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FINANCING OF ROLLING STOCK: REGIONAL COUNCIL'S INTERESTS IN "PUBLIC TRANSPORT SERVICE" ASSETS

Introduction

- Greater Wellington Regional Council (**GWRC**) is considering:
 - various options for the financing of rolling stock expected to be purchased by it, or a GWRC-controlled organisation, and made available (possibly by lease) to Toll Holdings (as operator of the Tranz Metro suburban passenger train service); and
 - purchasing from Wellington Cable Car Limited (**WCCL**) the overhead trolley-bus wires, fixtures and other assets associated with the electric wire network used to operate the trolley-bus service provided by Stagecoach in and around Wellington City.
- You have asked us to advise you on the manner by which a regional council may hold an interest in public transport assets and, in particular, whether GWRC is required to hold any interests in rolling stock and in trolley-bus wire assets in a council controlled trading organisation (**CCTO**).

Summary of our conclusions

- In our opinion, the words "any interest" in section 27(1) of the Land Transport Management Act 2003 (**LTMA 03**) include the ownership of, or

leasehold interest in, rolling stock assets and the ownership of trolley-bus wire assets used in each respective "public transport service".

4 In respect of any such interests in a "public transport service":

4.1 section 27(1) of the LTMA 03 requires a local authority to hold "any interest" in a "public transport service" in a CCTO;

4.2 we have considered that, on the one hand, because the definition of the statutory concept "public transport service" focuses on the business operations of such a service, it could be argued that a relevant "interest" for the purposes of section 27(1) is similarly limited to an active interest in the business operations of that service. If that were the case, and if GWRC had no active involvement in the business operations of the passenger train service, nor any active involvement in the business operations of the trolley-bus service, section 27(1) would not apply at all;

4.3 however, in our opinion (based on the meaning of the words used and determined by resort to the relevant principles of statutory interpretation), the better view is that the words in section 27 and the policy considerations relating to, and underlying this section, indicate that "any interest" should be interpreted as broadly as these words themselves suggest. Therefore, GWRC would be required to own or lease rolling stock and own trolley-bus wire assets through a CCTO.

"PUBLIC TRANSPORT SERVICE" INTERESTS UNDER THE LTMA 03

Introduction

5 You have asked us whether GWRC's proposed ownership of, or leasehold interest in, rolling stock or proposed ownership of trolley-bus wire assets would constitute an "interest" in a "public transport service". The effect of these might be that if they were each an "interest", GWRC would be required to hold these respective assets in a CCTO.

The LTMA 03 and section 27

6 The relevant legislation pertaining to regional council interests in "public transport services" is the LTMA 03. This Act also contains general provisions relating to public transport funding and management. Section 27 in particular sets out the basis by which a local authority (which is defined to include a regional council) may hold an interest in a "public transport service".

7 Section 27 reads:

Manner in which certain local authority interests in public transport service must be held

(1) Any interest that a local authority has in a public transport service to which this section applies must be held in a council controlled trading organisation, whether or not in conjunction with another local authority.

(2) This section applies to a public transport service held by a local authority if, and only if, the public transport service indirectly receives funding for the purpose from the national land transport account.

(3) A regional council may, subject to subsection (1), hold an interest in, or acquire the ownership of, a public transport service or any public transport infrastructure.

a In addition, to assist in analysing section 27 we note section 5 of the LTMA 03 defines "**public transport service**" as "the carriage of passengers for hire or reward by means of vehicles or coastal ships", which would include a passenger train service and the passenger bus service.

9 Furthermore, in order to proceed with the analysis of the relevant concepts within section 27 and for the purposes of formulating this opinion, we have assumed that:

9.1 the rolling stock to be purchased or leased by GWRC, or a GWRC-controlled entity, would be used by Toll Holdings for a "public transport service" in terms of the LTMA 03;

9.2 the trolley-bus wire assets would be purchased by GWRC and are (and would continue to be) used by Stagecoach in the operation of a "public transport service" in terms of the LTMA 03; and

9.3 each "public transport service" referred to in paragraphs 9.1 and 9.2 above would indirectly receive funding from the National Land Transport Account through GWRC (and therefore the test in section 27(2) would be satisfied).

Approach to interpretation of section 27

10 Whether section 27(1) operates to require GWRC to hold its interests in rolling stock and trolley-bus wire assets in a CCTO turns on the interpretation of the words "any interest" as they relate to a "public transport service".

