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Enquiry into Local Government Regulatory Performance
New Zealand Productivity Commission
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Dear Madam / Sir

We wish to commend the Commission on its draft report entitled "Towards Better Local Regulation". The draft report that follows the consideration of submissions and other work we believe is a very good assessment of the issues surrounding local regulation. It is considered, measured, and, overall, fairly represents the challenges associated with developing and implementing local regulation.

Section 1.6 talks about the principle of "subsidiarity". Local Government considers this to be a very strong foundation principle when it comes to mandating local governance and local regulation. We do agree however that there are situations where there are spill-over benefits and costs that mean national requirements are placed on local authorities. Indeed some issues are global in nature and in a similar way international arrangements and conventions will be placed on national governance. To this end, a parallel principle of "supplementarity" is important. Centralised arrangements are not substitutes for local governance but they should work to supplement, and hence improve, the performance of local government regulation. In concert, these two principles reflect the notion that better regulation is indeed a partnership between local and central government. In light of finding 2.1, we would agree that the level of tension is perhaps at an unhealthy level and it is hoped that the Commission's work will encourage procedures and practices that remove this level of tension and indeed enhance the degree of co-operation necessary to ensure better regulation.

In some respects this brings into play the role of Parliament when it establishes the statutory mandate for local regulation. Given Parliament's sovereign powers, identifying opportunities at the highest level where "fit for purpose" regulation is enacted, continues to be a challenge. While departments and ministries advise select committees, as well as Ministers, on the design of legalisation, perhaps the Commission could look at other means of ensuring legislation meets all the necessary tests. The Regulatory Impact Statement that accompanies legislation is something that happens at the beginning of the process. Perhaps there is an opportunity for an audit, or some form of bench-testing that could take place on a confidential basis involving local government, prior to legislation affecting local authorities being reported back to Parliament?

In Section 2.3 the various responsibilities conferred by Acts of Parliament are listed. We note that the Transport Act 1962 has been repealed in its entirety by the Land Transport (Road Safety and other Matters) Amendment Act 2011. Bylaws about roads and the ability to issue infringement notices by parking wardens are now mandated by Section 22AB of the Land Transport Act 1998. This particular example is noted because interestingly we would venture there are local authorities who continue to operate as if the Transport Act 1962 were still in force. Fortuitously, savings provisions in the legislation protect any bylaws still in force, but this change serves as a reminder that legislation does get amended regularly and it behoves Local Government to keep up to date with these changes.

Finding 2.3 correctly refers to the common misunderstanding that regulations made or administered by local authorities are mandated on the direction of Central Government or Parliament. However, we should accept that in some of the regulatory regimes local authorities are given discretion over how regulations are established at the local level. For instance bylaws are largely discretionary but if a local authority chooses to have them, then the process for their establishment and their scope are defined by legislation.

Findings 3.1 to 3.7 fairly reflect the degree of variation that exists in relation to local regulation. Given the differences in size, scale, location, and economic activity within local authorities, there is no "one size fits all" solution. Question 3.1 asks to what extent should local government play an active role in pursuing regional economic development. This question is very open ended and it will always be a question as to what extent should local authorities use their funding and regulatory powers to support or promote economic initiatives within their areas of jurisdiction. In light of the recent amendments to the purpose of local government under the Local Government Act 2002 there may indeed be questions as to whether this is a core activity area of local authorities. However in the context of better regulation we would accept that local authorities should assess the impact of any regulatory powers from an economic as well as social, cultural, and environmental perspective.

We support Findings 4.1 to 4.13.

In relation to the guidelines for allocating regulatory roles we think all the essential elements have been identified. We do believe however that the dangers associated with focussing on a single self-contained regulatory function using the example of building control, should not be under estimated. There are process flow relationships with other regulatory responsibilities such as property rating and resource consents that would need to be factored in to any discussion about the allocation of responsibilities for building control. One of the guidelines already talks about where regulatory roles are split, what is the relationship between levels of government. Another dimension to this is the connections with other regulatory responsibilities within each level of government. Process inefficiencies can result from poorly designed allocation of regulatory functions that fail to take account of other relationships.

We agree whole-heartedly with Recommendation 5.1 in that regulations that set fee amounts for local government functions should be repealed and that any fees that local authorities set should follow Section 101(3) of the Local Government Act 2002. We also support Finding 5.1.

Questions 5.1 to 5.3 raise the prospect of Government grants or some form of revenue sharing to assist the funding of local regulation. There are some within local government who would no doubt be pleased to receive more funding from central government, although one should be careful what you ask for. Funding from central government would no doubt strengthen any obligation on local government to ensure that it acts in accordance with central government direction. There may be some functions that could work this way but it would seem very important that it was only where local government was acting as an agent to deliver some nationally important outcome. Funding to achieve what are locally important outcomes should be sourced through general local authority revenues.

