ADAPTING TO NEW POWERS OF GENERAL COMPETENCE: EXAMINING THE IMPLICATIONS OF NEW FREEDOMS AND CONSTRAINTS UNDER THE NEW LEGISLATION

Successfully Implementing Local Government Reform Conference

Wellington
17 & 18 February 2003

Peter McKinlay
McKinlay Douglas Ltd

McKinlay Douglas Limited
36-42 GreySt
P O Box 13 125, Tauranga
Tel: (07) 579 4217 Fax: (07) 579 4218
www.mdl.co.nz
email: mckinlay@mdl.co.nz

INTRODUCTION

I want to introduce this paper by speaking a little about powers of general competence and the controversy that has surrounded this aspect of the new Local Government Act. The Government's discussion document *"Review of the Local Government Act: Consultation Document"* had this to say about the power of general competence:

> *"The Government considers that the present Local Government Act is too prescriptive in nature, and that local councils should have broader powers in order to work more flexibly and to be more responsive to the needs of their particular communities. It is therefore proposed that local authorities be granted a power of general competence."*

As proposed, a local authority was to have full capacity to carry on or undertake any business or activity, do any act or enter into any transaction, and for those purposes to have full rights, powers and privileges, but subject to the Act itself, any other enactment and the general law.

The discussion document also suggested that the power of general competence would be subject to conditions including:

- The activity is consistent with the object of the new Local Government Act.
- The Council has consulted meaningfully with its community.
- The Council complies with the law, including specific provisions in the new Local Government Act as well as other statutes.

Section 12 of the new Act basically repeats what was in the discussion document.

The proposal generated a strong response from elements within the business community who saw this as a legislative charter for widely increased powers for local government. Typical of the comment in the business press was this quote from The Independent for 9 October 2002. In an editorial entitled *"Local Government Law Will Shaft Business and Farming"* states that:

> *"Essentially, the Bill increases local authority powers to carry out activities not permitted under the current legislation"* and goes on to assert that *"The key concern among business people and farmers is a motion called the 'power of general competence' to be conferred on local government. This means local authorities will be free to do anything within their proposed new and expanded purposes, unless it is specifically prescribed by Parliament, whereas the current legislation stipulates specifically what authorities can do."*

For people familiar with the Local Government Act 1974, the business community had clearly misunderstood the significance of the power of general competence. The 1974 Act was a bizarre piece of legislation. It combined quite narrowly prescriptive provisions with some very broad-brush powers. In practice, local authorities that wished to promote social, environmental, cultural or economic outcomes within their communities normally found that they had full power to do so. They simply established a trust or other arm's length entity and

contracted with it, using the powers in Part 36 of the 1974 Act dealing with recreation and community development.

From a purely legal perspective, the more significant impact of the Act is tidying up a whole range of miscellaneous provisions and removing some quite peculiar anomalies (as well as placing regional councils on the same footing as territorials – subject to what may be a very interesting process for reaching agreement on activities already being undertaken by a territorial). My favourite is the powers that local authorities had under the 1974 Act to guarantee loans for the provision of housing. For someone wishing to acquire a flat, a local authority, if it wished to do so, could provide a guarantee on a mortgage of up to 100% of the cost. However, if the property was a single dwelling, then the guarantee was limited to the last third of 90% of the value. Under the new Act, if a local authority does want to provide support for housing it no longer needs to discriminate between single and multiple dwellings.

By far the more important impact of the Act is the symbolic re-definition of the purpose of local government and the role of the local authority, recognising a trend that really started to gain momentum with the reforms of the late 1980s and early 1990s. Section 37K of the 1974 Act, which was inserted by the 1989 amendment as part of the changes then taking place, for the first time provided a broad-based statement of purposes of local government. This marked the beginning of a move away from seeing the core role of local government as "roads, rats and rubbish" (with a bit of recreation and culture thrown in for good measure) towards a more broad-based community outcomes focus.

New Zealand was not pioneering in triggering this shift. Internationally, there is a growing recognition that much of what individual societies are seeking to achieve in terms of social, cultural, environmental and economic outcomes must be driven from a local or regional level (even when the bulk or all of the finance comes from a national level). Thus we seen an emphasis within the European Union on subsidiarity (the practice of devolving decision-making authority to the lowest practical level) as well as a growing role in North America for local government in areas which, in New Zealand, we still regard as primarily the function of central government.

