

Submission by



to the

**Productivity Commission**

on the

**Local Government Funding and Financing Draft Report**

August 2019

## **SUBMISSION BY BUSINESSNZ<sup>1</sup> ON THE PRODUCTIVITY COMMISSION'S LOCAL GOVERNMENT FUNDING AND FINANCING DRAFT REPORT**

### **1.0 INTRODUCTION**

- 1.1 BusinessNZ welcomes the opportunity to comment on the "*Local Government Funding and Financing Draft Report*" (the "*Draft Report*")
- 1.2 BusinessNZ would like to congratulate the Productivity Commission on the quality of the Draft Report and the clarity with which it deals with the many funding and financing issues facing local government. The quality of the Commission's work on a range of matters sets a benchmark to which other central and local government agencies should aspire.
- 1.3 The Draft Report covers several issues with which BusinessNZ is fundamentally in agreement, as its commentary on the Draft Report indicates. And as BusinessNZ made a comprehensive submission on the earlier Issues Paper, this submission does not address them again.
- 1.4 Key aspects of the Draft Report, strongly endorsed by BusinessNZ, include its emphasis on the benefit principle, that is, allocating rates primarily according to who benefits from council services and the proposal to get rid of business rating differentials. These, together with proposed additional funding and financing tools, are all matters which BusinessNZ has actively promoted over many years.
- 1.5 It is, however, disappointing that the Productivity Commission's Terms of Reference excluded the ability to consider current rating exemptions for Crown Land, or to make recommendations about the structure of local government. As well, not being able to consider 'substantial privatisation' essentially represents a lost opportunity given the possibility of asset recycling.
- 1.6 BusinessNZ is a member of the Local Government Business Forum (LGBF) which covers the above concerns in more detail in its submission. This includes questioning the Draft Report's conclusion that the 'four well beings' have not affected council activities and spending and will not do so in the future. BusinessNZ fully supports the LGBF submission.
- 1.7 As BusinessNZ's previous submission covered issues relating to Local Government funding and financing, this submission principally homes in on the Draft Report's specific questions but notes the Draft Report also includes several findings and recommendations (summarised on pages 254 - 271).

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<sup>1</sup> Background information on BusinessNZ is included as Appendix 1.

- 1.8 Given this organisation's broad membership, members of the wider BusinessNZ family may have a range of views on the Draft Report's questions, findings and recommendations, and/or there may be specific points which interest them. Many will provide separate submissions on matters of concern, some focusing on areas where they have their own expertise.
- 1.9 BusinessNZ would be happy to meet again with the review team to discuss our submission and/or to provide feedback as funding and financing policy options are developed in more detail.

## **2.0 FINDINGS AND RECOMMENDATIONS**

- 2.1 As stated earlier, BusinessNZ notes the report includes a substantial number of findings (67) and recommendations (30), which BusinessNZ generally endorses, in some cases very strongly, for example:

### **2.2 Recommendation 6.3 (p.264)**

***"In choosing among funding tools, rating bases and whether to charge rates as a percentage of property values or as uniform charges or some other targeted feature, councils should emphasise the benefit principle and efficiency in the first instance. They should also balance greater economic efficiency against low compliance and administration costs.***

***Councils should factor in any significant concerns about ability to pay at a second stage in their decision making"***

### **2.3 Recommendation 7.1: (p.266)**

***"The Local Government (Rating) Act 2002 should be amended to remove rates differentials and uniform annual general charges. Councils should have five years to implement their removal"***

### **2.4 Recommendation 7.4: (p.267)**

***"The Local Government (Rating) Act 2002 should be amended to remove the statutory cap on uniform charges".***

- 2.5 The rationale for these recommendations is well laid out both in the Draft Report and in BusinessNZ's submission on the previous Issues Paper so is not repeated here.

