

LOCAL GOVERNMENT FORUM

1. OVERVIEW

- 1.1. This submission is made by the Local Government Forum (the Forum). The Forum welcomes the inquiry into local government regulatory performance by the New Zealand Productivity Commission (the Commission). It is grateful for the opportunity to make a submission on the Commission's issues paper, *Local Government Regulatory Performance* (the Issues Paper).
- 1.2. The Forum comprises organisations that have a vital interest in the activities of local government. Its members include Business New Zealand, the Electricity Networks Association, Federated Farmers of New Zealand, New Zealand Chambers of Commerce, New Zealand Initiative, and the New Zealand Retailers' Association.
- 1.3. Members of the Forum are significant representatives of ratepayers in their own right. They also represent firms that are subject to considerable regulation administered by local government.
- 1.4. The Forum was established in 1994 to promote greater efficiency in local government and to contribute to debate on policy issues affecting it. The Forum's perspective is to advance community welfare through the advocacy of sound public policy. The Forum believes that local government can best serve the interests of the community and ratepayers by focusing on the funding and, where appropriate, the efficient provision of local public goods and the administration of welfare-enhancing regulations at the local level.
- 1.5. The regulatory activities of central and local government have expanded enormously since the Great Depression. Local government is now responsible for the administration of a vast array of regulation at regional and district levels (the local level). The efficacy of local government regulatory activities is vitally important to the

overall economic and social performance of local communities and the country as a whole.

- 1.6. The government's local government reform proposals, outlined in *Better Local Government*, included the Commission's inquiry into the regulatory performance of local government. Although such reviews should be undertaken regularly, they are rare. Moreover, consultations on council annual and long-term plans, which provide the main regular opportunity for interested parties to comment on council activities, tend to focus on spending programmes and the funding of local authorities rather than the regulatory functions that they perform.
- 1.7. The OECD's 2005 principles of good regulation provide a useful guide against which to judge the quality of regulation. According to the OECD's principles, good regulation should do the following:
 - serve clearly identified policy goals, and be effective in achieving those goals;
 - have a sound legal and empirical basis;
 - produce benefits that justify costs, considering the distribution of effects across society and taking economic, environmental and social effects into account;
 - minimise costs and market distortions;
 - promote innovation through market incentives and goal-based approaches;
 - be clear, simple, and practical for users;
 - be consistent with other regulations and policies; and
 - be compatible as far as possible with competition, trade and investment-facilitating principles at domestic and international levels.¹

¹ OECD (2005), *OECD Guiding Principles for Regulatory Quality and Performance*, retrieved 13 August 2012 from <http://www.oecd.org/gov/regulatorypolicy/recommendationsandguidelinesonregulatorypolicy.htm>. The most recent statement of the OECD on quality regulation, which is somewhat broader, is the OECD's *2012 Recommendation of the Council of the OECD on Regulatory Policy and Governance*, see <http://www.oecd.org/gov/regulatorypolicy/recommendationsandguidelinesonregulatorypolicy.htm>. The update does not diminish the relevance of the above principles for the purposes of this submission.

Although a review of local government regulation against all of the above principles may not fall within the terms of reference of the Commission's inquiry, some of those principles are relevant.

- 1.8. The Issues Paper states that the terms of reference for the inquiry can be synthesised into the following three questions:
 - How could the allocation of regulatory functions between central and local government be improved?
 - How can central and local government improve regulatory performance in the local government sector?
 - How can the regulatory performance of the local government sector be measured in a manner that leads to continuous improvement in the way it regulates?
- 1.9. The Forum submits that the allocation of regulatory functions between central and local government should be decided on a case-by-case basis following an analysis that takes account of the factors identified in the Issues Paper.
- 1.10. Fundamental concerns with current regulation, particularly major regimes such as the Resource Management Act 1991 (and related matters), need to be addressed if central and local government are to improve significantly the regulatory performance of local government. Two related concerns are listed below:
 - There is often inadequate recognition of private property rights including the provision of compensation for regulatory takings where appropriate.
 - Excessive discretion is often delegated to regulators. Instead, simple, non-discriminatory and transparent regulatory policies and rules with low costs of engagement and compliance are required. This is consistent with the OECD principles cited above.
- 1.11. The largest contribution to improved economic and social outcomes is likely to arise from a first principles review of the most important regulation administered, in whole or part, by local government. This does not imply that the current inquiry cannot lead to worthwhile improvements in the regulatory performance of local government but recognises that it is narrowly focused and that greater gains are potentially available from a broader review. The RMA and the Building Act 2004 are key candidates for

such a review.² Other regimes should be reviewed on a similar basis from time to time.

- 1.12. An important issue is to improve the quality of new regulation. One step would be to apply the principles of the Regulatory Standards Bill to local government regulation. The principles are set out in clause 7(1) of the Bill and are noted below:

The principles of responsible regulation are that, except as provided in subsection (2), legislation should—

Rule of law

- (a) be consistent with the following aspects of the rule of law:
 - (i) the law should be clear and accessible:
 - (ii) the law should not adversely affect rights and liberties, or impose obligations, retrospectively:
 - (iii) every person is equal before the law:
 - (iv) issues of legal right and liability should be resolved by the application of law, rather than the exercise of administrative discretion:

Liberties

- (b) not diminish a person's liberty, personal security, freedom of choice or action, or rights to own, use, and dispose of property, except as is necessary to provide for, or protect, any such liberty, freedom, or right of another person:

Taking of property

- (c) not take or impair, or authorise the taking or impairment of, property without the consent of the owner unless—
 - (i) the taking or impairment is necessary in the public interest; and
 - (ii) full compensation for the taking or impairment is provided to the owner; and
 - (iii) that compensation is provided, to the extent practicable, by or on behalf of the persons who obtain the benefit of the taking or impairment:

Taxes and charges

- (d) not impose, or authorise the imposition of, a tax except by or under an Act:
- (e) not impose, or authorise the imposition of, a charge for goods or services (including the exercise of a function or power) unless the amount of the charge is reasonable in relation to both—

² The recently proposed changes to the RMA are a step in the right direction but they do not address the fundamental problems with the RMA.