In benchmarking what is happening with local government in New Zealand, it is common to look at practice in England and Wales. In December 2002 the Office of the Deputy Prime Minister (which has responsibility for local government) released *"Government Action Following the Comprehensive Performance Assessment"* a statement of Government policy in response to the Audit Commission's findings following a review of all local authorities. That action statement included the following:

> *"In addition to these actions to remove controls and provide more freedom local government has been given very significant new powers to lead their communities and to take action to secure their well being by the Local Government Act 2000. The powers are ground breaking in the scope that they provide for local government to act for the benefit of their areas. Moving from limited vires to widely drawn, freestanding, primary powers to act for the wellbeing of their areas is a revolutionary change for authorities. The whole intention is to reverse the cautious approach that has sometimes characterised the way in which authorities have considered the scope for innovative action.*
>
> *Full use of these powers offers authorities some of the greatest opportunities to*

take action for the benefit of their areas. They allow closer working with partners via agreements; opportunity to exercise the functions of others allowing more discretion about how those functions are best discharged; power to form and participate in companies and to cooperate with bodies outside their areas and engage in initiatives at regional level."

This is an interesting approach from a government that The Economist recently described as the most centralised outside of North Korea.

There is one aspect of the business community's critique of the new Act with which I totally agree. This is the description of the Act, by groups such as Business New Zealand, as *"the biggest constitutional change since MMP"* (see Business New Zealand's report *"Supreme Court Proposal Raises Serious Questions"*).

I agree with Business New Zealand, not because the Act gives local government significant new legal powers but because the Act redefines the role of local government in very important ways:

- Section 10 states the purpose of local government as:
  - To enable democratic local decision making and action by, and on behalf of, communities;
  - To promote the social, economic, environmental, and cultural wellbeing of communities in the present and for the future.
- Section 11 complements the purpose of local government by stating the role of a local authority as to:
  - Give effect, in relation to its district or region, to the purpose of local government stated in Section 10;
  - Perform the duties, and exercise the rights, conferred on it by or under this Act and any other enactment.

This is a clear and unequivocal restatement of the role of each local authority. Whether it is a district or a regional council, it now has a clear obligation to give effect to the full purpose of local government. Effectively, these two sections in combination mean that a local authority can no longer say that its primary role is the traditional one of "roads, rats and rubbish". It now has a statutory obligation to give effect to a much broader purpose including a recognition that it has an over-riding purpose to enable democratic local decision making.

The focal point of the new Act is the emphasis on community outcomes, which are clearly intended to drive the planning and activity of local government. The wording of Section 91, which sets out the process for identifying community outcomes, makes it clear that it is the community's outcomes that underpin the role of local government, not the individual council's own views on what those outcomes should be.

In my judgement there is a very good reason for this shift. It is taking place because central government recognises that, in order to deliver on the outcomes that are at the heart of its own policies, it needs to engage with the communities in which those outcomes will unfold. It is no longer sensible (if it ever was) to speak in terms of national economic, social, cultural or environmental outcomes. These outcomes are inherently local or regional in terms of how

they are delivered, who is committed to them, the networks and resources required to achieve them, and the structures needed to support their achievement.

From work which my firm undertakes, I see ample evidence that this is much more than just central government rhetoric. It is very clear from policy shifts in a number of areas, and from private discussions with officials and ministers, that the shift is quite genuine and that it is being carried out not because Wellington has fallen into the hands of a group driven by decentralist fervour, but because ministers and officials recognise the necessity of working through local and regional communities.

So much for context. In the rest of this paper I will:

- Examine additional constraints and rules that still govern local government – how much flexibility will councils have in practice to move into new operational areas.
- Consider the impact of the Local Government (Rating) Act 2002.
- Look at the impact of changes to details surrounding asset sales, ownership, and the role of LATEs versus the freedoms of general competence.
- Consider what new funding initiatives councils can enter into.

ADDITIONAL CONSTRAINTS AND RULES

The greater freedom to determine activity without the need to find ways of managing through detailed prescriptive provisions comes at a cost. The cost is two-fold:

- Specific constraints imposed through the Act limiting powers of local authorities in some very important ways.
- A substantial increase in the range and nature of the accountability requirements with which councils must comply.

