Foodstuffs Submission: Improving our Resource Management System

This submission is made by Foodstuffs NZ Ltd on behalf of Foodstuffs (Auckland) Ltd, Foodstuffs (Wellington) Cooperative Society Limited, and Foodstuffs (South Island) Ltd which are retailer owned co-operatives. Foodstuffs NZ Ltd is the Federation headquarters of the Foodstuffs group of companies and co-ordinates national policy and input on public policy matters.

The Foodstuffs companies are 100 per cent New Zealand owned. The Foodstuffs companies develop retail stores which are franchised to co-operative members who own and manage the stores on a day-to-day basis. Our retail brands include PAK'nSAVE, New World, Four Square, On-the-Spot, Henry's Beer, Wine and Spirits, and Liquorland. The Foodstuffs organisation is the leading retail business in New Zealand with an aggregate turnover of $8.3 billion (2012).

The Foodstuffs companies are significant property owners, investing tens of millions of dollars in land, new store developments, and refurbishment projects annually. The companies and their members are also large employers with wholesale and retail staff exceeding 30,000.

Foodstuffs interest in resource management law flows directly from the companies' participation in district planning processes and their experiences as submitters in plan reviews and changes, and as resource consent applicants.

The organisation is generally supportive of the intent to improve both the quality and timeliness of resource management decisions. General feedback and our responses to the individual proposals contained in the public consultation document are set out below.

Further questions or enquiries should be directed to: Melissa Hodd, Executive Manager, Tel: 04 471 4810 [DDI], email: Melissa.hodd@foodstuffsnz.co.nz.

Part 1: Improving Resource Management – General Comments

Part 1 of the Paper endeavours to describe the key issues and opportunities within New Zealand's resource management system.

Overall, Foodstuffs considers that the resource management legislation provides a fair balance between competing interests and enables issues to be teased out and addressed in appropriate detail.

Foodstuffs considers that the presence of the Environment Court is a particularly important component of the system as it enables all interested parties to put their detailed views before an independent expert appeal authority and to have an objective decision made. Inevitably, the decisions made by the Court will not please all participants but the process itself enables all parties to express their views and the rationale for them. The fact that the judges are permanently appointed reinforces the Court's independence.

In Foodstuffs' experience, the cost and delay incurred through the resource management system is more often a consequence of the way in which it is administered rather than its legislative form. By way of example:

(a) Council officers will in many cases lack experience or be unwilling to exercise judgement and, as a result, will tend to resort to process issues in order to defer decision making.

(b) Councils often lack the resources needed to pursue matters through the Environment Court in a timely fashion, particularly in the context of plan changes or district plan reviews that are initiated by the council but take many years to complete. Legislative change cannot overcome that lack of resourcing.

(c) Foodstuffs' view is that a great deal of care needs to be taken in those cases in determining what legislative response, if any, should be made given that altering legislation will not overcome any lack of resourcing.

Part 3.1 - Proposal 1: Greater national consistency and guidance

3.1.1. Changes to the principles contained in section 6 & 7 of the RMA

It is proposed the current sections 6 and 7 be combined into a single section that lists the matters that decision-makers would be required to "recognise and provide for". The combined list includes some new matters and deletes others which the Government considers are effectively already covered in s5 of the Act (purpose).

Foodstuffs **support** the proposals. It is twenty years since the Act was first introduced and it is timely to reconsider what is important in the modern context. We agree the current separation between the matters identified in section 6 as "matters of national importance" and section 7 as "other matters" has led to an over emphasis of environmental considerations vis-à-vis economic social and cultural considerations. The development of a single combined list will ensure all relevant considerations are given appropriate weight.

We also support the addition of a specific reference to the built environment. This addresses an obvious omission in the current law and recognises that development activity is a legitimate and necessary activity to support economic and social advancement. A requirement to give appropriate recognition to the built environment will, in our view, lead to a better balancing of environmental, economic and social objectives.

3.1.2. Improving the way central government responds to issues of national importance and promotes greater national direction and consistency

It is intended that guidelines would be developed with criteria to clarify when and how each national tool or combination of tools would be used. Amendments would also be made to streamline the process for addressing urgent issues.

The proposal appears sound and is **supported**. Guidance could be expected to both clarify the Government intent and expectations, and provide greater certainty for the various stakeholders.

The Paper comments briefly on the possibility of streamlining processes for addressing urgent issues on a national basis. Foodstuffs is **opposed** to the suggestion regarding a streamlined process that would allow central government to consult on a proposed rule for a limited period and then advise a final decision without requiring the Council to follow the current Schedule 1 process to insert the rule into a plan.

3.1.3 Clarifying and extending central government powers to direct plan changes

The consultation document proposes a stepped process for central government to direct plan changes, with criteria in the RMA on the circumstances in which this process could be used.

While we are not opposed to the concept of central government intervention in local planning where necessary e.g. failure of a council to fulfil its statutory obligations or overriding national interest, Foodstuffs is **strongly opposed** to the proposal for a Minister of the Crown to be able to directly amend an existing operative plan if the Minister considers that the local authority has not adequately addressed an issue or outcome identified by the Minister.

Any provisions for central government intervention would need to have appropriate checks and balances to guard against the unreasonable use or abuse of power, including that provisions be subject to public submission and a hearing regime where the provisions can be tested and evaluated independently.

