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BETTER URBAN PLANNING – DRAFT REPORT

Trustpower Limited ('Trustpower') appreciates the opportunity to provide feedback on the report entitled Better Urban Planning by the Productivity Commission ('Draft Report').

By way of introduction, Trustpower is the fifth largest electricity generator in New Zealand and has electricity generation infrastructure spread across 12 regions and 21 local authorities. Trustpower has long-standing experience with the divergent resource management planning frameworks utilised by local authorities across New Zealand.

A key regulatory focus for Trustpower is ensuring that statutory planning documents under the Resource Management Act ('RMA') recognise the natural and physical resource requirements of renewable electricity infrastructure, and their importance to social and economic wellbeing. The company also seeks to ensure that emerging statutory planning documents do not adversely affect, or potentially undermine, the existing resource consents held by Trustpower. The achievement of this objective can often rely upon the utilisation of appeals to the Environment Court (or the High Court where appeal rights have been limited) on the provisions of statutory planning documents administered by local authorities. These appeal rights are critical safeguards to ensure robust decision-making, appropriate consideration is given to climate change and the need for renewable energy generation, and that statutory planning documents appropriately provide for the sustainable management of natural and physical resources.

Trustpower is supportive of the concept of ensuring that resource management processes are efficient, which appears to be a key recommendation of the Draft Report and aligns with many of the proposed amendments to the Resource Management Act 1991 ('RMA') set out in the Resource Legislation Amendment Bill ('Bill'). However, it is important that consultation and plan-making processes are inclusive of all stakeholders, provide for the rigorous consideration of competing submissions by way of robust hearing processes, and the retention of appeal rights to the Environment Court. The retention of these principles does not mean that plan-making processes need to be time-consuming and inherently litigious.

The Draft Report also suggests that the RMA is flawed given that it did not appropriately address the tension between economic development and environmental protection interests when it was enacted – and that local authorities have had to grapple with these (perceived)

competing priorities in the development of statutory planning documents and the consideration of resource consent applications over the last 25 years. It is Trustpower's experience that the weighing of economic development and environmental protection considerations will always require detailed assessments at a regional or local scale due to the particular environmental values in question and the potential economic benefits being generated. As such, the usefulness and effectiveness of an over-arching policy statement by the Government that specifies how natural and physical resources should be managed across New Zealand for the next term of governance is uncertain.

It may be more appropriate to re-evaluate the matters listed in sections 6 and 7 of the RMA. While it is recognised that the Bill is recommending an amendment to section 6 of the RMA to acknowledge the risks associated with natural hazards, sections 6 and 7 of the Act are predominantly focussed on the preservation, protection and maintenance of ecological, landscape, cultural and perceptive values. No regard is given to the importance of infrastructure or land uses (excluding section 7(j) of the RMA), or the importance of economic benefits, in decision-making under Part 2 of the RMA.

Given that recent court decisions[1] have determined that a failure to achieve one of the matters in section 6 of the RMA means that a resource consent application will effectively not achieve the sustainable management purpose of the RMA, there is an increased need to ensure that the matters of national importance and other matters in sections 6 and 7 of the RMA appropriately reflect the objectives of environmental protection and economic development.

The sections below provide Trustpower's response to the questions raised in the Draft Report. Further evidence and elaboration on these matters can be provided by Trustpower to assist the Productivity Commission with its thinking.

Q7.1 - Would it be worth moving to common consultation and decision-making processes and principles for decisions on land use rules, transport and infrastructure provision? How could such processes and principles be designed to reflect both:

- ***The interest of the general public in participating in decisions about local authority expenditure and revenue; and***

- ***The particular interest of property owners and other parties affected by changes to land use controls?***

The Draft Report notes that extensive appeal rights available under the current planning system in New Zealand allow both people and organisations not directly affected by a planning matter to 'hold up' decisions through court action, which is considered to contribute to local authorities behaving in a risk-averse manner.

The Draft Report also notes that any appeal rights on statutory planning documents should be limited to people or organisations 'directly affected' by any proposed provisions or rules. It considers that the case for a right to challenge a local authorities land use regulation is strongest for those people whose property, livelihood or wellbeing is impaired in some way by the decision. While that is relevant, it does not, in Trustpower's view, responsibly capture the complete range of environmental or economic interests that the RMA is required to consider.

Trustpower is supportive of local authorities being provided with a broad toolbox of consultation options with respect to the development of statutory planning documents. In particular, the company is supportive of consultation on statutory planning documents being

[1] For example, *Environmental Defence Society Inc v New Zealand King Salmon Company Ltd [NZSC 38].*

'front-loaded' in order to seek the greatest degree of consensus between local authorities, resource users, landowners, iwi authorities and environmental groups – such that the number and scope of appeals to the Environment Court on statutory planning documents is reduced.

