

# Departmental Disclosure Statement

---

Infrastructure Funding and Financing Bill
---

The departmental disclosure statement for a government Bill seeks to bring together in one place a range of information to support and enhance the Parliamentary and public scrutiny of that Bill.

It identifies:

- the general policy intent of the Bill and other background policy material;
- some of the key quality assurance products and processes used to develop and test the content of the Bill;
- the presence of certain significant powers or features in the Bill that might be of particular Parliamentary or public interest and warrant an explanation.

This disclosure statement was prepared by the Department of Internal Affairs.

The Department of Internal Affairs certifies that, to the best of its knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

3<sup>rd</sup> December 2019

**Contents**

Contents..... 2

Part One: General Policy Statement..... 3

Part Two: Background Material and Policy Information ..... 6

Part Three: Testing of Legislative Content..... 8

Part Four: Significant Legislative Features ..... 11

## **Part One: General Policy Statement**

This Bill is an omnibus Bill that amends more than 1 Act and is introduced under Standing Order 263(a) because the amendments deal with an interrelated topic that can be regarded as implementing a single broad policy. That single broad policy is to provide a funding and financing model to support the provision of infrastructure for housing and urban development that supports functioning urban land markets and reduces the impact of local authority financing and funding constraints.

### **Introduction**

New Zealand's current infrastructure funding and financing system presents a range of constraints that are making it difficult for the market and local and central government to respond to urban pressures. As a result, housing and infrastructure are not meeting the needs of New Zealanders. Specifically, local authorities face several challenges in relation to the financing of housing-related infrastructure and supplying serviced urban land.

This Bill establishes an alternative funding and financing model (the Model) to address these challenges and support the provision of infrastructure to support housing and urban development. The Model is an important step in the long-term evolution of the local authority funding and financing system and seeks to support the functioning of urban land markets by appropriately allocating the costs of infrastructure.

The Model is about creating flexibility in the infrastructure financing system to ensure that economically viable projects proceed, without being unnecessarily encumbered by a council's financing constraints. This will improve the responsiveness of infrastructure supply to service land for housing and competitive urban land markets, reducing the overall cost of housing in the long term. The Model also seeks to facilitate urban development infrastructure that supports community needs. Importantly, it allows for a project to be ring-fenced from the local authority's finances, ensuring there is no recourse to the local authority.

### **The Model**

#### **The Levy**

At the core of the Model is a multi-year Levy (the Levy) which is paid by beneficiaries of infrastructure projects to a Special Purpose Vehicle (SPV). The levy will be enabled by legislation and authorised by an Order in Council (levy order), also known as the 'levy order'. Where appropriate, the design of the levy mimics many of the rating provisions within the Local Government (Rating) Act 2002. The person who is liable to pay the rates on a property is the person liable to pay the levy, and this will be collected by the responsible levy authority. The responsible levy authority will be territorial authority in whose district the levy area is located.

The levy is applied to a geographic area of land and this will be identified within each levy order as the relevant area liable for the levy. The Bill provides for categories of

eligible costs that are authorised to support the eligible infrastructure within a project area and recovered by the levy.

The Bill includes provisions requiring the agreement from owners of protected Māori land to the inclusion of their land within the area subject to the levy. This enables the owners of protected Māori land affected to assess the risks and benefits to them of the levy being applied and the development potential it will finance.

### **Special purpose vehicle**

An SPV services the finance raised to cover the costs of the infrastructure via the Levy and is responsible for both financing and construction of the infrastructure assets. Once constructed, the infrastructure will vest with the relevant local authority or public body. The SPV has a range of bespoke disclosure and reporting obligations that it must comply with. Depending on the structure and nature of the project, an SPV will have the following roles: raising capital (utilising the levy revenue stream), financing infrastructure, commissioning construction and transferring the infrastructure to the relevant local authority (or other relevant public entities), and repaying any finance raised for infrastructure. These functions may be divided between 2 or more SPVs named in the levy order.

### **Recommender**

The role of the Recommender is to provide independent, well-informed advice to the Minister for Urban Development on a levy proposal, and subsequently on whether to recommend the use of a levy, with a view to protect the interests of consumers and the Crown.

The assessment of a levy proposal by the Recommender will make a recommendation on the structure and application of the levy, long-term beneficiary interests, affordability, and the expected distribution of benefits in the levy area. Consequently, the role of the Recommender is critical in safeguarding the interests of levy payers through the provision of high-quality advice to the Minister prior to a levy being authorised by levy order.

