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12 February 2008

The Committee Clerk
Transport and Industrial Relations Committee
Executive Wing
Parliament Buildings
Wellington

Public Transport Management Bill

Introduction

- 1 This submission by the Legislation Advisory Committee (LAC) relates to the Public Transport Management Bill.
- 2 The LAC was established to provide advice to Government on good legislative practice, legislative proposals, and public law issues. The LAC produces and updates the Legislation Advisory Committee Guidelines: Guidelines on the Process and Content of Legislation which have been adopted by Cabinet as appropriate benchmarks for legislation.
- 3 The LAC has reviewed the Bill and wishes to raise a number of issues with the Committee. These issues relate to the mechanisms in the Bill to regulate provision of transport services by commercial operators. The Bill will require a regional council to adopt a regional public transport plan if it intends to impose controls on commercial public transport services (clause 9). The kinds of controls that can be imposed on commercial operators are

listed in clause 12. Commercial operators have to be registered by a regional council. Councils can refuse registration on the grounds listed in clause 29. They can also enforce compliance with controls and deregister operators.

- 4 A plan must identify any control a council considers likely to have a material adverse effect on the financial viability of a registered commercial operator and must contain transitional arrangements (clause 10(1)(e) and (i)). A council is not liable to pay compensation as a result of imposing a control (clause 13(5)). Clause 15 specifies who must be consulted before a council adopts a plan. The list includes “public transport users and providers”. In view of the potential impact a control can have on an existing commercial operator, the LAC considers there should be an explicit obligation on councils to consult with operators of existing commercial public transport services.

Controls

- 5 Clause 12 sets out the kinds of controls that a regional council can adopt. It includes additional controls that may be specified in regulations. Regulations could specify a significant number of additional controls as well as controls of a significant kind. Regulatory controls could end up being quite extensive. There are no criteria relating to the kinds of controls that regulations can prescribe. The power to prescribe them is unqualified. This mechanism allows the executive to expand significantly the scope of the Bill and the power of councils. The LAC considers the Bill should contain criteria regarding the kinds of controls that may be prescribed in regulations.
- 6 Controls may be adopted on a wide range of matters including operating frequency, operating an integrated service, use of integrated technology, and integrated fares. Existing commercial operators will have to comply with controls subject to deferred commencement in certain circumstances and the choice an operator has to opt out of providing a service (clause 13). Regional councils will have no liability to pay compensation to

operators for costs or losses that result from a control. The Bill does not provide a mechanism for challenging controls once adopted. They are not subject to any test of reasonableness which they would be if they were contained in by-laws. The LAC considers the Bill should make provision for operators to challenge the imposition of a control. It seems unlikely that clause 41 relating to appeals to a District Court would cover this because the clause is confined to appeals against decisions relating to a person, which the imposing of controls is not, and seems designed to deal with decisions regarding registration and deregistration of operators and compliance by operators with controls that have already been imposed.

Registration of commercial operators

- 7 Regional councils are the regulators. They have to decide whether to register commercial operators or decline registration. Registration may be declined by a council on the ground that the proposed commercial service is likely to have a material adverse effect on the financial viability of a contracted service, that is, a service the council has contracted for (clause 29(a)). Registration may also be declined if the proposed commercial service is likely to increase the net cost to the regional council of a contracted service.

- 8 In reaching a decision, a council is potentially conflicted by having to weigh the merits and costs of the proposed commercial service against any likely impact it may have on a service in which the council has a financial interest. The LAC understands the objective of the policy. However, it considers it is not in accordance with good legislative practice to legislate an arrangement where a licensing body can take its own interests into account in deciding on applications. The same considerations apply to variations to commercial services that are already registered (see clauses 32 and 33).

Objections

- 9 If a regional council intends to decline to register a commercial operator, the council has to tell the operator and give it an opportunity to be heard

(clause 30). Two issues arise here. The first concerns who hears the objection. The second concerns how the objection is dealt with.

- 10 Although clause 30 does not state explicitly who hears the objection, it would seem that it would have to be the council itself. Some statutes provide a mechanism for neutral internal review. The review procedure under the Injury Prevention, Rehabilitation, and Compensation Act 2001 is an example. Although not truly independent, this gives a second chance to have an application assessed before engaging a statutory appeal process. The LAC considers the Bill should provide for an internal review process that provides a measure of independence from the original decision-maker.
- 11 Clause 30(2) uses the terms "heard" and "hearing". There is nothing in the clause, however, to indicate what kind of procedure is envisaged. It is not clear whether the objecting commercial operator can appear in support of the objection, call evidence, and be represented by a lawyer. Equally, it is not clear whether an objection can be decided solely on the papers. There does not appear to be any requirement for the regional council to inform the commercial operator of the grounds on which it proposes to refuse registration. The commercial operator would not necessarily know what it was up against. The same considerations apply to variations (clause 34) and cancellation of registration (clause 37). By contrast, a regional council has to tell a commercial operator both its reasons and the grounds on which it proposes to deregister the operator (clause 37). The LAC considers that the Bill should state what is involved in hearing an objection and should also require a council to inform an operator of the grounds on which it proposes to refuse registration and the reasons.
- 12 A commercial operator has 7 days within which to object (clause 30). On the face of it, this must mean 7 ordinary days, not 7 working days. Working days are not the same as ordinary days. The term working days is defined in the Interpretation Act to mean weekdays. It also excludes public holidays and certain other periods. Seven days seems rather short. The position differs under clause 37 where a regional council that intends to

deregister a commercial operator has to give the operator 20 working days within which to be heard. It is not clear why ordinary days is used in one place but not in another when the issues are broadly similar.

