

Auckland's CCOs: The Death of Democracy, or Genuinely Council Controlled?

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This article appeared in the October 2010 issue of Local Matters, the e-newsletter of the Local Government Centre

One of the more contentious issues in the creation of the new Auckland council has been the transfer, by Government, of approximately 75% of the service delivery functions of the new council to a series of seven council controlled organisations (CCOs). Many observers have seen this as effectively the death knell of democracy, with much of council activity to be controlled by un-elected and unaccountable corporate directors who will operate the entities in the interests of some un-stated corporate agenda, and almost certainly with the ultimate objective of privatisation.

On 24 May New Zealand Herald columnist Brian Rudman, in an article suggesting that the whole restructuring of Auckland should be dropped, had this to say:

If 75 per cent of Auckland's services and most of the cash is going to be controlled by the unelected and unaccountable CCOs, why would you put yourself through all the time, effort and expense of standing for an elected position, which you mightn't win anyway, when the real power lay elsewhere.

Better to get your political cronies to appoint you to the board of one of the seven CCOs which are going to run the place anyway.

Months later, in an article on the mayoralty on 18 September, the Herald's deputy editor John Roughan commented:

The new Auckland mayoralty may not be much more than a figurehead. Council-controlled organisations (CCOs) set up to run transport, property, investments, waterfront development and the like will make most of the concrete decisions.

Is this a case of "I read it in the paper so it must be correct", or was the Herald simply incorrect in its assumptions about the nature and function of CCOs?

First, some context.

The legacy of corporatisation and privatisation

It is very clear that for most New Zealanders the legacy of corporatisation and privatisation as practised by the Lange-led Labour Government, and its immediate successor, has left a very real distaste for the operation of major public assets through corporate structures, with a lingering concern that this inevitably signals an agenda for privatisation. As an example, consider the very real reluctance of the present Government to sell down minority stakes in any of its SOEs, despite strong argument from the Capital Markets Task Force that it

should do so as a means of strengthening New Zealand's capital markets and encouraging saving and investment.

The decision process

Next, the process the Government followed in setting up the Auckland CCOs could hardly be described as ideal. The decision to corporatise was taken without public consultation and initially without any suggestion that Ministers would even consult existing councils about proposed board appointments. You did not need to be a conspiracy theorist to have doubts about what was going on.

Arguably, the Government made matters worse for itself by paying insufficient attention to the very real public interest in having a say in many of the matters for which individual CCOs will have responsibility. The classic example is the decision that Auckland Transport will have responsibility for local roads and all matters associated with them - which happens to include a number of things about which local communities get most passionate including traffic calming measures, siting of pedestrian crossings, street trees, street furniture, town and village centre design and so on. The immediate and natural reaction was that matters that were critical to the quality of the local environment were going to be decided by faceless bureaucrats with no direct (and possibly no indirect) accountability.

The counterfactual

Finally, and in a way which really highlights the failure to think through how the Government's proposals would be perceived, no one appears to have asked and tried to answer the question "what is the counterfactual?" If these activities are not in CCOs, then how will they be managed and by whom? The obvious answer is that, if they are not in arms-length entities, then they would be business units within the Auckland Council itself. Rather than each reporting separately, with its own statement of accounts, annual report, statement of intent and so on, reporting would be through a single chief executive and largely as determined by that chief executive. A critical question to consider is how democratically accountable that kind of process would be as compared with the reporting and accountability arrangements for Auckland's CCOs. The long history of complaints regarding the lack of transparency of decision-making by executives of the previous Auckland City Council suggests that the council business unit option may not be an ideal expression of local democratic accountability in action.

CCO Director appointments

Public reactions seem to have been governed by the way the CCOs were established - by Ministers without public consultation, and with boards appointed by Ministers again without public consultation. Ministers did have a genuine dilemma. Once they had taken the decision that service delivery should be primarily through CCOs, they then had to handle the practical issue of ensuring the CCOs were in place on the day that the new council came into existence.

This meant the need to appoint Boards of Directors and chief executives before the Auckland Council itself came into existence. Thus, purely for reasons of timing, the Auckland Council itself could not be involved in those initial appointments. Arguably, the decision that the establishment process, including selecting and appointing the first boards of directors, should be substantially under ministerial control with little or no public input was an unfortunate decision if Ministers wanted to ensure public confidence both in the establishment process and in the legitimacy of the CCOs themselves.

This process, and the perception that the Auckland Council could be stuck with directors it did not want, was the subject of widespread public submission during the committee stages of the Bill. As a consequence the Government made explicit what was already in fact implicit in the powers of the Auckland Council under general local government legislation, that the Auckland Council has the power to dismiss any or all directors of any of its CCOs at any time.

In practice, the Auckland Council will have relatively few constraints regarding the appointment and dismissal of directors to its CCOs other than:

- A prohibition on the appointment of any elected member (of either the governing body or any local board) to the board of any of its major CCOs except the right to appoint one or two elected members of the governing body to the board of Auckland Transport.
- In respect of the power it has to appoint the chairman and deputy chairman of its CCOs, a prohibition on appointing an elected member as chairman or deputy chairman of Auckland Transport.

