Submission by

BusinessNZ

GROWING PROSPERITY AND POTENTIAL

to the

Environment Committee

on the

Inquiry on the Natural and Built Environments Bill

August 2021

INQUIRY ON THE NATURAL AND BUILT ENVIRONMENTS BILL
SUBMISSION BY BUSINESSNZ[1]

1.0 INTRODUCTION

1.1 BusinessNZ welcomes the opportunity to comment on the Exposure Draft of the Natural and Built Environments Bill ("the Bill"), the first of 3 Bills proposed in respect to the reform of resource management.

1.2 After many years of disquiet with the current Resource Management Act (RMA), demonstrated by a broad cross-section of society, the government undertook a review chaired by former Appeal Court Judge Tony Randerson. The Randerson Report was released mid-2020 and called for wide-ranging reforms to the RMA, including replacing it with 3 separate Acts:

1. **Natural and Built Environments Act (NBA)**, providing for land use and environmental regulation (this will be the primary replacement for the RMA).
2. **Strategic Planning Act (SPA)**, requiring the development of long-term regional spatial strategies to co-ordinate and integrate decisions made under relevant legislation.
3. **Climate Change Adaptation Act (CAA)**, addressing complex issues associated with managed retreat and the funding and financing of adaptation.

1.3 BusinessNZ, along with many other organisations across the political spectrum, has raised concerns about the RMA for many years. Some organisations consider the Act has not provided for adequate environmental protection while many businesses testify to their inability to develop infrastructure and undertake business development given the slow and cumbersome nature of the processes involved.

1.4 BusinessNZ considers the RMA has served as a handbrake on the Government, limiting its ability to achieve its economic development aspirations, especially in respect to rapid growth in the urban context where it has impeded the ability to obtain the infrastructure consents needed to support growth. In BusinessNZ's view, the RMA will continue to inhibit government aspirations until such time as it is amended to better allow for both economic growth and environmental protection. It is recognised that economic development will not always be compatible with environmental protection so that furthering one or the other will necessarily involve a balancing exercise.

[1] Background information on BusinessNZ is attached as Appendix 1.

1.5 It is hard to say the status quo has worked. All stakeholders – house owners, current and prospective, businesses and environmentalists – have significant problems with the RMA and its implementation despite, or possibly because of, almost constant legislative tinkering. We now face the schizophrenic situation where an Act interpreted for around 25 years on the basis of a particular approach ('overall broad judgment') is, following the King Salmon case, now seen as requiring the setting of environmental bottom lines.

1.6 The constant stream of legislative changes since the RMA's initial passage into law means there is now no strict application of either environmental bottom lines or an overall broad judgment.

1.7 BusinessNZ therefore congratulates the current government in attempting to move towards a more user-friendly and fit-for-purpose resource management system. But in doing so it will be essential to acknowledge the clash of values that underlies many environmental disputes. Such disputes will not go away; the expectation should rather be that their number will reduce.

1.8 However, while we are supportive of the intent of many of the proposed changes outlined in the Bill, we are concerned about how these will be implemented in practice. Given the novelty of some of the changes, it is possible the result will simply amount to replacing one form of complexity and uncertainty with another, for little substantive net gain. The Bill's Regulatory Impact Statement (RIS) raises several concerns that would lead to this conclusion.

1.9 A quality assessment of the RIS statement led by Treasury said there was a high level of uncertainty surrounding the proposals: *"the estimated costings appear understated, especially in relation to the costs of transitioning existing consents and allocation rights into the new planning system with new outcomes, environmental limits and national and regional priorities."*

1.10 A national planning framework could provide for greater certainty but its success or otherwise will depend on the quality of the planning input. Planning involves foreseeability which in turn involves uncertainty. The test of a regime of this kind will be its ability to respond both to changing circumstances and errors arising from the planning process, although whether these can be corrected via an essentially unsupervised regulation-making system remains to be seen. Nor will the apparent shift towards greater centralisation of authority make resource use disputes go away. Centralisation could make their resolution even harder than it is currently.

1.11 Second, because the Bill is only the first of 3 proposed Bills to be introduced over the next year, it is difficult to predict how, or whether, these will fit or work together as one coherent package.

1.12 While BusinessNZ is pleased the current Bill has been released as an exposure draft, providing submitters with the opportunity to comment on areas either not considered in the current Bill or left to be included when its next iteration enters the House (likely to be early next year), it will be crucial for stakeholders to be fully involved in the development of the remaining sections. Many issues contained in the amended Bill will be of significance to the business community and could affect future investment.

1.13 For clarity, this submission is in 2 subsequent sections: Section 1 comments on important issues missing from the current (Exposure Draft) Bill some of which will be included in the Natural and Built Environment Bill expected to be introduced into Parliament early next year. Section 2 examines some of the key clauses in the Bill, addressing these from a broader BusinessNZ perspective.

1.14 Given the diversity of our membership, some members and sectors will have specific issues they wish to comment on in more detail. Therefore, we have encouraged individual members and sector representatives to make their own submissions raising those issues specific to their areas of interest.

