

7 March 2013

Inquiry into Local Government Regulatory Performance
New Zealand Productivity Commission
PO Box 8036
The Terrace
Wellington 6143

Dear Sir/Madam

TOWARDS BETTER LOCAL REGULATION – DRAFT REPORT – DECEMBER 2012

1.0 INTRODUCTION

- 1.1.** Hamilton City Council (HCC) welcomes the opportunity to make a submission to the New Zealand Productivity Commission's December 2012 Draft Report 'Towards Better Local Regulation' (referred to throughout this submission as the 'Draft Report').
- 1.2.** HCC would like to congratulate the Productivity Commission on the comprehensiveness of the Draft Report and the process used to develop it, as well as its content and analysis of the key issues canvassed around local government regulation.
- 1.3.** Overall, HCC endorses the findings of the New Zealand Productivity Commission and looks forward to seeing the final 1 May 2013 report that is submitted to Government.

2.0 SUPPORT FOR LOCAL GOVERNMENT NEW ZEALAND

- 2.1.** HCC also endorses Local Government New Zealand's submission to the New Zealand Productivity Commission, and in particular the following key points that LGNZ identified and supported from the Draft Report.
 - Local government regulatory activities have a clear impact on regional economic growth and ultimately national growth. The scope and breadth of the regulatory functions of local government cannot be overestimated with the Commission identifying over 30 pieces of primary legislation that confer regulatory responsibilities on local governments.
 - There is scope for improvements in the overall regulatory system by aligning the incentives of all regulatory actors; ensuring adequate capability at both central and local level; coordinating multiple regulatory activities and integrating multiple levels of government to ensure that regulation achieves its desired outcomes.
 - There is a level of tension between central and local government about their respective roles and went on to further suggest that it may be at an unhealthy level that could undermine the development and performance of regulatory functions.
 - Local government's constitutional position should be considered when governments are designing new regulatory systems.
 - Despite common perception, almost all regulations administered by councils are undertaken at the direction of central government.
 - As a matter of principle, better regulatory decisions will be made and overall well-being improved when those who bear the costs and benefits from the regulation have representation in the jurisdiction making the decision.

- There are advantages from local decision-making where preferences are heterogeneous because local governments are better at aligning local preferences than central government - and that where preferences are homogeneous there may be advantages in reducing the effort of multiple decision-makers.
- Where regulations are developed centrally and implemented locally the incentives faced by government departments to undertake rigorous policy analysis are reduced.
- There is significantly more cooperation, coordination and sharing of resources occurring amongst local authorities than is commonly known.

3.0 OVERALL COMMENTS

- 3.1.** HCC is of the view that many of the regulations imposed by Government on local authorities are of relatively poor quality in regard to their practicality at an operational level. A greater understanding of the day to day workings and processes of local government by those drafting such regulations would go a long way in ensuring improvements to the standards and rigour of the various regulations in force.
- 3.2.** In particular, there needs to be a greater understanding of the relationship between local and central government and what this means for regulations by those responsible for writing local government legislation.
- 3.3.** There tends to be a perception by a segment of the public that fees charged by councils for particular regulatory services (e.g. building consent fees) are excessive. While there is always likely to be a segment of the population who is unhappy with the current charging regime by local authorities, in HCC's case the focus is on ensuring that the service provided is of a very high standard and that in turn the cost of providing the service is fully recoverable – there is certainly no element of a 'profit' factor involved.
- 3.4.** Local authorities should be provided with a more comprehensive 'toolkit' of legislative tools e.g. instant fines and comprehensive prosecution provisions.
- 3.5.** The majority of local authorities don't have adequate resources (both funding and staff) to monitor and enforce regulations efficiently and effectively. Given the importance of monitoring and enforcement of activities for which consents have been granted, this is an area where there is a definite case for central government to 'come to the party' more regarding funding.
- 3.6. ENFORCEMENT OF BYLAWS**
- 3.7.** HCC strongly supports the Draft Report's statement that regulations would be considerably more effective if infringement notices were further available to councils for a wider variety of non-compliant behaviour.
- 3.8.** Having the ability to issue an infringement notice, and stating this clearly in a bylaw tends to act as a significant deterrent to people that continue to breach Council's bylaws.
- 3.9.** HCC (like many other local authorities) does not normally take cases of breaches of its bylaws to court, primarily due to the expensive and time consuming nature of the legal processes that need to be followed i.e. the end result (summary conviction and subsequent fine) would, in the majority of cases, not normally offset the associated cost to HCC.