Central government intervention risks undermining the intent of the current regime to allow local communities to manage their own resources in a way that meets local community needs and any power to intervene must therefore be exercised with appropriate caution/safeguards.

3.1.4 Making NPSs and NESs more efficient and effective

The proposals would permit a combined NPS and NES so that guidance could be given on all components of a plan at one time. It is also intended to clarify that NPSs and NESs can be targeted to a specific region or locality, and introduce further streamlined processes for developing NPSs and NESs.

Foodstuffs **support** the proposals.

Proposal 2: Fewer resource management plans

3.2.1 A single resource management plan using a national template

The intention is that all councils would have a single plan in place within five years (per district of a broader area if agreed between the councils). Once in place the single plan would consolidate the three or more planning documents into one. The single plan would have to be consistent with a new national planning template developed by central government. This national template would include standardised terms and definitions and could also include content for specific standardised zones and rules for particular activities.

Foodstuffs support the proposal for a single planning instrument although questions whether 5 years is a realistic timeframe to meaningfully develop a new planning instrument. A single planning instrument will encourage a single coherent plan for each area and reduce the complexity of the current system, as well as the time and effort individual businesses need to commit to engaging in planning processes. While a time-limit will be helpful in ensuring that councils get on with the job and make planning decisions in a reasonable timely fashion, so that developers have earlier certainty about planning rules, we doubt whether five years is sufficient for all councils to complete this process.

Guidelines requiring plans to follow a standard approach with common terms and definitions, will improve the consistency of plans and reduce the current ambiguity around terms used in planning documents and would be a welcome development.

Currently, because we have property and business interests in every local council district we need to monitor every district plan, plan review, and plan change, and usually need to engage in the consultation process, making submissions, attending hearings, and on occasion taking appeals. This creates a huge burden for the business and diverts resources away from more productive endeavours.

3.2.2: An obligation to plan positively for future needs e.g. land supply

The proposal is to advance a range of legislative and non-legislative changes to encourage a more positive future-focused approach to planning. Changes are proposed to sections 30 and 31 of the Act to indicate that managing for positive effects is one of the councils' core functions. Councils would be required to ensure there is adequate land supply to provide for at least 10 years of projected growth in demand.

Foodstuffs **support** the proposals.

We further submit that that there should be an explicit requirement that a council must review its plan if growth within the district exceeds original estimates above a tolerance threshold. This recognises that growth forecasts are not a precise science and growth will be uneven across districts. It is important the councils are responsive to significant changes that were unforeseen and are required to take account of and plan for them.

3.2.3: Enable a single resource plan (between councils) with narrowed appeals

It is proposed that district and regional councils could choose to group together and jointly prepare a single integrated plan for each district or larger area. A streamlined plan development process with limited rights of appeal would be made available to the councils if the proposed grouping met certain criteria. The proposed plan-making process would involve: a plan partnership agreement, pre-notification engagement and collaboration, an independent hearing panel, and narrowed appeals to the Environment court.

The ability to appeal council decisions on components of plans would be limited to where the council deviates from the recommendations of the independent hearing panel. The right to appeal to the High Court on points of law would be available where the council accepted the hearing panel's decision. The scope of the Environment Court's consideration of an appeal would also be narrowed. Appeals would be by way of rehearing rather than "de novo".

Foodstuffs has significant concerns regarding the hearings panel and narrowed appeals to the Environment Court proposed in items 3 and 4 on page 46 of the Paper. This mechanism is similar to the one that has been proposed for the Auckland Unitary Plan process. Foodstuffs has opposed the method in that context and **attaches** (Attachment 1) a copy of the relevant submission made to the Select Committee on the Resource Management Reform Bill (2012) ("**the Bill**").

In summary:

(a) The single hearing mechanism proposed will in practice lead to increased costs because parties will need to address all matters in full at that hearing and will need to exercise cross-examination rights in order to test assumptions and evidence. In comparison, the current three stage (council hearing, Environment Court mediation and Environment Court hearing) process allows for a relatively low-key and efficient hearing process at first instance followed by more detailed analysis on appeal in respect of only those matters that are not resolved at first instance.

(b) The quality of the plans produced through a single hearings process is likely to be lower than that developed through the current process. That is because the current process enables an iterative improvement and refinement of key provisions whereas the single hearing process will require the hearings committee to make definitive judgments on all aspects of the plan.

(c) Foodstuffs is becoming increasingly concerned by the constitutional implications of the tendency to appoint commissions or committees for particular resource management tasks in preference to utilising the specialist and independent Environment Court. We understand that the Court's judges are appointed on a permanent basis and thus are beyond any criticism of dependence upon their appointers for ongoing work. In contrast, the membership of commissions or committees appointed for particular tasks can be open to manipulation by the party with the power of appointment. Foodstuffs accepts that the role of the Environment Court may change as new structures for developing and approving planning instruments are implemented but considers that there is a need for truly independent assessment of such instruments and that the Environment Court remains the best body to carry out that role.

Foodstuffs suggest that the government await the outcome of the Auckland Unitary Plan process (if the Bill is adopted) before applying it elsewhere.

3.2.4: Empowering faster resolution of Environment Court proceedings

Changes are proposed to increase the Environment Court's existing power to enforce agreed timeframes e.g. the time period for exchanging evidence; strengthen existing provisions to require the parties to undertake alternative dispute resolution.