1.15 BusinessNZ requests the opportunity to appear before the Select Committee in due course to present our submission.

Recommendations

BusinessNZ **recommends** that:

to encourage efficient investment in natural resource and infrastructure development for the economic, social, environmental and cultural well-being of current and future generations of New Zealanders, the Select Committee insert clauses into the Bill:

(a) recognising the importance of upholding property rights to encourage efficient investment and determining how existing use rights will be treated,
(b) grandparenting current rights to resource use where practical and providing for the trading and transfer of rights within a specified framework,
(c) introducing a compensation regime for regulatory takings to encourage better decision-making from regulators when affecting private property in the public interest,
(d) providing for merit appeals/review rights where regulatory decisions impact on existing property rights, and
(e) providing for a cost/benefit analysis of plan changes (e.g. an enhanced Section 32 of the RMA).

BusinessNZ **recommends** that:

Clause 5 be amended to ensure the purpose statement does not provide for a hierarchy of environment or development outcomes.

BusinessNZ **recommends** that:

Clause 7 be amended to allow greater consideration to be given to the making of trade-offs at a local level in respect to hard environmental limits, recognising that a one-size approach may not be satisfactory in all circumstances. Local trade-offs will still be needed, the existence of a national planning framework notwithstanding.

BusinessNZ **recommends** that:

Clause 8 be recognised as containing potentially conflicting objectives making it, to some extent, an unrealistic counsel of perfection. Provided the costs and benefits of any activity are largely internalised, then individuals, households, and companies should be relatively free to make investment decisions on their merits, based on normal commercial imperatives. The length and nature of the clause testify to the impossibility of avoiding future conflict between environment and development.

2.0 SECTION 1: WHAT's MISSING FROM THE BILL?

2.1 As noted in paragraph 74 of the Natural and Built Environments Bill – Parliamentary paper on the exposure draft, (see below) - there are issues not covered in the current Bill which will be dealt with in its subsequent iteration.

Included in the exposure draft	Not included*
• preliminary provisions (eg definitions) • purpose and related provisions (including the concept of Te Oranga o te Taiao) • Te Tiriti o Waitangi clause • environmental limits • environmental outcomes • National Planning Framework (NPF): key clauses, but not the process to develop the NPF • Natural and Built Environments Plans (NBA plans): key clauses, but not all	• process to develop the NPF • consenting • existing use rights • allocation of resources, and economic instruments • compliance, monitoring and enforcement • water conservation orders • heritage orders • designations • subdivision • transitional provisions • provision for urban design, including urban tree cover • the function and roles of Ministers and agencies, as well as regional councils and territorial authorities in the system **This is not a complete list and does not represent what these matters may be called in the new system*

2.2 As some aspects of the Bill are of particular importance to the business community in terms of investment decision-making, in this section BusinessNZ is providing its thoughts on them, so the Select Committee is aware of its views before the Bill's next iteration. BusinessNZ would also stress that it expects a full and genuine consultation on any new issues included in the amended Bill, given their potential to impact adversely on current or future resource users.

2.3 Many issues not yet included in the Bill have significant implications for business, for example, existing use rights and the allocation of natural resources. Their exclusion from the Bill is particularly concerning given some of the Randerson Report's thinking on Natural Resource Use.

2.4 For example, while the Randerson Report talks a little about freshwater allocation mechanisms and approaches, it very much kicks for touch in making the hard allocation decisions, leaving it for future planning decisions to provide solutions. This failure to address the freshwater allocation issue raises concerns over decision-making certainty for investors by continuing the uncertainty businesses have had to face for years in respect to a major economic resource. While flexibility is to some extent appropriate when making allocation decisions (as each region is different in terms of water quantity/quality), government will nevertheless need to respond by implementing approaches such as that agreed by the Land and Water Forum (LWF) - water to flow to its most highly valued uses via trading and transfer, provided environmental quality standards are not unduly jeopardised. This, effectively, will mean allowing for water use decisions locally. Anything else could lead to argument both centrally and in each locality.

2.5 The Randerson Report contains some potentially concerning proposals - how to deal with over-allocation and how to transfer allocations from existing to new users – but provides no clear guidelines on the need for adequate compensation. Freshwater consents are often capitalised into land values so there is no such thing as "existing users" having windfall gains. With no clear direction on future allocation, investment in infrastructure requiring freshwater could be jeopardised or suppliers could want a greater return on their investment to deal with natural resource use uncertainty.

2.6 The Randerson Report suggests the current RMA is in favour of the status quo: i.e. because it is "effects based", it can prevent development. While this is a useful point, decision-makers need to be very careful when it comes to taking away or unnecessarily interfering with people's property rights, since without adequate compensation, the effect on investment decision-making will be chilling. Moreover, it is often not adequately recognised that not only are current owners affected by a loss of property rights but the communities in which they operate suffer as well. Too often the wider effects of resource use decisions are not properly understood, a particular danger with centralised decision-making when decision-makers are too remote from the communities affected. There is a danger planners will pick winners without properly recognising the impact on existing businesses, a situation not helped by the Randerson Report suggesting that in general, the (current) maximum consent period of 35 years for water is too long. The issue of property rights is scarcely mentioned, if at all, in the Report, let alone the need for compensation if private property rights are taken or reduced in the public interest.

