

10 June 2011

Sir John Hansen
Convenor
Canterbury Earthquake Recovery Review Panel
c/- Canterbury Earthquake Recovery Authority
Private Bag 4999
CHRISTCHURCH 8140

Dear Sir John

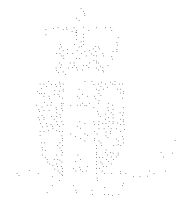
Canterbury Earthquake (Local Government Act 2002) Order 2011 and Canterbury Earthquake (Energy Companies Act) Order 2011

Proposal

1. We seek a review by the Canterbury Earthquake Recovery Review Panel, under section 73 of the Canterbury Earthquake Recovery Act 2011, of two related draft Orders in Council proposing an alternative approach to planning and accountability in Christchurch for 2010/11 and 2011/12.
2. One Order proposes amendments to the Local Government Act 2002 for Christchurch City Council and council-controlled organisations. This affects the Council's 2010/11 annual report and 2011/12 annual plan, and council-controlled organisations' 2011/12 statements of intent. The draft Order is attached as Appendix One. The relevant Minister for this Order is the Minister of Local Government, Hon Rodney Hide.
3. The other Order extends reporting timeframes in the Energy Companies Act 1992 for Orion New Zealand, the Council's electricity lines company. The draft Order is attached as Appendix Two. The relevant Minister for this Order is the Acting Minister of Energy and Resources, Hon Hekia Parata.

Background

4. The Local Government Act 2002 (the Act) includes a number of provisions for planning and accountability. Each council is required to develop and adopt an annual plan and an annual report, with a specified purpose and content. The special consultative procedure must be used as part of the process for adopting the annual plan.



5. Following the earthquake of 22 February 2011, Christchurch City Council (the Council) raised doubts about its ability to meet some of the Act's planning and accountability requirements for its 2010/11 annual report and 2011/12 annual plan. It also noted that Council-owned entities needed additional time to prepare and update their 2011/12 statements of intent and other documents.
6. The Council asked for an Order in Council to:
 - relieve it from obligations to include certain information in the 2010/11 annual report and 2011/12 annual plan;¹
 - exempt it from using the special consultative procedure to adopt the 2011/12 annual plan;
 - defer the date by which council-controlled organisations are required to deliver their draft and completed 2011/12 statements of intent, by five months; and
 - defer the dates by which Orion New Zealand is required by the Energy Companies Act 1992 to deliver its 2011/12 statement of corporate intent (by three months), and 2010/11 operations report and financial statements (by two months).
7. The Act does not specify the consequences for not meeting legislative requirements. These requirements exist to ensure accountability to ratepayers and communities. As well as risking the confidence communities have in the Council, not complying with the law could have other significant repercussions. The draft annual plan is the vehicle for setting out, and seeking feedback on, the Council's funding impact statement, which includes its proposed rates. Not consulting on these proposals, without an appropriate mandate, raises the risk that the validity of the Council's rates might be challenged.
8. In relation to the 2010/11 annual report, the Council has requested exemptions from requirements to include comparisons between actual and intended activities, performance, and service levels. Making such comparisons would be impracticable given that the earthquake has rendered many of the programmes and projects in the annual and long-term plans irrelevant.
9. The Council intends to produce an annual plan for 2011/12, and to adopt this by the end of June as required by the Act. However, it is seeking exemptions from content and purpose provisions that require the annual plan to support, and explain variations from, the long-term plan. As much of this information is no longer relevant, this would not be a productive use of Council resources.

¹ For the annual report, this relates to requirements for comparisons between actual and intended activities, performance, and service levels, and progress with community outcomes, as provided for in section 98(2)(a), and clauses 15 and 16 of Schedule 10. For the annual plan, this relates to information that supports and explains variations from the long-term plan, as provided for in sections 95(5)(b) and (c), 95(6)(a) and (b), and clause 13(b) in Schedule 10.

