

Submission

by



to the

Local Government and Environment Select Committee

on the

Resource Legislation Amendment Bill

14 March 2016

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Appendix: About BusinessNZ

RESOURCE LEGISLATION AMENDMENT BILL - SUBMISSION BY BUSINESSNZ¹

1.0 INTRODUCTION

- 1.1 BusinessNZ welcomes the opportunity to make a submission to the Environment and Local Government Select Committee on the Government Bill entitled 'Resource Legislation Amendment Bill'.
- 1.2 BusinessNZ welcomes many of the proposed improvements to the planning and consenting processes. However, we are concerned that the proposed amendments – in focusing almost exclusively on process changes – will ultimately fail to fully unlock real and enduring economic and environmental gains. This is for two reasons, being the:
 - a. failure to look more broadly for both the nature of the underlying problems and solutions, which misses an opportunity to address the real issues associated with the implementation of the Act – a lack of clarity over property rights; and
 - b. experimental elements of some of the new processes combined with the diminution of appeal rights.
- 1.3 In terms of our approach, we believe that changes to Part 2 and beyond must reflect a coherent overall view about the basis under which the Act should work. We are sceptical that bolting on changes that impose bottom lines into an Act that is being interpreted by the courts and local authorities in an entirely different way will deliver the lasting changes that are required.
- 1.4 Having said that, the bulk of this submission focuses on a set of key amendments, being:
 - a. the greater use of national direction (for example, inclusion of natural hazards in section 6, and the greater use of National Policy Statements and National Environmental Standards);
 - b. the new resource consenting processes; and
 - c. the new planning processes.
- 1.5 As a general point, while we are supportive of the intent of many of the proposed amendments we are concerned about how they will be implemented in practice. Given the novelty of some of the amendments, it is possible that the end result will simply have been to replace one form of complexity and uncertainty with another, for no substantive net gain. We believe that the risk of unintended outcomes is high and believe that the complexity of the changes are such that the

¹ Background information on BusinessNZ is attached as Appendix One.

Bill would have benefited considerably from being first issued as an exposure draft to help iron out the possibility of such outcomes out, before getting to the select committee.

RECOMMENDATIONS

It is recommended that the Select Committee:

- ***delete the insert 6(h) and the consequential amendment to section 106 pending further consideration of its potential economic impacts***
- ***incorporate the intent of the statement of expectations in the Order in Council for the Christchurch Replacement Plan into new section 18A***
- ***clarify that boundary activities are applicable to commercial business owners***
- ***further investigate the new consenting processes (boundary activities, fast-track, and deemed permitted) with a view to refining their application under a consistent principle of written approval and the provision of certain information***
- ***ensure that reverse sensitivity effects are avoided with respect to existing major industrial sites***
- ***delete clause 135***
- ***require consideration by an informed and independent group (e.g. the Legislation Advisory Committee or possibly the Productivity Commission) with a report back given the issue of any restriction on merit appeals is of such potential significance for the NZ economy***
- ***further amend clause 54 (section 85 of the Act) as proposed***
- ***delete clause 229 (section 147A of the EEZ Act), as well as clause 81***

2.0 THE SCOPE OF THE REFORMS: ONLY HALF A REFORM WITHOUT LOOKING AT SECTIONS 5, 6 AND 7

- 2.1 It is hard to say that the status quo has worked. All stakeholders – house owners, current and prospective, businesses and environmentalists – have significant issues with the Act and its implementation despite or possibly because of almost constant legislative tinkering. We now face the schizophrenic situation of an Act based on a particular approach ('environmental bottom lines') with 25 years of case law that – until the recent King Salmon case – interpreted it on the basis of the application of an 'overall broad judgment'.
- 2.2 We are therefore, ambivalent towards the view held by some that the Act is a bulwark against the diminution of environmental bottom lines. The Act is so changed from its original that it is almost unrecognisable. The constant stream of legislative change since its initial passage into law have perfected the art of the sticking plaster to the point where there is now no strict application of either environmental bottom lines or an overall broad judgment.
- 2.3 The question, in our view, is not whether sections 5, 6 and 7 ought to be amended or merged, but how and to what purpose. We are for the reasons outlined immediately above, not particularly persuaded by arguments about retaining case law.
- 2.4 We strongly agree with the Hon. Gerry Brownlee when he responded to the remarks of the Leader of the United Future Party at the time, by saying:

"His (Mr Dunne's) belief is that the RMA simply needs a little bit of change but no change to the purpose because if you change the purpose, you destroy a whole pile of case law. He actually says that the case law now drives what you can do under the RMA, *and that is the very problem that we are trying to solve.*"

(emphasis added)

A WHAT'S THE PROBLEM?

