

Submission by



to the

Resource Management Review Panel

on

**Transforming the Resource Management System: Opportunities for
Change**

Issues and Options Paper

February 2020

**TRANSFORMING THE RESOURCE MANAGEMENT SYSTEM:
OPPORTUNITIES FOR CHANGE ISSUES AND OPTIONS PAPER
SUBMISSION BY BUSINESSNZ¹**

1.0 SUMMARY

- 1.1 BusinessNZ welcomes the opportunity to comment on *Transforming the Resource Management System: Opportunities for Change – Issues and Options Paper* (“the Issues and Options Paper”).
- 1.2 As noted in the Issues and Options Paper, successive governments have amended the Resource Management Act (RMA) many times since its enactment, adopting ad hoc measures in response to the issues facing New Zealand.
- 1.3 While many substantive issues are covered in the Issues and Options Paper, this submission is limited to those addressed in Issue 10: *Allocation* or more specifically, the fraught and largely unresolved issues arising from the allocation of freshwater (p.42).
- 1.4 BusinessNZ considers freshwater allocation raises some important principles which need to be considered in the design of any future allocation mechanism, whether under the current RMA or through an alternative regulatory mechanism.
- 1.5 BusinessNZ notes that some members will be making their own submissions on issues specific to their areas of expertise.
- 1.6 BusinessNZ is happy to meet with the Resource Management Review Panel if this would be considered helpful.

¹ Background information on BusinessNZ is attached as Appendix 1.

2.0 DISCUSSION ON ALLOCATION (ISSUE 10 – p.42)

- 2.1 BusinessNZ notes and agrees with the Issues and Options Paper that there are many complex issues to be worked through in developing a policy for water allocation. It also agrees that this detailed work may require different approaches to different types of resources.
- 2.2 It is also noted that the Government is developing its freshwater allocation policy through its Essential Freshwater work programme. Through the Action for Healthy Waterways Discussion Document (which BusinessNZ submitted on in October 2019), the emphasis to date has been on freshwater quality reform as an initial step.
- 2.3 Freshwater is essential for life and environmental sustainability and is relied on for export production, tourism, hydro-electricity generation and recreational activities. Water is a key input into numerous sectors of the NZ economy and, if used strategically, can considerably improve the country's future economic growth prospects.²
- 2.4 Overall, New Zealand is a water-rich country although current allocation regimes have resulted both in over-allocation in some catchments and adverse environmental effects from intensive water use. Uncertainty over property rights to water has meant significant sunk-cost investment in plant and equipment has been delayed or not considered at all.
- 2.5 Under section 30 of the RMA, regional councils have primary responsibility for water management and consider applications for consents to take, use, dam and divert water for up to a 35-year term (although shorter terms are often granted). However, a consent does not provide ownership of the water or guarantee its availability.
- 2.6 Existing water allocation policies, as reflected in the RMA, are based on a first-come-first-served approach. Factors such as more irrigation in traditionally dry land areas have put increased pressure on the allocation of available water supplies. Production has increased markedly as a result of greater water use but at times this has led to the degradation of aquatic and riparian ecosystems and declines in biodiversity. Now, the ecological values associated with in-stream water flows are increasingly recognised and given priority.

² A number of studies have documented the economic returns from various uses of water (e.g. irrigation on the Canterbury Plains). Some water is used for consumption purposes (e.g. irrigation) while other water is simply used as part of a process (non-consumption uses) and re-enters waterways (e.g. water used for hydro-electricity generation or cooling).

- 2.7 Therefore BusinessNZ is concerned that policy decisions relating to the allocation and use of water should be soundly based and should support the development of business and the economy while at the same time taking account of New Zealanders' social, environmental and cultural goals.
- 2.8 BusinessNZ's submission focuses largely on several high-level matters of fundamental importance if any changes to freshwater management are to be fair and lasting while not unduly compromising further investment growth. BusinessNZ emphasises that proposals should be coordinated, appropriate trade-offs made and the property rights of affected parties understood and upheld.

Principles of a sound water allocation regime

- 2.9 A sound water allocation policy regime should ultimately ensure that within a sustainable framework, current and future generations gain the greatest economic, social, environmental and cultural benefits of water use. From a business perspective this means allocating scarce resources to their most highly valued and productive use and employing them efficiently, taking into consideration such matters as reasonable security of water use rights and the ability to transfer those rights where appropriate. These considerations are often given little or no account under current water management regimes but must be part of any water allocation reform agenda.
- 2.10 The first-come-first-served principle has for some time been the subject of criticism, particularly as there are those who consider it does not facilitate the movement of water to its highest use. Nevertheless, the first-come-first-served approach has enabled large areas of the economy to function with some degree of assurance that water resources will not be confiscated without compensation to users (e.g. hydro-electricity generation).
- 2.11 Any move away from first-come-first-served to a transfer or tradeable water rights regime will need to involve an orderly transition with compensation payable if rights are taken, particularly in catchments where water use rights are at present fully- or over-allocated.
- 2.12 There must be agreed mechanisms for dealing with current or potential cases of water over-allocation and here, other jurisdictions provide an indication of the range of options available. In Australia, for example, where water has been over-allocated, Federal and State Governments have purchased permits on the open market thus compensating users for any losses incurred.