3.10. JOINT AND SEVERAL LIABILITY

3.11. Introduction

- 3.11.1. HCC is of the view that the issue of joint and several liability is a key component that needs to be considered in much more detail by the Productivity Commission when looking at ways to improve the effectiveness and efficiency of better local regulation for councils.
- 3.11.2. As noted on page 135 of the Draft Report: *“Where risk and the potential for significant financial liability are apportioned to local authorities through their regulatory activities, it is not surprising to see councils managing the risk by introducing more requirements or applying regulation with increased rigour. Many submitters to the Commission’s Housing Affordability inquiry, for example, commented on the response of local authority Building Consent Authorities in the face of potential liability – the requirement for more information, more time taken to process consents and an increase in the number of inspections.”*
- 3.11.3. Given the significance of this issue for all local authorities, staff from HCC made a submission on 30 January 2013 to the New Zealand Law Commission’s Issues Paper ‘Review of Joint and Several Liability’.
- 3.11.4. The view of HCC staff was that there seemed a justifiable need to review the present position on the basis of a fairer system for apportionment of costs, particularly with regard to leaky building claims. The key points outlined in the following sections (i.e. 3.12 – 3.15) were made to the Law Commission’s Issues Paper.

3.12. Weathertight Homes Crisis

- 3.12.1. In our view the weathertight homes crisis sparked demands for a better apportionment of costs, particularly where there were multiple parties defending claims. The present joint and several liability structure disadvantages Local Authorities who are more often seen as the target by claimants, given a Local Authority’s unique role as the consenting approver in every case. Other parties (including the builder, fundamentally making the largest contribution to the construction of any building) have had the ability liquidating their company avoiding accountability. In many cases this leaves the Local Authority as ‘last-man-standing’.
- 3.12.2. This is unjust, particularly given the expectation that the plaintiff must be fully compensated in terms of the law. We agree that any plaintiff has the right to be compensated where there is a loss suffered, but do not agree that the law contemplated that be one party in all instances.
- 3.12.3. Our recommendation is that there has to be a fairer system that apportions liability on the basis of the role played in the construction process in terms of buildings.

3.13. Local Authorities now Risk Averse

- 3.13.1. The flow on effects have resulted in Local Authorities becoming very risk averse in the consenting and compliance process and being unwilling to readily assess alternative designs simply on the basis of a perceived greater risk in the event that something goes wrong. This risk adverse attitude does not support the performance-based building code regime.

3.14. Need for Insurance and Warranty Systems

- 3.14.1. In light of the recent launch of the LBP scheme and subsequent problems resulting from the introduction of restricted building work, the need for well thought out and appropriate insurances and reliable warranty systems is very apparent. The test for a

Building Consent Authority accreditation is extremely high with two-yearly IANZ audits, annual competency assessments for technical staff and more and more costs for Local Authorities. Local Authorities are no longer able to find insurance for leaky buildings, therefore the cost of defending and settling claims falls to the ratepayers.

3.15. Proportional Liability

- 3.15.1. The introduction of and application of proportional liability should not be dismissed on the premise that general application to a wider framework is too difficult. The application of proportional liability to the building industry, in our view, has obvious merits in establishing a basis for apportioning liability according to extent of the role played in the construction process. Therefore it is important that the Law Commission focus on the application to the construction industry.
- 3.15.2. It is our view that there are a number of fundamental elements that must be considered in the context of the application of proportional liability. Other countries have well grounded processes in place that ultimately ensure the home owner can adequately protect their investment in the event something goes wrong. Examples in the UK include an affordable home warranty system, enforced contracts between owner and builder, and mandatory maintenance requirements that home owners must abide by.
- 3.15.3. The ability therefore to set up a proportional liability scheme in the context of the present environment should not be difficult. The UK model, where a proportional liability and warranty system has been working well for many years, should offer encouragement to central government agencies to look closely at introducing a similar system into New Zealand.
- 3.15.4. Any scheme must offer surety for all parties, particularly the homeowner. HCC supports the introduction of a proportional liability scheme as a means of apportioning liability for housing construction defects.
- 3.15.5. The establishment of a scheme similar to that operating in the UK where builder warranties are linked with proportional liability in our view offers the best chance for success in the New Zealand environment.

4.0 FURTHER INFORMATION

- 4.1. Should the New Zealand Productivity Commission require clarification of the points raised in this submission, or additional information, please contact Brian Croad (General Manager City Environments) on 07 838 6639, email brian.croad@hcc.govt.nz

5.0 FORMAL APPROVAL OF SUBMISSION

- 5.1. Please note that although this submission has been circulated to Hamilton City Council's Elected Members for consideration and feedback, it has not been formally adopted through the committee process.
- 5.2. Hamilton City Council's submission is to be considered and adopted retrospectively at the 2 April 2013 Strategy and Policy Committee meeting. We will advise you after this meeting if Council makes any changes to its submission.

Yours faithfully



Barry Harris
CHIEF EXECUTIVE