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Inquiry into Local Government Regulatory Performance

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Dear Mr Bailey

Towards Better Local Regulation– Draft Report December 2012

1. The Electricity Networks Association (ENA) represents New Zealand's Electricity Network Businesses (ENB's). Apart from a small number of major industrial users connected directly to the national grid, electricity consumers are connected to a distribution network operated by an ENA member, distributing power to consumers through regional networks of overhead wires and underground cables. Together, our member's networks total around 140,000 kms of lines. Some of the largest distribution network companies are at least partially publicly listed, but most are owned by consumer or community trusts, or are owned by local government.
2. We wish to commend the Productivity Commission (the Commission) for its constructive report. The report recognises that there certainly are some issues experienced in New Zealand because of the way in which local government is interpreting and applying the regulatory functions assigned to it, but the Commission also acknowledges that local government has not always been well supported in that role by central agencies to date. We like the forward-looking, constructive and solution-focused approach taken by the Productivity Commission. Here we note:

[“The aim of this inquiry is therefore to identify opportunities to improve New Zealand's productivity through a more efficient regulatory framework as it applies to the local government sector.”](#)

3. Broadly speaking, we endorse the principles/framework as set out in the draft report for determining when greater central government guidance is needed in local government regulation. We endorse the approach the Commission has taken in the draft report; to enable improvements in critical areas while still, at an overall level, recognising the importance of locally based bodies who best understand, and can respond to, the unique needs of their communities.
4. We note your conclusion that:

[“There is a well-established general principle that regulatory functions should be performed closest to the community that is affected, unless there is good reason to centralise.](#)

Exceptions to this will be where regulations can benefit from economies of scale, avoid duplication of effort, or where smaller councils do not have the capability to carry out these roles.”

5. We note too your observation on page 2 that *“there are circumstances in which the efficiency of local decision making needs to be balanced against the gains from coordinating or centralising”*.

6. And that:

F 4.2 If there are spillover effects, better regulatory decisions will be made if the costs and benefits that are borne by those outside the decision making jurisdiction are taken into account.”

7. Here we observe that local-centric decision making does not always deliver well on applications for which there is no local benefit. As an example, we ourselves have heard a council representative say that he did not intend to allow for the installation of a certain utility infrastructure project in his jurisdiction, as the service would not have benefited his council’s constituents (the proposed essential utility service would only pass through their area, for the benefit of those in other regions). If an alternative route existed at all for the infrastructure it would have been extremely costly to circumvent the said council’s area.

F 4.3 There are advantages from local decision making if preferences are heterogeneous because local governments are better at aligning local preferences than central governments, but where preferences are more homogenous across the country there maybe advantages in reducing the effort and cost of multiple decision makers.

8. We agree with the above statement, and wish to re-iterate (as it was perhaps not clear enough in your draft report) that greater national guidance can be developed, that can still allow for some local flexibility in defined circumstances. Efficiency and consistency can be increased in harmony with local interests/needs (for example, while reflecting the differences between rural and urban areas), while also reducing strain on local government. We believe a good example (and of the need for more central guidance in local government regulation) can be seen in the *National Code of Practice for Utility Operators’ Access to Transport Corridors* which was mandated under central government legislation in 2011. Admittedly, there are still some crinkles to iron out in its implementation, but it is fair to say that a set of clear rules and procedures has benefited all parties – as with the RMA we believe it was difficult for individual authorities to set the rules for utilities, and there was a lot of inconsistency and dispute with utilities over various council interpretations of what was reasonable.
9. We also agree that *“while the heterogeneity of preferences and the magnitude of spillovers are important in deciding who should make regulatory decisions, consideration also needs to be given to who has the regulatory competency to undertake different regulatory responsibilities. “*
10. We note here that *“the Commission’s approach to allocating regulatory functions between different levels of government is guided by the principle of ‘subsidiarity’. This principle asserts that decision making, powers, responsibilities and tasks should be handled by the lowest or least centralised competent authority (level of government). Therefore there is a presumption against centralisation unless there is insufficient competence to carry out any particular function.”* That is, the Commission’s principle

of subsidiarity has a caveat of competency, with which we agree. We also note you have expressed other caveats, such as homogeneity and spillovers.