Now to the nub of the issue. What powers will the Auckland Council have to hold its CCOs properly accountable and ensure an acceptable level of community engagement?

Accountability, community engagement and the CCO/Council relationship

The Council's CCOs are governed both by Auckland-specific legislation and by the general provisions of the Local Government Act (except to the extent that those are amended by the Auckland specific legislation).

The key accountability document linking a CCO and its parent council is the Statement of Intent (SOI). The SOI is prepared by the directors but must be agreed with the council (the elected members). It covers a wide range of matters including such things as the CCO's objectives, its approach to governance, accounting policies, the performance targets and other measures by which the performance of the group may be judged in relation to its objectives and "any other matters that are agreed by the shareholders and the board". Among other things this provides a basis for setting objectives in relation to the CCO's performance in engaging with the communities it serves.

CCO accountability mechanisms

- ≈ The Statement of Intent
- ≈ Directors' duties
- ≈ Legislative provisions for Auckland CCOs
- ≈ CCO compliance with LTCCP and spatial plan
- ≈ Requirement for an accountability policy.

One matter which often gives rise to public concern regarding CCOs, at least those that adopt a company structure, is the requirements in the Companies Act

intended to entrench the position of the directors. Statutory provisions include that the directors are responsible for the management of the company and that the directors must act in the best interests of the company - a provision often interpreted to mean not just the interests of the shareholders.

CCOs are subject to Local Government Act requirements which substantially change the directors' obligations. Specifically, "all decisions relating to the operation of a CCO must be made by, or under the authority of, the board of the organisation in accordance with its SOI and its constitution". Furthermore, the council can at any time resolve to change the provisions of a CCO's SOI, and the board of the CCO must comply with the resolution.

Additional provisions have been put in place to strengthen the accountability arrangements between the Auckland Council and its CCOs. First, there are some specific rules for Auckland Transport. The Auckland Council may "make rules by which Auckland Transport must operate, including rules in relation to — how the governing body of Auckland Transport must operate; how Auckland Transport must appoint and employ staff (including its chief executive); and how Auckland Transport must acquire and dispose of significant assets".

Next, all of the Council's CCOs are required to comply with the relevant provisions of the Council's LTCCP and other plans (which will include the spatial plan).

The Council is also required to adopt an accountability policy for its substantive CCOs (which includes Auckland Transport but not Watercare) covering matters such as "a statement of the Council's expectations in respect of each substantive council-controlled organisation's contributions to, and alignment with, the Council's objectives and priorities; and a statement of the Council's expectations in respect of each substantive council-controlled organisation's contributions to, and alignment with, any relevant objectives and priorities of central government."

The place of local boards

One of the real concerns about Auckland Transport is that because it has full authority over local roads, local communities could be shut out of decisions affecting them. Whether this happens is now fully back in the hands of the Auckland Council. Auckland Transport now has extensive powers of delegation including powers to delegate decisions to one or more local boards. Combined with the Auckland Council's rulemaking powers, the tools are now in place for the Auckland Council to ensure that its local boards do have authority over local matters within the ambit of Auckland Transport.

More generally, it is open to the council to ensure that the SOIs for CCOs include provisions governing community engagement, and how CCOs will deal with the concerns of local boards.

Commentary

The set of statutory provisions surrounding the operation of Auckland's CCOs provides a relatively robust framework for elected members to exercise substantial control over the activities of CCOs, and to ensure effective accountability to Auckland's communities. This leaves the question of why public reaction to the use of CCOs has been so strong, and so based on the perception that they amount to a denial of local democracy.

Part of the explanation is obviously the impact of the process which was adopted for the establishment and the appointment of initial directors. It clearly fuelled public fears that the Government's underlying agenda was privatisation of significant public assets.

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The more significant explanation almost certainly lies in the quite widespread lack of understanding of the subtleties of CCO governance, and the nature of the support required for elected members in discharging their role in relation to CCOs. As a first point it is worth recalling that even central government recognises that the effective monitoring of public sector owned entities

such as companies is a highly specialist activity which requires the support of people with very deep skills in governance, and in establishing and monitoring both financial and non-financial performance indicators. It relies on the Crown Ownership Monitoring Unit now based in Treasury, rather than leaving it to individual departments to deal with those entities for which their Minister has responsibility. There is no comparable governance resource in local government - an important task for the Auckland Council's chief executive and Mayor will be to ensure that the Auckland Council has equivalent skills available to it.

Next, there is no formal training available for elected members who might want to take a specialist interest in the governance of CCOs. This in itself is clearly a very major drawback in the effective management of council/CCO relationships, with many councillors unsure of the extent of their powers or how to exercise them.

To conclude ...

The accountability mechanisms which have been described in this note are in marked contrast to the relative lack of any specific provisions in legislation or practice for ensuring that major activities undertaken within individual council business units are as transparent to elected members as the same activities are when undertaken through CCOs (provided elected members understand and properly exercise the powers they have). We conclude that one of the most important steps for establishing the effective democratic accountability of Auckland's CCOs will be a combination of ensuring that elected members do have the understanding, and ultimately the experience, required to exercise their own roles effectively, and that they are adequately supported by an appropriate dedicated capability within the council itself.