Furthermore, Trustpower supports consultative / collaborative processes that are inclusive of all relevant stakeholders. In this regard, collaborative processes should represent the views of all parties with an interest in the management of natural and physical resources (i.e. not just those deemed to be 'directly affected'). It is critical that any refinement of consultation or decision-making processes for statutory planning documents does not remove the appeal rights afforded to submitters via schedule 1 of the RMA. The retention of these rights is necessary in order to maintain appropriate safeguards to ensure that statutory planning documents promote the sustainable management of natural and physical resources, and that the law has been appropriately applied by decision-makers.

Trustpower also considers that there are inherent difficulties in attempting to limit participation in statutory planning processes to those that are 'directly affected'. While out-of-scope or vexatious submission can be frustrating and take up time, there are mechanisms within the RMA to address these issues (but which are seldom used). It is important that hearing panels are not forced to decide on the appropriateness of individual submissions and whether submitters are directly affected before submitters have had the opportunity to present their case.

It is also important that submitters who have a longer-term development interest within the jurisdiction of a local authority are not accidentally excluded from statutory planning processes because they are not 'directly affected'. Trustpower often participates in statutory planning processes within the jurisdiction of local authorities of which it has no existing electricity generation infrastructure. It does this because it has long-term development aspirations in an area and because there are often limited opportunities to ensure that the statutory planning framework that applies to electricity generation infrastructure is balanced and / or enabling. There would, however, be a risk in these circumstances that Trustpower was not considered directly affected by a statutory planning document due to its longer term or undisclosed interests within the jurisdiction of a local authority.

Q7.2 - Should all plan changes have to go before the permanent independent hearings panel for review, or should councils have the ability to choose?

The Draft Report suggests that a permanent independent hearings panel should be utilised to hear and consider any new statutory planning documents or plan changes. This option would include the right for local authorities to retain the right to accept or reject recommendations from the independent hearing panel, and limitations on appeal rights for submitters in the event that the local authority accepts the recommendations of the independent hearing panel (as per the approach adopted for the Proposed Auckland Unitary Plan).

Trustpower considers that there is potential merit in having independent hearing panels consider statutory planning documents on behalf of local authorities. This approach would assist in ensuring that decision-making on statutory planning documents is more robust and consistent, and would most likely improve the 'testing' of competing evidence on matters relating to the management of natural and physical resources.

In particular, the utilisation of independent hearing panels would ensure that panels have the appropriate mix of expertise and experience to consider what are increasingly complex matters in statutory planning documents. As such, Trustpower considers that the concept of all statutory planning documents being considered by independent hearing panels ought to be explored further.

Notwithstanding the above, Trustpower does not support the concept of a singular national body that acts as an independent hearing panel for all statutory planning documents across New Zealand. Local authorities should be able to retain independent experts to hear submissions on statutory planning documents that have relevant local expertise. This is consistent with the approach adopted by the Government in the selection of the independent hearing panels to consider the Proposed Auckland Unitary Plan and the Christchurch Replacement District Plan.

Trustpower also considers that the use of an independent hearing panel to hear and consider submissions on statutory planning documents should not negate the ability for appeals to the Environment Court. As noted above, there is a need for appropriate safeguards to ensure that statutory planning documents promote the sustainable management of natural and physical resources, and that the law has been appropriately applied by decision-makers. The fact that the Environment Court often substantially amends the decisions of local authorities on statutory planning documents after a more forensic examination of expert evidence and the consideration of higher order policy documents should not be seen as flawed exercise. Rather, it highlights the importance of retaining appeal rights to ensure robust decision-making.

Q8.1 - What should be the process for developing a Government Policy Statement (GPS) on environmental sustainability? What challenges would developing a GPS present? How could these challenges be overcome?

The Draft Report suggests that a future planning framework could include an overarching Government Policy Statement ('GPS') on environmental sustainability and that this would establish environmental goals to be achieved that are quantifiable and measurable. The Draft Report also suggests that the GPS would replace National Policy Statements ('NPS') and National Environmental Standards ('NES') – and, therefore, it is assumed that lower-order statutory planning documents would also have to give effect to the GPS.

Trustpower questions the need for a GPS on environmental sustainability as the Government already has the option to establish objectives and standards for the management of natural and physical resources by way of NPS and NES. Rather than replacing NPS and NES, Trustpower considers that the more appropriate response is for the Government to increase their utilisation of NPS and NES to direct how particularly natural or physical resource management issues should be managed by local authorities – with the most recent examples being the further refinements to the National Policy Statement on Freshwater Management and the development of the National Policy Statement on Urban Development.

