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Dear Mr Tuncak

**Thematic Report - Right of access to information with respect to hazardous substances and wastes - Response of the New Zealand Human Rights Commission**

1. Thank you for your letter of 4 February 2015 seeking information from National Human Rights Institutions (NHRIs) relating to the right of access to information with respect to hazardous substances and wastes.
2. The response of the New Zealand Human Rights Commission ('the Commission') is set out below. Our response sets out a general description of the following aspects of New Zealand's legislative and regulatory framework:
  - The Hazardous Substances and New Organisms Act 1996
  - Resource Management Act 1991
  - Public health legislation
  - Hazardous substances notification in Canterbury

**Hazardous Substances and New Organisms Act 1996**

3. The principal legislation governing hazardous substances<sup>1</sup> in New Zealand is the Hazardous Substances and New Organisms Act 1996 (HSNO Act).

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<sup>1</sup> A 'hazardous substance' is defined under section 2 of the HSNO Act as any substance with 1 or more of the following intrinsic properties – explosiveness, flammability, a capacity to oxidise, corrosiveness, toxicity and eco-toxicity – which on contact with air or water (other than air or water where the temperature or pressure has been artificially increased or decreased) generates a substance with 1 or more of those properties

4. The statutory purpose of the HSNO Act is to “protect the environment, and the health and safety of people and communities, by preventing or managing the adverse effects of hazardous substances and new organisms”<sup>2</sup>. This is underpinned by a statutory principle that requires persons exercising functions, powers and duties under the Act to recognise and provide for:

*“...the maintenance and enhancement of the capacity of people and communities to provide for their own economic, social, and cultural well-being and for the reasonably foreseeable needs of future generations.”<sup>3</sup>*

5. The HSNO Act accordingly contains a number of provisions that are congruent with a general right of public access to information concerning decisions made under its auspices.
6. For example, the HSNO Act requires that all applications seeking to introduce a hazardous substance or new organism must be recorded in a register that is held and maintained by the Environmental Protection Authority (EPA). The Act provides that every person has a right to inspect the register during EPA operating hours. The register is also available for public access on the EPA's website.<sup>4</sup>
7. The HSNO Act also provides that any person exercising any functions, powers and duties must take into account New Zealand's international obligations.<sup>5</sup> Further to this provision, the Act appends the Stockholm Convention on Persistent Organic Pollutants, Article 10 of which places obligations on States Parties concerning public awareness, education and information<sup>6</sup>.

#### *Role of Environmental Protection Authority (EPA)*

8. The HSNO Act designates the EPA as the primary entity responsible for regulating hazardous substances and new organisms and is empowered to put controls in place to manage the risks of hazardous substances to safeguard people and the environment. In addition to providing for a range of decision-making, advisory and monitoring functions, the HSNO Act tasks the EPA with promoting awareness amongst the public of the adverse effects of hazardous substances and new organisms and of the prevention and safe management of those effects<sup>7</sup>.
9. Accordingly, the EPA's website<sup>8</sup> provides the public with information on hazardous substances, approvals and group standards, hazardous waste, as well as information on importing and manufacturing and consumer information to guide safe use of hazardous substances.
10. The EPA also administers the public notification and submission process regarding any proposed amendments to the HSNO Act. Submission forms can be downloaded from EPA's website and can be submitted via the website by email. The EPA's website also provides the public with relevant background information and the policy rationale for any proposed amendment.

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<sup>2</sup> HSNO Act, section 4

<sup>3</sup> HSNO Act section 5(b)

<sup>4</sup> <http://www.epa.govt.nz/search-databases/Pages/applications-search.aspx>

<sup>5</sup> HSNO Act section 6(f)

<sup>6</sup> *ibid* Schedule 1AA

<sup>7</sup> *ibid* section 11(1)(c)

<sup>8</sup> [www.epa.govt.nz](http://www.epa.govt.nz)

### *EPA public notifications and reporting procedures*

11. The HSNO Act provides that applications made to EPA concerning the release of hazardous substances and new organisms must be publically notified<sup>9</sup>. Applications regarding the containment of such substances must also be publically notified if the EPA considers that there is likely to be significant public interest.
12. The public notification process under the HSNO Act provides that any person may make a written submission on the particular application under EPA assessment. This includes notification of the closing date for submission, the location of the place where the application and accompanying information may be viewed, and the EPA's address for service of the Authority<sup>10</sup>.
13. The HSNO Act also provides that any person can request that the EPA reassess an application if new information indicates that the risks to human health and/or the environment may not be appropriately managed by the existing controls, or because new information is available on the benefits of the substance. Any person can also apply to EPA have a group standard (relating to practice and personnel requirements) amended, the classification of a substance reviewed, and a minor change made to a hazardous substance approval<sup>11</sup>.
14. The EPA is also required to include in its annual report information showing the number and type of incidents caused by inadequate management of hazardous substances or new organisms, information on reassessment decisions, and any other matters the Authority considers to be significant in the management and use of hazardous substances and new organisms, including the investigation and use of environmental user charges<sup>12</sup>.