Foodstuffs **support** the proposal. In the commercial world planning delays cost money and efforts to speed up processes will reduce business costs.

Proposal 3: More efficient and effective consenting

3.3.1: A 10-working-day time limit for straight-forward non-notified consents

Under the proposed approach councils would have a shorter 10-working-day processing timeframe for those non-notified resource consents that are straight-forward. The Act would be amended to this effect. Criteria would be spelt out in regulations.

We **support** the proposal. A 10-working day processing timeframe is reasonable for straight-forward consents and will ensure that straight forward projects are not unduly delayed.

3.3.2: A new process to allow for an "approved exemption" for technical/minor rule breaches

The proposed approach would allow an activity to be "deemed permitted" by giving councils a small degree of tolerance to decide on a case-by-case basis that a full consent is not needed.

We **support** the proposal in concept. Providing limited discretion for councils to approve consents which would otherwise be very nearly permitted is a common-sense approach.

3.3.3: Specifying that some applications should be processed as non-notified

It is proposed to make sections 95A(3)(a) and 95B(2) further-reaching by allowing non-notification on the basis of other forms of regulation. Regulations could direct non-notification as a nationwide standard for some activity types.

We **support** this proposal. There may be common forms of activity where it makes sense to have a national regime rather than "reinvent the wheel 60 times". This approach would reduce business costs for developers and encourage more investment because developers could plan projects with greater certainty. Developers who were able to deal with one consenting agency might also benefit from reduced transaction costs.

3.3.4: Limiting the scope of consent conditions

The proposal would revise and strengthen the RMA provisions that set the types of conditions which can be put on different classes of consents. This might include limiting conditions so they are directly connected to the reason why a consent is required in the circumstances.

We **support** this proposal. Conditions on resource consents need to be both relevant to the activity for which consent is sought, its environmental effects, and be reasonable. The proposed limitations – that conditions are directly related to the provision in a district plan which has been breached, or the adverse environmental effects of the proposed activity, or matters agreed to by the applicant, appear to be a good basis on which to go forward.

3.3.5: Limiting the scope of participation in consent submissions and in appeals

The proposal involves amendments to the consenting process to limit the scope of submissions and third party appeals to only the reasons the application was notified and the effects related to those reasons. This would require the council to identify why the application is being notified and to identify specific effects that meet the notification tests in the Act.

Resource consent applicants are entitled to know why their application is being notified. Accordingly we agree that councils should be required to clearly identify the reason(s) why the application is to be notified including the specific effects that meet the notification test. Such as requirement will ensure that councils use the notification provisions for the purpose they were intended and make councils more accountable for these decisions.

We note the consultation paper has suggested changes to the process by which written approval is obtained from neighbours who are affected by a development. The concept that councils might invite comment on a proposal by a particular date and limit submissions to those aspects of the development that affect the neighbour is a useful and pragmatic suggestion.

3.3.6: Changing consent appeals from de novo to appeals by way of rehearing

Foodstuffs is **opposed** to any proposal to limit the de novo hearing of resource consent applications at the Environment Court on appeal:

(a) Foodstuffs' understanding of the proposal is that resource consent applications would have a first instance hearing before the council followed by an appeal where the Environment Court would be able to rely on the record of evidence presented at the first instance hearing or could choose to seek the provision of additional evidence in specific areas.

(b) That approach may reduce the cost of providing evidence at the appeal hearing level but it will also:

(i) Inevitably lead to parties presenting more comprehensive evidence at the first instance hearing which will therefore take on a more expensive and lengthy character.

(ii) Require parties to have the power of cross examination at the first hearing so that the evidence that might be placed before the Court on appeal is adequately tested. This will increase the cost and duration of the first instance hearing markedly. [NB: Cross examination will also be needed with regard to the proposed mechanism in Part 3.2.3 of the Paper for planning instruments.]

(c) The advantages of the current process in respect of resource consents are similar to those that apply with respect to planning instruments. That is, it enables matters to be addressed relatively speedily and inexpensively at the first instance hearing and for any matters that are not resolved at that point to then be addressed iteratively through more detailed hearings on appeal. Foodstuffs considers that the proposal will sacrifice that advantage (which applies to the majority of cases that do not proceed on appeal) in return for a potential reduction in the duration of the small proportion of matters that actually proceed on appeal. Thus it will add to the cost of resource consent processes for all parties as it will require a comprehensive hearing at first instance instead of the efficient mechanism that is currently available under the two stage process.

(d) The Environment Court mediation process is a useful mechanism to resolve minor matters.

3.3.7 Improving the transparency around consent processing fees

The consultation document proposes a new requirement for councils to set their own fixed charges for certain types of resource consent e.g. charges could be based on the type of activity, zone, level of non-compliance and/or activity status. The fixed charge would represent the full and final cost for a resource consent that met the criteria.

Where fixed charged were not required councils would be required to estimate the additional charges in advance of the application being processed (replacing the current provision for an estimate to be provided at the request of the applicant).

The proposals would improve transparency and give developers certainty about the cost of consents, and are **supported** on this basis.

3.3.8: Memorandum accounts for resource consent activities

A new provision would require councils to publish memorandum accounts specifically for their consenting activities. This would bring greater transparency to charging, improve the discipline not to over-charge or cross-subsidise, and avoid erratic fee adjustments, etc.