- 2.5 Decisions weighing up where the public and private interests lie in the natural and built environment are to a large extent determined by the framework set out in the Act. This distinction between public and private interests lies at the very heart of the Act.
- 2.6 While there is any number of issues with the Act, the most problematic is its sheer and burgeoning breadth. Regulation has now broadened to cover issues that were *never* contemplated to be covered and whose coverage is not in the public interest for the sustainable management of the environment (the core purpose of the Act).

- 2.7 Unfortunately, the Act has become a tool to increasingly extend the ambit of government regulation of private rights in the name of the public interest. This has involved the progressive blurring of the boundary between public and private interests in favour of determining the public interest by a process of constant legislative and judicial review and adjustment, and by regulatory creep by local authorities (the Crown's regulatory agent in regard to the implementation of the Act).²
- 2.8 As a result of this regulatory creep, and the apparent underlying presumption that property rights are in need of constant review and adjustment, councils struggle to keep a sharp focus on the strategically important issues (water quality is, for example, a case in point, and a stark rebuttal to the argument that the RMA is working well and doesn't need to be fundamentally changed).
- 2.9 Some seem to believe that this can be remedied by high-quality resource management plans and templates. This is only half the picture. The other half is the growing plan and rules-based gulf that now separates how the Act was intended to operate (the legitimate protection of the public interest in the environment) from its increasing use (via plans and rules) to reallocate private property rights³ into the public realm in order to achieve often opaque or highly dubious public goals.⁴
- 2.10 One need not be overly surprised that the corollary to the progressive diminution in private property rights has been the dampening of the incentive to preserve today in order to preserve or harvest tomorrow.

² While not necessarily completely comparable, the example of water quality standards and their application to reticulated water systems and how the Crown determines where the boundaries of its regulatory interests should extend to, but not beyond is informative. At some point it was deemed in the public interest (in this specific case the avoidance of the spread of water-borne illnesses) to impose water quality standards on reticulated water systems only (for these systems the public benefits of doing so outweighed the costs). Presumably, the public benefits from regulating small non-reticulated systems were outweighed by the costs and so it was not deemed to be in the public interest to regulate them. In the case of the RMA, it almost seems to have become axiomatic that if it involved some impact on the environment, then it should be regulated as a matter of course, in the public interest.

³ The term "private property rights" should not be confused as referring solely to ownership by private interests (as ownership can be held by either a public entity or a private citizen), nor does it only reflect the status of ownership, but can encompass a range of rights, such as use or management rights, and the responsibilities that accompany them.

⁴ A number of relatively well-known examples of such an extension are set out on page 52 of the document entitled 'Report of the Minister for the Environment's Resource Management Act 1991 Principles Technical Advisory Group', dated February 2012. For example, 1.2 metre limits on heights of front fences and rules requiring lounge rooms to face the street.

3.0 GREATER NATIONAL DIRECTION

A NATURAL HAZARDS – A NEW MATTER OF NATIONAL IMPORTANCE

- 3.1 Clause 5 inserts into section 6 of the Act a new matter of national importance, the management of significant risks from natural hazards, and amend section 106 of the Act to allow a subdivision to be refused if there is a significant risk from natural hazards. BusinessNZ has serious misgivings about this inclusion believing that while good intentioned it will – like those of the initial proposals on earthquake building standards – ultimately impose costs that substantially outweigh the benefits.
- 3.2 As a general principle, individuals and businesses should bear the full costs associated with their behaviour (i.e. costs should be internalised) or individuals and businesses will over-consume resources if they can shift costs on to third parties. Management of risk - in this case the risk of hazards - is no different in this respect. If individuals are to make rational decisions in respect to hazards, they should ideally bear the associated costs (and benefits). However, it is accepted that just about every activity in life has some externalities (either positive or negative) and it is impossible in most respects to totally internalise costs (and benefits) at least without great cost. The key is to ensure that costs and benefits are internalised to a reasonable degree.
- 3.3 With greater and more precise information, local authorities will be able to more accurately determine the nature of the risk and whether or not it can be managed by individuals and businesses. In this respect, measures to manage hazards need to be better targeted at those clearly identified instances where the costs and benefits are not internalised.
- 3.4 Given the above, it is important that individuals and businesses are fully aware of the risks associated with their actions (or non-actions) to ensure that they make informed decisions in respect to the management of risk. This requires sound, scientifically-based, information in order to successfully manage known hazards and to ensure that individuals and businesses do not simply pass on the costs associated with (in hindsight) bad decisions which are ultimately paid for by the wider community (ratepayers generally).
- 3.5 Notwithstanding the above, the probable effect of the amendments will be to effectively impose further hazard management controls (i.e. more restrictions on how, when and why individuals and businesses can use resources). There is little, if any, identification of the potential costs involved or recognition of the fact that restricting land use will have significant implications on established property rights. Neither is mention made of the desirability of compensating individuals for loss of value associated with the taking of property rights, nor any discussion

of why local authorities are presumed to be in a better position to manage risk than the private sector.