### *Limitations to public disclosure of information*

15. The EPA has limited grounds under the HSNO Act under which it can withhold information it has obtained through an application process. These grounds relate to commercially sensitive information and the protection of trade secrets<sup>13</sup>.

### **Resource Management Act 1991**

16. The Resource Management Act 1991 (RMA) is the principal over-arching environmental legislation in New Zealand. The central statutory purpose of the RMA is to 'promote the sustainable management of natural and physical resources'.<sup>14</sup> 'Sustainable management' is defined in part as:

*"...managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety."*<sup>15</sup>

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<sup>9</sup> HSNO Act section 53(1)

<sup>10</sup> HSNO Act section 53(3)

<sup>11</sup> *ibid* sections 62-65

<sup>12</sup> *ibid* section 148

<sup>13</sup> *ibid* section 57, cf. Section 9(2)(b) Official Information Act 1982

<sup>14</sup> RMA section 5

<sup>15</sup> *ibid* section 5(2)

17. Environmental regulation under the RMA is largely administered through the provision of regional and district plans and resource consent, including control of discharges to water, land and air. The management and administration of these processes are for the most part undertaken by local authorities, rather than central government departments or agencies. However, proposals of national significance and the development of national environmental standards are facilitated by central government and fall under the auspices of the EPA. Specialist judicial recourse regarding decisions made under the RMA is available through the Environment Court, which is established under the Act.
18. The RMA accordingly provides the legislative foundation for the regulation of the discharge of wastes. It provides a general prohibition on the discharge of contaminants from any industrial or trade premises, unless such discharge is expressly allowed by a rule in a current or relevant proposed regional plan, resource consent, or regulations. Controls on discharges from premises other than industrial or trade premises are governed by rules in current or proposed regional plans. Discharge of waste in a manner not prescribed by the governing regional plan is prohibited, unless the discharge is otherwise allowed by resource consent or is designated as an existing lawful activity under the RMA.
19. The RMA provides for public notification and submissions processes for resource consents applications, national environmental standards and policy statements and proposals of national significance. For the resource consent process, public notification is not mandatory. However, the responsible consent authority must notify the public in the following circumstances<sup>16</sup>:
  - the application for resource consent regards an activity that has adverse effects on the environment that are “more than minor”; or
  - public notification is required under a rule or national environmental standard; or
  - the applicant for resource consent requests that public notification takes place
20. Once an application for resource consent has been publicly notified, a person may make a submission on it to the consent authority<sup>17</sup>, although some restrictions apply in cases where trade competition exists between the applicant and the person making a submission<sup>18</sup>.
21. Overarching requirements concerning discharge practices may be also implemented through the issuing of national environmental standards. These standards are passed by the Governor-General through Order-in-Council, and thus have the force of regulation and, as such, are binding on local authorities. National environmental standards can be developed in respect of air quality and soil quality in relation to the discharge of contaminants and include standards for any discharge<sup>19</sup>.
22. Notification and consultation with both the general public and iwi authorities<sup>20</sup> is a mandatory requirement in the development of any national environmental standard. The Minister must undertake these processes before they are permitted to recommend the making of a national environmental standard<sup>21</sup>.

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<sup>16</sup> RMA section 95A

<sup>17</sup> *ibid* section 96

<sup>18</sup> *ibid* section 308A-308B

<sup>19</sup> *ibid* section 43

<sup>20</sup> Māori tribal authorities

<sup>21</sup> RMA section 44

## Public health legislation

23. New Zealand's public health legislation imposes a number of legal measures designed to protect the health of the public from activities which introduce pollutants into the environment. For example, the Health Act 1956 provides local authorities with powers of inspection to ascertain whether any nuisances or conditions are offensive or likely to be injurious to health, and to secure abatement of those nuisances or conditions<sup>22</sup>.
24. The Act also provides that local authorities are responsible for providing sanitary works in a local area, including drainage works, sewerage works and works for the collection and disposal of refuse.<sup>23</sup> Local authorities are required to appoint environmental health officers and other officers as necessary to carry out these functions<sup>24</sup>.
25. The Health Act 1956 also establishes New Zealand's statutory regime governing notifiable diseases that pose a risk to public health. Lead absorption, and 'poisoning arising from chemical contamination of the environment' are included as notifiable diseases for the purposes of the Act<sup>25</sup>. The Act requires medical practitioners to notify a Medical Officer of Health of any cases they come across in practice<sup>26</sup>.
26. A similar notification requirement is also provided under the HSNO Act requiring hospitals and medical practitioners to notify hazardous-substances injuries to Medical Officers of Health<sup>27</sup>. In the case where a notifiable disease is unable to be contained through the quarantine powers and procedures available under Health Act, national and local emergency powers are available under the Civil Defence Emergency Management Act 2002.
27. In 2009, the Ministry of Health issued guidelines for Public Health Units on 'The Investigation and Surveillance of Poisoning and Hazardous-substance Injuries' (the 'Guidelines'). The Guidelines have a focus on human health risk and health-impact assessment and are designed to provide a systematic framework for the investigation and surveillance of chemical-exposure incidents. They provide background information about legislation, stakeholders, systems of surveillance and reporting requirements, and sources of further information about chemical injuries. In addition, they provide a recommended framework for administering chemical-injury notifications, including how risks may be evaluated, managed and communicated. The Guidelines are publically available on the Ministry's website<sup>28</sup>.

