

Tim Davin, Director – Policy, IPENZ

PO Box 12-241, Wellington 6144

Email: dir-pp@ipenz.org.nz

Phone: 04 473 2027

LOCAL GOVERNMENT (AUCKLAND LAW REFORM) BILL

**SUBMISSION TO THE AUCKLAND GOVERNANCE LEGISLATION COMMITTEE
12 FEBRUARY 2010**

INTRODUCTION

This is a joint submission made by the Institution of Professional Engineers' New Zealand (IPENZ) and Association of Local Government Engineering NZ Inc (trading as INGENIUM). Collectively we represent the views of New Zealand's local authority asset managers and professional engineers.

BACKGROUND TO IPENZ

The Institution of Professional Engineers New Zealand (IPENZ) is the lead national professional body representing the engineering profession in New Zealand. It has approximately 11,500 Members, including a cross-section from engineering students, to practising engineers, to senior Members in positions of responsibility in business. IPENZ is non-aligned and seeks to contribute to the community in matters of national interest giving a learned view on important issues, independent of any commercial interest.

BACKGROUND TO INGENIUM

INGENIUM is the brand name of the Association of Local Government Engineering New Zealand Incorporated. INGENIUM's 900 members comprise mainly engineers employed by local authorities, consultants and contractors who manage and operate the infrastructural assets of local authorities and are responsible for providing the following local authority services: roads, bridges, footpaths, water supply, sewerage, stormwater, land drainage, solid waste and flood protection.

CONSULTATION

A draft version of this submission was made available to all IPENZ Members via the IPENZ web site, and interested Members were also sent it directly on request. All IPENZ Members were invited to comment on it, and their comments have been included in this version.

A draft version of this submission was also sent to INGENIUM Board Members and interested parties in Auckland; feedback was sought from those people.

EXECUTIVE SUMMARY

IPENZ and INGENIUM (“we”) are concerned that substantial amendments to the Local Government (Tamaki Makaurau Reorganisation) Act 2009, the Local Government (Auckland Council) Act 2009, and the Local Government Act 2002 may have resulted in this Bill missing provisions and containing other unclear and contradictory provisions.

We support the provisions in the Bill for a Spatial Plan for Auckland, and consider it will be a useful document for ensuring efficient long term infrastructure planning.

We note that the Bill will result in Auckland Transport having functions of a territorial authority, regional council and a requiring authority. Auckland Transport will thus be the equivalent of a unitary authority, but with a governing board with initial directors appointed by the Government. It is also not required to have a Statement of Corporate Intent (SCI). To ensure accountability we recommend Auckland Transport be required to prepare an SCI, and Auckland Council’s approval be obtained for both the SCI and for bylaws.

We note the arrangements for the Auckland water organisation are a mix of commercially orientated council controlled organisation responsibilities with a board of directors; however the organisation will have powers normally associated with government, including coercive powers over private drains and powers of entry. To us, these arrangements appear to be in contrast, as the water organisation does not have the final say on price setting and bylaw making. We consider the water organisation should have the ability to make, amend and revoke bylaws, with approval from the Auckland Council.

The Bill establishes responsibility for levels of service. We consider the roles are conflicting. For infrastructure we consider it is inappropriate, and in some cases impossible, for Local Boards to have different levels of service. We therefore recommend that Local Board plans do not include levels of service for infrastructure.

In relation to bylaws for infrastructure, we consider the role of Local Boards should be confined.

We note the synergy between wastewater and stormwater management and the scale of the new arrangements and organisations. We believe stormwater management should become the responsibility of Watercare Services. In addition, we recommend there be clear lines of responsibility managing culverts, sumps and sump leads.

We note water and wastewater services, other than standalone services, are vested in Watercare Services. We question why standalone services are not included, and recommend stand-alone water supply and wastewater schemes become the responsibility of the Watercare Services.

Finally, in relation to the notifications of work, we recommend Clause 45 be reworded to be consistent with the Infrastructure Bill.

SUBMISSION

1. GENERAL ISSUES

IPENZ and INGENIUM (“we”) support the provisions in the Bill for a Spatial Plan for Auckland. Its purpose is a broad long-term strategy for growth and development in Auckland, and will set out the long-term (20 to 30 year) strategy for Auckland and its communities. The development of such a plan is essential to provide the context for long term efficient infrastructure planning.

We note there are provisions in the Bill for the Auckland Council to require its substantive council-controlled organisation to prepare and adopt a plan covering a period of at least ten years. This plan will describe how the organisation intends to manage, maintain, and invest in its assets, and how it will maintain or improve service levels.

These provisions, combined with the provisions of the Local Government Act 2002, including Schedule 10, make certain the Auckland Council will prepare long term asset management plans. These plans will ensure Auckland’s infrastructure assets’ long term management and future integrity.

