

## Submission on Local Government Regulatory Performance

Submission to                   New Zealand Productivity Commission  
Submission on                   Local Government Regulatory Performance  
From                               Queenstown Lakes District Council  
Date                               14 September 2012

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### Introduction

This submission is made by the Queenstown Lakes District Council ("Council"). Council is a district council under the Local Government Act 2002 (LGA 02).

In making this submission, we have chosen not to respond to the specific questions raised in your issues paper, as that approach limits the consideration of important issues of principle that should be debated in coming to a view of the appropriate allocation of regulation as between central government, local government and the community.

We apologise that this submission is less complete than we had wished. There is limited resource available within smaller Councils to be able to devote the time and effort required to make substantial contributions to reviews even although they are important to shaping the future of regulation in local areas.

### The "Local" v "National" Debate

Chapter 5 of the paper sets out a national centric assessment of factors that should be considered in determining where the best place for regulation should occur. Unfortunately, it treats the issue in a static way which ignores significant context.

Firstly, the development of statist powers is relatively new and is continuing to evolve. The roles and powers of nation states are under two opposing pressures: surrendering some of their powers to international entities (e.g. WTO) and other powers to regional and local entities (Calabresi, 2011). What may be preferences now may not be the case even in the short to medium term.

Secondly, as set out in Box 5 of the draft paper, the purpose of local government is to enable democratic local decision making and action by and on behalf of communities and the role of a local authority is to give effect to that purpose and perform the duties and exercise the rights conferred on it within its district. It seems, though, that although the provisions have been cited by the report's authors, they have been largely ignored.

Furthermore, it appears that the paper is informed by a Commission and staff with a centrist *weltanschauung*. This results in a paper that starts with a predisposition that the objective should be an economically efficient allocation, where efficiency is measured at the national level.

Council acknowledges that a dichotomy exists between a national standards based approach to regulation, which seeks to identify and eliminate any local variation on the premise of economic efficiency versus the intent of the LGA02 which provides for local communities to determine what is important to them and the degree to which the important matters should be protected. This is demonstrated in the RMA Working Group mini case set out below.

Council argues that its role, as prescribed by the LGA02, is to put in place the regulatory environment desired by its community. Other Council's will make their decisions based on their communities' views and that leads to regulatory variety across the country. In our submission, the local variety in regulation, which is sanctioned by the LGA02, is important for a number of reasons:

Firstly, with a number of regulators of similar activities in different locations there is the opportunity for the development of innovation in regulatory development and delivery as each community, in determining its regulatory response, can consider the different responses of other communities and choose what best suits it. An example of where this Council has done this is in its Gambling Policy, required under the Gambling Act. (See

mini case below). Where local diversity is subsumed within a national regulatory structure, innovation is much more likely to wither. An example of this occurring within this District is the expansion of the role of the (now) Maritime New Zealand into the regulation of commercial tourist activities – jet-boating and rafting. (See mini case below)

Secondly, local variety in regulation is important because the population of New Zealand is not homogenous and not equally distributed across the country along any demographic or psychographic dimension. For example, this district differs from many others in New Zealand through its high growth rates and very high numbers of visitors (domestic and international). The regulatory issues important in this context of development pressure and, for example, growing numbers of freedom campers are very different from an area where population is declining, there is no development and visitor numbers are low. A central regulatory regime means that the wrong areas will be targeted for regulatory focus in some parts of the country and the degree or level of regulatory oversight will be either too much or too little.

Thirdly, there is a principled argument for the continued local delivery of regulatory services within the significant body of literature on subsidiarity. It seems that the consideration of this issue is minimal and the principle has been dismissed largely, it appears, because it does not suit what appears to be the author's preferred outcome of a national regulator with no local variation. This is in contrast to its consideration in other jurisdictions. This preference is no surprise. It follows the approach described by Ben-David of the process by which central government asserts itself over subordinate decision making institutions. He describes a four stage model of: **interest**, followed by **persuasion**, followed by **influence**; then finally, **control**. (Ben-David, 2011). Successively, recent central governments in New Zealand have followed this trajectory.

