the sense that it further describes the matters to which persons exercising functions and powers under the Act shall have regard to in order to achieve the purpose of the Act ...*
>
> *(11) The new clause 5A embodies various natural features which are to be recognised and provided for...this is in line with similar language used in section 3 of the Town and Country Planning Act 1977. The relative priority of this clause is indicated by the opening words "Notwithstanding anything to the contrary in sections 4 and 5";"*

In their substantive February 1991 Report,[96] the group (on reflection) proposed the following clauses to the Government:

- 4 – Purpose (one);
- 5A – Matters of national importance (five in number, and which were all subject to the purpose);
- 5 – Principles (eight in number); and,
- 6 – Treaty of Waitangi.

As to clause 5, the Report stated:[97]

> *7.1 ...The purpose of this clause is to identify further matters which have sufficient importance to be stated as principles, but which are not required to be included in the purpose clause or as matters of national importance. In the hierarchy, they come after purposes and matters of national importance but their significance should not be under-estimated. The clause must be read along with clauses 4 and 5A and provides important elaboration of the purpose clause of the Bill.*

Ultimately, Part 2 of the RMA was enacted with a single purpose (s.5), matters of national importance (s.6), other matters (s.7), and the Treaty of Waitangi principles (s. 8).

In the early years, the pre-eminence of the sustainable management purpose was clear, as reflected in this High Court judgment:[98]

> *Part II of the Act sets out its governing purpose and principles which infuse its decision-making and policy-formulating procedures. Of these, the purpose (being the promotion of sustainable management as defined in section 5) is paramount. At each operational level, policy statements, plans, and rules promulgated under the Act are linked back to the core provisions of Part II. Moreover, Part II must be considered in determining any resource consent application (s104 as amended).*
>
> *This represents a relatively new form of statutory organisation; the Act is structured around a fundamental purpose and various principles which*

[95] Page 7.
[96] Report of the Review Group on the Resource Management Bill.
[97] Page 11.
[98] *Faulkner v Gisborne District Council* [1995] 3 NZLR 622 at 632.

> *function as substantive guidance to decision-makers at a localised level. The Act itself is perhaps not so much a code as such (in that it merely sets certain standards and delegates much to the local authorities); it does, however, represent an integrated and holistic regime of environmental management....*

The experience, however, is that RMA decision-makers have not consistently kept faith with s.5 being paramount within the Part 2 framework.

While there are indicia of a descending hierarchy within the Part 2 principles, each of ss. 6-8 commence with the words "in achieving the purpose of this Act". This reinforces the scheme where each of the Part 2 principles are accessory to s.5, and a s.6 matter does not trump a s.7 matter.

In *Unison Networks Ltd v Hastings District Council,*[99] the Environment Court effectively penalised a proposal because the s.7 factor in favour of it was trumped by the countervailing s.6 factor in opposition:

> *[156] The benefits to be derived from the use and level of renewable energy is a matter to which particular regard is to be paid under s.7(j), along with kaitiakitanga (from the Māori perspective) under s.7(a). However, we are required as well to recognise and provide for Māori values under s.6(e)* ***as a matter of national importance, against the fact that no provision is contained in s.6 in relation to the use and development of renewable energy and the country's related needs****. Added to that from the Māori perspective is the directive to take into account the principles of the Treaty of Waitangi, including the protection of Māori taonga."* [Emphasis added]

In contrast, the Environment Court in *Genesis Power Ltd v Franklin District Council*[100] followed the correct path:

> [64] The cardinal and pivotal matter for us to bear in mind in weighing and evaluating the evidence and exercising our discretion, is the Act's single purpose as set out in section 5.
>
> . . .
>
> *[65] The proper application of section 5 involves an overall broad judgement of whether or not a proposal promotes the sustainable management of natural and physical resources. Such a judgement allows for comparison of conflicting considerations and the scale or degree of them, and their relative significance in the final outcome.*
>
> *[66] In North Shore City Council v Auckland Regional Council the Environment Court held that where, on some issues, a proposal is found to promote one or more of the aspects of sustainable management, and on others is found not to attain, or to attain fully, one or more of the aspects described in sub-sections 5(a), (b), or (c), it would be wrong to conclude that the latter overrides the former with no judgement of scale or proportion.*
>
> *[67] The remaining sections in Part II, subsequent to section 5, inform and assist the purpose of the Act. We may accord such weight as we think fit to any competing considerations under Part II, bearing in mind the purpose of the Act. We agree . . . that these subsequent sections must not be allowed to obscure the sustainable management purpose of the Act. Rather, they should*

[99] (W11/09).
[100] [2005] NZRMA 541 (EC).

> *be approached as factors in the overall balancing exercise to be conducted by the Court.*
>
> *. . .*
>
> *[69] Where Part II matters compete amongst themselves, we must have regard to the statutory hierarchy as between ss. 6, 7 and 8 as part of the balancing exercise. However, notwithstanding their importance, all of those sections are subordinate to the primary purpose of the Act. The High Court laid down this principle in NZ Rail, in relation to s.6(a).*

To ensure the pre-eminence of the sustainable management statutory purpose and require RMA decision-makers to truly treat the other provisions of Part 2 as accessory to s.5, we propose that the new s.6:

- States resource management principles and not matters of national importance;
- Has a direct link to s.5 via an express reference to the 'overall broad judgment';
- Continues the "recognise and provide for" language in the current s.6; and,
- Combines themes from the current ss. 6 and 7 together with new themes.

We now address each element.

4.1.2 Principles v matters of national importance

A fundamental change to the current s.6 is the proposed adoption of a resource management principles-based regime rather than matters of national importance.

In so doing, we emphasise three key points.

First, the language of a principles-based approach will ensure the s.6 provisions are seen as accessory to the overriding sustainable management purpose, and not as isolated ends in themselves. As some cases have shown, proposals which compromise the current matters of national importance can nonetheless promote sustainable management.[101] However, these cases are not always the norm and there has been rigidity applied by some decision-makers to the current ss. 6 and 7.

Second, the absence of directory language in our s.6 (for example, "protection" or "maintenance and enhancement") does not signal any intention to move away from securing high environmental outcomes. We consider the current ss. 6 and 7 model has resulted in real uncertainty and cost without corresponding environmental benefits. Our review has led us to the conclusion that a resource management principles approach is the appropriate statutory means to best support the sustainable management purpose while still achieving high environmental outcomes.

[101] *Genesis Power Ltd v Franklin District Council* [2005] NZRMA 541 (EC).

Third, the proposed resource management principles identify the central elements that are to be the subject of the particular RMA inquiry, hence the suggested language of "natural character values" and "visual and physical qualities". This, along with corresponding definitions, will provide more certainty in decision-making.

Potential concerns with this proposal may include:

- Principles carry less significance than matters of national importance, and thereby a loss of environmental protection;
- A loss of case law value with a corresponding cost from fresh litigation;
- A reduction of central government direction; and,
- Less consistency between plans across the country.

We address each issue in turn.

As to the nomenclature of s.6, the provenance of matters of national importance is instructive.

Under the TCPA, the matters of national importance (s.3) overrode the statutory purpose of planning under that Act (s.4).

It is perhaps unsurprising then that the Randerson Group originally proposed that the s.6 equivalent be titled as "principles" (and not "matters of national importance"), and that they were not to be subject to the sustainable management purpose clause. In discussing their subsequent reversion (to "matters of national importance"), the Randerson Group stated:[102]

> *6.3 ... to emphasise the importance to be attached to the matters in clause 5A [the s.6 equivalent] the review group suggests that it should follow immediately after the purpose of the Bill (clause 4) and should adopt the words of section 3 of the Town and Country Planning Act to "recognise and provide" for the various items as "matters of national importance".*

In hindsight, the attempt to translate the TCPA regime, where matters of national importance were pre-eminent (trumping even the purpose clause), into a fundamentally different new statute (where "national importance" was declared to be subservient to the sustainable management purpose) was always going to create a challenging tension.

Unsurprisingly then, the retention of the terminology of "matters of national importance" has had the perverse effect of leading some RMA decision-makers to be distracted from the sustainable management purpose of s.5 by placing undue emphasis on s.6. Hence, we propose a new s.6 set of "principles".

The concern with a potential loss of precedent value is a common refrain with any law reform measure. Taken to its logical limit, this argument would prevent the law from ever changing. As noted in the Randerson Report:[103]

[102] Page 10.
[103] Page 2.

> *There can be no doubt that the Bill will introduce sweeping changes to resource management in New Zealand and will set the framework for the relationship between development and the interests of environmental protection for a number of years.*

Twenty plus years on, we consider it is time for a substantive course correction which will have the major benefits of reaffirming the primary place of s.5, and reducing uncertainty and attendant cost arising from the operation of the current Part 2.

Our approach reinforces the place of s.5. We do not consider that would result in any loss of "national direction" as it is widely accepted that one of the failings of the RMA has been a long standing lack of such direction, hence a renewed emphasis on promulgating national policy statements and standards in recent years.

Similarly, the current Part 2 architecture has not produced any discernible consistency between plans across the country.

4.1.3 Overall broad judgment

The reference in the s.6 preamble to the "overall broad judgment" underscores, and provides continuity with, the nature of the s.5 evaluation as confirmed by the Courts.[104] It is noted that the case law has confirmed this approach for both plan and resource consent processes.

It also further ensures that s.6 serves rather than competes with the single purpose of the RMA.

In considering the overall broad judgement, the approach to be taken in plan making is to articulate the resource management issue and then to apply the principles in considering the appropriate planning response to the issue.

Section 6 principles will be applied to the extent that they are relevant to the issue under consideration.

Section 7 methods are to be applied in all circumstances. When considering a regional policy statement in the whole, it is reasonable to expect that the overall broad judgment will require recognising and providing for a full account of ss. 6 and 7.

4.1.4 Recognise and provide for

The proposed s.6 continues with the "recognise and provide for" expression in the current s.6.

The Randerson Report had this to say:[105]

> *It has been suggested that the use of the expression "to recognise and provide for" provides an obligation which is too absolute in its nature. The review group has carefully considered this suggestion and is of the opinion that no*

[104] See, for example, *North Shore City Council v Auckland Regional Council* [1997] NZRMA 59 at 92-94 (EC), cited with approval by the High Court in *S & M Property Holdings Ltd v Wellington City Council* [2003] NZRMA 193, para 39.
[105] Page 10.

> *undue difficulty should arise. The phrase has been used in the Town and Country Planning Act without difficulty and has not been construed as imposing an absolute obligation. Under the review group's recommended draft, the section will have to be examined and applied in the light of the overall purpose and principles of the Act. It also contains limitations within its own subclauses (notably in respect of the unnecessary subdivision, use and development of the coastal environment and in the protection of outstanding natural landscapes)."*

We agree that the statutory expression is not to be construed as imposing an absolute requirement, especially as each of the non-section 5 provisions of Part 2 are to be subservient to the preeminent sustainable management evaluation ("in achieving the purpose of this Act").

Potential concerns with this proposal include:

- Giving rise to unnecessary uncertainty/confusion and consequent litigation while the Courts endeavour to interpret Parliament's intent; and,
- Diluting the environmental imperative/reduce the weight, of each of the principles listed.

The first issue has been addressed above. We consider there will be a substantive improvement in certainty and attendant time and cost savings. As occurred with the RMA, there will inevitably be a bedding-in period. Though, it is to be noted that the current wording of the RMA has not prevented ongoing significant judicial "clarifications" through the life of the RMA, for example an evolving elaboration on the meaning and parameters of outstanding landscapes, the permitted baseline, the receiving and future environments, and environmental compensation.

Inherent in the principles-based approach is allowing decision-makers to assess the merits and evaluate what best promotes the sustainable management of natural and physical resources. That does not of itself lead to any diminution in environmental outcomes.

4.1.5 Internal hierarchy

Section 6(2) confirms that s.6 has no internal hierarchy in order to avoid issues over any priority of "competing considerations".[106]

Again, this will ensure there is no distraction from or conflict with the ultimate s.5 evaluation.

4.1.6 Two sections versus one section

We consider that rather than serving the sustainable management evaluation, there has been a tension with the presence of the current ss. 6 and 7. The concept of a hierarchy of matters to be given extra or special consideration in Part 2 of the RMA has less place in an overall broad judgment approach.

We therefore recommend that the one new section of resource management principles should replace the current ss. 6 and 7.

[106] See, for example, *Genesis Power Ltd v Franklin District Council* [2005] NZRMA 541 at [53] (EC).

There may be a view that this approach will effectively result in an elevation of s.7 matters into de facto matters of national importance under the new s.6. Such argument might be valid if there was retention of the expression "national importance" in a combined section. But, that is not the case with our proposal. The statement of non-hierarchical principles enables RMA decision-makers to provide and recognise for any relevant principles in the particular inquiry, but in a way which serves, rather than competes with, the sustainable management purpose.

4.2 New section 6 – clause by clause

4.2.1 New section 6(1)(a)

This clause continues and combines the themes currently contained in ss. 6(a)[107] and (d)[108]:

> **(1) In making the overall broad judgment to achieve the purpose of this Act, all persons performing functions and exercising powers under it must recognise and provide for:**
>
> **(a) The:**
>
> **(i) <u>natural character</u> values of the coastal environment, wetlands, and lakes and rivers and their margins; and**
>
> **(ii) value of public access to and along, the coastal marine area, wetlands, lakes and rivers.**

<u>Natural character values</u>

The coastal environment is important to New Zealanders.

There was an intense debate during the RMA law reform process as to whether the test for preservation / protection of the natural character of the coastal environment should be one of "unnecessary development" or "inappropriate development".

The Randerson Group[109] argued for the former (and thereby the continuation of the TCPA regime) while the Ministry for the Environment[110] argued for the latter. The Select Committee Report had this to say:

[107] "6...(a) the preservation of the natural character of the coastal environment (including the coastal marine area), wetlands, and lakes and rivers and their margins, and the protection of them from inappropriate subdivision, use, and development".

[108] "6...(d) the maintenance and enhancement of public access to and along the coastal marine area, lakes, and rivers".

[109] Pages 43 and 145 of the Randerson Report.

[110] Ministry for the Environment, (1991). *Departmental Report on Supplementary Order Paper No.22*, unpublished June 1991, pp 13-15.