2.7 Below is a brief discussion on the importance of upholding property rights to encourage investment, the importance of grandparenting current rights where practical, the desirability of introducing a compensation regime for regulatory takings to encourage better decision-making from regulators when impacting

on private property in the public interest, and the desirability of appeal rights. None of these issues appears to feature in the current Bill, yet they are all fundamental to encouraging efficient investment in natural resource and infrastructure development for the economic, social, environmental, and cultural well-being of current and future generations of New Zealanders.

Upholding property rights to encourage investment

2.8 It is a fundamental pillar of a market economy that property rights should be relatively clear and unambiguous and able to be upheld in a court of law. Where property rights are removed or reduced by way of regulatory takings, compensation should generally be paid.

2.9 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.

2.10 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. Here 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, gives rights to particular people to do certain things or use particular resources, but with significant restrictions. For example, water permits are issued to users for periods of up to 35 years (often for much shorter periods) but with authorities able to modify/change those permits during their tenure if new information comes to hand. The point here is that while some property rights are relatively certain and enduring, others are not.

2.11 Clearly a water user does not have right of ownership of the actual water resource, but resource consents do give the user the right to take, dam or divert water. In this regard, a resource consent is a property right or at the very least, affects the decisions made about property. Farmers unable to renew water consents are unlikely to upgrade farms (including to improve water quality); may find access to finance is affected; rural employment will suffer; and communities will atrophy. A similar effect is likely if electricity generators have no confidence their water use consents will be renewed. Water permits are recognised and valued as rights, particularly where there is an increasing demand for water. Therefore, semantics aside, water consents *are* water rights, as reflected in the large infrastructure investments undertaken in New Zealand - electricity generation, large scale irrigation schemes, manufacturing,

processing, mining etc. In many cases the value of consents for agricultural irrigation has been capitalised into land values.

2.12 Clearly investors will not invest in relevant schemes if they consider their rights to future water use will be unduly jeopardised. It is certainly the case that 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 to provide greater certainty of future use.

2.13 BusinessNZ considers that to encourage greater accountability, there is a strong case for including in the Bill a cost/benefit test (something much better than the RMA's original Section 32), ensuring a strong understanding of the impacts associated with plan changes in respect to economic development and employment, along with any significant environmental effects.

Grandparenting existing rights

2.14 It can be strongly argued that the initial allocation of resource use (e.g., water) rights within a tradeable rights framework should be based on historical allocations and/or usage. This would provide for the protection of existing investments and would be consistent with the approach taken to the allocation of other resource use rights such as the Individual Transferable Quotas (ITQs) in respect to fisheries and the issuing of free credits under the Emissions Trading Scheme (ETS).

2.15 An alternative to grandparenting rights would be re-allocating them (when the term of the current permit expires) based on possible approaches such as auctioning the rights. However, auctioning existing allocated rights to water would seriously undermine the protection of existing rights and the value of what, in some cases, would be significant sunk cost investments.

2.16 Businesses will have limited incentive to invest in expensive irrigation equipment, in land development, or in electricity generation if they have a strictly limited time frame in which to use water and no reasonable guarantee their right to access it will be renewed. It is fair to say that most individuals investing in irrigation systems and hydro-electricity generation have built their developments on the expectation of their consents being renewed. As mentioned previously, often the value of water consents is capitalised into land values.

2.17 If it became evident that permits to take water were simply being transferred to other users when they expired (or significantly adjusted during their current term), all existing water users would have their legitimate expectations of continuing water property rights eroded. This would involve the Crown making spontaneous and ad hoc decisions about the developments it would promote and would drive at the heart of established property rights, seriously undermining the ability of many businesses to continue operating. This is particularly so given the high sunk costs of investment in the land development which accompanies irrigation conversion or, on a more significant scale, electricity generation. It is therefore fundamental that existing rights be maintained and enhanced to encourage investment in assets which utilise water as a significant input.

2.18 Notwithstanding the above, the Government will need to implement approaches such as agreed by the LWF (and referred to in paragraph 2.4 above), namely, that water should flow to its most highly valued uses via trading and transfer, provided environmental quality standards are not unduly jeopardised. However, relevant recommendations notwithstanding, if the value of an existing investment is not recognised, the associated uncertainty will likely cause considerable harm. Uncertainty over existing use rights, together with proposed national bottom lines and regional, rather than local, planning rules, risk destroying local communities and causing a great deal of unnecessary suffering. Costs will not reduce, nor disputes decrease in number.