### **Statutory powers**

There are several regulatory powers that SPVs require to effectively and efficiently construct infrastructure. These include accessing powers conferred on Network Utility Operators under the requiring authority regime in the Resource Management Act

1991. These powers provide an SPV with the ability to seek, hold, or receive a designation or to compulsorily acquire land through the Minister for Land Information. Local authorities are also enabled to exercise their existing Public Works Act 1981 powers in respect of projects that proceed, or are intended to be undertaken by an SPV, under the Model. In some instances, a public body may wish to transfer land held for a public work to an SPV to undertake that work.

Protected Māori land is excluded from such compulsory acquisition powers; however, voluntary sales of land is possible.

It should be noted that the Model will continue to work with complementary regulatory regimes, such as resource and building consenting processes. However, as the Model

provides local authorities with an additional tool to finance infrastructure, this may influence how local authorities allocate capital, meet other regulatory requirements, and plan urban development.

## **Monitor**

The role of the monitor is to ensure that SPVs comply with the terms of the empowering Act and levy orders. The monitor performs as a regulator within the Model and is an important safeguard for both the Crown and levy payers once a levy order has been made. The monitor also has a role in considering and determining any objection by a person subject to the levy as to the accurateness of the Levy assessed to that person.

In order to fulfil its purpose, the monitor has the power to require information from SPVs and to annually confirm the amount of levy to be collect from levy payers and will ensure that the SPV applies the levy in accordance with the levy order. The Monitor can give statutory directions to SPVs when they are in breach of these obligations and, if those directions are not followed, ultimately recommend the Crown step in to manage the SPV until any significant problems are resolved.

## **Local Authority involvement**

The Local Authority endorsement mechanism in the Bill is another safeguard to protect the legitimate interests of the local authority (or relevant public body) to which the assets will vest. A proposal for a levy must receive an asset endorsement and a levy endorsement prior to the Minister recommending it to Cabinet. The local authority must also assess and collect the levy on behalf of the SPV. This may entail including the levy on a rates invoice, with the levy paid simultaneously with rates collection.

Following construction, the asset will vest to the responsible infrastructure authority be it a local authority, the New Zealand Transport Authority or a council-controlled organisation.

## Part Two: Background Material and Policy Information

### Published reviews or evaluations

<b>2.1. Are there any publicly available inquiry, review or evaluation reports that have informed, or are relevant to, the policy to be given effect by this Bill?</b>	<b>YES</b>
The Productivity Commission's draft inquiry into local government funding and financing supported the use of legislation to enable the expansion and use of Special Purpose Vehicles. <sup>1</sup>	

### Relevant international treaties

<b>2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?</b>	<b>NO</b>
--	-----------

### Regulatory impact analysis

<b>2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?</b>	<b>YES</b>
"Infrastructure Funding and Financing Regulatory Impact Assessment", Department of Internal Affairs and the Treasury, 18 April 2019. The Department of Internal Affairs' RIA panel and the Treasury reviewed the RIA in accordance with the quality assurance criteria.	

<b>2.3.2. Are there aspects of the policy to be given effect by this Bill that were not addressed by, or that now vary materially from, the policy options analysed in these regulatory impact statements?</b>	<b>YES</b>
<p>The RIA provided for the Facilitator to assess the viability of a project and design a funding and Levy proposal and did not specify the role of the Recommender. However, the Bill establishes only a Recommender function. The Bill provides that the Recommender's function is to provide formal advice on a levy proposal, including setting out the terms of a levy order, and advise the responsible Minister on the statutory considerations they must make prior to recommending a levy order be authorised. However, officials and Ministers still expect an entity to facilitate the development of quality levy proposals.</p> <p>The RIA also provided that once the Levy has commenced, Local Authorities must cease collecting compulsory development contributions for infrastructure that is to be funded by the Levy from properties subject to the Levy. However, this previous decision was revoked by Cabinet to enable a mix of development contributions and levies to ensure appropriate funding streams are utilised for specific development circumstances. This will help ensure that the Model is flexible, and more projects proceed than the previous policy would enable.</p>	

### Extent of impact analysis available

<b>2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill?</b>	<b>NO</b>
---	-----------

---

<sup>1</sup> New Zealand Productivity Commission (2019) *Local Government Funding and Financing*. Available from [https://www.productivity.govt.nz/assets/Documents/21e9d8fde3/ProdCom\\_Draft-report\\_Local-government-funding-and-financing-v5.pdf](https://www.productivity.govt.nz/assets/Documents/21e9d8fde3/ProdCom_Draft-report_Local-government-funding-and-financing-v5.pdf)