We support Findings 7.1 to 7.11.

Question 7.1 seeks feedback on the possible measures to improve the quality of analysis underpinning local regulation. We agree that the discipline of preparing a RIS is a good step in the development of legislation but as evidenced by the recent Local Government Reform Bill the Government can still elect to override the findings of a RIS. The Regulations Review Committee is another device that can assess the effectiveness of regulations enacted by Order in Council but the volume and scope of regulations affecting local government have in the past failed to arouse much interest. To be fair, local government has not used the opportunity to seek reviews and simply goes into compliance mode once regulation has been enacted; it is easier to "blame" central government when it comes to implementing poorly designed regulation or regulatory processes that impose extra costs on others.

The measures identified in table 7.1 do not cover well regulations enacted at the local level. Section 32 of the Resource Management Act and section 77 of the Local Government Act 2002 require local authorities to assess the costs and benefits of choosing to enact local regulation. Given the level of scrutiny and criticism these obligations may be found wanting. However there will always be competing views over the desirability and content of any form of regulation. Even the most comprehensive RIS or equivalent will be found wanting by those who choose, for whatever reason, to oppose the regulation. This inevitability means a series of principles should apply at either central or local level.

- Proposals to enact regulation should comply with accepted design principles
- A regulator should be required to explain the need for the intervention and identify benefits and impacts
- There should be an opportunity for interested parties to comment on a draft regulation prior to enactment
- Once enacted, there should be an onus on the regulator to monitor implementation.

Whether there should be a step in the process for review, appeal, or recall is not easy to answer (also dealt with in your Chapter 12). The Regulations Review Committee has the ability to review regulations but can only report to Parliament. There are some obligations on local authorities to present bylaws to the relevant Minister, some for approval some for noting. Resource management plan provisions can be appealed to the Environment Court. All regulations can be subject to judicial review.

What are the features or circumstances that determine when and why a review process should be instituted? Judicial review remains an option but an expensive one. We would not support Ministerial recall as that only confuses accountability.

We do support Finding 7.12 and clearly the 2006 DIA policy guidelines have not received widespread traction - the report does not identify why this might be so. DIA is not a control department (in relation to local government matters) like Treasury so there has been no incentive from other departments to follow the guidelines. Table 7.2 offers some suggestion on improving capability in regulatory design and all are feasible as are the suggestions in table 7.3 for improving engagement on regulatory issues.

Finding 8.1 is a salutary reminder that there is a great deal of co-operation, co-ordination and sharing of resources amongst local authorities than is acknowledged. It is not new and examples of shared services, reverse contracting, transfer of powers exist today. How risk and liability are dealt with is an issue which has not been covered in section 8.5. The selected case studies are representative of working examples at the local level. There may also exist opportunities for cooperation between levels. For instance, in Tasman DoC rangers have been appointed animal control officers to help control dogs on beaches adjoining the Abel Tasman National Park and our Harbourmaster is an honorary Warden under the Conservation Act and Marine Reserves Act. We are aware of situations where the former Department of Labour, while funding was available, contracted with local authorities to deliver hazardous substances functions.

We agree with Findings 9.1 to 9.3 and would comment that in our experience the issue of councillor involvement in regulation has not been an issue. This is because of the understanding of the governance role of councillors and appropriate delegations in place.

Question 9.2 raises a concern about local authorities using their law making powers to regulate access to services rather than relying on a contractual relationship. This is indeed does happen but is not confined to local government. NZTA has similar powers in regulating access to state highways and even some SOEs, e.g. transmission companies, have similar frameworks under which they can regulate third party activity. What is important is why a unit of government wishes to regulate behaviour using powers of compulsion. If it for a public interest reason then let that be demonstrated. If it is for some commercial or quasi-commercial reason then leave that as a matter of contract. The difficulty will arise for instance when it is in the public interest for properties to connect to a community water or wastewater supply when this then obliges property owners to join a scheme rather than rely on on-site servicing. With greater use of Council Controlled Trading Organisations to deliver infrastructure services this aspect of regulation does require some attention. Councils, having the powers of a "natural person" can charge for goods and services the same as any other business subject to any statutory prescriptions.

Section 10 addresses monitoring and enforcement. The monitoring pyramid in section 10.3 reflects the practice within local government. For instance the Tasman District Council Enforcement Policy (viewable at http://www.tasman.govt.nz/policy/policies/enforcement-policies/) is a risk based approach where the response is proportionate to the set of circumstances applying (Section 8.3 of the Policy refers). The policy, while initiated under the Council's RMA responsibilities has been broadened to cover all regulatory enforcement actions (section 3 of the Policy refers). Accordingly our answer to your Question 10.1 is that enforcement practice in this unit of local government is consistent with the principles articulated and we would venture to suggest likewise in all regional councils and a good number of territorial authorities.

