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RMA reforms – A new dawn or continued uncertainty?

Summary

1. This memo accompanies a paper prepared by LGNZ and does not repeat matters addressed in that paper. While we have concerns with other aspects of the Resource Management Review Panel's (Review Panel) recommendations, including in relation to the planning functions and roles of local government, this memo is focused on proposed Part 2 of the Natural and Built Environment Act (NBEA).
2. The (Review Panel released their report in June 2020. The Review Panel did an excellent job within tight timeframes and addressing very complex and challenging issues. However, did the Review Panel achieve its chair's comments that: "*We expect our recommendations to result in better quality outcomes for both the natural and built environments and a more responsive system to meet the challenges we face as a nation*"? Our opinion, more in line with that expressed by the Parliamentary Commissioner for the Environment (PCE), is that the Review Panel's drafting of Part 2 raises critical questions as to its effectiveness and leaves a significant amount of uncertainty.
3. This uncertainty is proposed to be resolved by the Minister (through national direction and limit setting) with little in way of meaningful guidance with the NBEA itself. This provides substantial, largely unfettered, power to the Minister of the day. Parliament is in effect delegating, without clear parameters, the critical direction of the NBEA to the Minister. It is also ironic that a critical issue that has affected the RMA, the lack of national direction, is central to the NBEA.
4. The focus of the reforms proposed by the Review Panel are on environmental protection through greater (and stricter) regulation (directed by the Minister). In this respect the fundamental change is an approach to introducing limits (see below) within the statutory framework to protect biophysical bottom lines and a shift in focus to "*outcomes*" as opposed to "*effects*".
5. The key issue for local government is that it has a broad statutory function to "*play a broad role in promoting the social, economic, environmental, and cultural well-being of their communities, taking a sustainable development approach.*"¹ This raises a policy question as to whether a more pragmatic approach should be adopted for the new NBEA. While carefully developed fundamental limits make sense, great care needs to be taken to allow "*positive environmental outcomes*", including for people and communities, and to enable current 'crises' such as climate change and housing to be addressed.
6. We agree with the PCE that environmental law requires specificity and clear direction to avoid lengthy and costly arguments and the uncertainties they create. Say what you mean and mean what you say. In relation to the Review Panel's version of the NBEA (as amended through the Cabinet paper), we have concerns as to lack of: strategic direction and clarity within the purpose;

¹ Local Government Act 2002, section 3(d).

specificity as to limit setting; prioritisation of outcomes; clear guidance; and appropriate flexibility within Part 2 of the NBEA.

7. We also consider that, within limits, and with proportionate and efficient controls, use and development must be better enabled. Part 2 of the NBEA must support the mechanics of the processes being streamlined in a meaningful and pragmatic manner to achieve that.
8. Without clarity of direction within the NBEA itself there will be lengthy, costly and repeated arguments as to what the provisions mean and how they should be applied. Further, unintended outcomes are highly likely to occur. This will lead to repeated changes in national direction and legislation which has plagued the RMA and caused significant issues for local government left to try and 'pick up the pieces' (with limited or no funding). In saying this we agree with the PCE that no system will lead to "*peace, harmony and goodwill towards planners*".

Purpose of the NBEA

9. It is exceptionally challenging to draft a purpose that avoids trade-offs that deliver 'unsustainable' outcomes while maintaining and enhancing the cultural, social and economic wellbeing of people and communities. The key issue relates to environmental protection and whether, and if so how, it should be prioritised above use and development. While limit setting gives certainty, it provides (unless the limits themselves allow) no flexibility to changing circumstances (especially in relation to new technology, living patterns and managing climate change).
10. In our opinion the key to a purpose of a statute such as the NBEA is to provide clear strategic direction as to how conflicts are to be resolved. It must direct at the strategic level when and how economic, social and cultural considerations should be considered (or conversely when they should not be considered). As the PCE commented "*we should be very clear about what we are trying to achieve*". We consider that the Review Panel's purpose is simply too broad to provide such clarity.
11. While overlapping with the limits discussion below, when considering a purpose, the policy position must be very clear (if that is the outcome wanted) that key biophysical limits should not be breached. It is also important to consider in determining that policy approach whether for some outcomes (for example climate change and housing), having a carefully managed and directed broader consideration may be appropriate and lead to better overall "*positive environmental outcomes*".
12. We have a number of concerns with the proposed purpose (many of which overlap with the PCE and other commentators):
 - (a) The purpose of the NBEA uses a number of vague phrases and "*concepts*", including "*quality of the environment*" which as drafted can mean all things to all people and it applies a broad definition of "*environment*".
 - (b) The Review Panel's drafting is arguably vague and broad enough to enable an overall judgement or balance approach (and thereby compromising the Panel's intent). Equally, we do not consider that the changes in the Cabinet paper wording, if designed to do so, avoid the same outcome. We also consider that the PCE's wording, while a substantial