Compensation for regulatory takings

2.19 As a general principle, individuals and companies should bear the full cost of their behaviour (i.e., costs should be internalised). Over-consumption of resources is always likely if costs can be shifted on to third parties. Management of land use - and risk – is no different. If individuals and companies are to make rational decisions about land use, they should ideally bear the cost (and gain the benefits) associated with specific options/outcomes. If, on the other hand, individuals and companies are forced to pay a greater amount than any cost they impose, the outcome will either be a more expensive product and/or reduced commercial activity, with associated flow-on implications for employment etc.

2.20 There is no allowance in the RMA (or the current Bill), other than in some specific instances, for the payment of compensation in recompense for regulatory takings (or for a reduction in private property rights in the public interest). This is a substantial flaw in both the Act and the Bill and serves (and will continue to serve) to depress necessary economic activity.[2]

[2] If considering this statement in demand and supply terms, a zero price on regulation is always going to mean that the demand for regulations will be high while the voluntary supply of property rights in return will be very low.

2.21 The persistent and ongoing departure from the principles of consent to the diminution of private interests in the name of the public interest, and the provision of compensation when this occurs, have created an enduring and deep-seated dissatisfaction among the business community with the way the RMA is implemented. The current Bill is silent on how the legislation will ultimately deal with the issue of regulatory takings (if at all).

2.22 Regulatory takings should not be legislatively condoned. Instead, as noted above, BusinessNZ believes that core to the issue of property rights, where regulatory takings are contemplated, is the acknowledgement of the right to compensation. As a general principle, property rights should not be diminished without compensation. This is a long-held view. BusinessNZ considers the presumption of compensation to be a vital economic system check and balance.

2.23 The need to compensate for regulatory takings is hardly a new or novel conclusion in public policy terms. Over recent years the Crown, in the process of regulating private property rights in the perceived public interest, has at least accompanied regulation with compensation. This has occurred most notably in the areas of carbon emissions and fisheries management.

2.24 The public policy principle is no different in the case of the proposed Natural and Built Environments Bill, though its application may be more complex. BusinessNZ's view is that the principle itself is fairly straight-forward – that is:

> *"If the public want something new to be in the public interest and regulated by the Act because they will benefit from it, then the public should pay for it."*

2.25 This principle recognises that local democracy and the ability for local communities to make choices relevant to their community are important. It is just that such choices are not costless.

2.26 Ideally, those who seek to benefit from stopping a development should in principle fund the compensation, since they are unlikely to represent the public at large. If that is not practical, ultimately, funding should come from the taxpayer.

2.27 For these reasons, BusinessNZ considers the current provisions regarding compensation where property is taken or its use or value are restricted, require strengthening. S85 of the RMA gives a pointer although it does not provide for payment of compensation, an essential requirement if arbitrary takings are not to prevent reasonable development activity. Apart from the Public Works Act, there is currently no allowance, other than in one or two specific instances, for the payment of compensation for regulatory takings (that is, a reduction in private property rights in the public interest).

Merit Appeal/Review Rights

2.28 There is a strongly held view that merit appeal/review rights are essential in societies that fully respect fundamental rights. These can be seen as a safeguard or safety valve against bad decision-making, including regulatory takings without compensation.

2.29 There are important reasons for continuing to promote merit appeal rights, not only in respect to processes under the Natural and Built Environments Bill but in respect to many other legislative and regulatory powers across a whole range of Acts of Parliament as well.

2.30 The reasons for supporting merit appeal rights are outlined below but are not necessarily listed in any order of importance. Every reason is important in its own right.

a. the prospect of scrutiny (appeals) will likely encourage primary decision-makers to make better and more careful decisions in the first place,

b. appeal decisions can often lead to better and higher quality outcomes given a fresh look at the issues,

c. some regulators have very wide powers that leave them, in effect, the rule-makers. It is simply wrong that regulators should act as final judge and jury on the application of their own rules,

d. the risks of excessive individual influence on decision-making are reduced by the right to take a decision to an outside body,

e. there can be more confidence in the integrity of the law, and support for it, when there is at least one full right of appeal,

f. the parties crystallise the key issues better on their second run through a case,

g. the more elevated view of the appellate court makes it easier to extract principles of general application, and decisions are more likely to be stated in terms which allow people to predict how the law will work in future, and

h. appeal rights provide protection for property rights and thus create the conditions for investor confidence and economic growth.

2.31 These are all important issues. Inferior decisions generate uncertainty. Poor decisions force businesses into expensive second-best 'work arounds' to cope with the risk of uncertainty or arbitrary interventions. Poor precedents threaten investment and economic growth even though people may not be able to measure, or even recognise, the source of such costs. The difference between high quality predictable decisions and low-quality ad hoc readings can be enormous for a small economy like New Zealand's.

2.32 Internationally, the role of merit appeal rights is firmly understood and is promoted strongly by the Organisation for Economic Cooperation and Development (OECD) in its various documents relating to improving the quality of regulatory decision-making.

