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**Public inquiry into the New Zealand's building and
construction sector**

RESEARCH PAPER

**LAWS 542: LEGISLATIVE DESIGN, DRAFTING AND
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Abstract

This paper sets out a terms of reference for a potential public inquiry into the New Zealand's building and construction sector. The objective of this potential public inquiry is to investigate the causes of significant issues in the New Zealand's building and construction sector. Some of these significant issues currently present in the New Zealand's building and construction sector are:

- (1) liability distribution;
- (2) inefficiency;
- (3) quality of the work been produced;
- (4) practice differs from the Building Act 2004.

Word length

The text of this paper (excluding abstract, table of contents, footnotes and bibliography) comprises approximately 3793 words.

Subjects and Topics

Building and construction law.

Public inquiry.

1 Problem and future consequences

In New Zealand, the Building Act 2004 (the Act) is one of the key statutes that governs the New Zealand’s building and construction sector.¹ The purposes of the Act are:²

- a) to provide for the regulation of building work, the establishment of a licensing regime for building practitioners, and the setting of performance standards for buildings to ensure that—
 - (i) people who use buildings can do so safely and without endangering their health; and
 - (ii) buildings have attributes that contribute appropriately to the health, physical independence, and well-being of the people who use them; and
 - (iii) people who use a building can escape from the building if it is on fire; and
 - (iv) buildings are designed, constructed, and able to be used in ways that promote sustainable development:
- (b) to promote the accountability of owners, designers, builders, and building consent authorities who have responsibilities for ensuring that building work complies with the building code.

Moreover, the New Zealand Building Code (NZBC), which is contained in Schedule 1 of the Building Regulations 1992, stipulates the performance criteria that all building work must comply with³ in order to satisfy the function requirement(s) of each technical clause and thereby satisfy the social objective(s) of each technical clause.⁴

There have been numerous amendments to the Act and the NZBC. Up to 10 October 2016, there have been 25 reprints of the Act since it received its royal assent on 24 August 2004 and seven reprints of the Building Regulations 1992 since it was made on 8 June 1992. More amendments to the Act and the NZBC are coming, as some changes are already made in amendment Acts and are

1 Ministry of Business, Innovation and Employment “Building regulatory framework” (21 March 2016) BUILDING PERFORMANCE <www.building.govt.nz/>; Ministry of Business, Innovation and Employment “New Zealand Building Code Handbook” (2014) BUILDING PERFORMANCE <www.building.govt.nz/>.

2 Building Act 2004, s 3.

3 Building Act 2004, s 17.

4 Ministry of Business, Innovation and Employment “How the Building Code works” (21 March 2016) BUILDING PERFORMANCE <www.building.govt.nz/>.

waiting to be brought into force, for instance, some of sections the Building Amendment Act 2012 such as ss 17 and 22 of the Building Amendment Act 2012. In addition, some modifications are already planned out, for example, a revised NZBC Clause C3.4(a) has been drafted. Despite the amendments made to the Act and the NZBC up to now, there are still major issues within the New Zealand building and construction sector that need to be addressed. Some of these issues are:

- (1) liability distribution;
- (2) inefficiency;
- (3) quality of the work been produced;
- (4) practice differs from the Act.

A Liability Distribution

As the joint and several liability rule stands at the moment, the local authorities acting as building consent authority (BCAs) almost always ends up paying for a majority of the loss claimed by a party in litigation. This is because local authorities are nearly always the last entity standing in proceedings. Since, the other parties involved in proceedings such as construction companies and architecture companies can go into liquidation or they can be very difficult to track down. Consequently, the costs incurred by local authorities get transferred to the ratepayers. In April 2015, the High Court of New Zealand in Auckland had awarded the largest leaky building payment in New Zealand so far to the building owners of The Nautilus in Orewa, Auckland (Note: total payment amount = \$25,072,507.80)⁵ in the case *Body Corporate 326421 v Auckland Council* [2015] NZHC 862. Auckland Council, who is the first defendant among the six defendants, is going to pay about \$23.7 million out of the total payment amount to the owners of The Nautilus⁶, which is about 95 per cent of the total payment amount. The second, third and the fifth defendant for this case are in liquidation. The plaintiffs had discontinued their claim against the fourth defendant.⁷ If the joint and several liability rule remains status quo, (Note: this means a party who suffered a loss can claim against one wrongdoer among the two or more parties that are liable for the