Foodstuffs **support** this proposal. The preparation of memorandum account would encourage councils to align consent processing fees with the cost of delivering these services and discourage cross-subsidisation with activities which are more appropriately funded by rates. Greater scrutiny in this regard should result in improved accountability by councils.

3.3.9 Allowing a specified Crown-established body to process some types of consent

It is proposed that either the call in provisions be expanded or new legislation be developed to enable the Minister to designate nationally important issues, such as the availability of land for housing, to be eligible for an alternative consenting process in specified circumstances.

There may be circumstances when the concept has merit, however there would need to be very clear criteria defining the circumstances and conditions under which an alternate national consenting process could be put in place, with appropriate checks and balances to safeguard against the inappropriate use of these powers. There is a risk that any such proposal would add complexity (and therefore cost) to consent processes.

3.3.10: Providing the consent authorities tool to prevent land-banking

It is proposed to enable consenting authorities to set conditions when approving section 223 survey plans to require construction work to be completed in shorter time than currently.

Foodstuffs does not understand why the Paper is addressing this issue and **opposes** the proposal:

(a) In practice, what is termed "*land banking*" involves the early identification by prospective developers or investors of land that is likely to become attractive for development in the future; the consolidation of ownership of those properties; the provision of appropriate zoning where needed; and, in some cases, the obtaining of resource consents. In many cases, those works occur many years before the market is ready or able to accommodate the proposed development but they give the developer and the wider community confidence that land can and in the fullness of time will be developed. Land banking is an example of strategic thinking and forward planning – qualities that are generally considered to be beneficial.

(b) Holding costs on land are high. It is unusual for developers and investors to delay the implementation of zoned and consented development other than where market circumstances indicate that it is not economically viable to develop. In Foodstuffs' experience, most developers and investors would prefer to develop land relatively early and thus minimise holding costs and release the funds for investment in further development elsewhere.

(c) The proposed provisions involve enabling consent authorities to impose conditions that require construction work on subdivisions to be completed within a specific time period failing which the survey plan will lapse. There is no rationale for that approach. Sub-dividers in particular seek to release capital as soon as possible and will not unnecessarily hold up subdivision of land. Furthermore, providing that subdivision consents lapse after a certain period of time will simply require developers to obtain new consents. That is likely to add to the delay prior to development occurring along with the cost (and hence risk) incurred by sub-dividers. It will discourage development from occurring rather than incentivise it.

Proposal 4: Better natural hazard management

In line with the recommendations of both the Canterbury Earthquake Royal Commission and RMA Technical Committee it is proposed that natural hazards be added as a matter in the principles of the RMA, and that section 106 be amended to ensure all natural hazards can be appropriately considered in both subdivision and other land-consents decisions.

It would be prudent to introduce requirements for the risks posed by natural hazards to be recognised and planned for. However consent conditions around risk mitigation must be commensurate to the probability and significance of the underlying risk. There is concern that an over-zealous approach by the consenting authorities to natural hazard management will significantly increase development costs and have a stifling effect on property investment.

Proposal 5: Effective and meaningful iwi/Maori participation

Where a council does not have an arrangement in place with local iwi it would be required to establish an arrangement that gives the opportunity for iwi/Maori to directly provide advice during the development of plans (ahead of council decisions on submissions).

Foodstuffs believe the existing arrangements are appropriate.

Proposal 6: Improving accountability measures

It is proposed that Government provide local authorities with greater clarity on what they are expected to achieve, how performance would be measured and what they are expected to report on. This direction would be provided through an *expectations system* developed in collaboration with councils. Expectations might be related to a customer-centric approach to service delivery. There would be enhanced monitoring of service delivery through the national monitoring systems and improved state of the environment reporting.

We **support** the proposals. Greater clarity around Government priorities and performance expectations could be expected to lead to a greater focus on the things that really matter, more consistent reporting of performance outcomes, and greater accountability for the quality of service performance.

End

Attachment 1

FOODSTUFFS
(AUCKLAND) LIMITED

PROUDLY 100% NEW ZEALAND OWNED AND OPERATED

60 Roma Road, Mt Roskill
DX Box CX 15021
Auckland, New Zealand
Phone: 09 – 621 0600
Facsimile: 09 – 621 0297

28 February 2013

Committee Secretariat
Local Government and Environment Select Committee
Parliament Buildings
WELLINGTON, 6160

By email

Dear Sir / Madam,

Submission on Resource Management Act Reform Bill 2012
Part 2 – Changes to Local Government (Auckland Transitional Provisions) Act 2010

This submission is made on behalf of Foodstuffs (Auckland) Limited ("**Foodstuffs**"). Foodstuffs **wishes to appear** before the Select Committee to speak in support of its submission.

Foodstuffs' address for service and correspondence is:

Angela Bull
General Manager Property Development
Foodstuffs (Auckland) Ltd
60 Roma Rd
Mt Roskill
Auckland 1440
angela.bull@foodstuffs.co.nz
ph: 09 621 0714

This submission is in respect of Part 2 of the Resource Management Act Reform Bill 2012 ("**the Bill**"). Part 2 proposes to change the Local Government (Auckland Transitional Provisions) Act 2010 ("**LG Auckland Act**") by inserting a new Part 4 "*Process for the development of the first combined plan for Auckland Council*". The new Part 4 comprises a one-off process for the development and adoption of the forthcoming Auckland Unitary Plan ("**the Unitary Plan**").