First, to the restrictions on the power of general competence. Government clearly has some very strong views about the desirability of private versus public ownership coupled with a concern that not all local authorities may share those views. One result is what amounts to a prohibition on privatisation of water services (other than for small water schemes to collectives of those using them), a prohibition which extends to using the assets as security for a purpose. As well as the prohibition on privatisation of ownership, the Act also:

- Requires a local authority to continue to maintain existing or any future water services including its capacity.
- Effectively prevents a local authority from cutting off supply to any person – the most a local authority can do is restrict water supply – but not if that will create unsanitary conditions in, or associated with, the land or building.

The power to contract out management is also severely constrained. The maximum term for any contract or partnership is 15 years and the local authority must retain control over all matters relating to:

- The pricing of water services;

- The management of water services;
- The development of policy related to the delivery of water services.

None of the prohibitions apply to transactions between local authorities or local authority controlled organisations. What they do do, it seems to me, is effectively shut the private sector out of a significant involvement in ownership or management – ownership because of the prohibition, management because the restraints are likely to be seen as unacceptable. Paradoxically, the likeliest situation in which the private sector could see the provisions as workable is under a contract which guaranteed a minimum rate of return.

As well as the water-related prohibitions, the Act also raises the threshold in dealing with other significant local authority assets or businesses. Section 90 requires a local authority to adopt a policy setting out its general approach to determining the significance of proposals and decisions in relation to issues, assets, or other matters. That policy must list the assets considered by the local authority to be strategic assets.

A strategic asset is an asset or group of assets the local authority needs to retain if it is to maintain its capacity to achieve or promote any outcome it determines to be important to the current or future wellbeing of the community. Amongst other things it includes:

- Social housing.
- Equity securities in a port company or an airport company.

Under Section 97, a decision to transfer the ownership or control of a strategic asset to or from the local authority can only be taken if it was explicitly provided for in the council's long-term council community plan.

Each of these prohibitions or restrictions has its origins in what were, for the current government, politically sensitive local authority decisions which ran counter to what it considered appropriate but which it was unable at the time to influence. These included:

- The corporatisation of Auckland City Council's retail water services as Metro Water – and subsequent concerns that the new company was insufficiently accountable to the Council. This was not in fact privatisation – the Council still owned the business – but raised directly the potential for privatisation of water and wastewater services.
- The approach that Metro Water took to dealing with non-paying customers – particularly with cutting off water supply entirely.
- The long-term franchise agreement between Papakura District Council and United Water, an agreement which has been subject to considerable criticism, partly because of a concern that the interest of users may not have been properly respected.
- The decisions of the current Auckland City Council under the leadership of Mayor John Banks to sell the city's pensioner housing and half of its shareholding in Auckland International Airport.

Collectively, those provisions in the Act send a strong signal to local government. Central government is prepared to see a greater level of discretion exercised by local government

but with the caveat that initiatives which conflict with core central government values may result in constraints on the power of local government.

In practice, much of what local government might want to do, especially in terms of ongoing flirtation with the private sector, has probably been captured by the provisions of the current Act, at least in the sense that any major decisions must go through the special consultative procedure.

The extended use of this mechanism, and the range of other accountability instruments the Act now provides for, could be seen as an expression of the central government view that, whilst local government needs greater freedom from petty and sometimes conflicting controls, at the same time it cannot really be trusted to act responsibly.

In my view, that is an overly gloomy reading of the motivation behind those provisions (even although there is good anecdotal evidence to support the view that at least some Ministers and some officials take that attitude).

Rather, it seems to me that the new constraints reflect the governments declared view of the role of local government. In this respect it is worth revisiting what the then Minister of Local Government had to say in her first reading speech introducing the Bill:

> *"Mr Speaker this Bill is, above all, about "empowerment".*
>
> *Not as some might imagine, the empowerment of councils to exert greater influence and authority over their electors, but rather, empowering New Zealanders within their local communities to exercise ever greater control over their lives and over the environments in which they live."*

My reading of the provisions of the new Act, reinforced by discussions I have had with various officials and ministers, is that the main driver behind the new provisions is the intention of empowering communities. Local authorities are to be the instruments of local democracy through which communities achieve the outcomes to which they aspire.

This is a very major change. Traditionally most local authorities have operated almost at arms-length from their communities in a "them and us" relationship. Typically, councils are perceived as entities that do things to people and communities often against the will or perceived interest of those communities (I stress here that I am speaking of perceptions rather than reality).

The Act can be seen to be an attempt to change this by a combination of greater transparency and greater accountability, including much more opportunity for people to take part in and influence council decision-making.

