

27 February 2013

SUBMISSION OF THE HAWKE'S BAY REGIONAL COUNCIL TO THE PRODUCTIVITY COMMISSION

on the

DRAFT REPORT: TOWARDS BETTER REGULATION

1. INTRODUCTION

The following submission by the Hawke's Bay Regional Council has been prepared in response to the Commission's Draft Report: *Towards Better Regulation* (December 2012). Councillors formally considered the submission at a meeting on 20 February 2013.

2. INTRODUCTION

In developing a view for the Productivity Commission inquiry the Hawke's Bay Regional Council is mindful and supportive of the following high level principles endorsed by the National Council of Local Government New Zealand:

Local autonomy and decision-making: communities should be free to make the decisions directly affecting them, and councils should have autonomy to respond to community needs;

Accountability to local communities: councils should be accountable to communities, and not to government, for the decisions they make on behalf of communities;

Local difference= local solutions: avoid one-size-fits-all solutions, which are over-engineered to meet all circumstances and create unnecessary costs for many councils. Local diversity reflects differing local needs and priorities;

Equity: Regulatory requirements should be applied fairly and equitable across communities and regions. All councils face common costs and have their costs increased by Government. Government funding should apply to some extent to ease this burden;

Reduced compliance costs: legislation and regulation should be designed to minimise cost and compliance effort for councils, consistent with local autonomy and accountability. More recognition needs to be given by government to the cumulative impacts of regulation on the role, functions and funding of local government;

Cost-sharing for national benefit: where local activities produce benefits at the national level, these benefits should be recognised through contributions of national revenue.

3. GENERAL COMMENTS

The Hawke's Bay Regional Council endorses many of the Commission's findings.

Regulation, and its implementation, is a requirement for the proper functioning of any economy and society. We believe that in looking towards better local government regulatory performance it is necessary to look at the performance of regulation across the whole system. This is the approach the Productivity Commission has taken. There is no desire to point blame at different parts of the system, but to assess and review its efficiency as a whole and look for improvements in all parts of the regulatory system (including at central government level) which will have the outcome of improving the regulatory performance of local government.

The Productivity Commission has recognised the differences between regional and territorial councils in its Draft Report, although perhaps not to the extent that was sought by Local Government New Zealand. Hawke's Bay Regional Council endorses the following points made by Local Government New Zealand:

- Regional councils have quite different roles and responsibilities to territorial authorities;
- This, together with the large geographical scale of most regional councils means they are different in their focus, concerns and relationships with their communities and stakeholders;
- In its report back to the government the Commission must be very clear about the nature and particular roles of regional councils, and ensure that discussions about the issues and solutions clearly distinguish how they relate to the different levels of local government.

To these points we would add the following:

- A significant proportion of regional council regulation derives from the Resource Management Act 1992 (RMA). By this we mean significantly more than for territorial authorities who also have major responsibilities through other legislation, notably building legislation, and liquor licensing;
- Regional council RMA responsibilities are managing fundamentally what are public resources (the "commons") such as freshwater, air and coastal water, as compared to territorial authorities whose regulations cover primarily private resources (land use, buildings etc). This means that while regional councils are essentially regulating access to a public resource, territorial authorities are regulating the use of an already acquired private resource. In giving consideration to the government's request to examine the role of local government in economic development the Commission should be mindful of how these separate duties influence economic development.

As a final general comment Hawke's Bay Regional Council acknowledges the Commission's findings in respect of the performance of central government. There has been a strong element of frustration expressed by local government at a lack of consistency and consideration for local government during the development of regulation by central government. An opportunity to address these is welcomed.

4. SPECIFIC COMMENTS

The following paragraphs provide Hawke's Bay Regional Council's response to the various chapters in the Commission's report, rather than to the very specific questions posed in the report.

Allocating regulatory responsibilities

The framework identified by the Productivity Commission to guide the allocation of regulatory roles is supported; in particular the premise that recognises local and proximate factors: allocate the regulatory function locally unless there is a good reason to allocate elsewhere.