Foodstuffs New Zealand Ltd ("Foodstuffs NZ") has made a separate submission on Part 1 of the Bill, as it relates to changes to the Resource Management Act 1991 more generally.

Foodstuffs' submission is as follows:

Foodstuffs' Interests

1. Foodstuffs' is a cooperative that, through its members, owns and operates PAK'nSAVE, New World and Four Square supermarkets and Gilmours wholesalers in the wider Auckland region. The Foodstuffs companies are 100% New Zealand owned and its stores are operated by its members. Foodstuffs is the leading retail and supermarket organisation in New Zealand, operating 25 PAK'nSAVE and 49 New World stores in the upper half of the North Island.

2. Foodstuffs' interests are directly and significantly affected by provisions in regional policy statements, district plans and regional plans. Accordingly, Foodstuffs takes an active part in strategic planning processes throughout the Auckland region and will do so through the forthcoming Auckland Unitary Plan process. To that end, Foodstuffs has been liaising with Auckland Council ("**Council**") with regard to the planning issues that are likely to be of concern to it in the Unitary Plan.

3. Foodstuffs is concerned that the Bill will increase the time, effort and expense that it will need to invest in the Unitary Plan process and for that reason makes this submission on the Bill.

Summary of Submission

4. While Foodstuffs supports the intention to reduce delay and cost through the Unitary Plan process, it considers that the single hearing process proposed in the Bill will not generate the benefits anticipated by the Council and that Part 2 should be deleted from the Bill. The Environment Court has identified ways in which it can improve the efficiency of the appeals and Foodstuffs considers that the Council should work cooperatively with the Court to speed up the mediation and appeals process for the Unitary Plan but within the existing statutory framework.

5. If Parliament elects to retain Part 2 of the Bill then Foodstuffs considers that changes need to be made to ensure that the single hearing process for the Unitary Plan functions appropriately. To that end, Foodstuffs' submission is:

    a. Clause 125 of the Bill is supported so that the proposed Unitary Plan does not have legal effect from the date of its public notification (other than the exception under section 86B of the RMA);

    b. Council should be able to initiate variations to the proposed Unitary Plan;

    c. Clause 124 of the Bill should be deleted, which allows the Minister of the Environment to promulgate regulations that could amend and override the process set out in Part 4 of the LG Auckland Act;

    d. The hearings panel ("**the Panel**") should comprise of independently appointed members, without involvement of the Council;

    e. The Panel should be chaired by a legally qualified person and ideally an Environment Court judge;

f. The Panel should include more than one person qualified to act as the chair (i.e. at least two current Environments Court judges);

g. A significant portion (at least 50%) of the Panel membership should comprise current Environment Court members;

h. The Council should be required to appear as a party to the proceedings;

i. Submitters should have a right of cross examination of the Council officers who are responsible for the relevant Unitary Plan provisions and the writers of further evaluation reports for the Ministry of the Environment;

j. Any objections in respect of procedural decisions by the Panel should be determined by an independent authority or enable a right to appeal to the Environment Court on those procedural matters;

k. Only Panel members who are present throughout the relevant part of the hearing should be entitled to be involved in making findings and recommendations on that aspect;

l. The provisions in the Bill that enable the Panel to recommend alterations to the Unitary Plan that are raised during the course of the hearings but are beyond the scope of submissions on the Unitary Plan should be deleted; and

m. All appeal rights (whether or not limited to matters of law) should be to the Environment Court.

n. The Panel should have *regard* to the Auckland Spatial Plan but Foodstuffs would strongly oppose any suggestion that the Unitary Plan should give *effect* to the Spatial Plan

Primary Submission on Part 2

6. Foodstuffs' primary recommendation is that Part 2 of the Bill be deleted and that the Council work with the Environment Court to maximise the efficiency of the existing two stage (Council and Environment Court) Resource Management Act ("**RMA**") hearing process for the Unitary Plan.

7. Foodstuffs supports the intention to shorten the time frame within which planning instruments and in particular the Unitary Plan are made operative and is keen to ensure that the cost of such processes are minimised. That support is conditional, however, on the Unitary Plan provisions that arise from the process being of at least the same high quality of those that they are replacing.

8. The Unitary Plan will influence investment in Auckland for many years. The RMA contains provisions that address the interim period whilst a proposed planning instrument is being tested and Foodstuffs along with other participants in the planning process is familiar with those interim mechanisms. Accordingly, Foodstuffs considers that, to the extent that a conflict arises between the quality of the provisions that arise from the

Unitary Plan process and the speed of that process, it is preferable for a more cautious process to be retained.

9. Foodstuffs is concerned that the single hearing process proposed in the Bill (ie: without a general right of substantive appeal to the Environment Court) will not generate the intended benefits. In particular, Foodstuffs is concerned that, in practice, the proposed regime:

    a. Will increase costs for parties such as Foodstuffs; and

    b. Will not generate any reductions in the duration or complexity of the process.