- 2.13 The collaborative Land and Water Forum's (LFW's) four reports, within clear limits, cover the issues that can arise in encouraging the more efficient use of water. BusinessNZ would commend these reports to the Review Panel when considering future potential freshwater allocation mechanisms.
- 2.14 A future sound water allocation rights regime would need to:
1. Be exclusive and enforceable
 2. Provide a right to access (not necessarily own)
 3. Be flexible and transferable
 4. Define reliability
 5. Specify the duration of the right (including any defined use term).

Security and Clear Specification of use

- 2.15 Property rights and their enforcement are a fundamental pillar of a market economy. Without reasonable security from confiscation by the state or others, the incentive on individuals and businesses to invest and build up productive assets is severely weakened.
- 2.16 There is still much debate about property right boundaries. At one extreme, property rights can generally be considered reasonably clear, for example, a private title over land and buildings. At another level property rights can be assigned by government - resources such as fishing quotas, for example. These property rights are generally reasonably secure or, if reductions in take are made (e.g. because of over-fishing), current quota holders have reasonable certainty their proportion of the total take will remain the same. At the other extreme, government, or its delegated authorities, give rights to particular people to do certain things or use specific resources but with significant restrictions. For example, water permits are issued to users for periods of up to 35 years (and often for much shorter periods) but authorities can modify/change those permits during their tenure if new information comes to hand. The point is that while some property rights are relatively certain and enduring, others are not.
- 2.17 For water allocation in New Zealand, a resource consent (a water permit) is generally required. However, the RMA states in Section 122 that a resource consent "*is neither real nor personal property*". Therefore, some might argue a resource consent to take water (a permit) is not a property right at all.
- 2.18 However, while clearly a water user does not have the right of ownership of the actual water resource, resource consents do give the user the right to

discharge, take, dam or divert water. Therefore, a resource consent is a property right to that extent. Moreover, water permits are recognised and valued as rights, particularly where there is an increasing demand for water. So, semantics aside, water consents can be considered water rights, as reflected in New Zealand's considerable infrastructure investment - electricity generation, large-scale irrigation schemes, manufacturing, processing and mining etc. And in many cases, the value of consents for agricultural irrigation has been capitalised into land values.

- 2.19 Clearly investors would not invest in the kind of schemes referred to above if they thought their rights to future water would be unduly jeopardised. But some investments have been delayed or simply abandoned because of uncertainty over existing and future water property rights. To secure future investment in water infrastructure, current property rights to water need to be enhanced, ensuring greater certainty of future use.
- 2.20 A high degree of certainty a right to take water will not be unduly jeopardised, restricted or taken away without agreement is essential, regardless of which water allocation mechanism is adopted.
- 2.21 In this respect, individual users need **(i) Security of Property Rights** and **(ii) Clear Specification** of water use.
- Security of Property Rights:** water rights are of adequate length with adequate security for confident investment but with the ability to trade the rights where appropriate.
- Clear specification:** any constraints on water use are well-defined, publicly known, and not subject to arbitrary change e.g. any risk-sharing arrangements are made clear.
- 2.22 Given the existence of significant infrastructure assets, notably electricity generation, it is important that in formulating national water allocation principles the potential for such assets to be affected is clearly understood.
- 2.23 Generation assets currently operate within a resource consent system. The ability to operate depends on consent conditions specific to each river and catchment.
- 2.24 It is fundamentally important to recognise the electricity sector's contribution to the NZ economy and not compromise electricity generation output and

operational flexibility either in pursuing secure and reliable sources of energy or in meeting the Government's clear climate change objectives.

- 2.25 It is also important to recognise the foreseeable impacts of climate change and the need for climate change mitigation, including the avoidance, reduction or displacement of greenhouse gas emissions. Renewable energy will play a notable role in the transition to a low carbon economy.

Compensation for regulatory takings

- 2.26 BusinessNZ believes the RMA should provide for the payment of compensation for loss of property rights and regulatory takings. That would ensure local and central government take greater account of the effects of unnecessarily restricting or impacting on resource use (including freshwater).
- 2.27 Apart from the Public Works Act, no allowance is currently made, other than in one or two specific instances, for the payment of compensation for regulatory takings (that is, where private property rights are reduced in the public interest).
- 2.28 Regulatory takings without payment of compensation should not be legislatively condoned. Rather it should be acknowledged that the right to compensation is at the core of the property rights issue. The long-held view that property rights should not be diminished without compensation is still generally accepted. The presumption of compensation is a vital check and balance on the economic system.
- 2.29 BusinessNZ recognises that in some cases, the transaction costs of determining winners and losers in a regulatory taking situation might be disproportionately high, making the payment of compensation impractical. However, this possibility reinforces the importance of having both a sound process (including robust decision-making requirements) and appeal rights.