- 3.6 Given that markets are generally faster at self-correcting than government intervention, the onus of proof must be on government to prove beyond doubt that the benefits of intervention exceed the costs, including unintended costs associated with regulation (such as cost escalation).
- 3.7 Without sound information based on known science, there will be a tendency for local authorities to take an unduly cautious approach to the management of hazards which may have unintended consequences, including restricting the ability of individuals and firms to engage in productive activity. This is entirely natural given the incentives facing local authorities, particularly if the liability for adverse outcomes falls back on local authorities as has been the case in respect to a number of activities. A number of examples to date (some of which are outlined below) would suggest that local authorities are taking a much more precautionary approach to the management of risk and hazards, mainly because of the fact that at the end of the day, if anything goes wrong, individuals and businesses are inclined to point the finger at local authorities for allowing them to undertake certain activities. Hence compensation for loss (or remedial action) tends to get placed on local authorities (ratepayers) rather than on the individuals and businesses making particular decisions.
- 3.8 It should be noted that regulators generally have strong incentives to minimise their own risk by imposing higher standards than might arguably be justified. Because regulators do not bear the costs associated with their decisions (costs will ultimately be passed on to consumers), they may well over-regulate rather than be aware of, or adequately consider, the cost/quality trade-offs consumers are willing to make. Given that each individual is unique, individuals will generally have different risk profiles, with some willing to pay considerable amounts of money to minimise risk while others will want to invest little in reducing real or perceived risk.
- 3.9 These amendments imply that consumers and companies should not be allowed to manage risk and that regulation is a more appropriate mechanism for providing certainty of outcome. While it is possible that regulation may provide for greater certainty (though not necessarily of outcome), that certainty is likely to come at a considerable cost, which will ultimately flow through to consumers.
- 3.10 The economic perspective of risk stresses two ideas:
 - a. more resources, including time and money, are needed to reduce risk; and

- b. people (through their actions) have a desired level of risk that is well short of zero, because of what they must give up in terms of increased cost or of other desirable considerations.
- 3.11 It is important to understand up-front that there is an optimal amount of resources which should be utilised in reducing risk in respect to natural hazards, just as there is an optimal amount of resources that should be spent on crime prevention, health interventions, etc. The crucial and undeniable fact is that resources are limited and risk cannot be completely eliminated or, if at all, not without great cost. While it may be possible to reduce risk, beyond a certain point the marginal cost of taking action becomes progressively higher, while the potential returns from taking action reduce. Therefore it pays for companies and individuals to invest in risk minimisation strategies only up to the point at which the marginal cost equals the marginal benefit of taking action
 - 3.12 It is not a case of eliminating risk, to do so would be to effectively close down all productive activity.
 - 3.13 Often market-based mechanisms for determining risk will be far more effective than local authority-controlled outcomes and will fairly reflect the actual risk associated with hazards. For example, in a competitive insurance market, individuals and businesses seek competitive quotes in dealing with hazardous situations. In some cases insurers may be unwilling to insure a building at all if the situation is considered too hazardous. This approach naturally incentivises people to assess the costs and benefits of building in areas where natural hazards have been identified.
 - 3.14 There are a number of instances in the hazard management area where local government controls will not only impact on the property rights of existing landowners but will seriously restrict available land for housing development, increasing the cost of available housing and as a result, rental prices. But it doesn't end there, as concerns about housing prices will ultimately be reflected in higher interest rates as the Reserve Bank attempts to ensure that inflation remains within its target band of one to three percent.
 - 3.15 Residents in the Kapiti Coast District Council area are well aware of the implications of "hazard lines" (from the Lim report) on about 1800 properties along the coast, sparking fears that the lines will affect valuations and insurance.
 - 3.16 These proposals, if implemented, would not only have seriously impacted upon the value of the land in question due to questionable analysis, but will also place restrictions on the ability of affected residents to expand beyond their current property footprint.
 - 3.17 Putting aside the debate as to whether the erosion hazard identified by the Council is within the reasonable bounds of probability, even if the

erosion eventuates, the risks will largely be borne by individuals whose residences are on or close to the foreshore. Arguably, the 'risks' of further erosion will affect these individuals in the sense that their property values may decline and/or they will no longer be able to secure insurance, at least not without greater cost. It is hard to see how such an outcome (even if unlikely, according to some sources) would involve adverse effects on external parties of such a magnitude as to justify the Council's draconian response.

