

Submission by



to the

Environment Committee

on the

Inquiry into Climate Adaptation

November 2023

SUBMISSION BY BUSINESSNZ¹ TO THE ENVIRONMENT COMMITTEE ON THE INQUIRY INTO CLIMATE ADAPTATION

1.0 EXECUTIVE SUMMARY

- 1.1 BusinessNZ welcomes the opportunity to submit to the Environment Committee on the Inquiry into Climate Adaptation (*"the Inquiry"*) of which the Terms of Reference were released on 24th August 2023.
- 1.2 It should be noted that at the time of writing this submission, the shape and composition of the incoming Government is yet to be finalised (special votes will be announced after the closing date of this consultation process, and formation of a government will come sometime thereafter). We note that whether the Inquiry will proceed is subject to consideration by the new Minister and Government.
- 1.3 BusinessNZ acknowledges that more extreme weather has been affecting and will, in the future continue to affect, NZ and its infrastructure, including transport, energy, and water and that on a number of fronts, consideration is increasingly being given to managed retreat.
- 1.4 BusinessNZ notes that significant work, such as on Community-led retreat and adaptation funding, has already been undertaken and will help inform the Inquiry: Issues and options paper by the Ministry for the Environment (August 2023), the Report of the Expert Working Group on Managed Retreat: A proposed System for Te Hekenga Rauora/Planned Relocation (August 2023), and Assessment of Mechanisms of Managed Retreat – A Report prepared for MfE by consulting firm Sapere (11 August 2022).²
- 1.5 Managed retreat is an important issue with significant implications for property rights; it has to be carefully thought through. We support the Government's view that care will need to be taken to manage any perverse or unintended outcomes - moral hazard for example (that is, inappropriate incentives to continue development in at-risk areas). BusinessNZ has previously made a submission to MfE in 2022 outlining considerations in respect to managed retreat.³
- 1.6 BusinessNZ considers there should be a very high threshold for central or local government requiring people to move, generally restricted to cases where there is significant public risk to the wider community, or where the cost of continuing to

¹ Background information on BusinessNZ is included as Appendix 1.

² Assessment of mechanisms on managed retreat. Report for the Ministry for the Environment, 11 August 2022

³ BusinessNZ Submission to MfE on Adapt and Thrive: Building a climate resilient NZ (June 2022)

provide infrastructure services (roading/water/sewage etc) is prohibitive and cannot reasonably be funded principally by the beneficiaries of those services.

- 1.7 In any case, there can be no 'one-size fits-all approach'. Such an approach could not reflect the unique circumstances facing different communities; government should encourage local solutions for local problems where possible.
- 1.8 This is not to say some matters won't need to be dealt with on a national basis, but by and large, management of risk is best left to those closest to the actual situation, so they are aware of the costs and benefits of taking or not taking a specific action.
- 1.9 It will also be important to understand what resilient communications networks and data frameworks look like. There is the need to gather data effectively about specific locations and climate impacts (rainfall, flooding, wind force, land stability tidal surges etc), so that both emergency management and managed retreat decisions are based on sound data. This will be a very necessary part of climate adaptation.
- 1.10 It will be important that providers of critical infrastructure are involved early on in the decision-making process around adaptation and managed retreat (such as the development of regional risk assessments, local adaptation planning, and relocation planning). For example, if the processes recommended by the Report of the Expert Working Group on Managed Retreat are taken forward, this should include critical infrastructure entity representation on the new adaptation committees engaging in local adaptation planning. Without careful planning, constraints or relocation imposed on critical infrastructure by adaptation and managed retreat processes will have significant implications for the ongoing operation of essential services.
- 1.11 BusinessNZ's members are also likely to address individual business issues they wish to raise with the Inquiry in some detail. For this reason, BusinessNZ has encouraged them to make their own submissions, raising issues particular to their areas of expertise.
- 1.12 Key issues raised in this submission include:
 - Clearly understanding the risks (to both property and life) in order to inform rational decision making,
 - Determining who is best placed to manage risk and the trade-offs involved – local solutions for local problems,
 - Improving public information to better reflect risk, thereby ensuring better-informed decision-making by property owners/businesses,
 - Recognising the importance of upholding property rights and providing compensation for regulatory takings,

- Providing for merit Appeal/Review Rights against mandatory retreat.