### **3.0 QUESTIONS AND BUSINESSNZ RESPONSES**

- 3.1 BusinessNZ is not responding to all the submission's questions but comments on the specific questions discussed on the pages referred to below (or notes it has 'no specific comment' to make). Some questions will be best answered by councils themselves and/or by businesses (and other) groupings in specific communities.

#### **Chapter 3 – Trends in local government revenue, expenditure, prices and debt**

##### **3.2 Question Q3.1 (page 49):**

**Is the current methodology for preparing the Local Government Cost Index sufficient for forecasting the prices that local authorities are likely to face? If not, should the methodology be improved, such as by one or more of:**

- **Carrying out more frequent reweighting;**
- **Including output indices, and**
- **Disaggregating by council type?**

##### **BusinessNZ Response:**

- 3.3 No specific comment.

#### **Chapter 4 – Pressures on funding and financing**

##### **3.4 Question 4.1 (page 72):**

**To what extent are the Treaty-related costs associated with fulfilling the obligations and requirements under local government statutes "business as usual" for councils? And to what extent should they be considered costs incurred to fulfil obligations on behalf of the Crown under the Treaty of Waitangi?**

##### **BusinessNZ Response:**

- 3.5 BusinessNZ has little to add to our response to a question on co-governance etc., posed by the Productivity Commission in the earlier draft report. Given that the Land and Water Forum (LWF) generally agreed that issues of iwi rights and interests in water were to be determined by the Treaty Partners

(the Crown and Iwi), there is a degree of logic in leaving the costs of co-governance and the like to lie with the Crown via general taxation, rather than being foisted on to local ratepayers.

- 3.6 There is a strong case for central government assisting local government with any explicit costs associated with Councils having to meet the Crown's obligations under the Treaty of Waitangi. Having said that, BusinessNZ is of the view that where councils consider implementing formal processes of engagement of their own accord then arguably such costs should be funded by the local council, although to be fair there may be some blurring between 'a requirement' under a Treaty settlement as opposed to a 'nice to have'.

## **Chapter 5 – Improving decision making**

### 3.7 **Question 5.1 (page 126)**

**The Commission is seeking more information on the advantages and disadvantages of reducing the frequency of Long-Term Plan (LTP) reviews, while retaining the requirement for annual plans. What would be the benefits, costs and risks of reducing the frequency of LTPs, from every three years to every five? What if five years were a minimum, and local authorities were free to prepare LTPs more frequently if they wished?**

#### **BusinessNZ Response:**

- 3.8 BusinessNZ has long had significant concerns with Long-Term Plans (LTPs), particularly with the transparency of such plans, as outlined in our earlier submission to the Productivity Commission's Issues Paper:

*While BusinessNZ and the wider BusinessNZ family have submitted on a number of long-term plans both at the local and regional council level, it would be fair to say that in most cases the LTP process arrives at a foregone conclusion, there being little time for robust debate either orally or through the formal submission process. In BusinessNZ's experience, it is very much a rubber stamp process with marginal tweaks here and there and therefore likely to deter groups from spending time and effort making submissions.*

*In order to improve processes, it is necessary and desirable to have a robust debate over the types of activities councils are involved in, including whether these meet the criteria of local public goods, and with input not only from users but from the goods' principal funders.*

*As this submission has noted, businesses pay a disproportionate share of the rates burden."*

- 3.9 In addition to the comments made in our previous submission, BusinessNZ is concerned about the quality of LTPs per se and the trade-offs made in respect to their frequency. Often, currently, rate payers are provided with no other options for meeting a council's objective or the trade-offs local communities might be willing to make are not considered - as over frequency versus cost of service etc.
- 3.10 In this respect BusinessNZ fully supports Recommendation 5.6 (p261) which would require LTP consultation documents to describe other reasonably practicable options for addressing each identified issue:

***"The legislated information requirements for the consultation processes of local authorities should be amended to:***

- ***make the terminology around the required analysis of alternative options consistent across relevant sections of the Local Government Act 2002;***
- ***clarify that Long-Term Plan (LTP) consultation documents must describe the reasonably practicable alternative options for addressing each identified issue; and***
- ***explicitly require that LTP consultation documents include high-level information on the implications for rates and future service levels associated with each of the identified options."***