On the transparency side, councils are now subject to a number of new requirements including a set of governance principles and a requirement to produce a very comprehensive local governance statement.

On accountability, changes include a new emphasis on community outcomes. Sections 91 and 92 provide:

"91 Process for identifying community outcomes

(1) A local authority must, not less than once every 6 years, carry out a process to identify community outcomes for the intermediate and long-term future of its district or region.

(2) The purposes of the identification of community outcomes are—

(a) To provide opportunities for communities to discuss their desired outcomes in terms of the present and future social, economic, environmental, and cultural wellbeing of the community; and

(b) To allow communities to discuss the relative importance and priorities of identified outcomes to the present and future social, economic, environmental, and cultural well-being of the community; and

(c) To provide scope to measure progress towards the achievement of community outcomes; and

(d) To promote the better co-ordination and application of community resources; and

(e) To inform and guide the setting of priorities in relation to the activities of the local authority and other organisations.

(3) A local authority may decide for itself the process that it is to use to facilitate the identification of community outcomes under subsection (1), but the local authority—

(a) Must, before finally deciding on that process, take steps—

(i) To identify, so far as practicable, other organisations and groups capable of influencing either the identification or the promotion of community outcomes; and

(ii) To secure, if practicable, the agreement of those organisations and groups to the process and to the relationship of the process to any existing and related plans; and

(b) Must ensure that the process encourages the public to contribute to the identification of community outcomes."

"92 Obligation to report against community outcomes

(1) A local authority must monitor and, not less than once every 3 years, report on the progress made by the community of its district or region in achieving the community outcomes for the district or region.

(2) A local authority may decide for itself how it is to monitor and report under subsection (1), but the local authority must seek to secure the agreement of organisations and groups identified under section 91(3)(a) to the monitoring and reporting procedures, including the incorporation of any research, monitoring, or reporting undertaken by those organisations and groups."

This is complemented by the requirements for the preparation of a long-term council community plan which is now to be based on community outcomes rather than, as with the present long-term financial strategy, largely on a set of outputs and financial measures.

The Act also seeks to legislate greater opportunity for involvement in decision-making. It includes rules and requirements governing the decision-making process:

> ***"76 Decision-making***
>
> *(1) Every decision made by a local authority must be made in accordance with such of the provisions of sections 77, 78, 80, 81, and 82 as are applicable.*
>
> *(2) Subsection (1) is subject, in relation to compliance with sections 77 and 78, to the judgments made by the local authority under section 79.*
>
> *(3) A local authority—*
>
> *(a) Must ensure that, subject to subsection (2), its decision-making processes promote compliance with subsection (1); and*
>
> *(b) In the case of a significant decision, must ensure, before the decision is made, that subsection (1) has been appropriately observed.*
>
> *(4) For the avoidance of doubt, it is declared that, subject to subsection (2), subsection (1) applies to every decision made by or on behalf of a local authority, including a decision not to take any action.*
>
> (5) *Where a local authority is authorised or required to make a decision in the exercise of any power, authority, or jurisdiction given to it by this Act or any other enactment or by any bylaws, the provisions of subsections (1) to (4) and the provisions applied by those subsections, unless inconsistent with specific requirements of the Act, enactment, or bylaws under which the decision is to be made, apply in relation to the making of the decision*.
>
> *(6) This section and the sections applied by this section do not limit any duty or obligation imposed on a local authority by any other enactment."*
>
> ***"77 Requirements in relation to decisions***
>
> *(1) A local authority must, in the course of the decision-making process,—*
>
> *(a) Seek to identify all reasonably practicable options for the achievement of the objective of a decision; and*
>
> *(b) Assess those options by considering—*
>
> (i) *The benefits and costs of each option in terms of the present and future social, economic, environmental, and cultural well-being of the district or region; and*
>
> *(ii) The extent to which community outcomes would be promoted or achieved in an integrated and efficient manner by each option; and*
>
> *(iii) The impact of each option on the local authority's capacity to*

meet present and future needs in relation to any statutory responsibility of the local authority; and

(iv) Any other matters that, in the opinion of the local authority, are relevant; and

(c) If any of the options identified under paragraph (a) involves a significant decision in relation to land or a body of water, take into account the relationship of Maori and their culture and traditions with their ancestral land, water, sites, waahi tapu, valued flora and fauna, and other taonga.