10. The Council also considers it is not feasible to consult on the draft plan in the usual manner, and has asked to be exempt from requirements to use the special consultative procedure, which takes approximately eight weeks. Work on the draft plan had to stop while the Council responded to the 22 February earthquake. Since then it has needed to review and revise the contents of the plan, including its budgets, capital works programme and service levels.
11. The Council fully or partly owns a number of council-controlled organisations, either directly or through its investment arm, Christchurch City Holdings Limited. As the forecasts prepared for their draft statements of intent are now largely irrelevant, these organisations have asked for extra time to update this information. The Council is seeking to defer delivery of the draft statements of intent to 1 August 2011, extend the deadline by which boards must consider comments on those drafts to 1 October 2011, and defer delivery of the completed statements to 30 November 2011 (that is, by five months each).
12. The Council is also the major shareholder in Orion New Zealand, and is seeking to defer the deadlines for its 2011/12 statement of corporate intent by three months, and its 2010/11 operations report and financial statements by two months. This would involve providing a one-off extension to the timeframes specified in the Energy Companies Act 1992.
13. Section 71 of the Canterbury Earthquake Recovery Act enables Orders in Council to grant an exemption from, modification of, or extension of provisions in other enactments, including the Local Government Act 2002.² These can be absolute, subject to conditions, and/or made by stating alternative means of complying with provisions. Under section 71(5), they can be made for the purpose of relaxing or suspending provisions that may divert resources away from responding to the earthquakes, or may not be reasonably capable of being complied with due to the circumstances resulting from the earthquakes. The Orders referred to in this letter would be made for these reasons.

Policy Objective

14. When considering the Council's requests for modifications and/or exemptions from provisions in the Act, we asked the following questions:
 - Is it practicable for the Council to comply with this provision? That is, does the Council have the capability, capacity, and/or information required to meet the requirements?
 - Under the circumstances, is this provision useful for the Council and its communities? In this sense, 'usefulness' is based on whether the provision:
 - helps the Council manage the situation it is facing;

² Although the Energy Companies Act 1992 is not specified in the list of enactments that may be the subject of an Order in Council, section 71(3) includes the words "without limitation" in relation to that list.

- provides information to the public that helps them assess the Council's management of that situation; and/or
 - does not divert resources away from reconstruction and recovery efforts.
15. If a provision appears neither practicable nor useful, we then considered whether there are alternative requirements that would:
- help to maintain or enhance transparency and accountability;
 - enable continued public oversight and scrutiny of, and/or involvement in, Council decisions;
 - not require the Council to divert resources from recovery work; and
 - enable the Council to work proactively, cooperatively, and efficiently with the Minister for Canterbury Earthquake Recovery and the Canterbury Earthquake Recovery Authority (CERA).

Timing

16. It is highly desirable that the Orders come into effect no later than 30 June 2011. This is the date by which the Council must adopt its 2011/12 annual plan. The Council and its communities need clarity about the content of, and process for adopting, this plan.
17. The draft Orders contain retrospective commencement dates as the statutory deadlines for some of the provisions, particularly those relating to draft statements of intent, have already passed.

Preferred Option

18. When examining the Council's request for an Order in Council, we have considered the following issues:
- Could an Order be used to achieve the amendments and other objectives sought, or could provisions in the Canterbury Earthquake Recovery Act be used as well or instead?
 - If an Order is made, what would it include? Are all of the exemptions requested by the Council acceptable? What alternative provisions could be made for transparency, accountability and public scrutiny?
19. These issues, and options for addressing them, are discussed below.

Using provisions under the Canterbury Earthquake Recovery Act 2011

20. The Canterbury Earthquake Recovery Act sets out measures to enable the Minister for Canterbury Earthquake Recovery and CERA to facilitate and direct, if necessary, greater Christchurch and its communities to respond to,

and recover from, the effects of the earthquakes. Amongst other things, the Act:

- empowers the Minister for Canterbury Earthquake Recovery to suspend, amend, or revoke annual plans made under the Local Government Act 2002;
- empowers the CERA chief executive to direct councils to take or stop taking any action, or to make or not to make a decision; and
- requires councils to amend an annual plan to give effect to the provisions of a Recovery Plan, if required to do so in that Plan.³