Compliance with controls

- 13 Under clause 38, a regional council can give a commercial operator a notice to comply with a control. If the operator fails to comply, the council can apply to a District Court for an order for specific performance or damages. Specific performance is a discrete remedy that courts order to compel the performance of contracts. The remedy is subject to well established principles. The LAC does not consider it is appropriate to use the term specific performance in a statute to compel performance of a statutory obligation or of an obligation that derives from a statute. A preferable approach would be to refer to the making of an order directing an operator to comply with the control.

- 14 A related matter concerns the power to order relief by way of damages (clause 38). Damages are usually awarded by courts to compensate a person who has suffered loss as a result of the negligence, breach of contract, or other conduct of someone else. The power to award damages to a regional council where an operator has failed to comply with a control appears to be an unusual use of the remedy. It is not clear how a regional council might sustain damages. The LAC considers further consideration needs to be given to stating explicitly the circumstances in which an operator might be ordered to make a monetary payment to a council.

Withdrawal of service

- 15 Clause 39 of the Bill requires a commercial operator to notify a regional council if it intends to withdraw from providing a service. Notice has to be given within any period specified in a regional public transport plan or, if no period is specified, within 21 days before the service ceases. The operator cannot withdraw the service before expiry of any minimum period stated in the plan.

- 16 It can be appreciated why a council would wish to have notice and why it would not wish an operator to terminate a service in circumstances that left the public without public transport. The council can waive both the notice period and the minimum period of operation if satisfied the public would not be unreasonably disadvantaged. It could not do so, however, if withdrawing the service would result in significant disadvantage to the public.
- 17 An operator may for financial or other reasons have no option but to cease business. Company directors are under a duty to ensure that a company does not trade recklessly or incur obligations that it will be unable to perform (sections 135 and 136 Companies Act 1993). A receiver may have no option but to discontinue a service immediately. While it is almost inconceivable to think that an operator would be prosecuted for an offence under the Bill (clause 49) in a situation where it had no option but to cease trading, the LAC believes that it is unsatisfactory for a conflict to exist in these circumstances. An operator could find itself in an impossible position. It will be in breach of the Bill if it ceases operations but it will be in breach of other legislation if it does not. There is also an element of reverse onus in that operators will have to establish a defence.

Registers of public transport services

- 18 Clause 25 requires regional councils to keep public registers of public transport services. The clause also specifies what information has to be recorded in the register. If a council fails to comply with the clause, it commits an offence and may be fined up to \$3,000 (clause 49). The LAC questions the need for this.
- 19 Offence provisions in statutes relating to registers tend to be directed to ensuring that the information recorded is not misused or falsified. Under the Companies Act, the Registrar of Companies has to maintain a register of companies and is also the Registrar of Personal Property Securities responsible under the Personal Property Securities Act for maintaining the register under that Act. Neither Act has an offence provision similar to

clause 49. It is not clear what the policy reason is for creating an offence for councils. A council could commit an offence simply by failing to register material such as a timetable or fares. The requirement to maintain a register should be treated as a public law duty rather than being enforced by an offence regime.

Appeals

20 Appeals against decisions of regional councils under the Bill may be made to a District Court (clause 41). An appeal must be commenced by originating application (clause 41). The originating application procedure under the District Courts Rules 1992 is designed for matters where the ordinary action procedure, which requires a notice of proceeding and statement of claim, is not appropriate. The District Courts Rules contain, in Part 9, comprehensive rules about appeals. While there are a few instances in statutes where the originating application procedure is prescribed for appeals, there appears to be no good reason for requiring it to be used here instead of the procedure in the District Courts Rules specifically designed for appeals to District Courts.

"Transport disadvantaged"

21 Clause 14 of the Bill requires regional councils in preparing or adopting regional public transport plans to consider the needs of "persons who are transport disadvantaged". The term "transport disadvantaged" is capable of applying in a variety of circumstances. It might apply to people who live in a locality where there is no public transport. It could also apply to people who have access to public transport but have to use a car to get to it. It could also apply to a person who does not drive or who does not own a car. It would be helpful if the Bill spelt out the kinds of circumstances that are envisaged. Although the term has been used in earlier legislation and despite the fact that its use may not have given rise to uncertainty or litigation, it is a loose term that could lead to unnecessary judicial review.

Conclusion

- 22 A number of features of the Bill when taken together place commercial operators at a disadvantage. They have no direct entitlement to be consulted about proposed plans or the adoption of specific controls. There is no mechanism for challenging controls. Operators become subject to controls once adopted and have limited rights to opt out of a service. Their capacity to discontinue a service is constrained. In some situations not discontinuing a service might bring them into direct conflict with other legislation. Decisions about registration are made by a body that is potentially conflicted. They can only object to the same body that refused registration. There is no explicit procedure for objection. They are not entitled to compensation for the costs they might incur or losses they might sustain because of a control. They are, however, liable to pay regional councils damages if they fail to comply with controls. They can commit 4 different kinds of offences. A council may commit an offence, but the offence itself seems inappropriate and should be removed. In many of these respects the Bill is incompatible with basic legal principles.
- 23 The LAC would be pleased to appear before the Committee to speak to this submission.

Yours sincerely

Sir Geoffrey Palmer
Chairperson