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## Born Again? Legislative Assistance to Reinststate Christchurch Cathedral

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Since being severely damaged in the 2010/2011 earthquakes, the iconic Christ Church Cathedral has lain largely in ruins, not only impacting the physical and economic regeneration of the immediate surrounds but for many, symbolising the pace (or lack thereof) at which the rebuild of Christchurch has occurred. Seven years on, announcement after announcement, and significant time and money invested in legal costs and consultancy bills, the decision to re-instate the Cathedral was confirmed by the Anglican diocese in September this year. The re-instatement option is estimated to cost approximately \$104m, and is expected to be funded by grants from the Christchurch City Council, the Great Christchurch Buildings Trust, the Crown and the insurance payout received by the Anglican Church. In addition to the grant, the Government is offering a \$15m loan.

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Recognising the decision of the Diocese, the strategic importance of the Cathedral to the regeneration of the city, and the threat that continued challenge to the reinstatement would present, the Government has proposed legislation which seeks to streamline the process of reinstatement and provide a higher degree of certainty that it will occur. We have summarised the key elements of the Bill (which was presented to the House in early December) below.

### In brief:

- **The Bill will allow the Governor General, on recommendation by the appropriate Minister, to issue Orders in Council (OIC) to grant exemptions from, modify (which includes suspending, or excluding the jurisdiction of the court) or extend statutes listed in Schedule 2 of the Bill.** Perhaps most significantly, the subject statutes currently include the Resource Management Act 1991 (and plans or rules made under it) and the Heritage New Zealand Pouhere Taonga Act 2014 (Heritage Act). In effect, an OIC issued under the Bill could substantially alter or indeed suspend the processes under both of these statutes which if left unaltered could allow for further public, Council or Heritage New Zealand input which might further delay the reinstatement.

- **The Bill also contains a mechanism (utilising OICs on the recommendation of the Minister) to add statutes to Schedule 2.** However, the proposal (via an OIC) to include further statutes in Schedule 2 is made subject to confirmation by the House of Representatives.
- **The application of OICs is geographically bound, only applying to the Cathedral area.**
- **The supervisory jurisdiction of the High Court through judicial review is proposed to be time bound,** requiring applicants to lodge a statement of claim within 28 days of the relevant decision being made. The justifications for the proposed limit on this crucial constitutional role are the risk and delay to the project, should parties have an open ended right to request review of decisions made under it, and the reduced risk of review given the airtime (both through broader consultation and litigation) already given to affected parties to express their views and concerns. The limiting of the supervisory jurisdiction of the High Court by the legislature and/or the executive branches has rarely gone down well with the judiciary. However given the nature of the limit (timing of bringing a claim) and the history of the Cathedral, it may be considered justified on this occasion.
- Perhaps more interestingly, clause 17(2) of the Bill provides that **even where review is requested in good time and the exercise of power is found by the High Court to be invalid, any such determination does not affect the validity or effectiveness of any action already taken under or in reliance on the exercise of power.** Although, the Court retains a discretion to order that that the subsection does not apply this section reinforces to need to act quickly to challenge a decision. This is both in order to meet the time restriction, but also to mitigate or avoid the risk of what would essentially be a meaningless claim if the action to which the decision relates is already carried out and cannot be “undone”.
- The recommendation of Minister to the Governor General to issue an OIC in respect of a Schedule 2 statute must satisfy the following pre-requisites before it may be made:
- The Minister must be satisfied that (among other matters) the OIC is necessary or desirable for the purposes of the Act (described below).
  - The terminology “necessary or desirable” seems to be a deliberate deviation from the requirement included in both the (now repealed) Canterbury Earthquake Recovery Act 2010 and the Greater Christchurch Regeneration Act 2016 of the Minister to only exercise his/her powers where he/she “reasonably considers it necessary”. That requirement was subject to a prescriptive judicial interpretation by the Court of Appeal in Independent Fisheries, instituting it as a very high bar for the Minister to meet (1). Confirmed in that same decision, “desirable” on the other hand sets a much lower bar (2).
  - **A draft of the OIC has been reviewed by a Panel established to review the OICs and the Regulations Review Committee.**
  - **The Minister has had regard to the Panel’s recommendations on the OIC and the comments of the Committee.**

- **The Minister has consulted with the Minister for Arts, Culture and Heritage (if the OIC relates to the Heritage Act), or the Minister for the Environment (if the OIC relates to the RMA).**
  - **The statutory engagement process has been followed.**
  - In short, this process requires the Minister to “make available” an explanation of the aim of the proposal, the effect it will have, and why the Minister thinks it is “necessary or desirable” to persons the Minister thinks appropriate given the proposed effect of the Order, or to the public generally. Those persons have 20 working days to provide written comment on the proposal, and the Minister must have regard to those comments.
- The requirement to exercise statutory authority in accordance with the purposes of the authorising legislation provides a critical “check” on the exercise of power by public bodies. The purposes of the Bill is to facilitate the reinstatement of the Cathedral and, in particular;
- To facilitate the rein-statement in an expedited manner compared with processes and requirements outside the Act; or
  - To provide cost-effective process for reinstatement compared with processes outside the Act; or
  - To achieve earlier or greater certainty for the owner of the Cathedral and the Christchurch community generally as to the reinstatement of the Cathedral than would be likely under processes and requirements outside the Act.

Interestingly, in order to meet any of those purposes, the proposal (to which the exercise of power relates) must meet both the definition of “re-instatement” and “Cathedral” in clause 4. Both definitions are broadly drawn. “Cathedral” includes all ancillary structures and improvements proximate to, and directly associated with, the Cathedral. “Reinstatement” includes 1 or more of a wide range of other actions, including “demolition of any part of the Cathedral”. There are, in other words, a plethora of actions as part of reinstatement that this Bill will seek to provide for. As currently drawn, we do not however consider that, should the decision to reinstate be changed to demolish and replace, the Bill would provide for this.

### **General Comment**

The discretion afforded to the Minister and the proposed absence of substantive public process will undoubtedly raise concerns as the Bill progresses through the House. As alluded to, any limitation on the supervisory jurisdiction of the High Court will also attract controversy. On that basis we would expect to see some amendment to the Bill. However this is a very specific context and the legislation is designed to address a very specific mischief, being to accelerate the resolution of what has been a very long, expensive and contentious matter. Further, legislation to facilitate whatever outcome was determined for the Cathedral was also indicated from the former Government, and as such, we could expect general support from both sides of the House.

Greenwood Roche’s resource management specialists have unrivalled experience with delivering large scale project developments across New Zealand (and particularly in the Canterbury context) using fast track planning legislation. Our

team is following the development of this legislation closely and will provide updates as they come to hand.

Footer:

1. *Canterbury Regional Council v Independent Fisheries Limited* [2012] NZCA 601.
  2. *Canterbury Regional Council v Independent Fisheries Limited* [2012] NZCA 601, at [107].
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