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*INITIAL SUBMISSION*

*LOCAL GOVERNMENT REGULATION INQUIRY*

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**DEFFECTIVE MACHINERY CONTROLLING**

**LOCAL GOVERNMENT DELIVERY OF REGULATION**

*31 August 2012*


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# DEFFECTIVE MACHINERY CONTROLLING

# LOCAL GOVERNMENT DELIVERY OF REGULATION

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## 1.0 INTRODUCTION

1.1 The Productivity Commission Inquiry into local government (LG) regulation has sought initial public submissions in order 'to ensure that its inquiries are well-informed and relevant'.

1.2 The signatories to this submission and their professional advisors ("the team") advances, in this initial submission, recommendations on particular points of focus for the Inquiry.

1.3 The team's professional advisors are:

a) Brian Maskell – machinery-of-government principles

b) Alan Webb – statutory interpretation and constitutional and administrative law principles.

1.4 These recommendations arise from the team's

a) combined experiences and evaluations;

b) common points of perspective arising from those experiences;

c) analyses of deficiencies in the relevant elements of the machinery-of-government; and

d) analyses of LG non-awareness (and therefore non-compliance) with relevant principles of public law.

1.5 These experiences, perspectives and analyses conclude that LG regulatory deficiencies are:

a) materially damaging to the well-being of people and communities;

b) materially damaging to New Zealand's ability to innovate and flourish; and

c) materially damaging to people and communities' trust in the regulatory role of the Crown and the mechanisms of effective justice that are its responsibility to provide.

1.6 This initial submission is necessarily brief because of the complexity and the wide canvas raised by any attempt at effective reform of the LG sector that has arguably been 'out-of-control' for more than two decades.

1.7 This initial submission is therefore restricted to making illustrative and indicative points with the intent of urging your LG Inquiry to sharpen its focus onto particularly relevant and likely very productive areas.

1.8 In summary, the thrust of this initial submission suggests that significant benefits may likely arise from a more focussed Government policy approach on evidence of LG failings caused by inadequate regulatory, judicial and machinery-of-government controls that influence the *conduct* of the LG sector.

1.9 In essence therefore the message in this initial submission is to suggest 'a material tightening of LG controls – including the controls on possession of adequate training in and exercise and observation of appropriate competencies when administering statutory responsibilities'.

1.10 This Submission closes with some indicative recommendations.

## 2. EFFECTIVENESS OF THE ESSENCE

2.1 There seems to be an unfortunate fashion in government circles to focus upon arguably 'second-order' issues of 'efficiency' and 'fine-tuning of regulatory prescriptions'.

2.2 Arguably, 'first-order' and key factors such as the adequacy of LG regulatory competencies; controls on legal compliance and effectiveness; and peoples' access to justice in the breach of LG obligations are ignored.

2.3 'Efficiency' as a machinery-of-government or economics term relates to a ratio between inputs and outputs. However, the LG sector produces myriad different outputs – using the same (competent or incompetent):

a) senior management;

b) internal controls; and the

c) Board-of-governance decision-makers.

2.4 It follows that incompetence at any one or more of the levels (a) to (c) above places such a big question-mark around 'effective' performance as to render irrelevant any focus upon efficiency of that likely ineffective performance.

2.5 This team's inquiries and experiences indicate that LG senior management seems to have no comprehension whatever of the principles and obligations that should constrain the exercise of their regulatory conduct.

2.6 LG planners tend to dominate the LG sector's approach to the formulation of regulations: but our inquiries indicate that planning schools apparently do not train planners in the principles of statutory interpretation and the principles and obligations that should constrain the exercise of their regulatory conduct.

2.7 LG entities are arguably remarkable for their lack of internal controls and internal audit practices.

2.8 Because such internal audits and controls are the primary feedstock for effective governance, the parlous state of governance in the LG sector is understandable.

2.9 That factor means that there is no basis for any governance comfort that an LG entity is:

a) acting with due care; and

b) acting in compliance with regulatory principles;

c) acting reasonably and appropriately and with due regard to the relationship of dependency and trust that is intrinsic to LG entities' relationship with people and communities.

