Parliamentary Commissioner for the Environment
Te Kaitiaki Taiao a Te Whare Pāremata

# RMLA Salmon Lecture 2020

## RMA Reform: coming full circle

**The Association for Resource Management Practitioners**

**Wintergarden Room, The Northern Club, Auckland**

- Thirty years ago I invited Tony Randerson QC to chair a Review Group to advise me on the Resource Management Bill I had inherited from the previous Parliament and undertaken to pass, subject to review. He did a fine job in a few short months and by October 1991 the Resource Management Act 1991 (RMA) was law.
- Thirty years later we have the report of a Review Panel led by the same Tony Randerson QC, now a retired judge of the Court of Appeal.[1] And here I am again, this time in my role as Parliamentary Commissioner for the Environment.
- One might be tempted by this remarkable continuity of personalities to conclude that *plus ça change, plus c'est la même chose*. But of course it isn't. The world has changed enormously. And the Review Panel's proposals reflect some of those changes. Let me be clear at the outset that I welcome many of the changes that have been proposed including, specifically:
  - continuing to take an integrated approach to land use planning and environmental protection, encompassing both the built and the natural environments
  - introducing some mandatory environmental limits
  - requiring regional spatial strategies
  - shrinking regional and district level documents into a single, combined regulatory plan
  - the use of independent hearing panels with limited appeal rights.
- One would expect framework legislation like the RMA to need periodic updating and evaluation as processes, technologies and modes of living change. I want to be clear at the outset that, notwithstanding my part in authoring the Act, I am not driven by a sense of ownership or protectiveness. It isn't an ancient Greek vase to be protected in a museum case. But if it was one it would be covered in hairline fractures that record endless breakages and restoration attempts. There, however, the metaphor breaks down because this vase has grown in size. We now have a very prolix statute that needs serious attention.

[1] Resource Management Review Panel, 2020. New Directions for Resource Management in New Zealand. Wellington: Ministry for the Environment.

- So while some of the changes proposed by the Review Group represent a radical break with the past, I think there is wide agreement that many of them are overdue and will significantly improve our experience of resource management law. But I must warn that statutory spring cleaning is not going to lead to peace, harmony and goodwill towards planners. Some of the conflicts that are giving rise to current dissatisfaction are eternal and will persist no matter what statutory framework is enacted.

- Before I turn to the Review Panel's proposals, I want to explore some of those conflicts and test the charges that the RMA is to blame for the way we have managed them. If we're going to embark on major reform, we should be very clear about what we're trying to achieve, and about what improvements to the system can and can't be delivered through the law.

## What is it about the RMA that people are unhappy about and how has it performed?

- It has to be stated that there is no single source of dissatisfaction with the Act. Rather, there are many dissatisfactions, some of them completely unrelated to one another. That shouldn't be surprising. This is a statute that deals with activities that span the entire economy from parking in residential suburbs to hydroelectric dams.

- If your concern is with layers of regulation, you could legitimately point to the fact that much regulatory practice from the pre-RMA world was simply rolled over without too many questions being asked about its fitness for purpose. As the Review Panel's Working Group on urban systems and planning has noted, although the RMA offered councils the means to be innovative, in reality much "regulatory practice simply spilled over from the Town and Country Planning Act into the RMA almost 30 years ago".[2] In some cases, this included rules that were not necessary to achieve sustainable management and were not actually required by the RMA. I hear councillors from time to time denouncing the RMA for imposing requirements on such trivia as renovations even though they are in fact responsible for choosing to retain them.

- Alternatively, your concern might be with the delay and billowing costs of the plan making process that sees armies of specialist advisers, consultants and lawyers assembled to stake out ground in a hearing process that stands every chance of being repeated – *de novo* – on appeal. And the whole process is often required to start all over again ten years later. The resources expended on a process that may span years sometimes far outstrips the time or money spent enacting statutes with national coverage.

[2] Urban Systems and Planning working group paper, p.4.

- In terms of the urban environment, you may be tempted to attribute our failure to facilitate change and urban renewal to the injunction in section 7 to maintain and enhance amenity values. It has certainly proved to be a powerful tool in favour of the status quo for those with the resources to fight legal rearguard actions. These conflicts are real and will never be extinguished but whether the Act manages them well is another matter. On the other hand, the Act can't be held responsible for immigration or tourism-driven growth pressures.

- Or, again, your concern might be with a failure to secure improved environmental quality. The failure to match regulatory requirements with the intensification of agriculture and the burgeoning growth in tourism are two standout examples. But you might also refer to the failure to face up to the shortcomings of our processes for allocating some publicly owned resources, most notably water. It certainly has to be acknowledged that for all this vast machinery of administrative law, the state of the environment has, far from improving, deteriorated.

- There are a range of reasons for this. But the core problem has been that both local and central government have been reluctant to impose the restrictions necessary to deliver on the RMA's ambition. Many of the environmental imperatives set out in the Act were never going to be met without impinging on people's perceived rights to use their property as they wish. Recalibrating property rights is always going to be contentious. Repealing the Act won't make that conflict go away.

- Even outside the natural environment, I would venture that much dissatisfaction with the RMA is rooted in unresolved conflicts about the appropriate boundaries of regulatory intervention in the affairs and interests of people using both private property and claiming access to common resources. Until we do the hard thinking about how property ownership and environmental management should intersect, we will struggle to secure a social license for regulation. Property rights are not immutable – you'd need to erect some theory derived from natural law to maintain that. But there are good economic and cultural reasons to take them seriously. If we're going to limit the things people can do, we need to do it in a coherent and transparent way rather than litigate where the lines should be drawn case by case.