(2) This section is subject to section 79."

"78 Community views in relation to decisions

(1) A local authority must, in the course of its decision-making process in relation to a matter, give consideration to the views and preferences of persons likely to be affected by, or to have an interest in, the matter.

(2) That consideration must be given at—

(a) The stage at which the problems and objectives related to the matter are defined:

(b) The stage at which the options that may be reasonably practicable options of achieving an objective are identified:

(c) The stage at which reasonably practicable options are assessed and proposals developed:

(d) The stage at which proposals of the kind described in paragraph (c) are adopted.

(3) A local authority is not required by this section alone to undertake any consultation process or procedure.

(4) This section is subject to section 79."

"79 Compliance with procedures in relation to decisions

(1) It is the responsibility of a local authority to make, in its discretion, judgments—

(a) About how to achieve compliance with sections 77 and 78 that is largely in proportion to the significance of the matters affected by the decision; and

(b) About, in particular,—

(i) The extent to which different options are to be identified and assessed; and

(ii) The degree to which benefits and costs are to be quantified; and

(iii) The extent and detail of the information to be considered; and

(iv) The extent and nature of any written record to be kept of the manner in which it has complied with those sections.

(2) In making judgments under subsection (1), a local authority must have regard to the significance of all relevant matters and, in addition, to—

(a) The principles set out in section 14; and

(b) The extent of the local authority's resources; and

(c) The extent to which the nature of a decision, or the circumstances in which a decision is taken, allow the local authority scope and opportunity to consider a range of options or the views and preferences of other persons"

Section 78 is particularly interesting. One of the criticisms that has been persistently been made of the consultation provisions under the 1974 Act was that the special consultative procedure too often meant local authorities going to consultation on a fait accompli. In practice, a local authority had already identified the problem and its preferred solution before it started to engage with its community. Section 78 (2) clearly intends to change this. Views and preferences of persons likely to be affected are to be considered starting at the stage at which the problems and objectives related to the matter are defined.

Another part of the attempt to deal with what was seen as the unsatisfactory provisions for consultation under the previous legislation is a much more extended and prescriptive set of requirements for the special consultative procedure itself intended, from looking at the provisions, to make sure that people get information in a much more user friendly and accessible way.

Finally, in terms of decisions and consultation, special provision is made for Maori:

"81 Contributions to decision-making processes by Maori

(1) A local authority must—

(a) Establish and maintain processes to provide opportunities for Maori to contribute to the decision-making processes of the local authority; and

(b) Consider ways in which it may foster the development of Maori capacity to contribute to the decision-making processes of the local authority; and

(c) Provide relevant information to Maori for the purposes of paragraphs (a) and (b).

(2) A local authority, in exercising its responsibility to make judgments about the manner in which subsection (1) is to be complied with, must have regard to—

(a) The role of the local authority, as set out in section 11; and

(b) Such other matters as the local authority considers on reasonable grounds to be relevant to those judgments."

This is enhanced by clause 5 of Schedule 10 dealing with the LTCCP, which provides:

> ***"5 Development of Maori capacity to contribute to decision-making processes***
>
> *A long-term council community plan must set out any steps that the local authority intends to take, having considered ways in which it might foster the development of Maori capacity to contribute to the decision-making processes of the local authority, over the period covered by that plan."*

Similarly, the annual report must deal with this issue:

> ***"21 General***
>
> *An annual report must include a report on the activities that the local authority has undertaken in the year to establish and maintain processes to provide for opportunities for Maori to contribute to the decision-making processes of the local authority."*

One other change needs to be noted. The financial management provisions of the 1974 Act (the so-called "No 3 Act" of 1996) included two provisions which very substantially limited the ability to challenge local authority decisions. The first was Section 122I which set out the discretion of local authorities to make funding judgements in very broad terms including a statement that it was the responsibility of each local authority to make judgements about fairness and equity and its judgements on funding expenditure, *"which judgements may reflect the complexity and inherent subjectivity of any benefit allocation for specified outputs and the complexity of the economic, social, and political assessments required in the exercise of political judgement concerning rating".*

Next, Section 122W required any challenge to be made by way of a written submission to the local authority in the course of the special consultative procedure.

Taken together, these provisions effectively ruled out the prospect of judicial review. Those provisions have no equivalent in the new Act. Section 77 (quoted above) which deals with compliance in relation to decisions provides much less in the way of scope for local authorities to avoid challenge.