- (i) the benefits that payers are likely to obtain from the goods or services; and
- (ii) the costs of efficiently providing the goods or services:

Role of courts

- (f) preserve the courts' role of authoritatively determining the meaning of legislation:
- (g) if the legislation authorises a Minister, public entity, or public official to make decisions that may adversely affect any liberty, freedom, or right of a kind referred to in paragraph (b),—
 - (i) provide a right of appeal on the merits against those decisions to a court or other independent body; and
 - (ii) state appropriate criteria for making those decisions:

Good law-making

- (h) not be made unless, to the extent practicable, the persons likely to be affected by the legislation have been consulted:
- (i) not be made (or, in the case of an Act, not be introduced to the House of Representatives) unless there has been a careful evaluation of—
 - (i) the issue concerned; and
 - (ii) the effectiveness of any relevant existing legislation and common law; and
 - (iii) whether the public interest requires that the issue be addressed; and
 - (iv) any options (including non-legislative options) that are reasonably available for addressing the issue; and
 - (v) who is likely to benefit, and who is likely to suffer a detriment, from the legislation; and
 - (vi) all potential adverse consequences of the legislation (including any potential legal liability of the Crown or any other person) that are reasonably foreseeable:
- (j) produce benefits that outweigh the costs of the legislation to the public or persons:
- (k) be the most effective, efficient, and proportionate response to the issue concerned that is available.

Clause 7(2), referred to above as subsection 2, states:

Any incompatibility with the principles is justified to the extent that it is reasonable and can be demonstrably justified in a free and democratic society.

Clause 7(3) states:

Nothing in this section limits the New Zealand Bill of Rights Act 1990.

- 1.13. The Forum submits that external monitoring and comparison of the regulatory performance of local authorities in undertaking their main regulatory functions, together with periodic independent review of regulatory regimes on a first principles basis, are likely to generate the largest continuing net improvement in the regulatory performance of local government.
- 1.14. The balance of this submission is presented in three sections. The next section (section 2) presents general observations on local government regulation. The regulatory powers of local authorities are outlined and certain concerns of the Forum are noted. The questions raised in the Issues Paper are addressed in section 3. The Forum's conclusions are presented in section 4.
- 1.15. The Forum notes that its members may make separate submissions.

2. GENERAL OBSERVATIONS

Regulatory Powers of Local Government

- 2.1. Local authorities are empowered to undertake their most important regulatory functions by statutes, other than the Local Government Act 2002 (LGA). Where this is the case, central government is responsible for high-level issues that have the largest effect on the efficacy of regulation, such as whether the perceived problem is properly defined, whether government intervention is warranted and whether regulation is the best form of government action. Local government's role is often limited to the application of a specified statutory regime, or a limited aspect of it, at the local level. The RMA sets out an environmental protection regime which local government applies. Local government undertakes limited regulation under the Health Act 1956, for instance the registration of certain premises. Councils are sometimes authorised to deciding whether to apply a statutory regulatory regime or a part of a regime in their regions or districts. The discretionary power to make bylaws under the Prostitution Reform Act 2003 is an example.
- 2.2. The LGA confers on territorial local authorities a general power to make bylaws to do the following:
- to protect the public from nuisance;

- to protect, promote, and maintain public health and safety; and
- to minimise the potential for offensive behaviour in public places.

2.3. Territorial local authorities also have specific power to make bylaws to regulate one or more of the following:

- on-site wastewater disposal systems;
- waste management;
- trade wastes;
- solid wastes;
- the keeping of animals, bees, and poultry; and
- trading in public places.

2.4. They may also adopt bylaws for managing, regulating against or protecting from damage, misuse, or loss, or for preventing the use of, the land, structures, or infrastructure associated with one or more of the following:

- water races;
- water supply;
- wastewater, drainage, and sanitation;
- land drainage;
- cemeteries; and
- reserves, recreation grounds or other land under the control of the territorial authority.

Local authorities may also make certain bylaws for the prevention of the spread of fires and to control the consumption (including the prohibition) or possession of liquor in public places.

2.5. A regional council may make bylaws under the LGA in relation to the following:

- forests that it owns or controls;
- parks, reserves, recreation grounds or other land that the regional council owns or controls; and
- flood protection, flood control and water supply works undertaken by, or on behalf of, the regional council.

2.6. Certain features of the regulatory functions of local government are noted below:

- In respect of some regulation, for instance that related to the RMA and the Building Act 2004, local government's responsibilities are pervasive, affecting (directly or indirectly) all businesses and residents. In certain other areas (such as biosecurity, food hygiene and the sale of liquor) regulations administered by local government impact most directly on particular sectors or activities, or classes of consumers. Some regulation affects relatively few entities, for example, the registration of street vendors and operators of amusement devices, and hairdressers' premises.
- Considerable regulation administered by local authorities specifies the conditions under which local government provided infrastructure and other services may be used (for example, the regulation of transport, water supply, and stormwater and wastewater services). Comparable provisions might be reflected in voluntary supply agreements if the relevant services were provided under contract (with regulation limited to those matters such as externalities that could not be efficiently addressed via voluntary contracts and where regulation is warranted). Weight restrictions for heavy motor vehicles, for instance, could be a matter that road providers could reflect in their agreements with road users.
- Much regulation is primarily intended to promote the health and safety of the public such as that relating to buildings, food hygiene, infectious diseases, hazardous substances, harbours, fires, the fencing of swimming pools, dogs, funeral directors, hairdressers, mortuaries, bathhouses, beauty therapy clinics, health and fitness centres, skin piercing and tattooing studios. The role of local authorities in such areas is often limited to the licensing or registering of premises or providers, and related inspections.