2.10 With such dysfunctional competencies and non-existent machinery for delivering 'effectiveness' in the LG sector, it seems futile and premature to contemplate any sensible focus on the 'efficiency' with which various 'outputs' are being achieved by LG entities.

2.11 In any case, the LG sector absence of effective internal audit and associated management accounting competencies means that the pursuit of performance and efficiency measures for any outputs would be farcical – to put it mildly

## 3. EFFECTIVENESS, PRODUCTIVITY-CONTRIBUTION & COMPETENCIES – THE PRIORITIES

3.1 This initial submission therefore suggests that the current absence of reliable data on the efficiency with each function is undertaken in the LG sector is not a *current* priority issue anyway.

3.2 Rather, current and pressing issues about LG sector *effective performance* require an alternative and priority focus on such factors as –

a) requiring acquisition and maintenance of LG competencies that enable realistic *functional capabilities* and *effectiveness expectations*;

b) requiring net productivity economic contributions to New Zealand (i.e. the antithesis of the present corrosive and disabling conduct);

c) purposive requiring of 'enabling' regulatory conduct and purposive discouragement of unnecessarily restrictive (disabling) and economically-damaging regulatory provisions; and

d) an explicit and strict requirement that contemplation of regulatory provisions must be made with transparent consideration of and proper due regard to all well-established regulatory principles and conventions - e.g. fiduciary obligations, LAC Guidelines and Regulatory Impact Assessment (RIA) frameworks as developed by The Treasury.

3.3 Effective regulatory administration obviously requires and demands that the LG sector must acquire and maintain the necessary adequate competencies.

## 4. LG COMPETENCIES

4.1 It is arguably plain that the LG sector has not identified and therefore not acquired and maintained the necessary competencies that would enable it to carry out its breadth of statutory functions effectively, efficiently and economically – and therefore make a net and enabling contribution to the economy and the well-being of people.

4.2 This initial submission asserts that this matter of LG inadequate competencies is a *primary issue* that should be accorded a 'Category A' weighting for regulatory and machinery-of-government reform.

4.3 Therefore, one of the most cost-effective reform initiatives would be to require all senior LG officials and consultants who are in any way to be associated with approaching and formulating regulatory provisions to study and to acquire a Diploma in Regulatory Administration (DRA) to be made available in two parts.

4.4 Part One of the Diploma in Regulatory Administration would cover *Regulatory Compliance Principles* and could, we understand from our advisors, likely be readily developed by a law school that has a recognised and particular strength in New Zealand constitutional and public law. Perhaps The Treasury's RIAT department and the Law Commission could have some oversight of the content and effectiveness of that training and its revision from time-to-time.

4.5 Part Two of the Diploma in Regulatory Administration would cover *Internal Controls & Governance Principles*. It would be a requirement for both LG senior officials and councillors. Part Two could be specified to comply with international standards set by the Institute of Internal Auditors and might be run (contracted to the Office of the Controller and Auditor-General) by a leading international accounting firm that places a particular emphasis on effective internal control departments reporting direct to audit committees for effective governance control of organisations.

4.6 Such a Diploma in Regulatory Administration should be made a requirement for all senior LG officials (and all planners and consultants engaged by them) by a reasonable specified date – perhaps 1 June 2015, with an earlier requirement – perhaps 1 June 2014 for all LG CEOs.

4.7 Such a Diploma could also be utilised for central government senior public servants: it seems that there is painful evidence that many of them need it. [Reference the NZIER study for The Treasury that recorded that only a very low percentage of departmental Regulatory Impact Statements (RIS) met a reasonable standard.]

## 5. MINISTERIAL & PUBLIC ACCOUNTABILITY REPORTING

5.1 It is plain that once such competencies are in place, appropriate processes will be required that will establish both public and Ministerial reports that will display accountability and performance in a meaningful way. Such new processes will hopefully displace the many unproductive, costly and hollow processes that presently blight the LG sector – but seem to give it so much comfort in their observance.

5.2 Thus there will be proper and reliable signals for a Minister that will provide early warning that some Ministerial scale of interest and possible intervention is likely to be required in a particular LG entity.