> *50. The committee considers that in clause 5(a) the word 'unnecessary' should be changed to the word 'inappropriate' in recognition of the body of case law. The committee also considers a similar change to clause 5(b) to be necessary.*

In the event, the RMA was enacted with the "inappropriate development" test.

The two areas that have occupied the attention of decision-makers under the current s.6(a) have been "natural character" and "inappropriate development". There continues to be significant ad hoc focus on what those terms mean.[111]

The new s.6(1)(a) identifies that it is the actual values of natural character that are to be recognised and provided for, and this is assisted by a new definition:

> **Natural character means the physical qualities and features created by nature, and may include such matters as:**
>
> **(i) natural patterns and processes;**
>
> **(ii) biophysical, ecological, geological and geomorphological aspects;**
>
> **(iii) natural landforms, such as headlands, peninsulas, cliffs, dunes, wetlands and reefs; and,**
>
> **(iv) places or areas that are wild or scenic.**

This definition derives from that contained in Policy 13(2) of the New Zealand Coastal Policy Statement (2010), but is less prescriptive than that definition. Specifically, for example, the definition proposed here does not include "the natural darkness of the night sky" or "experiential attributes". That said, the proposed definition relates to "physical qualities and features created by nature" and the list in (i) – (iv) above are not exclusive, as natural character "may include such matters as" those listed.

Public access

The principle of the value of public access to and along, the coastal marine area, lakes and rivers and their margins is continued.

We propose, in addition, that the new s.6(1)(a) be extended to include wetlands given their increasing importance in the natural environment[112]. For example, it is estimated by the Department of Conservation that less than 10% of the original extent of wetlands remain. This would also be consistent with the current requirement in relation to the natural character of wetlands.[113]

[111] For example, New Zealand Rail v Marlborough District Council [1994] NZRMA 70; Minister of Conservation v Kapiti Coast District Council [1994] NZRMA 385; Harrison v Tasman District Council [1994] NZRMA 193.
[112] The importance of wetlands (and an imperative to protect them) is included in the NZCPS, the NPS on Freshwater Management and the proposed NPS on Indigenous Biodiversity.
[113] This would also be consistent with the RAMSAR Convention.

A potential concern with this proposal is that enlarging access to include wetlands could discourage the establishment, maintenance and enhancement of wetlands by private interests or on private land.

As noted, a principles approach accessory to the overriding sustainable management purpose signals no change in the importance and need to achieve high environmental outcomes. Also, as noted, the Courts have confirmed the potency of a central principles provision.[114]

The new s.6(1)(a) principle is not an absolute direction; nor is the current provision. Also, the current direction as to public access to areas involving private land has not created insuperable difficulties. Moreover, the addition of new s.7(e) would provide a corresponding balancing factor.

4.2.2 New section 6(1)(b)

This clause continues the theme currently contained in s.6(b)[115]:

> **(1) In making the overall broad judgment to achieve the purpose of this Act, all persons performing functions and exercising powers under it must recognise and provide for: …**
>
> **(b) The:**
>
> **(i) physical qualities of <u>outstanding natural features</u>; and,**
>
> **(ii) visual qualities of <u>outstanding natural landscapes</u>:**

There was no TCPA equivalent to the current s.6(b). The closest provisions were found in the schedules to the Act (matters to be included in plans).[116]

The Randerson Report had this to say:[117]

> *(ii) the reference to the retention of natural landscapes and land forms is also regarded as too broad for this provision. Instead, the review group has*

[114] The judgment of Justice Arnold in relation to the Care of Children Act 2004 (*B v K* [2010] NZCA 96 at p16):

> Plainly Parliament did not engage in a meaningless exercise in including s 5 in COCA. . . Even if the section simply identified principles that the courts had previously applied, the fact that they are set out in s 5 does give them added significance. . . While the principles are not exhaustive, s 5 should assist in achieving some degree of consistency and transparency in decision-making, as well as promoting informed decision-making. But that cannot disguise the fact that the assessment is an evaluative one, involving the identification and weighing of all factors (whether referred to in s 5 or not) relevant to the particular case. These include, of course, the views of the affected child.

[115] "6...(b) the protection of outstanding natural features and landscapes from inappropriate subdivision, use, and development".

[116] See:

> Schedule1: "4(c) identification of areas to be excluded from urban development, including land with **high aesthetic value**"
> Schedule 2: "5(ii) preservation/conservation of trees, bush, plants, or landscape of scientific, wildlife, or historic interest, or of **visual appeal**"
> Schedule 3: "2(a) – "preservation/conservation of flora and fauna and their habitats, and stretches of coastline of scientific, fisheries, or wildlife importance, historic interest, or of **visual appeal**" and "7 **aesthetic considerations/preservation of views**".
> [Emphasis added]

[117] Page 11.

> *recommended the use of the phrase "the protection of outstanding natural landscapes from unnecessary subdivision, use and development". The term "outstanding" is one used in the context of water conservation orders and its use is continued in clause 162A. Existing case law defining the expression "outstanding" will aid certainty in this area.*

In a subsequent Ministry for the Environment report, officials stated:[118]

> *Generally there was support for the retention of case law although one submission ... expressed concern at the subjective nature of the word "outstanding". This word is not seen as causing a problem as the plan will provide an interpretation of what is seen as outstanding in the district.*

That, however, has not been the experience. Not all plans identify outstanding natural features or landscapes. Moreover, the Courts have confirmed that the absence of an operative plan reference to an outstanding landscape does not prevent a decision-maker from identifying such an area for the purposes of s.6(b), even when the plan process determined that such area did not qualify for outstanding status.[119] In that instance, it is significant that notwithstanding the High Court determination, the Environment Court remained somewhat anxious over making an outstanding landscape findings given the very clear position on the operative plan.[120]

The current s.6(b) has generated real uncertainty and cost given the ad hoc approach to the identification of outstanding natural landscapes and outstanding natural features regardless of the position under operative plans. This is also reflected in the current revisiting of the ad hoc case law landscape constructs that have evolved under the RMA.[121]

This is the antithesis of the Supreme Court's dictum:[122]

> *[10] The district plan is key to the Act's purpose of enabling "people and communities to provide for their social, economic, and cultural well being". It is arrived at through a participatory process, including through appeal to the Environment Court. People and communities can order their lives under it with some assurance.*

[118] Ministry for the Environment, (1991) *Departmental Report on Supplementary Order Paper No.22*, unpublished June 1991, p15.

[119] *Unison Networks Ltd v Hastings District Council* (Wellington, CIV-2007-485-000896, 11 December 2007) (HC). See also *Te Runanga a Iwi o Ngati Kahu v Far North District Council* [2010] NZEnvC 372, para 168 – 169, where the Court considered that there was nothing to prevent it from finding that the subdivision site was an outstanding natural landscape. This finding was despite the subdivision site not being so identified in the district plan, but being adjacent to an identified ONL.

[120] See, for example, Endnote B (at the end of this Chapter) for a relevant extract from *Unison Networks Limited v Hastings District Council* (Decision W 11 / 2009).

[121] See, for example, the commentary on the Pigeon Bay factors (*Wakatipu Environmental Society Incorporated v Queenstown-Lakes District Council* [2000] NZRMA 59, para 72-80) (EC) and *Pigeon Bay Aquaculture Ltd v Canterbury Regional Council* [1999] NZRMA 209, para 56-58 (EC)) in subsequent cases such as *Unison Networks Ltd v Hastings District Council* at (W11/09), para 82-96 (EC) and *Final Report and Decision of the Board of Inquiry into the Hauāuru mā Raki Wind Farm and Infrastructure Connection to Grid* (May 2011), para 611.

[122] *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] 2 NZLR 597, p609.

The most recent example of fluidity as to what the current s.6(1)(b) means is in **High Country Rosehip Orchards Limited v Mackenzie District Council** wherethe original Wakatipu landscape factors[123], which evolved to become the Pigeon Bay factors[124], have now morphed into the 'Lammermoor factors'[125]:

> *[85] As it happens the first two Lammermoor lists were derived from two earlier decisions of the Environment Court: Pigeon Bay and Wakatipu Environmental Society Incorporated v Queenstown Lakes District Council...*[126]

The dilemma is captured in the following passage from *High Country Rosehip Orchards Limited v Mackenzie District Council*:

> *[83] However, there is little or no other reference to landscapes in the RMA apart from s.6(b). That has caused so much difficulty that we are reluctant to encourage analysis of the whole country in terms of landscapes as units of land. In our view a much more useful and scientifically based unit of land is the hydrological catchment, and that should be the starting point of most analyses. Only when considering areas where there may be an "outstanding natural landscape [or feature]" should the concept of a "landscape" be the starting point for resource management purposes. And when deciding that issue in any case where it is raised, the first question is "what is the relevant landscape?".*

There are three changes proposed by us.

First, the focus is on the actual attribute that is to be recognised and provided for (visual and physical qualities). We consider that to be necessary to align the concept of "landscape" with that taken from its dictionary definition, and not the much wider set of criteria that derives from the case law.

Second, to qualify a feature or landscape must be outstanding at the national or regional scale.

Third, to qualify for recognition, such areas will need to be identified in an operative regional policy statement, within a transitional period of five years. Support for identification in a planning instrument is to be found in the Environment Court decision in *High Country Rosehip Orchards Limited v Mackenzie District Council*.[127]

[123] The Court stated:

> [75] On the definition of "landscape'' as the word is used in s.6(b) of the RMA, in *Wakatipu Environmental Society Incorporated v Queenstown Lakes District Council* the Court wrote that:
>
> > ... [A] "landscape" involves both natural and physical resources themselves and also various factors relating to the viewer and their perception of the resources.
>
> The court also referred to a landscape as an "arbitrary cultural lumping" rather than as (necessarily) being" ... ecologically significant".

[124] *Pigeon Bay Aquaculture Ltd v Canterbury Regional Council* [1999] NZRMA 209 at (56).

[125] See, Endnote C (at the end of this Chapter) for the relevant extract from *High Country Rosehip Orchards Limited v Mackenzie District Council* [2011] NZEnvC 387.

[126] *High Country Rosehip Orchards Limited v Mackenzie District Council* at [85].

[127] *High Country Rosehip Orchards Limited v Mackenzie District Council*:

> [77] However, Policy 3A resulting from the Commissioners' decision stated differently: it described the Mackenzie Basin "... as having a distinctive and highly valued landscape containing outstanding natural landscapes ... ". **That causes problems because the reader of the district plan cannot find whether any particular area is within an**

We proposed a new definition as follows:

> **<u>Outstanding natural features</u> and <u>outstanding natural landscapes</u> means features and landscapes that are identified in an operative provision of a regional policy statement as being outstanding on a national or regional scale.**

4.2.3 New section 6(1)(c)

This clause continues and combines the themes currently contained in ss. 6(c)[128] and 7(h)[129]:

> **(1) In making the overall broad judgment to achieve the purpose of this Act, all persons performing functions and exercising powers under it must recognise and provide for:**
>
> **(c) The physical qualities of:**
>
> **(i) <u>areas of significant indigenous biodiversity</u>;**
>
> **(ii) <u>areas of significant indigenous terrestrial habitats</u>; and,**
>
> **(iii) areas of significant aquatic habitats.**

The current s.6(c) had no TCPA equivalent. However, the schedules to the Act may have influenced its development,[130] as well as the provision in the Town and Country Planning Act 1953 which provided for lands to be classified, "for the purposes for which they are best suited by nature or for which they can best be adapted".[131]

In the Randerson Group's December 1990 Discussion Paper, "indigenous vegetation" was dealt with alongside natural landscapes and landforms.[132] According to the Discussion Paper, the protection of natural landscapes was seen as one of the, "matters which New Zealanders have long regarded as important elements which ought to be particularly protected from unnecessary development".[133] This provision was then pulled into a separate section of its own in the Group's final report, which stated that:

> *The reference to indigenous vegetation has been expanded to include the habitat of indigenous fauna. It is difficult to justify the inclusion of one of the two without the other.*

> **outstanding natural landscape or not** … **Fourthly, and practically, in the meantime landowners and occupiers are entitled to know where they stand**." [Emphasis added].

[128] "6...(c) the protection of areas of significant indigenous vegetation and significant habitats of indigenous fauna".

[129] "7...(h) the protection of the habitat of trout and salmon".

[130] Town and Country Planning Act 1977. Schedule 2 provided for the preservation / conservation of trees, plants, or landscape of scientific, wildlife, or historical interest, or of visual appeal (5(ii)), while Schedule 3 provided for the preservation / conservation of flora and fauna and their habitats, and stretches of coastline of scientific, fisheries, or wildlife importance, historic interest, or of visual appeal (2(a)).

[131] Town and Country Planning Act 1953, s.3.

[132] Proposed section 5A(1)(a)(ii) – "the retention of natural landscapes, landforms, and indigenous vegetation", p49 of the Discussion Paper.

[133] Page 5.

The proposed new s.6(1)(c) extends the current s.6(c) to encompass a 'physical quality' attribute for terrestrial habitats and aquatic habitats.

We have added a new expression "indigenous biodiversity" in order to emphasise the importance of this biophysical value.

As noted, the inclusion of the current s.7(h) (protection of the habitat of trout and salmon) was not recommended by the Randerson Group and came in very late during the RMA reform process. The inclusion of this provision began when Cabinet added the term "the habitat of fish" to the Bill's proposed section on indigenous flora and fauna.[134] At the RMA SOP stage (June 1991), officials had this say:[135]

> *"With these measures, it could be considered whether it is necessary to include reference to the habitats of trout and salmon at all. These fish, however, are an important part of New Zealand in both the recreational sense and from a tourist viewpoint. They are also an important indicator regarding the "health" of freshwater habitats."*

The proposed provision encompasses both indigenous and exotic aquatic habitats. This reflects the spiritual and cultural importance of indigenous species to tāngata whenua as well as introduced species to the general community.

Given this, and the fact that some indigenous fish are health indicator species similar to salmonids, there is no need for a specific trout and salmon reference.

If, however, there is seen merit in carrying over current language, the new s6 (3)(iii) drafting could explicitly refer to both key native species and trout and salmon, for example:

> "(c) the physical qualities of:
>
> ...
>
> (iii) <u>areas of aquatic habitats</u>, including eels, galaxiids, trout and salmon:"

As to any concern that this previous s.7 matter will be elevated to one of greater prominence, we repeat the point that the s.6 "principle" approach does not replicate the "matters of national importance" regime. Rather, the language and structure of the principles will ensure the s.6 provisions are seen as accessory to the overriding sustainable management purpose, and not isolated ends in themselves.