11 In order to ascertain the meaning of these words, therefore, we must look first to statutory definitions, and second, we must use the established principles of statutory interpretation. These principles of statutory interpretation (including as enacted in the Interpretation Act 1999), indicate that the meaning of those words must be ascertained by:

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- 11.1 analysing the words used in section 27(1); and
- 11.2 considering the purpose, including the underlying policy of section 27(1) (particularly where the words used are not clear, or are capable of more than one interpretation).
- 12 Unsurprisingly (given that the LTMA 03 is a recently enacted statute), section 27(1) has not been considered by the courts and, as such, no guidance as to the interpretation of the particular words in section 27 can be drawn from case law.
- 13 Arguably, the words of section 27(1) are clear: "**any** interest" is broad, and would capture an interest in assets used in a "public transport service", as well as an interest in the active provision of that service itself. By owning/leasing rolling stock and by owning trolley-bus wire assets used in each respective "public transport service" (as defined in paragraph 8 above), **GWRC** would hold an "interest" in that rolling stock and in the trolley-bus wire assets. If so, these interests must, therefore, be held in a CCTO.
- 14 On the other hand, it is arguable, given that the definition of "public transport service" focuses on the provision of a service (and not the assets used in that service), that the relevant "interest" section 27(1) refers to is an interest in the service itself; i.e. the business operations of a passenger train service and passenger bus service. A consideration of the legislative history of the term "public transport service" supports this argument. Prior to the enactment of the LTMA 03, the Transit New Zealand Act 1989 used the term "passenger service" and as well as defining it narrowly, contained specific operative provisions indicating that this term was limited to the actual business operation of providing public transport. The LTMA 03 substituted "public transport service" directly for "passenger service" for the purposes of part 44C of the Local Government Act 1974 (then still in place, but which since has been repealed). This could indicate, therefore, that Parliament had intended "public transport service" to be as limited as its predecessor equivalent term.
- 15 It could be argued, therefore, that because GWRC would not be actively involved in either such services, but would under the proposed transactions merely own or lease assets used by a provider of those services, its ownership or leasehold interests would not be the kind intended to be captured by section 27(1).
- 16 Given that there are two possible interpretations of these specific words in section 27(1) (as described in the preceding two paragraphs), we now turn to consider the "purpose" of section **27(1)**. To consider the "purpose" of a

section (as we may in accordance with principles of statutory interpretation), we can look to and consider the policy underlying it.

- 17 Because section 27(1) of the LTMA 03 refers to the CCTO structure, it is necessary in this instance to also consider the provisions and policy of Part V of the Local Government Act 2002 (**LGA 02**), which sets out the CCTO business structure framework. The following paragraphs summarise the policy provisions relevant to an analysis of the LGA 02 elements within the LTMA 03 and, in particular, those relevant to section 27(1).

CCTO policy

- 18 The CCTO framework established by the LGA 02, and utilised in section 27 of the LTMA 03, is underpinned by a policy that business operations in which local authorities have an interest, or which have access to a local authority's creditworthiness, should operate on a "level playing field" with equivalent private sector businesses.
- 19 To achieve that objective, the CCTO framework set out in Part V the LGA 02 imposes on a CCTO certain obligations which are consistent with a "private sector approach", including:
- 19.1 conducting its affairs in accordance with sound business practice;
 - 19.2 operating pursuant to a written constitution and statement of intent;
and
 - 19.3 issuing audited financial statements.
- 20 In addition, and as a further measure designed to stop CCTOs from taking prohibited advantage of their link to the creditworthiness of their local authority, that local authority, such as a regional council, is prohibited from guaranteeing a CCTO's obligations, and must not lend or provide any other financial accommodation to a CCTO on terms more favourable than it would itself receive without charging rates/rate revenue as security.
- 21 With that policy in mind, we now turn to consider the two possible interpretations of the words "any interest" (as introduced above), being:
- 21.1 first, that the words "any interest" are intended to be as broad as a literal interpretation of these words would suggest, i.e. an ownership/leasehold interest in an asset used in a "public transport service" would be captured; or