10. By way of explanation:

    a. The current two stage (council and Court) hearing process for planning instruments enables an iterative improvement and refinement in the planning provisions and an efficient use of resources with the focus and resources eventually being placed on the contentious matters that go to appeal.

    b. In practice, most matters addressed in planning instruments are resolved through the initial council hearing. Of the small proportion of matters that go on appeal, most are resolved through mediation. It is only the balance of contentious issues that proceed to full hearing before the Environment Court.

    c. The council hearing at first instance acts as a sieve for issues. Parties can present relatively brief but focussed cases. If the council accepts their submission then no further work needed. If the council rejects the submission then greater resources can be placed on the matter on appeal.

    d. In practice, council committees do not want to hear extensive evidence on matters. They prefer to get a good understanding of all issues then to issue decisions which can be refined through the appeal process.

    e. In contrast, a single substantive hearing means that parties will no longer have the backstop of an appeal right to rely on. They will need to present full cases on all matters. In practice, that will require substantial evidence on all matters raised in the submission, with the level of detail currently found only on appeal, cross examination and more extensive legal submissions. Thus the single substantive hearing will resemble an even more extensive Environment Court hearing rather than the current first instance hearing before a council.

    f. The critical issue is that such an extended hearing will be required for all aspects of the Unitary Plan and not just those that go to hearing on appeal as is currently the case. The additional duration of the hearings and higher quality and volume of evidence required will significantly increase costs for all participants.

    g. Currently, any legal or procedural flaws in first instance council decisions are cured by the right of appeal to the Environment Court. The loss of that appeal right will mean that decision makers on the Unitary Plan will need to draft more considered decisions if they are to avoid challenge by way of judicial review or

appeal on matters of law. That will also extend the duration and cost of the process.

h. Given those changes, it is likely that the time period before decisions on the Unitary Plan are issued will be greater than is the case with the two stage process. Under the two stage process those matters that are not appealed become operative in effect following the issue of council decisions. Thus the Unitary Plan process will extend the period of time before any of the Unitary Plan becomes operative in effect.

11. Foodstuffs considers that the best way to reduce the duration of the Unitary Plan process would be to retain the two stage hearing approach while ensuring that the Council and the Environment Court work constructively together to improve the mediation and hearing process. The Court has issued papers that explain how its resources can be applied to that goal.

12. It is Foodstuffs' experience that the delays that currently occur in the Environment Court mediation and hearing process are largely the result of inadequate resourcing on the part of councils rather than being the fault of the Court or other parties. The Bill will not resolve those problems which are also likely to compromise the single hearing process.

The following comments have relevance if the Committee elects to retain Part 2 of the Bill.

Unitary Plan Content and Status

13. Foodstuffs supports clause 125 of the Bill which is consistent with the provisions of the Resource Management Act 1991 (the "RMA"):

    a. The usual provisions in the RMA regarding the status of plans will apply and the Unitary Plan will not have interim legal effect on notification (other than under section 86B of the RMA) and will only become operative once notified in accordance with clause 20 of Schedule 1 of the RMA (proposed section 154 of the LG Auckland Act). Those provisions were introduced in the 2009 amendments to the RMA.

    b. Given the proposed timeframe for consideration of the Unitary Plan, the Unitary Plan's wide scope and theme of change, and the untested nature of its provisions prior to the Panel's consideration; it is considered appropriate that the usual provisions of the RMA should apply.

14. Foodstuffs asks that the Bill be amended to allow Council to initiate variations:

    a. Under proposed section 121 of the LG Auckland Act, the usual ability for Council to make amendments to proposed plans through variations before the plan is operative has been removed. Changes will only be able to be made to the Unitary Plan in response to a Hearing Panel's recommendation or under clause 4 of Schedule 1 of the RMA, which relates to the insertion of designations.

b. Presumably this is to avoid complicating the Unitary Plan process with variations but it will have the effect of casting regional and local planning in stone during the three or four year process envisaged.

c. Private plan changes have been a major planning mechanism in Auckland over the past decade. That has reflected the dynamic nature of the region and the fact that local government entities have not been pro-active regarding planning. Once submissions have been lodged on the Unitary Plan there will be no way to initiate private plan changes to that document. In the absence of an ability for Council to initiate variations, planning will be unable to advance in the region other than via resource consents, even if the Council and landowners agree that the appropriate course is to initiate a variation.

15. Foodstuffs strongly opposes clause 124 of the Bill that allows the Minister of the Environment to promulgate regulations that could amend and override the process set out in Part 4 of the LG Auckland Act:

    a. Clause 124 allows the Minister to promote such regulations if he or she considers that they are necessary or desirable for the development of the Unitary Plan and consistent with the purposes of the RMA. This is a very broad and unusual discretion that effectively gives the Minister a power to override the process introduced in the Bill.

    b. Foodstuffs considers it constitutionally inappropriate to enable a Minister through regulation to override or amend a process introduced by statute. If the Bill is enacted then the Unitary Plan process in its preferred form will reflect the will of Parliament and will have been informed through this select committee process. That process will have significant cost and practical implications for Foodstuffs and other submitters. Foodstuffs considers that the process should not be amended other than by Parliament following another public consultation process.

    c. Leaving aside those constitutional concerns, Foodstuffs is concerned that clause 124 will encourage lobbying of the Minister for the time being (remembering that the Unitary Plan will extend beyond the term of the current Government) by Council or private parties in order to alter the process to one considered more favourable.

    d. This clause is inappropriate and unnecessary and should be deleted.

Constitution of Hearing Panel

16. The hearing of submissions on the Unitary Plan will be conducted by the Panel which will be appointed by the Minister for Environment and Minister of Conservation in consultation with Council and the Independent Māori Statutory Board. Foodstuffs supports the independent appointment of the Panel and would oppose any greater role or involvement by the Council in the panel's appointment.