As with landscapes, we propose that to qualify for recognition, such areas will need to be identified in an operative regional policy statement, within a transitional period of five years.

[134] March 1991 Cabinet Minute ENV (91) M 4/3.

[135] Ministry for the Environment, (1991) *Departmental Report on Supplementary Order Paper No.22*, unpublished June 1991, pp15-16.

We propose a new definition as follows:

> **<u>Areas of significant indigenous biodiversity</u> means areas identified in an operative provision of a regional policy statement which have species compositions or habitat structure or ecosystem functions, or a combination thereof, that are of significance for the maintenance of biodiversity nationally.**
>
> **<u>Areas of significant indigenous terrestrial habitats</u> means areas identified in an operative provision of a regional policy statement which have ecological attributes that are regionally significant.**
>
> **<u>Areas of significant aquatic habitats</u> means areas identified in an operative provision of a regional policy statement which have physical, recreational or ecological attributes that are regionally significant.**

In respect of "significant indigenous biodiversity" we note three things:

- the nomenclature used generally mirrors that in the proposed National Policy Statement on Indigenous Biodiversity;
- It is biodiversity at the national scale that is to be recognised and provided for, noting that regional scale attributes are more properly considered in terms of their being "significant indigenous terrestrial habitats" and "significant aquatic habitats"; and
- The current definition of "biological diversity" should be repealed.

4.2.4 New section 6(1)(d)

The new s.6(1)(d) continues and combines the themes currently contained in ss. 7(i) and (j)[136]:

> **(1) In making the overall broad judgment to achieve the purpose of this Act, all persons performing functions and exercising powers under it must recognise and provide for: ….**
>
> **(d) in relation to climate change;**
>
> **(i) managing the significant risks of climate change effects; and,**
>
> **(ii) the benefits to be derived from the use and development of renewable energy:**

The current ss. 7(i) and 7(j) were introduced by the Resource Management (Energy and Climate Change) Amendment Act 2004. Similar provisions relating to renewable and non-renewable resources had originally been suggested for inclusion in the Act in 1991 but did not proceed.[137]

[136] "7...(i) the effects of climate change".
"7...(j) the benefits to be derived from the use and development of renewable energy".

[137] For example, the Randerson Report's proposed s.5(1)(c), at page viii in Appendix VI.

The purpose of the 2004 amendment was to, "make explicit provision" for these matters in decision-making.[138] In particular, it was designed to provide a stronger legal mandate to align with the Government's energy and climate change objectives, set out in climate change policies and the National Energy Efficiency and Conservation Strategy. These objectives form part of obligations under the Kyoto Protocol.[139]

A key change in s.6(1)(d)(i) (from s.7(i)) is to provide a sharper focus for decision-makers by encouraging them to manage the risks of significant climate change effects, rather than the more prosaic approach of having particular regard to the effects of climate change. This is consistent with our approach for natural hazards.

Another change is the addition of a "significance" threshold for the management of the risks of climate change effects. This is consistent with other similar thresholds in the current s.6 (for example, "outstanding natural features" and "significant habitats of indigenous fauna").

As to any concern that this previous s.7 matter will be elevated to one of greater prominence, we repeat the point that the s.6 principle approach does not replicate the 'matters of national importance' regime. Rather, the language and structure of the principles will ensure the s.6 provisions are seen as accessory to the overriding sustainable management purpose, and not isolated ends in themselves.

4.2.5 New section 6(1)(e)

This clause continues and combines the themes currently contained in ss. 6(e)[140], (g)[141] and 7(a)[142]:

> **(1) In making the overall broad judgment to achieve the purpose of this Act, all persons performing functions and exercising powers under it must recognise and provide for: ….**
>
> **(e) In relation to Māori:**
>
> **(i) the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, taonga species and other taonga;**
>
> **(ii) the exercise by Māori of kaitiakitanga; and,**
>
> **(iii) protected customary rights.**

Section 6(e) continued the approach in s.3(1)(g) of the TCPA, while ss. 6(g) and 7(a) were new matters inserted into the RMA. As with other provisions for Māori in ss. 6 and 7, the inclusion of these sections was a deliberate attempt

[138] Resource Management (Energy and Climate Change) Amendment Act 2004, s3.
[139] Commentary on the *Resource Management (Energy and Climate Change) Amendment Bill*, p1.
[140] "6...(e) the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga".
[141] "6...(g) the protection of protected customary rights".
[142] "7...(a) kaitiakitanga".

to increase the recognition of Māori interests and values in resource management and honour the principles of the Treaty of Waitangi.[143]

This insertion followed the Resource Management Law Reform process where one of the four core groups was set up to provide a Māori perspective and seek Māori views.[144] A number of working papers were developed which explored options to improve deficiencies in how the planning system recognised Māori issues and values in resource management, and to provide better recognition of Treaty obligations.[145]

The addition of these provisions in ss. 6 and 7 was seen to directly reflect obligations under Article Two of the Treaty through the recognition of and provision for the special relationship tāngata whenua have with natural resources as taonga and their traditional role as kaitiaki.[146]

One change in the new s.6(1)(e) is the addition of the term "taonga species" in the new s.6(1)(e)(i). This reflects the importance of such taonga as confirmed by the Waitangi Tribunal in its June 2011 Ko Aotearoa Tēnei (Wai 262) Report.[147]

The other change is the removal of the term "protection" in the current s.6(g) ("protection of protected customary rights"). This is consistent with the approach taken with adapting the other current s.6 matters into a principles-based regime. It does not signal any dilution in the importance of that protected customary right.

As to any concern that this previous s.7 matter will be elevated to one of greater prominence, we repeat the point that the s.6 principle approach does not replicate the 'matters of national importance' regime. Rather, the language and structure of the principles will ensure the s.6 provisions are seen as accessory to the overriding sustainable management purpose, and not isolated ends in themselves.

4.2.6 New section 6(1)(f)

This clause continues the theme currently contained in s.6(f)[148]:

> **(1) In making the overall broad judgment to achieve the purpose of this Act, all persons performing functions and exercising powers under it must recognise and provide for:**

[143] Palmer, G. (1996) *'The RMA – has it achieved the intentions of its creators'* speech and RMLR Core group (1988) *'Directions for Change'.*

[144] Stephenson, J. (2001) *'Recognising Rangatiratanga in Resource Management for Māori Land: A Need for New Set of Arrangements?'* New Zealand Journal of Environmental Law (5), pp 159-163.

[145] For example, Working Paper No.28 '*Town and Country Planning and the Treaty of Waitangi'* (1988), Working Paper No. 29 '*The Natural World and Natural Resources: Māori Value Systems and Perspectives'* (1988), Working Paper 27. '*A Treaty Based Model – the Principle of Active Protection'* (1988).

[146] See Chapter 3 "Resource Management Act 1991" of *Environmental and Resource Management Law*, (3rd Edition), Derek Nolan.

[147] *Ko Aotearoa Tēnei - A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262) (June 2011) at pp 89-97.

[148] "6...(f) the protection of historic heritage from inappropriate subdivision, use, and development".

(f) significant values of archaeological sites, historic places and historic areas:

The expression heritage values was initially added into s.7(e) of the RMA as a new matter. Previously, heritage values had been referenced in the TCPA's schedules.[149] Like natural landcapes, the Randerson Group recognised in their Discussion Paper that the protection of heritage values was important.

The original heritage values clause contained in s.7(e) of the RMA provided for:

> (e) the recognition and protection of heritage values of sites, buildings, places, or areas.

That provision was elevated to the current s.6 in the 2003 RMA amendment[150].

The minority view in the Select Committee report on the Bill states:[151]

> *Of particular concern are the heritage provisions that will increase uncertainty and costs for landowners and businesses. Elevating the protection of historic heritage to the level of national importance will allow objectors to virtually veto developments. There is no mandatory requirement for landowners to be consulted in decisions made affecting their land. The introduction of new nebulous and undefined terms "cultural landscapes" and "ancestral landscapes" can only increase uncertainty and compliance costs.*

We agree with the comments on certainty and cost; indeed a quick computer search reveals that the term "cultural landscape" has arisen in over 50 Environment Court cases.

The Heritage New Zealand Pouhere Taonga Bill was introduced on 4 October 2011. The focus in the Bill is on archaeological sites, historic places and historic areas. In line with this new approach, we propose a principle which recognises and provides for the significant values of archaeological sites, historic places and historic areas, inclusive of utilising the definitions contained in that Bill.

We have added a "significance" threshold in order to maintain consistence with the other like principles in the new s.6.

We propose new definitions as follows:

> **<u>Archaeological site</u> means any place in New Zealand, including any building or structure (or part of a building or structure), that:**
>
> **(i) was associated with human activity that occurred before 1900 or is the site of the wreck of any vessel where the wreck occurred before 1900; and,**
>
> **(ii) is or may be able, through investigation by archaeological methods, to provide evidence relating to the history of New Zealand**

[149] Town and Country Planning Act 1977: Schedule 2, s 5(i), and Schedule 3, s 2(a) and 2(b).
[150] Resource Management Amendment Act 2003, section 4.
[151] Page 7.

Historic place:

(a) means any of the following that form a part of the historical and cultural heritage of New Zealand and that lie within the territorial limits of New Zealand:

(i) land, including an archaeological site;

(ii) a building or structure (or part of a building or structure); and,

(iii) any combination of land, buildings, structures, or associated buildings or structures (or parts of buildings, structures, or associated buildings or structures):

(b) includes anything that is in or fixed to land described in paragraph (a).

Historic areas means an area of land that—

(a) contains an inter-related group of historic places;

(b) forms part of the historical and cultural heritage of New Zealand; and,

(c) lies within the territorial limits of New Zealand.

The current definition of "historic heritage" should be repealed.

4.2.7 New section 6(1)(g)

This clause continues the theme from the current s.7(b)[152]:

(1) In making the overall broad judgment to achieve the purpose of this Act, all persons performing functions and exercising powers under it must recognise and provide for:

(g) the efficient use of natural and physical resources:

Section 7(b) follows on from the general sustainable management purpose, and was in line with the TCPA's approach of "wise use and management of New Zealand's resources." The provision was included and removed at various stages of the Resource Management Bill's development.

For example, it was not included in the Resource Management Bill introduced by Supplementary Order Paper on Tuesday, 7 May 1991. The clause had been removed from the 1991 Bill because it was considered "unnecessary", potentially in the context of a sustainable management purpose and market focus. As such, its later inclusion suggests the intent of reinforcing these values in the text of the matters to be considered.

The one change we proposed to this provision is the deletion of the phrase "and development" from the current s.7(b). Given our proposed new s.6 (1)(h), the proposed deletion will enable decision-makers to focus solely on

[152] "7...(b) the efficient use and development of natural and physical resources."

resource use efficiency, as opposed to addressing any relevant development considerations.

As to any concern that this previous s.7 matter will be elevated to one of greater prominence, we repeat the point that the s.6 principle approach does not replicate the 'matters of national importance' regime. Rather, the language and structure of the principles will ensure the s.6 provisions are seen as accessory to the overriding sustainable management purpose, and not isolated ends in themselves.

4.2.8 New section 6(1)(h)

This new clause introduces a new economic benefits provision:

> **(1) In making the overall broad judgment to achieve the purpose of this Act, all persons performing functions and exercising powers under it must recognise and provide for:**
>
> **(h) the significant benefits to be derived from the use and development of natural and physical resources.**

The rationale for this provision is discussed in Chapter 3 of this report.

4.2.9 New section 6(1)(i)

This new clause introduces a natural hazards provision:

> **(1) In making the overall broad judgment to achieve the purpose of this Act, all persons performing functions and exercising powers under it must recognise and provide for:**
>
> **(i) managing the significant risks associated with natural hazards:**

This provision has been included for the reasons discussed in Chapter 2 of this report.

We consider that the current RMA definition of "natural hazard" remains appropriate, but that there are a number of amendments that could be made to other provisions of the Act, to ensure that, for example, the terminology used in describing functions and powers aligns with this definition.

4.2.10 New section 6(1)(j)

This new clause introduces a built environment provision drawing from the Report of The Minister for The Environment's Urban Technical Advisory Group (July 2010)[153]:

> **(1) In making the overall broad judgment to achieve the purpose of this Act, all persons performing functions and exercising powers under it must recognise and provide for:**
>
> **(j) the planning, design and functioning of the built environment, including the reasonably foreseeable**

[153] Report of The Minister for The Environment's Urban Technical Advisory Group. (July 2010) www.mfe.govt.nz/rma/central/amendments/documents/urban-tag-report.pdf.

availability of land for urban expansion, use and development:

The rationale for this provision is discussed in Chapter 3 of this report.

4.2.11 New section 6(1)(k)

This new clause introduces an infrastructure provision drawing from the Report of the Minister for the Environment's Infrastructure Technical Advisory Group (August 2010)[154]:

> **(1) In making the overall broad judgment to achieve the purpose of this Act, all persons performing functions and exercising powers under it must recognise and provide for:**
>
> **(k) the planning, design and functioning of significant infrastructure:**

The rationale for this provision is discussed in Chapter 3 of this report.

4.3 The non-retained provisions of the current section 7

Six of the current s.7 other matters are not carried over into the new s.6.

4.3.1 Current section 7(aa)

The current s.7(aa)[155] provides for the ethic of stewardship. It came about as a non-Māori rendition of kaitiakitanga.

We note that "stewardship" is an inherent consideration within s.5[156], and the extended definitions of "environment"[157] and "effect"[158] are core elements of

[154] Report of The Minister for The Environment's Infrastructure Technical Advisory Group. (August 2010) www.mfe.govt.nz/rma/central/amendments/documents/infrastructure-tag-report.pdf.

[155] "7...(aa) the ethic of stewardship".

[156] Section 5 provides:

> **"Purpose**
> (1) The purpose of this Act is to promote the sustainable management of natural and physical resources.
> (2) In this Act, **sustainable management** means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while—
> (a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations;
> (b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and,
> (c) avoiding, remedying, or mitigating any adverse effects of activities on the environment."

[157] Section 2 provides:

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

[158] Section 3 provides:

> "**Meaning of effect**
> In this Act, unless the context otherwise requires, the term **effect** includes—
> (a) any positive or adverse effect;
> (b) any temporary or permanent effect;

section 5 and the regimes for policy/plan development[159] / resource consent decision-making[160].