3.11 **Question 5.2 (page 128)**

**Is it appropriate for local authorities to include an adjustment for anticipated price inflation when they set rates each year? If not, what disciplines could be applied to the rate-setting process, to encourage local authorities to seek to manage cost and price pressures through productivity improvements? What would be the benefits and drawbacks of such an approach?**

**BusinessNZ Response**

- 3.12 To insert some discipline into the rate setting process, it is important to look at a range of mechanisms, some of which unfortunately were outside the Productivity Commission's Terms of Reference.
- 3.13 In BusinessNZ's view there is a range of mechanisms that could be applied to restrain rates increases. These are briefly outlined below:
- 3.14 First, the impact of central government decision-making, imposing added costs on local government, needs to be considered.

- 3.15 There are numerous instances where central government imposes costs on local government without taking account of the full ramifications of its actions. One response might be to require central government to pay compensation to local government for the costs associated with what might be considered inappropriate controls or where local ratepayers receive little or no benefit. BusinessNZ is not averse to considering such an option although our clearly preferred approach would be to ensure central government develops a principled Regulatory Responsibility Act (RRA) to minimise the risk of inappropriate regulations and controls. However, in the absence of any central government desire to implement such an Act, BusinessNZ would support further consideration of a local government compensation regime.
- 3.16 Second, constraining what it can and should do is likely to be another effective tool for ensuring local government focuses on key core activities rather than provides 'nice to haves' paid for by local ratepayers. On that point, the expansion of the purpose statement of the Local Government Act to include the four well-beings is very much a backward step.
- 3.17 Despite the Productivity Commission's apparent lack of concern, BusinessNZ considers there is potential for recent changes to result in significant expenditure creep, much of which will fall on the business sector principally as a result of the wide-spread use of business differentials. For example, the business differential set by the Wellington City Council is currently 2.8:1, meaning that for an equivalent level of capital value, businesses pay almost 3 times more in rates than households.
- 3.18 The business sector pays about half the country's rates bill and the level of rates paid is often entirely disproportionate to the level of services received. The situation is exacerbated by the widespread use of business/commercial rating differentials despite strong evidence supporting their removal. Where councils have agreed to reduce the differentials, they have often been tardy in doing so, tending to incremental change due to expenditure pressures.
- 3.19 Notwithstanding the above, BusinessNZ is pleased that the Productivity Commission has come out strongly in support of removing rating differentials, with a recommendation they be phased out over 5 years.
- 3.20 The move towards applying the 'beneficiary principle' to local government goods and services should result in greater scrutiny of local government spending initiatives over time. Councils have often, to date, used business differentials as a soft touch to ensure households were protected to some degree from the rising costs of local government service expansion.
- 3.21 Third, it is often the case that the provision of local government goods and services is not subject to the same degree of competition applying to many everyday goods and services acquired or used by businesses and households in general (i.e. local government does not face the same competitive pressures that often apply to the private sector).

3.22 Fourth, there is considerable scope for local government to manage cost pressures by managing assets and delivering services more efficiently through:

- greater aggregation and sharing of local government resources across local and regional boundaries, thereby achieving greater economies of scale.
- greater use of user-pays principles to send users of services clear signals (in real time) as to the costs associated with the provision of certain goods and services, consequently limiting the overall cost to other ratepayers.
- divestment or recycling of assets.

3.23 Dealing with each issue in turn.

#### *Economies of scale*

3.24 In many instances the greater aggregation of resources across local and regional council boundaries could result in better resource use. For example, in the case of water supplies, it seems absurd for most councils to have their own system when there is logic in combining resources for service provision purposes.