5.3 Such machinery-of-government, founded upon sound standards of internal controls operated by qualified persons as an independent check on the executive, provides:

a) a proper and reliable basis for effective LG governance;

b) a proper basis for external audits by the Audit Office; and

c) a reliable basis for Ministerial accountability – and Ministerial intervention when inadequacies are not addressed satisfactorily.

## 6. STRUCTURAL FAILURE OF MACHINERY-OF-GOVERNMENT CONTROLS

6.1 There is considerable public frustration with LG performance across a broad spectrum of LG functions.

6.2 The ordinary person does not and cannot be expected to know how to tackle LG incompetence and regulatory tyrannies: e.g. our illustrative experience includes –

a) LG regulatory claims on rights in property using words not found in the claimed enabling Act;

b) LG regulatory interference in rights in property without due regard to and in blatant contravention of the purpose of the claimed enabling legislation;

c) LG approaches to formulation of plans and rules that ignores all applicable regulatory principles that should properly be required to be observed;

d) LG approaches to formulation of plans and rules that ignores peoples' implicit relationship of trust and dependency upon reasonable LG conduct in compliance with required fiduciary obligations in the circumstances;

e) LG entities allowing external lobby groups to 'capture' its delegated legislative powers under threat of judicial appeals for not bending to such demands.

6.3 Blatant breaches of fiduciary obligations seem to be commonplace to the point of having become unremarkable.

6.4 Such uncontrolled breaches of required obligations by LG entities are fast-shifting peoples' perception of the Crown as an arrogant and out-of-control tyrant that ignores proper conduct with impunity. LG entities have fashioned processes and sheep-like behaviours (watching and copying one another) it seems for the purpose of taking comfort that process-adherence and conformity to the herd is a sufficient justification for outrageous and absurd conduct that produces regulatory outcomes never intended by Parliament in the enabling Acts.

6.5 Such process-adherence conveniently enables LG entities to seek and appointment staff content to crank-the-handle on a process that has little coupling with the purpose or intent of an Act. Local relevant research is rarely undertaken: so there are no transparent assessments and weightings of all relevant regional and district facts,

evidence and circumstances; rather the record shows many arbitrary regulatory interventions arising from an arguably mindless process.

6.6 Not surprisingly, such mindless processes have been spawning numerous absurdities.

6.7 Ordinary persons cannot be expected to know how to bring such out-of-control LG entities to account: that should be the task of effective machinery-of-government controls – but it seems that such controls do not exist and that judicial controls are either economically inaccessible for the ordinary person - or experienced by people to be ineffective anyway.

6.8 An ordinary person trying to take issue with damaging planning intentions by a LG entity might unknowingly think that engaging a local law firm is appropriate. But that course will frequently lead to a costly, frustrating and ineffective judicial process because many regional legal firms know little about effective assertion of principles of statutory interpretation, constitutional law and the principles of administrative law and the special relationship between the Crown and its people that gives rise to fiduciary obligations in the circumstances of trust and dependency.

6.9 And, anyway, it is arguably shameful and repugnant that ordinary people should have to find money and time to take issue with the Crown's out-of-control machinery-of-government.

6.10 It follows therefore that effective government requires effective machinery-of-government controls.

6.11 It is plain that adequate machinery-of-government controls do not exist. So, it is a waste of time to talk about reforms of LG 'efficiency' as though it is some sort of comforting mantra.

6.12 In the public sector pursuit of 'efficiency' in a context of unlawful conduct and gross 'ineffectiveness' - because of an absence of effective machinery-of-government controls - is arguably a farce, to put it mildly.

6.13 The damage that the out-of-control LG sector is doing to ratepayers and the economy of New Zealand is more than sufficient evidence that there is something very deficient with machinery-of-government controls.

6.14 That reasonable observation surely raises issues of policy review around the role and functions of the Office of the Controller & Auditor General. The present audits of LG statutory compliance functions of that Office are clearly not currently operating effectively and that ineffectiveness is arguably putting the public interest and the New Zealand economy in jeopardy.