- Some regulation is largely intended to maintain public order such that relate to the sale of liquor and noise control.

Some Broad Concerns

2.7. The speech from the throne in December 2011 stated that the "driving goal of my Government is to build a more competitive and internationally-focused economy with less debt, more jobs and higher incomes."³ An improvement in the quality of regulation and in the administration of regulation at central and local government levels should be an important element of the government's strategy to achieve its economic growth goal.

2.8. Bryce Wilkinson reported that there were widespread concerns among legal experts about the quality of regulation in New Zealand. He summarised them in the following terms:

Some concerns relate to deficient policy analysis – such as inadequate problem definition, failure to establish that legislation is needed and legislation that fails to give effect to the intended policy. Legislators sometimes appear to regulate in ignorance of the existence of the common law. It is asserted that they sometimes issue laws as symbolic public action, rather than as practical solutions to real problems. There are also concerns about inaccessibility and content. Legislation sometimes fails to comply with constitutional principles.⁴

While Wilkinson focused on central government many of his findings apply to the regulatory regimes that local government administer.

2.9. In the 2009 *Government Statement on Regulation*, the government committed to introduce new regulation only when it is satisfied that it is required, reasonable and robust, and to review existing regulation to identify and remove requirements that are unnecessary, ineffective and excessively costly.⁵ The Regulatory Standards Bill,

³ Key, John (2011), "Speech from the Throne", retrieved 13 August 2012 from <http://beehive.govt.nz/speech/speech-throne-1/>.

⁴ Wilkinson, Bryce (2001), *Constraining Government Regulation: A Discussion Paper Prepared For the New Zealand Business Roundtable, Federated Farmers of New Zealand (Inc), Auckland Regional Chamber of Commerce and Industry and the Wellington Regional Chamber of Commerce*, p vii, retrieved 13 August 2012 from <http://www.nzbr.org.nz/>.

⁵ English, Bill and Hide, Rodney (2009), "Government Statement on Regulation: Better Regulation, Less Regulation", retrieved 13 August 2012 from <http://www.treasury.govt.nz/economy/regulation/statement/>.

which can be traced to Wilkinson's study, would give legislative effect to the *Statement*. The Bill is currently before Parliament.

2.10. The Forum notes the following main concerns relating to the regulatory regimes that local government administers:

- Inadequate recognition of private property rights. Private property rights should be upheld to maintain the autonomy of the individual and to encourage firms and individuals to use resources productively. The general presumption in favour of liberty in the *Legislation Advisory Committee Guidelines* should apply.⁶ Governments should not interfere in private property rights without good reason and when they do so the issue of compensation needs to be addressed. These principles are too often ignored in the regulatory regimes that local government administers. The RMA is a prime example. Private property rights are extinguished or eroded by the RMA. The 2025 Taskforce reported that the fundamental problem with the RMA was that "it encourages local government to see the changed use of private land as a privilege that they bestow, rather than a right that might be modified only in narrow and well-specified predictable ways."⁷
- Delegation of excessive discretion to regulators. The RMA is the prime concern. In *Environmentalism versus Constitutionalism: A Contest Without Winners*, Suri Ratnapala concluded that the RMA is a threat to liberty and the environment:

The RMA's grant of virtually unconstrained discretionary power to the executive represents a calculated departure from the rule of law standard and the principle of parliamentary democracy in favour of command and control ... The challenge of identifying and responding to environmental problems requires much more knowledge than is available to a ministerial commander in chief, even one aided by committees and local councils. In general, the requisite knowledge is harnessed more effectively by allowing individuals to go about their lives within a framework of clear and fair rules

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Liberal democratic societies entrust the assessment of harm and risk to democratic legislatures and independent courts guided by objective standards. The RMA fails the people of New Zealand by replacing this

⁶ Legislative Advisory Committee, *Guidelines on Process & Content of Legislation*, 2001 edition and amendments, see <http://www2.justice.govt.nz/lac/index.html/>.

⁷ Brash, Donald T, Caygill, David, Sloan, Judith and Wilkinson, Bryce (2010), *Focusing on Growth: The Second Report of the 2025 Taskforce*, p 112, retrieved 2 December 2010 from <http://www.2025taskforce.govt.nz/>.

cardinal function with an inherently arbitrary system of environmental management.⁸

- The absence of simple non-discriminatory and transparent policies and rules with low costs of engagement and compliance. This concern is related to the constitutional point noted above. The RMA again illustrates the problem. Small businesses and households do not generally have the expertise and time to engage actively in highly discretionary regulatory processes. High costs are incurred if they hire experts to assist. As a consequence, such processes become the domain of a small group of insiders with other groups largely disenfranchised. Simple, clear, non-discriminatory rules that are known in advance are therefore required to lower compliance costs, provide greater certainty for affected parties and encourage firms to undertake productive activities rather than engage in rent seeking and other wasteful activities.

