Planning Bill and Natural Environment Bill: Legislative design and core components

27 March 2026

To Environment Select Committee

Introduction

This note responds to the Committee's request for some general advice of what is required, or core, for legislation for an effective environmental management system. The note sets out the key issues that the system must manage and what the core components of any enabling legislation needs to cover. It then canvasses some of the key design choices raised Bills and suggests questions the Committee (and indeed the Government) might like to consider. Some of the particular problems raised by biodiversity protection are elaborated in a separate, companion note.

As Parliamentary Commissioner for the Environment, my statutory mandate is to scrutinise legislation of this nature 'with the objective of maintaining and improving the quality of the environment'.[1] I suggest that Committee members would do well to ask themselves whether the Planning Bill and the Natural Environment Bill would makes it more or less likely that the quality of the environment will be 'maintained and improved'. I intend to comment further on this topic in my Adviser's Report. For now, I would just note that I am sceptical that what is proposed will make a difference to the steady decline in ecosystem health in many parts of New Zealand.

Functions of an environmental management system

The natural and physical environment includes resources that are in public 'ownership' – things like air, water and coastlines – and land that is in private ownership, like farms, factories, and private homes. Any environmental management system will have to address three areas of potential conflict. It will need to:

- make rules about how we manage competing interests in the **use of public resources and manage their environmental impacts** (e.g. how much air or water pollution we tolerate)
- facilitate ways to manage **the frictions of how people and businesses live alongside one another** (e.g. the noise, odours and visual impacts adjoining property owners)
- provide mechanisms for determining limitations on private interests, where these intersect with public interests (e.g. designations for infrastructure and utilities, significant natural areas, places of cultural significance).

[1] Environment Act 1986, s 16(1)(a).

The frictions that arise, and the trade-offs that must be made, will be present in whatever system design is chosen. Statutes, like the RMA and these Bills, establish the processes for decision-making, and determine the level at which they are taken. They are also an opportunity to reflect the particular relationship between Māori and te taiao.

These Bills attempt to streamline and simplify current process and implementation issues. A key question is whether in doing so it makes environmental degradation more likely. But whatever level of risk appetite or risk aversion to environmental harm the legislation takes, it has to be understood that legislation will never eliminate dissatisfaction. The frictions and trade-offs referred to above are inevitably conflictual but need to be managed somehow.

Core components

The following core components look at what any environmental management system (not just the one proposed by the Bills) should have, in some form or another, to function well. These have been divided into two broad categories – components core to almost any regulatory system, with some commentary on some of the particular issues that environmental regulatory systems raise, and tools that are specifically used in many environmental management systems. This second group includes processes and other mechanisms that will deliver the regulatory functions.

Regulatory system operation

Purpose

Purpose provisions are drafted for various reasons: to communicate the basic purpose of a regime, to set the direction for a regime or to guide the interpretation of the legislation. While a purpose clause cannot be expected to do any substantial legal work for a regime, it does have legal effect when it comes to the interpretation of the regime and can be a useful tool in describing the ultimate outcome to be achieved by the legislation. Vague aspirational or political statements should be avoided.[2]

> In the present case, the Committee is being asked to examine two purposes – because there are two Bills. These clauses, unlike section 5 of the Resource Management Act, are descriptive and provide no guidance about what is supposed to be achieved by those exercising powers under these Bills. That guidance comes by way of goals set out in clauses 11 of each Bill. These goals cover a vast range of topics that are to be weighed up, without any particular outcome in mind. Despite the proposed list of goals, which have attracted much attention in submissions, their application and effect is so limited that it is unclear what, if any, effective guidance the Bills will provide to decision-makers. I will elaborate on this in my Adviser’s Report.

Duties and restrictions

It should be clear to the people making decisions and people undertaking activities in the system what they can and cannot do, and what the expectations are about *how* they carry out their duties and functions.

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[2] Legislation Design and Advisory Committee, Legislation Guidelines (2021 edition), Supplementary materials, *Designing purpose provisions and statements of principle*.

Treaty-related provisions

Given New Zealand's constitutional context, any regulatory system will need to address matters guaranteed to Māori under Article 2 of Te Tiriti.

Public participation

To the extent that regulations affect people's interests, they should have an opportunity to comment *before* decisions are made that affect their personal interests or commonly held resources on which they rely.

> An environmental regulatory system manages public resources (such as water, air, biodiversity, heritage) and involves managing conflicts and determining trade-offs between peoples' competing interests and views.