--

<b>2.5. For the policy to be given effect by this Bill, is there analysis available on:</b>	
<b>(a) the size of the potential costs and benefits?</b>	<b>NO</b>
<b>(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?</b>	<b>NO</b>
<b>2.6. For the policy to be given effect by this Bill, are the potential costs or benefits likely to be impacted by:</b>	
<b>(a) the level of effective compliance or non-compliance with applicable obligations or standards?</b>	<b>NO</b>
<b>(b) the nature and level of regulator effort put into encouraging or securing compliance?</b>	<b>NO</b>

## Part Three: Testing of Legislative Content

### Consistency with New Zealand's international obligations

<b>3.1. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with New Zealand's international obligations?</b>
--

No relevant international obligations were identified.
--

### Consistency with the government's Treaty of Waitangi obligations

<b>3.2. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with the principles of the Treaty of Waitangi?</b>
---

The Bill complies with the principles of the Treaty of Waitangi. The Department has used the Te Tiriti o Waitangi guidance (Cabinet Office Circular (19) 5) to test whether the Bill complies with Te Tiriti o Waitangi and considers that there are no inconsistencies.
--

Provisions have been included in the Bill that protect the interests of Māori in relation to protected Māori land.
--

### Consistency with the New Zealand Bill of Rights Act 1990

<b>3.3. Has advice been provided to the Attorney-General on whether any provisions of this Bill appear to limit any of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990?</b>	<b>YES</b>
---	------------

There are no implications arising from the Bill. This Bill is consistent with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993. Advice provided to the Attorney-General by the Ministry of Justice is generally expected to be available on the Ministry of Justice's website at introduction of a bill, and can be accessed at <a href="https://www.justice.govt.nz/justice-sector-policy/constitutional-issues-and-human-rights/">https://www.justice.govt.nz/justice-sector-policy/constitutional-issues-and-human-rights/</a>
--

### Offences, penalties and court jurisdictions

<b>3.4. Does this Bill create, amend, or remove:</b>	
--	--

<b>(a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?</b>	<b>YES</b>
--	------------

<b>(b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?</b>	<b>NO</b>
---	-----------

An offences regime in relation to prohibited conduct or non-compliance, principally targeted at persons that control an SPV. The regime applies to those failing to comply with reporting obligations, providing false or misleading information, or obstructing compliance with the Act.
---

The regime is also necessary to support the Monitor to undertake its activities. The Monitor may also seek orders from the Court to deal with non-compliance by applying for injunctions and civil liability orders.
--

The offence provisions, located in Part 5 of the Bill are largely modelled on the Crown Entities Act 2004, with some modifications. Other elements, such as civil liabilities, are based on the Financial Markets Conduct Act 2011.
---



<b>3.4.1. Was the Ministry of Justice consulted about these provisions?</b>	<b>YES</b>
<p>Yes, Ministry of Justice were consulted on the offence and penalty provisions.</p> <p>Penalties have been set at the same level as equivalent offences found in the Crown Entities Act 2004. Ministry of Justice vetted those penalties and considered them appropriate and proportionate.</p>	

## Privacy issues

<b>3.5. Does this Bill create, amend or remove any provisions relating to the collection, storage, access to, correction of, use or disclosure of personal information?</b>	<b>YES</b>
<p>The Bill incorporates amendments to the Local Government Official Information and Meetings Act 1987 (LGOIMA) requiring a local authority to add certain information to a Land Information Memoranda where land is subject to a levy order under the IFF Act. The Office of the Ombudsman was consulted.</p> <p>We do not consider that this directly affects the Ombudsman's jurisdiction or responsibilities, rather creating an additional requirement for local authorities where a levy has been authorised.</p>	

<b>3.5.1. Was the Privacy Commissioner consulted about these provisions?</b>	<b>NO</b>
--	-----------

## External consultation

<b>3.6. Has there been any external consultation on the policy to be given effect by this Bill, or on a draft of this Bill?</b>	<b>YES</b>
<p>High Growth Councils (Auckland Council, Hamilton City Council, Tauranga City Council and Queenstown Lakes District Council) were consulted on the policy to be given effect by this Bill and on a draft of this Bill. These councils have a substantial interest in the model due to the significant levels of urban growth and development required by their respective areas and their probable involvement and future use of the model.</p> <p>Consultation was also undertaken with other growth Councils on the policy decisions that led to the Bill including Waikato District Council, Waipa District Council, Western Bay of Plenty District Council, Wellington City Council and Christchurch City Council, however this was more limited in nature.</p> <p>Targeted consultation on the Bill was also undertaken with Crown Infrastructure Partners Limited, Local Government New Zealand, and the Society of Local Government Managers.</p> <p>No public consultation was undertaken on the proposed Bill.</p>	

## Other testing of proposals

<b>3.7. Have the policy details to be given effect by this Bill been otherwise tested or assessed in any way to ensure the Bill's provisions are workable and complete?</b>	<b>YES</b>
---	------------

We have tested the workability of the policy details to be given effect by this Bill with high growth councils, Crown Infrastructure Partners, and the Department's commercial and legal advisors.