5 Anne Gibson "Orewa tower owners win NZ's biggest leaky building case" (30 April 2015) NZ Herald <www.nzherald.co.nz/>.

6 Tao Lin "Auckland Council to pay nearly \$24m in Nautilus leaky building case" (29 May 2015) stuff <www.stuff.co.nz/>.

7 *Body Corporate 326421 v Auckland Council* [2015] NZHC 862.

same loss or damage, for the recovery of the whole loss or damage. Then that one defendant can seek out contributions from the other wrongdoers⁸), the ratepayers are going to continue to unfairly pay unduly amount of money for the litigation taken against the BCAs and other entities.

Another liability concern is that individual building officials, which are people employed by territorial authorities (TAs), regional authorities or BCAs to ensure building compliance is achieved in accordance with the Act, regulations made under the Act and any other legal instrument, are not held directly liable for their actions. In New Zealand, the building consent accreditation body i.e. International Accreditation New Zealand (IANZ) accredits BCAs under s 250 of the Act⁹ and not the individual building officials. This can cause building officials to hide behind the BCAs' accreditation with regard to liability. Since, it is not the building officials' accreditation on the line when IANZ does its biennial reassessments, with the possibility of revocation of accreditation.¹⁰ Unlike New Zealand, several states in Australia such as New South Wales, Victoria and Queensland have mandated in law that all building surveyors or certifiers, which are similar to building officials in New Zealand, must be accredited by an authority such as Building Professionals Board which is an independent New South Wales government authority¹¹, in order to grant development certificates in the New South Wales context¹² or occupancy permits in the Victoria context¹³ which are within the scope of their accreditation/registration. If building officials hide behind the BCAs' accreditation regarding liability, the integrity of the New Zealand building and construction sector will be jeopardized. Since, individual building officials will not suffer any legal consequences for their mishaps. Furthermore, if the integrity of the New Zealand building and construction sector is compromised for a prolonged period, then the New Zealand building and construction sector is going to break.

8 New Zealand Law Commission "Joint and Several Liability" (2016) <www.lawcom.govt.nz/>.

9 Building Act 2004, s 250.

10 IANZ "Procedures and conditions of Building Consent Authority accreditation" (October 2015) <www.ianz.govt.nz/>.

11 Building Professionals Board "What we do" <bpb.nsw.gov.au/>.

12 Building Professionals Board "What a certifier does" <bpb.nsw.gov.au/>.

13 Victorian Building Authority "Appointing a building surveyor" (2 September 2016) <www.vba.vic.gov.au/>.

B Inefficiency

One of the findings from the 2009-2010 Building Act review was that “the building regulatory system is not broken, but that it is costly and inefficient”.¹⁴ The amendments made to the Act to date have not completely addressed the efficiency issue. Most BCAs still have a paper laden system for their building consent administration system which can create times delays and unnecessary costs for BCA customers. Also, the paper laden system creates difficulties for sharing workload between BCAs, between BCAs and contractors and among building technical personnel. These sharing workload difficulties and time delays are insignificant if New Zealand does not have a high demand for building work. Unfortunately, New Zealand does have a high demand for building work due to the lack of houses in New Zealand, the repair work resulting from the 2010 Canterbury earthquake and the 2011 Christchurch earthquake, the ongoing leaky building crisis which started from the late 1990s¹⁵ and the high demand for infrastructure developments and updates around New Zealand.