3.25 Achieving greater resource efficiency for a resource such as water is likely to involve political considerations with who pays and asset valuation of significance for some councils. Furthermore, a concern over loss of local control will probably make some smaller councils nervous. It is noted that the current government is considering options for the better use of natural resources across local council boundaries.

#### *User charges*

3.26 Charging for the use of private goods and services would also bring greater efficiencies. For example, paying for waste disposal out of general rates and supplying every ratepayer with a rubbish disposal bin takes no account of the amount of rubbish ratepayers generate. This could actively encourage waste generation because effective cross-subsidisation means the full costs of waste disposal are not sheeted home. Water, as indicated, is another good example where clear user-pays pricing-principles encourage greater efficiencies.

3.27 While some councils charge for water and waste on a user-pays basis, many still fund water use out of general rates, sending strictly limited signals to consumers as to the real cost of their behaviour.

3.28 Government and councils could also make greater use of toll roads or bridges and cost-reflective pricing for water infrastructure.



*Divestment or recycling assets*

- 3.29 In many cases, councils own assets that could be sold or partially sold to build new infrastructure. Shares in council-owned assets could be sold to pay for urgently needed infrastructure, recycling one asset into another, higher priority, asset. For example, the recent listing of Napier Port Holdings is a timely example of the investment arm of a local council using the exchange to partially realise its assets and fund expansion opportunities.
- 3.30 While some councils obtain significant investment income from revenue-generating assets, the justification for continued local authority ownership is weak. Some councils try to justify their exposure as a mechanism for reducing the general rates burden, but the exposure potentially puts ratepayers at risk should returns on assets prove lower than expectations. The problem of funding expansion for local authority-owned assets is also raised, with a potential tension between a council's desire for investment returns in the form of dividends and a company's asset base need for reinvestment and growth. Moreover, given that in general private sector companies out-perform state-owned companies, logically, the private sector should be prepared to offer a premium on the current valuation of many local authority assets; hence ratepayers would receive a windfall gain from asset sales.
- 3.31 Arguably, although local government can obtain debt funding at lower rates than some private sector participants, this does not justify local government involvement in the provision of private good infrastructure. Lower funding rates generally reflect a lower risk because ultimately local authorities can call on their ratepayers either to fund any shortfall or to carry the risk of low investment returns. It is important to accept that local authority funding does not eliminate risk but transfers it from the private sector (which is often better placed to manage risk) to ratepayers.
- 3.32 There would appear to be significant scope for councils to divest themselves of their commercial businesses where there is no sound continuing rationale for ratepayer ownership e.g. electricity lines businesses, airports and ports. This would free up significant funds either as returns to shareholders (i.e. ratepayers) or to invest in core local public goods activity. The difficult part is encouraging local councils to give up their commercial activities voluntarily, without either covert or overt pressure from central government.
- 3.33 It might also be possible to provide for more of what are in effect, 'government to government' joint funding initiatives, where assets are transferred between government agencies to boost balance sheets, e.g. the Accident Compensation Corporation (ACC) and the New Zealand Superfund purchasing a stake in KiwiBank. Some local government assets could be commercially acceptable to private sector investors. But given general public resistance and the Government's effective commitment to no more substantial asset sales, government to government transfer might be an alternative

mechanism for officials to explore further as a way of reducing the rates burden.

- 3.34 The public-private partnership (PPP) model is also well-suited to meeting infrastructure needs – private partners can cover a project’s upfront costs while recovering them over time from end users. Consideration should be given to greater private sector participation in infrastructure development, operation and service provision.