Nevertheless, we have a number of concerns with the governance and management framework proposed for Auckland in this Bill. What is proposed is a mixed and confused set of institutional arrangements that have the potential to hinder sound asset management and core service provision. These issues are discussed further below.

In preparing this submission, the analysis has been difficult because of the substantial amendments to relevant legislation. We consider the interrelationships between the Local Government (Tamaki Makaurau Reorganisation) Act 2009, the Local Government (Auckland Council) Act 2009, and the Local Government Act 2002, and the resulting complexities, may be some of the reason there are missing, unclear and contradictory provisions.

2. GOVERNANCE AND STATUS OF CCOS

2.1 AUCKLAND TRANSPORT

Clause 45 of the Bill (new Part 4 - Clause 38) provides for Auckland Transport to be a council-controlled organisation (CCO) of the Auckland Council. Its role will be to manage and control the Auckland transport system.

The functions of Auckland Transport include those of a territorial authority under the provisions of Part 21 of the Local Government Act 1974 (the general road management powers). It also includes the functions of a regional council to prepare the regional land transport programme and public transport planning, regulation, and contracting under the Public Transport Management Act 2008.

Auckland Transport will have the power of a local authority to make and enforce bylaws without recourse to the Auckland Council. It will also be the enforcement authority under the Transport Act 1962 for the purposes of prosecuting stationary vehicle offences. In addition it will have the powers of an enforcement authority under the Land Transport Act 1998 in relation to prosecuting infringement offences regarding the use of special vehicle lanes within Auckland.

Besides those mentioned, Auckland Transport will have has the functions and powers of a requiring authority under the Resource Management Act 1991 in relation to transport activities within Auckland.

We support the bringing together of these various powers to enable the holistic management of transport activities in Auckland.

We consider that Auckland Transport is thus the equivalent of a unitary authority (both a territorial authority and a regional council) for all transport functions. However it will be in the unusual situation of having a governing board with initial directors appointed by the Government (Clause 24 of the Bill - subclause Clause 351). The board of directors will have no fewer than six and no more than eight voting directors, of whom two may be elected members of the Auckland Council.

It is noted that some of the provisions for CCOs in the Local Government Act 2002 do not apply to the Auckland Council. This includes Section 59 (including no requirement for objectives of shareholders), and Section 64 (no requirement to have a Statement of Corporate Intent). In other words, Auckland Transport is effectively not a CCO, but a local authority with powers normally associated with government (including coercive powers of enforcement), but with a majority of non elected board directors.

In effect this is a local authority with a majority of private directors; in many ways it is a parallel to a Crown Entity in central government (similarly a CCO is equivalent to a State-Owned Enterprise). This type of constitutional arrangement and the mix of management and enforcement functions are without precedent, and is an untested infrastructure governance model in New Zealand. However it can succeed provided appropriate accountability mechanisms are in place.

We therefore support the new model but consider it important that Auckland Transport prepares an Statement of Corporate Intent and has the powers for the making, amending and revoking of bylaws. In both cases it will be required to seek the approval of the Auckland Council to ensure that it is able to exercise governance oversight.

Recommendation

Auckland Transport will be required to prepare a Statement of Corporate Intent, and the Auckland Council's approval is required for both the Statement of Corporate Intent and for bylaws.

2.2 THE AUCKLAND WATER ORGANISATION

Until the end of 30 June 2012, Watercare Services Limited will be a CCO and will continue to issue its Statement of Corporate Intent for approval **by the Auckland Council**. Its functions will continue to involve water supply, bulk water supply, sewerage, and the treatment and disposal of sewage and trade wastes. In setting prices for its water and wastewater services it must comply with any directions given by the Auckland Council.

We consider it important that Watercare Services be given direct powers (potentially through delegated powers) to enable it to administer control of its network. For example, Watercare Services needs to be able to deal with unlawful activity such as private activity damaging the water supply network. Without delegated powers, Watercare Services would be in the difficult position of having to ask the Auckland Council to undertake enforcement action.

Under Part 3 Clause 73, the Auckland Council will, until the end of 30 June 2015, remain the owner of Watercare Services Limited. It will need to decide how it will provide water and wastewater services in Auckland after this date. Under Clause 45 Part 5 it is implied that a new Auckland water organisation will continue the functions of water and wastewater management, but it is not clear what the transition process will be from the end of Watercare Services in 2015 to the creation of an Auckland water organisation. We consider the Bill does not lay out the establishment processes for the Auckland water organisation or specify its functions.