21. It is possible that these provisions might enable some of the exemptions requested by the Council, and/or the additional measures we are proposing below. However, these are intended to be reserve powers, only to be used by the Minister and CERA if they are necessary. A collaborative approach between central and local government is preferable, wherever possible. It is desirable, therefore, for the Council to have the power to voluntarily amend its annual plan, rather than for this to be done by the Minister or specifically required in a Recovery Plan.
22. In the Department's view, it is likely to be more efficient if the Council is given flexibility to work proactively and cooperatively with CERA. This would reduce the need for the Minister/CERA to intervene or issue directions (or for the Department and/or Council to ask them to do so), and for processes to be developed on an ad hoc basis. In addition, the Canterbury Earthquake Recovery Act does not appear to allow the Minister or CERA to direct the Council to circumvent legislative requirements, such as use of the special consultative procedure to adopt the annual plan.
23. We consider it necessary, therefore, that this matter is dealt with through an Order in Council. This would provide both the Council and its communities with greater certainty about what will, and will not, be required during 2011/12 in terms of annual reporting and annual planning. It should help to reassure the public that there will be formal processes for amending and updating Council information, which will provide opportunities for oversight and scrutiny.

Contents of the draft Canterbury Earthquake (Local Government Act 2002) Order 2011

24. The Council asked for an Order in Council to make certain exemptions from legislative obligations, as considered below. However, if these requirements are to be taken away, albeit temporarily, then there is a need to consider what might take their place. Therefore, we identified alternative mechanisms that could provide for transparency, accountability, and scrutiny.
25. In relation to the 2011/12 annual plan, the options considered were to:

³ These powers are provided in sections 27(1)(b), 48, and 26(4) of the Canterbury Earthquake Recovery Act 2011 respectively.

- delay the date by which the annual plan is to be adopted (this option is not recommended and is not in the draft Order);
 - specify a minimum time period in which written feedback on the proposed content of the annual plan can be provided by the public;
 - enable the Council to formally amend the annual plan during the year, in public, to allow for information to be updated and to align with the Recovery Strategy and Recovery Plans; and/or
 - require the Council, at intervals of not less than four months, to receive and consider reports, in public, on progress against the annual plan.
26. For the 2010/11 annual report, we considered requiring the Council to describe the effects of the earthquake on the assets it uses to deliver groups of activities and on its ability to deliver services in each group.

Annual report 2010/11

27. We consider the exemptions requested by the Council to be reasonable. Providing comparative service performance information is not deemed to be useful, given there are likely to be significant variations from the annual and long-term plans, and the reasons should be clear to ratepayers. Much of the information required by the Act is based on the assumption that councils are operating under business as usual conditions, which is not applicable to Christchurch at the moment.
28. We consider that a more useful requirement would be for the Council to report on the effects of the earthquake on:
- the assets it uses to deliver each group of activities, and the condition of those assets at 30 June 2011; and
 - other factors affecting its ability to deliver the service from 30 June 2011.
29. The report would also include a cost of service statement in the same format as in its annual report for the year ended 30 June 2010. This would record operating and capital receipts for outgoings for groups of activities.
30. As the Council has an interest in several council-controlled organisations, which provide local services, we also consider that the annual report should contain descriptions of the effect of the earthquake on each organisation's assets and service delivery capability.
31. The Council should be able to produce this information. It has already said it intends to include an indication of the damage to its assets and the estimated time and cost of repairs in the 2010/11 annual report. Specifying requirements in the Order in Council would provide ratepayers with greater certainty about the content of the report, as well as clarifying for the Council that the information is to be descriptive.

Annual plan 2011/12 – adoption process and content

32. In the circumstances, the annual plan will be an interim budgeting mechanism until the next long-term plan, and proposed Recovery Strategy, are in place. Information on, or cross-references to, an outdated long-term plan does not seem to be useful to the Council or its ratepayers. Therefore, we consider it appropriate that the Council is not required to include this information in its 2011/12 annual plan.
33. The Act requires the special consultative procedure to take not less than one month, after which submissions need to be considered and public hearings held. In practice, this means draft annual plans would usually need to be out for consultation around the end of March. However, the Council has not been able to follow this process for its 2011/12 draft annual plan. It has needed to use the time and resources usually taken up by the special consultative procedure to do recovery-related work and amend the contents of the draft plan.
34. Using the special consultative procedure has not been practicable, for both timing and resourcing reasons. In addition, the 2011/12 annual plan will provide less certainty than usual and is likely to require regular updating, making consultation on the draft less useful than it would normally be. Therefore, we consider it appropriate to include an exemption from the special consultative procedure in the Order in Council, and to have this apply retrospectively.
35. To off-set a reduction in formal consultation, we consider it will be important for the public to have greater oversight and scrutiny of the draft annual plan and how it is implemented and amended by the Council. While it is for the Council to decide how to engage with its communities, measures in an Order in Council could enhance transparency and accountability and enable an appropriate level of public scrutiny to occur.
36. One such measure would be to delay adoption of the 2011/12 annual plan. This would enable additional public oversight and feedback, and reduce pressure on the Council to finalise the draft plan before the end of June.
37. However, this is the most problematic of the options identified because it affects rate setting processes and billing timeframes. The Council told us that it does not consider it practicable to defer decisions on the annual plan beyond 30 June 2011 because:
 - the first rates instalment for the 2011/12 year is due for payment by 15 August 2011, in accordance with current rating policy;
 - to be fair and consistent with that policy, invoices for the first instalment must be with ratepayers by 15 July 2011;
 - it takes about 10 days to produce and check the rating database before assessments and invoices can be sent out;