3.36 **Question 5.3 (page 130)**

**Would establishing a capital charge for local authorities be an effective way of incentivising good asset management? What would be the advantages and disadvantages? Are there other, more effective ways of encouraging better asset management practices in local government?**

**BusinessNZ Response:**

- 3.35 In addition to the comments made in relation to the previous question (5.2, paragraph 3.11 on), particularly in respect to ‘user charges’, asset recycling, and PPPs, BusinessNZ considers a capital charge to incentivise local government to better asset management could be of potential benefit.
- 3.36 On the positive side, a capital charge should better reflect the true (opportunity) costs of local government’s current asset ownership. Better reflecting opportunity costs might encourage councils to move towards the greater use of asset recycling (mentioned above) and hence to focus more on key ownership requirements rather than on ‘nice to have’ asset retention.
- 3.37 If applied correctly, a capital charge could ensure ‘beneficiaries’ are more cognisant of the real costs associated with holding/utilising current assets and thereby bring greater pressure on Council decision-makers.
- 3.38 A capital charge might also incentivise central government to make better decisions about imposing costs on local government, knowing this will be reflected in the cost to ratepayers of the infrastructure etc. required to achieve the central government objective.
- 3.39 A capital charge could also potentially put greater pressure on councils to consider the trade-offs between a gold-plated service and one more in tune with the demands/needs of local communities and the cost/services trade-offs communities are prepared to make.

- 3.40 It might even be possible to allow local councils to achieve outcomes which do not necessarily fit within the regimented requirements of legislation. For example, provided the base minimum required to ensure public health and safety is achieved, local government should arguably be allowed to supply only those goods and services that meet the needs and aspirations of the local community.
- 3.41 All the above arguments support the introduction of a capital charge but if it is to have the desired impact, the devil will be in the detail when it comes to application. As stated in response to question 5.2 (paragraph 3.11 on), unless the Government gets rid of rates differentials, some of which are truly absurd, the costs of a capital charge are likely to fall unfairly on the business community. In this respect the importance of applying the beneficiary pays principle espoused in the Draft Report is paramount.

## **Chapter 6 – Future funding and financing arrangements**

### **3.42 Question 6.1 (page 153)**

**How desirable and useful would a tax on vacant land be as a mechanism to improve the supply of housing for New Zealanders? How would such a tax measure up against the principles of a good system of local government funding and financing?**

### **BusinessNZ Response:**

- 3.43 BusinessNZ notes the Tax Working Group highlighted the challenge of housing affordability in NZ and the constraints on residential land supply that drive the high cost of housing. To this end, the Group recommended the Productivity Commission inquire into local government funding and financing and consider a tax on vacant residential land.
- 3.44 It is perhaps a little disappointing the Productivity Commission's Draft report failed to examine some of the pros and cons of taxing vacant residential land. However, in the absence of any substantive discussion, this submission will provide some general thoughts, believing any approach to introducing such a tax should be made with a considerable degree of caution.
- 3.45 As BusinessNZ understands it, the issue of concern to both the Tax Working Group and the Productivity Commission is the potential for land-banking, restricting the supply of land for development, thereby increasing development costs. By imposing a tax, the assumption is that land-bankers (however defined) will be incentivised either to develop their land or to sell it off to others who would be more inclined to do so.

- 3.46 While the logic has a superficial appeal, it also has certain drawbacks.
- 3.47 The first and most fundamental drawback is that land supply is not fundamentally constrained by land-banking but as a direct result of regulatory failure, both on the part of central government and more importantly, local government. Artificially imposed zoning requirements and urban limits directly affect the price of land inside a city compared with land outside.
- 3.48 Although successive governments (and the current Minister Phil Twyford) have talked about the need to remove urban limits, this has not happened to date.
- 3.49 There are several likely reasons for the failure to remove city limits, including the fact that housing prices could drop substantially in high population growth areas if the urban limits were removed overnight and councils and the wider community actively supported new, greenfield developments. Existing residential owners would probably show some resistance to the removal of city boundaries knowing this might reduce the equity they currently have in their properties. This, in turn, could have a flow-on effect to the broader economy given relatively high levels of household debt.
- 3.50 From the point of view of population growth, however, town boundaries have significant implications for the price of land. Together with council rules about the size of building platforms/type of materials used etc. (including massive and complex planning rules and regulations and associated appeal rights) they seriously undermine the ability of individuals, businesses and developers to proceed with major projects.
- 3.51 In short, removing regulatory barriers will likely prove a much more effective way of promoting economic and population growth than imposing a specific tax. This is particularly so if the private sector sees merit in a development and is therefore prepared to fund an activity that makes commercial sense.
- 3.52 Consequently it is disappointing the Government has seen fit to introduce a proposed National Policy Statement on Highly Productive Land (MPS-HPL), intended to protect certain agricultural land from development by requiring councils to consider the land's productive capacity in planning and consenting decisions.
- 3.53 The potential for the kind of policy referred to above to cut right across government's desire to free up more land for housing is very real, as outlined succinctly in a 14 August 2019 Local Government NZ (LGNZ) media release:

*"LGNZ.....notes it has the potential to conflict with the Government's urban growth agenda, which is encouraging fast growing councils to expand house building to tackle New Zealand housing affordability crisis...."*

*We need to carefully assess and balance the trade-offs between protecting highly productive land and enabling cities to grow, because at first glance these two policy frameworks appear to work against each other"*

*"In places like Auckland and Hamilton, where New Zealand's housing crisis is most severe, the only place these cities can meaningfully expand greenfield development is in the areas that the NPS is looking to protect"*

- 3.54 Such a proposal has significant and important implications, riding rough-shod as it does over established property rights, preventing individuals and companies from utilising their free-hold land as they feel is appropriate and where the costs and benefits of their actions are largely internalised.
- 3.55 Housing provision's fundamental problems must be addressed – current demand and supply side-constraints; owners of vacant land should not be randomly picked on for a special land tax.
- 3.56 Introducing a tax on vacant residential property is likely to defeat the principles of a good tax system, quite apart from having significant unintended consequences for good economic management and efficient resource use.
- 3.57 Getting into the detail: how would such a tax apply?
- 3.58 For example, would the land tax be imposed across all vacant residential land, irrespective of whether the land was in demand? Would vacant land in Auckland be treated the same as land in a small town in Southland with population decline and nobody wanting to build? What if the land currently had a few sheep grazing on it? Would it be defined as vacant land? And so on.
- 3.59 What about the issue of retirement home providers and large supermarket owners who need to acquire property in order to build structures to meet the needs of the local population? In many cases, this will involve purchasing properties over several years until an economically sustainable enterprise can be created. Requiring taxation on such so-called vacant land would simply ramp up building costs, ultimately to be passed on to consumers. How would a regulator determine what is "land-banking" per se as opposed to individuals and companies who are in a long-term process of determining the land's best use?
- 3.60 Often the delay in utilising land has nothing whatsoever to do with land banking but results from regulatory overkill constraining when, how and why an individual and/or company can develop land. The issue is regulatory failure, not market failure and tools to deal with the former need to be

developed rather than jumping to the conclusion that a tax on vacant residential land would be the silver bullet that increased housing supply and addressed cost and affordability issues.

**Question 6.2 (page 168)**

- 3.61 **What would be the advantages and disadvantages of a system of payments to territorial authorities based on new building work put in place in each territorial local authority? What would be the best design for such a mechanism? Would it be effective in incentivising councils to keep the supply of consented land (greenfield and brownfield) and local infrastructure responsive to growth pressures?**