Access to justice

People should be able to contest decisions that have been made that affect them or the commonly held resources on which they rely. Access to justice becomes particularly important if public input prior to decisions being made has been limited, or has occurred mostly at higher levels of the system (e.g. on national direction or plans), where the likely impacts of decisions might not have been apparent.

> The common ownership of many environmental resources raises a particular problem for contesting decisions that affect those resources. Elected officials are tempted to deal with those resources as if they 'owned' them on behalf of the people. Telling those who disagree with their decisions that their only recourse is at the ballot box, effectively confers unchecked power on decision-makers to do as they like. For that reason, environmental management systems usually provide standing for advocacy groups who represent the public interest in those commonly held resources.

Compliance, monitoring and enforcement

The purpose of the law is to provide a framework for operating a rules-based society. But it is only as effective as the incentives and disincentives for compliance. A wide range of compliance and enforcement options helps to make the system to be more flexible and proportionate, and is likely to be more effective in achieving higher levels of compliance.

> In the case of environmental management, accurate biophysical information is essential to be able to manage the quantity and quality of resources in specific locations.

System performance

Complex systems, such as environmental management, should contain assurance mechanisms that permit a regular appraisal of whether the design and function of the system is delivering on its outcomes or purpose. The effective assessment of system performance relies on accurate information, including state of the environment monitoring.

Funding

Resources are needed to operate any regulatory system. There is a good case, to the extent that publicly owned resources are being managed, that taxpayers and ratepayers should provide a significant share of the necessary funding. Where use of public resources confers a private benefit, there is also a strong argument that users should pay. That should extend to the cost of monitoring compliance with any rules, standards and consent or permit conditions, including rules and standards around permitted activities that do not need permits or consents.

Secondary legislation and administrative instruments

Most regulatory systems deal with matters that are too complex to be handled in primary legislation (although some, such as taxation, go to considerable lengths to do this). When this is the case, provision needs to be made for secondary legislation to make rules guided by primary legislation. The balance between primary and secondary legislation, and any checks and balances included in the empowering provisions, are key design choices (see below).

> Environmental regulation can be attempted through primary legislation when the issue of concern is uniform and not dependent on local conditions. But most environmental pressures and land-use frictions are place-based, requiring delegated powers to provide place-based context.

Environmental management tools

Planning/rule-making

Plans have traditionally been the point at which all the objectives, policies, rules and methodologies relevant to environmental management decisions in a particular geographic area are brought together. They should be clear and easy to understand and navigate so that all actors in the system know what they can and cannot do. As plans govern the allocation of public resources, and manage frictions and trade-offs between people's interests, they should be developed using a robust process with appropriate public participation and access to justice.

Classification of activities and impacts (including cumulative effects)

A resource management system needs to manage a wide and diverse range of *activities* and their *impacts* on the environment. Doing that effectively, efficiently and (relatively) consistently requires a system that classifies activities and effects in advance and decides what is acceptable as of right, what needs greater scrutiny and what might be 'prohibited'. Some environmental effects, which may be small in isolation, can accumulate over time as activities expand so that, in total, they become significant. The regulatory system needs a way to manage those **cumulative effects**.

Standards

A system that will allow some activities to proceed without specific scrutiny (i.e. permitted activities) needs to have a clear set of standards and rules that those activities need to meet in order to be classified as 'permitted'. Those activities should be monitored to ensure they are complying with the standards and rules and be subject to compliance action if found to be in breach. Standards can also be a useful tool to ensure consistency across an activity class regardless of whether it is 'permitted' or requires a consent or permit.

Consenting and permitting

For those activities that may be allowed to go ahead after greater scrutiny (i.e. those that aren't 'permitted' or 'prohibited'), the system needs some sort of assessment and permission granting process. The process should allow for some degree of public participation and review of decision-making for people affected by the activity being considered.

Environmental protections

An effective environmental management system needs to determine what level of environmental harm is acceptable and what is not. There must be effective mechanisms to protect the environment to ensure that those determined levels are met. There is a range of protection tools that can be used, including **environmental limits, prohibited activities, protected areas, water conservation orders (WCOs) and coastal matters provisions**.[3] Care needs to be taken in the design of these measures to ensure that they provide effective protection without imposing unnecessary cost. There should also be mechanisms to allow greater scrutiny of activities that continue to contribute to environmental degradation. These might include stricter standards for existing activities, requiring consents or permits for what were permitted activities and, in extreme situations, the cancellation of permits or consents.