We therefore consider s.7(aa) is unnecessary.

4.3.2 Current section 7(ba)

The current s.7(b)[161] provides for the efficiency of the end use of energy.

As noted, the current s.7(b) has been repeated in the new s.6(g). Also, the definition of "natural and physical resources"[162] explicitly encompasses "energy" which therefore makes its efficient utilisation a relevant consideration under the s.6(g).

We therefore consider s.7(ba) is unnecessary.

4.3.3 Current section 7(c)

The current s.7(c)[163] provides for the maintenance and enhancement of amenity values.

Amenity values are an explicit component of the environment (as defined) which must be sustainably managed under s.5.

We therefore consider s.7(c) is unnecessary for similar reasons as for s.7 (aa).

4.3.4 Current section 7(d)

We adopt similar reasoning in relation to the current s.7(d)[164] given "ecosystems", and therefore their "intrinsic values", is an explicit part of the environment (which definition includes the "constituent parts" of ecosystems) and is also explicitly provided for in s.5(2)(b).

Also, as noted, the new s.6(c) includes an indigenous biodiversity provision.

4.3.5 Current section 7(f)

The current s.7(f)[165] is another example of thematic repetition within Part 2.

The quality of the environment is writ large within s.5 and the RMA definitions noted above.

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

[159] For example, sections 45(2)(a), 56, 62(1)(g) and (i), 63 and 72.

[160] For example, sections 104(1)(a), 105(1)(a) and 107(1).

[161] "7...(ba) the efficiency of the end use of energy".

[162] Section 2 provides:

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

[163] "7...(c) the maintenance and enhancement of amenity values".

[164] "7...(d) intrinsic values of ecosystems".

[165] "7...(f) maintenance and enhancement of the quality of the environment".

4.3.6 Current section 7(g)

Again, s.7(g)[166] involves thematic repetition given that the finite nature of resources is expressly provided for in ss. 5(2) and 5(2)(a).

4.4 New section 7 (sustainable management methods)

The new section 7 approach

As noted, to support the principles approach we propose a new s.7 comprising sustainable management methods for all resource management decision-making. This will augment the positive process and practice outcomes achieved under the Resource Management (Simplifying and Streamlining) Amendment Act 2009.

The methods contained in the proposed s.7 are all new.

We anticipate that some may contend methods or process matters are incongruent with Part 2 of the Act. We say that process issues are responsible for much of the criticism that the Act has attracted almost since its inception.

As discussed in Chapter 3, if there is to be confidence in our environmental regulation, given the considerable powers conferred on local government under the RMA and LGA, it is crucial that process outcomes are achieved in a timely and cost effective manner and with unnecessary interference with the public's conduct of their affairs.

4.5 New section 7 – clause by clause

4.5.1 New section 7(a)

It is a trite observation that all participants in RMA processes bear a cost for their participation, be it in time or actual financial costs. Whether that is a cost as a resource consent applicant, or as a submitter on an application or the plethora of council policy statements and plans.[167]

This new method addresses this issue by requiring:

> **All persons performing functions and exercising powers under this Act must:**
>
> **(a) achieve timely, efficient and cost-effective resource management processes:**

This provision would be supported by s.21, located in the miscellaneous provisions of Part 3 of the RMA.

[166] "7...(g) any finite characteristics of natural and physical resources".

[167] The Ministry for the Environment's survey of local authorities 2010/11 revealed that the average time to move a plan through the process from notification to making it operative was 6.4 years. More than two thirds of plans took between three and eight years. The direct cost of plans is also substantiated. A 2008 Ministry for the Environment survey revealed the average cost for developing a plan is $1.9 million.

4.5.2 New section 7(b)

A famous judicial observation was made on the RMA in its early years by Cooke P (as the late Lord Cooke of Thorndon then was):[168]

> *Notable though the Resource Management Act is for the aspirations and principles embodied in it, their very generality seems to have led in the drafting to an accumulation of words verging in places on turgidity.*

A common and recurrent criticism of the RMA surrounds the promulgation of local authority policy and plan instruments – the length and cost of process, as well as length and turgidity of the instruments themselves[169]. That is probably not surprising given drafters have sought to amplify the manifold list of considerations in Parts 2, 4 and 5 of the RMA.

These issues are not assisted by the ubiquitous approach taken by local authorities as to what they include in their instruments, for example, vision statements and 10 or 50 year goals. These types of examples exacerbate the position with a lack of certainty over the requirements of a policy or plan.

Our proposed new s.7(b) addresses this issue by requiring:

> **All persons performing functions and exercising powers under this Act must:**
>
> **(b) in the case of policy statements and plans:**
>
> **(i) include only those matters within the scope of this Act;**
>
> **(ii) use concise and plain language; and,**
>
> **(iii) avoid repetition:**

Essentially we are directing best practice/common sense as a principle. Unfortunate, but necessary.

We even gave some brief thought as to whether it might be possible to introduce a page limit on the length of documents. The thought was only brief, but did reflect the frustration felt when even people with decades of experience in the field cannot read plans and be confident that they have correctly understood them.

[168] *Auckland Regional Council v North Shore City Council* [1995] 3 NZLR 18 at 20 (CA).

[169] The 2009 TAG report (Report of the Minister for the Environment's Technical Advisory Group, February 2009, pages 7-9) quoted a Ministry for the Environment survey that showed that:

- on average it takes local authorities 2.5 years of research and drafting and consultation before a proposed plan is notified;
- on average it takes 3.3 years to resolve all appeals after a council has made its decision on submissions; and
- the average time from start to finish of the plan process was 8.2 years.

The same report also stated that first plans on average cost $1.9 million (taken over all of New Zealand's local authorities, that is a total of $130 million.)

4.5.3 New section 7(c)

There has been a growing trend in recent case law to effectively revisit s.5(2)(c) of the RMA in the guise of the concept known as "residual effects", those that are not avoided remedied or mitigated) which in turn need to be "compensated".

A recent decision providing some much needed clarity was the Board of Inquiry's decision on the Transmission Gully Plan Change (October 2011):

> *[203] Accordingly, the Court in J F Investments appeared to use the terms set-off (offsetting) and environmental compensation interchangeably but identified the significance of proximity (in terms of distance, kind or quality) of the counter balancing action in assessing the value of that action. There comes a point at which the action being offered ceases to remedy or mitigate the adverse effect which has been created and is rather offered as an indirect but compensatory benefit for allowing that adverse effect. An example of the latter type of action would be an offer to make a cash payment to an environmental cause as a response to damaging a water body.*
>
> *...*
>
> *[210] What ultimately emerged from the evidence, representations and submissions of the parties was an acknowledgement that the term offsetting encompasses a range of measures which might be proposed to counter balance adverse effects of an activity, but generally fell into two broad categories. Offsetting which related directly to the values affected by an activity was in fact a form of remedy or mitigation of adverse effects and should be regarded as such. Offsetting which did not directly relate to the values affected by an activity could more properly be described as environmental compensation.*
>
> *...*
>
> *[246] Secondly, and in terms of offsetting, we record:*
>
> - *We agree with the end position of NZTA that offsetting is a subset of remedying or mitigating effects. Ultimately there was general agreement that compensation did not constitute offsetting but if it was advanced as part of any application for TGP, could be considered pursuant to s104(1)(c);*
> - *We are aware that offsetting is a concept already identified in the Freshwater plan under Policies 4.2.14, 4.2.15, 6.2.15 and 10.4. We think that it is generally apparent from those policies that offsetting is regarded as an aspect of avoidance remedy or mitigation although that is not always clear.*
>
> *[247] We have concluded that for the purposes of TGP the concept of offsetting is intended to encompass management methods which fall into the categories of remedying or mitigating (or possibly even avoiding) adverse effects. That being so there is no need to include reference to offsetting in the policy hierarchy proposed by NZTA even though NZTA continued to seek its inclusion in its closing submissions. [Emphasis added]*

The upshot of this analysis is that:

- Offsetting (as defined in Transmission Gully) is a type of measure which avoids, remedies or mitigates potential adverse effects; and,

- Compensation (as defined in Transmission Gully) is a separate concept. Compensation cannot be required or imposed by a consent authority but is something that may be offered by an applicant.

Given the pivotal role of s.5(2)(c) in the RMA, it is important that uncertainty is not created by inconsistent judicial interpretations.

Our proposed new s.7(c) addresses this issue by requiring:

> **All persons performing functions and exercising powers under this Act must: …**
>
> **(c) have regard to any voluntary form of environmental compensation, off-setting or similar measure which is not encompassed by section 5(2)(c):**

To assist in achieving the above, we propose that a new definition of "mitigation" be included, based on the conventional interpretation, as derived from case law, as follows:

> **<u>Mitigation</u>**
>
> **a) means to lessen the rigour or the severity of effects; and**
>
> **b) contemplates that some adverse effects from developments may be considered acceptable, no matter what attributes the site might have. To what extent the adverse effects are acceptable, is, however, a question of fact and degree;**
>
> **c) but does not include any form of environmental or financial compensation or similar measure, except to the extent that such measure is to be provided on a voluntary basis.**

4.5.4 New section 7(d)

The increasing number of unitary councils and examples of a 'one plan'[170] has the advantages of avoidance of repetition / duplication, and consequent certainty and reduced cost.

An important related objective is encouraging neighbouring councils to confront common resource management issues. One example is the failure by both the Waikato Regional Council and former Auckland Regional Council to integrate their coastal planning and decision-making over the Firth of Thames given their respective boundaries vertically bisect that area of the sea. Recent initiatives suggest that position may change via a joint coastal spatial plan.

It is for these reasons that we recommend the inclusion of a resource management method to promote collaboration between and across adjoining councils – regional and district, district and district, and regional and regional – on common resource management issues:

> **All persons performing functions and exercising powers under this Act must: …**

[170] Combined regional policy statement / plan, and in the case of Auckland Council combined regional policy statement / plan and district plan.

(d) promote collaboration between local authorities on common resource management issues:

4.5.5 New section 7(e)

We recommend that our proposed revised s.7(e) contain recognition of private property rights, in particular requiring that all those performing functions under the Act do so in a manner which recognises:

> an appropriate balance between the public and private interests in use of land.

Because we apprehend that this recommendation may be viewed by some as controversial, and because the concept has antecedents we first trace its legislative history.

The legislative genesis of the RMA can be traced back well before the presentation to Parliament in 1989 of the initial Bill. Extensive public consultation and preparation of a number of discussion papers had taken place from 1988 onwards. One of these was *"People, Environment, and Decision Making: The Government's Proposals for Resource Management Law Reform"*, Ministry for the Environment, December 1988. The new Bill referred to:

> ensuring an effective balance between individual rights and public interest.

By the time the Bill went to Parliament in 1989, this expression had evolved into a principle of achieving:

> An appropriate balance between the public interest in achieving the purpose of this Act and any private interests in the reasonable use of private or public property.

The Select Committee, which reported back in 1990 after hearing extensive evidence and submissions, recommended no change to this provision. That year's General Election saw the defeat of the Government, and the elevation to Cabinet of the Hon. Simon Upton, who was Minister for the Environment during the passage of the Bill through the new Parliament.

As set out in Chapter 3, one of the new Minister's first steps was to appoint the 'Randerson Group', which examined and revised Part 2, still retaining the former Government's reference to the "appropriate balance...".

The inspiration for our proposed revised s.7(e) is therefore derived directly from the work of those who prepared the original RMA reform proposals which were in place before the election of the new Government in 1990, and were adopted by the Randerson Group.

Our formulation is simpler in expression, but of the same intent and effect.

In our Introduction, we devoted some attention to tracing the evolution of the interpretation of Part 2 from an environmental bottom line approach as promoted by the Bills' new parliamentary patrons, to the interpretation adopted by the Courts of an "overall broad judgment" approach.

In terms of the environmental bottom line approach, there was not seen to be a place in ss. 6 and 7 of the Act for social, economic or cultural issues (the only

exception to this exclusion are the references to Māori issues in sub-sections 6(e) and 7(a)), as the substantial purpose of these sections was to flesh out the environmental bottom lines referred to in subsections 5(2)(a), (b) and (c).

Achieving a "balance" was regarded by the incoming Minister as inconsistent with his view of how the Act should work, and accordingly was dropped from the Bill when it was significantly amended by way of Supplementary Order Paper.[171]

However, as we have presaged in our Introduction, the Courts have not interpreted the Act in the manner in which many of its promoters, and in particular the Minister, had anticipated; and it is the overall broad judgment approach which has now prevailed.

It is therefore appropriate to reconsider whether the original intentions to include recognition of the full range of relevant factors should now be revisited.

Section 5(1) sets out that the purpose of the Act:

> is to promote the sustainable management of natural and physical resources.

Section 5(2) defines "sustainable management" to mean:

> managing the use, development and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while:
>
> (a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations;
>
> (b) Safeguarding the life-supporting capacity of air, water, soil and ecosystems; and,
>
> (c) Avoiding, remedying, or mitigating any adverse effects of activities on the environment.

If people and communities are to be so enabled, then it is obviously important that they be free to do so without the constraint of unnecessary, ineptly drawn or ill-targeted regulations. We think that the original Resource Management Bill of 1990 expressed it well in that there should be:

[171] In his Stace Hammond Grace lecture, the Hon. Simon Upton referred to his having "resisted" a "concerted last minute attempt by the Chairman of the Select Committee to have me reintroduce into clause 6 a provision balancing public interest in achieving the purpose of the Act with any private interests in the reasonable use of private or public property". He expressed the view that "such a move would have inevitably destabilised the notion of an environmental bottom line and replaced it with an indeterminate balancing exercise" – *1995 Waikato Law Review*, 17, p39. It is interesting to note however that the Ministry's advice to the Select Committee was that "it would be useful to retain the reference to the balance between public and private interests in the use of resources and the reference **to** efficient use and development of natural **and** physical resources." – Ministry for the Environment. (1991) *Departmental Report on Supplementary Order Paper No.22*, unpublished June 1991, p 13.

> an appropriate balance to the public interest in achieving the purpose of this Act and any private interests in the reasonable use of private or public property.