17. Foodstuffs seeks a number of refinements to the provisions governing the Panel.

18. Foodstuffs asks that the Bill be amended to provide that the Panel is to be chaired by a legally qualified person and ideally an Environment Court judge:

    a. The Bill provides that the members of the Panel will have expertise in the RMA, regional and district planning documents, tikanga Māori and Tamaki Makaurau. There are no requirements as to special qualifications or experience required of the chairperson (ie: above and beyond that of members of the Panel generally).

    b. The Panel will be dealing with a very lengthy and complex document. Its recommendations, if accepted by Council, will be final. The recommendations will need to be legally accurate and the process will need to be defendable. Inevitably the hearings will be run on a more formal basis than a first instance council hearing (ie: akin to a court or board of inquiry process). Thus the chair ought to have a legal qualification and experience and ideally be a current or retired judge.

    c. Foodstuffs has a strong preference for judges with practical experience of RMA law to be appointed as they are likely both to be familiar with the statutory framework and to have a sound understanding of the planning context which will be essential when dealing with the matters of detail. Environment Court judges are specialists in regional and district planning law whereas most High Court judges have little practical experience in the area and Foodstuffs therefore recommends that the chair of the Panel be an Environment Court judge or, failing that, a retired judge of that Court.

19. Foodstuffs asks that the Bill be amended to enable the Panel to include more than one person qualified to act as the chair (i.e. at least two current Environments Court judges):

    a. The Unitary Plan will be a very large document and the hearings process will incur a great deal of cost and effort from parties. There is no guarantee that the recommendations will be issued until the end of the hearing process.

    b. There is a risk that the process will be compromised if the chair of the Panel is unable to complete their task (through incapacitation or otherwise). That could result in the abandonment of the whole hearings process or part of it.

    c. Accordingly, the process requires a degree of redundancy through the appointment of a second person able to act as chair. That will also enable two sub-committees, each with a judicially qualified chair, to run in parallel.

20. Foodstuffs asks that a significant portion (at least 50%) of the Panel membership comprise current Environment Court members (which may include the chair):

    a. The independence of the Panel will be critical to parties having confidence in the process.

    b. The Bill provides for Ministerial appointment of the Panel. That is preferable to appointment of a committee by the Council. Foodstuffs would oppose any suggestion that the Council play a greater role in the Panel appointment process.

    c. More generally, Foodstuffs is uncomfortable with "*independent*" commissioners being appointed for one off cases or processes. Foodstuffs considers

independence is best ensured through the use of adjudicators whose appointment is permanent and whose on-going income stream is completely unrelated to the extent to which they support or challenge particular positions. Otherwise there is a risk that at least some appointees will not feel free to form potentially opinions that may be found challenging by Council or the Government. That is characteristic of an appropriate separation of powers and is the basis for permanent appointments to judicial positions.

d. In the context of the RMA, the most appropriate adjudicators are Environment Court commissioners whose appointments are for an extended period of time and reflect expert qualifications and experience. A number of those commissioners are based in Auckland and have particular skills and expertise that would render them ideal for this task.

Hearing Procedure

21. Foodstuffs asks that the Bill be amended to require Council to appear as a party to the proceedings and confer on submitters a right of cross examination of the Council officers who are responsible for the relevant Unitary Plan provisions and the writers of further evaluation reports for the Ministry of the Environment:

    a. Submitters on the Unitary Plan who indicate a wish to be heard will have a right to speak at the hearing (either personally or through a representative) and may call evidence (proposed section 125 of the LG Auckland Act). The Panel may permit parties to question and cross examine other parties and witnesses but there is no statutory guarantee of such a right.

    b. Council is required by the Bill to attend each hearing session to assist the Panel but it is not clear whether the Council officers will prepare background reports or will be required to give evidence. The drafting in proposed section 132 suggests that the Panel may permit the parties to cross examine a Council officer giving evidence but that there is no express right to cross examine the Council officers. Similarly it is not clear whether the Panel's power to allow questioning extends to allow cross-examination of the officers or consultants who audit the further evaluation reports for the Ministry of the Environment.

    c. It is essential that submitters be able to test the Council's assumptions and evidential case. That requires the provision of evidence on the part of the Council and its participation as a party in the hearing. Cross examination is a critical element in the testing of evidence and of the assumptions relied on by Council in preparing the Unitary Plan. Given the curtailment of appeal rights, the value and constitutional importance of cross examination in this case needs to be expressly acknowledged in the Bill.

22. Foodstuffs asks that the Bill be amended to ensure that any objections in respect of procedural decisions by the Panel are determined by an independent authority or that there is a right to appeal to the Environment Court on those procedural matters:

a. The Bill confers on the Panel broad powers to direct pre-circulation of evidence, make directions (including the strike out of a submission), commission reports, exclude the public and summon, pay or protect witnesses as if it were a Commission of Inquiry (proposed sections 132 – 138 of the LG Auckland Act).

b. If the Panel strikes out a submission the submitter has the ability to object but that objection will be determined by the Panel itself and there are no rights of appeal.

c. It is inappropriate and unfair for the Panel to determine appeals from or objections to its own determinations. Instead, those matters should be determined by an independent body (eg: an administratively separate review board) or be subject to appeal to the Environment Court.