There is a lack of houses in New Zealand, since Department of Building and Housing (DBH)’s New Zealand Housing Report 2009/2010 has indicated a housing shortfall of 10,603 is expected between 2016 to 2021 (See Table 1). Table 1 “assumes that the average number of families per family household and the average number of people per other multi-person household remain constant at 2006 levels until 2031.”¹⁶ In 2006, the average number of families per family household was 1.041 and the average number of people per other multi-person household was 2.6.¹⁷ As for the repair work resulting from the 2010 Canterbury earthquake and the 2011 Christchurch earthquake, major commercial recovery building work is yet to begin and residential recovery building work is going to continue at a steady pace (See Figure 1). The Reserve Bank of New Zealand

14 Ministry of Business, Innovation and Employment “Legislative and other reviews” (23 June 2016) <www.mbie.govt.nz/>.

15 Law Commission *REVIEW OF JOINT AND SEVERAL LIABILITY* (NZLC IP32, 2012).

16 Department of Building and Housing “New Zealand Housing Report 2009/2010: Structure, Pressures and Issues” Ministry of Business, Innovation and Employment <www.mbie.govt.nz/> at 64.

17 Department of Building and Housing “New Zealand Housing Report 2009/2010: Structure, Pressures and Issues” Ministry of Business, Innovation and Employment <www.mbie.govt.nz/>.

predicts that the Canterbury rebuild will continuing beyond 2020.¹⁸ Lastly, as for the ongoing leaky building crisis, the number of Weathertight Homes Resolution Service (WHRS) claims lodged with the Ministry of Business, Innovation and Employment (MBIE) or prior to July 2012, with the DBH is increasing (See Figure 2), which means the number of properties in New Zealand that have weathertightness issues is rising and thereby more weathertightness remedial building work will be done.

Table 1: Table 4.1 of DBH’s New Zealand Housing Report 2009/2010 reproduced¹⁹

Period	Expected increase in the number of households	Expected increase in the number of new dwellings that would add to supply	Shortfall/surplus
2006 – 2009	66,000	55,734	-10,266
2009 – 2011	45,000	28,419	-16,581
2011 – 2016	112,800	98,028	-14,772
2016 – 2021	108,000	97,397	-10,603
2021 – 2026	104,000	89,946	-14,054
2026 – 2031	99,000	101,322	2,322

18 Amy Wood, Ilan Noy and Miles Parker “The Canterbury rebuild five years on from the Christchurch earthquake” (18 February 2016) RESERVE BANK OF NEW ZEALAND <www.rbnz.govt.nz/>.

19 Department of Building and Housing, above n 16.

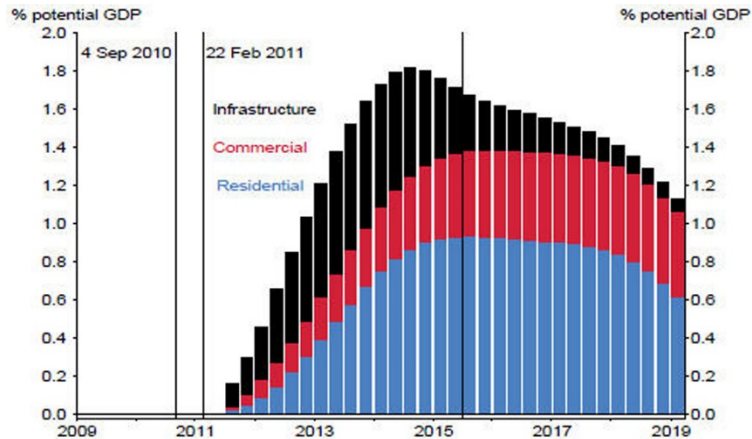
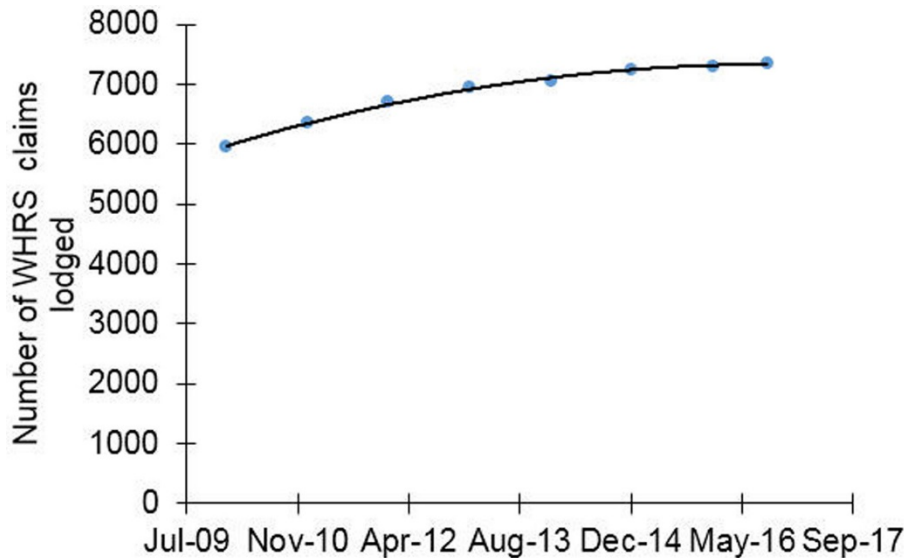
Figure 1: Figure 1 of Reserve Bank’s February 2016 Bulletin reproduced²⁰