Improving Regulatory Performance

- 2.11. The largest contribution to better economic and social outcomes is likely to arise from a first principles review of the most important regulation administered, in whole or part, by local government. This does not imply that the current inquiry cannot lead to worthwhile improvements in the regulatory performance of local government but recognises that it is narrowly focused and that greater gains are potentially available from a broader review. The RMA and Building Act 2004 are key candidates for such a review. Other regimes should also be reviewed over time.
- 2.12. A key issue is to improve the quality of new regulation. While the circumstances that gave rise to the Canterbury Earthquake Recovery Act 2011 were unusual, the act is breathtaking in its disregard for private property rights. It highlights the need to take steps to ensure that new regulation is of a high quality.
- 2.13. A helpful step would be to apply the principles of the Regulatory Standards Bill to local government regulation. As the Regulatory Responsibility Taskforce noted, the principles now reflected in the Regulatory Standards Bill (formerly the Regulatory Responsibility Bill) are equally applicable to local government.⁹ However, the

⁸ Ratnapala, Suri (2006), *Environmentalism versus Constitutionalism: A Contest Without Winners*, p 33, retrieved 9 December 2010 from <http://www.nzbr.org.nz/>.

⁹ Scott, Graham *et al.* (2009), *Report of the Regulatory Responsibility Taskforce*, p 13, retrieved 13 August from <http://www.treasury.govt.nz/economy/regulation/rrb/taskforcereport/>.

Taskforce decided that local government should not be made subject to the Bill, at the time of its report, because the Taskforce had not specifically considered whether the mechanisms proposed in the Bill should be applied to local government. The Commission should recommend that the application of the principles of the Regulatory Standards Bill be applied to local government.

- 2.14. The Forum also encourages the Commission to explore the possibility of mutual recognition of regulatory approvals by local authorities, where appropriate.
- 2.15. Outdated regulation should be reviewed. The Forum understands that some regulatory regimes have not been reviewed in the recent past. In addition, certain provisions of the Local Government Act 1974, for example those relating to roads and drainage, still apply. Similarly, certain provisions of the Auckland Metropolitan Drainage Act 1960 relating to trade wastes could apply until 2015 despite the act's repeal by the Local Government (Auckland Transitional Provisions) Act 2010. While the former act will soon cease to have any effect, its survival to the present points to the possibility that similar archaic and obscure regulation may exist. The retention of some provisions in acts that have been largely repealed (other than on a transitional basis) makes the law relatively inaccessible and discourages voluntary compliance.
- 2.16. There is a tendency in New Zealand to commit promptly to legislate or introduce regulations in response to public pressure that central or local government should 'do something' about perceived problems. The proposed response may be doubtful from a public policy perspective. In contrast, relatively little attention is devoted to the appropriate enforcement of existing legislation and regulations. There is very little information readily available on the enforcement activities of local authorities. The Commission can assist by examining the efficiency with which local government enforces the regulation that it administers.

3. RESPONSE TO QUESTIONS

- 3.1. The Forum's response to the questions posed by the Commission is set out in the table below.

Response to Questions Posed by the Commission

| Questions | | Forum Comment |
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| Q1 | <p>What is the relative importance of the range of the regulatory activities local government undertakes?</p> <p>Where should the Commission's focus be?</p> | <p>Regulation relating to the RMA and the Building Act 2004 is the most important. Such regulation has a large pervasive impact on businesses and residents.</p> <p>The Forum has major concerns about the efficacy of the RMA and the Building Act 2004.</p> <p>Much other regulation has a large impact on particular activities, industries or communities.</p> <p>The Commission should generally focus on those areas where the largest improvement in the overall welfare of the community is likely to be realised.</p> |
| Q2 | <p>What are the main economic, social, demographic, technological and environmental trends that are likely to affect local government regulatory functions in the future?</p> | <p>The government has stated that lifting the rate of economic growth is its highest priority. Fostering growth is also likely to be a key priority for future governments. Regulation should generally be consistent with the achievement of that goal.</p> <p>There has been a vast growth in the regulatory activities of government over recent decades. It is unlikely that all such regulation could be shown to enhance overall welfare. The pressure to expand regulation is unlikely to ease.</p> <p>Excessive regulatory burdens are imposed on firms and citizens. This erodes respect for the law and leads to excessive administration and compliance costs.</p> <p>Technological advances are increasing competition and changing the ways of doing business. Regulation needs to be supportive rather than an obstacle to such advances.</p> <p>The resources available to central and local government to undertake regulatory activities are limited. They need to be used wisely.</p> |

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| Q3 | Has the Commission accurately captured the roles and responsibilities of local government under the statutes in Table 2? | Yes. |
| Q4 | <p>Are there other statutes that confer significant regulatory responsibilities on local government?</p> <p>What, if any, regulatory roles of local government are missing from Table 2?</p> | <p>The Civil Defence Emergency Management Act 2002 should perhaps be added. Local authorities have certain responsibilities under the act and regulations made under the act could, in the event of a state of emergency, have a large impact on businesses and households.</p> |
| Q5 | <p>Are there any other local organisations with regulatory responsibilities that the Commission should consider?</p> | <p>A distinction should be made between those entities that have power to regulate and those that implement or administer regulation only.</p> <p>The delegation of the power to regulate raises different issues from those that arise in contracting out the administration of regulation. For constitutional reasons the power to regulate should generally rest with elected representatives and should not be delegated to other entities, although such entities could recommend regulation. The administration of regulation can be delegated.</p> <p>The table seems to include both groups without distinction.</p> <p>There may be other entities that administer regulation for councils.</p> |
| Q6 | <p>Do the different characteristics and priorities of local authorities explain most of the difference in regulatory practice across local government?</p> | <p>The Forum agrees with the thrust of the discussion in the Issues Paper. The level of resources available to local authorities is likely to be an additional factor.</p> |
| Q7 | <p>Are community expectations to 'do more' about social issues leading to different approaches to regulation between local authorities?</p> | <p>Yes. The expectations referred to are generally not significant outside of the main urban and resort areas.</p> <p>Public choice arguments suggest caution in examining whether such community pressures necessarily warrant additional regulation.</p> |