- the Council has a contract with Environment Canterbury for the issue of assessments and invoices, and the collection of that Council's rates in accordance with this timetable; and
 - any delay would create uncertainty, with both Councils starting the new financial year without their major source of income locked in place. This could affect cash flows. It would also mean the Council would have no formal mechanism for budget or service accountability.
38. Delays would also have an effect on ratepayers, particularly those on fixed incomes, who need certainty about billing dates for their household budgeting. For all of these reasons, we have not recommended that the adoption of the annual plan be delayed.
39. Although the Council resolved to invite written feedback on the proposed content of the annual plan, this would only be for a short, unspecified period. We consider a more useful approach could be for the public to be given more reassurance about this process through a set timeframe for feedback. After discussion with the Council, we proposed a minimum period of two weeks be specified in the Order.

Annual plan 2011/12 – amendments and scrutiny during the year

40. Further transparency and accountability could be achieved by requiring the Council to receive and consider reports, in public, on progress against the annual plan. These would include revised financial projections and progress on restoring services and infrastructure. To give the Council some flexibility, we proposed these progress reports be produced at intervals of not less than four months.
41. These reports should not be onerous for the Council to prepare, and would not create additional compliance costs or require resources to be diverted from recovery-related tasks. The Council should have this information for internal use anyway, and it is standard practice for staff to provide councillors with quarterly performance reports.
42. Performance reports are made public, and the Council has said these reports will continue and could deal with changing circumstances throughout the coming year. However, while we would expect the Council to carry on following good practice, it would be preferable if the Order in Council required the production of reports and specified certain content, rather than relying on a voluntary approach. Members of the public need a guarantee that information will be made available and reports will be considered in open meetings, in order to assuage concerns that the Council may choose to consider some content behind closed doors. This could help to provide some certainty in an otherwise unpredictable year, and off-set less involvement in the development of the draft annual plan.
43. Changing circumstances in Christchurch will mean the Council's budget is likely to need updating during the year, but the Act makes no provision for amending the annual plan. Although some amendments to the annual plan

could be made by the Minister of Canterbury Earthquake Recovery, under the Canterbury Earthquake Recovery Act, or could be required in a Recovery Plan, we consider it desirable for the Council to be enabled to do this on its own. This would be a more flexible and efficient method, as it would not rely on decisions being made by the Minister and the amendments would not have to link directly to provisions in a Recovery Plan. It would allow the Council to be responsive to change, including its role in developing and implementing the Recovery Strategy and Plans.

44. The draft Order enables annual plan amendments to be made during 2011/12, if the Council wants to do so. This would not allow for changes to rates, though, which would have been made by resolution at the start of the year. The amendments would be agreed by Council resolution at an open meeting, allowing them to be scrutinised by members of the public. Formal consultation with communities has not been suggested, though, as this could be time consuming and divert Council resources away from recovery-related work. The Council should be free to determine what consultation, if any is needed. Changes made to align with the Recovery Strategy or Recovery Plans may have already been consulted on when these are being developed.

Council-controlled organisations' statements of intent 2011/12

45. The extensions to the deadlines requested by the Council and its council-controlled organisations appear to be reasonable, and have been included in the draft Order. The organisations would benefit from extra time to prepare and update their statements of intent in a post-earthquake environment, particularly given that the forecast information originally prepared for the draft statements is now largely irrelevant.