As well as the specific prohibitions applying to water services, the Act also tightens the requirements which local authorities face in commercial dealings and in setting up arms-length entities.

The 1974 Act had a number of restrictions in place relating to local authority trading enterprises (including council controlled trusts established to operate a trading undertaking with the intent or purpose of making a profit) but no constraints on the use of other trusts.

The new legislation bundles all council controlled entities under the single category of Council Controlled Organisation. As a plus, it introduces a new requirement for local authorities to have a policy on the appointment of directors (or trustees) on a "fitness for purpose" basis.

Compliance requirements are strong. All CCOs will need to have a statement of intent and the council will have the power to require alterations to that statement, a provision that could undermine the independence of directors and trustees.

The role of the directors (or trustees) is to assist the organisation to meet its objectives and any other requirements in its statement of intent. That obligation *"does not limit or affect the other duties that a director of a council controlled organisation has"* (Section 58). This sets the scene for some particularly interesting conflicts between the duties of the directors (if the CCO is a company) or the obligations of trustees. On the positive side, it is far less of a threat to good governance than the equivalent provisions in the Bill as introduced.

In anticipation of a growing role for public private partnerships, the Act also, for the first time, requires local authorities to have a policy on partnerships with the private sector. Section 107 provides:

> ***"107 Policy on partnerships with private sector***
>
> *(1) A policy adopted under section 102(4)(e)—*
>
> *(a) Must state the local authority's policies in respect of the commitment of local authority resources to partnerships between the local authority and the private sector; and*
>
> *(b) Must include—*
>
> *(i) The circumstances (if any) in which the local authority will provide funding or other resources to any form of partnership with the private sector, whether by way of grant, loan, or investment, or by way of acting as a guarantor for any such partnership; and*
>
> *(ii) What consultation the local authority will undertake in respect of any proposal to provide funding or other resources to any form of partnership with the private sector; and*
>
> *(iii) What conditions, if any, the local authority will impose before providing funding or other resources to any form of partnership with the private sector; and*
>
> *(iv) An outline of how risks associated with any such provision of funding or other resources are assessed and managed; and*
>
> *(v) An outline of the procedures by which any such provision of funding or other resources will be monitored and reported on to the local authority; and*
>
> *(vi) An outline of how the local authority will assess, monitor, and report on the extent to which community outcomes are furthered by any provision of funding or other resources or a partnership with the private sector.*
>
> *(2) In this section,* ***partnership with the private sector*** *means any arrangement or agreement that is entered into between 1 or more local authorities and 1 or more persons engaged in business; but does not include—*

(a) *Any such arrangement or agreement to which the only parties are—*

(i) *Local authorities; or*

(ii) *1 or more local authorities and 1 or more council organisations; or*

(b) *A contract for the supply of any goods or services to, or on behalf of, a local authority."*

Normally, this policy is to be adopted as part of the long-term council community plan. As such, it is subject to public consultation, which could be intensive in areas where there are groups opposed to greater private sector involvement in local government services.

A council is not bound to abide by that policy but if it makes any decision inconsistent with it, must justify that. The relevant statutory provisions are:

> *"96(3) Subject to section 80, and except as provided in section 97 [which will not apply in this case] a local authority may make decisions that are inconsistent with the contents of any long-term council community plan or annual plan."*

Section 80 requires the local authority, when making an inconsistent decision, to identify:

- The inconsistency; and
- The reasons for the inconsistency; and
- Any intention of the local authority to amend the policy or plan to accommodate the decision.

The Act makes it clear that a partnership with the private sector does not include *"a contract for the supply of any goods or services to, or on behalf of, a local authority".*

What then does this all mean for local government – and how much flexibility will councils have in practice to move into new operational areas?

First, on the face of it, it seems clear that the discretion of local authorities to opt for different forms of service delivery, management or ownership in the water and wastewater area has been severely constrained. It will be interesting to see how that plays out in practice. There is quite a strong body of opinion in the water industry that believes significant restructuring of the sector is required in order to develop water businesses of sufficient scale to have the expertise, and employ the experts needed, for effective operation. The Act does not exclude amalgamations, mergers, joint ventures or other arrangements between local authority organisations (councils or CCOs). Expect to see continuing initiatives in this area.