- 3.18 Notwithstanding the above, in order for individuals and businesses to make rational decisions in respect to risk and hazards they need to have sound information in order to assess risk, and how best to manage that risk. Incomplete or sub-standard information is likely to result in sub-optimal decision-making, by individuals, businesses, and insurance companies.
- 3.19 The nature of insurance is to price insurance according to risk and to pool risk within similar risk categories. In order for insurance markets to operate effectively, it is important that the nature of any risk is well understood so that it can be priced accordingly.
- 3.20 There is no reason why local authorities should be unnecessarily concerned about hazard issues in respect to land use provided the externalities associated with any adverse event will be internalised as much as possible (e.g. the parties involved in building on flood plains, erosion areas or whatever are responsible for any adverse impacts associated with their behaviour).
- 3.21 This general principle has been upheld in a recent decision of the Environment Court where essentially the property-owners wished to build a house on land which could be prone to flooding. The view of the court was that:

“We have thought carefully about the way in which Mr and Mrs Holt have said they understand and will accept the risk of flooding of their property at 96 Stornoway Street, Karitane. We do not believe they are being foolhardy in proposing to build and live in a house on the property, but have assessed the probabilities rationally. There comes a point where a consent authority should not be paternalistic (at least not under the RMA) but leave people to be responsible for themselves, provided that does not place the moral hazard of things going wrong on other people.”⁵

- 3.22 In this case, a private zoning tool (as opposed to public zoning) of a covenant was used by the Holts as an efficient means to take into account all the costs and benefits in order to maximise their own gain. BusinessNZ considers that the use of covenants in regard to the management of natural hazards should have wider application.

⁵ Judge Jackson and Commissioner Manning in *Otago Regional Council v Dunedin City Council and BS and RG Holt* [2010] NZEnvC 120, page 4.

- 3.23 BusinessNZ considers that there are no solid grounds for increasing regulation in respect to land use and therefore is opposed to the proposal. Given that the costs and benefits of land use are largely internalised to those utilising the land, the case for an increased derogation of private property rights via increased controls is weak, and will, as outlined above, have unintended consequences, particularly adding to land and housing costs which will ultimately be reflected in reduced economic growth, not to mention reduced housing affordability.
- 3.24 Notwithstanding the above, the importance of having sound information to assess risk and manage hazard is fundamental. With greater and more precise information, local authorities will be able to more accurately determine the nature of the risk and whether or not it can be managed by individuals and businesses.
- 3.25 Any role of government and local authorities in the management of risk and hazards needs to be clearly targeted at those issues clearly identified where the costs and benefits are not internalised, like a massive tsunami. Many current examples, as outlined above do not meet this test.
- 3.26 It is **recommended** that the Select Committee:
- ***delete the insert 6(h) and the consequential amendment to section 106 pending further consideration of its potential economic impacts***

B PROCEDURAL PRINCIPLES

- 3.27 A new section 18A sets out "procedural principles" to be applied by every person exercising powers and performing functions under the Act. These include:
- a. using timely, efficient and cost effective processes that are proportionate to the functions or powers being exercised;
 - b. ensuring that policy statements and plans include only matters relevant to the purpose of the Act and are worded clearly and concisely; and
 - c. promoting collaboration between or among councils on common resource management issues.
- 3.28 These principles are drawn from the proposed new section 7 that was proposed as part of the 2013 RMA reform process. We note that the statement of expectations in the Order in Council for the Christchurch Replacement Plan included an expectation that the Christchurch Plan:

"reduce significantly (compared with the existing district plans):

- (i) reliance on resource consent processes; and
- (ii) the number, extent, and prescriptiveness of development controls and design standards in the rules, in order to encourage innovation and choice; and
- (iii) the requirements for notification and written approval:

and think that these, or similar concepts could be usefully incorporated into the new principles section given the similar intent.

3.29 It is **recommended** that the Select Committee:

- ***incorporate the intent of the statement of expectations in the Order in Council for the Christchurch Replacement Plan into new section 18A***

C NATIONAL INSTRUMENTS

3.30 BusinessNZ welcomes greater national direction in the form of national instruments (. The practical outcome of the Act has to date, become a highly uncertain combination of jurisprudence and local planning. Greater national direction, while potentially inimical to the strict application of environmental bottom lines, is a necessary function of the need to provide all stakeholders with more predictability.