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- 21.2 secondly, that the relevant "interest" is restricted to an interest in the service itself, i.e. the business operations of a passenger train service or the business operations of a passenger bus service.
- 22 In our view, the words "any interest" in section 27(1) should be interpreted as broadly as these actual words suggest. "Any interest" would, therefore, include the ownership of, or leasehold interests in, rolling stock, and the ownership of trolley-bus wire assets. In support of this literal interpretation, it is our view that the first alternative best accords with the general policy underpinning the **CCTO** framework (as described in paragraphs 18 - 20 above). The relevant "public transport service" Toll Holdings might operate (a passenger train service) is one which a private sector company could operate alone (without depending on **GWRC** for a lease of rolling stock assets) and, similarly, Stagecoach could operate the passenger trolley-bus service without **GWRC's** assistance. To interpret the words in section 27(1) consistently with the "level playing field" policy inherent within the **CCTO** framework, therefore, **GWRC** must hold any interest in rolling stock (such as a potential ownership or leasehold interest) and any interest in trolley-bus wire assets in a **CCTO**.
- 23 Nevertheless, reasonable arguments for the second alternative can be made. For example, we understand that regional councils routinely hold public transport infrastructure assets in the councils themselves. If that is the case, it is anomalous that a council could hold those infrastructure assets, but that an interest in non-infrastructure assets (such as rolling stock) must be held in a **CCTO**. If the council is not operating the relevant "public transport service" and, therefore, not competing directly in the provision of services with any private sector operator(s), there would seem no justifiable distinction between assets such as rolling stock, and infrastructure assets. (However, note our comment in paragraph 31 below: arguably, public transport infrastructure would be caught by section 27(1) as "any interest" in a "public transport service", and should, therefore, be held in a **CCTO**.)
- 24 Further, when assessing the meaning of statutory provisions, statutory context - namely, other provisions of the LTMA 03 - is important. In particular, the words in section 27(2) could be used to support this second alternative. Subsection (2) states that section 27 "applies to a public transport service **held** by a local authority if, and only if, the public transport service receives funding for the purpose from the national land transport account". On the basis that **GWRC** would not "hold" a "public transport service" itself (i.e. it would not engage in the business operations of the passenger train service), and would merely own or lease assets ancillary to that service, it is arguable that section 27 would not apply to

this proposed transaction at all, and that GWRC may be entitled to hold the assets in the council itself.

- 25 We note also in support of this alternative argument that the legislature, when enacting the LTMA 03, substituted "public transport service" directly in place of the previously defined term "passenger service" for the purposes of other legislation. In such prior and other legislation, "passenger service" had been clearly treated as being limited to the actual business of providing public transport. It might be argued that this imports the same limited meaning of service provision into the meaning of "public transport service".
- 26 On balance, however, we believe that the purpose of section 27(1) is clear, and as it incorporates the **CCTO** legislative framework and policy underpinning this framework from the **LGA 02**, section 27(1) is intended to capture a broad range of interests in order to be consistent with such policy. To the extent GWRC is involving itself in a "public transport service" by purchasing/leasing rolling stock and purchasing trolley-bus wire assets, and making that rolling stock available to Toll Holdings as the service operator (possibly by a lease) and making the trolley-bus wire assets available to Stagecoach as the service operator, we think the better view is that it must do each through a **CCTO**.

Public transport "infrastructure"

- 27 We note that section 27(3) allows a regional council to hold (subject to subsection (1)) an interest in, or own, a "public transport service", or any "*public transport infrastructure*". If an interest in public transport infrastructure is distinct from an interest in a "public transport service", it could be argued that section 27(1) would not apply to such interests. As a consequence, according to this argument, if rolling stock or trolley-bus wire assets could be classified as "public transport infrastructure", then section 27(1) would not apply to these assets.
- 28 However, in our opinion "public transport infrastructure" would not include rolling stock, for the following reasons:
- 28.1 although the LTMA 03 does not define the term, a definition was included in draft versions of the Land Transport Management Bill. That definition referred only to non-moveable property and land (for example, public transport stops, signs, shelters, transfer stations, sections of roadways, wharves and jetties); and
- 28.2 similarly, dictionary definitions of "infrastructure", and other legislative usage, limit the term to fixed property.

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- 29 Therefore, because rolling stock is not fixed or attached to land, it is unlikely to constitute "public transport infrastructure", and, instead, will be some other form of public transport asset.
- 30 "Public transport infrastructure" would, however, appear to include trolley-bus wire assets, as they are fixed equipment used to facilitate operation of the electric trolley-bus system. It could be argued, therefore, as noted in paragraph 27 above, that section 27(1) may not apply to these assets.
- 31 However, even if "public transport infrastructure" included rolling stock, and assuming it did include trolley-bus wire assets, provided both were used in the operation of a "public transport service", an interest in either of these assets would arguably still constitute "any interest" in a "public transport service" for the purposes of section 27(1), in accordance with the broad interpretation of these words that we have identified in paragraph 22 and 26 above. Accordingly (and perhaps contrary to apparent practice), such "infrastructure" would be required to be held by a regional council through a CCTO.

General

- 32 If you would like to discuss any aspect of this opinion or if any matter requires clarification, then please do not hesitate to contact us.

Yours faithfully



John Sproat / Mike Dallas
Partner / Law Clerk