- The scope of the interventions the RMA currently permits reflects an intense debate that followed the receipt of Tony Randerson's first report. In a lecture I gave at the Waikato University Law School in 1995 I laid out, at what must have seemed mind-numbing length, the evolution of section 5 from the Bill Sir Geoffrey Palmer introduced in 1990 to the statute finally enacted in mid-1991.

- It describes some of the philosophical and ideological forces that were in play. I won't weary you with a regurgitation, but I would like to cite one passage from that lecture which summarises the legislative intent with which I have been associated ever since:

> "… whatever section 5(2) has to say about economic or social activities, the matters set out in sub-paragraphs (a) (b) and (c) must be secured. They cannot be traded off. They constitute a non-negotiable bottom line. Unless it is a bottom line, sustainable management ceases to be a fixed

> point or pre-eminent principle and sinks back into being a mealy-mouthed manifesto whose meaning is whatever decision-makers on the day want it to be."[3]

- I remain broadly of this view, in particular the non-negotiable imperative of guaranteeing environmental bottom lines, even if it took a further twenty years for the Supreme Court in King Salmon to put to bed the "overall broad judgment" approach that was considered to be settled law and the unquestioned basis of the 2013 TAG report on the RMA's Principles.[4]

- The RMA enabled far-reaching environmental regulation but did not specifically require it. If that seems surprising today, you need to go back to the economy and society as it was thirty years ago. The grotesque environmental consequences of subsidised land clearance and production subsidies were ended in the mid-1980s. Large areas of land were retired or turned over to forestry. Stock numbers were falling. The human population was 3.3 million and had grown by just 200,000 over the preceding decade. Overseas visitor arrivals were fewer than one million per year. The problems we're familiar with today such as the impacts of agriculture on water quality or housing affordability in rapidly growing cities were still in the future.

- The RMA gave new responsibilities to a local government sector that had been slimmed down from 625 units to 'just' 94. It was cautiously respectful of settled interests. It allowed landowners to carry on with existing uses even if they became contrary to a subsequent district plan or national environmental standard (provided their scale and impact remained similar).

- Before I turn to the Review Panel's proposals, let me review briefly how implementation of the Act has been experienced over the last three decades.

## The biophysical environment

- When it comes to protecting the biophysical environment, all the powers needed to limit environmental damage have been available to elected politicians with the political will to use them. The RMA enshrines no 'right' to pollute or degrade the environment that might have been bundled with existing uses. But placing limitations on some of that environmental harm has been uneven.

- On the one hand, there has long been an expectation that the discharge of pollutants by factories and industrial enterprises to air or water should be limited by regulation. In the last decade or so that expectation has started to extend to diffuse, non-point discharges, notably in the agricultural sector. But it remains a work in progress as recent pushback to restrictions on winter grazing has demonstrated.

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[3] Upton, S D; Purpose and Principle in the Resource Management Act (1995) 3 Waikato Law Review 17.

[4] Report of the Minister for the Environment's Resource Management Act 1991 Principles Technical Advisory Group, 2012. https://www.mfe.govt.nz/sites/default/files/tag-rma-section6-7.pdf [accessed 6 October 2020].

- On the other, biodiversity may not have come so far. While there is a reasonably longstanding acceptance that landowners are responsible for pests and weeds that can escape and damage the properties of neighbours, some landowners still regard prohibitions on the removal of indigenous vegetation or the drainage of wetlands as an illegitimate truncation of their rights to use land. But even here there is change. The uncontested requirement to clean up water and reduce sedimentation means that protecting rather than destroying biodiversity has become an increasingly valuable and cost-effective way of mitigating these problems.

- In areas such as water, we have not been helped by a lack of clarity on questions of allocation and a political reluctance to engage until recently. But I don't believe there is serious debate that the RMA lacks appropriate tools for progressively addressing these discharges. The main issue is that the tools have been underutilised.

- One frequently offered explanation for that is the highly devolved nature of many RMA functions that saw them placed in the hands of entities that lacked both the expertise required to manage such a sophisticated statute and the necessary guidance from central government in how to undertake those functions.

- I think there is justice in this claim. But I should observe that the absence of guidance from the centre has on occasions suited both parties. Central government was able to avoid controversy on highly contentious issues such as water quality limit setting and the development of new allocative tools by claiming that these were for local and regional communities to determine. And the absence of central guidance meant that elected local and regional officers could more easily adopt the path of least resistance in the face of powerful bottom-up lobbying by those wishing to avoid regulation and resist central government concern in the name of keeping decisions in the hands of the local community.

- It was always going to be hard to insist on central direction in a system that was designed, in a spirit of subsidiarity, to put decision making much closer to communities following the excesses of the 'Think Big' era. But I think blaming a lack of guidance or unwise devolution of decision making ignores the real reason why environmental limits that bite have proved so difficult to impose: very simply, many of the goals of improved environmental quality that the Act was supposed to deliver involved interfering with existing uses and favoured industries. That is always going to be contentious, but it becomes more so as natural resources dwindle and the pressures on them rise.

- And rise they have. In the intervening 30 years we have seen our population increase by almost two thirds. International visitor arrivals have more than trebled. We have seen massive intensification of agricultural land use in some parts of New Zealand coupled with growing alarm about the state of our water and biodiversity. Belatedly, a determination to regulate for environmental outcomes has emerged.

