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Te Kaitiaki Taiao a Te Whare Pāremata

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Tēnā koutou Eugenie and committee members

Thank you for asking me to provide advice on the latest RT versions of the Natural and Built Environment Bill and the Spatial Planning Bill.

Given the tight timeframe you are working to, I have not been able to undertake a comprehensive analysis of the proposed drafting changes. Rather, I have focused on two critical issues: the purpose clause and the legal effect of environmental limits (and targets) in the Natural and Bulit Environments Bill.

The purpose clause

Describing the purpose of the statute as being about *upholding* te Oranga o te Taiao is to describe something akin to advocacy for a conceptual - almost metaphysical - proposition. As such, it is aspirational and lacking in purposive weight. A purpose provision should provide powerful interpretative assistance across the Act.[1] It will inevitably be litigated, so it is important that Parliament crafts it in a way that minimizes ambiguity.

This is a statute that is about the active promotion of outcomes. The lofty detachment of its purpose fails to cascade down through the Bill's provisions to give a clear signal to active participants. Furthermore, the purpose clause conflates the purpose of the Act with guidance on how the purpose is to be achieved. It goes on to repeat content from the definition of te Oranga o te Taiao in spelling out the ways in which the purpose must be achieved.

The health of the environment is central to te Oranga o te Taiao, so I am pleased that the latest drafting in clause 3(2) seeks to make the use and development of the environment subject to the prior claims of the environment's health. However, for the purpose clause to have real purposive weight, it needs to ensure the protection of the natural environment. Ensuring the protection of the health of the environment will then serve the relationships that are acknowledged by te Oranga o te Taiao.

[1] See *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38 at [24(a)], where the definition of sustainable management in s 5(2) of the RMA "states a guiding principle which is intended to be applied by those performing functions under the RMA"; and *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board and Ors* [2021] NZSC 127 at [240], the purpose provision at s 10 of the EEZ Act "provides an overarching guiding framework for decision-making under the Act and, to this extent, has substantive or operative force".

To that end, the purpose clause should be simplified and formulated as a true statement of purpose, becoming one that outcomes can usefully leverage. The Committee might like to seek advice on the following drafting:

3 Purpose of this Act

(1) The purpose of this Act is to uphold te Oranga o te Taiao by:

(a) ensuring the health of the natural environment is protected; and

(b) subject to paragraph (a), enabling the use and development of the environment in a way that promotes the well-being of both present and future generations.

(2) **Te Oranga o te Taiao** ~~means~~ includes all of the following:

~~(a) the health of the natural environment:~~ and

(b) the relationship between the health of the natural environment and its capacity to sustain life: and

(c) the relationship between the health of the natural environment and the health and well-being of people and communities; and

(d) the interconnectedness of all parts of the environment; and

(e) the relationship between iwi and hapū and te Taiao that is based on whakapapa

The use of the conjunctive *by* makes it clearer the Act has a singular purpose that can be achieved in two ways, one subject to the other.

Ensuring is a more deliberative verb that requires active steps to protect and thus gives some weight to the protective tools the Act provides (environmental limits and targets, protected places and the natural environment outcomes in clause 5). It also complements the active verb *enabling* in subclause (b).

If my suggested drafting approach is adopted, the reference to 'the health of the natural environment' could then be removed from the definition of te Oranga o te Taiao, as its protection will then become part of the purpose statement. Use of the word *includes* allows the health of the environment to be read into the definition of te Oranga o te Taiao without it being specified.

Amending the purpose clause as I suggest will provide a clear signal of the intended legislative effect of te Oranga o te Taiao, rather than leaving it somewhat untethered, at a distance from the workings of all the activity the statute is designed to guide.

Environmental limits and targets

Some of the amendments made in the RT version have significantly weakened the legislative effect of environmental limits and targets.

The previous drafting of clause 3 (Purpose of this Act) included provision that use, development and protection of the environment was done in a way that "complies with environmental limits and their associated targets". The amended purpose clause no longer contains this reference to limits and targets. The key means for achieving the purpose in clause 3A simply signposts that environmental limits and targets must be set; it does not require them to be complied with. This seems limp given the purpose of the Act, which is to assure protection of the natural environment.

With the reference to limits removed from the purpose of the Act, the operative provisions should be clear that compliance with environmental limits (and targets) is required. Subpart 2 of Part 3 sets out the framework for setting environmental limits, which is entirely silent on required compliance, but oddly contains an exemption regime. While this might suggest limits

are to be complied with, obligations should be drafted explicitly, particularly where consequences for non-compliance are intended.

The key issues are:

- As outlined above, nothing in the relevant clauses on environmental limits and targets (clauses 37-55A) requires that decision makers or those using the environment to ensure compliance with environmental limits and targets.
- Environmental limits and targets do not feature in the decision-making principles in clause 6(1). Of further concern is that the chapeau in clause 6(1) results in these principles only applying to recommendations or decisions made on the NPF and NBE plans, not to decisions made under those documents. It is those subsequent decisions on consenting and compliance with rules which are most immediately relevant to the impact activities have on the environment.
- Clause 223(11) requires that a resource consent cannot be issued if it is contrary to a limit or target. As I have previously advised to the Committee, *contrary to* is a very high bar that should be lowered.

Potential drafting solutions include:

- Amend clause 3A(b) to:

  (b) limits and their associated mandatory targets must be set, and complied with, for each of the domains listed in section 38(1), in the national planning framework and in plans; and

- Add a new subclause to clause 6 Decision-making principles:

  (1A) All persons exercising powers and performing functions and duties under this Act must ensure that all environmental limits and targets set under this Act are complied with.

- An alternative, albeit messier option, would be to modify clauses 17-25 to not allow those activities if they would breach a limit or target regardless of whether the activity is allowed by a consent or plan.
- Amend subclause 223(11) Matters for which consent must not be granted

  (11) The consent authority must not grant a resource consent if—
  (a) it is ~~contrary to~~ inconsistent with—
  (i) an environmental limit or target:

My preference would be for the Committee to make all of the changes suggested above. That would help ensure the intent of environmental limits was clear to any person using those sections of the legislation. The Committee should certainly take advice on this point and ensure there is no ambiguity about the need for compliance with limits.

Concluding comment

As I have indicated, I have only had the time to consider in depth the two issues covered above. There are many further changes proposed by the RT version I have not had an opportunity to consider. I question whether this Bill is ready to proceed.

Thirty-two years ago when the Resource Management Bill had reached a similar phase in relation to a forthcoming election, its progress was paused. If these replacement Bills are to provide the basis for a new and enduring framework for environmental law in Aotearoa New Zealand, a similar pause recommends itself. The hurried completion of legislation of such complexity and ambition runs the risk of errors and, more seriously, unintended ambiguity.

The result of that can be unintended consequences as costly as the problems the legislation seeks to remedy.

I leave this for the Committee's consideration.

Yours sincerely,

Rt Hon Simon Upton

Parliamentary Commissioner for the Environment
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