Also expect to see advisors looking for ways in which the private sector can still find opportunities notwithstanding the legislation. Although it is quite comprehensive, there do appear to be some possibilities. The issue that local government and potential private sector partners will need to assess is the risk of pre-emptive amendments to the Act to stop any initiatives that might be able to find their way through gaps in the present drafting.

More generally, there is very significant scope within the Act for greater flexibility in the local government sector including the opportunity for local authorities to move into new operational areas. Indeed, arguably one intention of the Act is to encourage local authorities to move into non-traditional areas – this is clearly one of the implications of the changed purpose of local government and role of a local authority.

The crucial issue for local authorities will be how they manage the process. Remember that the Act is about checks and balances. Local authorities are being encouraged to take a wider approach to their roles – especially regional councils – but at the same time being made subject to a much more intensive set of arrangements for transparency, accountability and reporting.

My personal view is that the key to whether individual local authorities will enjoy greater flexibility will be how they manage their new transparency, accountability and reporting requirements. My expectation is that most local authorities (and perhaps members more than officers) will be distributed along a spectrum the two ends of which are:

- Total acceptance of the spirit and intent of the new Act reflected in a real effort to make the authority an example of local democracy in action.
- Resistance to the spirit and intent of the Act based on the belief that "we were elected to govern" and don't want any more interference from the community.

Another way of expressing this is to say that the degree to which local authorities will have flexibility will be very much a function of the quality of leadership.

Why do I make this assessment? Because there is now so much opportunity within the requirements local government faces for groups who are not happy with the way a local authority is conducting its affairs, or the outcomes of its activities to be obstructive, that "growing the business" could become virtually impossible.

There is another factor to think of. The Act is written very much in terms of collaboration – between territorial authorities within a region, between the regional council and the territorials, and between the local government sector, central government and other major interest groups. The incentives to work co-operatively will, in my view, be considerable, whether it is positioning the local authority better to attract government resources or build partnerships with other key resource holders.

For this part of the paper, my conclusion is that local authorities will have much greater flexibility but this will be conditional on how well they manage the new requirements that they face.

THE IMPACT OF THE LOCAL GOVERNMENT (RATING) ACT 2002

For local government practitioners, the main interest of the Act has almost certainly been on the technical side with issues such as:

- A shift to owner liability.
- New provisions regarding rating of Maori land.

- Freedom for regional councils to rate directly.

From my perspective the more interesting aspects of the Act are:

- The rewritten postponement provisions.
- The new targeted rate.

Under previous legislation, the powers which councils had to postpone the payment of rates were very limited. For a residential ratepayer, the power was available only on proof of hardship (effectively requiring an assets and income test). Postponement could be for a maximum of six years.

Under the new legislation a local authority may adopt whatever postponement policy it sees fit, so long as it does it through its annual plan. Postponement is now effectively for the period determined plus a further six years.

Despite the extraordinarily narrow treatment of this change in the Local Government Know-How publication on rating – which seems to assume that, despite the legislative changes, local authorities will continue applying a very narrow hardship-based approach - I see these changes as very significant. Without going into details (for reasons of commercial confidentiality associated with work we are currently undertaking) it seems clear that these provisions will allow a much more flexible approach.

The targeted rate replaces the old special rate provisions. The main intention was to streamline and clarify a very awkwardly worded piece of legislation. The result, in my view, is to create a very interesting tool indeed. Again, it would be inappropriate for reasons of commercial confidentiality to be too detailed in terms of potential use. The point that I would make is that, with the use of the targeted rates provisions, a local authority can effectively position itself as the parent of one or more of a series of self-governing co-operatives – something of particular interest for local authorities that come under very specific types of pressure, such as those that apply to areas that are popular holiday destinations.

ASSET SALES, OWNERSHIP AND THE ROLES OF LATES (CCOS) VERSUS THE FREEDOMS OF GENERAL COMPETENCE

The situation here is something of a mixed bag. Government has clearly tried to impose greater accountability on local authorities in dealing with significant ownership interests, or in using arms-length entities as a means of undertaking activity. More consultation is going to be required with changes in ownership or with the means of delivering activity. Thus:

- Any changes in the delivery of a significant service will be subject to the special consultative procedure.
- So will any sale of a strategic asset.

Potentially more significant in dealing with assets or services is the Section 78 requirement (see pages 8 and 9 above) requiring a local authority in the course of decision-making to give consideration to the views and preferences of persons likely to be affected or likely to have an interest with that consideration to be given at different stages including:

- The stage at which the problems and objectives are defined.
- The stage at which reasonably practical options are identified.
- The stage at which reasonably practical options are assessed and proposals developed.
- The stage at which those proposals are adopted.