In our view information and capability to make regulatory decisions is a key driver for where that function should lie. The framework would be further enhanced by extending the options from national or local to encompassing the relative merits of allocation between territorial authorities and regional councils. The following matters would be of relevance:

- The scale and nature of an activity to be regulated – an activity that revolves around effects on the natural environment might be a better candidate for regional council involvement.
- The areas of benefit of the particular activity – an activity where benefits and costs “spillover” from one territorial authority to the neighbouring local authorities might be better allocated to regional councils
- The area over which coordinated activity and enforcement will be most effective.

The funding of regulation

In undertaking its 'Better Local Government' reform the Government expressed its concern at rates increases as a significant contributor to increases in the *Consumer Price Index*. What has been overlooked by the Government is the additional regulatory requirements that have been placed on local government by central government without full and proper consideration of the cost implications.

Local Government New Zealand has completed a report (November 2012) on the impact of government policy and regulations on the costs of local government. This report identified three forms of cost shifting :

Cost shifting – transfer of responsibilities without funding to local government and/or the reduction of funding for a local government activity requiring a greater contribution from rates; (e.g. reduction in funding for road maintenance and renewal; costs created by Treaty settlements; NES for Air Quality; reduction in funding for Enviroschools (has been increased again though last year); regional animal and plant pest strategies);

Raising the bar – a requirement of councils to raise the level of service of particular services, beyond what local citizens themselves are prepared to pay for; (e.g. impact of RMA national policy statements and reform of the Building Act; the introduction of water meter regulations; the extension of general powers of competence to regional councils in 2002 exposed us to increasing

funding requests from community organisations and territorial authorities; and meeting the requirements for MfE's environmental reporting plans);

Regulatory creep – the imposition of regulations and processes that increase administrative costs and increase the cost of 'doing business'. (e.g. compliance with long term planning provisions, 2010 amendments to the LGA 2002 and the Public Records Act. Others include Land Transport Amendment Act 2008, Public Transport Management Act 2008, LGOIMA, increased consultation costs).

Hawke's Bay Regional Council acknowledges that a number of these costs are the costs of councils carrying out their business and should be funded by local authorities. What we are however concerned about, and what we are pleased to see acknowledged in the Commission's report, are the unfunded mandates where regulation requires local government to perform certain duties that are not accompanied by funding for fulfilling the requirements.

A notable example of an unfunded mandate for the Hawke's Bay Regional Council has been the introduction of the National Environment Standards for Air Quality, via the Resource Management Act. The NES for Air Quality, while promulgated through the Ministry for the Environment, was driven by the Ministry of Health on the basis that PM₁₀ reductions would reduce premature deaths and hospitalisations as a result of respiratory illness.

The consequence for Hawke's Bay Regional Council, and other regional councils throughout New Zealand, was a requirement to spend money on the establishment of air quality monitoring for PM₁₀, on the technical evidence required to develop a plan change and take that Plan change through the First Schedule process of the RMA, and on ongoing monitoring of the standard throughout the region. In HBRC's case this has amounted to approx \$1.25M of ratepayer money, comprising \$1.027M in science investigation and monitoring and the balance for the plan change process. This is a clear example of where the community has not been able to make its own funding choices.

It is also a clear example of the transfer of a central government responsibility to local government, without funding to fulfil the responsibilities. Prior to the RMA being legislated the management of air discharges was the responsibility of the Ministry of Health, including discharge consents. This recognised that the benefits of good outdoor air quality fell largely to the health sector. The benefits still do. Yet local government has been handed the duty to manage PM₁₀ without support funding, thereby incurring the costs without the benefits.

Regulation making by central government

Hawke's Bay Regional Council agrees with the Finding F2.3 in the Commission's report:

"Contrary to common perception, almost all regulations made or administered by local authorities are undertaken on the direction of central government, or are necessary for carrying out their duties under Acts of Parliament."

It is interesting that the Commission found no examples of bylaws being made that were not obviously required or empowered by statute law. This links the effectiveness of local government

implementation of regulations to the effectiveness of central government making of regulations. It is therefore disconcerting to find that the Commission has concluded that:

“Regulation making at the central level is below leading practice. This is having a material impact on the quality of regulations devolved or delegated to the local government sector”.