6.15 For example, one the team's advisors drew the attention of an Assistant Controller and Auditor-General (Local Government) to evidence of a blatant disregard of both proper statutory interpretation and generally-recognised principles of law by a LG entity that was claiming to be fashioning regulatory controls under the Resource Management Act 1991. Our advisor requested that the Audit Office should review the facts and evidence of the complaint and carry out its own investigation. That Assistant Controller and Auditor-General (Local Government) said that 'it is not a matter for this Office; but I recommend that you use my telephone to speak with a Commissioner for the

Environment'. However, that Commissioner for the Environment pointed out that the LG entity was clearly trying to do something that benefitted the environment so the Office of the Commissioner for the Environment was not interested in giving consideration to serious adverse economic effects!

6.16 Subsequently, an audit of statutory compliance of the same LG entity by the Audit Office recorded that the entity was in compliance with its statutory obligations! It is therefore perhaps reasonable for the ordinary person to wonder about the competencies of staff in the Office of the Controller and Auditor-General. Perhaps officials in that Office plus the consultants that the Office engages to undertake audits under contract should also be obliged to undertake the Regulatory Administration Diploma training that is recommended in this Submission.

6.17 Such dysfunctional machinery-of-government controls might once have been of particular interest to the State Services Commission operating under its former State Services Act 1962 and its associated functions. But there now seems to be a void: the machinery-of-government drifts ever more out-of-control because there are apparently no effective controls to shape it reasonably.

## 7. CENTRAL VERSUS LOCAL FUNCTIONAL ALLOCATIONS

7.1 It is of concern that the Commission has been asked to place a focus upon central versus local functional allocations – effectively, 'who should look after what?'.

7.2 That direction for the Inquiry is arguably misguided because it poses a question that is not of the essence: the subsidiarity principle (putting discretionary regulatory decision-making close to the turf where it will have best effect and be monitored closely) is arguably a sound basis for shaping much of the machinery-of-government.

7.3 However, subsidiarity does require effort and training in the competencies necessary to administer regulatory discretions locally in a proper and lawful manner. Since the advent of the Resource Management Act 1991 (RMA), that arguably delegated locally very powerful and complex regulatory powers, there has arguably been no relevant training for LG entities in how to administer the related discretionary powers properly and lawfully.

7.4 But a lack of Crown commitment to both provide and require proper training for all LG decision-influencers and decision-makers over the last quarter of a century – and the mess that such a lack of relevant competencies has created – is not a proper excuse for returning many regulatory functions to central government. To do so would arguably replace local incompetence with central exercise of discretionary regulatory provisions that are likely to be significantly irrelevant to many local circumstances – therefore such an exercise of central regulatory discretion would likely be ineffective, costly and wasteful.

7.5 However, this Inquiry should perhaps consider whether or not a LG entity should be allowed to enter into substantial commercial adventures without effective and competent external control oversight and a proper weighing of and provision for risks involved. As well as proper consideration of risks in such adventures there is also the matter of borrowings as a future obligation on ratepayers. Then there is the matter of effective controls on the adventure – and then the matter of the calibre of governance that will have effective oversight and direction of the adventure.

7.6 For example, the public may justifiably wonder why present LG legislation apparently enables LG entities to engage in adventures such as establishing an international airport based, it seems, upon imprudent weight being given to assumptions and no proper weight being given to attendant risks attaching to those assumptions - and their possible risk-consequences for ratepayers.

7.7 Presently there seems to be no independent audit requirement for oversight of such an LG's proposed commercial adventure – an oversight that would inform the public and the Minister whether or not a LG-planned commercial adventure exposed ratepayers to unacceptable risks arising from lack of demonstrated competency to evaluate, set up, govern, direct and control the adventure properly – or perhaps that the likely scale of borrowing, debt servicing and cash-flow minima likely to be involved are imprudent and likely not to be in the public interest.

7.8 For a quarter of a century the LG sector has given little if any priority to acquiring competencies appropriate to the carrying out of its complex and challenging core regulatory responsibilities for which it has become accustomed to simply charging ratepayers on an unaccountable basis.

7.9 By contrast, significant and material commercial adventures expose ratepayers to commercial risks and (usually) material borrowings with none of the rigour of being accountable to shareholders that attends commercial initiatives in the private sector – and where shareholders elect to 'buy in' to a degree of risk.