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| Q8 | <p>To what extent are local preferences a source of regulatory variation in New Zealand? How far should councils, when implementing a national standard, have discretion to reflect local preferences in their bylaws?</p> | <p>Local preferences are a significant source of variation but other factors are also important.</p> <p>The prior question is why have a national standard? Such a standard may be appropriate in some circumstances but not in others, for example where local conditions differ.</p> <p>Where local preferences, factors and information are important a national standard may be inappropriate.</p> |
| Q9 | <p>Are there areas of regulation where local and central government regulation appear to be in conflict? If so, how far should such conflicts be accepted as a consequence of the diversity of preferences?</p> | <p>Rules are required to establish which set of regulation has priority if there is a conflict.</p> <p>The Forum understands that statutes generally contain such rules if a conflict is possible, see for example section 144 of the LGA which states that the Bylaws Act 1910 prevails over the bylaw provisions in Parts 8 and 9 of the LGA.</p> <p>The problem may be more common in relation to detailed rules (tertiary legislation) where there is duplication of rules in some areas and hence scope for conflicts. One area relates to indigenous vegetation where the Ministry for Primary Industries (MPI), regional councils and district councils are involved. This is especially a problem where a regional council has assumed regulatory responsibility for indigenous vegetation.</p> <p>An example concerns the Stratford District Council. A district plan change seeks to require landowners to obtain a resource consent to selectively log indigenous vegetation even when the landowner has a selective logging permit or plan approved by MPI. Landowners are also required to get a resource consent from Horizons Regional Council if their land is in its region (as part of the Stratford district is).</p> <p>Waipa District Council had a rule that made goat or deer farming closer than 1km to a "significant natural area" a non-complying activity that required a resource consent. There is legislation affecting goat/deer farming, particularly the Fencing Act 1978, and a Department of Conservation Deer</p> |

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| | <p>Farming Notice No 5 in 2008. The Notice sets out where deer farming is allowed and regulates deer farms and safari parks. The Notice limits deer farms around certain forests or areas (like the Coromandel Peninsula). It is made under the Wild Animal Control Act 1977.</p> <p>In November 2011, the Western Bay of Plenty District Council proposed the introduction of an electricity transmission corridor or buffer zone in its district plan, which would restrict building, earthworks and subdivision within the affected corridor. These activities are already addressed through other arrangements such as easement agreements, electrical codes of practice and the Electricity Act 1993. An independent hearing commissioner largely declined the proposed plan change 5 in August 2012. According to the decision, the Council did not have authority under the relevant national code (NZECP 34:2001) and therefore unnecessary duplication would be entailed if consents were required for purposes that effectively go no further than requiring compliance with that code. Nonetheless, affected parties incurred significant costs in responding to the proposed plan change.</p> <p>There is duplication affected hazardous substances with hazardous substances and new organisms regulations, standards, group standards, approved handlers, Ministry for the Environment, regional and district Councils all involved. This is an issue with the Ruapehu District Council at present.</p> <p>There can also be duplication between regional and district councils related to earthworks, especially around water and outstanding natural features and landscapes.</p> |
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| Q10 | Does the way in which a local authority chooses to exercise its regulatory powers – through bylaws or through its District Plan – lead to differences in effectiveness and outcomes for communities? | <p>They may do so.</p> <p>A council's ability to regulate is limited by the purpose of the relevant statute and the particular powers that it grants. A district plan is required under the RMA. Bylaws for particular purposes may be made under the LGA and some other statutes.</p> |
| Q11 | In what ways has the Treaty of Waitangi influenced how local authorities have undertaken regulatory functions delegated to them by the Crown? | <p>Treaty obligations rest with the Crown as the Issues Paper notes.</p> <p>Parliament may direct local authorities to make provision for Treaty arrangements through statutes.</p> <p>Local authorities may be required to consult with Maori. Additional rights may be conferred on Maori, such as those relating to the co-management of some rivers and lakes, which potentially impact on related regulation.</p> |
| Q12 | What does this variation mean in practice – for Maori, the local authority and for the regulation of the resource? | Consultative requirements and costs incurred by firms that require consents may be higher than otherwise. Approvals may be delayed. Some proposals may not materialise. |
| Q13 | Are there other significant sources of variation in local authority regulatory practice than those described in this chapter? | Even if the rules are similar judgments about how they should be applied in particular circumstances or in particular jurisdictions may differ significantly. |
| Q14 | Can you provide examples of inconsistencies in the administration and enforcement of regulations between local authorities? | The district plans of comparable councils differ considerably and the their enforcement can also differ materially. |