The Department consulted on the Bill with its commercial and legal advisors, PwC, and Simpson Grierson.

## Part Four: Significant Legislative Features

### Compulsory acquisition of private property

4.1. Does this Bill contain any provisions that could result in the compulsory acquisition of private property?	YES
<p>An SPV requires several powers in order to effectively and efficiently construct infrastructure. The power to compulsorily acquire land would most likely be for road infrastructure, and significant items of three waters infrastructure. The Bill provides an SPV with access to Resource Management Act 1991 (RMA) powers as a network utility operator within the requiring authority and land acquisition regime which involves the approval of the Minister for Land Information in each case; unless the land is already held by the Crown or a local authority and transferred to the SPV by consent.</p> <p>Local authorities are also enabled to exercise their existing Public Works Act 1981 powers in respect of projects that proceed or are intended to be undertaken by a SPV under the Model. A transfer of land held by a public body to a SPV may trigger offer back requirements under the PWA.</p>	

### Charges in the nature of a tax

4.2. Does this Bill create or amend a power to impose a fee, levy or charge in the nature of a tax?	YES
<p>The core of the Model involves the setting of a multi-year levy which is paid by beneficiaries of local infrastructure projects. The Levy will be enabled by legislation and can only be struck following an Order in Council which will set out terms of the Levy. The Levy will be levied by a SPV who is responsible for financing all or part of the project. The Levy is used to service financing raised to cover the costs of the infrastructure. The Levy will be imposed on the beneficiaries of a project.</p> <p>Legislation is needed to enable an SPV to have statutory levying powers akin to a targeted rate and to enable the Levy to be collected for a long period of time (up to 50 years). The ability for an entity independent of local authorities to the right to Levy (that in turn is used to fund the construction of infrastructure) is fundamental to ensure the delivery of infrastructure is not limited by the financing constraints of local authorities.</p> <p>Approval mechanisms for the infrastructure project and Levy at the central and local government level will be important to protect the interests of beneficiaries.</p>	

### Retrospective effect

4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?	NO
--	----

### Strict liability or reversal of the usual burden of proof for offences

<b>4.4. Does this Bill:</b>	
<b>(a) create or amend a strict or absolute liability offence?</b>	<b>NO</b>
<b>(b) reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding?</b>	<b>NO</b>

### Civil or criminal immunity

<b>4.5. Does this Bill create or amend a civil or criminal immunity for any person?</b>	<b>NO</b>
---	-----------

### Significant decision-making powers

<b>4.6. Does this Bill create or amend a decision-making power to make a determination about a person's rights, obligations, or interests protected or recognised by law, and that could have a significant impact on those rights, obligations, or interests?</b>	<b>NO</b>
--	-----------

### Powers to make delegated legislation

<b>4.7. Does this Bill create or amend a power to make delegated legislation that could amend an Act, define the meaning of a term in an Act, or grant an exemption from an Act or delegated legislation?</b>	<b>NO</b>
---	-----------

<b>4.8. Does this Bill create or amend any other powers to make delegated legislation?</b>	<b>YES</b>
<p>The core of the Model involves the setting of a multi-year Levy by Order in Council that is paid by the beneficiaries of the infrastructure. This is provided for in Part 2 of the Bill. The Order in Council is the legislative instrument that will be used to authorise a Levy being imposed on landowners by a specified SPV. It is the foundation that enables a SPV to raise finance, let construction contracts and ultimately, deliver the infrastructure.</p> <p>The role of the Monitor is to provide appropriate oversight and safeguards to ensure that the SPV complies with its obligations under the Act and applicable OIC. In the case where there may be a significant problem with the SPV, a Crown Manager may be appointed to exercise the SPV's powers and duties to the extent required to resolve the issue.</p>	

### Any other unusual provisions or features

<b>4.9. Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment?</b>	<b>NO</b>
--	-----------