## The built environment

- Something different happened in urban New Zealand. With the exception of a bespoke local government reform for Auckland, we have basically struggled on with a multiplicity of regional and district policy statements and plans. In the same way that the RMA largely rolled over the absence of regulatory requirements that applied to many uses and requirements in 1991, it allowed the continuation of regulatory thinking that dated back to the country's first planning statutes.

- The result has been the opposite of that experienced in rural New Zealand. Rather than widespread land use change unchecked by environmental regulation, the built environment has witnessed regulation-driven conflict. The regulations in question often seek to manage the frictions of proximity and amenity. In doing so, they have often increased property values by protecting the ambience that makes places more pleasant to live in. So ironically, frustration with the RMA often seems linked to the defence of interests that arise in part from the benefits of regulation itself.

- For at least a century, we have had regulations that often impose highly detailed rules on what can and cannot be done on land, particularly in urban and peri-urban settings. This is scarcely surprising because this is where the density of human interactions is greatest. Problems with things like noise, privacy and parking are inescapable in an urban setting.

- And then there is 'amenity'. Amenity is elaborately defined in the RMA as "those natural or physical qualities and characteristics of an area that contribute to people's appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes".

- Whether or not you agree with infringements on the right to use land based on the need to protect 'amenity', the long-standing existence of those curtailments has in many cases entered into the bundle of rights that people believe attaches to their land. If you purchase land in a leafy suburb with larger sections and lower density housing or a block of peri-urban land surrounded by protected indigenous vegetation, you probably pay a premium – and it's a premium that, having paid for, you will probably want to defend.

- Is it so surprising, then, that getting any changes to urban and peri-urban environments has been a slow business? Landowners are intensely interested in any impairment to property values or, if they live there, intangible amenity. Is it fair to blame the RMA for this? Those advocating dynamic, changing urban environments are very often developers or elected officials who, far from securing stable expectations for landowners, want to upend those expectations.

- Aucklanders know what I am talking about. The intensification and up-zoning proposed in the 2013 urban plan ignited a firestorm in the leafier eastern suburbs, leading to the tactical withdrawal of some of the offending maps. The rights and wrongs are not for me to judge. I simply mention this as a vivid example of the way in which regulatory settings become grafted onto what people believe they 'own' as part of the perceived bundle of rights of property ownership.

- As we review the appropriate focus of environmental legislation three decades after the last major reform, we need to discriminate between the nature of the ills we are trying to grapple with in the natural and built environments. I would suggest that in practical, everyday terms, people make a distinction between those land uses that compromise the biophysical functioning of the ecosystems we intersect with and are a part of; and those land uses that raise social, cultural and amenity frictions. It is a distinction that holds the key to pragmatic law reform.

- I think it is too easy to pronounce the RMA a failure. Its regulatory outcomes – or lack thereof – reflect the pressure of contested claims by interest groups and property owners. I also consider that the invention of the overall broad judgment approach gave regulators too much room to manoeuvre in cases where delivering on the mandate set out in the Act would have generated political fallout. With some important amendments, to which I shall come presently, I think the RMA remains appropriately focused to address the really important environmental challenges we face, even if amendment is needed to cater better for the built environment. That is not, however, the conclusion that has emerged from two important processes – the work spearheaded by the Environmental Defence Society (EDS) on Reform of the Resource Management System and the deliberations of the Resource Management Review Panel that was published three months ago.

## Will the Review Panel's proposals actually secure better environmental outcomes?

- The EDS has called for the RMA's purpose and principles to be "more outcomes-focused than effects-focused". In its recent synthesis report on a model for the future, it identified a "need to upgrade from the reactive concept of management, to one embracing the need for active and conscious change – both to achieve bottom lines that have been infringed and to pursue positive social and environmental outcomes beyond them … There should be no bias towards the status quo." The EDS has also called for an RMA that is about "planning resource use in a way that improves overall wellbeing and facilitating trade-offs and resolving tensions between competing values".[5]

- In a similar vein, the Review Panel[6] has placed 'outcomes' at the centre of its proposed Natural and Built Environments Act. It seeks 'to enhance the quality of the environment' to support a much more expansive outcome – 'the wellbeing of present and future generations'. That outcome is defined very broadly to embrace the "social, economic, environmental and cultural wellbeing of people and communities and their health and safety." An entire new section would charge those exercising functions and powers under the Act with a lengthy list of desirable outcomes that must be provided for to assist in achieving the purpose of the Act.

[5] Environmental Defence Society, 2019. Reform of the Resource Management System: A model for the future – Synthesis report, p.85.

[6] Resource Management Review Panel, 2020.

- The call for more outcomes seems to have been largely driven by a concern that the Act does not provide enough guidance on managing the built environment. The concern is a valid one that the late Barry Rae summarised in these terms:[7]

> "The bottom line is that the RMA requires adverse effects to be avoided, remedied or mitigated irrespective of the benefits of the proposed development. This is understandable in respect of the natural environment, but is totally at odds with the reality of the built environment. ... The management of current complex urban growth, intensification and restructuring ... cannot be left simply to the avoidance, remediation and mitigation of adverse effects on the existing environment."

- I agree with that. And the Review Panel has echoed that sentiment in drawing a distinction between natural and built environments. These are settings in which some quite distinct social and economic forces are playing out and it makes sense not to try to force them all into the same legal and procedural blender.