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| Q15 | Do these inconsistencies impose extra costs on businesses? If so, are these extra costs significant? | <p>Because of the predominance of small businesses, most firms are subject to the jurisdiction of a single regional and territorial council (or a unitary council).</p> <p>Large businesses, though smaller in number, account for a disproportionately large level of business activity and employment. These businesses incur costs in complying with the particular requirements of different jurisdictions. These costs could be significant, particularly in relation to the RMA where wide discretion is exercised by consent authorities.</p> |
| Q16 | To what extent does variation in regulatory practice matter? | <p>A single set of simple, transparent and non-discriminatory rules provide obvious savings in compliance costs for those firms that operate in more than one jurisdiction.</p> <p>Savings are also possible where rules differ among jurisdictions but where they are simple, clear and non-discriminatory. Such rules assist small and new firms relative to large established firms that have the resources to employ or engage people who know how the system really works. For larger firms they increase costs.</p> <p>Standardisation of rules among jurisdictions would, however, impose other costs. Preferences may differ. Different circumstances would not be taken into account. Competition among jurisdictions and innovation may be stifled.</p> <p>The largest costs are likely to be invisible. They comprise the costs of worthwhile projects from society's perspective that are discouraged by regulation.</p> <p>The aim should be to maximise the overall welfare of society. Undue attention to eliminating variations in regulation or lowering compliance costs may be inconsistent the maximisation of overall welfare.</p> |

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| Q17 | Can you provide examples of regulatory innovation by local government? | The Hastings District Council has exempted the construction of certain farm buildings from the requirement to obtain a building consent. The owner must apply to be eligible for the exemption and certain criteria must be satisfied. This example indicates that consents are not necessary for all farm buildings. Less onerous regulation appears to be adequate from a public safety perspective. |
| Q18 | Is the innovation specific to a particular local authority and its unique circumstances, or could it be adopted more widely? | The Forum understands that the example supplied in response to Q17 applies to the Hastings District Council alone. It could be adopted by other councils and applied to buildings other than farm buildings. |
| Q19 | What mechanisms or incentives are there for local authorities to share innovations (or experiences with 'failed' innovations) with others? | Local authorities are motivated to do their job well. This will encourage them to share experiences, although information about failures is more likely to be suppressed than that relating to successes. |
| Q20 | What factors encourage (or deter) local authority innovation (eg, the (in)ability to capture the cost savings from innovation)? | Incentives to innovate are relatively weak because many of the rules are made by central government, regulation is mandatory, the cost to firms and households of moving to another jurisdictions is often high, and accountability of local authorities for regulatory performance is limited. Moreover, the incentives facing elected representatives and regulators are unlikely to emphasise innovation. |
| Q21 | Has the Commission captured the advantages and disadvantages of centralisation and decentralisation for each of the factors? | Yes. |
| Q22 | Which of the factors discussed in this chapter are the most important for allocating regulatory functions locally or centrally? | It is not possible to say which factors are the most important. The particular circumstances that apply to the perceived public policy problem need to be examined on a case-by-case basis and the relevant considerations weighed up. Generalisation is difficult, if not, impossible. |

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| Q23 | Which other factors might be important for considering whether a regulatory function should be undertaken locally or centrally? | <p>See the answer to Q22.</p> <p>If territorial local authorities are significant providers of the regulated product or service, either regional councils or central government may need to undertake the related regulatory activities to maintain independence.</p> <p>The setting of drinking water standards by central government and the responsibility of regional councils for the regulation of aspects of solid waste disposal are examples. The latter, which arose from the introduction of the RMA, led to a significant improvement in environmental practices at council waste disposal facilities.</p> |
| Q24 | Are the factors discussed above helpful in thinking about whether a regulatory function should be relocated? | Yes. |
| Q25 | In the New Zealand context, are there regulatory functions that need reconsideration of who (central, local, community) carries them out? | See the answer to Q22. |
| Q26 | Do local authority significance policies allow for adequate consideration of the present and future costs and benefits of local government regulation-making? | The exacting requirements of section 77 of the LGA are commonly diminished (if not undermined entirely) because section 79 provides councils with wide discretion as to how the requirements of section 77 are to be assessed. Careful assessment of whether regulation is necessary is rare. Government failure, for example, is usually ignored. |
| Q27 | Does the local government regulation-making process lead to good regulation? If there is evidence to show that it does not, how could the process be improved? | <p>The picture is mixed. Some problems rest with the regulatory regimes that local authorities are required to administer. The RMA is an example.</p> <p>There is inadequate focus on the overall costs and benefits of government action.</p> <p>There is insufficient recognition of private property rights. The Canterbury Earthquake Recovery Act 2011 is a recent and particularly egregious example.</p> <p>Regulations are often too vague and they delegate too much discretion to regulators</p> |

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| | | <p>rather than establishing unambiguous, transparent, non-discriminatory rules that, consistent with the rule of law, are known in advance.</p> <p>Independent reviews of regulation should be undertaken from time to time.</p> <p>The principles of the Regulatory Standards Bill should be applied to local government.</p> <p>External monitoring of the regulatory performance of local authorities would help.</p> |
| Q28 | Do you have examples of regulatory responsibilities being conferred on local authorities with significant funding implications? | <p>Every activity undertaken by local authorities is authorised by statute. Few activities are funded by central government. (Transport activities, which are generally part-funded by central government, are the main exception.) In that sense virtually all local government activities constitute an unfunded mandate.</p> <p>Local government has been granted power to impose rates, charges and fines to fund its activities, including regulatory activities.</p> <p>The independence of local government depends on its freedom to operate within its statutory mandates and to raise its own funds.</p> <p>The issue of ‘unfunded mandates’ has been exploited by some in the local government sector to deflect criticism of the high rates of growth in council spending. The Forum’s scepticism is not helped by the local government sector failing to provide sufficient hard evidence of the cost of its ‘unfunded mandate’.</p> <p>The Forum hopes that the Commission’s inquiry will help cast some light on whether there is in fact a significant problem; and, if so, the size of the problem; and what (if anything) should be done about it.</p> |