7.10 An ability for LG entities to borrow against the security of future cash-flows from rates and unfettered discretions to increase rates, carries with it a special burden of trust in such circumstances; a level of trust that should invoke a special duty of rigour and care. Such borrowings should arguably be reserved for special-case projects in which medium-term economic analyses suggest a good return on the borrowings for ratepayers. In the absence of such a strong economic case, access to borrowings should be reserved for emergency contingencies such as recovery from natural disasters.

7.11 In that regard there is understandably little if any public confidence in or respect for the present LG Civil Defence function. The disciplined emergency competencies and experienced command structure properly required would arguably be better placed with the NZ Fire Service that could knowledgably and sensibly oversee auxiliary CD resources appropriate to well-informed and well-disciplined local contingency plans. Utilisation of the disciplined communications, command and control approach embedded in the NZ Fire Service would be leveraged at little marginal cost to ratepayers.

7.12 Similarly, there is little public confidence in LG building inspector competencies.

7.13 The Building Act 2004 and its associated Building Code published by the Department of Building & Housing (DBH) are documents that arguably require reasonable performance by players in the building sector.

7.14 However, instead of letting the building sector get on with innovation and building, the DBH chose to publish *prescriptive* Building Code Compliance Documents and Handbooks that tell building designers, building officials and trades people in that profession *how to comply* with the Building Code.

7.15 LG entities embraced these ‘tick-and-turn’ prescriptions like public servant ducks entering a calm pond filled with beautiful tick-and- turn processes - devoid of risks! Instead of using informed discretionary powers, building inspectors were enabled to disconnect any brainpower and simply demand that the building sector should comply with the prescriptions – or face ‘non-complying’ discretionary decisions.

7.16 However, some of the prescriptions in those DBH Compliance Documents failed to embrace vital building principles – presumably because the DBH did not know what it was doing and because it chose advisors who were similarly handicapped (i.e. lacking appropriate competencies).

7.17 Compliance Documents that require buildings to be erected that are unhealthy because of their inability to handle internal and external water-vapour are arguably unlawful because such Compliance Documents are arguably contrary to the purpose of the Building Act 2004 and its Building Code.

7.18 However, LG building inspectors have slavishly and mindlessly asserted the DBH Compliance Documents. Presumably they asserted provisions in those Compliance Documents because they were told to do so; perhaps because they provided an easy tick-and-turn prescription; perhaps because any risks were thus assumed by the DBH; and also that the calibre of inspectors did not require that they had a proper understanding of *building principles* (inadequate competencies leading to ineffectiveness and process-centred conduct - again).

7.19 So, the people of New Zealand have had to watch as their houses grow fungi that threaten their health and eat into their prime asset - simply because a fundamental building principle was ignored by DBH and LG officials who clearly did not and, apparently, still do not know about or understand the key principles necessary for building a healthy home in accord with the purpose of the Act.

7.20 Government policy on tackling the issue of circa $23b damage to the NZ economy was, it seems, similarly ill-informed because statutory reforms have so far failed to address the key problem: prescriptive Compliance Documents produced by people in the machinery-or-government who do not understand key relevant principles and therefore happily propagate prescriptions for mindless LG inspectors who extract material fees for encouraging faulty construction of unhealthy homes!

7.21 What normal controls would spot a serious deficiency in regulatory draft Compliance Documents relating to scientific principles and of new-technology materials? Well, conventionally, it should be a competent scientific entity that is independent of cash-flow conflicts of interest from building product manufacturers. But the doctrinal doing away with the DSIR and instead the establishment of cash-hungry ‘commercial model’ Crown Research establishments arguably did away with such independent scientific-based control.

7.22 Now it is the people of New Zealand who suffer terribly from the ownership of unhealthy homes – made additionally unaffordable by expensive LG process-centred building inspection ‘services’. Such unhealthy homes cost their owners and tax-payers and rate-payers a lot of money. So what value does the LG building inspection ‘process’ produce for New Zealanders and the economy of New Zealand?

7.23 Meanwhile Government building sector regulatory reform policy chases ‘straw men’ and does not face up to the fundamental issues.