We have simplified this wording a little and recommend that our proposed s.7(e) include:

> **All persons performing functions and exercising powers under this Act must: …**
>
> **(e) achieve an appropriate balance between public and private interests in the use of land.**

As the means by which the activities are regulated is to a large extent a process issue; such a formulation would sit especially well into our proposed s.7.

Chapter 4 endnotes:

A. (per Footnote 91)
Extract from *High Country Rosehip Orchards Limited v Mackenzie District Council* [2011] NZEnvC 387, where the Environment Court stated:

> [462] The Environment Court has powers to amend the subordinate legislation contained in a district plan. The justification for these powers appears to be in one of the very few exceptions to the cornerstone principle that legislation should be enacted by elected representatives. Such exceptions acknowledge the roles of politicians (and their temptation to think short-term) in relation to the capital assets of society. The best known example is in the Reserve Bank of New Zealand Act 1989 in which Parliament has recognised that national politicians cannot trust themselves not to inflate (financial) capital. It dealt with the problem by entrusting the Reserve Bank to deliver ". . . stability in the general level of prices". There are some similarities in the RMA processes. In the statute which governs us, Parliament has recognised that, at a lower level, elected local (or regional) politicians can usually but not always be trusted to manage a district's (or region's) environmental capital so as to achieve sustainable management of natural and physical resources. For example, short term thinking may be encouraged by the fact that representatives seeking election gain no votes from future generations despite the latter having reasonably foreseeable needs for natural and physical resources. As a safeguard the legislature has given the court the humbler oversight powers in the First Schedule to the RMA. Parliament has then managed the risk of judicial activism by appointing Environment Commissioners to the court, and by directing the court's powers *to* achieving sustainable management under section 5 of the Act, while subjecting it to the cost-benefit and risk assessment of section 32 of the Act. It is also important to recognise that the Environment Court's role in ensuring the fundamental purpose of the Act - sustainable management - does not extend as far as planning people's welfare: the purpose of the Act is merely to enable people and communities to attain their own welfare.
>
> [463] The Environment Court's choices, like those of the local authority before it, while they involve a broad judgment, are not between competing but equally legitimate open-ended values. The court is bound by the values and their relative scale of importance as fixed by Parliament in the principles set out in ss. 6 to 8 of the RMA. As Lord Cooke stated for the Privy Council in *McGuire v Hastings District Council*: "These are strong directions, to be borne in mind at every stage of the planning process". Briefly what has gone wrong in this case is that, while the Council had correctly identified the issues relating to the outstanding natural landscape of the Mackenzie Basin, it failed to follow the directions given by Parliament.
>
> [Footnotes omitted]

B. (per Footnote 117)
Extract from *Unison Networks Limited v Hastings District Council* (Decision W 11 / 2009), where the Environment Court stated:

> [74] In preparing its district plan, HDC commissioned from a landscape consulting firm known as Isthmus Group a landscape assessment of the district. This study identified as an outstanding natural feature (ONF 7) an area described as Maungaharuru range - Titiokura saddle - Te Waka range. That area comprised the area which is now so identified in the district plan, but extended to stretch south over the proposed wind farm site to the extent that it included the area on which it is now intended to locate a number of the 34 turbines.
>
> [75] In reaching a decision on submissions to the plan, the Council resolved that the ONF should not extend over the waka feature (the hull) and its wake, and set the boundary of ONF 7 some 6.5km to the north-east of the application site. However, the division of the Court that heard Unison's earlier stage 2 proposal decided that the area initially proposed by the Isthmus Group was part of an outstanding natural feature or landscape under s.6(b) RMA. The Environment Court's ability to do so at law was upheld by the High Court.
>
> ...
>
> [125] We find on the basis of his evidence as discussed, supported by Ms Lucas (albeit with her somewhat different basis of approach) that Te Waka and the area to the south of it as delineated by Mr Lister is an

outstanding natural feature, both individually and as part of the wider range extending northwards. For the purposes of this case we do not need to make a finding about its northern limits. **We would add that we do not arrive at this conclusion without a measure of anxiety, having regard to the district plan with its background of change as to the limits of ONF 7.**

[Emphasis added and footnotes omitted].

C. (per Footnote 121)

Extract from *High Country Rosehip Orchards Limited v Mackenzie District Council* [2011] NZEnvC 387, where the Environment Court stated:

[79] We now turn to consider the evidence on whether the Mackenzie Basin is one or more landscapes. We adopt the approach stated by the court in *Maniototo Environmental Society Incorporated and others v Central Otago District Council and Otago Regional Council* (the Lammermoor case). There the court stated that to "describe and delimit" a landscape a local authority could usefully consider:

(1) a reasonably comprehensive (but proportionate to the issues) description of the characteristics of the space such as:

- the geological, topographical, ecological and dynamic components of the wider space (the natural science factors);
- the number, location, size and quality of buildings and structures;
- the history of the area; and,
- the past, present and likely future (permitted or consented) activities in the relevant parts of the environment.

(2) a description of the values of the candidate landscape including:

- an initial assessment of the naturalness of the space (to the extent this is more than the sum of the elements described under (1) above);
- its legibility - how obviously the landscape demonstrates the formative processes described under (1);
- its transient values;
- people and communities' shared and recognised values including the memories and associations it raises;
- its memorability;
- its values to tangata whenua;
- any other aesthetic values; and,
- any further values expressed in a relevant plan under the RMA.

(3) a reasonably representative selection of perceptions - direct or indirect, remembered or even imagined- of the space, usually the sub-sets of:

(a) the more expansive views of the proposed landscape ; and

(b) the views, experiences and associations of persons who may be affected by the landscape.

There is some repetition [between] the sets. For example the objective characteristics of the landscape go a long way towards determining its naturalness. More widely, the matters in the third set influence the perceptions in the second."

5. SOIL CONSERVATION AND RIVERS CONTROL ACT 1941, LAND DRAINAGE ACT 1908, AND RIVER BOARDS ACT 1908

Our Terms of Reference require us to consider whether ss. 6 and 7 can be improved to consider changes that would enable the incorporation of the Soil Conservation and Rivers Control Act 1948 (SCRCA), Land Drainage Act 1908 (LDA), and River Boards Act 1908 (RBA).

5.0 Overview

The SCRCA, LDA and RBA form part of a number of Acts that manage floods in New Zealand.[172] They are empowering statutes, providing essential operational powers for regional councils and territorial authorities to enter onto and use land to carry out works to protect property from flood damage and prevent soil erosion. The SCRCA, in particular, is the most important statute for taking active steps to prevent flooding or control its effects. It also contains some important clauses relating to soil conservation.

The three Acts were amended with the enactment of the RMA to make their powers subject to the RMA. In essence, the powers of local authorities under the Acts are subject to the procedures of the RMA. Although the Acts provide authorities with quite broad powers to enter and use property to manage flood risk, they are subject to existing protection for private property rights as part of the wider legal framework. Particularly relevant are provisions in the Public Works Act 1981, SCRCA and Local Government Act 2002 (LGA02). There are also controls under the RMA – for example, section 13 places a restriction on certain uses of beds of lakes and rivers unless expressly permitted by a national environmental standard, regional plan or resource consent.

Previous departmental reviews of flood legislation found that the SCRCA, LDA and RBA are dated, with many of their provisions repealed or redundant.[173] Specific issues identified with these Acts include drafting errors and inconsistencies, outdated enforcement provisions, redundant sections and terminology, outdated language and drafting conventions, and fragmented layout. They contribute to a fragmented and untidy suite of legislation for managing floods in New Zealand.

[172] Other Acts that manage floods include the RMA, the Local Government Act 2002, the Local Government Act 1974, the Building Act 2004, and the Civil Defence and Emergency Management Act 2002. Along with the SCRCA, LDA and RBA, these statutes cover a broad range of private property and public good issues relating to land development and management, land use controls, flood risk management and its funding, flood emergency response and recovery, and flood protection insurance.

[173] Previous reviews included a 2008 review entitled *Meeting the Challenges of Future Flooding in New Zealand* by the Flood Risk Management and River Control Steering Group, which included representatives from a number of government departments and regional and territorial authorities.

5.1 Legislative review

We have found little evidence to suggest that the legislative issues identified above are resulting in significant problems for local authorities in implementation and practice. However, we consider that there is an opportunity to transfer and repackage the Acts' essential powers for flood control and soil management into a modern legislative framework. This would reduce legislation and improve clarity, however, such work may not be a priority. An assessment of the costs and benefits of legislative change should be undertaken with appropriate consultation.

The Acts' fragmented and overlapping provisions create a relatively complex and finely balanced legal framework. A number of Local Acts, bylaws and water conservation orders potentially reference the Acts. There are also some active land improvement agreements and soil conservation reserves established under the SCRCA. In repealing the Acts, care would need to be taken to ensure that there are no unintended consequences affecting necessary powers of local authorities or existing arrangements.

Attached as Appendix 1 is an assessment of the key matters addressed by the three Acts that we think should be retained if they are transferred and repackaged into other legislation. This assessment was based on advice received by Local Government New Zealand (on behalf of the local Government River Managers' and Land Managers' Groups), Environment Canterbury and Greater Wellington Regional Councils. Further consultation with local government is likely to be necessary to confirm what elements in the existing legislation are required to continue essential flood control and soil erosion functions.

5.2 SCRCA, LDA, RBA in sections 6 and 7

Our Terms of Reference ask us to consider how the issues associated with the Acts can be remedied within ss. 6 and 7 of the RMA. Due to the operational nature of the Acts, we consider that it is not appropriate to include their essential powers under ss. 6 and 7.

We have already considered ways to make better provision in the RMA for natural hazards in general as part of our wider Terms of Reference (see Chapter 2).

We have considered options for transferring and repackaging essential provisions of the SCRCA, LDA and RBA into other legislation.

Recommendation: due to the operational nature of the SCRCA, LDA and RBA, their remaining provisions should not be incorporated into ss. 6 and 7 of the RMA.

5.3 Transfer into the RMA

Hazard planning, or more specifically flood risk management, is clearly a matter that falls within the purview of the RMA. On the face of it, there is

alignment with the purpose of the RMA (enabling people and communities to use resources within an environmental bottom line) and the avoidance and mitigation of the effects of soil erosion and floods. The functions of local authorities under the RMA also form a high-level match with provisions of the SCRCA, LDA and RBA in relation to floods and soil erosion.[174]

However, the flood-related provisions of the RMA focus on flood management through plans – controlling activities for the purpose of natural hazard mitigation / avoidance. They were not established to provide local authorities with specific powers to undertake physical works for flood protection. This is in contrast to the SCRCA, LDA and RBA, which primarily give local authorities the power to undertake physical works to manage flood risk. We therefore do not consider it appropriate to include in the RMA the powers and duties that are currently found in the SCRCA, LDA and RBA.

5.4 Transfer into the LGA02

If it was decided to rationalise and repeal the SCRCA, LDA and RBA, we consider that the best option would be to re-write and incorporate the Acts' essential powers into the LGA02. This option is supported by LGNZ.

As noted above, the remaining provisions of the Acts are operational in nature, while the LGA02 contains similar provisions. For example, Part 8 of the LGA02 provides for regulatory, enforcement, and coercive powers of local authorities, including the power to enter land. These coercive powers to enter private property or take land in order to carry out works are not dissimilar to the powers under the SCRCA, LDA and RBA.

While the Acts' powers related to flood management and drainage works probably fit best under the LGA02, the integration of some specific powers into the RMA could also be considered, such as provisions for flood management planning.

5.5 Create a standalone Act

Another option, supported by Greater Wellington Regional Council, is to consolidate the SCRCA, LDA and RBA into a single statute. This option would improve clarity and cohesion, however, creating a new Act is likely to be more costly and time consuming than transferring powers into existing legislation. It may also be hard to justify the creation of such a small Act (approximately only 20–30 useful provisions left in all three Acts, not taking into account potential duplication) in light of the Government's priority of less legislation. We therefore do not recommend this approach.

[174] For example, regional councils have functions under the RMA that include the control of the use of land for soil conservation purposes and the avoidance and mitigation of natural hazards, to control the use of water, and to manage the strategic integration of infrastructure with land use. Territorial authorities have functions to control the use and development of land including for the purpose of avoiding or mitigating natural hazards.

Recommendation: repeal and transfer important operational powers currently under the SCRCA, LDA and RBA into existing legislation, preferably the LGA02.

5.6 Other issues

5.6.1 Overlapping powers

The above discussion has focussed at a high level on options for identifying and integrating essential powers of the SCRCA, LDA and RBA into modern legislation. However, the legislation is fragmented and messy and repealing these three Acts is unlikely to be a simple case of cutting and pasting essential provisions into another Act.

The primary issue is that there appears to be a significant amount of duplication and redundancies of river management and land drainage provisions, both between these three Acts and between other Acts. In relation to the three Acts, each have separate provisions/processes for activities such as entry onto land for monitoring and works, acquiring land and compensation, protecting works, charges and penalties, etc.

Outside the three Acts, the LGA02 and the Local Government Act 1974 (LGA74) contain various sections relevant to land drainage and river management. These sections may overlap or conflict with the powers in the SCRCA, LDA and RBA.

For example, Part 8 of the LGA02 contains various generic powers relevant to river management/drainage, including power for territorial authorities to make bylaws specifically associated with water races and land drainage (s146(b) (i), (iii) and (iv)), for regional councils to make bylaws related to flood protection and control (s149(c)), powers for local authorities to enter onto and construct works on private land for water and drainage works (ss. 171 and 181), and acquire land for such works (ss. 189-90).

In addition, there are still a significant number of sections of the LGA74 containing operational powers relating to land drainage and river clearance that remain in effect. For example, Part 29 of the Act, entitled “Land Drainage and Rivers Clearance”, includes sections related to control of drainage channels and land drainage works (ss. 507-8, 511-15), powers of local authorities with respect to land drainage (ss. 509-10), and bylaw-making powers for protection of drainage works (s517). Part 29A deals with the transfer of ownership of drainage/water race schemes from local authorities to ratepayers. There are also some miscellaneous sections relating to land drainage in remaining Part 26 of the Act.

A summary of the provisions related to land drainage and flood management contained in the LGA02 and LGA74 is attached as Appendix 2.