Figure 2: WHRS claims statistics



If the efficiency issue is not addressed in the near future, the pressure on BCAs, designers, engineers and other building tradespeople is going to continue to rise. This could then decrease compliance with the Act, the NZBC and any other relevant legal instrument. Consequently, the risk of building failure in New Zealand will increase.

²⁰ Amy Wood, Ilan Noy and Miles Parker “The Canterbury rebuild five years on from the Christchurch earthquake” (18 February 2016) RESERVE BANK OF NEW ZEALAND <www.rbnz.govt.nz/> at 4.

C Quality of the work been produced

In November 2007, the New Zealand central government launched the licensed building practitioners (LBP) scheme.²¹ The LBP scheme was incorporated into the Act through the Building Amendment Act 2008. The purpose of the LBP scheme “is to encourage competent building practitioners to build homes right the first time.”²² The LBP scheme only applies to restricted building work (RBW), which is any building work that requires a building consent, in other words building work not covered by Schedule 1 of the Act and that is associated with the primary structure (NBZC Clause B1) of a house or a small-to-medium apartment building, or the external moisture-management system (NZBC Clause E2) of a house or a small-to-medium apartment building. It also includes design work associated with fire safety system attached to or forming part of a small-to-medium apartment building, for instance, design work associated with NZBC Clause F7 and the building work which the design covers requires a building consent.

In 2014, MBIE conducted a case study that focused on the causes for delays in building consent applications once they have entered BCAs’ building consent administration system. One of the findings from the case study was that over 54 per cent of the total number of NZBC clauses counted in request for further information (RFIs) issued by BCAs was concerned with NZBC Clause B1, E2 and G1.²³ This is a concern because the finding from MBIE’s case study indicates two things:

- (1) Building practitioners are demonstrating an above moderate level of non-compliance with NZBC Clause B1, E2 and G1, despite the inception of the LBP scheme.
- (2) BCAs could be unreasonably focused on NZBC Clause B1, E2 and G1.

A common theme emerged from a recent survey done by Building Officials Institute of New Zealand (BOINZ) on its members about their experiences with LBPs during the building consent process (Note: this means from building consent processing to inspection of building work that is covered by building consents then to the

21 Ministry of Business, Innovation and Employment “Overview” (14 June 2013) LICENSED BUILDING PRACTITIONERS <www.lbp.govt.nz/lbp>.

22 Ministry of Business, Innovation and Employment “Overview” (14 June 2013) LICENSED BUILDING PRACTITIONERS <www.lbp.govt.nz/lbp> at paragraph 1.

23 Ministry of Business, Innovation and Employment “Codewords Issue 64” (12 December 2014) BUILDING PERFORMANCE <www.building.govt.nz/>.

issuing code compliance certificate), was that LBPs have a lack of regulatory knowledge and understanding of the NZBC.²⁴ However, this is only one main component that will affect the quality of building work in New Zealand. The three other crucial parts that will affect the quality of building work in New Zealand are yet to be investigated and they are: building officials', building owners' and building material manufacturers' understanding about the NZBC and their level of building regulatory knowledge.