Efficient transferability of water rights

- 2.30 While the RMA technically allows water taking permits to be transferred amongst users in the same catchment area under certain conditions (section 136), and while some transfers do occur, the practice is not widespread. There will be several reasons for this, including the following:

- Water permits attach to individual consent holders. A water permit granted to dam or divert water may only be transferred to a new owner or occupier of the site for which the permit is granted.
- Water permits to take or use water can be transferred, in whole or in part, to another person on another site if both sites are in the same catchment or aquifer. However, the transfer must either be expressly allowed in the regional plan or approved by the consent authority. Not all regional councils expressly permit transfers and approval processes can be administratively burdensome.
- In many catchments, water has not been fully allocated and a new consent will likely be less expensive than one purchased from an existing user.
- As the right to take water is often reflected in land values, a water permit is seen as having value and worth retaining.
- Farmers whose property has been developed for irrigation are unlikely to want to return to dry land farming.
- Users who have historically been allocated too much water are currently more likely to have their use cut back via a reasonable use test (use it or lose it) than afforded the opportunity to sell or trade excess water rights on the open market.
- In many cases it may be impractical to move surface or run of the river water to a neighbouring property.

2.31 The ability to transfer (or trade) the right to take water should be considered fundamental to ensuring the efficient allocation of resources over the longer term. In other words, those who value the water most will generally be happy to purchase the right to use it and those who value the water less, generally happy to sell or lease any rights they may have. Such a market can exist only in an environment where water rights are certain and secure.

2.32 An efficiently functioning transfer system is also beneficial in that it reduces the potential for conflict between existing and potential water users by facilitating the trading of water to its most valuable use over time.

2.33 Indeed, the initial method of allocating water might be less important if subsequently, users are able to move water to higher valued use through transfer/trading options.

2.34 To ensure public confidence in a market system, the following conditions must be met:

- a. The amount of water available for allocation must be clearly determined.

- b. Individuals and companies must have secure tenure with their water rights clearly specified enabling existing and potential users to be certain the rights exist.
 - c. There must be a central registry of available water rights and permit holders, including mechanisms for recording transactions via a water trading registry.
 - d. Water use must be monitored and enforced to ensure individuals and companies take only what they are entitled to.
- 2.35 A properly functioning market would make it possible to transfer water to its most highly valued use (either through short- or long-term lease arrangements, or sale).
- 2.36 Tradeable rights are not a concept unique to water use but have been successfully implemented for other scarce resources with the objective of ensuring efficient allocation e.g. commercial fisheries management. Simply put, the basic concept is that resource users should be allowed to trade rights so resources can move to those who value them more.
- 2.37 There is little to suggest the same benefits could not apply to the allocation and trading of water rights in NZ. Obviously, water use raises some of the same issues as those affecting fisheries, for example, variations in available quantities (perhaps weather dependent). Therefore, rather than absolute allocations, it might be necessary to provide for any variation in water availability by taking the 'proportion of total allocation available' approach already applying to fisheries management.

Appendix One - Background information on BusinessNZ



GROWING PROSPERITY AND POTENTIAL

[BusinessNZ](#) is New Zealand's largest business advocacy body, representing:

- Regional business groups [EMA](#), [Business Central](#), [Canterbury Employers' Chamber of Commerce](#), and [Employers Otago Southland](#)
- [Major Companies Group](#) of New Zealand's largest businesses
- [Gold Group](#) of medium sized businesses
- [Affiliated Industries Group](#) of national industry associations
- [ExportNZ](#) representing New Zealand exporting enterprises
- [ManufacturingNZ](#) representing New Zealand manufacturing enterprises
- [Sustainable Business Council](#) of enterprises leading sustainable business practice
- [BusinessNZ Energy Council](#) of enterprises leading sustainable energy production and use
- [Buy NZ Made](#) representing producers, retailers and consumers of New Zealand-made goods

BusinessNZ is able to tap into the views of over 76,000 employers and businesses, ranging from the smallest to the largest and reflecting the make-up of the New Zealand economy.

In addition to advocacy and services for enterprise, BusinessNZ contributes to Government, tripartite working parties and international bodies including the International Labour Organisation ([ILO](#)), the International Organisation of Employers ([IOE](#)) and the Business and Industry Advisory Council ([BIAC](#)) to the Organisation for Economic Cooperation and Development ([OECD](#)).