7.24 There is a simple, cheap, effective –and even ‘efficient’ – solution that does not seem to be on the table at the moment. Get rid of the central DBH prescriptions and rely on building inspectors with appropriate competencies to use their discretionary powers according to the purpose of the Building Act 2004 and its associated Building Code. That solution will likely also be enabling of innovation in the building sector! [Except, of course, that will likely not be possible because LG planners have likely used their regulatory discretions to make rules that specify so much of what can be built and where!]

7.25 From this building sector case study, surely, the central government statutory and regulatory discipline required is clear? Simply do the policy research properly so that important issues are clearly identified; specify statutory purpose and intent clearly; indicate precisely the principles that are to be followed; and provide effective controls that ensure compliance with those principles.

7.26 Then make sure that there is a good-degree-of-fit with other closely-linked legislation and that appropriate competencies will be put in place and sustained so that there is a reasonable chance of effective implementation.

7.27 At the LG level, enable discretion to be exercised such as to enable innovation while achieving the broader purpose of the Act. Train building inspectors so that they know what building principles will result in safe and healthy homes. Then let the building inspectors use their discretion to determine the depth of their inspections on the bases, for example of their knowledge of and degree of confidence in the tradespeople involved; that will likely reduce building costs and interruptions to building work.

7.28 Also at the LG level, train planners to stop specifying building prescriptions and propagating rules and policies that limit innovation and creative design – an approach that often results in ‘sameness’ and drab-coloured houses (conforming strictly to the planners’ prescriptive palette) such that we all begin to think we are being ruled by an East German tyrannical socialist state.

7.29 In conclusion, a focus upon a well-considered ‘purposive rule’ has a lot to contribute to a well-regulated and a healthy society especially when it is asserted by competent administrators through effective and just machinery-of-government controls.

7.30 In both statutes and regulations it might be concluded that the practice of specifying the detail of what people are to do should be stopped: it prevents useful innovation; it stifles effective exercise of discretion; it ignores the breadth of likely circumstances that can arise; and it is prone to producing absurdities – especially if those doing the drafting do not know what they are doing.

7.31 Also it might be concluded that specifying processes and activities to be followed should also be stopped: such regulatory provisions tend to attract mindless public servants who can hide behind ‘process compliance’ and protest that they have a defence to excuse their absurd and costly conduct!

## 8. RECOMMENDED CLUSTERS OF LG REGULATORY FUNCTIONS FOR INQUIRY FOCUS PURPOSES

8.1 A disciplined 'trouble-shooting' approach to the breadth of statutory functions in the LG sector might suitably be focussed into five important parts:-

Part One: The 'inelastic essential service' LG functions such as delivery and maintenance of water, sewerage supplies, roads and other infrastructure and the rating and debt financial management required for the provision of those 'inelastic essential services' over time.

Part Two: Discretionary timing of enhancements to main operating infra-structure and enhancements of services such as libraries; children's play areas; recreational reserves and facilities; aesthetic improvements & etc.

Part Three: Discretionary regulatory functions: i.e. clarifying whether or not there are any issues in a local jurisdiction that require any form of exercise of (or review of) delegated regulatory powers; and for any such already established powers, administering and asserting those powers. (Inclusive of territorial authority statutory functions such as the Building Act 2004.)

Part Four: Internal audit controls on all functions reporting directly to council governance plus related documentation available to the Department of Internal Affairs for the formulation of Ministerial Reports and Ministerial advice.

Part Five: Annual reports by the Controller and Auditor-General certifying the adequacy or otherwise of LG entity internal audit competencies, breadth of functions and related governance responsiveness.

## 9. SOME PRIORITIES AND DISCIPLINES FOR EFFECTIVE LG REGULATORY REFORM

9.1 Primary service functions should be capable of being operated with a high level of transparent accountability for both effectiveness of performance and for financial efficiency. That aim would be possible provided that the LG sector is required to establish and maintain adequate financial management competencies, management accounting competencies and internal audit competencies.

9.2 However the LG sector is presently not *required* nor is it *controlled* to ensure that such competencies are present and properly exercised in a publicly-accountable way.

9.3 Establishment and maintenance of effective organisational controls is it seems presently ignored throughout the LG sector.

