

Proactive Release

This document is proactively released by Te Manatū Waka the Ministry of Transport.

Some information has been withheld on the basis that it would not, if requested under the Official Information Act 1982 (OIA), be released. Where that is the case, the relevant section of the OIA has been noted and no public interest has been identified that would outweigh the reasons for withholding it.

Listed below are the most commonly used grounds from the OIA.

| <u>Section</u> | <u>Description of ground</u> |
|----------------|---|
| 6(a) | as release would be likely to prejudice the security or defence of New Zealand or the international relations of the New Zealand Government |
| 6(b) | as release would be likely to prejudice the entrusting of information to the Government of New Zealand on a basis of confidence by <ul style="list-style-type: none"> (i) the Government of any other country or any agency of such a Government; or (ii) any international organisation |
| 6(c) | prejudice the maintenance of the law, including the prevention, investigation, and detection of offences, and the right to a fair trial |
| 9(2)(a) | to protect the privacy of natural persons |
| 9(2)(b)(ii) | to protect information where the making available of the information would be likely unreasonably to prejudice the commercial position of the person who supplied or who is the subject of the information |
| 9(2)(ba)(i) | to protect information which is subject to an obligation of confidence or which any person has been or could be compelled to provide under the authority of any enactment, where the making available of the information would be likely to prejudice the supply of similar information, or information from the same source, and it is in the public |
| 9(2)(ba)(ii) | to protect information which is subject to an obligation of confidence or which any person has been or could be compelled to provide under the authority of any enactment, where the making available of the information would be likely otherwise to damage the public interest |
| 9(2)(f)(ii) | to maintain the constitutional conventions for the time being which protect collective and individual ministerial responsibility |
| 9(2)(f)(iv) | to maintain the constitutional conventions for the time being which protect the confidentiality of advice tendered by Ministers of the Crown and officials |
| 9(2)(g)(i) | to maintain the effective conduct of public affairs through the free and frank expression of opinions by or between or to Ministers of the Crown or members of an organisation or officers and employees of any public service agency or organisation in the course of their duty |
| 9(2)(h) | to maintain legal professional privilege |
| 9(2)(i) | to enable a Minister of the Crown or any public service agency or organisation holding the information to carry out, without prejudice or disadvantage, commercial activities |
| 9(2)(j) | to enable a Minister of the Crown or any public service agency or organisation holding the information to carry on, without prejudice or disadvantage, negotiations (including commercial and industrial negotiations) |

Memo

19 August 2022

To: Hon. Michael Wood – Minister of Transport

From: Tristan Coulson – Senior Advisor – Governance, Auckland Light Rail

Subject: Sponsors role with the new Auckland Light Rail (ALR) Company – further advice

Purpose

1. At the 16 August 2022 ALR Sponsors meeting, the Sponsors considered a paper on *Establishing the company for the detailed planning phase: Sponsors role with the new ALR Company*.
2. This recommended that the Crown alone is party to a Project Planning Agreement (PPA) that will be agreed with the ALR Company, and that letters of commitment from the Crown to Sponsors are used as the instrument which confirms the role of Sponsors in this arrangement, until the Sponsors Agreement has been finalised
3. The Mayor of Auckland voiced strong concern with the proposed recommendation and expressed discomfort that Auckland Council's (council) role was not adequately accounted for if they were not party to the PPA.
4. The Sponsors agreed to have a further discussion and confirm who enters the PPA, and any additional instruments to confirm the commitment between Sponsors.
5. This memo is intended to provide additional information and advice to support further discussions among Ministers and with the Mayor.
6. To support this memo, the paper which was presented to the 16 August 2022 Sponsors meeting is included as Attachment one.

The role of and commitment between Sponsors is not made through the PPA

7. The establishment of the ALR Company and which parties enter into the PPA does not change the role envisioned for the council as a Sponsor. The PPA will not confirm the way that Sponsors work together to oversee the ALR project, nor will it determine the commitment between Sponsors and how they will work together during the current phase of the project.
8. These aspects will be made in an agreement between Sponsors, separate to any negotiation and agreement with the company (i.e. through the 'Sponsors Agreement').
9. What the PPA must do is detail the roles and responsibilities of the ALR Company (in relation to the ALR Project), as well as its relationship with the Crown and Sponsors. Officials' advice to Sponsors recommended that only the Crown enters into the PPA, given that this approach:
 - best retains the partnership principle, in that if not all Sponsors can enter the PPA then it is cleanest that the Crown undertakes this role on behalf of all Sponsors
 - aligns with the Crown being the sole funder for this phase of the project

- would be the most straight-forward and fastest option to deliver the PPA, ensuring Sponsors can keep to their commitments in supporting the quick set up of the ALR Company
10. The PPA will set out the role of the board and the relationship of that with Sponsors. It will set out its functions, funding and monitoring arrangements. The PPA is akin to a Terms of Reference and a funding agreement. In the current settings, the ALR Ministers approved the ALR Board Terms of Reference, in consultation with the council.