- But while I largely agree with this aspect of its diagnosis, I am unconvinced that the Review Panel has solved the problem. Its attempt to focus on outcomes builds on a tendency to legislate for outcomes whether or not they lend themselves to legislative solution.

- The recently enacted Urban Development Act (coming in at a mere 300 clauses and 187 pages) has as its purpose the facilitation of "urban development that contributes to sustainable, inclusive and thriving communities".[8]

- Similarly, the purpose clause of the Local Government Act talks of councils having "a broad role in promoting the social, economic, environmental, and cultural well-being of their communities, taking a sustainable development approach".[9] This has led, in practice, to all sorts of aspirational verbiage. We are repeatedly seeing language in local government development plans about cities where we can "live, work and play". This may make their authors feel good, but it is of no practical use when it comes down to resolving the difficult questions about where to draw limits and how to apportion the costs.

- The thrust of the Review Panel's proposals is in a similar vein. The core purpose is to "enhance the quality of the environment to support the wellbeing of present and future generations and to recognise the concept of Te Mana o te Taiao".[10]

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[7] Rae, B., 2009. Urban design and reform of the Resource Management Act. http://www.transurban.co.nz/images/Urban%20Desgin%20and%20Reforms%20to%20RMA.pdf [accessed 6 October 2020].

[8] Urban Development Act 2020, s 3(1).

[9] Local Government Act 2002, s 3(d).

[10] "Te Mana o te Taiao refers to the importance of maintaining the health of air, water, soil and ecosystems and the essential relationship between the health of those resources and their

- Critically, the environment that has to be enhanced is not limited to the natural environment. It includes all of:

  (a) ecosystems and their constituent parts;

  (b) people and communities; and

  (c) natural and built environments whether in urban or rural areas.[11]

- Simply calling for the achievement of positive outcomes for an environment framed as broadly as this is little more than a wish that all should be well with the world. This may be appropriate language for a statute, such as the Local Government Act, that seeks to define institutions and their roles. But it doesn't lend itself to a world of legal duties, rights and responsibilities which address very different sorts of biophysical, social, cultural and economic circumstances.

- The problem is magnified in the proposed provision on setting outcomes. Those exercising powers under the Act are required to deliver 21 discrete, unprioritised outcomes. Some of them, such as "the capacity to respond to growth and change" or "the increased use of renewable energy" require resources and institutions that cannot be mobilised under this sort of enactment alone.

- The wide-ranging outcomes in play, will inevitably come into conflict. In a democracy, it is highly likely that political discourse will advocate multiple overlapping outcomes that are in the end incompatible with one another. Legislation can help expose those incoherencies – through, for example, the requirement for arms-length environmental reporting. But simply spelling out a raft of new outcomes will not make them compatible or deliverable. We will need to be much more sophisticated than that to successfully tackle the underlying problems, especially when they relate to the way privately owned land is being used (or not used).

- It is a matter of political ideology how far you go in promoting particular economic and social outcomes through the law. We have seen, over the last twenty years, how changes to the scope of the Local Government Act have swung backwards and forwards in response to changing political philosophies about the role of governments in promoting wellbeing and even how it is understood. That, in our sort of democracy, is unlikely to change.

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capacity to sustain all life" (Resource Management Review Panel, 2020). Notably, there is only a requirement to "recognise the concept" rather than to deliver on it.

[11] In this respect, the Review Panel has essentially followed the all-embracing definition of environment attempted in the RMA. I will immediately concede that this is clearer than the current definition of the environment which, in addition to including amenity values includes the stupefying circularity of "the social, economic, aesthetic and cultural conditions which affect the matters stated in paragraphs (a) to (c) or which are affected by those matters". I'm guilty for having allowed that formula onto the statute book. I still don't know what it means but I think it was meant to be all-embracing: that we need to think about the environment holistically and in an integrated way. Now there is undoubtedly something admirable about this. But it doesn't necessarily lend itself to a world of legal duties, rights and responsibilities which address very different sorts of biophysical, social, cultural and economic circumstances.

- But wherever the political compass may be pointing for the time being and whatever your definition of wellbeing, any outcomes we seek are crucially dependent on healthy, functioning ecosystems. The health of those ecosystems can be objectively measured as can our impacts on them. And it is the overriding objective of protecting the health of those ecosystems that should be the focus of this legislation.

- Our framework for achieving biophysical environmental integrity has to be applied **prior** to any other social or economic projects we may wish to entertain, whether we are talking about infrastructure, new housing developments, inner-city renewal, new afforestation or intensive dairying. Requiring adherence to that foundational principle is the most important way legislation can contribute to the success of the wider resource management system.

- Limit-setting of the sort proposed by the Review Panel is a fundamentally sound way to resolve tensions and achieve our desired environmental outcomes in the natural environment. But it is **not** such a good vehicle for dealing with the raft of design, amenity and 'place making' frictions that are the stuff of urban development and renewal. These involve all manner of subjective judgments and there is always more than one 'right answer'. That doesn't make the conflicts that arise any less intense – on the contrary. But we shouldn't be trying to manage them under a definition of the environment as sweeping as that proposed and in a way that effectively hands the Minister and ultimately the courts the task of making overall judgments between incommensurable things.