If the quality of the work across the whole New Zealand building and construction sector does not improve in the future, people's lives are going to be endangered which is going against one of the purposes of the Act. Even if people's lives are not going to be endangered, the financial and the emotional burden that could be inflicted on people are diabolical.

D Practice differs from the Act

Section 48 of the Act requires a BCA to grant or refuse a building consent that does not have a national multiple-use approval issued under s 30F of the Act²⁵ within 20 working days after receiving the application for a building consent.²⁶ In 2014, MBIE through the National Building Consent System programme which was created in 2013 discovered that BCA customers expect large complex building consents to take 40 to 60 days to process by BCAs and they expect a residential consent to be processed within 11 days.²⁷ Therefore, there is a difference between customer expectation and statutory requirement. Consequently, BCAs have to manage this difference and to do that some BCAs have set up their own building consent turnaround period without breaching s 48 of the Act.

In the New Zealand building and construction industry, there is a heavy reliance on standards, acceptable solutions and verification methods to not only demonstrate compliance with the NZBC, but also to assess compliance with the NZBC. A possible reason for this is that the NZBC does not prescribe how to

24 Ministry of Business, Innovation and Employment "Codewords Issue 68" (21 August 2015) BUILDING PERFORMANCE <www.building.govt.nz/>.

25 Building Act 2004, s 30F.

26 Building Act 2004, s 48.

27 Ministry of Business, Innovation and Employment "Codewords Issue 62" (1 August 2014) BUILDING PERFORMANCE <www.building.govt.nz/>.

comply with the applicable performance criteria stated in the NZBC. For instance, NZBC Clause E2.3.2 states: “Roofs and exterior walls must prevent the penetration of water that could cause undue dampness, damage to building elements, or both.”²⁸ This clause does not disclose how to prevent water penetrating a building. For that, people need to refer to something else such as Acceptable Solution E2/AS1. Another possible reason is that no guidance has been given within the NZBC about how to show and/or assess compliance with the NZBC. For example, the 4Ds of weathertightness design, in other words the 4Ds developed by Canadian architect Don Hazleden and building scientist Paul Morris in 1999,²⁹ should be incorporated into NZBC Clause E2 as guidance for demonstrating compliance and/or assessing compliance with NZBC Clause E2, but it is not included in the NZBC as it stands in 2016. The 4Ds are four basic principles of external moisture ingress prevention in buildings and they, in order of importance, are:³⁰

- Deflection: shed water by a cladding system, including deflecting devices such as eaves and ‘weathering’ deflectors;
- Drainage: a back-up system to direct water that may bypass the cladding back to the outside;
- Drying: remove remaining moisture by ventilation or diffusion;
- Durability: provide materials with appropriate durability.

Thus, most people are designing and constructing buildings to comply with standards, acceptable solutions and verification methods rather than the NZBC. Similarly, most building officials are checking compliance with standards, acceptable solutions and verification methods and are indirectly verifying compliance with the NZBC.

However, s 17 of the Act requires all building work to comply with NZBC to the extent required by the Act whether or not a building consent is needed for the

28 Building Regulations 1992, Schedule 1 cl E2.3.2.

29 Ministry of Business, Innovation and Employment “External moisture – a guide to using the risk matrix — A companion guide to Acceptable Solution E2/AS1” (10 July 2013) BUILDING PERFORMANCE <www.building.govt.nz/>.

30 Department of Building and Housing “External moisture – An introduction to weathertightness design principles” (18 August 2006) BUILDING PERFORMANCE <www.building.govt.nz/> at 17.

building work.³¹ This section of the Act is not requiring building work to comply with standards, acceptable solutions, verification methods or any other documents that provide methods of complying with the NZBC. Moreover, s 49(1) of the Act states that:³²

A building consent authority must grant a building consent if it is satisfied on reasonable grounds that the provisions of the building code would be met if the building work were properly completed in accordance with the plans and specifications that accompanied the application.

Similar to s 17 of the Act, s 49(1) of the Act is not concerned with satisfying standards, acceptable solutions, verification methods or any other documents that provide methods of complying with the NZBC, rather it is focused on compliance with the NZBC.