### Chapter 3 – Local Government and Regulation

The draft paper sets out some of the framework legislation that empowers local government in Box 6. The following legislation is missing:

- Local Government Act 1974. Although largely repealed by the LGA 02, there are two significant areas of regulatory responsibility covered by the act – powers to make bylaws to control harbours and waterways, and powers of control over roads, including stopping and temporary closure of roads and dealing with obstructions in roads.
- Local Government Official Information and Meetings Act. This Act covers three discrete areas: it establishes the obligations for providing public access to information, based on the Official Information Act; it creates an obligation to provide land information memoranda (LIM) – generally everything Council knows about a property that exists within its district; and it sets out the rules governing the holding of meetings of Councils and subsidiary decision-making structures created by Councils.
- Local Authority Members Interests Act.

In Table 2, the paper attempts to set out the regulatory activities of local government as established by statute. The following legislation is missing:

- Burials and Cremations Act. This Act requires Councils to establish and operate cemeteries within its district and to regulate the operation of those cemeteries.
- Fencing of Swimming Pools Act. Council has responsibility for enforcement of the Act and is required to consider granting special exemptions from the requirements of the Act.
- Forest and Rural Fires Act. Requires council to establish a rural fire fighting response capability and enables the establishment of bylaws restricting fires in open places.
- Impounding Act. Requires Council to operate pounds and regulate wandering stock.
- Machinery Act. Requires Council to inspect and issue permits for the erection and operation of amusement devices.
- Walking Access Act. Enforcement powers where Council is a controlling authority under the Act.
- Waste Minimisation Act. Requires Council to implement measures which encourage waste minimisation and result in a decrease in waste disposal.

## Regulatory regimes

The beginning of Chapter Five proposes a model of the functional components of a regulatory regime as being:

- Setting standards to be achieved or complied with;
- Monitoring compliance with the standards;
- Enforcement when there has been non-compliance; and
- Review to evaluate if the regulation has been successful.

This model is deficient in that it misses a significant component of any regulatory system, the education function.

In the following schema, we have set out the roles and responsibilities of the various functions of two of the major regulatory functions undertaken by local government – the building consent process and the resource consent process.

As set out here, it is clear that the various components of the regulatory regime (as expanded by us) are given effect to by a range of different actors across the different functions. In our submission, complex systems cannot be reduced to simplistic analysis of where they should best be delivered from

In looking at the model as presented, there are three significant features worth further comment:

- Local government delivers a significant role in the education function. Whilst in many instances local government is not the standard setter, local government has an important role in ensuring the communities understand the standards and the process that are adopted in considering consent applications, monitoring and enforcement. Local government is directly connected to the regulated community and is best able to provide that educative service.
- The review function appears to be lacking in most areas, not just within local government. Bylaws adopted under the LGA02 have a mandatory review after five years and every ten years thereafter. The majority of statutes under which local government operates have no similar provisions for regular review to ensure their on-going effectiveness.
- There is a very limited range of enforcement tools available to local government. Based on the principle that enforcement should be proportional to the breach of standard, there needs to be a greater range of measures available. As described in the Cemetery mini case, the cost of undertaking a prosecution under the LGA02 is grossly disproportional to the offending that occurred in that case. However, unless central government has adopted an infringement regime (as it has under this Council's Waterways Navigation Safety Bylaw), the cost of taking action is a significant barrier to enforcement and may be disproportionate to the offence committed. The cost and time involved in using the enforcement tools available are not conducive to good regulatory practice. As described in the Wanaka Gym mini-case, where a borderline vexatious party is involved (the latest decision of the Court describes her thus), then costs and the time involved in pursuing the case are significantly disproportionate.

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	<b>Standard Setting</b>	<b>Education</b>	<b>Monitoring</b>	<b>Enforcement</b>	<b>Review</b>
Building Act	<p><b>Judiciary</b></p> <p><i>Weathertight Homes Tribunal</i></p> <p><b>Central Government -</b>  <i>Building Code</i>  <i>BCA Rules and audit Determinations</i>  <i>Industry participation</i></p> <p><b>BCA</b>  <i>Processes</i>  <i>Alternative solutions</i></p>	<p>DBH Guidance</p> <p>Guidance sheets                      Public enquiry function                      Pre app meetings                      Application review meeting</p>	<p>IANZ audit</p> <p>Compliance of plans to code                      Inspection during construction                      CCC</p>	<p>Removal of DBH status</p> <p>Dangerous building                      Insanitary Building                      NTF                      Prosecution</p>	
Resource Management Act	<p><b>Judiciary</b></p> <p><i>References to Plan</i>  <i>Consent decision appeals</i>  <i>Direct referral and Ministerial call-in decisions</i>  <i>Judicial review</i></p> <p><b>Central Government -</b>  <i>NPS</i>  <i>Plan review requirements</i></p>	<p>MfE Guidance</p> <p>Quality Planning                      Making Good Decisions</p>	<p>MfE survey of performance of local authorities</p>		