- When it comes to the built environment there are many issues that should be left to the affected community to determine. But the underlying integrity of ecosystems should not be up for grabs. So a more nuanced definition of the term 'the environment' is needed to reflect the quite different characteristics of the natural and built environments and provide a platform for a more discriminating regulatory approach.

- We must also avoid replacing the existing Part 2 with verbiage that sidesteps the conflicts between our competing priorities instead of acknowledging and resolving them. To make progress we must parse and prioritise these different matters without returning to the 'overall broad judgment' approach that some of us hoped King Salmon had put behind us.

- That, however, is where the Review Panel's proposed purpose statement and outcomes-inspired drafting will take us. Instead of establishing biophysical imperatives, it would open the door to just the sort of 'overall broad judgment' approach that compromised section 5(2) of the RMA for so long.

- In support of this troubling conclusion I offer the following observations:

    — As noted earlier, the proposed replacement for section 5 does not specify that safeguarding the biophysical environment is paramount. The clause is, rather, directed to enhancing the quality of 'the environment' as a whole, rather than just the 'natural environment'. Moreover, supporting the wellbeing of people, rather than ecosystems, becomes the overriding goal. The effect is that whenever a

proposal would compromise an ecosystem to enhance another part of 'the environment', an overall broad judgment as to what would best support the wellbeing of people would be applied to determine the appropriate regulatory response.

- The very sensible proposal that the use, development and protection of the natural and built environments must be conducted within environmental limits has been weakened by linking it back to that overly broad purpose provision. The limits are described as 'minimum standards prescribed through national directions … to achieve the purpose of this Act" – a purpose, as we have seen, that leaves the Minister focused on the wellbeing of people and communities.

- The requirement that these minimum standards "must provide a margin of safety above the conditions in which significant and irreversible damage may occur" is also a low bar. It could still accommodate environmental degradation provided it was not irreversible, on the basis that the limits involved still contribute to achieving the broader purpose of the Act.

- While the prescription of limits for key elements of the natural environment is mandated, enhancing the quality of the natural environment is just one outcome among many that those exercising powers under the Act must provide for. The proposed clause 7 lumps together, without differentiation or priority, much of the material currently found in sections 6 and 7 together with new material. These matters will inevitably conflict in particular cases. For example, the requirement to provide "development capacity for housing and business purposes to meet expected demand" is almost certain to run up against "the enhancement of features and characteristics that contribute to the quality of the natural environment" from time to time.

- These irreducible conflicts are left to the Minister to resolve through national direction or regulation or, failing that, "by the provisions of policy statements and plans". As we all know it is impossible, in advance, to identify and reconcile every conflict decision makers will need to resolve. So the courts will be left to fall back on a purpose provision which, as I have noted, gives no priority to the natural environment.

- If primary legislation can provide no guidance on the priority to be accorded to these many outcomes, officials, politicians – and ultimately the courts – will be left weighing the natural environment in the balance alongside the many other outcomes and wellbeings that are in play.

- Let me illustrate my concerns by considering how two recent leading cases might have been decided under the framework that the Review Panel proposes. First, there is the King Salmon case,[12] which confirmed the essentially environmental thrust I have argued for. The essence of the case involved two competing values – the natural

[12] Environmental Defence Society v New Zealand King Salmon Company Ltd and Sustain Our Sounds Incorp v New Zealand King Salmon Company Ltd [2014] 1 NZLR 717.

character and outstanding landscape of the coastal environment and the economic benefits of additional aquaculture. In applying the overall broad judgment approach, the Board of Inquiry found in favour of aquaculture even though the Board accepted that there would be significant adverse effects for the landscape and natural character of the coastal environment.

- The Supreme Court was able to reject the overall judgment approach because it identified in the NZCPS[13] a strongly worded directive protecting the outstanding natural character and landscape of the place that was a legitimate response to the injunction in section 5 to avoid the adverse effects of use or development. The Court recognised that the NZCPS was part of a hierarchy of documents giving effect to Part 2. Its potency in this particular case flowed from the fact that section 6 gave priority to the protection of outstanding natural landscapes over development interests – unlike the new provisions proposed by the Review Panel.

- In my view, if the King Salmon facts were considered under the Review Panel's proposals then, given that the natural environment is not given any priority in either the outcomes clause or the purpose clause (which, as noted above, infects the empowering provisions on limits), the result would have been anyone's guess. Certainly, the Court would have been free to make an overall broad judgment based on the undifferentiated elements being proposed. Aquaculture could well have been considered a 'positive outcome for the environment'.

- The second case is that involving the Auckland Unitary Plan process and the request by Okura Holdings Limited[14] to have the rural urban boundary moved to include its land. The competing values in this case were the regional need for housing versus the significant environmental effects that would ensue (particularly to the estuary and its environs) if residential development were permitted.

- The Environment Court considered that Okura's proposal failed to sustain the potential of the estuary to provide for the reasonably foreseeable needs of future generations of Aucklanders to have access to an estuary in a natural condition. In particular, it was acknowledged that the Okura Estuary was the last on the city's east coast to be largely free of development and the only estuary possessing all of the various, finite features identified by the Court. This case directly applied the reasoning in King Salmon, which, if no longer applicable as a result of the Review Panel's proposal, could have been determined very differently.

- I appreciate that the Review Panel has proposed mandatory ministerial limit setting and powers of national direction, but the proposed drafting leads me to the view that the door has reopened to a balancing approach whose results will give no priority to the environment.