Furthermore, Trustpower considers that the proposal within the Bill to introduce a combined process for the preparation and consideration of NPS and NES will provide the Government with a more efficient and effective suite of tools to address matters of national significance (as well as the priorities of the Government).

Trustpower also question whether a GPS would be developed in the same manner as NPS or NES and whether in reality it would simply represent a broad manifesto of the Government of the day. Under the latter scenario there is a concern that the GPS would be frequently reviewed and subject to amendment by successive Governments (i.e. potentially every three years). This would have consequential effects for the development and administration of statutory planning documents administered by local authorities.

It also unclear how a GPS would be developed and whether it would be subject to a robust decision-making process. While any NPS will effectively direct how the Government considers

particular natural and physical resources should be managed in order to achieve the sustainable management purpose of the RMA, they have all been subject to Boards of Inquiry (at least in their initial development phase) which have enabled the presentation of evidence on the appropriateness of the objectives and policies proposed by the NPS. In particular, these processes have enabled local authorities, iwi and developers to present evidence on the merits of the objectives and policies relatively to their areas of interest.

It is unclear whether a similar approach to that outlined above would be adopted for the development of a GPS, although it seems unlikely if the GPS is more akin to a Government manifesto.

Q11.3 - Do councils commonly use cultural impact assessments to identify the potential impact of developments on sites and resources of significance to Māori? How do councils set the thresholds for requiring a cultural impact assessment? Who sets the fees for a cultural impact assessment and on what basis? What are the barriers to cultural impact assessments being completed in good time and how can those barriers best be addressed?

Trustpower notes that it is not local authorities that seek cultural impact assessments to identify the potential effects of a development on sites / values of significance to Maori. Rather, cultural impact assessments are usually sought from iwi authorities by resource consent applicants in order to inform their assessment of environmental effects.

Local authorities do not, in Trustpower's experience, adopt a consistent threshold for requiring a cultural impact assessment. The circumstances as to when cultural impact assessments are required vary between local authorities and are increasingly set out in the relevant statutory planning documents (e.g. the Bay of Plenty Regional Policy Statement and the Proposed Auckland Unitary Plan (as notified)).

However, local authorities are increasingly specifying that a cultural impact assessment may be required for a wide range of different activities regardless of their scale. In some circumstances local authorities state that only iwi authorities can determine whether a cultural impact assessment is required for all types of resource consent applications (e.g. the Bay of Plenty Regional Council). This means that decision-making on resource consent applications (regardless of scale) is deferred until a cultural impact assessment is provided or the iwi authorities advise that one is not required (or resource consent applications are notified if agreement as to necessity or timeliness cannot be reached).

While Trustpower accepts that some development proposals will inevitably require a cultural impact assessment due to their scale or location, it is considered that there is a need for local authorities to exercise some degree of discretion / judgement as to when they are actually required – particularly to ensure the expediency of the processing of resource consent applications. For example, it may not be necessary for a small scale like-for-like application to require a cultural impact assessment.

It is relevant that a similar approach is already adopted by local authorities with respect to determining who may be adversely affected by a resource consent application in accordance with section 95 of the RMA and whether any technical assessments are required to inform a resource consent application.

With respect to the barriers that hinder cultural impact assessments being completed in good time, Trustpower experiences the following:

- Local authorities not being willing to make a determination as to when a cultural impact assessment may actually be required based on the potential significance of effects (leading to iwi authorities potentially being inundation with consultation enquiries); and / or

- Iwi not having sufficient expertise or capacity in the development of cultural impact assessments (including how cultural impact assessments are to be considered within the decision-making framework of the RMA).

As noted above, Trustpower accepts that some development proposals will require a cultural impact assessment. However, the timeframes for the completion of cultural impact assessments could be streamlined if there was a clearer threshold specified in statutory planning documents for when a cultural impact assessment was actually required.

With respect to the second matter, it is Trustpower's experience that the timeframes required to engage with iwi authorities over the preparation of a cultural impact assessment are mixed. While some cultural impact assessments are prepared in a timely manner and within a reasonable budget, Trustpower has had situations where it has taken three to four months to get confirmation from iwi authorities as to whether a cultural impact assessment is actually required.

Furthermore, some iwi authorities are unable to stay within scope or distinguish the current resource consent application from historical issues associated with the construction of the infrastructure 50 – 70 years ago (or alternatively want to consider the effects of activities that are permitted). This can lead to difficulties with respect to agreeing the scope and budget of cultural impact assessments between resource consent applicants and iwi authorities.