Panel Recommendation

23. Foodstuffs asks that only Panel members who are present throughout the relevant part of the hearing be involved in making findings and recommendations on that aspect:

    a. Proposed new section 155 of the LG Auckland Act provides that the Panel will consist of a chairperson and will have three to seven members. Three members of the Hearing Panel will need to be present at each hearing session and if the chairperson is not present he or she must appoint another member of the Panel as chairperson for that session.

    b. After the hearings are completed, the Panel must make recommendations on the proposed Unitary Plan provisions and the submissions (including its reasons for accepting or rejecting submissions). Under proposed section 139 it is the *Panel* that makes the recommendations when potentially only three of its members would have been present for the relevant hearing sessions.

    c. There is no indication that Panel members who miss a given session will be prevented from making findings and recommendations on matters heard at that session. The implication is that members of the Panel who are not present during a particular part of the hearing can still take part in the decision making on that topic. That would be a far less rigorous process than applies in the Courts and that ought to apply within first instance council hearings under RMA.

    d. The Unitary Plan will have significant implications for submitters' interests. Those submitters will be putting a lot of time and effort into their presentations to the Panel. They expect that material and the cross examination of witnesses to be heard and taken into account by decision makers. Given the value of the assets affected by these recommendations and the importance of the issues to parties, Panel members who are not present during a presentation must not have any role in determining the outcome.

24. Foodstuffs accepts that the Panel must have *regard* to the Auckland Spatial Plan but would strongly oppose any suggestion that the Unitary Plan should give *effect* to the Spatial Plan:

    a. The Bill requires the Panel to take into account the reports and matters listed in the new section 140 in making its recommendations. Of particular note is that the Panel must have regard to the Auckland Spatial Plan when doing so (proposed sections 139 and 140 of the LG Auckland Act).

    b. In doing so, the Bill formally gives the Auckland Plan legal status under the RMA that it did not have when it was consulted on. That said, Foodstuffs considers that the Spatial Plan would have been included in the category of management plans and strategies under other Acts that Council would be required to have regard to under section 74(2)(b) of the RMA.

    c. The Spatial Plan submission and hearing process were flawed and the final version of the Spatial Plan included changes that were not sought in submissions and were never tested. Accordingly, it would be inappropriate to require the Unitary Plan to give *effect* to the Spatial Plan.

25. Foodstuffs strongly opposes the provisions in the Bill (proposed new section 139 of the LG Auckland Act) that enable the Panel to recommend alterations to the Unitary Plan that are raised during the course of the hearings but are beyond the scope of submissions on the Unitary Plan:

    a. Proposed section 139 of the LG Auckland Act enables the Panel on the Unitary Plan to recommend alterations to the document that are beyond the scope of submissions on the Unitary Plan. That is, the Panel could on the basis solely of its own analysis recommend changes that no parties have ever been advised of or had an opportunity to comment on. Alternatively, parties (including the Council) could suggest new provisions during the hearing which might then be adopted by the panel without third parties being aware of the relief sought or the evidence filed in support of it. If the Council accepts such changes recommended by the Panel then there will be no right of appeal on the merits to the Environment Court on those matters.

    b. This is a significant departure from the law applying to all other planning instruments and could give rise to significant adverse effects on landowner rights without any ability to comment on the matter or to test any evidence relied on. It will open the Panel up to judicial review and appeals on matters of law and hence is likely to prolong the planning process.

    c. Foodstuffs consider this provision to be practically problematic and constitutionally inappropriate.

Appeal Rights

26. The key aspect of the Bill is the truncation of substantive appeal rights on the Unitary Plan decisions. Proposed sections 149 and 152 address this matter:

    a. Where the Council *accepts* the Panel's recommendations, appeal rights are limited to matters of law. Appeals must be lodged with the High Court.

    b. Where the Council *rejects* the Panel's recommendations, parties retain the right to appeal that decision to the Environment Court.

27. Leaving aside the fact that the Unitary Plan process will inevitably be more complex and time consuming than the current two stage process, the loss of appeal rights could only be acceptable if the Unitary Plan process was as independent and procedurally fair as the Environment Court process is. For reasons noted above Foodstuffs considers that the proposed Unitary Plan process does not yet meet that test. Accordingly Foodstuffs opposes the loss of appeal rights to the Environment Court.

28. Furthermore, Foodstuffs considers that all appeal rights (whether or not limited to matters of law) should be to the Environment Court:

    a. The Bill confers a right of appeal on matters of law from the Panel recommendation to the High Court. Foodstuffs' preference is that in the first instance the right of appeal on matters of law be to the Environment Court which is the expert forum in this regard.

    b. There could be a large number of appeals arising from the Unitary Plan process and that may place pressure on the High Court. In contrast the Environment Court, which will not be dealing with the flood of appeals it might otherwise expect from the Unitary Plan, will have the capacity and knowledge needed to address these matters.

    c. If the Council accepts some Panel recommendations but rejects others then there is a prospect of a mix of related substantive appeals and appeals on matters of law arising (i.e. substantive appeals to the Environment Court may raise similar legal issues to appeals on matters of law that are being heard in the High Court). In those circumstances, the most effective means of addressing the issues may be through a single comprehensive hearing. That will not be possible if the two sets of appeals are lodged with different Courts.

Yours faithfully
FOODSTUFFS (AUCKLAND) LIMITED

Angela Bull
General Manager Property Development