2.33 The OECD Guiding Principles for Regulatory Quality and Performance (2005) call on those charged with regulatory reform to "*Ensure that administrative procedures for applying regulations and regulatory decisions are transparent, non-discriminatory, contain an appeal process against individual actions, and do not unduly delay business decisions; ensure that efficient appeals procedures are in place.*" (p.5)

2.34 In many jurisdictions, rights of appeal against the discretionary decisions of government planning agencies have been established to allow those affected by planning decisions to have the decisions reviewed.

2.35 Merit-based appeals against government planning decisions are not universal but, it is understood, exist in many common law countries, including England and Wales, Ontario (Canada), Hong Kong, Australia, and of course, New Zealand.

2.36 The Commonwealth of Australia's Administrative Review Council in a report stated:

The Council prefers a broad approach to the identification of merit reviewable decisions. If an administrative decision is likely to have an effect on the interests of any person, in the absence of good reason, that decision should ordinarily be open to be reviewed on the merits.

If a more restrictive approach is adopted, there is a risk of denying an opportunity for review to someone whose interests have been adversely affected by the decision. Further, there is a risk of losing the broader and beneficial effects that merit review is intended to have on the overall quality of government decision-making.

The Council's approach is intended to be sufficiently broad to include decisions that affect intellectual and spiritual interests, and not merely, property, financial or physical interests." (p.3)[3]

2.37 Given the place of merit appeals (reviews) in New Zealand's current legal framework, and the international support provided through credible international organisations such as the OECD, any moves to restrict appeal rights should be seriously considered before pre-emptive action is taken.

Recommendations

BusinessNZ **recommends** that:

to encourage efficient investment in natural resource and infrastructure development for the economic, social, environmental and cultural well-being of current and future generations of New Zealanders, the Select Committee insert clauses into the Bill:

(a) recognising the importance of upholding property rights to encourage efficient investment and resolving how existing use rights will be treated,
(b) grandparenting current rights to resource use where practical and providing for the trading and transfer of rights within a specified framework,
(c) introducing a compensation regime for regulatory takings to encourage better decision-making from regulators when affecting on private property in the public interest,

[3] Commonwealth of Australia, Administrative Review Council – What decisions should be subject to merit review? (7 April 2011).

(d) providing for merit appeals/review rights where regulatory decisions impact on existing property rights, and

(e) providing for a cost/benefit analysis of plan changes (e.g. an enhanced Section 32 of the RMA).

3.0 SECTION 2: SPECIFIC COMMENTS ON KEY CLAUSES IN THE NATURAL AND BUILT ENVIRONMENTS BILL

3.1 The purpose of this Section is to comment on key clauses in the Bill which may have significant implications and require further thought.

Part 1: Preliminary provisions

Clause 3: Interpretation

Definition – Infrastructure and Infrastructure Services

3.2 Currently, clause 3 of the Exposure Draft has yet to define both "infrastructure" and "infrastructure services". The drafting of these definitions will be critical for many BusinessNZ members when it comes to developing the national direction on infrastructure services required by the national planning framework.

3.3 Ensuring network utilities are included and appropriately defined in the definitions is essential. It will also be important that these definitions, and any associated enabling consenting frameworks, provide for a holistic, network-based approach to infrastructure provision rather than just enabling core assets. The network approach should transcend private or public ownership and be focused on ensuring the critical "essential" infrastructure necessary for the safe and efficient functioning of New Zealand's communities can continue. It should also align with infrastructure providers' obligations under other legislation and regulations.

Part 2: Purpose and Related Provisions

Clause 5: Purpose of this Act

3.4 The current clause 5 places an almost overriding emphasis on environmental outcomes to the potential detriment of wider economic development. This is likely to result in more litigation rather than less, given clause 8's requirement to promote a long list of environmental outcomes. Clause 5 states:

(1) The purpose of this Act is to enable—

(a) Te Oranga o te Taiao to be upheld, including by protecting and enhancing the natural environment; and

(b) people and communities to use the environment in a way that supports the well-being of present generations without compromising the well-being of future generations.

3.5 Clause 5(3) defines Te Oranga o te Taiao as incorporating "the health of the natural environment; the intrinsic relationship between iwi and hapū and te taiao; the interconnectedness of all parts of the natural environment; and the essential relationship between the health of the natural environment and its capacity to sustain all life."

3.6 "Environment", together with "ecosystem" and "ecological integrity", is defined in clause 3. The three are intertwined. Specifically, "environment" means, as the context requires, "(a) the natural environment; (b) people and communities and the built environment that they create; (c) the social, economic, and cultural conditions that affect the matters stated in paragraphs (a) and (b) or that are affected by those matters", while "ecosystem" means "a system of organisms interacting with their physical environment and with each other".

3.7 "Ecological integrity" covers "the ability of an ecosystem to support and maintain (a) its composition: the natural diversity of indigenous species, habitats and communities that make up the ecosystem and (b) its structure: the biotic and abiotic physical features of an ecosystem." The term also covers the ecosystem's ability to support and maintain its "'ecological and physical functions and processes" and its "resilience to the adverse impacts of natural or human disturbances." Just about everything appears to be covered.