Allocation mechanisms

Imposing limits or caps on resource use is often necessary to protect the environment, but those limits restrict access and that is often controversial. Restricting access to resources that were previously open to all inevitably creates losers, so there needs to be some way to allocate access to resources between competing interests.

Current users (usually allocated on a first-come-first served basis) will want to maintain continued access thereby grandparenting those entitlements. Potential new users will argue that they also have a right to access the resource, which implies a competitive allocation mechanism. Finally, the public might believe that the resource is theirs, and private users of that resource should pay for the right to use it (a resource rental). Access to water is a classic instance that crystallises these conflicting claims.

The bureaucratic or administrative allocation of public resources like water may appear to align with public ownership. But depending on the duration of the access, it can 'freeze-the-frame' and effectively create a private property right in something that is common property. On the other hand, security of access to such resources is essential to underpin investment.

There are broadly two solutions. Either administrative allocations need to be periodically revisited, or the initial allocation made permanent but tradeable. For allocation mechanisms to be effective, there needs to be adequate information about the resource and demands on it. Depending on whether the mechanism is based on inputs or outcomes, gathering the necessary information will be more or less costly. In particular, market mechanisms that attempt to manage diffuse environmental impacts at the property level require large amounts of information. For caps and limits to be effective, there is also a need for **mechanisms to measure and claw back allocation** if over-allocation occurs or if environmental impacts (including cumulative impacts) are greater than expected and limits risk being breached.

[3] WCOs have been discussed in written and oral submissions. In a sense, WCOs are a public equivalent of private plan changes. They provide a mechanism for the public to protect rivers and their values that may be difficult to do through regular plan-making processes. Like provisions for private plan changes, they provide flexibility and agility to the system.

Environmental monitoring

Managing the environment effectively requires a good understanding both of the state of the environment and what impact various activities are having on the environment. The regime should have a robust environmental monitoring system. It is important to note that state of the environment monitoring is quite different from monitoring required for compliance (and enforcement) purposes. Both are needed, but despite their similarities they need to be discrete parts of the system because they address different needs.

Special purpose tools

Any system will likely need some tools to deal with specific issues or types of activities where the standard plans, rules and methodologies are not as effective or suitable. Examples of such tools include **designations for specified infrastructure, subdivision and reclamation, and freshwater farm plans**. The need to deal with novel, complex matters that cannot be easily provided for in advance may also call for 'special purpose' tools.

Emergency provisions

Experience has shown that in New Zealand's dynamic natural environment, there will be times where following the normal processes will be too slow to respond effectively given the urgency of the situation confronting a community. There needs to be provision for emergency works, and simplified processes for emergency response and initial recovery.

Legislative design decisions

The design of legislation should be a deliberate exercise. As the Committee identifies and considers the necessary components of the Bills, it will need to determine if those components contain matters that should be expressed in the primary legislation as distinct from those that need to be delegated to specified decision-makers.

When devolving matters to subordinate legislation or administrative instruments, thereby creating a legislative cascade, clear identification of what decisions should be taken at what level is required.

Once the levels at which functions, powers, and duties reside have been determined, the commensurate responsibility and accountability for decision-making should follow for each level – this should be considered a packaged deal. For system efficiency and effectiveness, the package of actions and responsibilities should be considered for each of the operative components of the system.

Primary vs secondary legislation

Greater specification in primary legislation is likely to result in a more stable and predictable system. This might include methodologies for implementation, significant national trade-offs, and consideration of inter-generational aspects. Excessive prescription in the primary legislation can lead to inertia for system implementation, as any changes or 'fixes' require an amendment bill process.

Greater reliance on secondary legislation to elaborate on the matters set out in primary legislation allows for a more agile and responsive system. But this can result in greater instability as governments change and different Ministers insert their own guidance through secondary legislation.

The Committee (Parliament) should be confident that matters are sufficiently prescribed in the primary legislation for a system to be understood and workable for implementation, and that it has specified appropriate checks and balances where the Executive (and lower levels of decision-making) are empowered to provide further rules and guidance for the operation of the system.

Decision-making design and system stability

The terms of primary legislation will determine the limits of discretion available to decision-makers. These checks and balances on decision-making, popularly referred to as 'guardrails', can further increase Parliament's confidence in the stability of the system established by that legislation. They can enhance scrutiny of decisions, increase public trust and confidence in the system, and contribute to system stability.