**BusinessNZ Response:**

- 3.62 BusinessNZ understands the rationale for incentivising local government to encourage development by making this as easy as possible. The Draft Report argues that local government has limited incentives to encourage development because of the costs/difficulty involved.
- 3.63 While BusinessNZ is not averse to the concept of incentivising local government to provide more infrastructure, the key issue is – what is wrong with the current approach? Answer this question and the right remedy might be found (which might or might not include payments to local government).
- 3.64 Currently numerous obstacles prevent local government from providing greater land for greenfield and brownfield developments and the situation will likely get worse before it gets better, owing to significant legislative change.
- 3.65 First, central government proposals to implement a National Policy Statement on Highly Product Land (NPS-HPL) would require councils to restrict even further the ability to develop land opportunities for expansion, as mentioned in response to an earlier question. (see paras 3.66 to 3.68).
- 3.66 Second, mandatory and ad hoc town boundaries have the artificial effect of inflating house prices within city limits (particularly in areas with strong population growth (e.g. Auckland). Removing these boundaries is likely to be difficult as there will be vested interests within both councils and the wider community (i.e. it is unlikely that households will actively vote for policies that may result in their housing equity reducing).
- 3.67 Third, local government is concerned about the ability to recoup new housing development costs, although to be fair, BusinessNZ finds it difficult to discern why this should be; Development Contributions are in place and there is a

requirement for developers to pay for new infrastructure as part of the development process.

- 3.68 Fourth, local government is really the meat in the sandwich making councils overly cautious in issuing building consents as there is a significant risk of consenting developments coming back to bite them.
- 3.69 Some of the risks constraining local authorities from providing consents in case things go wrong need to be off-loaded. Councils might then take a less cautious approach than at present, putting lines on maps to deal with potential issues such as climate change, erosion etc.
- 3.70 Provided individuals and companies and indeed, communities are prepared to bear the risk associated with the activity in question (i.e. if the costs and benefits can be internalised), there is no reason for council caution in consenting to an activity such as making land available for housing. To some extent this conclusion leads into the response provided to the next question addressed (question 8.2, concerning risk). Dealing with these issues is important in ensuring the development of an effective legislative framework.
- 3.71 Having said that, BusinessNZ is not averse to the provision of payments to councils for building activity, although how to deal with the buildings (as opposed to other infrastructure, e.g. water) would need to be managed. Also, costs imposed by central government on local government would also have to be considered to determine what local government ought to pay.

## **Chapter 8 – Adapting to climate change**

### **Question 8.1 (page 222)**

- 3.72 **What legal options exist for placing a condition on land-use consents that would make a voluntary assumption of risk by the current owner (and any person or entity who later becomes the owner) enforceable in all future circumstances?**

### **BusinessNZ Response:**

- 3.73 BusinessNZ notes and supports the Draft Report's discussion of the risks associated with local government approving consents since undue restrictions will incur opportunity costs whereas a too-liberal approach can result in the costs coming back to council if things go wrong.

*"These opposing risks can put councils in a quandary. Are any legal means available that could help councils in this situation? Perhaps some form of covenant could make the consent subject to an assumption of risks by the owner and be attached to the title of the*

*property. Then the council could be confident it would not suffer future obligations no matter what future climate hazards affected the property. The Commission is interested to know whether such legal means exist that would be enforceable in all future circumstances."*

- 3.74 BusinessNZ understands local government's dilemma when it comes to consents and considers being able to transfer responsibility for an associated risk to someone better able to manage it (such as a landowner) would provide a solution. The right to transfer would be subject to certain principles, including the desirability of grandparenting current consent rights and providing compensation for any 'regulatory taking'. Regulatory takings are discussed in more detail below.
- 3.75 BusinessNZ considers individuals should be allowed to make decisions about their own property, provided undue costs are not imposed on third parties as part of their activity, or, if an adverse event occurs (such as a climate change event), the cost of damage is internalised to the property's owner.
- 3.76 Riskier consents (however defined), might need an assurance from the owner of the land about the ability to meet any costs associated with an adverse event affecting that or others' property as a direct result of the land use. For example, this could mean providing proof of adequate insurance, or a bond etc., assuring local government that any reasonable future externalities were taken care of.
- 3.77 Moving towards a policy of making consents subject to the assumption of owner risk attached to the title of the property would need to distinguish between current and future consents, reflecting those investments made under rules prevailing when the consent was issued.
- 3.78 It would be a gross injustice to try and ride rough shod over existing property rights in view of the sunk cost investment owners have already made. Grandparenting current consent rights would therefore be important.
- 3.79 Property rights and their enforcement are a fundamental pillar of a market economy. Without reasonable security from confiscation by the state or others, the incentive on individuals and businesses to invest and build up productive assets is severely weakened.
- 3.80 Based on the above, BusinessNZ also believes greater consideration should be given to the payment of compensation for loss of property rights and regulatory takings to ensure local and central government take greater account of the effects of unnecessarily restricting property use.
- 3.81 Apart from the Public Works Act, no allowance is currently made, other than in one or two specific instances, for the payment of compensation for regulatory takings (that is, a reduction in private property rights in the public interest).