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[13] Department of Conservation, 2010. New Zealand Coastal Policy Statement 2010. Wellington: Department of Conservation.

[14] Okura Holdings Limited v Auckland Council ENV-2016-AKL-000211.

## An environmentally potent but more pragmatic way forward

- We need a way forward that is both environmentally potent and pragmatic. I think it can be done without turning the law upside down or adding a separate spatial planning statute to an already overburdened statute book. To this end, I am attaching to this lecture some drafting offered in the same spirit as that provided by the Review Panel (Appendix 1).
- I think that we would do better to retain as much of the essential structure of the existing Part 2 and the settled legal interpretation that goes with it as we can. Section 5 gives us most of what we need.
- Properly understood in a post-King Salmon sense, section 5(2)(b) distils a concise and ambitious outcome to be aimed for in respect of the natural environment. It is, if you like, a meta-level environmental outcome you achieve if you focus on securing the ecosystem services that flow from common resources like air, water and biodiversity, by minimising harm to them.
- I part company with EDS when it claims that section 5 "sets a fairly low bar for what the Act is trying to achieve". I couldn't disagree more. The language of section 5 is incredibly ambitious. The fact that we are nowhere near achieving it is probably the best evidence of that.
- But it needs to be supplemented with a requirement to set more precise environmental limits that will protect the natural environment and set clear norms and expectations about property rights at a national level. The Review Panel is on the right track in that regard. In hindsight, it is remarkable that we enacted legislation that didn't require national level standards governing the key environmental media. We need limits. And we need action on confronting scarcity through allocation mechanisms that match our environmental ambitions.
- I hope, from here on, that we can dispense with the term 'bottom lines'. It is not a legal term and I regret having used it. To my mind a 'bottom line' is something that is inflexible and is most meaningful as a limit – permissible levels of a substance in water or air, permissible numbers of animals allowed to graze in areas (like zero in a park or reserve), minimum levels of waste treatment and so on. These are standards that must be met.
- The use of the word 'bottom' invokes the unfortunate idea that there is something minimal about the line. There isn't – it can be set at a level that reduces environmental impact to zero. But it can equally be set at a level that accepts a trade-off, though given the degraded state of so many elements of our environment there is only one direction in which many limits can evolve, and that is upwards.
- The Review Panel has suggested that environmental limits "must provide a margin of safety above the conditions in which significant and irreversible damage may occur to the natural environment." I like that notion although that formula may still provide a rather low bar.

- Of course, in some cases we will go further – and not always through using limits. We do so using a variety of devices under different statutes. For instance, the National Parks Act gives a particular status to certain lands; specific Acts can completely prohibit substances (like ozone-depleting chemicals or asbestos). But the task is usually harder than that when it comes to the environmental resources that the RMA governs – the water, soil, air and living stuff – the biodiversity – that we seek to live with.
- If we want to safeguard their life-supporting capacity, then we should focus on expanding the suite of tools available to decision makers and landowners – including providing limits, guidance and funding – rather than on specifying new unenforceable outcomes.
- Whatever name the RMA bears it needs a purpose clause that is unambiguously focused on safeguarding the natural environment and ensuring that whatever use we make of that environment, safeguarding its life-supporting capacity is given priority.
- Putting the matter beyond doubt can be simply achieved by rearranging section 5(2) as follows:

  The purpose of this Act is to:

  (1) Ensure that the use, development and protection of the natural environment and the built environment is managed in a way that will—

  (a) sustain the potential of the natural environment to meet the reasonably foreseeable needs of future generations; and

  (b) safeguard the life-supporting capacity of air, water, soil, and ecosystems (including restoring life-supporting capacity where it has been lost); and

  (c) avoid, remedy, or mitigate any adverse effects of activities on the natural environment.

  (2) Subject to subclause (1), enable people and communities to determine how the natural environment and the built environment may be used to promote their social, economic, and cultural wellbeing, and their health and safety…
- And the terms 'natural' and 'built' environment would be defined as follows:

  (3) In this section:

  (a) The natural environment means natural resources including land, water, air, soil, minerals, and all forms of plants and animals (except humans) and other living organisms (whether native to New Zealand or introduced), and their habitats, and includes ecosystems.

  (b) The built environment includes human-made buildings, structures, places, facilities, infrastructure, and their interactions which collectively form parts of urban and rural areas in which people live and work.

- The section should also provide for the allocation of water, air and coastal space, and the management of growth and change in the built environment through spatial planning as core purposes.
- The balance of a restructured Part 2 should include the following clauses for which I have also proposed drafting. They would cover:
  - A clause requiring environmental limits and targets to be prescribed.
  - A Treaty clause.
  - A clause specifying matters of national importance in relation to te ao Māori.
  - A clause specifying matters of national importance in relation to the use, development and protection of the natural environment. This is an updated list of biophysical issues currently found in section 6 of the RMA and in national policy statements.
  - A clause specifying matters of national importance in relation to the use, development and protection of the built environment. This covers a range of environmental priorities, some of which have their roots in section 7 of the RMA.
  - A clause dealing with the protection of certain specifically identified places from inappropriate subdivision, use and development.
- Let me make several observations. Firstly, read as a whole, this drafting makes protection of the quality and integrity of the natural environment the prior basis on which all economic and social development should be premised. If that seemed radical in 1991, it should be mainstream in 2020. We have seen, this year, just how vulnerable our entire economic edifice is to a single invisible virus. Climate change is likely to greatly amplify challenges of this nature. The displacement of species and diseases could make such events relatively commonplace. That displacement will extend to entire human populations in areas affected by sea level rise.
- A changing climate will force adaptation in most economic sectors, particularly food and fibre production. Resources we have taken for granted such as plentiful clean water will become increasingly scarce whether as a result of drought, chemical contamination or the ubiquitous presence of micro-plastics. As the need to adapt intensifies, conflicts between property owners will intensify and primary legislation needs to be clear about the reliance of any definition of wellbeing on the environment.
- In my judgment, it is no longer reasonable or credible to organise our economy and society on a basis that regards natural capital as infinitely substitutable. Physical realities – be they viruses or rapidly changing climatic parameters – have to be adapted to, not treated as things you choose to believe if it suits you. Protecting the remaining integrity of our biophysical life-support systems has to be hardwired as the foundation of any future economy or future narratives about wellbeing. The unprioritised nature of the Review Panel's drafting fails to do this despite its good intentions.

