ACHIEVING SUSTAINABILITY THROUGH INCENTIVES AND COMPENSATION

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Introduction

Federated Farmers accepts the purpose of the Resource Management Act 1991 (the Act) to promote sustainable management as contained in s 5. However, secure property rights are fundamental to good stewardship for future generations. We have come to the view that financial incentives and compensation must be available for retaining positive public benefits of existing land use, for reasons of equity and effective implementation of the Act. Positive public benefits include:

- Significant Natural Areas (SNAs) and other fauna and flora protection;
- Public access;
- Heritage;
- Landscape, including natural features, natural character;
- Amenity values.

Equity

The Resource Management Act 1991 and the Forest Amendment Act 1993 are two recent pieces of legislation that have done perhaps more than anything else to threaten the private property rights of farmers. The federation is being reminded constantly by its members that the erosion of private property rights is of critical importance to farmers. Resource management rules that force landowners to provide free public services are highly discriminatory, deny land use rights and may devalue properties. That is why staff and elected members of the federation put over 50% of our policy resource into RMA plan development and spend $700,000 annually, which is totally out of proportion with the myriad of issues affecting our farming businesses.

Private property is a bundle of rights centred on entitlements to exclusive use, possession and disposition. Whether relating to farms or urban residences, they are the foundation stone of our property-owning society. They are the basis of the market economy under which New Zealand operates. Secure property rights are a necessary incentive for investment and therefore fundamental to good stewardship for future generations. In a capitalist society, private property is a basic and vital legal concept. Its security is important for much of social ordering and its protection is necessary to ensure private capital and effort is put into developing a resource. The basic principle that the State should not take private property without compensation of just

compensation, recognised in Western legal and philosophical thinking for centuries, is a key mechanism for that protection.

It is not argued that property rights are absolute and give the owner complete freedom of action regarding that property. Instead, that regulation at times will intrude to such an extent that it is effectively an exercise of the power of eminent domain of the State, or expropriation of the property. We accept that regulation has an important role in managing externalities resulting from adverse environmental effects.

It is recognised that private property has failed to keep pace with other citizen rights such as privacy, civil liberties, safety in the workplace, consumer protection and tangata whenua obligations as our civilisation has matured.

The market reforms that have occurred in this country over the past 15 years are driving a reliance on market solutions and a new ethos throughout society. For example, when once it was acceptable for publicly owned utilities to cause disturbances on private land, owners today expect those damages to be put right by the private utility operators.

The Act is a legislative anomaly in not incorporating a user pays principle where the community at large calls for regulation which impinges on private property rights. Other legislation administered by local government that incorporates user pays principles include the Biosecurity Act 1993, the Ratings Powers Act 1988, and the most influential Local Government Amendment (No. 3) Act 1996. Section 122F provides for expenditure to be recovered in a manner that matches the extent to which the direct benefits of that expenditure accrue to individuals and groups of people.

Without public funding, the burden of costs falls unequitably on individual landowners. In the Far North District, planned SNAs would have effectively taken away a third or more of some farms and a huge 35% of the District, on top of the 20% in conservation already managed by DOC. The economic impact on the individuals and impoverished Northland would have been devastating.

Any compensation by ratepayers could assist in redistributing the burden, but the cost would remain in Northland, while the benefits of preserving endangered species lie with all New Zealanders. Conservation interests must realise that the greatest conservation opportunities generally lie in the most sparsely and unspoilt parts of the country where the funding base is limited. The conservation challenge is so large that taxpayer compensation is required to redress this imbalance.

Economics

Economic principles can assist in clarifying compensation issues in two respects.

Firstly, in what constitute public good services. These are goods and services for which benefits accrue to the community generally rather than to identifiable persons.

Having several users does not deplete these benefits. Conservation of natural areas, heritage, general landscape protection, public access, and community amenity values are therefore all public goods. Section 122F Local Government Amendment Act (No. 3) 1996 follows this definition and indicates that rating is an acceptable means of funding public good services. Taxes must also be a reasonable means of funding matters of national importance. Individual private landowners must not be expected to fund public good alone.

The second point is that when private property rights are taken for the public good, regulators, pressure groups and the public tend to treat the taken land as a free good, which encourages over-consumption. Unfortunately, resource management in New Zealand is permeated with such behaviour. One of the worst offenders has been the Department of Conservation - a tax funded, non-rate-paying entity. Evidence of over-provision of conservation can be found in the numerous examples through the length of the country where councils have agreed to Significant Natural Areas on private property as advocated by DOC. But yet the same department has failed to control pests so as to secure the same conservation values in adjacent reserves under their own management control.