Confirming the Council's role in relation to the new ALR Company is best achieved through either a letter of commitment or an interim Sponsors Agreement, rather than the PPA

11. To confirm the role and commitment among Sponsors, there does need to be an agreement between Sponsors prior to the establishment of the company.
12. There are choices to achieve this, including either a letter of commitment or an interim Sponsors Agreement between the Crown and council. Sponsors may have a preference with respect to these options. Either can be implemented prior to the establishment of the company.
- A **letter of commitment** will be from the Crown to the council. This would confirm the Sponsor roles and commitments, as agreed to already in the heads of terms. The Crown would commit to representing the three Sponsors when acting under the PPA. Officials would envisage that the Council would respond to this letter agreeing to these commitments in advance of a Sponsors Agreement being signed

or

- An **interim Sponsors Agreement**. This would also confirm the Sponsors' roles and commitments to each other, although would represent a single document/commitment that both parties would be able to sign up to

13. s 9(2)(f)(iv)

Options to ensure council continues to have their intended Sponsors role as the ALR Company is established

14. To support Ministers discussions with the Mayor, three options are proposed in response to the concerns that Mayor Goff has raised. These are:
- Option one: the Crown enters into the PPA with the ALR Company, and letters of commitment confirm the role of Sponsors (this is our recommended option)
 - Option two: the Crown and council enter into an interim sponsors agreement, then only the Crown enters into the PPA.
 - Option three: a letter of commitment from the Crown to the council, with the Crown and the council entering into the PPA (not recommended).
15. Officials' advice is that option one continues to be recommended, followed by option two. This position is based on the Crown being the sole funder of this phase of the project, and because it carries the least risk due to it being administratively easier and quicker to deliver, without undermining the alignment of project Sponsors.
16. For option two, there is a greater level of uncertainty, and more risk, given the need to agree an interim Sponsors Agreement with the council alongside agreeing to the PPA with the Unit. However, this will be mitigated by the fact that Sponsors have already considered and endorsed the Heads of Terms of the Sponsors Agreement, which would be the basis of an interim agreement. There are also risks regarding the perception of entering into an interim Sponsors Agreement without mana whenua.

17. Option three is not recommended because it carries the greatest risk and most uncertainty, given the need to add a third party to the negotiation of the PPA. This option is the most resource intensive, and it is highly unlikely that it can be delivered within the required timeframes. This would jeopardise the ability to stand up the ALR Company by October 2022.

s 9(2)(f)(iv)

18. The following table provides further analysis and advice on the three options:

| | Option one | Option two | Option three |
|-----------------------|---|---|--|
| Benefits | <p>Aligns with the Crown being the sole funder for this phase of the project.</p> <p>Administratively easier and quicker to deliver.</p> | <p>Aligns with the Crown being the sole funder for this phase of the project.</p> <p>Both the Crown and council benefit from an enduring commitment between themselves through the local government electoral cycle.</p> | <p>Will ensure the role of council is accounted for as the ALR Company is established.</p> <p>Indicated as the Mayor's preferred option.</p> |
| Risks | <p>May be perceived that the Crown is solely driving the project, and the principles of an inclusive project are no longer being applied.</p> <p>This would be mitigated through letters of comfort being sent to other Sponsors.</p> | <p>Entering into an interim Sponsors Agreement without mana whenua could be perceived by mana whenua as not being true to the Sponsor partnership</p> <p>Added complexity and timing risk of having to negotiate both the Sponsors Agreement and the PPA before the company is established.</p> <p>This is mitigated by the fact that the Heads of Terms of a Sponsors Agreement has already been considered by Sponsors.</p> | <p>Entering into the PPA without mana whenua could be perceived by mana whenua as not being true to the Sponsor partnership.</p> <p>Added complexity and risk of having three parties to agree the PPA.</p> <p>A hard deadline of 7 October (prior to local government elections) to agree the PPA, or risk finalising the negotiation with a new council.</p> |
| Implementation | <p>Administratively easier and quicker to deliver, enabling focus to move to agreements for the delivery phase.</p> <p>This option is consistent with officials' current timeframes for the establishment of the Schedule 2 ALR Company</p> | <p>Will take longer to implement given the addition of a third party across two separate agreements.</p> | <p>Will take longer to implement given the addition of a third party.</p> <p>This will jeopardise our ability to establish the new company in current timeframes.</p> |

s 9(2)(f)(iv)