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| Q29 | How might central government regulation-making better take account of the costs and impact on local authorities from the delegation of regulatory functions? | The key step is to ensure that any new regulation is warranted on the basis of a rigorous assessment of its costs and benefits from a community-wide perspective. |
| Q30 | How might central government better work with local authorities on the design, implementation and funding of delegated regulatory functions? | <p>The principles of the Regulatory Standards Bill should apply to local government.</p> <p>The principles to be applied in funding regulatory activities could usefully be published in a guide.</p> |
| Q31 | How could the RIA framework be improved to promote a fuller understanding of the impact of devolving new regulatory functions to local authorities? | <p>The standard of RIAs is mixed. The first priority is to improve their quality generally.</p> <p>While it might be reasonable to assess the impact on local authorities of any proposed regulatory function, the focus on the overall merits of proposals from society's perspective should be retained.</p> |
| Q32 | How successful has the guidance document <i>Policy development guidelines for regulatory functions involving local government</i> been in improving the consistency and coherence of central government policies that involve local government? | No comment. |
| Q33 | To what extent is the effective implementation of regulations delegated to local government hampered by capability issues in local authorities? Do capability issues vary between areas of regulation? | <p>Investigations into leaky buildings and the Christchurch earthquake suggest that inadequate technical expertise employed in implementing regulation can be a problem, even for large councils.</p> <p>Capability is likely to be a particular problem for small councils that have difficulty in recruiting and retaining qualified staff where high-level technical assessments are required. (A solution is to contract out the administration of regulation to other councils or private firms.)</p> <p>The level of expertise differs. The skills required to register premises under the Health (Registration of Premises) Regulations 1966 are not as demanding as those required to consent a high-rise building.</p> |

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| Q34 | Can you provide examples of regulatory cooperation and coordination between local authorities or between central and local government, and describe successes and failures? | <p>Call-in provisions in the RMA allow for the EPA to assume responsibilities for certain proposals of national importance. (The problem of undue delays should, however, be addressed in respect of all consents.)</p> <p>The Waikato Regional Council processes consent applications for large-scale dams on behalf of all regional councils in the North Island. This is a good example of councils co-operating and economising of specialist expertise.</p> <p>Local Government New Zealand's 2011 report on shared services is also relevant to this question.</p> |
| Q35 | What types of regulatory functions more readily lend themselves to coordination to improve regulatory performance? | <p>Where high levels of technical expertise are required.</p> <p>Where more than one district or region is involved.</p> <p>Where local authorities are small and do not require their own expertise.</p> |
| Q36 | What are the most important factors for successful regulatory coordination? | Agreement among councils or between councils and central government to co-operate, and effective decision-making processes. |
| Q37 | Are opportunities for regulatory coordination being missed? | Yes. Compare with the US where local government in one jurisdiction commonly provides services for neighbouring jurisdictions. |
| Q38 | What are the main barriers to regulatory coordination? | Reluctance at the political and administrative levels to co-operate voluntarily. |
| Q39 | Are there examples in New Zealand where local authorities mutually recognise each other's regulations? | The Forum is not aware of any examples. |

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| Q40 | Which local government regulatory areas (eg, planning and land use, building and construction, environmental regulation, public safety and food safety) impose the greatest unnecessary regulatory burden on individuals and businesses? | The RMA by far imposes unnecessary compliance and other costs not just on businesses but also on the community as a whole. Building and construction is also very important. |
| Q41 | In what ways are these regulatory areas unnecessarily costly (eg, are they too complex, prescriptive or unclear)? | <p>The RMA confers excessive discretion on consent authorities.</p> <p>Property rights are overridden other than on valid grounds. Compensation is not provided for regulatory takings when it should be.</p> <p>The whole process is too complicated and is inaccessible except to insiders or those who can afford to hire experts.</p> <p>Delays and other problems are common.</p> <p>The proposed RMA reforms are a step in the right direction but fall well short of what is necessary.</p> |
| Q42 | Are there particular examples where local government approaches to regulatory responsibilities are especially effective at minimising unnecessary compliance costs for individuals and businesses? | Some straightforward regulatory approvals may be obtained at a modest cost, for example, the registration of certain types of premises. |
| Q43 | For which aspects of the regulatory process (eg, approval, monitoring, enforcement and appeals) could compliance costs to business be reduced without compromising the intent of the regulation? How could this be done? | <p>The RMA needs to be reviewed on a first principles basis.</p> <p>Consistent with the rule of law, simple transparent rules known in advance should replace the excessive discretion that currently applies.</p> <p>Private property rights should be upheld except where there is a principled reason not to do so (e.g. to address genuine hold out problems).</p> <p>Compensation for takings should be required to discourage councils from taking private property rights where it is not in society's overall interests.</p> |
| Q44 | How well are the principles on which | The economic principles that should apply to |