3.8 The proposed definitions cited above are so broad and apparently all-encompassing they will potentially generate great uncertainty as to what will or will not be legal. Business NZ has no view on the matter – except to say that such uncertainty about the scope and reach of what is proposed is unacceptable if people's well-being is to be a relevant consideration.

3.9 The Bill also makes no attempt to define what constitutes an <u>enhancement</u> of the natural environment. Different people can have different views about whether something (e.g. a wind farm) improves or detracts from the natural environment. The Bill is presumably content for it to be whatever the Government of the day wants it to be.

3.10 Who will decide whether the natural environment needs to be protected and, where necessary, restored and will making such decisions involve overriding individual property rights? Will there be any right of appeal?

BusinessNZ **recommends** that:

Clause 5 be amended to ensure the purpose statement does not provide for a hierarchy of environment or development outcomes.

<u>Clause 7:</u> Environmental limits

3.11 Under Clause 7, there will be requirements to introduce hard environmental limits, with such limits prescribed in the National Planning Framework (see comments below) or in plans. While it can be argued that the allocation of natural resources requires environmental limits to be clearly understood, there also needs to be flexibility to meet the unique trade-offs that local communities may be prepared to make. For example, it may be sensible to set a common national standard for maximum microwave discharge, since this is essentially a health issue and the risks of electro-magnetic radiation do not vary across the country. But a common national standard makes little sense in considering e.g., water allocation: should all rivers be subject to the same minimum flows? The benefits of mandatory national direction might come at the expense of flexibility (desirable economic outcomes) at the local level.

3.12 Within the existing RMA system, it is clear blunt environmental limits can lead to unintended or perverse outcomes. Unless provision is made for a clear consenting pathway through such infrastructure limits, significant issues could arise in relation to the protection, maintenance, or upgrading of core services where these are in a sensitive environment. Due to geographic factors, many networks span a variety of different areas, including environmentally sensitive areas. It is paramount for network providers to be able to maintain existing infrastructure without the need to follow an overly onerous consenting pathway.

3.13 The recent National Environmental Standards for Freshwater Regulations essentially prohibit earthworks on all 'natural wetlands' – the definition of which is extremely broad. This is a prime example of the problem of making national specific definitions to the detriment of quarrying and building within existing developments, taking no account of the unique circumstances facing individual regions or communities or the impact on broader economic development.

3.14 It is difficult to see how environmental limits can be set with any lasting certainty and to the extent the limits set will always be open to question, it is unlikely their

existence will prevent conflicts from arising, as the Parliamentary paper on the exposure draft recognises.

3.15 Given what appears to be a singularly prescriptive approach to defining environmental limits, the recognition that some data might be imperfect and not easy to quantify is perhaps of some comfort. Again, will there be appeal rights?

BusinessNZ **recommends** that:

Clause 7 be amended to allow greater consideration to be given to the making of trade-offs at a local level in respect to hard environmental limits, recognising that a one-size approach may not be satisfactory in all circumstances. Local trade-offs will still be needed, the existence of a national planning framework notwithstanding.

Clause 8: Environmental outcomes

3.16 Under Clause 8, the National Planning Framework and all plans must promote environmental outcomes ranging from *(a) "the quality of air, freshwater, coastal waters, estuaries, and soils protected, restored, or improved"*, through to the 8(o) "*the ongoing provision of infrastructure services……."*

3.17 The outcomes to be promoted also include recognition of urban development, housing and infrastructure, the latter expressed as the "ongoing provision of infrastructure services to support the well-being of people and communities, including by supporting (i) the use of land for economic, social and cultural activities: (ii) an increase in the generation, storage, transmission, and use of renewable energy."

3.18 However, the enabling outcomes for urban development and infrastructure are implied in less directive terms than the environmental outcomes. The concern is that this may result in the prioritisation of environmental outcomes over those for built or developed environments, at the risk of limiting the ability to obtain consents for essential infrastructure such as network utilities.

3.19 Accordingly, BusinessNZ believes the infrastructure outcome (clause 8(o)) should be strengthened to explicitly provide for the protection, maintenance and enablement of essential infrastructure to meet the needs of people and communities, and to recognise the functional need for infrastructure to sometimes locate in sensitive natural environments.

3.20 Notwithstanding the above, some of the 16 outcomes promoted under clause 8 are likely in many situations to conflict with each other; the question then becomes, which will take precedence? The current list reads almost like a wish list but with no indication or understanding of how any one outcome will be achieved. There is no activity that can achieve all of the outcomes in section 8. The essential question is, what process will manage the unavoidable trade-offs?

3.21 Moreover, there are concerns with the nature of some of clause 8's environmental outcomes as currently worded. For example:

(i) This provision is self-contradictory since if customary rights are protected, as is stated here, it must follow they have also been recognised.

(m) Re rural area development: this will likely at times conflict with (a) to (i) (and even with (j), referring to the reduction of greenhouse gas emissions). It would seem inevitable that the protection provided for will at times clash with the need to develop rural areas.