- But, as I said in 1991, provided we have this solid environmental foundation we should let people get on with their lives and businesses. Market economies are all about adaptation, and adapting to the environmental challenges we face will not be achieved in endless consent hearings or in the Environment Court.

- Which brings me to my second observation: that the drafting I am proposing has tried to strip out some of the general language in Part 2 that can justify just about any regulatory intervention you can imagine. I'm thinking about phrases like "the maintenance and enhancement of the quality of the environment" or "the maintenance and enhancement of amenity values". The word amenity goes right back to the Town-planning Act 1926 and was associated with the words 'healthfulness', 'convenience' and 'advancement'.

- This, in contemporary terms, is the world of urban design which the Review Group has filed under the capacious umbrella of 'the quality of the urban environment'. As someone who loves the superb livableness of central Wellington thanks to far-sighted councils, I am optimistic about what good design can achieve. But I don't think it belongs here at the front end of a heavy-duty statute dealing with sustaining our environment. It is an irreducibly subjective realm and a very local, place-specific one at that. Our towns don't have to look alike – communities should be deciding this stuff through appropriately empowered local bodies.

- In a similar vein, I have not incorporated the Review Panel's very general, high-level references to "including the capacity to respond to growth and change" or the "availability of development capacity for housing and business purposes to meet expected demand." This all seems to be a response to a very recent phenomenon – strong population growth driven amongst other things by liberal immigration policies and a volume-driven tourism industry. It is noticeable that those who complain about supply of land say little or nothing about the demand side of the equation. But if the Government abdicates responsibility for actually shaping demand, its ability to deliver many of the desired outcomes the Review Panel has identified will be seriously compromised.

- Thirdly, I have proposed adjustments to the framing of some of the subject matter of the existing sections 6 and 7. These include a new provision on protecting specified places, which would require key decisions to be reflected in plans rather than arrived at through consenting processes. People are entitled to more certainty about those places that qualify for protection and why, and about what 'inappropriate' means.

- Fourthly, you will note that while I have proposed a new clause bringing together matters of national importance in relation to te ao Māori, I have left the drafting of the Treaty clause untouched. Whether the Act should require decision makers to 'take account of' or 'give effect to' the principles of the Treaty is an important debate, but one that is beyond my mandate.

- Fifthly, the Review Panel's recommendations on radically reducing the plethora of planning documents and providing high-level integration through the use of region-wide combined and spatial plans will go a long way towards getting rid of the seemingly endless treadmill of hearings that a multiplicity of processes under the

RMA has perpetuated. Good riddance to that, I say. But we do not need to extend the reach of environmental legislation to become an economic planning and funding tool. I have little confidence that bureaucratic processes have much idea about nailing 'expected demand' which is driven by factors far beyond the world of planning and resource management.

- This brings me to my sixth observation: that spatial plans, subject to the overall environmental constraints we must accept, should be able to go a long way to ensure the coordinated provision of key elements of infrastructure and to provide broad high-level direction about what should go where in order to make the best use of that infrastructure and available environmental assets. That is why I have inserted reference to spatial plans in section 5 – they should be the pivotal point of integration between the natural environment and planning for change and growth, particularly in the built environment.
- Protecting the natural environment requires an eye on the long term. Planning for change and growth in the built environment is a much more dynamic affair, although it still has to be consistent with that prior, life-supporting capacity of the natural world. Spatial plans could be an excellent way of enabling dynamic change within environmental constraints that apply on intergenerational timeframes.
- But we don't need a separate statute to institute them. Spatial plans (together with the sort of radical reform and simplification of regulation proposed by the Review Panel) can easily be dealt with in a recast RMA. They should take their place in the hierarchy of directions and documents currently included in Part 5 of the Act. Using separate legislation would send a signal that spatial planning does not belong in a system that puts environmental constraints at the centre.
- There is no small irony in the Review Panel's call on the one hand for more integration and on the other its proposal to add a fifth layer to the legislative sponge cake which currently encompasses the RMA, the LGA, the LTMA and the CCRA.[15] The report states that these four statutes would be 'subject to' the Spatial Planning Act, yet spatial plans would have to be consistent with all of them and all of the direction provided under each of them. That seems to me to be a forlorn and unachievable hope given that, as the Review Panel has recognised, different pieces of national direction under the recast RMA will sometimes conflict with each other, let alone other legislation.
- To provide a glimpse of how spatial plans could fit within a unified statutory regime I have produced the attached figure (Appendix 2).
- The framework I am proposing sets out to ensure that the respective purpose of each piece of legislation is clearly delineated, and duplication of effort is avoided. The spatial plan is the right place to make strategic decisions on regional change and

[15] Resource Management Act 1991, Local Government Act 2002, Land Transport Management Act 2003, Climate Change Response Act 2002.

growth. But it is not the place to make regional decisions on environmental constraints. That approach would create a risk of the tail wagging the dog.