improvement, is arguably still not specific enough. In our opinion if the intent is that use and development only occurs within set limits then that must be specifically stated and prioritised. Say what you mean and mean what you say. As the PCE commented in relation to the proposed outcome provisions "*if primary legislation can provide no guidance on the priority to be accorded to the many outcomes, officials, politicians – and ultimately the courts, will be left weighing [them]*".

- (c) Retention of avoiding, remedying and mitigating adverse "*environmental*" effects needs to be reconsidered. We question whether *all* effects need to be managed (irrespective of scale of significance) in this way in a purpose statement. The result of this approach will be continued complexity, and a focus on the minutiae of all effects and ultimately reducing them to 'zero'. Further, if retained additional options including offsetting and compensation should be included, especially if "*positive environmental outcomes*" are to be promoted.
- (d) While we support "*positive environmental outcomes*" being achieved, given the broad and vague nature of what they are, coupled with the primary purpose statement, it further undermines the clear outcome we consider the Review Panel intended.

Limits

- 13. If a limit approach is the policy option to be pursued then the setting of those limits becomes critical. The clear intent of the Review Panel (and the PCE) is that there should not be breaches of the limits. But there is no direction within the NBEA itself as to how limits will be set (especially at what level), how they integrate with each other, which will have priority, whether exceptions are allowed, and how, if at all, those limits can be adaptable.
- 14. With no strategic guidance within the NBEA (apart from reverting to achieving the purpose of the Act and providing a margin of safety from significant and irreversible damage (which some argue is set too low)) we have concerns over how the limits will actually be set. The setting of the limits will be the most fundamental aspect of the reforms. The Minister of the day can, within reason, set the limits where he or she wishes. The ability of each new Minister to change the limits, without very clear direction, provides ongoing uncertainty as to this critical part of the NBEA. Further, on the policy basis that a breach of a limit leads to a prohibited activity great care must be taken to ensure this does not deliver unanticipated adverse outcomes.
- 15. Significant environmental change is already occurring in response to climate change but are we locking ourselves out of responding efficiently and effectively to it? For example, the Government is exploring a 'storage battery' scheme on Lake Onslow. We understand that the area, and the water to be utilised, have significant cultural, ecological and landscape values (among others). Such a project would face significant challenges to meet present 'limits' and 'national directions' let alone future, broader, ones under the NBEA. The same result is likely to apply to many housing developments being promoted to try and address the housing crisis. Should such outcomes have an avenue within the NBEA through which they can still be considered? Alternatively, if advanced through specific empowering legislation that undermines the NBEA.

16. An example of such an avenue is the recent High Court decision on the East/West Link in Auckland. In that case the High Court, in interpreting the Auckland Unitary Plan, was clear that while it includes directive avoidance policies for ecological protection it also envisages a "*careful and balanced look at the merits of a particular infrastructure proposal in order to determine whether it should proceed, whether or not such a proposal may be contrary to or inconsistent with any particular provision in the AUP.*"² It is worthwhile considering if there are circumstances when such an approach should be enabled, especially to provide "*positive environmental outcomes*".
17. The current drafting is that the Minister will set limits, but local authorities may set more stringent limits. Immediately this undermines the national level approach and opens limit setting at the local level for repeated, lengthy and costly arguments. The PCE's drafting wisely removes this provision.
18. Further, without direction in the instance of a conflict between limits which should take priority? For example, a new renewable energy power scheme may breach one limit but be critical to achieving another limit (for example climate change although not specifically listed). A breach of a water limit may be required to achieve an indigenous biodiversity limit. Or to remove a wastewater discharge from water, hence avoiding the breach of one limit, a quality of the soil limit may be breached. In such cases should one limit be preferred, or must both be achieved (the later seems intended)? Unless prioritisation and clarity is set by the Minister then local authorities and the Courts will have to decide those outcomes with only the broad purpose of the NBEA to assist. While external guidance may be useful it is not determinative and key matters should be within the NBEA itself.
19. Finally, qualitative limits and their definitions create considerably more uncertainty, cost, and room for argument than quantitative limits. For example, the Environment Court recently found the definition of natural inland wetland within the NPS-FM (2020) to be "*imprecise*" and to raise more questions than it answers.³ This leads to significant uncertainty and costs.