3.31 In BusinessNZ's view, the proposed changes set out in clauses 24 - 61, which are an extension of powers that already exist in the Act, simply reflect the:

- a. fact that the Act as originally intended, sought to regulate sustainable management of the environment in the public interest; and
- b. recognition that the Crown is best placed to determine where the boundary between the public and private interest lies (as it has already done in other areas such as fisheries management, air quality and carbon emissions).

3.32 A part of the failure of the 'overall broad judgement' approach has been the dereliction, by governments since the passage of the Act, of their duty in favour of its regulatory agent and the courts to determine what is in the public interest. The proposals go some way towards rectifying this.

3.33 In particular, BusinessNZ considers that these new proposals should go some way towards helping address the evident principal-agent problem that exists between the Crown and local authorities by

providing local authorities with a clearer outline of the Crown's expectations. Such changes should not be perceived as some sort of power-grab by central government, rather a desire on the part of the government to more clearly specify the terms of the arrangement by which it delegates its regulatory powers. However, having said that, what these changes do is signal a wider malaise with the Act that still needs to be addressed.

- 3.34 In terms of a specific comment about improving the use and effectiveness of National Policy Statements and National Environmental Standards, BusinessNZ supports the proposals. However, consistent with BusinessNZ's view about regulating only when clearly in the public interest, it is important that these tools are focused on those issues which are unambiguously in the public interest, and where there is a clear mismatch between marginal social costs and benefits and marginal private costs and benefits.
- 3.35 If implemented correctly, and with care, the outcome should be overall welfare enhancing.

4.0 NEW CONSENTING PROCESSES

- 4.1 The Bill contains three new consenting processes, being:
- a. boundary activities;
 - b. fast-track applications; and
 - c. deemed permitted activities
- 4.2 BusinessNZ supports these new processes but with some qualifications.
- 4.3 Boundary activities will not require a resource consent if written approval is provided by all neighbours with an affected boundary. This would appear to be a sensible change. However, it is unclear the extent to which, if at all, this new process is to only apply to residential properties or is equally applicable to commercial properties. Given the disproportionate impact of the Act's processes in terms of costs on small businesses, BusinessNZ would expect this new process to apply even-handedly across residential and commercial properties.
- 4.4 The fast-track applications proposal is the closest that the package gets to acknowledging that the boundaries or scope of the Act have become so stretched, that it is no longer meaningful to claim that the Act is operating only in the public interest. It is extremely difficult, in BusinessNZ's view, to claim that preventing a residential property situated between two existing businesses from housing a business, imposing a fence height, requiring certain residential rooms to be placed in defined places, or imposing substantial costs on to a

business to erect a verandah or storage shed, is in the public interest for the sustainable management of the environment.

- 4.5 However, the 10-day consenting time limit is a somewhat timid attempt to return to a focus on the sustainable management of the environment in the public interest by implicit acknowledgement that they should not be regulated. The same applies to the new deemed permitted activity status outlined in new section 87BB.
- 4.6 While these new processes are welcome, BusinessNZ wishes to better understand why those issues to be subject to the new ten day consenting process cannot be treated in a similar way to those of permitted boundary activities. The same applies to deemed permitted activities. In principle, each case should be able to be governed by a similar structure or formula that could apply, for example, written approval plus "certain information" equals permitted). This would be especially beneficial to small to medium-sized businesses.
- 4.6 At last count, these new processes will mean more than half a dozen current or proposed distinct processes for various types of application.⁶ When presenting to the Local Government and Environment Select Committee on its Resource Management Reform Bill in 2012, BusinessNZ noted the strong possibility of process confusion and/or fatigue. We remain of this view.
- 4.7 It is **recommended** that the Select Committee:
- ***clarify that boundary activities are applicable to commercial business owners***
 - ***further investigate the new consenting processes (boundary activities, fast-track, and deemed permitted) with a view to refining their application under a consistent principle of written approval and the provision of certain information***

A ELIGIBILITY AS AN AFFECTED PERSON TO BE NOTIFIED

- 4.8 New section 95DA outlines (clause 128 of the Bill) narrows who is eligible to be considered an affected person for certain consent applications. Again, these changes are supported but BusinessNZ considers that this proposed amendment has the potential for unintended consequences, especially in the case of subdivisions on the boundaries of major industrial sites.
- 4.9 This is generally referred to as the risk of reverse sensitivity effects. In order to ensure that industrial activities are protected from

⁶ These being the bespoke Auckland and Canterbury processes, and processes for projects of national significance, projects of regional significance, medium-sized projects, notified and non-notified projects, and now the three new ten process.

encroachment, BusinessNZ requests that where such encroachment occurs that developers relinquish all future ability to impinge on the existing property rights of the industrial neighbour, or ensure that industrial neighbours are notified of any developments on their boundaries.