Testing Willingness to Pay is Key

Environmental outcomes are being compromised because the legal framework in s 85 presumes against transfer payments from the public to landowners in order to secure public benefits. Although numerous planning rules exist that restrict changes in land use, important conservation sites are under threat as no public support is being provided to control weeds and animal pests. The stand-off will not end until processes are implemented whereby the public is given opportunity to decide how much conservation it is prepared to pay for. At a national level, taxpayers need to decide to what extent they need to finance the Nature Heritage Fund, Nga Whenua Rahui and any heritage funding agency, and at a local level ratepayers need to decide if and to what extent additional funds are required for locally important sites. Optimal decisions and community partnerships will continue to be thwarted until this principle is realised.

Brent Nahkies, the author of a report to the Historic Places Trust was recently quoted in the media as saying, 'Strong legislation has its place, but without compensation, it is likely to produce demolition by neglect and a flight of capital away from heritage buildings.'

Replacing the stick with a carrot will release huge landowner empathy towards conservation. A small dollop of public funds will lever a large voluntary contribution from landowners who would become proud custodians providing effective management of conservation. The Queen Elizabeth II Trust proves this point and has been a brilliantly successful conservation strategy that respects landowner values but one for which applications far exceed donations.

The new advocacy challenge for conservation groups should be to move out of a litigious environment and support a public priority-setting process by providing credible information. Just like the Government expects industry to put its money where its mouth is by making the provision of Public Good Science Funds conditional upon industry contributions, we think it is reasonable for politicians to do likewise with conservation. Before committing increased taxpayer or ratepayer contributions, politicians should take a measure on how successful conservation organisations have been in raising voluntary funding for the likes of QE II Trust. Such a test should not be applied in a mean-spirited way, but would cause an important change in mindset and the mode of operation of conservation groups to more inclusive and positive approaches.

Existing Provisions

The title of s 85, 'Compensation not payable in respect of controls on land' is the start and end of compensation issues under the RMA for most people. However, s 85(1) states that this is a presumption that applies unless otherwise provided for in the Act. Such provisos include:

- s 86, the power for councils to acquire by agreement under the Public Works Act 1981 (PWA) any land or interest therein in order to facilitate objectives and policies of the plan. While it is not obligatory that councils acquire any land, any such property taken shall be compensated in accordance with the PWA;
- s 32, the requirement for councils to consider other means including incentives before adopting any objective, policy, rule, etc;
- s 186, relating to designations and s 197 relating to heritage orders provide for the compulsory acquisition of land or an interest therein with compensation payable in accordance with the PWA;
- s 191 allows a territorial authority to recommend that a heritage protection authority reimburse the property owner for any additional costs of upkeep as a result of the heritage order.

While councils have had quite extensive legislative freedom to pay private landowners for public benefits, the track record is that, because of the negative presumption of s 85, they have been extremely prudent in this regard. Greater direction is required in the legislation. The practice must stop of avoiding heritage orders and attendant compensation by creating heritage controls outside of heritage order provisions of the Act.

Private Property Rights v. Polluter Pays

Where should the compensation line be drawn between private property rights and environmental externalities that should be a charge against the resource user?

Part III of the Act recognises the importance of private property. Section 9 places no restriction on the use of land other than rules in district and regional plans, whereas the presumption is the reverse for water use and discharges of contaminants, for which plans are required to expressly allow such. Section 10 allows land to be used in a manner that contravenes a rule in a district plan providing the effects of the use are the same or similar to lawfully established uses which existed before the proposed plan was notified. The Act does not provide the same concessions for using water, discharging contaminants and the like.

This legal framework supports my equity and economic arguments. Compensation should be payable when private land or an interest in such is taken by regulation. There is no expectation that compensation should be payable for denying use of resources other than on private land, or for discharging contaminants. Resource users have a duty to avoid, remedy or mitigate adverse environmental effects. However, to fully achieve the purposes of the Act, public support is a necessary component of funding the retention of those positive environmental features that are valued by the public.

Section 10 allows important ecological and heritage sites on private property to fall into ruin through neglect. There is no rationale in freezing uses of such sites by denying consent to change land use, unless a public commitment is made to actively protect the environmental values of the site.