The new Auckland water organisation will also have the powers of a local authority under the Local Government Act 1974 for wastewater. It will be able to require – for example - owners of land in certain cases to provide private drains; under the Local Government Act 2002 it will have general power of entry to private land for enforcement purposes and for the construction of works. These are considerable powers that encroach on property rights, and are normally the responsibility of democratically elected governments (in this case local government), rather than commercial organisations.

However for bylaws, the Bill will enable the organisation to make a proposal to the governing body of the Auckland Council for a bylaw to be made. We consider the Auckland water organisation should be able to make, amend and revoke bylaws, with the Auckland Council.

The arrangements for water in Auckland are to be a mix of the commercially orientated CCO responsibilities with a Board of Directors but, like Auckland Transport, it will have powers that are normally associated with government, including coercive powers over private drains and powers of entry. In contrast with these powers, it will not have the final say on price setting and bylaw making as these will be controlled by the Auckland Council. We do support the Auckland Council having these approval roles.

Again this is similar to a central government Crown Entity model and as such is supported. This model can succeed provided the appropriate accountability mechanisms are in place. Therefore, as with Auckland Transport, the Auckland Council's approval should be required in the making, amending and revoking of bylaws. There are already provisions for the Auckland Council to approve the SCI.

Recommendations

The transition provisions for the change of Watercare Services to an Auckland water organisation be clarified.

Auckland water organisation be able to make, amend and revoke bylaws, with the Auckland Council's approval.

3. LEVELS OF SERVICE

We consider the issues around levels of service are confusing and there is a potential conflict in roles between the levels of local government.

Typical infrastructure levels of service include water quality, reliability, sewage overflows, flooding and road pavement quality.

New Schedules 2 to 6 added to Local Government (Tamaki Makaurau Reorganisation) Act 2009 Clause 2 (4) require that the **Auckland Council** must specify the performance targets and other measures by which actual levels of service provision may be meaningfully assessed.

Section 20 (3) of the Local Government (Auckland Council) Act 2009 enables **Local Board Plans** to include a statement of the standard levels of service for local activities. The Plans will also include an explanation of each proposed variation from the standard levels of service and the resulting additional cost or saving.

Clause 45 of the Bill (new Part 8 - Clause 75) provides for the **CCOs** to prepare and adopt a plan covering a period of at least 10 years. This must describe how the organisation intends to manage, maintain and invest in its assets, and maintain or improve service levels (an asset management plan). Clause 68 also provides for **Watercare Services Limited** to specify the performance targets and other measures by which the performance of the group may be judged in relation to its objectives.

We consider it is inappropriate, and in some cases physically impossible, for Local Boards to have different levels of service for infrastructure services including transport, water, wastewater, stormwater, and waste management. Different levels of service would undermine the consistency and co-ordination that is one of the key benefits of the super city. For water and transport, they will, by definition, be the same as those of the relevant CCO.

Recommendation

The Local Board plans are not to include levels of service for infrastructure.

4. BYLAWS

Bylaws are developed for a range of functions – including protecting the public from nuisances, offensive behaviour and trading in public places. In addition, in some cases, bylaws are effectively conditions of supply.

There are a number of infrastructure-related bylaws for on-site wastewater disposal systems, waste management, trade wastes, water supply, wastewater, drainage, land drainage, parking restrictions, cemeteries, reserves, and recreation grounds.

Clause 45 of the Bill (new Part 4 - Clause 42) states one of the functions of **Auckland Transport** is the power to make and enforce bylaws in relation to the Auckland transport system. We consider there would be a very limited role for local traffic bylaws. One potential area for implementing local bylaws is in managing time limits on carparking. However, we consider the use of local bylaws would be limited, as other issues such as clearway provisions are traffic management issues and these should be controlled by the Auckland Council.

Clause 45 of the Bill (new Part 5 - Clause 50) states that an **Auckland water organisation** may propose to the governing body of the Auckland Council, in writing, that a bylaw relating to the management and supply of water supply or wastewater services be made. As stated previously we consider the Auckland water organisation should be able to make, amend and revoke bylaws with the approval of the Auckland Council.

The **Auckland Council** has powers to make bylaws under the provisions of Section 145 of the Local Government Act 2002 and Section 24 of the Local Government (Auckland Council) Act 2009. This legislation provides for **Local Boards** to propose the making, amending or revoking of a bylaw to the governing body.

We consider that there is very limited scope for a Local Board to propose bylaws and if they do propose bylaws, these are likely to be for issues related to public nuisances and offensive behaviour. Even if this does occur, it is difficult to see why any Local Board should have a different approach from the next one. A bylaw is only as effective as its enforcement and enforcement will be difficult if there are significant bylaw differences between Local Boards. We certainly consider that for infrastructure there is no scope for different bylaws.

If local bylaws were to be developed it is possible that enforcement officers from (for example) the Auckland water organisation could be required to enforce 20 to 30 different bylaws, which would be a ridiculous situation.