These aforementioned discrepancies between practice and the Act can generate confusion among building officials and among BCA customers. Also, BCAs customers can incur unnecessary costs on their building projects. For instance, the misconception about double glazing been made mandatory by law can cause building owners to spend extra money on their houses when they do not need to. In addition, the level of scrutiny on some building consents and some building work which are covered by building consents, for example, building consents for avant-garde building designs, can be become deficient and thereby the quality of building work in New Zealand will decrease. Consequently, the risk of building failure in New Zealand will increase.

II Potential public inquiry

Due to the major issues mentioned in section I of this paper, a public inquiry into the New Zealand's building and construction sector is posited. A public inquiry means a Royal commission "established under the authority of the Letters Patent constituting the office of the Governor-General"³³ or an inquiry established by the Governor-General through an Order in Council.³⁴ One of the reasons for suggesting a public inquiry is that the process and the findings of a public inquiry

31 Building Act 2004, s 17.

32 Building Act 2004, s 49(1).

33 Inquires Act 2013, s 6(1)(a).

34 Inquires Act 2013, ss 4 and 6(2).

are politically independent,³⁵ since s 10 of the Inquiries Act 2013 requires an inquiry and each of its members to act independently, impartially, and fairly.³⁶ Another reason is that a public inquiry have legislative authority under s 20 of the Inquiries Act 2013 to request anyone to supply information if it thinks the information is appropriate for the purposes of the inquiry.³⁷ Consequently, information that is otherwise difficult to obtain are acquired.³⁸ The final reason for proposing a public inquiry is that there are many methods available for conducting the inquiry, for instance, s 23 of the Inquiries Act 2013 allows witnesses to be called and give evidence before the inquiry through the issuing of witness summons.³⁹ In addition to that, hearings and interviews can be held if desired. Hence, flexibility⁴⁰ and comprehensiveness are provided in a public inquiry.

A Possible terms of reference

The following is a potential terms of reference for a public inquiry into the New Zealand's building and construction sector.

Objective: Investigate the causes of significant issues in the New Zealand's building and construction sector. Some of these significant issues currently present in the New Zealand's building and construction sector are:

- (1) liability distribution;
- (2) inefficiency;
- (3) quality of the work been produced;
- (4) practice differs from the Act.

Scope: This public inquiry will look into the following matters:

- (1) The payment distribution among the defendants of building and construction legal cases.
- (2) The fairness of the joint and several liability rule.
- (3) The appropriateness of the accreditation scheme for BCAs.
- (4) The way most BCAs administers building consents.

35 Roger Fitzgerald "Setting Up and Running Commissions of Inquiry" (February 2001) The Department of Internal Affairs <www.dia.govt.nz/>.

36 Inquiries Act 2013, s 10.

37 Inquiries Act 2013, s 20.

38 Fitzgerald, above n 35.

39 Inquiries Act 2013, s 23.

40 Fitzgerald, above n 35.

- (5) The construction methods and the building materials currently used in New Zealand on building sites.
- (6) The competency of building officials, designers, engineers, builders and other professionals involved the New Zealand building and construction industry.
- (7) The suitability of the Act and the NZBC for the New Zealand society and the New Zealand environment.

Membership: The core participants of this public inquiry will include:

- representatives of building officials. Every region in New Zealand will have a representative.
- A representative of IANZ.
- representatives of engineers. Every region in New Zealand will have a representative.
- representatives of main contractors. Every region in New Zealand will have a representative.
- representatives of building designers. Every region in New Zealand will have a representative.
- representatives of building material manufacturers. A representative will be selected for every common building component such as wall cladding.
- representatives of building owners. Every region in New Zealand will have a representative.
- A representative of MBIE.
- A representative of Parliamentary Counsel Office (PCO).