- 3.82 Regulatory takings should not be legislatively condoned and an acknowledgment of the right to compensation is at the core of the property rights issue. There is a general presumption that property rights should not be diminished without compensation. This is a long-held view. BusinessNZ considers the presumption of compensation to be a vital check and balance on the economic system.
- 3.83 The need to compensate for regulatory takings is hardly a new or novel conclusion in public policy terms. Over recent years the Crown, in the process of regulating private property rights in the public interest, *has* provided compensation, most notably in the areas of carbon emissions and fisheries management.
- 3.84 The compensation principle recognises that local democracy and the ability for local communities to make relevant choices are important but not costless.
- 3.85 BusinessNZ considers Resource Management Act (RMA) provisions relating to compensation where property is taken, or its use or value is restricted, require strengthening (in the case of the Act's section 85, this means the *reversal* of the current presumption of no compensation). Currently, compensation is the only relief available and at that, there is an exceedingly high threshold to be met. Compensation will be paid only if the taking or proposed taking would render the land incapable of reasonable use.
- 3.86 If local authorities were required to provide compensation for regulatory takings, BusinessNZ would expect them to take more care when regulating private interests in the public interest. The need for regulatory takings might then be expected to be low, perhaps based initially on one or two test cases.
- 3.87 Claims for compensation rest on more than an assertion of land use impairment; there would need to be adequate evidence to support a claim of changed land use.
- 3.88 The claims' process would not be costless and both parties would be required to assess the value of the compensation sought, the likelihood of gaining (or paying) compensation and the cost of participation. Rules such as requiring the losing party to pay the other's costs would contribute to getting the incentives for claiming or opposing compensation right.
- 3.89 Finally, BusinessNZ recognises that in some cases, the transaction cost of determining the winners and losers involved in a regulatory taking might be disproportionately high, making the payment of compensation impractical. This possibility reinforces the importance of having both a sound process (including robust decision-making requirements) and appeal rights.

**APPENDIX 1**

*Promoting New Zealand's success through sustainable market-led growth*

***BusinessNZ is New Zealand's largest business advocacy body, representing the majority of New Zealand private sector companies as members, affiliates or through membership of BusinessNZ divisions such as the Major Companies Group, ExportNZ, ManufacturingNZ, Sustainable Business Council and Buy NZ Made.***

***BusinessNZ represents around 14,000 businesses that are members of four regional business organisations:***

***Employers & Manufacturers Association (EMA) - northern half of North Island***

***Business Central - central region***

***Canterbury Employers' Chamber of Commerce (CECC)***

***Otago-Southland Employers' Association (OSEA)***

***BusinessNZ's Major Companies Group (MCG) works with and represents around 80 of New Zealand's largest companies.***

***ExportNZ and ManufacturingNZ work with and advocate for New Zealand exporters and manufacturers.***

***The Sustainable Business Council (SBC) provides mainstream leadership on sustainable business matters.***

***The BusinessNZ Energy Council (BEC) is a group of New Zealand organisations taking on a leading role in creating a sustainable energy future for New Zealand.***

The Buy NZ Made Campaign encourages consumers and organisations to help create local jobs and growth by buying New Zealand goods and services.

BusinessNZ's Affiliated Industries Group (AIG) is a grouping of 75 industry associations affiliated to BusinessNZ that work together on pan-industry issues.