- For that reason, I propose that environmental constraints and limits settled through national direction together with protected places identified in combined plans should be included in the spatial plan without changes. For example, the decisions the Minster makes on what qualifies as an outstanding natural landscape would not be able to be relitigated through spatial planning processes. Equally, combined plans would not be able to accommodate growth and land use change at odds with the spatial plan.
- I have also proposed that spatial planning should be primarily focused on giving effect to the relevant parts of the purpose of the recast RMA. If consistency with the LGA, the LTMA and the CCRA can also be achieved, that will obviously be desirable. But given that, for example, the purposes of the LGA and the recast RMA are deliberately different, there has to be a clear indication in primary legislation of what takes priority.
- The other element of the framework I'd like to comment on is the extent to which local communities should still be able to control issues that matter to them. Moving to a single region-wide regulatory plan has the potential to open a large gap between the rules and the people they govern. While national direction and the integrating reach of spatial plans have to be given effect to, not every fine-grained element of rulemaking needs to be made at what is effectively a regional level. Committees responsible for drafting combined plans should delegate control of those 'place-making' provisions that reflect the local character of a place closer to the community.
- While the proposal for combined plans will inevitably set in motion a new round of debate about the need for 78 local authorities and the case for amalgamations, the parallel case for subsidiarity should not be ignored. Just because we may want clearer and more authoritative national direction coupled with high-level spatial plans, it doesn't mean local communities shouldn't be able to determine how stuff in their own backyard, which only affects them, should be arranged.
- On the other hand, we should also be prepared to consider handing some functions back to the centre. For instance, regional council staff currently responsible for environmental compliance, enforcement and state of the environment reporting could become a regional face for the EPA.[16] The EPA currently manages a very eclectic portfolio of activities. Extending its role in the regulatory and monitoring space could provide consistency, more secure funding and immunity from local agency capture.

[16] Environmental Protection Authority.

## Conclusion

- In conclusion, I'd like to make an observation about the significance of the sort of law reform we are debating in the broad scheme of New Zealand's parliamentary democracy. We have a variety of constitutional protections, but entrenchment is confined to a handful of provisions in the Electoral Act.

- I have often pondered this in the context of the environment. For thirty years, the RMA has been our foundational environmental statute. Despite endless tinkering elsewhere, its purpose clause has gained a patina of age and continuity confirmed by our highest court. Outside of the world of conservation-related statutes, it is as close as environmental law gets to having constitutional status. This is not just the Dog Control Act or the Motor Vehicle Sales Act. It is legislation that has a profound reach over the physical environment on which all of us depend. So amendment to Part 2 should be treated with great caution.

- The process adopted by the Government thus far is commendable – an arm's length review has provided the basis for a discussion and nothing has been hurried in advance of an election. I have listed some of the quite far-reaching changes of a procedural and institutional nature that I support. But I am much more reticent when it comes to Part 2. There is a case for amendment that clarifies the environmental focus of the Act. But what has been proposed goes much further and returns us to a world of balancing competing outcomes. Experience has demonstrated that that often results in political paralysis when it comes to making hard calls.

- More worryingly still, it provides a largely open-ended mandate for elected officials to judge the relative weight that will be accorded to the environment when the inevitable conflicts between resource users arise. The recent Urban Development Act signals a large measure of comfort with this approach. In my view, legislators should use the only power they have to control the Executive, to limit those judgments.

- In Te Ara – the Encyclopedia of New Zealand maintained by the Ministry for Culture and Heritage, our constitutional arrangements are described very simply in these terms:[17]

  > "New Zealand's constitution is easy to change compared to other nations. That means that it is flexible and can adapt to changing circumstances quickly and easily. It also means that people may not notice when the constitution changes – in this way New Zealand's constitution is relatively vulnerable to changes that allow the abuse of public power."

- Any successor to the RMA should be passed with that thought in mind. In the absence of entrenched provisions or a written constitution, the least and the most Parliament can do is force the Executive to come back to the House if it wants to depart radically from the environmental protections that people think they have

[17] Te Ara – The Encyclopedia of New Zealand, 2012. https://teara.govt.nz/en/constitution/page-5 [accessed 6 October 2020].

enshrined in law. As Part 2 has been interpreted to date, a serious rollback of environmental protection could not be entertained without recourse to the scrutiny of the House.

- In taking up the debate the Review Panel has initiated, Parliamentarians need to fashion law that is fit for purpose not just in times of benign governance sympathetic to environmental goals, but in times of conflict and upheaval when leaders are tempted – either by vested interests or unwelcome facts – to let the environment go for short-term gain.

- Imperfect though it be, Part 2 provides some protections that an environmentally hostile government would have to legislate away to pursue its aims. The proposals we have before us fall short of providing that security. The interests of the environment and future generations are at the core of my mandate. I believe they should be unambiguously at the core of primary legislation, not just reliant on Ministers adjudicating between competing and often incommensurable outcomes. Parliament should, at the highest level, determine the priority of those outcomes on the face of the statute book.