11. When we talk about a lack of competence to make decisions re setting planning rules for ENB infrastructure we are not saying this as a criticism of local government – we simply believe that there are some areas for which it is unrealistic for central government to assume there will be the necessary expertise present, particularly when overlaid by the political nature of local government. In terms of electricity distribution, considerations are often quite complex and technical, issues are sometimes emotive, and sometimes have potential impacts from a local political perspective, and are quite difficult and time consuming for local bodies to work through. As a result there is variation around the country in matters such as when new ENB infrastructure is permitted, and when upgrades are (and are not) permitted under the different local plans.
12. Your paper and media release notes that 70% of business surveyed dealt with only one local authority, however we do not think this should be interpreted as implying that consistency was perhaps not a key issue. The remaining 30% is not an insignificant figure, and the impact on those companies is considerable. Moreover, as we have noted too you previously, our members have also considerable issue with the inconsistency in decisions **within** regions as well as across them. Most importantly, we believe the efficiency gains come not just from consistency, but from less resources (of ENBs and local authorities) being tied up in plan processes, appeal processes etc when these can be guided by a centrally agreed policy, guideline or standard. The current process of councils having to develop local policies re planning and ENB infrastructure from the ground up, is expensive to customers and businesses, as well as to councils and ratepayers (given the homogeneity of needs and concerns we believe exists across the country, regarding the RMA).
13. As you note, most of our concerns have centered on the RMA, and hence we are comfortable with the targeted solution approach you have proposed, where as we understand it, that those regulations proving problematic would be identified through your principles framework as cases where justification would be clear for more central guidance¹. You also note additional considerations such as:

4.10 Targeted approaches could be adopted for reducing the costs for businesses operating across multiple jurisdictions while maintaining the benefits of local tailored regulations.

14. We also note that the latest RMA reform discussion document *“Improving our resource management system”* has just been released and we note that this report has built in a lot of the findings and recommendations from the Productivity Commission’s work.

¹ As noted to you previously ENA strongly believes there is a need for more national guidance regarding ENB infrastructure and the RMA. We are yet to form a view on the exact nature of the ideal solution – e g whether that would be an NES/NPS or some other guidance (or combination).

15. One other core principle which you note, and we support, is that those affected should be represented, but we submit thought needs to ensure this too is part of an efficient process.

F 4.1 “Better regulatory decision 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 that decision.”

16. Here we would also like to stress that the local body election process does not normally mean that businesses such as ENBs have direct council representation. Where significant commercial costs are involved we submit that consultation is important and potentially constructive.

17. We would like to make a related point that there is an underlying problem with the decision making/governance structure of local bodies. You note in 9.2 *“Elected council members involvement in individual regulatory decisions is most likely greater than previously understood.”* We agree this is probably the case. In our view local government operations and decision making should be directed at people with the right expertise, while the role of elected councilors should be redefined along the lines of orthodox governing board structures. Work underway (including this report by the Productivity Commission and the RMA review) to look at a package of improvements (like when greater central guidance is needed) should help to mitigate the extent of this as an issue. But we think the Commission should still give further thought to this area.

18. Given this, and the representation issue also noted above, we will evaluate proposals to limit appeals carefully. We do note, however, that some of the ideas floated, such as around the RMA appeal process, have been encompassed as part of a more detailed package of ideas for change in the RMA discussion document. We're also aware that as our members are also requiring authorities they too have experienced some of the same frustrations when parties appeal who have not been involved in the earlier process. We note too that the need for appeal and consultation would be reduced (although not removed entirely) by greater central guidance, implementation assistance and follow up.

19. We agree that *“close and constructive engagement between central and local government is essential in the design of effective and efficient regulation, where it is intended that local government be responsible for implementing the regulation.”* We also submit that that engagement should also include representation of other affected parties also.

Closing Comments:

20. *“Regulation is part of doing business and can have a major impact on a firm’s profitability and growth.”* We agree with this observation.

21. ENA agrees that the implementation of regulatory functions by local bodies around New Zealand presents on-going problems and unnecessary costs to regional and national economies. We also agree it is important to recognise that local government has not always been well supported by central agencies in this area, and that in the absence of such guidance, such problems were inevitable. Therefore we endorse the approach the Commission has taken in the draft report; to make improvements in critical areas while still, at an overall level, recognising the importance of locally

based bodies who best understand, and can respond to, the unique needs of their communities.

22. We think there is clear evidence for more central guidance and assistance, particularly in some areas such as the RMA. We wish to reiterate and stress that, well designed national guidance can also allow for local flexibility when it is appropriate – e.g. in areas of particular local significance. ENA's expectation would be to have local flexibility appropriately allowed for in any national guidance regarding the RMA and ENB infrastructure.