One possibility is that the increased compliance costs associated with the decision-making process and the special consultative procedure may deter councils from considering asset sales or changes in the mode of delivery of significant services.

An alternative view is to see these provisions as simply reflecting in statute a common sense approach to the management of sensitive issues.

Consider the process the Auckland City Council went through in deciding to sell its remaining housing stock. That decision was taken under the 1974 Act so it had none of the compliance requirements that now apply. Despite that the compliance costs were obviously high as the council almost literally battled against a local minority opposed to the sale.

My guess is that, at least in well run councils, there is likely to be little compliance cost impact as a result of these provisions over and above the cost (hassle) the council in any event would have faced if the issue was at all controversial.

What does become more interesting is the impact on council decision-making – on the options that the councils would chose – of the new council controlled organisation provisions. As noted above, these apply not only to entities that were previously LATEs but also to trusts and, indeed, a wide range of other council controlled organisations including joint ventures, an arrangement for sharing of profits etc. (but not to joint committees).

There is a perception that compliance costs in respect of CCOs will be significant, especially as trust and any other non-company controlled council organisations are now caught within the compliance regime. The likelihood is that councils will look for ways of structuring arrangements to take them outside the CCO regime. This is clearly achievable in respect of trusts and probably achievable for companies as well whilst still preserving the essence of local authority ownership.

There is an added incentive for removing arms-length entities from the CCO regime, especially if they are trusts. This is the combination of:

- The prohibition on any local authority guarantee for a CCO;
- The requirement that any loan from a council to a CCO must be at an interest rate not less than the council's own cost of borrowing where that borrowing is not secured against rates.

Redesigning CCOs seems likely to be a fruitful source of business for people who have a good understanding of governance in the public sector, combined with a knowledge of how different structures operate and practice.

At the end of the day, it seems unlikely that the attempt in the Act to bring all arms-length activities under a common pattern of control will succeed. Hopefully though, councils who do find ways of taking arms-length entities outside the CCO regime will none-the-less respect the spirit of the legislation in terms of accountability to rate-payers – this is certainly the type of advice that we are giving clients for whom we are doing this kind of work.

WHAT NEW FUNDING INITIATIVES CAN COUNCILS ENTER INTO

The short answer is that, as a consequence of the Act itself, little has changed. The prohibition on borrowing or entering into incidental arrangements in currency other than New Zealand currency remains.

Changes in funding initiatives are much more likely to come about in an evolutionary way, as councils consider how they respond to the new purpose of local government and role of local authority. It will also come as the implications of changed provisions under the Local Government (Rating) Act are considered. There is a new potential for local authorities to act as intermediaries between financial institutions and groups of ratepayers, something which did not really exist under previous legislation.

CONCLUSION

The main significance of the new power of general competence (which the Department of Internal Affairs is now starting to describe as “general powers” or “general empowerment” rather than as powers of general competence) is the redefined purpose of local government and role of a local authority.

It is certainly true, from a technical legal perspective, that many of the complications arising from prescriptive provisions in the Act and the law relating to statutory corporations, have now gone. However, in terms of the issues that have really worried critics – that local authorities might start to develop a major presence in social services, welfare and related activities – the power to do that was already there to do under the 1974 Act.

Whether and to what extent local authorities will have greater flexibility will depend very much on how they manage the new transparency, accountability and reporting requirements. If they manage those in ways in which their communities see as legitimate, then the new Act will give them greater flexibility. If they fight against them, seeking to resist the shift towards local democracy, then the potential for conflict and frustration will be very considerable.

In areas such as ownership, and different means of undertaking activity, the main impact of the new compliance requirement will almost certainly be one of encouraging local authorities to find ways of avoiding the black letter law requirements whilst still respecting the spirit of accountability in those provisions.

It is difficult, at this stage, to make a clear judgement on the overall benefit of the new Act to the sector, and the communities it serves.

My guess is that government and advisors have substantially underestimated the compliance cost impacts – costs which ratepayers will be required to meet. On the other hand, I also

believe that a number of critics of the Act have underestimated its potential to make local authorities the central players (often in partnership and/or with funding from others) in the governance of New Zealand's communities including identifying and ensuring the delivery of the social, economic, environmental and cultural outcomes those communities seek.