Given that local authorities can only consider the matters relevant to the resource consent application before it, Trustpower considers that further resources need to be made available to iwi authorities by the Government and / or local authorities so as to ensure cultural impact assessments are fit for purpose relative to the scale of the development proposed. This should include improving understanding by iwi authorities of the matters that can actually be considered when preparing a cultural impact assessment for a specific resource consent application.

Q11.4 - What sort of guidance, if any, should central government provide to councils on implementing legislative requirements to recognise and protect Māori interests in planning? How should such guidance be provided?

Trustpower accepts that there may be value in the Government preparing a NPS that provides directions to local authorities (and developers / resource users) as to how they should recognise and provide for Maori interests in the sustainable management of natural and physical resources.

The utilisation of a NPS would assist in providing clarity for local authorities as to how the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga should be recognised and provided for as a matter of national importance. It would also assist in ensuring a consistent approach between local authorities.

Trustpower consider a NPS could potentially provide guidance on:

- The appropriate protective measures to be applied to historic sites on private land;

- The circumstances as to when a cultural impact assessment will be required and what they should include; and

- The requirement for local authorities to consult with iwi on the development of statutory planning documents.

Q11.5 - In what way, if any, and through what sort of instrument, should legislative provisions for Māori participation in land-use planning decisions be strengthened?

Trustpower supports iwi authorities having a role in the development of statutory planning documents and for this role to be focussed at the 'front end' of statutory planning processes.

That said, any measures to strengthen the role of Maori in land use planning need to be transparent to all constituents and need to be cognisant of the existing obligations within the RMA with respect to the involvement of iwi authorities in the development of statutory planning documents. In particular, schedule 1 to the RMA already establishes clear obligations on local authorities to consult with iwi authorities during the preparation of statutory planning document. This consultation process is not limited to the period prior to the notification of the statutory planning document. As such, it is reasonable to assume that consultation between local authority and iwi authorities will occur throughout the development of statutory planning documents.

There are also requirements within Schedule 1 of the RMA for local authorities to take into account relevant iwi management plans.

In addition to the above, it should be recognised that the interests of iwi authorities in a post-settlement phase are economically diverse and extend much broader than just ensuring the protection of ancestral lands and resources. It is, therefore, important that increasing iwi participation in land use planning does not favour one landowner over others due to their direct involvement in the preparation and decision-making on statutory planning documents (or via decision-making on the grant or review of resource consents.

Q13.1 - What are the strengths and weaknesses of these two approaches to land use legislation? Specifically:

- ***What are the strengths and weaknesses in keeping a single resource management law, with clearly-separated built and natural environment sections?***

- ***What are the strengths and weaknesses in establishing two laws, which regulate the built and natural environment separately?***

Trustpower accepts, in principle, that there may be merit in splitting the RMA into two distinct pieces of legislation relating to the management of the built environment and the natural environment in order to provide a more specific / relevant legislative framework for urban planning (and vice versa for the management of the use, development and protection of natural resources in the other legislation).

That said, it is noted that the sustainable management of the built environment and natural environment is inextricably linked and integrated management is required in order to ensure the best outcomes for natural and physical resources. In this regard, it is increasingly necessary to regulate urban or land use activities in order to ensure the appropriate management of freshwater resources or significant national infrastructure. By way of example,

rural-residential or intensive development may need to be restricted or limited in hydro catchments in order to ensure that freshwater resources are not over-allocated or sensitive infrastructure is not adversely affected.

With the above in mind, a significant benefit of the RMA is that it establishes one legislative test and framework for the consideration of all activities affecting the use, development and protection of natural and physical resources. It provides the opportunity for the integrated, consistent and efficient management of resources. It also provides for the comprehensive assessment of development proposals that span regional and local authority jurisdiction's.

As already noted in this submission, it may be more appropriate to re-evaluate the matters listed in sections 6 and 7 of the RMA. These matters are predominantly focussed on the preservation, protection and maintenance of ecological, landscape, cultural and perceptive values, with little regard given to the importance of infrastructure or the built environment. A review of these matters would be supported by Trustpower.

Furthermore, the functions of regional and local authorities specified in sections 30 and 31 of the RMA could be amended to clearly specify that one of their key roles is providing for the built environment and enabling economic development opportunities.

Trustpower would welcome the opportunity to meet with the Productivity Commission to discuss these comments in more detail.

We hope the comments provided in this response are of assistance. If you have any questions or wish to discuss this matter further, please do not hesitate to contact the undersigned at richard.turner@trustpower.co.nz or on 027 403 8784.

Yours sincerely
Trustpower Limited

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