3.22 Provided emissions are adequately covered by the ETS, authorities should be agnostic as to which specific projects should be supported.

3.23 Therefore, when it comes to meeting domestic and international obligations to reach net zero carbon emissions by 2050, we consider the focus should be on:

1. Net emissions and not gross emissions
2. The ETS as the sole tool except where it can be clearly demonstrated that further interventions will have net benefits
3. Any supporting policies as outcome-focused and technology agnostic
4. Avoiding bans and interventions as typically these increase cost for no gain, given the ETS cap
5. The importance of lowest cost abatement as cost matters to the wellbeing and livelihood of New Zealand families and businesses.

(o) Paragraph (o) of clause 8 is another provision likely to conflict with the earlier paragraphs referred to above.

(p) Paragraph (p), relating to reducing the significant risks of natural hazards and climate change and improving the resilience of the environment to natural hazards and the effects of climate change, could be more clearly drafted since, currently, this could be interpreted as requiring the risk of natural hazards occurring to be reduced. It is difficult to see how the significant risk of a natural hazard, such as an earthquake or tsunami *can* be reduced. To an extent it might be possible

to reduce an earthquake's effects, but that will not remove all uncertainty and might be achievable only at a greater cost than the risk involved.

3.24 Some of the terminology's subjectivity also needs more thorough consideration. For example, in clause 8(p) the use of the reference to "significant risks", "reduced", effects being "improved" etc. – are likely to be open to a very broad range of interpretations.

3.25 If we take the Bill's purpose statement at face value - that the purpose of the Act is to protect and enhance the natural environment - it could be considered that economic well-being will be relegated to a much lower pecking order than is currently the case. Who decides whether the natural environment needs to be protected and, where necessary, restored and who will be making decisions that involve overriding individual property rights? Obviously, this will be the subject of some debate and potential litigation.

3.26 Promotion of outcomes will be ineffectual or subject to litigation unless the purpose statement provides for economic development as a matter of course. On the current wording, economic development is severely restricted.

3.27 BusinessNZ considers that provided the costs and benefits of an activity are largely internalised, then individuals, households, and companies should be relatively free to make investment decisions on their merits based on normal commercial imperatives.

BusinessNZ **recommends** that:

Clause 8 be recognised as containing potentially conflicting objectives making it, to some extent, an unrealistic counsel of perfection. Provided the costs and benefits of any activity are largely internalised, then individuals, households, and companies should be relatively free to make investment decisions on their merits, based on normal commercial imperatives. The length and nature of the clause testify to the impossibility of avoiding future conflict between environment and development.

Part 3: National Planning Framework (NPF)

3.28 Theoretically a National Planning Framework (NPF) might be seen as desirable but is unlikely to cover all bases successfully, even for the present time, let alone the future (the latter recognised to some extent in the Parliamentary paper on the Exposure Draft).

3.29 Even should an NPF provide for greater certainty, its success or otherwise would depend on the quality of the planning input. Planning involves foreseeability which in turn involves uncertainty. The test of a regime of this kind will be its ability to respond both to changing circumstances and errors arising from the planning process, although whether these can be corrected via an essentially unsupervised regulation-making system remains to be seen.

Clause 11: National planning framework to be made as regulations

3.30 Making the NPF by regulations could have the effect of excluding those who will be affected by whatever decisions are made from involvement in the decision-making process and thereby contributing their on-the-ground experience. If mistakes are to be limited and arbitrary decision-making avoided, the legislation must make provision for effective consultation and discussion. Will, for example, the regulation development process have regional or district input?

Clause 13: Topics that national planning framework must include

3.31 The list of topics is formidable and will inevitably be subject to challenge, particularly as it cannot be expected that whatever rules are specified under the topic headings set out here will always be the right rules, or even sensible.

3.32 It appears from paragraphs (a) to (i) that business has no place in the NPF, although without business the legislation's aims cannot be achieved.

3.33 The explanations given in the Parliamentary paper on the exposure draft do not provide confidence that operating under the national planning framework will be any less stress-free than operating under the RMA. It appears there will still be many hoops to be jumped through before planning permission is obtained, and uncertainty will not be eliminated. Either that, or there will be so much certainty that little can be achieved. Central government, unfortunately, does not necessarily have all the answers and much of what is specified could very likely prove certain but inflexible. Even the best thought out planning framework will be unable to meet the legitimate expectations of both growth and environmental protection. What can only be hoped for is that fair compromises can be achieved.

Clause 14: Strategic directions to be included

3.34 How the NPF is to be implemented is unclear. Who will determine whether it is to be given effect through plans or regional spatial strategies (shouldn't this term be defined?) or that certain provisions will have legal effect without being included in either? If this is a national framework, will regional committees have any part in the process?

3.35 What is provided for here very much suggests that regional planning committees will be subject to central oversight, possibly to the detriment of the local community. But it is the local community that is best placed to decide what is right for the local area.