We recommend a review of the relevant provisions in the SCRCA, LDA and RBA, as well as the LGA02 and LGA74, with a view to removing duplication, tidying and repackaging them. Further consultation with local government and other relevant agencies should be undertaken to determine what powers authorities need to carry out their duties. Particular consideration should be

placed on whether more generic powers (such as those under the LGA02 or a modification of these) would be sufficient in place of the highly prescriptive powers remaining under the SCRCA, LDA, RBA and LGA74. In repackaging these powers, care needs to be taken to ensure that local authorities do not lose important existing powers allowing them to effectively address flood risks to their communities.

According to LGNZ, previous amendments to the SCRCA, LDA and RBA had repealed some provisions that local authorities found useful for carrying out their duties. In particular, LGNZ drew our attention to the repealed section 149 of the SCRCA, which enabled bylaws to be made to require people to maintain their drains. Consideration could be given as to whether such powers are necessary as part of the legislative review.

Recommendation: incorporate existing land drainage/river management provisions contained in the LGA74 and LGA02 as part of a review of the SCRCA, LDA and RBA with the aim of integrating and repackaging them in the LGA02.

5.6.2 Confusing responsibilities

Another issue raised by the Greater Wellington Regional Council is that, although the Acts provide sufficient powers for flood management and soil conservation, there are no requirements for local authorities to carry out such works, nor is there division of responsibilities between territorial authorities and regional councils.

We have found no evidence to suggest that the enabling nature of the flood management regime is causing significant problems. In general, local authorities appear to be adequately managing rivers on a case-by-case basis depending on the level of risk and the needs and expectations of their communities. Specific flood management duties in legislation could reduce flexibility to prioritise flood works based on the level of risk.

We note that section 10 of the LGA02 requires local authorities to promote the well-being of communities, while section 11A requires the consideration of the avoidance or mitigation of natural hazards through local authorities' core services. These general requirements to protect communities may be sufficient in place of specific affirmative duties for flood management.

5.6.3 Consideration of wider review of 'flood management' Acts

Previous reviews of New Zealand's flood management regime found that the overall legislative framework for floods management is ad-hoc and uncoordinated. A wider review of all flood-related legislation could be done at some stage in the future with the aim of looking at how the overall framework could be improved and made more cohesive. This would be a comprehensive solution to reveal interconnections and bring clarity to all the issues related to flood management, rather than reviewing specific Acts in isolation.

Recommendation: consider a comprehensive review of all flood-related legislation at some point in the future.

6. OTHER KEY AMENDMENTS

To implement the recommendations included in this Report a suite of amendments would be required to the Act, not all of which are included in sections 2, 6 and 7. The key amendments needed are summarised in the Table below. There will also need to be provisions for transitional arrangements (once the policy is finalised).

RMA provisions (existing or new)	**Details of amendment required**
Natural hazards	
Consent authority may refuse subdivision consent in certain circumstances (s.106)	Expand wording to include the full range of consequences which may arise from all of the types of natural hazards included in the section 2 definition (such as liquefaction and lateral spreading, which are arguably not covered at present). Change the wording "is likely to be subject to" to focus the decision on the level of risk rather than the likelihood of an event, so that the provision will cover natural hazards which are less imminent. (Additional recommendation – also amend the wording in the provision to require refusal of consent when there is a significant risk in regard to natural hazards, rather than confer a discretion)
New	New provision specifying that a combined regional and district plan under s.80 is compulsory for natural hazards, and must be operative within three years of the date when the amendments creating the obligation come into force. The provision should specify that the regional council should be the lead agency in the preparation of the combined regional an district plan.
When rules in proposed plans and changes have immediate legal effect (s. 86B)	Add natural hazards to the list of rules which have immediate legal effect without the need for an application to the Court.
Matters to be considered by regional and district councils in preparing Regional Policy Statement and regional and district plans(ss. 61, 66, 74)	Expressly refer to Civil Defence Emergency Management group plans as a matter which must be considered
Duty to gather information, monitor and keep records (s.35(5))	Require regional councils to provide all information obtained or held in respect of natural hazards to the other local authorities with jurisdiction over the area involved. Override any other statutory provision (including the Privacy Act 1993 and LGOIMA 1987) which may prevent information sharing between local authorities

RMA provisions (existing or new)	Details of amendment required
	on natural hazards, and also any provision which would prevent disclosure to any person who requests the information.
Significant indigenous biodiversity / habitats	
Contents of regional policy statements (s.62)	Add the new s.6(c) matters to the list of provisions which must be included in a Regional Policy Statement (RPS). Require that the RPS must clearly depict or describe the locality and boundaries of any s.6(c) area. Require all amendments needed to RPS to identify outstanding natural features (ONFs), outstanding natural landscapes (ONLs) and s6(c) areas to be made operative within five years of the date when the amendments creating the obligations come into force.
Functions of regional councils (s.30)	Give regional councils the function of identifying s6(c) areas
Outstanding natural features and outstanding natural landscapes	
Contents of regional policy statements (s.62)	Add ONFs and ONLs as a matter which must be included in RPS / regional plans. Require that the RPS must clearly depict or describe the locality and boundaries of any ONL or ONF. Require all amendments needed to RPS and plans to identify ONFs, ONLs and s.6(c) areas to be made operative within five years of the date when the amendments creating the obligations come into force.
Functions of regional councils (s.30)	Give regional councils the function of identifying ONFs and ONLs.
When rules in proposed plans and changes have immediate legal effect (s.86B)	Align the list of rules with immediate legal effect in subsection (3) with the new s.6(c) matters
Built environment and infrastructure	
Functions of regional councils (s.30)	Give regional councils the function of identifying the land required for reasonably foreseeable urban use and development, and provide for significant infrastructure
Contents of regional policy statements (s.62)	Require the RPS to identify the land required for reasonably foreseeable urban use and development
Functions of regional and territorial authorities (ss. 30 and 31)	Add the planning, design and functioning of the built environment as a function of both regional and territorial authorities

7. REFLECTIONS ON PRACTICE

7.0 Introduction

We have included an operating principle in new s.7 Sustainable Management Methods, s.7(d):

> promote collaboration between local authorities on common resource management issues.

This method extends to all functions and powers performed under the RMA.

In this chapter of the report we comment on the policy and plan making functions of regional and district councils with a view to supporting the objectives of the Phase 2 RM work programme.

RMA policies and plans and their development have been the subject of considerable criticism over the past 20 years. In undertaking our review of ss. 6 and 7 of the RMA we have identified the function of regional and district policy and plan making as a continuing resource management challenge facing New Zealand.

Section 6 and 7 matters are the stuff of resource management plans and policy statements. Quite rightly, plan chapters are devoted to matters such as landscape, biodiversity, natural hazards, and heritage. Reaching agreement on the content of such chapters has been time consuming and costly, involving multiple parties in multiple resource management processes with the end product being of variable quality.[175]. In recommending changes to ss. 6 and 7 we are mindful of the policy and plan change processes that will follow and the reform objectives of avoiding duplication in processes and improving economic efficiency of implementation.

Obtaining the potential benefits from updated ss. 6 and 7 would be greatly enhanced by complementary practice and process improvements in the area of policy and plan making.

[175] For example, the New Zealand Historic Places Trust's 2011 National Assessment of District Plan Heritage Provisions identifies significant divergence in terms of the resourcing, and adequacy, of district councils' provision for listed heritage items, with 12 district plans considered to make "inadequate provision for listed heritage places" (p16).
Similarly, a 2011 stocktake of Outstanding Natural Landscape provisions in regional policy statements undertaken by Boffa Miskell on behalf of LGNZ highlighted a lack of consistency, and significant variability in terms of whether the clarity and comprehensiveness of the landscape provisions. The findings are summarised in presentation to the RMLA / LGNZ Roadshow, "The Issue of Landscape: Achieving consistency and clear direction for the identification and management of landscape values" which is available at http://www.rmla.org.nz/librarydoc/index/ category/1/order/title/page/5.
The Parliamentary Commissioner for the Environment in correspondence to the Local Government and Environment Select Committee identified the variability of plan quality as a concern in limiting appeal rights. http://www.pce.parliament.nz/assets/Uploads/Reports/pdf/Letter_to_Chris_ Auchinvole_03.04.09.pdf.

We acknowledge the improvements that have been made through RMA Phase I Reform to streamline these functions. They include:

- A nine month deadline for making decisions on plan provisions dealt with as proposals of national significance under Part 6AA of the Act;
- Clarification that regional councils and territorial local authorities can combine to produce a single document that meets the requirements of a regional policy statement, regional plan, and district plan (in any combination);
- Enabling local authorities to rely on consultation carried out within the last 36 months under other legislation to meet their plan preparation obligations under the Act;
- Tighter restrictions on submissions by trade competitors;
- Limiting rights to make further submissions to only those persons who have an interest greater than the public generally;
- Enabling local authority decisions on submissions to be grouped according to plan provision or topics;
- Removing the right to seek the withdrawal of entire plans on appeal;
- New provisions on security for costs on appeals; and,
- A higher filing fee for appeals.

However, if the Government is to *achieve least cost delivery of good environmental outcomes*, then Phase 2 RM work programme provides an opportunity to consider further improvement in the policy and plan making functions of local government. The Government may also find that benefits gained through policy and plan improvements will assist in reducing the cost to local government with flow on benefits to rates and charges.

We specifically comment that alignment of RMA and Local Government Act 2002 (LGA) functions, supported by overt responsibilities and accountability is long overdue. This alignment may even seem like common sense to those with an understanding of the resource management and local government systems. Whether a lack of common sense or a lack of an understanding of the systems has resulted in previous Governments' approach to oversight, we wish to commend this Government on its approach to Ministerial roles. Bringing together the Local Government and Environment roles has potential that is far more than the sum of its parts.

We present this part of our report under three topic areas:

1. Multiplicity of plans – inefficiency through complexity and fragmentation
2. Plan agility – time and cost
3. Performance management

7.1 Multiplicity of plans – inefficiency through complexity and fragmentation

Fragmentation created by multiple plans and policy statements is a limiting factor in achieving system efficiency and integrated management of resources. A resource management system that operates with 171 operative RMA documents and 78 local authorities is difficult to reconcile with the Government objective of least cost delivery of good environmental outcomes.

The Minister has identified simplifying the planning framework as important to improving both the environment and economy.[176] Simplifying the RMA planning process also features in the Confidence and Supply Agreement with ACT New Zealand.

The 2009 Technical Advisory Group supported a review of the three-tier political governance arrangements that supports the resource management framework.[177]

New Zealand's planning framework primarily comprises three pieces of legislation: the RMA, the LGA and the Land Transport Management Act 2003 (LTMA). The three acts are not working together as a complete planning system, though some legal connections are present. Initial work by the Ministry for the Environment on spatial planning outside of Auckland has suggested that the key problems with the planning system include insufficient alignment, connection and flexibility within and across planning functions, statutes and layers of governance and decision-making.

Local authorities have operated work-a-bouts in order to strategically manage our urban environments under spatial planning frameworks. Each Act has a different purpose, and the strategies and plans created under each Act involve different consultation and implementation requirements, different legislative weight and appeal rights, and have different administrative timeframes. Ultimately, the complexity of the system is undermining our ability in strategy-making and affects the ability of a region or local community to make our urban environments better places to live. Fragmentation in the planning system makes it more difficult to deal with the complex and rapidly changing context in which planning decisions are now made. Implementation is the most flawed aspect.

[176] Reference for this sentence is the 25 January 2012 Nelson Rotary Address from the Minister.

[177] Refer Ministry for the Environment, *Report of the Minister for the Environment's Technical Advisory Group* (February 2009), p54:

> While it is beyond our Terms of Reference to consider all the issues that would need to be considered in reviewing and forming recommendations on the future of the regional level of government, we recommend that there should be such a review. One of the options that should be considered is to move toward a two-tier resource management system, in which the functions and activities currently performed at the regional level are split between the new EPA, which would need to have a regional presence, and territorial local authorities. We have set out below some of the matters which we consider should be taken into account in such a review.

There is evidence that the local government sector recognises the problem of plan fragmentation and the benefits of consolidation and collaboration in decreasing costs to participants and increasing strategic alignment. Examples of collaboration include:

- Draft Heretaunga Plains Urban Development Strategy developed by the Napier City Council, the Hastings District Council, and the Hawke's Bay Regional Council as a collaborative approach to planning for urban growth;
- The process established for developing the Canterbury Water Management Strategy;
- The development of a framework for terrestrial biodiversity monitoring by regional councils' technical staff in conjunction with Landcare;
- Hauraki Gulf Forum;
- Western Bay of Plenty's SmartGrowth Strategy and Implementation Plan; and,
- Wairarapa Combined District Plan.

In 2011, Local Government New Zealand undertook collaborative research with Australian counterparts to investigate options for consolidation in local government.[178] The research identifies significant benefits[179] in consolidation and acknowledges that:

> *Enhanced strategic capacity appears essential to local Government's long term success as a valued partner in the system of government, and this emerged as probably the most important issue for councils to consider in examining different modes of consolidation.*

With respect to strategic direction in the current provisions of the RMA, we consider that s.74 (2)(c) can, at best, be interpreted as an issue of consistency and planning mechanics. We do not consider it a directive to initiate strategic thinking between local authorities on land-use planning that enables people and communities to provide for their social, economic, and culture well-being.

Strategic capacity is hindered by variability in data and failure to transfer information or up-take information across documents. Evidence of lack of alignment between planning documents (resource management plans are critical for reduction functions) and a failure to understand roles and

[178] "*Consolidation in Local Government: A Fresh Look*" was a paper developed by Local Government New Zealand in collaboration with the Australian Centre of Excellence for Local Government (ACELG), Local Government Association of South Australia (LGASA) and is at: http://library.lgnz.co.nz/cgi-bin/koha/opac-detail.pl?bib=4588.

[179] The study has revealed that consolidation provides important opportunities to capture economies of scope and enhance the strategic capacity of local government. Economies of scope increase the capacity of councils to undertake new functions and deliver new or improved services that previously were not possible . . . The process of consolidation can generate a focus that transcends individual local government boundaries and encourages councils to operate in a broader context – one that is more regional or system-wide – and enables them to relate more effectively to central governments.

responsibilities is identified in the Ministry of Civil Defence review of National CDEM Capability Assessment 2010/11[180]. These issues can pose significant risks for communities and we have discussed this in more detail in our section on natural hazards.