Contents of the draft Canterbury Earthquake (Energy Companies Act) Order 2011

46. The amendments requested by the Council in relation to Orion New Zealand also seem appropriate, for similar reasons to those set out above. Orion faces the same difficulties meeting its planning and accountability requirements as council-controlled organisations. The company would benefit from extra time to prepare and update its statement of corporate intent and operations report, particularly in light of the changes to the electrical lines infrastructure since the earthquakes.
47. The Ministry of Economic Development also considers it appropriate to defer the reporting date for Orion's financial statements to allow the organisation additional time to prepare its statements and amend its forecasts in light of the changed nature of its infrastructure. Orion's financial year ends on 31 March, whereas for council-controlled organisations under the Local Government Act 2002 it ends on 30 June. As such, we consider it is reasonable to extend Orion's financial reporting deadlines, while leaving other council-owned entities deadlines unchanged.

Costs and Benefits

48. We do not consider there to be additional costs associated with the proposals. The Council has requested exemptions on the basis that it is not feasible and/or useful to comply with certain legislative requirements, and attempting to do so would divert resources away from recovery and reconstruction work.
49. The Council was already intending to allow the public to provide feedback on the proposed contents of the annual plan; the Order would just specify the time period for doing so. The Council also prepares quarterly performance reports, and would not be required to do this more frequently. Amending the annual plan is unlikely to incur costs, as formal consultation processes would not be required.
50. The alternative mechanisms have been proposed to off-set exemptions and provide for transparency, accountability, and public scrutiny. The intention is that these mechanisms will benefit the Council, its communities, and other stakeholders during the coming year, by enabling them to respond to, and receive additional information about, changing circumstances. We consider that members of the public and businesses would benefit from greater certainty about the information the Council will produce, and that this will be publicly available, so they know about progress with restoring services and updated financial information.

Risks

51. We do not consider there to be significant risks in proceeding with these proposals, which relate to the machinery of local government.

Consultation

52. Christchurch City Council has been consulted throughout the process for developing the proposals and on the draft Orders, and agrees with them. (This consultation has been with the Council's Solicitor and Corporate Services Manager, and its legal advisors Simpson Grierson.)
53. Environment Canterbury, Waimakariri District Council and Selwyn District Council have prepared and consulted on draft annual plans for 2011/12 and have not asked to be included in the draft Orders.
54. The following agencies were consulted on the proposals: the Office of the Auditor-General, Department of Building and Housing, Ministry for the Environment, Treasury, Land Information New Zealand, Ministry of Economic Development and Canterbury Earthquake Recovery Authority. The Department of the Prime Minister and Cabinet has been informed.
55. Treasury's Crown Ownership Monitoring Unit (COMU) was asked specifically about proposals to defer the delivery of Christchurch City Holding's draft and

completed statement of intent, as the Crown is also a shareholder in Christchurch International Airport Ltd. COMU is comfortable with the new deadlines proposed.

56. Orion New Zealand falls under the Energy Companies Act 1992, not the Local Government Act 2002. As this Act is administered by the Ministry of Economic Development, it was consulted on the Council's request to extend Orion's statement of corporate intent and financial reporting deadlines. The Ministry supports the proposals and agrees with the content of the draft Order.

Profile of draft Order and proposed publicity

57. The Council is currently preparing its annual plan, and will be seeking feedback on its contents this month. Members of the public may notice that the Council is not following standard consultation processes for adopting the annual plan, and the timeframe for commenting is shorter than usual.
58. Proposals for alternative transparency, accountability, and scrutiny mechanisms have been developed to off-set the risks of relieving the Council from some legislative requirements, particularly in terms of limiting consultation on the draft annual plan, reducing its contents, and there being less certainty about the contents that remain. It is possible there will still be some criticism though, particularly about the lack of time for feedback on the draft plan.
59. The Minister of Local Government and Minister for Canterbury Earthquake Recovery plan to issue a media statement about the proposals in the draft Orders.

Conclusion

60. We look forward to receiving your recommendations so that regard can be had to them before the relevant Ministers make a recommendation on the draft Orders. The key contact for this item of work is Jane Fleetwood, Senior Policy Analyst, Local Government and Community Policy Group (telephone: 04 494 5734; email jane.fleetwood@dia.govt.nz).

Yours sincerely


Marilyn Little
General Manager Policy
Department of Internal Affairs