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Te Kaitiaki Taiao a Te Whare Pāremata

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Dear Eugenie and committee members

I have now had a chance to read the full suite of departmental reports on the NBEA and SPA provided to the Committee by officials. With the assistance of Matt Paterson in my office, I have already provided the Committee with a commentary on some of the proposed changes outlined in those reports.

I'd like to use this opportunity to make some wider observations that flow from the fourth report – *Overview and Issues Analysis*. I found it very useful. It represents the clearest account I have read to date on the rationale for the reforms and their design.

In one sense, that is not unexpected. Any reform process of this nature is iterative and if policy makers are listening to the advice they have solicited it is only to be expected that key issues will come into focus as key concepts are clarified. But I think officials have done a better than average job of articulating what it is the reforms are seeking to achieve in an accessible fashion. Please pass on to them my appreciation of the work they have done.

Committee members may recall that in my original submission I said that I for one would not be criticising the proposed legislation on the basis of complexity. I think that is worth repeating.

The environment we live in is not simple and some of the processes we have set in train have no easy 'solutions'. There are many interdependencies between property owners as well as many spill overs from their use of environmental resources. Legislation of this nature will affect everyone's property rights, public and private. Further to that, the natural environment goes to the core of Māori identity.

So any attempt to manage these frictions or conflicts, whether through regulations or markets, will involve complexity and demand high levels of specialist expertise. Standing back, with the assistance of the officials' Overview, what the Committee should now be considering is whether there is clarity of purpose and roles and whether the scope of what is being achieved can actually be delivered by the people and skills available to us. On that score, I would like to make three points about the legislative framework that is proposed.

Firstly, the purpose of this whole reform has to be one that will secure better environmental outcomes. As I understand it, the purpose clause of the NBEA now reads as follows:

> **3 Purpose of this Act**
>
> (1) The purpose of this Act is to uphold te Oranga o te Taiao.
> (2) The purpose must be achieved in a way that—
> (a) protects the health of the natural environment; and
> (b) subject to paragraph (a), enables the use and development of the environment in way that promotes the well-being of present and future generations.

I consider this is a very significant improvement over the earlier drafting. Subclause 2 removes what was undoubtedly a source of ambiguity in the drafting of the RMA's purpose clause by making clear that the use and development of the environment is subject to maintaining the environment's health. That seems to me, in 2023, an environmentally responsible and ethically compelling statement of our collective dependence on the natural environment.

However, subclause 1, "to uphold te Oranga o te Taiao", is likely to introduce fresh legal uncertainty that will almost certainly need to be clarified by the courts. That may take years to play out. While the drafting of the four limbs of the definition may seem straightforward, phrases such as 'essential relationship' and 'intrinsic relationship' will no doubt invite ingenious legal argument. This is probably unavoidable, but the Committee should proceed with its eyes open.

My second key point is that that there is no clear hierarchy reflected in the unprioritised 'system outcomes' that are one of the means through which the NBEA's purpose is to be achieved. Neither is the sequence for developing key governing documents under the NBEA and SPA consistent with the proposed purpose clause cited above. Let me briefly elaborate.

A logical consequence of the redrafted purpose clause is that you would first elaborate the framework for environmental protection based on the best available information and mātauranga, then proceed to enable the use of environmental resources in a way that is consistent with environmental health.

But the current hierarchy of documents has the first NPF and RSSs (and likely some NBE Plans) being developed before limits, targets, places of national importance and HVBAs etc are identified. How can development be subject to the health of the environment if documents charting the shape of future development are written before the environmental parts? Logically, one would settle the environmental state of things, *then* proceed to develop a regional spatial strategy that is consistent with protecting its integrity.

None of this is helped by the reform still being framed as *two* statutes. Nothing in the officials' overview even attempts a rationale for this. I can only assume that unspecified political considerations are believed to make a dual statute framing more acceptable. It is certainly not necessary for integrating environmental and spatial planning with other instruments.

Finally, there is an important point to be made about roles and accountabilities. The proposed reform represents a decisive centralisation of regulatory authority with respect to the environmental and planning law. There are both positive and negative elements to this.

The devolution of regulatory power envisaged by the RMA represented a radical break with the past. The results – in terms of environmental outcomes and regulatory quality – have been mixed at best. It has become an almost unquestioned truth that inadequate guidance and

resources meant the RMA under-performed. There is certainly some truth in that – I have claimed as much myself.

But that is possibly too easy a conclusion to draw. It is equally as likely that in a country of just 3 million people (as we were in 1991), the depth of skills needed to operate complex and sophisticated new arrangements simply weren't there. Neither were the traditions of public engagement and arm's length administration of environmental regulation at the regional level.

Bringing responsibility for environmental regulation back to the centre as envisaged by the National Planning Framework and nationally mandated limits and targets is to my mind sensible. Not only will there be efficiency gains from having a consistent approach taken across the country. There will be a chance to develop and leverage a critical mass of technical and monitoring skills. The proposed reform does not, however, maximise the chances of that happening. This is not a matter of legal drafting but institutions.

The natural environment has common properties but spatial variation. The 'centre' needs to be present regionally to make spatial sense of nationally important environmental priorities. I have previously advised the Committee that a re-tasked EPA, taking over the technical capacities currently embedded in Regional Councils, would be the obvious vehicle to ensure that the re-centralisation of environmental management has the best chance of success. A *bric à brac* of regional planning committees and secretariats is a poor substitute for ensuring accountability for regulatory quality and efficiency.

On the other hand, regional planning committees seem to me ideally placed to provide the high-level spatial integration that is needed to accommodate a range of key infrastructures within a setting of urban and industrial growth. Here, in my opinion, the centralising mission of the proposed legislation is less persuasive. Spelling out at the national level social and economic outcomes and requiring them to be achieved can only ever be done at a level of generality that is uninteresting – or extremely coarse.

The spatial realities that regional planning committees will have to deal with arise in very different social and economic settings and the value judgments they throw up are inevitably in flux - that is, they reflect political and ideological priorities. These are quite different from the environmental imperatives we face.

In a nutshell, I would suggest that environmental challenges are of a piece and that it makes good sense to manage them nationally and require accountability at that level. By contrast, there is a heterogeneity about social and economic life that is much less easily planned from the centre. This *does* need to be devolved. Accountability for the spatial form and direction of a region's development is something that should be in the hands of the people of the region.

If, as I think inevitable, responsibility for environmental decision-making will move back towards the centre, the role of local voice in regional spatial planning becomes more important. I was astonished to read, in the officials' overview, the suggestion by the NZ Planning Institute that "the role of the planner in engaging with communities would ensure that the voice of local communities is heard".[1] Unelected regional policy committees are an equally unsatisfactory means of ensuring accountability to the communities who will live with the consequences of spatial planning decisions.

[1] Departmental Report, Tranche 4, p.51

There are no easy drafting fixes for some of these issues. The Committee would need to suggest that more work is required before the Bill is sent back to the House for consideration. While that would be my preference, I would at the very least hope that the issues I have raised could be noted in your report back to the House so that all MPs can factor them into their consideration of the Bills.

I would like to thank the Committee for the opportunity to share these observations.

Yours sincerely,

Rt Hon Simon Upton

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