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*EPA / Ministerial call-in*

<b>Regional Council - RPS</b>	Guidance sheets	Submission on applications to TA		
<b>Territorial Authorities - District Plan</b>	E-plan Guidance sheets	Compliance of application to RMA and planning instruments	Abatement Notice	Plan Effectiveness Review State of the Environment Review
<i>Administrative interpretations</i>	Public enquiry function	Inspection for compliance with conditions of consent	Infringement Notice	
<i>Decision making structures</i>	Pre app. meetings	Complaints	Enforcement Order	
<i>Direct referral</i>	Application review meetings		Prosecution	

## **Mini Cases**

In this section of our submission we have set out a number of small case studies of real events from within this community which are useful for illustrating the points made through the submission.

### **RMA Working Group**

Council has an innovative method of delivering the majority of its regulatory services – they are delivered through a wholly owned company, Lakes Environmental Limited, which is a council-controlled organisation under the LGA02. Council adopted this model in its current form in 2007. It provides separation between Council's corporate and regulatory functions, enables a complete ring-fencing and transparency around the costs of delivery of regulatory functions and enables expert governance around the regulatory functions.

In the Building Act area, that company is a BCA under the Building Act and delivers the full range of functions. Under the Resource Management Act Lakes Environmental undertakes all processing of applications, but decisions for all consents are made by independent commissioners. Non-notified resource consent decisions (more than 95% of all the applications received) are made by an independent senior planner. Notified decisions are made by a panel of two commissioners appointed from a panel of suitably qualified people. This model was adopted in the mid-2000. Latterly there has been community concern about the cost of the decision making model and the quality of some of the decisions. To address these issues, Council has formed a working party of Council members, officials and stakeholders in the resource management community to undertake a critical review of the way in which these decisions are made and provide a path forward to improve the quality and lower the cost of decision making.

Whilst creating a multi-party working group is not innovative of itself, it demonstrates the ability that local government has to identify issues with elements of its regulatory performance, to engage with the community and develop resolutions to achieve better regulatory efficiency.

### **Gambling Policy – why one rule doesn't suit all**

Territorial authorities are required to adopt a Gambling Policy for their district to regulate the number and location of class 4 gaming machines within their District. In considering this issue in the Queenstown Lakes District, Council had to consider not only the social impacts of class 4 gambling, but had to consider that within an environment where two casinos were licensed and operating. The policy developed by the Council in this setting was to create a permissive policy – new venues could be created and machine numbers increased within certain parameters – but balanced this with a requirement for applicants to go through a public advertising process for new applications and created a public submission and hearing process if there were objections raised regarding the application. The policy has been in place since 2004 and has been reviewed without change in 2007 and 2010. A small number of hearings have been required because of public objection to applications and in some cases the applications have been declined and in other cases approved. The policy works for this community with its particular set of circumstances where it might not work for others.

### **Maritime New Zealand. Regulation of commercial water-based activities [commercial jet-boating and rafting]. Loss of local innovation following central government take-over.**

Until the adoption of Rule Part 80 of the Maritime Rules, promulgated under the Maritime Transport Act, regulation of commercial water based activities in the Queenstown Lakes District was undertaken through the Lakes District Waterways Authority [LDWA]. That authority had powers to make bylaws to regulate the activities of multiple jet-boating and rafting operators on rivers within the District, such as the Shotover and Kawarau. The LDWA developed and implemented operating procedures and protocols to improve safety, such as mandatory driver training, testing and licencing, radio protocols and minimum safety equipment, all of which were adopted by the then Maritime Safety Authority and incorporated into Maritime Rule Part 80.