Outcomes

20. Inclusion of outcomes (tied to a purpose statement that includes "*positive environmental outcomes*") was a central plank to the Review Panel's reforms. While slightly redrafted, they have been largely retained in the Cabinet paper (although the PCE did not include any outcomes in his proposed drafting). The PCE called them "*unprioritised outcomes*" while noting that "*simply spelling out a raft of new outcomes will not make them compatible or deliverable.*"
21. We consider, due to the different verbs used, that the outcomes provide a hierarchy. We also consider that the NBEA itself should set the hierarchy of outcomes to actually give direction as to the implementation of the Act (as opposed to leaving it to the Minister of the day, or others, to prioritise without guidance). However, we question the hierarchy presently used and consider it further imbeds existing issues under sections 6 and 7 of the RMA. In addition, climate change is not prioritised. Many councils around New Zealand have acknowledged, and more recently a motion was passed in Parliament to acknowledge, a climate change emergency. However, there is

² *Royal Forest and Bird Protection Society of New Zealand Inc v New Zealand Transport Agency* [2021] NZHC 390, at [66].

³ *Director-General of Conservation v Taranaki Regional Council* [2021] NZEnvC 27 at [36].

nothing explicit in the NBEA that reflects a priority for addressing climate change (the same applies to housing). Indeed, the verbs used suggest they are of lesser importance.

22. For local authorities beyond reference to "*strategic integration of infrastructure with land use*" there is no outcome supporting infrastructure development (even when limits are met). In our view that is a fundamental failing given the broader role of local authorities for people and communities. Surely delivery of key infrastructure assets should be included as an outcome to align with the purpose of the NBEA? Other use and development should, within limits and with appropriate controls, also be enabled as a key outcome. People and communities need to be able to use resources and undertake activities and that should, within limits, be enabled.
23. The Review Panel intends for any conflicts among the outcomes to be resolved by the Minister through national direction (or, failing that, local authorities through planning). There is an irony that the Review Panel and the Cabinet paper both raise the lack of national direction as a key factor in the 'failure' of the RMA, but that same direction is even more critical to the success of the NBEA. Setting that aside, we agree with the PCE that it is impossible to resolve all conflicts ahead of time. That being the case the NBEA should itself give clear direction.
24. Further, if the Minister is to resolve conflicts the resolution is open to change with the appointment of each new Minister. That will, without clear direction within the NBEA itself, lead to significant uncertainty and a changing framework depending on the politics of the time. If the Minister does not resolve a conflict it is up to local authorities and the Courts to do so. History is that hard environmental decisions are often left to local authorities with little, if any, guidance and resourcing.

Implementation

25. The proposed implementation "principles" provide some good measures. However, some provisions remain vague. For example what does "*to an extent that recognises the importance of public participation to good governance*" mean. Other provisions add significant scope for significant and complex new arguments (as well as issues of interpretation and uncertainty) such as needing to compliment "*international obligations*".
26. In terms of additional principles, none relate to timely, efficient, and proportionate processes akin to s18A of the RMA. There are also none related to compliance monitoring and enforcement. Given the need to support a change in culture, as identified rightly by the Review Panel, such directions would be beneficial.
27. There is no principle to enable use and development within limits, with appropriate controls where necessary. As raised above this is a significant gap across Part 2 of the NBEA and will lead to additional costs and delays (including on local government) and a continuation of the current 'culture'.
28. The proposal (with more clarity in the Cabinet paper) to have the Minister identify key environmental matters, such as areas of nationally outstanding landscape is supported. It will provide greater certainty. However, the requirement to provide methods and requirements for several matters will add to the demands on local government. Without additional funding and very clear guidance these provisions will add a considerable burden and lead to lengthy processes.