The Commission has asked what measures, or range of measures, would be most effective in strengthening the quality of analysis underpinning changes to the regulatory functions of local government. In the view of the Hawke’s Bay Regional Council the following measures should occur consistently across central government agencies when developing legislation and regulation for implementation by local government:

- Initial high level assessment of whether a function is genuinely a centralised issue or a more local one (as opposed to being an expedient issue for central government to divest itself of)
- Consultation with the local government sector throughout the process of developing the legislation or regulations for practitioner input.
- Consistency with the Local Government Act 2002 and other relevant regulatory responsibilities;
- Recognition of risk, liability, transition and implementation issues for local government in the Regulatory Impact Statement
- Alignment of governance arrangements and funding responsibilities with the extent of discretion conferred
- Inclusion of clear accountability arrangements i.e if the issue is nationally regulated and locally implemented (e.g liquor licensing, Building Code) then clarify the responsibility for the delivery or non-delivery of the regulation.

Local government co-operation

Shared services are increasingly a preferred *modus operandi* in local government, thanks partly to encouragement through the Local Government Act and also to recognition of the need for greater efficiencies, addressing of capacity issues and enhanced customer service. The costs and benefits of closer cooperation have been well-canvassed in various studies.

We refer back to our earlier comments on being very clear about the nature and particular roles of regional councils and the differentiation between them and territorial authorities in a regulatory sense. There are benefits to be gained from increased local government cooperation in the area of regulation. Logically it would seem that those benefits are maximised when there is a common regulatory driver. Within a region, the territorial authorities will have a far more solid base of commonality with one another (in the areas of planning and building for example) than they will with the regional council.

Nevertheless regional councils are already cooperating with territorial authorities in back office and non-regulatory areas; and among themselves are looking at various cooperative initiatives. One example of this has been the regional sector work on water reform over the past two years. The Regional Sector of Local Government New Zealand agreed that they would cooperate on an agreed joint programme to implement the National Policy Statement for Freshwater Management. The various components of this collaborative approach included:

- A legal opinion to resolve the status of Policies A1 and A3, specifically how their requirements to adopt the best practicable option fit with the legislative requirement to “avoid, remedy or mitigate environmental effects.”
- A paper on the First Principles of Water Allocation – looking at the methods for the allocation of freshwater to activities, and the consideration of possible transition paths from current allocation methods to possible future ones
- A toolkit to bring together best practice in non-statutory programmes designed to improve water quality with the aim of improving understanding of best practice both within regional councils and within the wider community that has an interest in water quality.
- A policy paper and related advocacy tools and advice to support regional councils to engage in a process to improve the ability of councils to implement RMA policy more quickly.

This work, undertaken cooperatively, has cost each contributing council approximately \$10-12k and has is providing baseline information for the councils as they undertake their regulatory responses to the NPS. The aim of the work programme was to provide a level of consistency for regional councils in their regulatory approaches.

Making resource management decisions, and the role of appeals

The future economic performance and quality of life of New Zealanders depends upon ongoing and increased use of natural and physical resources. The policies and rules that govern the use and allocation of natural and physical resources directly impact on the economic value of resources and the structure and operation of property markets. Failure to adjust the policy framework can (and has) result in quite damaging environmental outcomes. A lack of responsiveness can also result in substantial missed economic opportunities.

The current RMA system for plan making has created a series of incentives for particular behaviours. The current ability to appeal policies to the Environment Court creates a number of incentives that reinforce the very long time that it takes to complete a plan development process. From the outset of a plan development process the incentive for anyone other than the council is defer expenditure or effort and try to secure their objectives with the least possible effort or expenditure. This means that by the time of the council hearing few of the major submitters will have prepared a full brief of evidence to support their submission. The cost of a full brief of evidence is not incurred until after a submitter appeals. This is rational behaviour, but it invariably means that the council hearing does not benefit from the same level of evidence or research that would be presented to the Environment Court.