9.4 The LG sector is not required to have internal audit disciplines of any competence and proper compass[1]. That deficiency means that governance controls by councillors are both under-informed and likely ill-informed – and therefore governance controls are structurally non-existent and they are therefore ineffective. Councillors therefore tend

[1] For example, to the international and generally-recognised standards and code of ethics specified by the Institute of Internal Auditors. (Ref. https://na.theiia.org/Pages/IIAHome.aspx ).

to dangle from a CEO string fastened around their necks – therefore they are led and controlled: not leading.

9.5 External audits of LG entities arranged by the Audit Office should be able to rely to a significant extent upon such entities being required by statute to maintain reasonably-adequate LG internal controls; maintenance of adequate competencies necessary to setup and operate those controls; and adoption of closely-linked governance reporting standards that will enable both effective governance and the production of transparent financial and management performance standards accessible to the Ministry of Internal Affairs and its Minister.

9.6 Arguably, one of the highest priorities for LG regulatory reform is to require explicit and strict compliance with key statutory and regulatory principles so as to provide an immovable and non-negotiable basis for sound *machinery-of-government controls* covering compliance with proper –

* statutory interpretation[2];

* constitutional law principles and conventions[3];

* administrative law principles and conventions[4];

* fiduciary obligations appropriate in the circumstances of public vulnerability and intrinsic trust in and dependency on the Crown[5]; and

* other generally-accepted conventions appropriate to public organisation accountability.

9.7 The present absence of these strict and explicit requirements means that there are no sound bases for LG internal audit and governance controls nor therefore proper evidential bases for the Ministerial graduated interventions into an under-performing LG entity.

9.8 Perhaps the Audit Office functions could be extended to cover the specification of LG Internal Audit Standards (IAS); Generally-accepted Accounting Standards (GAAS); Financial Management Standards (FMS); Management Accounting Standards (MAS); and Governance Reporting Standards (GRS).

9.9 Add that framework to a required explicit and strict statutory requirement to adhere to the principles set out in Clause 8.6 above then New Zealand might have a chance of evolving an effective LG sector capable of making a material contribution to the Country's economy and the well-being of its people. Once that has been done any residual matters such as 'efficiency' might be worth some attention.

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[2] For example, as set out in *Statutory Interpretation,* Bennion, Francis, Butterworths, 1997.
[3] For example, as set out in *Constitutional and Administrative Law in New Zealand, 3rd Ed.,* Philip A Joseph, Thomson Brookers 2007

[4] For example, as set out in the reference at footnote 3 above
[5] For example, as set out in *Fiduciary Obligations,* Finn, P.D., The Law Book Company Limited 1977

9.10 The on-going lack of such a disciplined foundation for LG in New Zealand is now beginning to shake peoples' trust and confidence in the Crown – and that is a most serious matter.

9.11 And that serious matter will not likely be addressed by a piffling policy focus on 'improved LG efficiency'.

9.12 Also that fundamental matter will arguably not be addressed by fiddling with the present purpose of the Local Government Act 2004.

9.13 It may perhaps be reasonably assumed that the law-drafters of the current LGA recognised the level of trust and vulnerability of people to the actions, inactions and conduct of LG entities that give rise to special fiduciary obligations in such circumstances - and therefore sought to reflect such obligations in the purpose of the Act through the words 'social and economic well-being of the people'.

9.14 Thus the current policy that proposes the abandonment of those words sends a signal to LG entities that they can ignore their fiduciary obligations arising from the circumstances in which they exercise their statutory delegated discretionary powers.

9.15 The record to date seems to indicate that most LG entities are either not aware of ignore such fiduciary obligations anyway. So, as the current President of the Local Authorities Association stated on a recent National Programme broadcast, the proposed changes to the purpose of the LGA will have little if any effect on LG entities.

9.16 It should not need to be stated that the nature of the Crown's administration carries with it many shades of fiduciary obligation that arise in the circumstances of facets of that administration.

9.17 The present (and perhaps ignorant) endemic disregard of the fiduciary obligation principle and other similar principles of constitutional and administrative law are arguably at the root of peoples' growing distrust, frustration and growing anger with the Crown and its conduct.

9.18 Perhaps the current policy thrust on LG reform might adopt, require and assert such principles - and thus begin the start of a new era in peoples' trust in the Crown.