We do not accept Finding 10.1 has universal application. Statutory timeframes for consent processing have not, in Tasman's case, diverted us away from meeting our monitoring and enforcement responsibilities. We may be structured and have a philosophical understanding different from those authorities where there is an issue, but we have dedicated inspection teams in both building and resource management. This happened before the introduction of statutory processing timeframes for workload response and coverage reasons. We do concede that it is a matter of the priority and resourcing which a council chooses to dedicate to this function.

As a general comment, we consider local authorities have sufficient enforcement tools available to them. In some cases the method is not lacking but the problem may be with the mandating legislation e.g. freedom camping. The process of mandating instant fines under the Local Government Act and in relation to navigation safety could be more streamlined. The level of fines where used could be adjusted but this is often just a matter of regular review. For instance it took 11 years to increase a litter infringement fine from $20, set in 1979, and then a further 16 years to increase it to the current $400 maximum in 2006 and it is now 2013!

You ask whether there is evidence or data to demonstrate whether local authorities carry out sufficient monitoring. We can always do more but resources are always constrained. What data is collected is reportable and often reported. Mostly however activity is monitored in quantitative terms - type and number of decisions, timeliness, value of activity, outstanding actions, percentage of compliance achieved. The qualitative dimension or outcomes achieved are not well monitored.

Chapter 11 looks at the cost impact of local regulation on business. We can understand the attention given to this aspect and the findings are not unexpected. Our own customer survey across all permit types and not just business applicants shows people often think cost is more than expected and delay is a factor. People even resent having to pay to register their dog. What is often unappreciated is that if costs are not recovered from applicants the general ratepayer is left "to pick up the tab". The table below summarises the 2012 survey conducted on Tasman District Council's behalf by National Research Bureau.

| Question | Score – showing proportion of respondents who agree or strongly agree | | | | |
|---|---|---|---|---|---|
| | Total | Building | Resource Consents | Dogs | Environmental Health |
| Staff were helpful and courteous | 88.2 (89.5) | 84.3 (86.8) | 82.4 (82.7) | 94.1 (96.2) | 92.2 (92.3) |
| Costs were reasonable | 59.8 (60.8) | 51.0 (50.9) | 47.1 (42.3) | 74.5 (80.8) | 66.7 (69.2) |
| Time taken was reasonable | 85.3 (83.7) | 76.5 (75.5) | 82.4 (80.8) | 98.0 (100.0) | 84.3 (78.8) |
| Overall level of satisfaction with Council service | 86.8 (88.0) | 82.4 (77.4) | 76.5 (82.7) | 92.2 (98.1) | 96.1 (94.2) |

Bracketed figures are those applying to 2010/2011

Question 12.2 challenges concepts like "zones and rules" and suggest a performance based approach to regulation would be better. In asking this question the Commission demonstrates a lack of understanding of the current methods and practices used in environmental management. Many of the rules in plans are performance standards codified in spatial terms (called zones) to reflect circumstances or outcomes. In some cases limits, in the form of minima or maxima are easier to calculate, use and understand and so have their

place.[1] There are many books and theses written on this matter across all jurisdictions and it does not seem to be an easy area to be definitive. The only way it could be implemented would be through nationally prescribed plan templates and these have been rejected in the past. This is an area where the sector, including central agencies, and universities should be promoting the development and sharing of best practice.

Chapter 13 looks at the issue of Maori participation in regulation. The issue for the Commission is whether there are any constitutional reasons that support Maori involvement in the development and implementation of local regulation. As far as the impact of regulation on activities undertaken by Maori, the Council sees no reason to differentiate from people generally.

Chapter 14 looks at assessing regulatory performance of local government. Multiple agencies may be involved in the audit of local government, including the Office of the Auditor-General, the Parliamentary Commissioner for the Environment, and the central government department with lead responsibility for any particular regulation. There are also existing annual or biennial reporting obligations which local government has. We agree that any performance assessment process needs to meet a cost benefit test. Benchmarking has been identified as one option but the design of any system will have its challenges particularly when it comes to measuring cost of process. Benchmarking can work easily where quantitative comparisons can be made (e.g. number of dogs registered, percentage of permits processed within statutory timeframes). It is less easily suited to qualitative assessments where local circumstances make comparisons difficult.

In the regulatory area performance monitoring is more transactional. Table 14 identifies possible ways of improving the efficiency and effectiveness of performance assessment but they are all a partial solution and have their own imperfections. Hopefully the Commission's further work and submission responses may shed light on what better systems might be developed. Whatever the system, the cost implications of audit, monitoring, and information-gathering demands on local government should be accounted for. This should not be seen as a capability issue for local government but more a co-ordination issue for central government agencies.

We are happy to respond to any further questions.

Yours faithfully

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[1] As an example Tasman tried to use traffic generation potential standards to manage traffic risks associated with land use. They proved too uncertain, costly to calculate for applicants and Council, and were always a recipe for debate.