Establishing the company for the detailed planning phase: Sponsors role with the new Auckland Light Rail (ALR) Company

16 August 2022

Purpose

- 1 To explain the function of the ALR Project Planning Agreement (PPA) and confirm which parties enter into it.
- 2 Confirm the instrument that maintains the role of Sponsors in the absence of the Sponsors Agreement, as the new Auckland Light Rail Company is established (the ALR Company).

Recommendations

That the Sponsors:

A. **note** that a Project Planning Agreement will be used to define the:

- roles and responsibilities of the Crown, other Sponsors and Auckland Light Rail Limited
- scope of decision-making for Auckland Light Rail Limited
- information sharing between Auckland Light Rail Limited, Sponsors and officials
- funding arrangements
- assurance and monitoring arrangements.

B. **agree** that letters of commitment from the Crown to Sponsors will be the instrument which confirms the role of Sponsors, until the Sponsors Agreement has been finalised.

C. **agree** the Crown alone is party to the Project Planning Agreement with the Auckland Light Rail Company.

Background

- 3 As ALR progresses through the detailed planning phase, Sponsors agreed to establish a new company (the ALR Company) to carry out the roles and functions currently assigned to the ALR Unit.
- 4 ALR Sponsors discussed and ALR Sponsoring Ministers subsequently have confirmed that the ALR Company will take the form of a Crown entity company, named under Schedule 2 of the Crown Entities Act 2004.
- 5 In order to establish the ALR Company for the detailed planning phase, the following workstreams are being undertaken:
 - the Ministerial, Cabinet and statutory processes associated with the creation and gazetting of a limited liability company
 - entering into a Project Planning Agreement that will govern the project and provide Ministers and Sponsors the necessary influence and oversight required during the detailed planning phase. This must be in place before the company is stood up
 - ensuring the ALR Unit has the systems and processes needed to operate as a company and transition out of the Ministry of Transport. This is the responsibility of the ALR Unit and Board

- registering the company
- preparing strategic company documents (i.e. Letter of expectation).

A Project Planning Agreement will govern the project in the detailed planning phase

The role of Sponsors in the detailed planning phase

- 6 In establishing ALRL, we intend for the principles of the existing governance arrangements to endure, this is particularly important with respect to the role of Sponsors.
- 7 The foundation of the governance arrangements is the partnership between the Crown, Auckland Council and mana whenua, who form the Sponsors. This partnership is critical to the success of the ALR project and wider programme.
- 8 The detailed planning phase requires significant policy and strategy decisions that need to be made by, and are the reserve of, the Crown and Sponsors. This includes, for example, the level of intensification along the corridor and the funding and financing arrangements. These decisions will inform the business case and ensure it meets the Sponsors outcomes and, wider government and council priorities.
- 9 Because of this role in the detailed planning phase, the governance arrangements have been set up with a direct line of sight and influence for the Crown and Sponsors to make decisions and guide the ALR Unit.
- 10 In the current organising model the board is a Ministerial Advisory Committee, this enables the direct line of sight and influence required by Sponsors.

Why a project planning agreement is required

- 11 With the establishment of the Crown entity company, the public sector oversight framework governing the new company has limited scope for Sponsor oversight and decision-making. It falls short of what is required to reflect the intended roles of Ministers and Sponsors during the detailed planning phase.
- 12 The role of Sponsors to have a direct line of sight and influence in the detailed planning phase does not change and must continue with the establishment of the ALR company.
- 13 The PPA will detail the roles and responsibilities of the ALR Company (in relation to the ALR Project), as well as its relationship with the Crown and Sponsors. The PPA will include:
 - roles and responsibilities of the Crown, other Sponsors and the ALR Company in relation to the ALR Project
 - scope of decision-making authority of the ALR Company
 - information sharing between the ALR Company, Sponsors and their officials. This will be done through the Sponsors' meeting and the Sponsors' Forum
 - funding arrangements and payment regime
 - assurance and monitoring arrangements.
- 14 It is important to note that by entering into the Project Planning Agreement (which will also govern funding) the company contractually agrees to be bound by decisions and guidance of Sponsors, or to do or not do certain things, in specified situations – these are contractual constraints within which the ALR company is agreeing to operate by entering into this agreement.
- 15 It is expected that the PPA will be developed and agreed in-principle before the ALR Company is established. The transfer of responsibilities from the Ministerial Advisory Committee (and the ALR Unit) to the ALR Company will be contingent on the signing of the PPA. This is expected to occur in early October. Without the PPA the ALR