In the framework proposed by the Bills, decision-making is weighted heavily in favour of the Executive, with significant reliance on national instruments (policy direction and standards) to deliver much of the operational context for implementation. There are, without question, good reasons for national instruments, not least providing a measure of consistency in managing expensive processes in a small, skill-scarce economy.

The Bills' reliance on national direction has been regularly referenced as a reason why Ministry officials have not been able to expand on their advice with detailed explanations, or construct case studies, to enhance the Committee's understanding of the Bills' provisions. It has also been a feature in the submissions heard by the Committee, raising concerns that the system the Bills propose will be more unstable than the RMA, given the relative ease with which changing governments and Ministers can promote changes to national instruments under provisions in primary legislation that allow a very wide range of regulated outcomes, often without further scrutiny or adjudication. These are concerns I share.

Submitters have recommended mechanisms that could be applied to reduce the inevitable system churn of changing Ministers. This includes the mandatory use of Technical Advisory Groups (TAG) or a Board of Inquiry to develop national instruments.[4] Independent hearings panels are seen as a means of injecting rigour into councils' plan making. There is no reason why a similar approach should not be taken for national direction. I suggest that the Committee further consider how the appraisal of national direction could be subjected to more independent scrutiny and, in the case of preparing fundamental national instruments (e.g. freshwater management, indigenous biodiversity, coastal matters), how Boards of Inquiry (BoI) could be used.

The fact that the BoI mechanism was removed from the RMA because it was not being used should not deter the Committee from considering its reintroduction. This is, after all, a brand-new regime which allows the Executive to make far-reaching directions. Those directions need to be made in a way that best achieves as broad a mandate as possible to underwrite the durable and stable implementation of the law.

I have conducted a review of the opportunities for ministerial discretion proposed in the two bills and pulled these together into a diagram (that accompanies this note). It sets out the extent of Ministerial discretion and the opportunities for public participation in processes.

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[4] For example, see the submission of the New Zealand Planning Institute.

It clearly shows that while the system design delegates certain functions and duties to levels below the national level, the Minister is still able to interfere.[5]

The ability to arbitrarily interfere in processes that have been devolved disrupts system certainty and efficiency. For example, recent amendments to the RMA, to extend the duration of coastal permits for marine farms, sought to address a problem with the management of reconsenting – a problem that local authorities resoundingly submitted were planned for and well managed.[6] Despite the evidence contradicting the policy position for the amendments, the changes were made and extensions granted, upending local authority planning for reconsenting and creating a future pressure point for consent management.

Allowing public participation, commensurate with the functions that are performed at each level, enhances system stability. Where people are unable to appropriately participate in processes that affect them, challenging decisions through litigation becomes the alternative. Constant and sustained legal challenges disrupt system implementation and workability. The risks of litigation can be mitigated if people are given sufficient opportunity to participate or are otherwise clear on how decision-makers are held accountable.

Transparency in decision-making and scrutiny mechanisms, provide additional means to achieve checks and balances for decisions. This can be as simple as requiring the publication of the reasons that have been relied on in respect of particular decisions or requiring the provision of a justification for departing from expert advice (e.g. choosing an alternative to what is recommended by a TAG or BoI).

The Committee should consider what mechanisms might balance the weight of discretion being handed to Ministers. Cross-party agreement on the balance between executive agility and scrutiny could significantly underpin stability going forward.