Clause 15: The implementation of the national planning framework

3.36 There is a question as to what extent an NPF will be able to take account of local circumstances. Again, a degree of conflict would seem inevitable. Local circumstances need to be considered.

Clause 16: Application of the precautionary approach

3.37 Environmental limits are required to be set in accordance with a precautionary approach. This approach is repeated at every stage of the framework outlined in the Exposure Draft, including in the development of combined plans and with respect to persons undertaking functions under the NBA. BusinessNZ's concern is that this runs the risk of developing an overly conservative framework in favour of protecting the natural environment and is likely to further constrain the ability to gain consents for essential infrastructure in sensitive environments.

3.38 The use of the precautionary approach must have its limitations. Adopting a precautionary approach to determining environmental limits is likely to hinder or prevent otherwise beneficial development (particularly as some decision makers are more risk averse than others). Risk is an element of life; trying to eliminate it can do more harm than good.

Clause 18: Implementation principles

3.39 As relevant individuals will have very different points of view, conflict will be inevitable and any consenting process correspondingly slow.

3.40 The principles as stated here are clearly open to interpretation. What, for example, is intended by the requirement to 'have particular regard to any cumulative effects' (f)? Will this allow those promoting the integrated management of the environment to stop developments that are underway or take over property, ignoring property rights in the process, with no provision made for compensation should this happen? What is promoted by these current principles is uncertainty and uncertainty, of itself, is likely to have a chilling effect on New Zealand's prospects of continuing to be a place where people want to invest.

3.41 The Exposure Draft is silent as to the intended transition between the existing system under the RMA and the new regime. It remains unclear how similar environmental "limits" or "directions" in RMA regulatory documents (such as the NPS or NES) will shift into the new system. BusinessNZ suggests and supports a clear timeline for transition to enable forward planning and investment. Direct consultation and forewarning are also required – and essential.

Part 4: Natural and built environment plans

Requirements for natural and built environment plans

Clause 19: Natural and environments plans

3.42 Potentially moving from around 100 plans down to 14 regionally based plans could provide for greater consistency. Currently, many problems arising from the RMA are the consequence of varying council interpretations, plus a high degree of risk-averseness and sometimes a lack of necessary expertise, all of which have delaying consequences. However, consistency might not be the answer if what is appropriate for one region is not appropriate for others.

3.43 If one plan per region covers resource use, allocation and land use management, will resource consent applications be made to a regional organisation or to a local council? If, as above, many problems arising from the RMA are the consequence of varying council interpretations, plus a high degree of risk averseness and sometimes a lack of necessary expertise, will this *'significant change'* produce a better result?

3.44 There would appear to be two major issues with the proposed 14 regional plans which need further consideration. First, how far will the ability to make trade-offs at a local level be provided for? Second, given the number of relevant views from a broad cross-section of society, it is difficult to see how coherent plans can be developed in a timely manner in view of the very wide range of environmental outcomes promoted. Local pushback is also likely if planning becomes the sole

prerogative of regional councils, particularly as it is not obvious that the consequence will be an improvement in quality. Consistency should not be purchased at the expense of local input or control.

3.45 The NPF and natural and built environments plans will be contained within Schedule 1 and 2 of the Act. Currently, the schedules are blank and will need to be populated before the actual Natural and Built Environments Act is introduced early next year.

Clause 21: How plans are prepared, notified, and made

3.46 There is some inconsistency between this provision (regional plans to be made by regional planning committees) and clause 15(2) which allows for centralised input into regional decision-making.

Clause 22: Contents of plans

3.47 See comment above re a possible conflict between national planning requirements and what a particular planning committee might want to implement.

Clause 23: Planning committees

3.48 Will there be any right of appeal from planning committee decisions?

Clause 24: Considerations relevant to planning committee decisions

3.49 With its focus on the natural environment and the precautionary approach, this Bill appears to view the development of the built environment as very much a secondary matter. In its present form, it will provide the basis for much argument about how much built environment development is permissible.

Schedule 3: Planning committees

1 Membership of planning committees

3.50 It is noted that the Minister of Conservation is to be represented on the regional planning committee 1(1)(a).

3.51 We would question why the Minister of Conservation should be represented on planning committees rather than any other Minister - that Minister's responsibility

for coastal planning doesn't seem a strong enough reason. Why not the Minister of Finance? Or the Minister for Economic Development?

3.52 While individual government departments occasionally engage with local government no one agency speaks for central government in its entirety. Rather than solve this problem, leaving the locus of "planning" or resource use decisions to be made locally, the Bill proposes to shift some decisions up to central government in the form of a national planning framework and environmental bottom lines. And while the Minister of Conservation will be represented on the regional planning committees, no other central agency will be.

3.53 The above approach seems arbitrary at best. It must be possible to provide for a central government seat on regional planning committees to be filled by the representative most appropriate for the issue in question. The danger, otherwise, is that development perspectives be relegated to the bottom of the pile.

Appendix One - Background information on BusinessNZ

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).