Section 80 provides scope for strategic cooperation between regional and territorial authorities but, without the funding and priority setting arm of the LGA being administered by the same decision-makers, opportunities for integrated planning are uncertain. To obtain the system efficiencies in matters such as significant infrastructure provision, biodiversity and water management, improvements are needed to coordinate resource management plan and policy development with long-term plan priorities across local authority boundaries.

A reflection on plan fragmentation requires consideration of the funding mechanism that supports plan making functions. Funding of local government resource management planning and policy making occurs via annual plan and long-term plan decisions under the LGA[181]. Resource management processes compete for funding along with all other council activities. Where coordination is needed across council boundaries the potential for a lack of alignment in funding priorities is high.

The issue of a lack of alignment between RMA planning and financial planning has been identified as a key barrier to the effectiveness of RPSs by the Northland Regional Council recently, including in a consultation document[182] which notes that:

> *Of particular importance is the integration of the RPS with both Regional and District Council Long Term Council Community Plans (LTCCP) and Annual Plans – prepared under the Local Government Act 2002 – as these plans outline Councils' work programmes and financial planning. There are numerous examples where short-term financial planning has not aligned with RPS and other Regional Plan outcomes, with the result that RMA plan outcomes do not get implemented and/or achieved. For example, the current RPS requires the Regional Council to include a list of outstanding natural features and landscapes in the RPS however this has not been achieved as this outcome has not been reflected in the Regional Council LTCCP work programmes and financial planning.*

Within our Terms of Reference we have made recommendations to define specific plan making functions that are to be undertaken by regional and district councils[183]. We have included a recommendation for a sustainable management method that promotes collaboration between local authorities on common resource management issues.[184]

[180] Ministry of Civil Defence and Emergency Management, National Summary Database of National CDEM Capability Report 2012, [yet to be published].

[181] Note the exception of private plan changes.

[182] Available at http://www.nrc.govt.nz/upload/7851/Integrated Management - Background.pdf.

[183] Refer new definitions and amendments.

[184] New S.7(d).

The Phase 2 RM work programme seeks greater central government direction on resource management. Further central government direction to ensure collaboration in local authority policy and plan making could be advanced by adding a new provision to s.25A to give the Minister the power to direct the preparation of combined plans. As a general rule, Ministerial intervention is a last resort. If this provision was to be added to s.25A ,clear criteria would need to be considered to establish when the Minister should take this course of action.

An alternative would be to amend s.80(7)[185] to require local authorities to prepare combined plans unless doing so would have significant disadvantages. The current provision does not stipulate when this option should be pursued. However, consideration would need to be given to the circumstances when local authorities should be able to opt out.

To achieve integrated planning and coordinated implementation better timing and sequencing of the primary planning documents (prepared under the RMA, LGA02 and LTMA) is required. Financial allocations to develop and implement plans need to be considered as part of the planning process. The Ministry for the Environment's work on spatial planning may advance some options for improvement.

While RMA processes are generally adversarial in nature, we have observed greater use of collaborative measures to achieve better outcomes. A move to greater voluntary collaboration should be supported and mandated, as stakeholders are increasingly demanding more meaningful engagement in what have been traditionally bureaucratic processes. Meaningful strategic collaboration also requires the participation of central Government. Central government investments and decisions (such as in schools or other social infrastructure) often have significant place-shaping effects, especially in rapidly-growing areas. However, central government agencies — with the exception of the New Zealand Transport Agency — tend not to be especially engaged in local and regional strategic planning exercises. This makes it difficult to achieve strategic objectives. Notwithstanding the benefits to be derived from collaboration, such processes should not be utilised at the expense of achieving timely and efficient resource management outcomes.

The relationship between governance arrangements and planning frameworks is important to the success of planning and resource management more generally. For that reason, local government reform has been used in some cases to enable greater integration and alignment of planning frameworks. Reducing complexity, and enabling greater integration and alignment can be pursued through local government reform, as has occurred in Auckland.

Ultimately, simplifying the planning framework may be better advanced through a structural change or reduction in the number of local government

[185] Section 80 (7) states:

> Without limiting subsections (1) to (6), local authorities must consider the preparation of the appropriate combined document under this section whenever significant cross-boundary issues relating to the use, development, or protection of natural and physical resources arise or are likely to arise.

entities with RMA accountability. Consideration of this matter is beyond our Terms of Reference.

7.2 Plan agility – time and cost

Plan agility is a term that has gained currency as a means of describing the ease with which plans may be changed. Local Government New Zealand acknowledges[186] that it is not currently possible to put regional and local policies and plans in place fast enough to deal with changing local and regional issues. The documents lag behind and failed performance is reflected in environmental degradation and lost economic opportunity. The system of policy and plan response must be more agile. Local Government New Zealand contends that a well functioning resource management system will support local authorities in developing and making operative a complex resource management plan within a single three year election cycle[187]. We support this contention and note the opportunity for greater accountability of decision-makers to the community if plan change outcomes were known within an election cycle.[188]

Plan making is resource intensive for local authorities and the communities they represent. They are not only expensive to develop and implement[189] but carry an opportunity cost when they are out of step with changing resource management issues, community expectations and central government direction.[190] The issue of 'planning lag' was highlighted in Local Government

[186] *Enhanced Policy Agility – Proposed Reform of the Resource Management Act,* Local Government New Zealand, December 2011.

[187] Ibid. – p6 refers to the difficulties the current system results in for local authorities. There is little incentive for councils to devote time and energy to RMA policy processes when it is highly unlikely that the process will be completed within one election cycle. Councillors recognise that policy decisions can be overturned by the next incoming cycle, and/or ultimately made by the Environment Court which has no accountability to the local community. In addition, because the process is so long staff often seek new opportunities at the end of key phases, creating difficulties in maintaining staff continuity.

[188] Note the requirement under Clause 10, First Schedule of the RMA for local authorities to make decisions on a plan within two years of notification. Note that this two year timeframe does not include time taken in plan development prior to the point of notification, or time taken after decisions to resolve any appeals. Refer to Table 7.1 in the draft Productivity Commission report "Housing Affordability Enquiry" (pp91-91) for typical plan change and consent timeframes.

[189] *Enhanced Policy Agility – Proposed Reform of the Resource Management Act,* Local Government New Zealand Regional Sector Group, December 2011, p5 states that the direct costs of plans are substantial. Referring to a MfE 2008 survey it states that the average cost for developing a plan is $1.9million, with on average 27% of the costs to the council related to resolving appeals. One council estimated their costs at $17 million, with Queenstown Lakes District Council stating it spent more than $15 million over 110 years.

[190] The 2009 Technical Advisory Group Report, *Costs and Inefficiencies of Plan Making Process (pages 7-9 of Report).*

The official briefing paper prepared for our group identified the issue in the following terms:

> Repetitive and costly consultation processes, broad appeal rights, and the time consuming reporting requirements can add tens of thousands of dollars and years to plan preparation and to change processes. This prevents plans being an effective mechanism for addressing identified environmental issues while being responsive to emerging issues.

A preceding report: "RMA Schedule 1 Processes – Preliminary Analysis of Options for Future Amendments" reported that in October 2008 a survey of data derived from the MfE database noted that:

- after 17 years of the RMA five of our 85 local authorities still did not have an operative plan

New Zealand's *Briefing to the Incoming Minister* (January 2012).[191] The 2009 TAG report also highlights this issue.[192]

This view is supported by plan analysis and other research undertaken on the speed with which previous amendments to Part II were implemented through plans. The Report, *Providing National Guidance on Infrastructure through the RMA* (17 September 2010) found that (at 30):

> *The decision-makers and stakeholders [interviewed] also considered that s.6 and 7 amendments were being addressed by councils, albeit slowly. They considered that while the amendments had had a more immediate impact on decision-making on projects (i.e. resource consents and designations), in terms of plan changes, there was a considerable lag time before changes were prepared unless it was a 'burning issue' for the district or region. These perceptions generally match the results of the plan analysis.*

A related matter that we have reflected on at some length is the requirement to undertake a full Schedule 1 process for amendments to give effect to regional policy statements or national policy statements (except provisions incorporated under section 55(2)).

While legislative changes to hasten plan change processes, such as removing "whole plan" appeals were undertaken as part of the phase 1 reforms, the implementation of strategic plans through council initiated plan reviews (and changes) to regional, district and unitary plans (Schedule 1 of the RMA) remain

- only a similar number of local authorities had notified their second generation plans (these are required to be prepared at no greater than 10 year intervals)
- on average it takes local authorities 2.5 years of research and drafting and consultation before a proposed plan is notified
- on average it takes 3.3 years to resolve all appeals after a council has made its decision on submissions
- the average time from start to finish of the plan process was 8.2 years
- the average time from start to finish for plan changes was 3 years.

In our view this long timeframe is likely to mean that by the time the plan becomes operative:

- it may fail in significant respects to properly reflect community needs or aspirations;
- environmental issues facing the council are different in form or emphasis from those which were current when preparation work started on the plan;
- there will be extended periods when costs are placed on local authorities, resource consent applications and the community by their having to deal with parallel requirements of currently proposed plans and transitional plans;
- councils may be deterred by cost and delay from promoting desirable changes to their plans.

The same report addressed the cost incurred by councils in producing plans. The first plans on average cost $1.9 million (taken over all of New Zealand's local authorities, that is a total of $130 million). Ericksen et al have estimated that, in addition, a further $30 million was expended by central government agencies in relation to plan making. Of the money expended by councils, some 37% was spent prior to notification on consultation, researching and drafting, and 27% was incurred in resolving appeals.

[191] Which stated that (at 26):

> Lack of agility in statutory planning is a key issue for local government. Statutory planning often lags behind emerging issues and is slow to react to problems. While some improvements have been made in recent years, the plan making process under the RMA remains complex, costly, and time and resource hungry. The frustration felt by the community and industry at the lack of agility within the RMA legislative framework is shared by local government.

[192] Which stated that (at p7):

Repetitive and costly consultation processes, broad appeal rights, and the time consuming reporting requirements can add tens of thousands of dollars and years to plan preparation and to change processes. This prevents plans being an effective mechanism for addressing identified environmental issues while being responsive to emerging issues.

an issue. The extent to which a local authority is successful in implementing its high-level strategy through council-initiated plan changes is variable. It can be affected by not only the decision-making capacity of its hearings panels, but Environment Court appeals and decisions, and the length of time these processes take. In Christchurch, where the Government has stepped in, we have seen positive changes in the implementation of the regional policy statement. The 2009 Technical Advisory Group reviewed survey data[193] on the time and cost of plan making and concluded:

> *It was the TAG view that, by any measure, this data presented an unacceptable picture. One can only muse as to whether either the environment or society as a whole has been well served by this huge commitment of resources.*
>
> *There is clearly a pressing need to address issues of both the costs and delays inherent to date in preparing and changing plans.*

In the LGNZ Regional Sector Group (RSG)[194] paper, analysis is provided of the Ministry for the Environment's 2010/11 Survey of Local Authorities. A total of 610 plan changes or variations were underway and only 226 completed in the year. Fewer plan changes were completed in the 2010/11 year (226) than were completed in the 2007/08 year (274). The paper considers that the average completion time for a plan change will not have shifted markedly from those recorded in 2008.

The LGNZ paper usefully focuses on the opportunity cost of delays in decision making.

> *Opportunity costs arise both as environmental losses that occur during the appeal process, or in other cases as the economic value that is lost as a result of being unable to utilise resources in the most efficient and intended way.*

The LGNZ paper identifies a number of resource management practice and process initiatives that could contribute to speeding up policy making[195]. Most suggestions can be advanced under the RMA as enacted. However, the paper considers that the combined effect of the improvements would not be sufficient to enable a council to put a complex plan in place in one three year term. The RSG advances that the single initiative that would reduce timeframes is to remove de novo appeals to the Environment Court.

This view is endorsed by Local Government New Zealand in its *Briefing to the Incoming Minister* (January 2012) which stated that a key priority for local government is resolving the role of the Environment Court in plan and policy decisions.

[193] "*RMA Schedule 1 Processes – Preliminary Analysis of Options for Future Amendments"* Ministry for the Environment, October 2008.

[194] *Enhanced Policy Agility – Proposed Reform of the Resource Management Act,* Local Government New Zealand Regional Sector Group, December 2011.

[195] For example reviewing pre-notification consultation practices, looking at the level of effort devoted to section 32 analysis, simplifying the ways in which policies, methods and rules are written, ruling out submissions that are late or off-topic, requiring evidence at the time of submission, applying specific timeframes for Environment Court mediation.

> As the RMA is one of the principal means of implementing strategies approved under the LGA resolving the role of the Environment Court is a priority for local government. We support the principle of elected councillors making decisions on behalf of their communities and the removal of the Environment Court in substantive plan and policy decisions.

The 2009 Technical Advisory Group considered constitutional issues as they apply to the role of elected representatives and the Environment Court. The group was satisfied that changes were required. However, it did not go so far as to support removal of the Environment Court from plan and policy decisions in Phase 1[196]. It supported a system in which the right of appeal to the Environment Court was limited by a requirement to seek the leave of the Court. Criteria were advanced to appropriately limit appeals on policy and plans, being:

> We would suggest that the following criteria may appropriately limit appeals, namely that the proposed policy statement or plan:
>
> (a) would have a significant impact on existing property rights;
>
> (b) would fail to give effect to matters provided in Part 2 of the Act;
>
> (c) is of unclear meaning and intent; and,
>
> (d) is manifestly unreasonable.

While much of the 2009 Technical Advisory Group's work was advanced in the RMA Phase 1 reform, the proposal to seek leave of the Court was not. We are also of the view that these matters warrant further consideration, following careful analysis of costs and benefits.

We are now in the Phase 2 RM work programme and it is clear that the calls for removal of the Courts' role in policy and plan appeals has not abated.

However, in contrast to LGNZ's desire to limit the role of the Courts, we note recent criticism by the Court of elected representatives' capability to make decisions that support the purpose of the RMA, as follows[197]:

> *In the statute which governs us, Parliament has recognised that, at a lower level, elected local (or regional) politicians can usually but not always be*

[196] 2009 TAG report - Appeal Process (pages 9-11 of Report)

> The TAG was conscious of the considerable extent to which the abolition of this right of appeal may be seen by many as a significant erosion of long held rights, and on balance took the view that consideration of such a reform was best left to Phase 2. There are some additional considerations. Because policy statements and plans provide the objectives and policies for decision-making on consents, their clarity focuses and influences both the scope of litigation, and costs and delay in the consenting process. Review by the Environment Court of plans has historically provided an important mechanism for quality control and protection of property rights, as well as a means of ensuring that plans do in fact reflect the matters which Parliament has listed as being of national importance.
>
> We therefore recommend that the right of appeal on matters of law be maintained. We are, however, as part of Phase 1, attracted to a system in which the right of appeal to the Environment Court is limited by a requirement to seek the leave of the Court.