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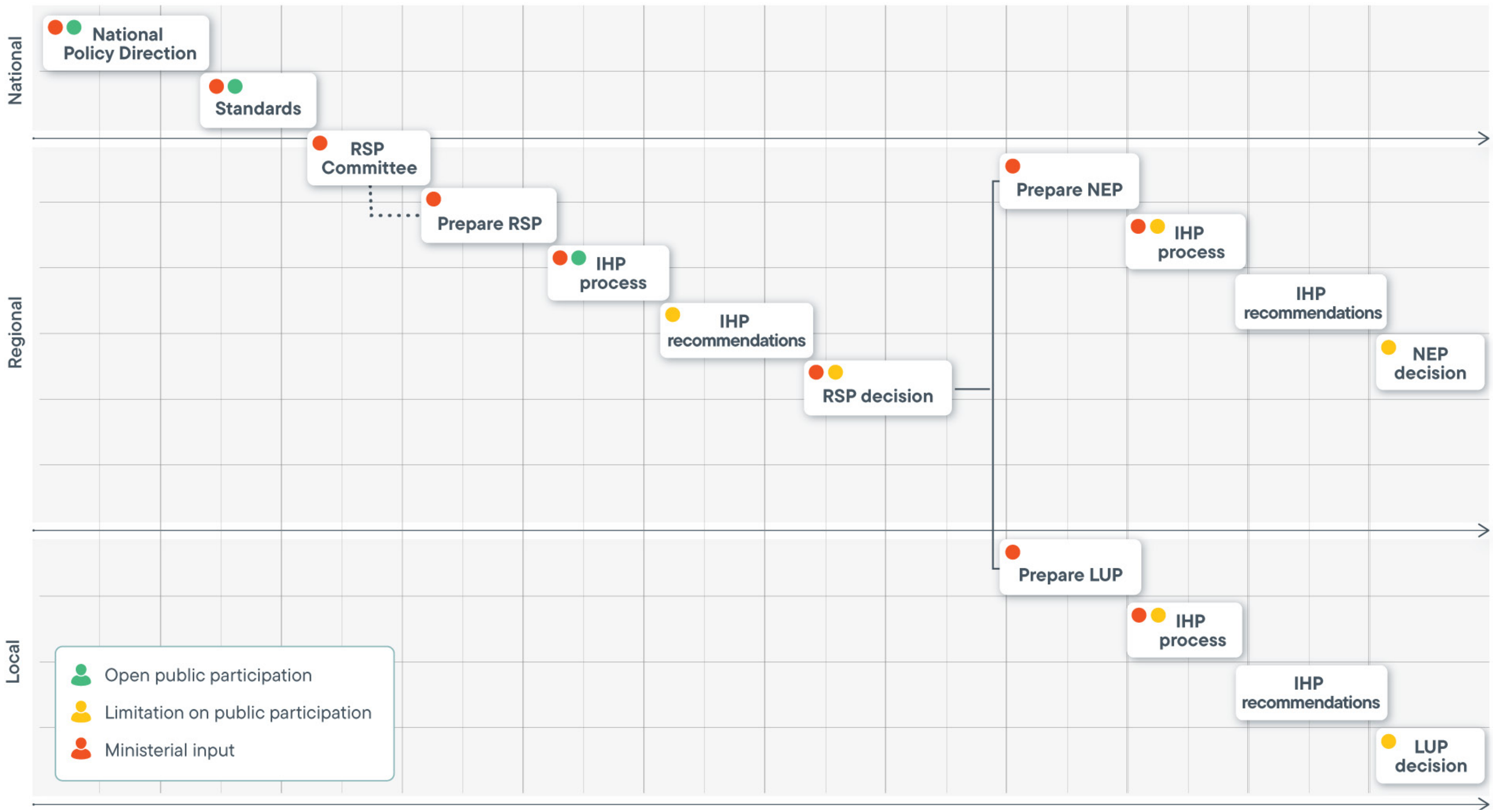
Te Kaitiaki Taiao a Te Whare Pāremata

[5] The diagram shows where in the processes the Minister can intervene in national direction setting and plan making. There may be further ways for the Minister to input where public participation is limited such as during consenting and permitting and through the system oversight provisions.

[6] Resource Management (Extended Duration of Coastal Permits for Marine Farms) Amendment Act 2024.

Ministerial powers and constraints on participation at the top of the system



Level	Process stage	Details
National	National Policy Direction (NPD)	**Ministerial input** • Minister may direct plan outcomes, content of plans and matters local authorities must have regard to when making plans (PB cl 47, 48 and 55 and NEB cl 71, 72 and 79). • Minister may direct how goals are to be achieved and how conflicts between goals are resolved (PB cl 56 and 57 and NEB cl 80 and 81). • Minister has discretion over timeframes for notifying NPD (PB Sch 1, cl 6).
	Standards	**Ministerial input** • Minister, through national standards, may direct how plans are to be prepared and what they can and cannot include, including specific consenting pathways, allocation processes and controls related to fishing under the NEB (PB cl 47, 48 and 60 and NEB cl 71, 72, 84 and 86–88).
Regional	Regional Spatial Plan (RSP) Committee	**Ministerial input** • Minister may appoint one or more (subject to agreement) members to a RSP Committee (PB cl 72).
	Prepare Regional Spatial Plan (RSP)	**Ministerial input** • What can and cannot be included in a RSP is determined by national instruments (PB cl 47, 55 and 60 and PB Sch 2, cl 2). • Minister may audit draft RSP before it is notified (PB Sch 2, cl 13). • Minister may appoint infrastructure provider as a designating authority (PB Sch 4, cl 11). • Minister has discretion over timeframes for notifying RSPs (PB Sch 1, cl 6).
	Independent Hearings Panel (IHP) Process	**Ministerial input** • Minister may set skills and qualifications of IHP (PB Sch 4, cl 2). • Minister may appoint one or more members to an IHP (PB Sch 4, cl 5).
	Independent Hearings Panel (IHP) Recommendations	**Limitation on public participation** • No requirement for IHP recommendations to be notified to public (or all submitters) within 40 working days of hearing closing (PB Sch 2, cl 17).