Company would not be able to access funding, nor would Ministers and Sponsors be able to have the level of oversight or influence expected.

Giving effect to the relationship between and the role of Sponsors

- 16 A heads of terms for the Sponsors Agreement governing the detailed planning phase has previously been developed and agreed by both Cabinet and Auckland Council (the council). However, it is not the intent to confirm the Sponsors Agreement until all Sponsors are ready into it. This requires the confirmation of mana whenua Sponsor representatives, which is ongoing.
- 17 In the absence of a finalised Sponsors Agreement alongside the establishment of the ALR Company and the entering into of the PPA, an additional instrument to maintain the relationship between and role of Sponsors is required. This is because the ALR Company will be 100 percent Crown-owned, yet the Sponsor partnership to govern the ALR Programme remains.
- 18 The proposed additional instrument is a letter of commitment from the Crown to the other Sponsors, which would confirm the role of Sponsors. These will be superseded by the Sponsors Agreement once this has been finalised.
- 19 The letters of commitment would be underpinned by the already agreed heads of terms. This would commit the Crown to representing the three Sponsors when acting under the PPA, maintaining the principle in the heads of terms for Sponsors to speak as 'one Sponsor' when providing direction to the ALR company
- 20 A response from council and mana whenua would further cement the commitment between Sponsors.
- 21 Officials considered entering into an interim sponsors agreement, without mana whenua as a means to maintain the Sponsors role alongside the establishment of the ALR Company.
- 22 While entering into an interim sponsors agreement would be a significant milestone to progress the governance arrangements for the detailed planning phase, this option is not recommended.
- 23 Entering into the Sponsors Agreement without mana whenua is undesirable. Both Cabinet and the council agreed the heads of terms on the grounds that these would form the basis of the Sponsors Agreement to be confirmed once mana whenua representatives were able to join the agreement too. This reflects the principle of a partnership between all three Sponsors.

It is proposed that the Crown is party to the project planning agreement with the Auckland Light Rail Company

- 24 With the letters of commitment in place to maintain the role of Sponsors, it is proposed that the Crown enters into the PPA with the ALR Company.
- 25 The case for this approach is:
 - it best retains the partnership principle. It is considered that if not all Sponsors can enter the PPA then it is cleanest that the Crown undertakes this role on behalf of all Sponsors
 - it aligns with the Crown being the sole funder for this phase of the project
 - it is the most straight-forward and fastest option to deliver the PPA, ensuring Sponsors can keep to their commitments in supporting the quick set up of the ALR Company

Other options considered

26 Officials from the Crown and council have considered a variation on the recommended approach where the Crown and the council are both party to the PPA with the ALR Company. Officials advise there is a risk with this option in that two Sponsors are formalising their relationship without mana whenua's involvement. This could be perceived negatively by mana whenua when their Sponsor representatives are confirmed.

27 s 9(2)(f)(iv)

28 Based on these risks, officials do not recommend this option.

Consultation with Sponsor agencies

29 This matter has been discussed with all Sponsor agencies and was presented to the August 2022 Sponsors Forum.

30 This paper reflects the general agreement of Sponsor agencies.

Sponsors will be proactively engaged before decisions are made

31 Confirming the PPA is a critical component of standing up the ALR Company. Agreeing now who the parties to the PPA are will allow officials to best plan for the signing of this agreement and avoid delays to stand up the ALR Company.

32 The Crown will continue to work closely with other Sponsors to ensure a strong Sponsor role. All sponsors will be engaged on the PPA as it becomes finalised. Officials advise this will be undertaken in September or October 2022.

PROACTIVELY RELEASED BY
TE MANATŪ WAKA MINISTĀRY OF TRANSPORT