Nonetheless, this public inquiry can at any time through a written notice designate any person to be a core participant in this inquiry.⁴¹ Every core participant of this public inquiry has the right to give evidence and make submissions to this inquiry. However, this right is subjected to any directions of this public inquiry concerning the manner in which evidence is to be given and the way in which submissions are to be made.⁴² Moreover, the Governor-General can remove any member of this public inquiry from office through an Order in Council if s 8(3) of the Inquiries Act 2013 applies.⁴³ Section 8(3) of the Inquiries Act 2013 states:⁴⁴

41 Inquiries Act 2013, s 17(1).

42 Inquiries Act 2013, s 17(3).

43 Inquiries Act 2013, s 8.

44 Inquiries Act 2013, s 8(3).

A member of an inquiry may be removed under subsection (1) or (2), as the case may be, but only—

- (a) due to the misconduct of the member; or
- (b) if the member is unable to perform the functions of office; or
- (c) if the member has neglected his or her duty.

When there is a vacancy in the membership for this public inquiry, s 9 of the Inquiries Act 2013 shall apply as appropriately. Furthermore, each member of this public inquiry has immunities as stipulated in s 26(2) of Inquiries Act 2013. Also, every member of this public inquiry must act independently, impartially, and fairly when exercising his or her powers and when performing his or her duties under the Inquiries Act 2013.⁴⁵

Appointment of chairperson: A suitably qualified person will be appointed as the chairperson for this public inquiry.

Protocol:

- (1) Section 14(2) of the Inquiries Act 2013 shall apply when this public inquiry makes a decision regarding the procedure or conduct of this inquiry and when this public inquiry makes a finding that is adverse to any person.
- (2) Sections 14(3) of the Inquiries Act 2013 shall apply when this public inquiry intends to make a finding that is adverse to any person.
- (3) A fine of \$10,000 maximum is imposed on any person that commits an offence under s 29(1) of the Inquiries Act 2013.⁴⁶ However, if s 29(2) of the Inquiries Act 2013 applies to a person, then no fine will be inflicted onto that person.
- (4) This public inquiry can be postponed or temporarily suspended only after consultation with the appropriate Minister and s 16(1) of the Inquiries Act 2013 applies. Furthermore, this public inquiry “must commence or continue when it is satisfied that to do so would no longer prejudice the other investigation or any person interested in it.”⁴⁷

45 Inquiries Act 2013, s 10.

46 Inquiries Act 2013, s 30.

47 Inquiries Act 2013, s 16(2).

- (5) The terms of reference for this public inquiry can be amended by the appropriate Minister through a notice in the New Zealand Gazette.⁴⁸
- (6) The terms of reference for this public inquiry must be notified in the establishment instrument for this public inquiry or in a notice in the New Zealand Gazette as soon as possible after the date of the establishment instrument.⁴⁹

Reporting: A final report will be produced and present it to the Governor-General once this public inquiry is completed.⁵⁰ Also, the final report will be tabled by the appropriate Minister to the House of Representatives as soon as practicable after the Governor-General has received the final report for this public inquiry.⁵¹ The final report will be presented to the Governor-General within three years after the commencement of this public inquiry and it will set out among other matters the findings of this public inquiry and any recommendations of this public inquiry.⁵²

Information disclosure: Once the final report for this public inquiry has been reported in accordance with s 12 of the Inquiries Act 2013, all documents created by this inquiry or received in the course of this inquiry are official information for the purposes of the Official Information Act 1982, except for the information specified in s 32(2) of the Inquiries Act 2013.⁵³ Section 32(2) of the Inquiries Act 2013 states:⁵⁴

the following are not official information for the purposes of the Official Information Act 1982:

- (a) any matter subject to an order under section 15(1)(a):
- (b) any documents that relate to the internal deliberations of the inquiry and are—
 - (i) created by a member of an inquiry in the course of the inquiry; or
 - (ii) provided to the inquiry by an officer of the inquiry.

48 Inquiries Act 2013, s 7(5).

49 Inquiries Act 2013, s 7(3).

50 Inquiries Act 2013, s 12(1)(a).

51 Inquiries Act 2013, s 12(3).

52 Inquiries Act 2013, s 12(2).

53 Inquiries Act 2013, s 32(1).

54 Inquiries Act 2013, s 32(2).

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