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<sup>22</sup> Health Act section 23

<sup>23</sup> *ibid* section 25

<sup>24</sup> *ibid* section 28

<sup>25</sup> Health Act 1956, Schedule 2, Section B

<sup>26</sup> *ibid* section 74(1)(b)

<sup>27</sup> HSNO Act section 143

<sup>28</sup> <https://www.health.govt.nz/system/files/documents/publications/investigation-surveillance-poisonings-hazardous-substances-injuries-guidelines-public-health-units-may09.pdf>

## Hazardous substances notification in Canterbury

28. Since the 2010/11 earthquakes in Christchurch and the Canterbury region, more than 6600 properties designated as 'red zone'<sup>29</sup> have been checked for hazardous household waste as part of an earthquake recovery programme led by Environment Canterbury (ECan), the regional council responsible for the reduction of adverse effects on the environment of the use, storage and transportation of hazardous substances and disposal of wastes. About 1700 properties were cleared of about 320 tonnes of hazardous waste, of which approximately 80 per cent was paint, but also included agrichemicals, medical waste, solvents and fuels. Most of the waste was dealt with in New Zealand, but some hazardous substances were not able to be disposed of in New Zealand and were sent overseas.
29. As part of their role in the Canterbury Earthquake Recovery Plan, ECan is responsible for work undertaken to address pollution caused by asbestos, soil contaminants and construction and demolition waste. ECan's Resource Management Act Monitoring and Compliance section investigates complaints from the public made through their pollution hotline<sup>30</sup>. The hotline is operated 24 hours a day, 7 days a week throughout the year and provides the primary means by which members of the Canterbury community are able to report incidents concerning environmental pollution stemming from the earthquakes and the rebuilding work that has followed. Response criteria are graded according to the level of risk, with top priority accorded to incidents which pose a significant risk to the public or the environment.

## Conclusion

30. The well-being of people and communities are core purposive objectives of New Zealand's environmental legislation. In reflection of this, both the HSNO Act and the RMA provide for public access to information arising from their respective decision-making processes and require public notification and consultation processes to be invoked in a number of circumstances. Policy development and administration is also relatively transparent, with a plethora of official information available on the websites of the relevant government or local authority websites.
31. However, the degree to which vulnerable or marginalised people and communities access information or participate in decision-making regarding hazardous substances and waste is unclear. The complex, technical nature of environmental management procedures, not to mention the science and engineering involved, may render such information inaccessible for people without specialist skills, knowledge or awareness.
32. Furthermore, the RMA has been earmarked for reform by the New Zealand Government. The proposed reforms include an emphasis on speeding up and simplifying the resource consent process and providing a greater weight to private property rights<sup>31</sup>. The legislative reform process is yet to publicly commence, so it is difficult to predict the extent to which the reforms will impact on the ability of the public to access information or participate in decision-making processes concerning hazardous substances and waste disposal or management.

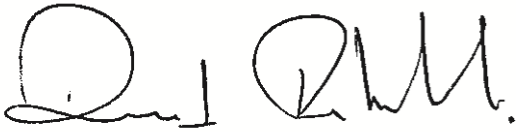
<sup>29</sup> Residential property in the Canterbury flat land has been zoned red when the land has been so badly damaged by the earthquakes it is unlikely it can be rebuilt on for a prolonged period.

<sup>30</sup> <http://ecan.govt.nz/services/pages/pollution-hotline.aspx>

<sup>31</sup> Hon Dr Nick Smith, Minister for the Environment, Minister for Building and Housing, *RMA Reform Agenda Outlined*, Press Release, 21 January 2015

33. I trust that you have found this information helpful. Please do not hesitate to contact me should you require any further information.

Yours sincerely

A handwritten signature in black ink, appearing to read 'D. Rutherford'.

David Rutherford  
Chief Commissioner  
New Zealand Human Rights Commission