Regional	Regional Spatial Plan (RSP) Decision ●●	**Ministerial input** • Minister may change IHP recommendations where a matter will have a significant positive or negative impact on the delivery, use, performance, or cost of infrastructure or other assets owned or funded (in whole or part) by central government; or a matter of national interest included in national instruments, a government policy statement, or other national plan or strategy (PB Sch 2, cl 19). • Minister may make a decision or appoint an independent person(s) to make a decision(s) where local authorities cannot reach consensus on a a matter (PB Sch 2, cl 23). **Limitation on public participation** • Appeals on decisions on RSP generally restricted to points of law (PB Sch 2, cl 24). • Merits appeals are only available where local authorities reject an IHP recommendation on infrastructure (Sch 2 Cl 25 PB) or in relation to a designating authority decision where the matter was raised in the appellants submission (PB Sch 2, cl 26).
	Prepare National Environment Plan (NEP) ●	**Ministerial input** • What can and cannot be included in a NEP is determined by national instruments (NEB cl 71–72, 79, 84 and 95–96) and any other direction provided by Minister (NEB cl 217). • Minister has discretion over timeframes for notifying the NEP (PB Sch 1, cl 6). • Minister must be consulted on draft NEP before it is notified (PB Sch 3, cl 5). • Chief Executive (arm of Minister) may audit NEP before it is notified (PB Sch 3, cl 13).
	Independent Hearings Panel (IHP) Process ●●	**Ministerial input** • Minister may set skills and qualifications of IHP (Sch 4 Cl 2 PB). • Minister may appoint one or more members to an IHP (Sch 4 Cl 5 PB). • Minister may appoint a person(s) to resolve disputes related to IHP establishment (Sch 4 Cl 6 PB). **Limitation on public participation** • Submissions (and standing to appeal) are limited to qualifying residents, those who have an interest greater than the general public and local authorities (Sch 3 Cl 17 PB).
	National Environment Plan (NEP) Decision ●	**Limitation on public participation** • Appeals on a standardised plan provision or any matter excluded from a NEP are restricted to points of law (PB Sch 3, cl 32). • Merits appeals are only available for bespoke provisions and relief framework provisions and only if raised in the appellants submission (PB Sch 3, cl 33–34).

Local	Prepare Land Use Plan (LUP)	**Ministerial input** • What can and cannot be included in a LUP is determined by national instruments (PB cl 47–48, 55, 60, 78–79) and any other direction provided by Minister (PB cl 203). • Minister has discretion over timeframes for notifying the LUP (PB Sch 1, cl 6). • Minister must be consulted on a draft LUP before it is notified (PB Sch 3, cl 5). • Chief Executive (arm of Minister) may audit LUP before it is notified (PB Sch 3, cl 13).
	Independent Hearings Panel (IHP) Process	**Ministerial input** • Minister may set skills and qualifications of an IHP (PB Sch 4, cl 2). • Minister may appoint one or more members to an IHP (PB Sch 4, cl 5). • Minister may appoint a person to resolve disputes related to IHP establishment (PB Sch 4, cl 6). **Limitation on public participation** • Submissions (and standing to appeal) on a LUP are limited to qualifying residents, those who have an interest greater than the general public and local authorities (PB Sch 3, cl 17).
	Land Use Plan (LUP) Decision	**Limitation on public participation** • Appeals on a standardised plan provision or any matter excluded from a LUP are restricted to points of law (PB Sch 3, cl 32). • Merits appeals are only available for bespoke provisions and relief framework provisions and only if raised in the appellants submission (PB Sch 3, cl 32–34).