That Rule came into effect in February 1999. It has just recently been replaced by Rule Part 81 – Commercial Rafting in 2011 and Rule Part 82 – Commercial jet-boating in 2012.

In the 12 years that Rule Part 80 was in effect, there were no changes made to reflect changes in the commercial jet-boating or rafting markets and neither were there additional rules made or amendments made to cover other commercial water-based activities such as river surfing.

From being a leader in the development of regulatory measures to enhance safety in commercial water-based activities through the user forum of the LDWA, the Queenstown Lakes District has ceased innovating in the regulation of this industry – which was done in association with the industry – and is unable to respond to new products in the water based adventure tourism market as they develop.

A consequence of this stifling of innovation at the local level and the inability of a national regulator to respond quickly to developing trends was the furore created around the tragic death of an international tourist in a river surfing accident and the subsequent Government enquiry into adventure tourism. Unfortunately, the response of the enquiry is the development of generic national standards that are not readily able to be monitored or enforced.

This case demonstrates a significant loss of local innovation in keeping pace with rapidly changing activities and being forced to develop at the pace that the national regulator wants to go at.

#### **Cemeteries – Ineffective or inadequate enforcement options.**

Council has obligations under the Burials and Cremations Act for the provision and operation of cemeteries. Council has created a bylaw to provide for the efficient regulation of burial activity in its public cemeteries. In early 2012 Council was made aware of some irregularities that had occurred with the interment and disinterment of ashes in a number of plots at one of its cemeteries. After an initial internal investigation, which confirmed the appearance of irregularities, Council engaged PricewaterhouseCoopers to undertake a forensic audit of the alleged actions, which confirmed breaches of the Council bylaw, the Burials and Cremations Act and the code of conduct for the Funeral Directors Association (FDANZ). Council had only one enforcement option available to it – a prosecution under the LGA02 for a breach of the bylaw. Such a prosecution was estimated to cost Council around \$25,000 in legal costs. It referred the matter to the Ministry of Health as administrator of the Burials and Cremations Act, who declined to take any action and to the FDANZ who have investigated but not advised us of any outcome if there has been one.

This case demonstrates the limited range of enforcement tools available. A prosecution at a cost of \$25,000 was not a proportionate response to the breach that occurred. As a consequence, the undertaker responsible has not incurred any sanction from his gross behaviour.

[Removed by agreement with the submitter due to the matter being subject to an appeal]

## Performance Management

Council's monitors the performance of its regulatory functions through its performance management system. This system incorporates both performance measures established as part of activity measurement under the long term plan process and corporate performance measures not associated with particular service delivery activities. Council's systematic approach to performance management is relatively new. The measures are focussed in the process and output parts of the continuum in figure 11.

Whilst Council can and does measure and assess its own performance it is unable to meaningfully compare its performance to others. It has been involved in the recent attempts by local government to establish common benchmarks across the sector. Regrettably it appears that there is no common sector desire to develop these from within. We believe there is considerable benefit to be gained from benchmarking performance, so long as the focus of the benchmarking is on performance improvement and not "league tables" for the purpose of criticism.

Our preference is for the sector to develop performance benchmarks rather than them being imposed by the Secretary for Internal Affairs. In our view, internally generated benchmarks are more likely to be relevant to the sector and supported by them than measures imposed on the sector. We believe that Local Government New Zealand and the Society of Local Government Managers should jointly sponsor and be a catalyst for this development.

## Conclusion

Council appreciates this opportunity to contribute its views on this important review. We have sought to demonstrate some of the issues facing a relatively small Council in dealing with the regulatory challenges of this district. In particular, we have provided examples to highlight problems in the centralisation of regulation through loss of innovation and the limits in the enforcement tools available to Councils.

We look forward to continuing our engagement with the review as it proceeds.

## References

- Ben-David, R. (2011). Federalism, Subsidiarity & Economics: In search of a unifying theory. *Improving Regulatory Performance*. <http://www.vcec.vic.gov.au/CA256EAF001C7B21/pages/vcec-regulatory-conference-2011>.
- Calabresi, S. a. (2011). Federalism and Subsidiarity: Perspectives from the Law. *APSA 2011 Annual Meeting Paper* (p. 2). SSRN: <http://ssrn/abstract=1902971>.



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