4.10 It is **recommended** that the Select Committee:

- ***ensure that reverse sensitivity effects are avoided with respect to existing major industrial sites***

B RESTRICTIONS ON APPEAL RIGHTS

4.11 BusinessNZ finds the proposed restrictions on appeals rights in certain cases (section 120, clause 135) to be highly problematic especially in the context of the issues discussed immediately above. While clearly a double-sided risk for business, BusinessNZ considers that the removal of appeal rights should only occur once the new processes have been implemented and found to be sufficiently robust. For more on the removal of appeal rights in the context of the new planning processes, see section 5 below.

4.12 It is **recommended** that the Select Committee:

- ***delete clause 135***

5.0 NEW PLANNING PROCESSES

5.1 The Bill will change the way plans look and how they are created. Two new planning tracks - additional to the current Schedule 1 process – are established, these being a collaborative plan-making track and a streamlined process that the Minister can grant to councils to amend plans to give effect to national direction.⁷

A COLLABORATIVE PLANNING

5.2 The rationale for a more collaborative plan-making process (with limited appeal rights), is to try and encourage the parties to reach agreement without the degree of litigation some parties consider is part and parcel of the current process.⁸ While encouraging consensus-building is a laudable objective, the danger, in BusinessNZ's view, is that given the possible effects of plan changes on potential property rights and

⁷ It is accepted that there is no presumption in favour of Councils using a collaborative process but rather the decision to use a collaborative process will be based on a number of factors which Councils must have regard to before going the collaborative planning track.

⁸ It is understood that the Bill will only allow merit appeals to the Environment Court where a council decision is inconsistent with Panel recommendations unless the council determined the change was necessary to comply with s4 or 5 of the RMA or Treaty of Waitangi Act.

investment, the need for full appeal rights against regional council decisions is fundamental to ensuring transparency, acting as a safety valve against inconsistent or ill-thought through plans.

- 5.3 The collaborative plan-making track proposal in the Bill has been significantly included by the plan-making approach discussed and recommended by the Land and Water Forum (LWF) in its second report. Notwithstanding the above, the LWF was unable to reach agreement on the limitation of merit appeal rights, with BusinessNZ remaining particularly concerned with the absence of merit appeal rights within the collaborative process plan option.
- 5.4 There are two important points here:
- a. given the proposed more collaborative approach to plan decision-making are quite radical by NZ standards, (and largely untested), removing the right of appeal is a serious matter which should be thoroughly considered, particularly in regard to the potential impact of plan changes on user rights to, say, freshwater; and
 - b. full rights of appeal are embedded in a large array of legislation in New Zealand (and overseas in many OECD countries). Any changes to such an established framework should be made with a significant degree of caution.

B WHY ARE MERIT APPEAL RIGHTS IMPORTANT?

- 5.5 There is a strongly held view that merit appeal/review rights are essential in societies that fully respect fundamental rights. They can be seen as a safeguard or safety valve.
- 5.6 There are a number of important reasons for continuing to promote merit appeal rights, not only in respect to processes under the Resource Management Act (RMA) but in respect to many other legislative and regulatory powers across a whole range of Acts of Parliament.
- 5.7 The reasons for supporting merit appeal rights are outlined below but are not necessarily listed in any order of importance. Every reason is important in its own right.
- a. the prospect of scrutiny (appeals) will likely encourage primary decision-makers to make better and more careful decisions in the first place;
 - b. appeal decisions can often lead to better and higher quality outcomes given a “fresh look at the issues”;

- c. some regulators have very wide powers that leave them, in effect, the rule makers. It is simply wrong that they should act as final judge and jury on the application of their own rules;
- d. the risks of excessive individual influence on decisions are reduced by the right to take a decision to an outside body;
- e. there is more confidence in the integrity of the law, and support for it, when there is at least one full right of appeal;
- f. the parties crystallise the key issues better on their second run through a case;
- g. the more elevated view of the appellate court makes it easier to extract principles of general application, and decisions are more likely to be stated in terms which allow people to predict how the law will work in future; and
- h. appeal rights provide protection for property rights and thus create the conditions for investor confidence and economic growth.