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| | local authorities are required to base the funding of regulatory activities applied? | <p>the funding of regulatory activities are poorly understood and are rarely applied appropriately.</p> <p>Excessive weight is given to the benefit principle, which is an equity principle, when the entity or person that ultimately benefits is unknown.</p> <p>The split between private and public benefit is often arbitrary.</p> |
| Q45 | Are there examples of where cost recovery is reducing compliance with regulations and reducing their effectiveness? | Firms and individuals can be expected to respond to the incentives that they face, including fees charged. |
| Q46 | To what extent are councillors involved in the administration and enforcement of regulation? Has this raised issues in regard to the quality of regulatory decision-making and outcomes? | <p>Councillors commonly make decisions on regulatory applications, for instance resource consents.</p> <p>Their involvement is not necessarily negative as implied in the question.</p> <p>They may have a better appreciation of local conditions and community preferences than their officers.</p> |
| Q47 | Are there any other governance issues which impede the efficiency of local government regulation? | A critical issue is the quality of the regulatory regimes that local authorities are required to apply. Governance at central government level is of vital importance in this regard. |
| Q48 | Are the current processes for reviewing existing regulation adequate? Could they be improved? | <p>No. Regulation can stay on the books without any serious questioning of whether it is necessary or effective.</p> <p>Review processes can be improved by making them more systematic.</p> |
| Q49 | In which regulatory areas are there good regulatory review mechanisms? In which regulatory areas are there poor or insufficient regulatory mechanisms? | <p>As a general rule regulations are not subject to regular review. Provisions relating to the review of district plans are particularly poor.</p> <p>Proposals for the reform of the RMA may help (for instance, addressing the problem of weight being given to proposed plan changes) but the Forum does not think they go far enough.</p> |
| Q50 | Who should undertake regulatory review – the responsible agency or | An independent body should undertake |

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| | an independent body? | <p>reviews of major regulation.</p> <p>Local government has shown a reluctance to change policies significantly.</p> <p>All major reforms within the sector over the last 25 years have been externally driven.</p> |
| Q51 | Is there a sufficient range of mechanisms for resolving disputes and reviewing regulatory decisions of local authorities? | Generally, yes. |
| Q52 | Are some appeal mechanisms used excessively, frivolously or for anti-competitive reasons? | <p>As noted in the Issue Paper this is a problem in respect of the RMA.</p> <p>Part of the problem is the undue disregard for private property rights, including limits on compensation, and the discretionary nature of the regime that applies.</p> |
| Q53 | In what areas of local government regulation is performance being monitored effectively? | Drinking water standards and selected aspects of resource consents. External monitoring applies in both cases. |
| Q54 | Are there areas of local government regulation where performance is not being monitored and assessed? | The really important aspects of regulation, which are difficult to evaluate, are only assessed occasionally. |
| Q55 | Is the current monitoring system effective in providing a feedback loop through which improvements in the regulatory regime can be identified and rectified? What examples are there of successful improvements to a regulatory regime? | The Forum is not aware of substantial improvements arising in this way. |
| Q56 | What challenges or constraints do local authorities face in developing and sourcing data for better practice regulatory performance measures? | <p>Obtaining the information required is costly.</p> <p>Regulatory regimes need to be examined on a case-by-case basis.</p> |
| Q57 | Are there examples where local authorities are using better practice performance measures? What, if any, obstacles exist for wider adoption of these measures? | No comment. |
| Q58 | What kind of regulatory performance measurement would add maximum value to local authorities, their | External review of major regulatory regimes and comparisons of the practices among local authorities, including surveys of firms |

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| | communities and New Zealand? | and households that are directly affected. |
| Q59 | What regulatory performance indicators are most commonly used by local authorities? Can you provide examples of good input, output and outcome measures for regulations you have experience with? What makes them good indicators? | Easy to measure indicators that are relatively unimportant in evaluating the overall regulatory performance of local authorities. |
| Q60 | What kind of centrally provided data would enhance the local government regulatory monitoring regimes? | <p>The focus should be on the efficacy of important regulatory regimes and on output information and comparisons among local authorities.</p> <p>General statistical information, such as crime statistics, is currently available but does not relate to the main regulatory functions of local authorities.</p> <p>Councils often produce social indicators but these do not help much in assessing what local authorities can do to address problems and assess the effectiveness of their regulatory (and spending) activities.</p> |
| Q61 | Are there quality issues in existing nationally available data sets that would need to be resolved before developing national performance measurement regimes? | No comment |
| Q62 | What are the specific characteristics of individual local authorities that make local authorities comparable with regard to their regulatory performance? | Different classes of local authorities are comparable e.g. territorial authorities in the major urban areas, in provincial cities and rural areas. The functions that they perform are often similar e.g. applications for resource consents and buildings. |
| Q63 | Of the performance indicators commonly collected by local authorities, do any naturally lend themselves to systematic benchmarking of regulatory performance? | Some of the easy to measure performance indicators could be collated and compared. |
| Q64 | What new performance indicators could meaningfully measure the regulatory performance of local government? | The focus should be on the efficacy of important regulatory regimes, output information and comparisons among local authorities. |

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| Q65 | Is there a role for a third party evaluator to measure customer service standards in local authority regulatory functions? | Yes. Comparisons among councils could be useful but regard needs to be had to the cost involved. |
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4. CONCLUSIONS

4.1. The Forum's conclusions are listed below:

- The allocation of regulatory functions between central and local government should be decided on a case-by-case basis following an analysis that takes account of the factors identified in the Issues Paper.
- Fundamental concerns with current regulation, particularly major regimes such as the Resource Management Act (and related matters), need to be addressed if central and local government are to improve significantly the regulatory performance of local government.
- An important issue is to improve the quality of new regulation. One step would be to apply the principles of the Regulatory Standards Bill to local government regulation.
- External monitoring and comparison of the regulatory performance of local authorities in undertaking their main regulatory functions, together with periodic independent reviews of regulatory regimes on a first principles basis, are likely to generate the largest net improvement in the regulatory performance of local government.
- The Issues Paper and this submission have been prepared at the initial stage of the Commission's inquiry. The Forum looks forward to contributing constructively at later stages of the inquiry.