## 10. JUDICIAL CONTROLS ON THE LG SECTOR

10.1 Such principles, firmly adopted by the Crown in both its approach to policy formulation and statutory and regulatory drafting and administration would also provide more secure bases for the operation of judicial controls.

10.2 Presently, the public, frustrated with arguably unlawful performance of the LG sector, has no economically-reasonable access to a just judicial hearing.

10.3. An ordinary person adversely affected by regulatory conduct of a LG entity as a result of breach of the principles set out in this initial submission has arguably no reasonable access to justice in the Courts. That situation arises repeatedly in regard to local authority adventures into commercial exploration and particularly in regard to RMA matters.

10.4 Strangely, machinery-of-government policy has left people exposed to the unequal position of taking issue with a LG entity in an *adversarial* court: the absurdity of a vulnerable person taking on a LG entity that has relatively unlimited funds acquired from ratepayers!

10.5 Arguably, that makes an approach to justice in such a situation farcical. An ordinary person has to have the funds to retain legal counsel capable of arguing complex principles in Court against an adversary with unlimited ratepayer funds – often provided by the same people damaged by the unlawful lack of LG adherence to generally-accepted principles and conventions of law and justice!

10.6 Therefore, surely it is plain that people should have access to appeal to judicial review by an *Inquisitorial Court* with competence and jurisdiction to determine, in particular, issues of compliance with due proper statutory interpretation; due regard to principles of constitutional and administrative law; and with due regard to fiduciary obligations arising in the circumstances.

10.7 Currently, for example compliance with RMA-related matters is determined by an adversarial court – the so-called Environment Court – that seems to have no competence or jurisdiction to determine whether or not an LG entity has adhered to required principles of law.

10.8 We understand that during an Environment Court hearing in Tauranga, an appellant advanced that the BoP Regional Council had not complied in its conduct with applicable principles of administrative law: however, the Judge indicated that he was not familiar with such principles; the Court was offered and received a copy of the LAC Guidelines as indicative of such principles; after considering the LAC Guidelines the Court set those principles aside on the grounds that such principles did not apply to local government (despite the attention of the Court being drawn to a Foreword to the LAC Guidelines by the then Minister of Justice stating – presumably on behalf of Parliament - that the Guidelines applied 'for the whole of government'.

10.9 Such impotent judicial machinery for a person's access to justice arguably does little to preserve respect for the Crown from the people that the Crown is supposed to serve.

10.10 Perhaps the present planned multi-stage approach to reform of the LG sector could address the key issue of effective and just access to appropriate judicial review of local government decisions by a competent Inquisitorial Court.

## 11. SUMMARY

11.1 This initial submission accentuates the point that policies shaping the reform of the LG sector need to have a primary focus on identifying and requiring the sector to comply with explicit and strict adherence to generally-accepted regulatory principles as referenced, for example, by the authorities mentioned in this document.

11.2 This initial submission then asserts the importance of explicit and strictly-required controls dove-tailed together at every level of machinery-of-government administration – including a proper evidential basis for the exercise of Ministerial oversight and interventions.

11.3 This initial submission closed with a reference to a need to provide people with effective and just access to inquisitorial judicial review of LG sector compliance with principles of statutory interpretation; constitutional and administrative law; and fiduciary obligations appropriate to the circumstances.

11.4 Such principles are the corner-stone of a just society; they are the principles that should be judicially accessible to people; they are principles that can be asserted to confront LG tendencies to arrogance and tyranny of the people that LG entities are supposed to serve.

11.5 By comparison, the present so called 'Environment Court' is arguably a functionally absurd, costly and ineffective construction which, as a court of record, has blithely endorsed what a competent inquisitorial court would likely determine as unlawful LG administrative conduct.

## 12. RECOMMENDATIONS

12.1 That the Director of the present Inquiry note the points made in this initial submission and consider making those points a particular focus for its further research and Inquiry.

## 13. FOLLOW-UP

13.1 Thank you for the opportunity to make this initial submission.

13.2 We trust that the compass, content and thrust of this initial submission will be informative and of value to your Inquiry.

13.3 We wish your important Inquiry every success – and we remain available to provide additional inputs should you deem that they might be of value.

Jay Weeks

Gordon Levet

John Brosnahan