5.8 These are all important issues. Inferior decisions generate uncertainty. Poor decisions force businesses into expensive second best 'work arounds' to cope with the risk of uncertainty or arbitrary interventions. Poor precedents threaten investment and economic growth even though people may not be able to measure or even recognise the source of such costs. The difference between high quality predictable decisions and low quality ad hoc readings can be enormous for a small economy like New Zealand's.

5.9 Internationally, the role of merit appeal rights is firmly understood and is promoted strongly by the Organisation for Economic Cooperation and Development (OECD) in their various documents relating to improving the quality of regulatory decision-making.

5.10 The *OECD Guiding Principles for Regulatory Quality and Performance* (2005) call on those charged with regulatory reform to “*Ensure that administrative procedures for applying regulations and regulatory decisions are transparent, non-discriminatory, contain an appeal process against individual actions, and do not unduly delay business decisions; ensure that efficient appeals procedures are in place.*” (p.5)

5.11 In many jurisdictions, rights of appeal against the discretionary decisions of government planning agencies have been established to allow those affected by planning decisions to have the decisions reviewed.

5.12 Merit-based appeals against government planning decisions are not universal, but it is understood they exist in many common law countries

including England and Wales, Ontario (Canada), Hong Kong, Australia, and of course, New Zealand.

- 5.13 The Commonwealth of Australia's Administrative Review Council in a report stated:

The Council prefers a broad approach to the identification of merit reviewable decisions. If an administrative decision is likely to have an effect on the interests of any person, in the absence of good reason, that decision should ordinarily be open to be reviewed on the merits.

If a more restrictive approach is adopted, there is a risk of denying an opportunity for review to someone whose interests have been adversely affected by the decision. Further, there is a risk of losing the broader and beneficial effects that merit review is intended to have on the overall quality of government decision-making.

The Council's approach is intended to be sufficiently broad to include decisions that affect intellectual and spiritual interests, and not merely, property, financial or physical interests." (p.3)⁹

- 5.14 Given the place of merit appeals (reviews) in NZ's current legal framework, and the international support provided through credible international organisations such as the OECD, any moves to restrict appeal rights should be seriously considered before pre-emptive action is taken.

- 5.15 It is the **recommended** that the Select Committee:

- ***require consideration by an informed and independent group (e.g. the Legislation Advisory Committee or possibly the Productivity Commission) with a report back given the issue of any restriction on merit appeals is of such potential significance for the NZ economy***

C THE STREAMLINED PLANNING PROCESS

- 5.16 BusinessNZ supports the introduction of the streamlined planning process.

⁹ Commonwealth of Australia, Administrative Review Council – What decisions should be subject to merit review? (7 April 2011).

6.0 OTHER ISSUES

A A COMPENSATION REGIME FOR REGULATORY TAKINGS

- 6.1 There is currently no allowance in the Act, other than for some specific instances, for the payment of compensation in recompense for regulatory takings (or a reduction in private property rights in the public interest). This is a substantial flaw in the Act that serves to depress economic activity.¹⁰
- 6.2 The persistent and on-going departure from the principles of consent to the diminution of private interests in the name of the public interest, and compensation when this occurs, have resulted in an enduring and deep-seated dissatisfaction among the business community with the implementation of the Act.
- 6.3 Regulatory taking should not be legislatively condoned. Instead, BusinessNZ believes that core to the issue of property rights is the acknowledgement of the right to compensation. As a general presumption, property rights should not be diminished without compensation. This is a long-held view. BusinessNZ considers the presumption of compensation to be a vital economic system check and balance.
- 6.4 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 determining to regulate private property rights in the public interest, has accompanied that regulation with compensation. This has occurred most notably in the areas of carbon emissions and fisheries management.
- 6.5 The public policy principle is no different in the case of the Act, though its application may be more complex.¹¹ BusinessNZ's view is that the principle itself is fairly straight-forward – that is:
- “If the public want something new to be in the public interest and regulated by the Act because they will benefit from it, then the public should pay for it.”
- 6.6 This principle recognises that local democracy and the ability for local communities to make choices relevant to their community is important, just that such choices are not costless.

¹⁰ If considering this statement in demand and supply terms, a zero price on regulation is always going to mean that the demand for regulations will be high while the voluntary supply of property rights in return will be very low.

¹¹ Though having been involved in the design and implementation of the compensation regime under the NZETS, this claim is, admittedly, a finely balanced judgement call.

6.7 For these reasons, BusinessNZ considers that the Act's provisions regarding compensation where property is taken, or its use or value is restricted, require strengthening and given this, BusinessNZ welcomes clause 54 of the Bill that amends section 85 of the Act.