1.13 BusinessNZ stands ready to meet with the Environment Committee and relevant authorities to discuss our submission in due course and, again welcomes the Committee's early consideration of the many complex issues involved before proceeding to put in place any legislative/regulatory framework. These issues are far too important to proceed at pace.

SUMMARY OF RECOMMENDATIONS

BusinessNZ **recommends** that:

An exposure draft should be provided before any proposed legislation is introduced and sent to a Select Committee, allowing opportunity for public input to iron out potentially adverse outcomes (intended or unintended) prior to a bill becoming law.

BusinessNZ **recommends** that:

Any legislation introduced should have cross-party support. Cross-party support is highly desirable to ensure that, once a rigorous and economically viable framework has been developed, the legislation will not likely be subject to political manipulation further down the track.

BusinessNZ **recommends** that:

Interventions to reduce the risk of serious injury or premature death should be relatively consistent across the economy, given it is not economically practical to eliminate all risk.

BusinessNZ **recommends** that:

A high threshold should be set if central and local government are to require people to move, with clear, robust criteria needed for mandatory retreat.

BusinessNZ **recommends** that:

A 'one-size fits-all approach' should be avoided. Government should encourage local solutions for local problems wherever possible.

BusinessNZ **recommends** that:

an easily accessible, independent risk database tool to enable effective risk assessment, analysis, and planning is set up to allow for individuals to make better informed decisions in respect to risks.

BusinessNZ **recommends** that:

Government decision-making should not be rushed given the potential for whatever is decided to affect long-established property rights principles.

BusinessNZ **recommends** that:

Any regulatory takings and land use restrictions should generally be accompanied by compensation within a reasonable threshold framework.

BusinessNZ **recommends** that:

There should be robust merit appeal/review rights against any forced managed retreat decision.

2.0 DISCUSSION OF KEY ISSUES

- 2.1 BusinessNZ acknowledges that more extreme weather is currently affecting and will, in the future, affect NZ and its infrastructure, including transport, energy, and water. More long-term thinking is needed to make sure New Zealand's responses and infrastructure are future-proofed to deal with any additional stress caused by climate change. Currently, managed retreat is under consideration but as this is an important issue with significant implications for property rights, it needs to be carefully thought through.
- 2.2 There are many issues to be addressed before any regulatory/legislative response is contemplated. This submission raises a number that BusinessNZ considers key, some very difficult and controversial (such as valuation of life) but which must be dealt with if a coherent regulatory framework is to be developed.
- 2.3 The following issues are not necessarily in any order of importance as all are important in their own right. Nor is this an exhaustive list. No doubt other submitters will raise many more issues.

Clear understanding of the risks (to both property and life) to inform rational decision making

- 2.4 The economic perspective of risk stresses two ideas:
1. More resources, including time and money, are needed to reduce risk; and
 2. People (through their actions) have an acceptable level of risk, well short of zero, because of otherwise increased costs or other less desirable considerations.
- 2.5 It is important to understand up-front that there is an optimal amount of resource which should be utilised in reducing risk arising from natural hazards, just as there is an optimal amount of resource that should be spent on crime prevention, health interventions etc. The crucial and undeniable fact is that resources are limited while risk can often not be completely eliminated or not, at least, without great cost. It might be possible to reduce risk but beyond a certain point the marginal cost of acting becomes progressively higher, while the potential returns reduce. Therefore, it pays for companies and individuals to invest in risk minimisation strategies only up to the point at which the marginal cost of taking action equals the marginal benefit.
- 2.6 It is not a case of eliminating risk, to do so would effectively be to close down all productive activity.