23. We heartily agree with the following observation by the Commission:

“The power to issue national policy statements has been used relatively sparingly...As more national policy statements and environmental standards are issued and take effect...it could transpire that some of the problems seen in the first 20 years of the RMA's operation will not be the same.”

24. We would like to thank the Commission for their hard work in developing a report that covers a breadth of issues and for the high level of thinking that has gone into its detailed and tailored recommendations. We believe that the work the Commission has done will contribute to improved productivity in the RMA space.

25. We thank you for the opportunity to make this submission. We make some more detailed comments in the attached appendix. Please contact Tanya Ashby (contact details are given below) if you have any questions.

Yours sincerely

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Appendix 1 - More detailed Comments on report Questions/conclusions:

Only a Low Rate of Resource Consents are Actually Declined

26. Your report notes that consistently fewer than 1% of resource consents are declined.

Q 12.1 asks is the very low number of consents declined best explained by risky applications not being put forward, the consent process improving the application or too many low risk activities needing consent.

27. We believe the latter two reasons best explain the less than 1% declined rate. Significantly, there is an issue in relation to some activities where we think the number of activities requiring consent could be reduced, making the process more efficient for local authorities and applicants, such as ENBs. Specifically, if more central guidance or standards were set for the distribution sector around such matters as what activities were permitted for maintenance (including tree trimming around lines for safety and supply security), installations and upgrades (as enjoyed by Transpower though the NPS and NES for transmission) we believe considerable resources and time would be saved on all sides.

The One Page Guide – 4.4

28. Here we refer to (4.4), the one page guide for deciding where the allocation between central and local government should fall.

29. Overall we think this is a good guiding set of principles – though we think it could be improved by noting that it's not just relevant if the interests extend 'nationally', but also into other jurisdictions.

30. We also think that in the "*are there efficiencies from reducing duplication?*" box there should also be questions such that "should there be more guidance centrally?" and "should there be a national standard?" - that is this question is relevant here also, as well as in terms of 'national' interest'. The one pager needs to be clear that it is not just whether there is a 'national' interest in something, but is there a high degree of homogeneity in an issue/ and homogeneity in how to deal with it?

National Standards

31. Here we refer to your observations that "national standards do not necessarily improve consistency".

32. While it is true NESs have not always delivered to their full potential, we have concerns that this could be read in isolation by some readers, who may miss the view we understand you have come to that a good case can be made for more national standards. We think your point in this section was to highlight that central agencies also need to do more than they have done to date to facilitate good implementation of those standards. We agree, but note that even without additional implementation assistance, while national standards may not always be applied consistently, having them is still a big improvement on nothing – i.e. relying on the inconsistency in interpreting the broad purpose (etc.) statements of the RMA, without any guidance at all.

Chapter 5 – fees and funding

33. We note the Commission's recommendation (see 5.1) that *“regulations should be reviewed to remove specific fee amounts and make those fees at the discretion of local authorities subject to the requirements of section 101(3) of the LGA 2002.”*

34. We do not find the wording of 101 (3) of the LGA particularly comforting as a tool to ensure fees will be set fairly. There are examples from other Acts (or indeed perhaps in other sections of the LGA) which provide better wording to comfort fee payers as to how these uncapped amounts would be set instead. For example, section 36 of the RMA sets out conditions applying to the fees charged such as:

“A local authority must, upon request by any person liable to pay a charge under this section, provide an estimate of any additional charge likely to be imposed under subsection (3).

(4) When fixing charges referred to in this section, a local authority shall have regard to the following criteria:

- (a) the sole purpose of a charge is to recover the reasonable costs incurred by the local authority in respect of the activity to which the charge relates”

35. We note that it is common for there to be conditions such that only actual and reasonable costs for the activity can be recouped (not necessarily on a case by case basis but as a category) and that good practice requires a consultation process to be followed with affected parties when fees are set. See for example the fees set for charging for the administrative processes for utilities' access to transport corridors.

Bylaws

Q 12.6 What feature of the bylaw-making process are distinct from the district plan-making process and how might you use practice under the one to improve the process under the other?

36. We note that in relation to bylaws, as an example, we have heard some complaints from utilities that some local bodies are using the bylaw process to usurp the national direction as set out in the NCOP for Utilities Access to the Transport Corridor. If that is the case it may be useful to ensure protective mechanisms in the central/local government regulatory divide that prevent any such efforts to undermine national/central guidance.