The current system also creates perverse incentives for local authorities. The current average time for developing a plan to the point that it becomes operative is in the order of eight years. That spans three electoral cycles. When a council considers its priorities and where its efforts might make the biggest difference there is little incentive to commit to an eight-year process that has substantial cost but indeterminate benefits. Every council knows that ultimately all of the major and contentious policy decisions that are provided for in their policy statement or plan will be referred to the Environment Court. The decision will then be made by a court with no accountability to the community and yet the council will be held accountable for the decision and the provisions of the plan – no matter what decision the Court makes. Councillors know that they can spend years of community service dealing with complex and challenging issues, with difficult community relationships and intractable conflicts only for a group of unaccountable people to make the ultimate decision for them.

There are a number of resource management practice initiatives that could speed up policy making:

- Front end loading of stakeholder engagement activity through formal collaborative requirements with concurrent incentives for all parties to participate. (This was recognised by the Land and Water Forum as an action to create a more agile planning process);
- Review of level of analysis required to underpin a policy change through section 32 reports;
- Simplification of way in which policies, methods and rules are written;
- Councils could exercise more discipline in ruling out submissions that are late or off-topic;
- Requiring evidence at the time of submissions could significantly reduce the time taken to complete the council hearing process. It would flush out the issues in a way that would enable council to better focus the hearing and its efforts to addressing the issues;
- The single initiative that could most significantly transform the timeliness of effective policy making would be to limit the role of the Environment Court.

. Removing recourse to the Environment Court on policy decisions and limiting appeals to matters of law would profoundly change the quality, timeliness and nature of resource management decision making. This would need to be supported by processes to make sure councils are well-informed and stakeholders have been engaged. These processes are outlined above. . This single change will remove the direct time associated with progressing appeals, mediation, preparing and presenting evidence and court decision making.

. Evidence from Canterbury shows that the removal of appeal rights to streamline plan making has resulted in significant behaviour changes. Parties now have a clear incentive to engage fully and early in the plan development process. Parties know that to be effective they need to influence the decision-makers (in this case the commissioners). That means they need to be able to put on the table as early as possible their concerns and their evidence. Parties are now incentivised to seek win-win outcomes and to work constructively with each other to get a result.

Courts are not established to mirror or represent the value judgements of people and communities. The role of the Environment Court in resource management policy and plan development is anomalous with respect to the broad range of other decisions made by local authorities. Decisions

to set rates, acquire property through compulsory purchase, spend significant public money or build new public infrastructure are all fundamental public policy decisions. There is no ability to challenge these decisions and take them to another jurisdiction. They cannot be appealed. The only avenues for the public to object are through judicial review of legality of the decision, or through the ballot box at the next election.

The proper role of the Environment Court is to adjudicate on points of law and on disputes arising from the interpretation and implementation of resource management policies.

Local regulation and Māori

The Commission has found that on the available evidence, the current system for involving Māori in resource consent decisions does not appear to be working well for anyone, due largely to the costs and timeframes involved. Hawke's Bay Regional Council agrees with this assessment, and considers that the longer this system, which relies on a reactionary process, is in place the greater the level of frustration likely to be experienced by all parties in the system.

Within the Hawke's Bay Region Council has established a joint Regional Planning Committee with the representatives of the mandated Treaty claimant groups with an interest in the region. The Committee is based on equal representation of councillor and iwi members. It has created a true partnership between regional iwi and council and given the iwi representatives a seat at the policy-making table. They have a say in the setting of overall policy/rules for all natural resources in the region. So instead of having to react to a proposal once it has been made by an applicant they are at the decision making table setting the policies and rules under which that application must be made.

By focussing the input of Māori into regulation at the development stage the hoped for outcomes include: less likelihood of the fragmentation of regulation (through possible river boards), a reduction in the costs of decision making, greater certainty for stakeholders and the wider community, and the potential for reduced conflict and entrenchment of positions over resource management issues.

5. The Hawke's Bay Regional Council thanks the Commission for the opportunity to make this submission.

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