- 2.7 Regulators generally have strong incentives to minimise their own risk by imposing higher standards than might arguably be justified. Because regulators do not bear the costs associated with their decisions (costs will ultimately be passed on to consumers), they may well over-regulate rather than be aware of, or adequately consider, the cost/quality trade-offs consumers are willing to make. Given every individual is unique, they will generally have different risk profiles, with some willing to pay considerable amounts of money to minimise risk while others will want to invest little in reducing risk, real or perceived.
- 2.8 The Sapere Report's analysis raised some very useful points, including but not limited to the fact that overseas there has been somewhat ad hoc and reactive use of managed retreat, typically in the context of natural disasters where the impact has already been realised.
- 2.9 Perhaps even more importantly, the Sapere Report stated that *"There is also no specific risk tolerance criteria in New Zealand to determine when a particular annual loss-of-life risk is acceptable or not, making it more difficult to determine the point at which risk reduction, such as managed retreat, is required"* (p.1).
- 2.10 Valuation of life is a fundamental issue that needs to be addressed in any programme of managed retreat.
- 2.11 In terms of loss of life and disruption, the Canterbury Earthquakes were the single biggest natural disaster ever to hit NZ. 185 people lost their lives in the February 2011 earthquake (133 victims died as a result of the collapse of two large buildings) with, according to some estimates, approximately \$40 billion's worth of damage to buildings and infrastructure. While there will always be debate as to the precise impact of the earthquakes on the economy, both in the short and in the medium term, there is general consensus that the impact was significant.
- 2.12 Over more recent years, efforts have been undertaken to ensure a greater degree of consistency in decision-making and this is to be commended given the number of potential projects that could reduce risk. However, it is acknowledged there is a significant difficulty in getting a consistent measure of people's willingness to reduce risks; willingness may differ according to the type of risks involved. For example, some overseas jurisdictions recommend higher valuations for certain activities targeted at preventing cancer deaths than for, say, some transport interventions, given the protracted period of pain and suffering associated with the disease.

BusinessNZ **recommends** that:

Interventions to reduce the risk of serious injury or premature death should be relatively consistent across the economy, given it is not economically practical to eliminate all risk.

Who is best placed to manage risk and the trade-offs involved – local solutions for local problems?

- 2.13 It is fair to say that New Zealand communities, towns and regions are not homogenous in respect to size, population density, contributions to Gross Domestic Product (GDP), and, indeed, income levels. What two different communities will be prepared to pay to reduce risk (not only in respect to climate change risk but many other risks as well), might differ substantially, depending on the trade-offs which must be made. Some regions are in a relatively strong growth phase while other regions are showing negligible growth. Indeed, some regions are showing strong population growth – others are showing steady decline.
- 2.14 This is not to say there won't be some issues which will need to be dealt with on a national basis, but by and large, management of risk is best left to those closest to the actual situation, so they are aware of the costs and benefits of taking or not taking specific actions.
- 2.15 Notwithstanding the above, it will be important that providers of critical infrastructure are involved early on in the decision-making process around adaptation and managed retreat (such as the development of regional risk assessments, local adaptation planning, and relocation planning). For example, if the processes recommended by the Report of the Expert Working Group on Managed Retreat are taken forward, this should include critical infrastructure entity representation on the new adaptation committees engaging in local adaptation planning. Without careful planning, constraints or relocation imposed on critical infrastructure by adaptation and managed retreat processes will have significant implications for the ongoing operation of essential services.
- 2.16 A very high threshold should be set if central and local government are to be able to require people to move. This ability should be restricted to cases where there is a significant risk to the wider community resulting in significant environmental and economic damage or cause public health problems affecting third parties that bonds etc. from property owners would not mitigate.
- 2.17 In any case, there can be no 'one-size fits-all approach'. Such an approach would not reflect the unique circumstances facing different communities. Government should encourage local solutions for local problems wherever possible.

- 2.18 There are many possibilities in terms of solutions for local problems and the following might be particularly worth investigating further:
- a. Where the costs of continually providing infrastructure are increasing prohibitively due to climate change, it might be possible for local and/or central government to gift assets to local communities to manage as they see fit (provided standards of hygiene for sewage disposal etc) are met. Alternatively, they could sell the assets to communities for heavily discounted values accompanied (or not) by compensation. Contract details would need to be carefully worked through to ensure each party was clear as to what liabilities would arise from such an agreement.
 - b. There are other examples of funding arrangements, such as the Lake Taupo 'clean-up', where contributions to reducing nutrient emissions going into the lake have been shared between several parties. This has been necessary because of the difficulty of clearly determining who precisely has caused nutrient leaching where such leaching has taken place over many years and cannot be totally pinned on current landowners.