A Pragmatic Solution

Economists view regulation as always generating an opportunity cost. Compensation simply crystallises that cost. The issue is who pays, the regulator or the regulated. It is no longer acceptable for law makers to continue showing reluctance to provide for planning compensation, in fear of opening a Pandora's box. This is particularly so for site-specific rules such as for heritage and SNAs, as better decisions should be made when the public pays for what it demands.

The Pandora's box fear has little foundation. Funding the cost of protection works, whether capital or maintenance can be defined and limited.

The more difficult area is in valuing lost opportunity arising from restricting changes in land use. Control freaks fear a flood of applications from opportunists merely rent-seeking. We believe that this would be subdued in the real world by funding constraints that would impose a discipline of priority setting based on sound s 32 analysis. Landowners would not be bothered with the hassles and costs of an application that would normally yield a low compensation unless they were seriously pursuing a development opportunity. Conservation activists who oppose paying landowners for foregone opportunity costs so that the public conservation dollar can be spent on maintenance and enhancement alone are seeking misallocation of public finances.

Federated Farmers believes that a smart solution would be for the Act to provide two options for councils.

The first and most frequently used would capitalise on the goodwill of landowners by raising awareness and seeking voluntary protection using financial incentives and contributions for protection works, to the extent necessary to achieve the objectives. Agreements would be negotiated as is normal when property interests are being traded, rather than being imposed in an offensive manner through rules. The process would be respectful rather than adversary and resentful. Where necessary, those agreements could be legally formalised. Councils would avoid uncontrollable costs resulting from a flood of applications by taking care in pitching the level of incentive and by prioritising applications.

The second option relates to the most significant environmental features and would provide for compulsory acquisition of land or an interest therein to allow active protection, maintenance or enhancement that otherwise could not be assured because of existing use rights. Compensation would be payable in accordance with the PWA. That is, ss 186 and 197 should be extended to cover the retention of positive benefits and not just designations and heritage orders. Also, the provision in s191 should be made mandatory for the reimbursement of any additional costs of upkeep.

Compensation under the PWA for an interest taken in land would normally be made under the test of injurious affection and must be available when an interest in land is taken and not just when land is taken. Landowners could only precipitate compulsory acquisition by applying for development consent. The potential exists for councils to face greater demands than available funds, but the principle of intergenerational equity embodied in s 122F of the Local Government Amendment (No. 3) Act 1996 requires such purchases to be debt funded rather than funded from income.

Such a legal framework already exists in the Act, but it is too sketchy, it provides insufficient direction to councils and its scope must be broadened and more clearly defined.

A necessary rule for significant sites would require consents for a change in land use so as to give the council opportunity to trigger one of the above options, or to grant the consent without conditions.

The effect of such options on landscape, natural features and natural character may be to place primacy on voluntary methods, as the public may be reluctant to fund injurious affection and the regulators would generally find the valuation of injurious affection problematical. Draconian landscape rules on productive land, such as rules stopping forestry development on farmland would be easier to value but prohibitive to finance.

This proposal would defuse the threat of destruction of heritage and natural areas created by landowners fearing costs associated with having significant sites identified on their properties.

Amenity regulations require special consideration because they are so entrenched in planning. When landowners are similarly impacted and are happy to adopt self-imposed amenity regulation to ensure peaceful enjoyment of their own property, compensation is not required. In this circumstance, legislation could exempt amenity and, for that matter, landscape from compensation providing that the regulators had genuine regard to the wishes of those and only those landowners being regulated.

In summary, compensation would only be payable:

- for land use controls i.e., when a land use consent is declined or conditions imposed;
- when the reason for declining consent or imposing conditions is to retain a public benefit such as protecting indigenous vegetation, heritage, landscape or amenity values.

Land use controls that are requested by those landowners being regulated would be exempt from compensation.

Conclusions

Federated Farmers is firmly of the view that land use controls for the retention of positive public benefits should be supported by public purchase of the interest in private property so affected. This would encourage a move away from controls and towards negotiated agreements. Such amendments would not only restore equity by removing the obligation on landowners to pay for retaining public benefits, but would provide security of property rights that are fundamental to good stewardship. The proposal would transpose an adversary process into a respectful one. Most importantly, the community funding the protection (ratepayer or taxpayer) should be able to influence decisions on the size of and priorities for the fund. The result would promote sustainable management by finding genuine solutions for on-going protection. We must recognise that the current legislation encourages vociferous demands for regulation, a stand-off from committing finances, and does precious little for the environment.