[197] *High Country Rosehip Orchards Ltd v MacKenzie District Council* [2011] NZEnvC 387, para 462.

> *trusted to manage a district's (or region's) environmental capital so as to achieve sustainable management of natural and physical resources. For example, short term thinking may be encouraged by the fact that representatives seeking election gain no votes from future generations despite the latter having reasonably foreseeable needs for natural and physical resources. As a safeguard the legislature has given the court the humbler oversight powers in the First Schedule to the RMA.*

We are of the opinion that the Environment Court should not be viewed as a backstop to poor first hearing processes or a watch dog on behalf of the public. This is an unsafe assumption. The Court only addresses matters that are referred to it. The Court is limited further by the relief sought in the appeal and who chooses to participate. Local government may in fact have access to a more comprehensive and representative evidence base than the Courts in some respects.

If the standard of local authority decision making is such that the purpose of the Act is secondary, even in limited circumstances as the judgment advances, to re-election priorities or a failure to contemplate the needs of future generations, then surely it is better to fix the problem at source.

It is reasonable for us to reflect that a well functioning resource management system will be supported by those who have lead parts in it. That support would extend to confidence in their role and confidence in the role of other players. We appear to be some way from that scenario.

We agree with the 2009 Technical Advisory Group that a review of the Environment Court's role is appropriate in Phase 2 RM work programme. The appropriate frame of reference is to establish how the Courts can support and add value to the resource management system to achieve least cost delivery of good environmental outcomes. That may involve changed functions; some deletions and some additions.

In that regard a proposal from Waikato Regional Council (WRC)[198] seeks to establish an alternative path and warrants attention. The WRC experience is one of opportunity cost and policy lag issues identified earlier in this Chapter. The proposal may be summarised as comprising:

- A single hearing procedure from which appeals are available only on points of law;
- The hearing to be chaired by an independent commissioner appointed by the Minister for the Environment from a nationwide pool, who is suitably qualified to manage complex RMA hearings with rights of cross examination;
- The composition of the hearing panel to be determined based on the policy issues under consideration (for example, technically complex issues may be best dealt with by a panel with increased numbers of independent experts); and,

[198] Alan Dormer and Vaughan Payne. (October 2011) Improving RMA Decision Making: Prescription for Reform.

- In all cases the hearing panel should include appropriate iwi membership.

In commenting on this alternative path we commend it for further consideration, as part of an all-encompassing assessment of the various options, and their costs and benefits.

A related matter that we have reflected on at some length is the requirement to undertake a full Schedule 1 process for amendments to give effect to regional policy statements and national policy statements (except provisions incorporated under s.55(2)). While we accept that some amendments will warrant a full submission and hearing process, this is both unnecessary and inefficient in respect of new provisions which simply repeat RPS and NPS content. In such cases, the approach taken to the recognition of national environmental standards under section 44A would be far preferable.

7.3 Performance management

We have been asked to undertake a focussed review of sections 6 and 7 and to recommend improvements. Ultimately, legislative improvement is tested when it is implemented.

We have considered whether sufficient checks and balances exist in the plan making system to ensure that those with functions and duties will recognise and provide for ss. 6 and 7 matters.

We have asked ourselves some simple questions. What happens if statutory functions are not fulfilled or delayed[199]; if the time and the cost and the complexity to address outdated resource management policy statements and plans are a low funding priority for local authorities? If local authorities do not have the technical or financial capacity to fulfil their functions under s.6 or s.7, or under ss. 30 and 31[200]?

In policy and plan preparation, the Environment Court plays a role in reviewing quality and performance, but it is not an overarching one given the limited number of resource management matters that are determined before the Court. The Ministry for the Environment could also, were it so minded, play a helpful and constructive role in plan preparation[201]. LGNZ has a key role in promoting good performance and building capacity within the local

[199] For example, compliance with Section 79 Review of Policy Statements and Plans is variable with a number of regions unable to demonstrate that an active review has been initiated. Recognition of s.6(b) is not recognised in Tasman District Council's resource management planning documents.

[200] High Country Rosehip Orchards Ltd v Mackenzie District Council [2011] NZEnvC 387 at para 461; normally the court would recommend to a local authority that it fill any gaps not covered by a district plan, and then leave it to the Council to do so by plan change. However, that is both a time-consuming and uncertain process. We are concerned that there are particular circumstances applying to the Mackenzie Basin so that the Council has little time to act. Having such a small rating base it may not have the resources either

[201] See e.g. clause 3(1) First Schedule RMA.

government sector.[202] The Parliamentary Commissioner can also investigate the effectiveness of environmental planning.

Section 35(2)(b) of the RMA gives specific direction on performance management. Every local authority is required to monitor the effectiveness and efficiency of the policies, rules, or methods in their policy statements and plans.

In 2011, the Office of the Auditor General (OAG) conducted a review of four regional councils' freshwater management.[203] The recommendations in the report are aimed at all regional councils and unitary authorities. One recommendation was for councils to meet the requirements of s.35(2)(b). The OAG's investigation identified non-compliance despite the mandatory imperative in the drafting of this sub-section in the RMA. There were no performance management consequences for the underperforming councils identified by the OAG.

We consider that reliance on s.35(2)(b) for a performance management purpose has risks that may not be acceptable in a robust statutory reporting system. We also note that if funding is required for council staff to comply with s.35(2)(b) that this is allocated via the annual and long-term plan mechanisms of the LGA.

We acknowledge that the Minister is proposing a new Environmental Reporting Act with the intent that the Parliamentary Commissioner for the Environment's role is extended to being an auditor of New Zealand's environmental systems. We consider the issues we have raised have application to a future audit role.

Given the necessary linkage between the statutory requirements of the RMA and the statutory requirements of the LGA, we have contemplated further direction being given to local authorities on core services. Although currently untested, we are hopeful that our recommendation to include natural hazards in s.6 is supported by the complementary reference to natural hazards in new s.11A of the LGA. Given the importance of the resource management framework to the current and future prosperity of New Zealand, it would seem reasonable to identify the provision of efficient and effective resource management policies and plans as a core service in s.11A of the LGA.

We also note that the current provisions in ss. 24 – 27 of the RMA give the Minister considerable power to direct provision of information and to direct plan changes.

We can go no further in this report than to support the Minister in investigating and advancing initiatives that will support performance improvements in policy and plan making where ss. 6 and 7 matters are fundamental to a well functioning resource management system. We request that where we have made reference to complementary amendments to the

[202] *Briefing to the Incoming Government,* Local Government New Zealand, January 2012.

[203] Report from the Controller and Auditor-General *Managing freshwater quality: Challenges for regional councils* (September 2011).

LGA that these are referred to the Minister of Local Government for consideration.

7.4 Conclusion

During the course of our considerations we have identified continued underperformance of policy and plan making functions, a lack of clarity of roles, and an opportunity cost that results in environmental and economic losses.

Our observations are similar to those of preceding technical advisory groups appointed by the Minister.

Within the scope of our Terms of Reference we have recommended amendments to the Act that support improved policy and plan making functions. In this chapter we have highlighted additional areas of opportunity to improve environmental outcomes and we urge that they be considered as part of other components of Phase 2 RM work programme.

Capturing the opportunities to enhance the strategic capacity of local government will be essential to achieving the objective of least cost delivery of good environmental outcomes.

Finally we note that improving the lines of responsibility and accountability between local authorities, and between local government and central government, is essential if system improvements are to be achieved. We request that that these responsibility and accountability issues be urgently referred to the Minister of Local Government for his attention.

APPENDIX 1

Soil Conservation and Rivers Control,

Land Drainage and River Boards Acts

Introductory comments

The Soil Conservation and Rivers Control Act, the Land Drainage Act, and the River Boards Act are all empowering statutes – that is, they authorise local authorities to do certain things and they establish a level of service delivery.

Hazard planning is an RMA function.

In essence, the RMA is a statute focussed on regulation whereas the other statutes are focussed on operational matters.

In council long-term plans these two functions are completely separate.

These notes are prepared from an operational perspective relating to drainage/flooding/erosion. The following notes capture the **key matters** addressed through current legislation that **should be retained**.

Each table names the sections of the Acts that have some relevance to the subject heading.

1. **A statement of functions and powers, rights, and privileges**
   - Sets the context for the activities that need to be carried out to deliver the statutory function.

SC & RCA	LDA	RBA
Sections 126	15, 57,61	73

2. **Entry onto land (public and private) for monitoring, inspection, survey**
   - Power of entry onto land for survey/investigations for a new drainage/river scheme, or for monitoring/inspection.
   - Essential tool for use when there is an absence of good will.
   - Can also include inspections of waterways not within schemes to understand their performance.

SC & RCA	LDA	RBA
21,132	17, 18	76

3. **Entry onto land for construction/operation/maintenance/improvement of watercourses, outfalls, and defences against water**

- Power of entry onto land for construction/operation/maintenance/improvement of watercourses, outfalls, and defences against water.
- Essential tool for use when there is an absence of good will.
- For drains, the suite of works usually includes:
    i. excavation of drains and construction of drain stability works;
    ii. construction/maintenance of culverts, floodgates, bridges, grade control structures, pump stations;
    iii. hand or mechanical removal of weed, spraying of weed in or beside drains;
    iv. using machinery for removal of sediment, deposition of weed/sediment on the land;
    v. tree maintenance.
- For rivers the suite of works relates to:
    I. the construction and maintenance of flood protection works such as stopbanks, groynes, weirs, floodgates, planting and maintenance of berm vegetation, and fairway edge protection;
    II. activities in the river fairway such as mechanical removal of vegetation, spraying, channel diversions, rock work etc.

SC & RCA	LDA	RBA
131, 133, 134, 135	17, 23	76

4. Entry onto land to carry out emergency work

- The power of entry is essential tool for
    i. emergency works the purpose of which is to 're-containing' water, and re-stabilising the defences against water.

SC & RCA	LDA	RBA
133 (2)	21	

5. Power to deposit onto, or remove earth or materials from land

- This power enables the use of local materials for the construction of defences against water and to deposit unsuitable construction material or maintenance by products (eg, weed or silt from drains).

SC & RCA	LDA	RBA
135	17, 19	75, 76

6. Process to acquire land and compensation for injurious effect, damage or taking land associated with works

- The three acts are not consistent.
- A commonly accepted process is needed.
- Public Works Act is the obvious choice.

SC & RCA	LDA	RBA
133, 137, 145, 145B, 146	17, 18, 19, 21, 29, 30, 57	74

7. Tools for protecting drainage/river protection infrastructure on private land

- Easements are one approach but require survey to define the area of the easement.

- Land improvement agreements (LIA)are an alternative approach.
- Advantage of LIAs are:
  i. no need for legal survey;
  ii. construction plans can be used to define the stopbank position, levels, and dimensions;
  iii. no need to purchase land,
  iv. no bisection of properties creating access problems;
  v. avoids purchase and subdivision liabilities relating to riparian/stopbank land and need to create esplanade reserve/strips.
- Issue – need for Ministerial approval to LIAs.
- Another tool for protecting flood/drainage infrastructure is a bylaw under the Local Government Act. Environment Canterbury has a project under way to develop this tool.

SC & RCA	LDA	RBA
30A	26, 27	

8. Power to require landowner to take specific action to remove possible or actual impediment to flow

- Used to address potential or actual impediments in waterways that are not within an established river/drainage rating district.
- Alternative – a bylaw under the Local Government Act.

SC & RCA	LDA	RBA
	62, 63, 63A	77

9. Ability to apportion costs by agreement (as alternative to rating)

- In some cases, usually for small schemes, it is more efficient to negotiate an agreed cost sharing arrangement outside of the formal long-term plan process.

SC & RCA	LDA	RBA
138	23	

10. Charges and penalties

- Charges for restoration costs.
- Addresses need to be able to restore levels of service without additional costs.
- Penalties for damage.
- A scaled punishment should be additional, not an alternative – restoration of the level of service does not automatically follow the repairs. This may take several seasons.
-

SC & RCA	LDA	RBA
153;154,1;56;157,1,60	26;27;82;83;84	79;125

11. No liability on council for consequential damage other than in the case of negligence

- Such protection is essential when managing schemes for the purpose of limiting the effects of natural systems.

SC & RCA	LDA	RBA
148	28	

12 Other matters

Part 4 of LDA covers landowners constructing/maintaining a drain across another's land and the reciprocal rights.

Examples of local statutes

Waimakariri River Improvement Act 1922
- A few sections still relevant, especially purpose of endowment land.
- Can stand on its own.

Ashley River Improvement Act 1925
- A few sections still relevant, especially purpose of endowment land.
- Can stand on its own.

Ellesmere Land Drainage Act 1905
- Endowment land is probably only topic of relevance now.
- Can stand on its own.

South Canterbury Catchment Board Act 1946
- Endowment land is probably only topic of relevance now.
- Can stand on its own.

South Canterbury Catchment Board Act 1958
- Questionable ongoing relevance..
- If still relevant can stand on its own.

APPENDIX 2

Initial assessment of sections relevant to land drainage/river management in the Local Government Act 2002 and 1974

LGA74	
Section	**Subject**
446	Council may cover watercourse to make drain
459	Require landowners to provide private drains
460-62	Powers in relation to management of private drains
467-8	Drain protective works
507-8	Control of drainage channels and land drainage works
509-10	Powers of councils with respect to land drainage
511-15	Drainage maintenance
517	Bylaws for protection of land drainage works
517A-517ZM	Divestment of land drainage and water race schemes

LGA02	
145(b)	General bylaw making power for territorial authorities to protect, promote and maintain health and safety
146(b)(i),(iii),(iv)	Specific bylaw making power of territorial authorities to make bylaws relating to water races and land drainage
149(c)	Power of regional councils to make bylaws in relation to flood protection and flood control works
171	Power of entry onto private land
172-3	Power of entry for enforcement purposes or emergencies
181	Construction of works on private land
182	Power of entry to check utility services (including drainage works)
189-90	Power to acquire land and compensate