BusinessNZ **recommends** that:

A high threshold should be set if central and local government are to require people to move, with clear, robust criteria needed for mandatory retreat.

BusinessNZ **recommends** that:

A 'one-size fits-all approach' should be avoided. Government should encourage local solutions for local problems wherever possible.

Improving public information to better reflect risk therefore allowing for better informed decision-making from property owners/businesses.

- 2.19 As a general guiding principle, BusinessNZ considers that costs and benefits should be internalised as much as possible and passed on to individuals. In other words, individuals should manage their own risk to the extent possible. To achieve this, data needs to be easily available, consistent and timely enabling people to make informed decisions so that mitigation techniques, such as the provision of flood protection, can be implemented in a timely manner without undue delays – by consenting authorities and others.

- 2.20 More data and guidance are needed to provide individuals and businesses with better information to improve judgements and decision-making.
- 2.21 It will also be important to understand what resilient communications networks and data frameworks look like. There is the need to gather data effectively about specific locations and climate impacts (rainfall, flooding, wind force, land stability tidal surges etc), so that both emergency management and managed retreat decisions are based on sound data. This will be a very necessary part of climate adaptation.
- 2.22 BusinessNZ recommends setting up an easily accessible, independent risk database tool to enable effective risk assessment, analysis, and planning.
- 2.23 While councils can currently 'stop' local roads when it is no longer cost-effective to supply them, services such as water supply are much more difficult to stop.
- 2.24 Clearer options are needed for councils to risk rate service provision so existing residents can have a choice - either through higher rates and/or the gradual withdrawal of council provided services to reflect changing risk over time.
- 2.25 While such proposals would need a high degree of certainty to be established, including adequate adjustment time allowed for both the increase in the cost of services and/or their withdrawal, they would provide residents with choice as to how to proceed – either moving early or staying, given the costs and benefits of remaining.
- 2.26 It should also be noted that in a very useful paper by the NZ Initiative in July this year⁴, Dr Eric Crampton raised the idea that Special Purpose Bonds could be utilised for new development, driven by sub-sets of local communities.
- 2.27 If sub-council local communities could set a durable levy on themselves to finance debt taken on to fund improvements that mitigate the consequences of climate change, then this would be a complete gamechanger and would reduce the need for central or local government involvement in issues surrounding managed retreat but leaving it up to local communities assessing the costs and benefits of taking action.
- 2.28 Instead of central government or councils drawing lines on maps and thinking about compensation/forced retreat, it would allow local communities to figure out what risks they are prepared to bear, which risks they are willing to pay to mitigate, and what makes most sense given local circumstances.

⁴ Funding the Future: The Case for Special Purpose Bonds, Dr Eric Crampton, NZ Initiative (July 2023)

BusinessNZ **recommends** that:

an easily accessible, independent risk database tool to enable effective risk assessment, analysis, and planning is set up to allow for individuals to make better informed decisions in respect to risks.

The importance of upholding property rights and compensation for regulatory takings

- 2.29 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.
- 2.30 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.
- 2.31 It is noted that in the MfE papers mentioned in the Executive Summary, there is reference to the importance of being very careful when taking and restricting property use for Māori as some land cases are associated with Treaty settlements and taking the land could be considered the taking of property rights. We agree and would like to see government extend this conclusion to all landowners as it applies equally to property rights in general.
- 2.32 All regulatory takings and restrictions on land use should generally be accompanied by compensation within a reasonable threshold framework. Regulators must be incentivised not to be overly cautious by simply minimising their own risk and placing all the costs and risks on to property owners.
- 2.33 Negotiation is to be preferred over blanket bans. However, if negotiation is not feasible and there is no other reasonable solution, government should use the Public Works Act to compulsorily buy out property owners.
- 2.34 Current resource management legislation makes no allowance, 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 and serves (and will continue to serve) to depress necessary economic activity.⁵

⁵ If considering this statement in demand and supply terms, a zero price on regulation is always going to mean the demand for regulation will be high while the voluntary supply of property rights in return will be very low.