6.8 However, BusinessNZ is still of the view that the threshold for the granting of compensation remains too high. We propose the following amendments to section 85:

85 Environment Court may give directions in respect of land subject to controls

(1) An interest in land shall be deemed ~~not~~ to be taken or injuriously affected by reason of any provision in a plan unless otherwise provided for in this Act

(2)

(3B) The grounds are that the provision or proposed provision of a plan or proposed plan-

(a) restricts the use of private land to achieve the purpose of this Act; and

(b) renders any land incapable of reasonable use to a significant extent;
and

(c)

6.9 It is the **recommended** that the Select Committee:

- ***further amend clause 54 (section 85 of the Act) as proposed***

B SUSPENDING WORK ON NON-PAYMENT

6.10 Clause 229 (new section 147A of the EEZ Act) provides for the EPA to potentially suspend work in relation to an application if costs invoiced to an applicant are not paid within 20 working days and could also direct a Board of Inquiry ("BOI") to suspend work though both must resume their duties if the costs are subsequently paid. An affected applicant could lodge an objection in relation to costs, however, that does not affect the rights of the EPA and the BOI to stop work.

6.11 This amendment appears to be a knee-jerk reaction to the Chatham Rise invoice dispute. Such a process is unique in commercial arrangements (not to mention one-sided and heavy-handed). As such we recommend that this clause be deleted. These comments also apply to clause 81, new section 149ZG.

6.12 It is the **recommended** that the Select Committee:

- ***delete clause 229 (section 147A of the EEZ Act), as well as clause 81***

7.0 SUMMARY

7.1 BusinessNZ considers that the Act has served as a hand-brake on the Government achieving its economic development aspirations especially where related to rapid growth in the urban context and the ability to quickly consent the necessary infrastructure to support that growth. BusinessNZ considers that it will continue to do so until such time as it is amended to better reflect the ability to achieve both economic growth and environmental protection. Its reform is an essential element in a more vibrant, growing economy.

7.2 However, while comprehensive in terms of its consideration of planning and consenting processes, this is not a comprehensive review of the Act. Rather, it is a further attempt at a patchwork of changes that only go some way towards addressing the real underlying public policy problems and as such, the jury is out as to whether the changes will be capable of delivering on their potential.

7.3 The blurring of the public interest turns the sustainable management of the environment into a complex, and uncertain negotiation where the risk of the loss of property rights is high. This creates a regulatory framework that is unstable and subject to intense lobbying – an effect that has been increasingly observed, despite a large number of amendments to the Act purportedly targeted at resolving these very concerns.

7.4 It is axiomatic that an effects-based piece of resource management legislation will to some extent diminish property rights. But any such diminution needs to be undertaken within a coherent and robust framework. Without this, a blurring of the distinction between the public interest in the sustainable management of the environment and the private interest occurs, resulting in an erosion of property rights, undermining confidence and dampening desire to invest. Poor environmental outcomes are also the result.

7.5 In supporting the majority of the changes set out in the Bill, albeit with qualifications, BusinessNZ hopes that if implemented the changes will progressively contribute towards lifting what has become, over time, a legislative blanket that has increasingly served to suppress economic activity. In doing so, it is also hoped that they will contribute towards improved overall decision-making and enable opportunities that are mutually beneficial to both the environment and the economy to proceed.

APPENDIX: ABOUT BUSINESSNZ

Encompassing four regional business organisations (Employers' & Manufacturers' Association (Northern), Business Central, Canterbury Employers' Chamber of Commerce, and the Otago-Southland Employers' Association), BusinessNZ is New Zealand's largest business advocacy body. Together with its 80 strong Major Companies Group, and the 70-member Affiliated Industries Group, which comprises most of New Zealand's national industry associations, BusinessNZ is able to tap into the views of over 76,000 employers and businesses, ranging from the smallest to the largest and reflecting the make-up of the New Zealand economy.

In addition to advocacy on behalf of enterprise, BusinessNZ contributes to Governmental and tripartite working parties and international bodies including the ILO, the International Organisation of Employers and the Business and Industry Advisory Council to the OECD.

BusinessNZ's key goal is the implementation of policies that would see New Zealand retain a first world national income and regain a place in the top ten of the OECD (a high comparative OECD growth ranking is the most robust indicator of a country's ability to deliver quality health, education, superannuation and other social services). It is widely acknowledged that consistent, sustainable growth well in excess of 4% per capita per year would be required to achieve this goal in the medium term.