We consider that a Local Board should be able to advocate to the Auckland Council on matters but should not be able to make, amend or revoke bylaws that relate to infrastructure.

Recommendation

Local Government (Auckland Council) Act 2009 be amended to ensure the role of Local Boards in the making, amending or revoking of a bylaw is specified and confined to non-infrastructure related matters.

5. STORMWATER

Clause 45 of the Bill (new Part 5 - Clause 49) provides the Auckland water organisation with the powers to manage water supply and wastewater services.

Section 6 of the Local Government (Auckland Council) Act 2009 establishes the Auckland Council as a territorial authority. It therefore has the responsibility for stormwater management. It is also a regional council responsible for managing natural watercourses and the regulatory responsibilities prescribed in the Resource Management Act 1991.

Stormwater management is a complex service. Some areas of Auckland are reticulated for stormwater, and some areas are served by man-made open channels and by natural water courses. In addition roading management includes managing culverts, sumps and sump leads, and stormwater outlets from private properties. Territorial authorities also have regulatory responsibilities for ensuring roof stormwater is safely disposed of and not connected to the wastewater system. Regional councils have regulatory responsibilities for the discharge of water and contaminants. Stormwater is disposed of in natural water courses and the Auckland estuaries and harbours

It is because of the nature of stormwater, and the many routes for its collection and disposal, that it is normally regarded as a public good and funded from general rates. This is distinct from water and wastewater that are private goods and are funded from user charges.

In Auckland there are further complications as there are a significant number of combined stormwater and wastewater reticulation systems.

For these reasons stormwater services have not been included in the functions of Watercare Services to date. However in recognising the synergy between wastewater and stormwater management, and the scale of the new arrangements and organisations, we think this is an appropriate time to reconsider who should have responsibility for stormwater management. Stormwater and wastewater design and construction activities draw on the same expertise. Combining their management in one organisation will have the potential to achieve economies of scale and scope. Therefore we believe stormwater management should become the responsibility of the Watercare Services.

In addition there need to be some clear lines of responsibility for managing culverts, sumps and sump leads; most territorial authorities consider these as a roading responsibility and the costs of maintenance are eligible for financial assistance from the New Zealand Transport Agency.

Recommendation

Stormwater management be the responsibility of Watercare Services.

The division of responsibilities for the management of culverts, sumps and sump leads be defined between the Auckland Council and Auckland Transport.

6. STANDALONE WATER AND WASTEWATER SCHEMES

The amendments to Local Government (Tamaki Makaurau Reorganisation) Act 2009 are provided for under Part 1, Clause 24 (new Section 35(J) (5)). This Clause provides that the assets relating to water supply or wastewater services for the local authorities in Auckland (other than stand-alone water supply or wastewater schemes) will be vested in Watercare Services.

We note under Section 43 of the Local Government (Auckland Council) Act 2009 amending the Local Government (Tamaki Makaurau Reorganisation) Act 2009 Clause 30A(2), Watercare Services Limited must formulate a plan for the interim management of standalone water and wastewater schemes in Auckland. It must also develop detailed proposals for their management. It does not refer to who will own them from November 1, 2010.

We assume the reference to standalone refers to the public systems that are not connected to the major metropolitan water and wastewater schemes in Auckland. There are many standalone water and wastewater services in the Auckland area that are owned by the seven local authorities in rural areas; these seemed to be excluded from being transferred to Watercare Services. Stormwater is in the same category. This makes no sense – who will own and manage these assets?

Recommendation

The stand-alone public water supply, wastewater and stormwater schemes be owned and managed by Watercare Services.

7. NOTIFICATIONS OF WORK

Clause 45 of the Bill (new Part 5 - Clauses 53 to 56) provides a regime for notification by the Auckland water organisation to Auckland Transport, or the Auckland Council, to undertake work on roads. There are corresponding clauses for advice on conditions and failure to advise conditions. The wording of these sections, including criteria for what constitutes reasonable conditions is inconsistent with the Infrastructure Bill – which has been reported back to the House by the Transport and Industrial Relations Committee.

One of the purposes of this Bill is to achieve consistency through the variety of utilities legislation. It will be somewhat counterproductive if one of the first infrastructure-related Acts to be enacted following the enactment of the Infrastructure Bill re-introduces an inconsistent approach all over again.

Recommendation

The notification provisions in the Bill be consistent with those in the Infrastructure Bill.

CONCLUSION

IPENZ and INGENIUM appreciate the opportunity to make this submission and are able to provide further clarification if required.

We wish to appear in person before the Select Committee to speak to our submission. Please ring or email me to obtain the contact details of our representatives. My contact details are available on the first page of this submission.

Tim Davin

Director – Policy