- 2.35 The persistent and ongoing departure from the principle of consent to the diminution of private interests in the name of the public interest, and the provision of compensation when this occurs, has created an enduring and deep-seated dissatisfaction among the business community with the previous Resource Management Act (and its successor – the Natural and Built Environment Act).
- 2.36 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.
- 2.37 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.
- 2.38 If local authorities were required to provide compensation for regulatory takings BusinessNZ would expect them to take more care when regulating private interests in the public interest. It might then be expected that the need for regulatory takings would be low, perhaps based initially on one or two test cases.
- 2.39 Claims for compensation would need to rest on more than an assertion that land use had been impaired but on evidence sufficient to support a claim of changed land use.
- 2.40 The claims' process would not be costless and both parties would need to assess the value of the compensation sought, the likelihood of gaining (or paying) compensation and the cost of participation. Rules such as requiring the losing party to pay the other's costs would contribute to getting the incentives for claiming or opposing compensation right.
- 2.41 Finally, BusinessNZ recognises that in some cases, the transaction costs associated with determining the winners and losers involved in a regulatory taking might be disproportionately high, making the payment of compensation impractical. This possibility reinforces the importance of having both a sound process (including robust decision-making requirements) and appeal rights.

- 2.42 But with managed retreat and compensation for the same comes the difficult question whether different approaches are justified where a property was purchased before a risk was identified (or the extent or severity of the risk was known) and where it was bought after the risk became clear.
- 2.43 While the above issue is difficult, there is a strong argument for grandparenting current rights (i.e., individuals businesses/households compensated if they have to move under a high threshold test). Unless businesses and individuals have reasonable security over their property rights ensuring these are not subject to confiscation or regulatory takings by the state, they will have little incentive to invest. However, given new investors should be aware of the risks of climate change (and other risks), there is a strong argument that in these circumstances, they should bear the associated costs (of land erosion etc).
- 2.44 A complicating factor for businesses and industries making decisions on climate change mitigation policies is that several industries (in, for example, the energy sector) are regulated by the Commerce Commission and/or other government agencies in terms of their Rate of Return (ROR) and supply/service agreements, which means they must take account of potential climate risks/hazards without falling foul of agency requirements. This may involve some cost sharing arrangements between government and industry to deal with current and/or future risks associated with investment in climate change mitigation measures.

BusinessNZ **recommends** that:

Government decision-making should not be rushed given the potential for whatever is decided to affect long-established property rights principles.

BusinessNZ **recommends** that:

Any regulatory takings and land use restrictions should generally be accompanied by compensation within a reasonable threshold framework.

Merit Appeal/Review Rights?

- 2.45 Given the current relatively low level of legislative support for compensation for regulatory takings (see above), 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.

- 2.46 There are important reasons for continuing to promote merit appeal rights, not only in respect to potentially mandatory managed retreat but in respect to many other legislative and regulatory powers across a whole range of Acts of Parliament as well.
- 2.47 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 the future, and
 - h. appeal rights provide protection for property rights and thus create the conditions for investor confidence and economic growth.
- 2.48 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 intervention. 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.

- 2.49 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.
- 2.50 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)
- 2.51 In many jurisdictions, rights of appeal against the discretionary decisions of government planning agencies have been established to enable the decisions to be reviewed.
- 2.52 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), Australia, and of course, New Zealand.
- 2.53 The Commonwealth of Australia's Administrative Review Council stated in a report:

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)⁶

⁶ Commonwealth of Australia, Administrative Review Council – What decisions should be subject to merit review? (7 April 2011).

2.54 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 given serious consideration before pre-emptive action is taken.

BusinessNZ **recommends** that:

There should be robust merit appeal/review rights against any forced managed retreat decision.

Appendix One - Background information on BusinessNZ



The BusinessNZ Network is New Zealand's largest business organisation, representing:

- Business groups [EMA](#), [Business Central](#), [Canterbury Employers' Chamber of Commerce](#), and [Business South](#)
- [BusinessNZ](#) policy and advocacy services
- [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

The BusinessNZ Network 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.

The BusinessNZ Network contributes to Government, tripartite working parties and international bodies including the International Labour Organisation ([ILO](#)), the International Organisation of Employers ([IOE](#)) and Business at OECD ([BIAC](#)).

