SOLGM

Submission on the Local Government (Rating of Whenua Māori) Amendment Bill

Society of Local Government Managers – April 2020

leadinglearninglinking

WHAT IS SOLGM?

The New Zealand Society of Local Government Managers (SOLGM) thanks the Māori Affairs Committee (the Committee) for the opportunity to submit on the *Local Government (Rating of Whenua Māori) Amendment Bill* (the *Bill*).

SOLGM is a professional society of 873 local government chief executives, senior managers and council staff.[1] We are an apolitical organisation that can provide a wealth of knowledge of the local government sector and of the technical, practical and managerial implications of legislation and policy.

Our vision is:

> *professional local government management, leading staff and enabling communities to shape their future.*

Our primary role is to help local authorities perform their roles and responsibilities as effectively and efficiently as possible. We have an interest in all aspects of the management of local authorities from the provision of advice to elected members, to the planning and delivery of services, to the equally important supporting activities such as election management and the collection of rates.

The Productivity Commission tells us that there are approximately 40 pieces of legislation that directly confer some obligation or duty on local authorities. This *Bill* addresses one of the most complex of the legislative and policy issues local government faces. The rating of Whenua Māori, both legislation and practice, is the result of the complex interplay of many factors including constitutional, legal, historic, economic and even spiritual. There are no fewer than five pieces of legislation, administered by three separate departments that interact where Māori freehold land is involved.

Māori freehold land is quite heavily concentrated in a group of 12-15 local authorities – generally in Northland, the Central North Island, and the eastern parts of the North Island. For those local authorities, this is a significant issue, for many others the impact will be relatively minor.

The explanatory note to the *Bill* correctly notes that:
"Current rating legislation has long been recognised as an impediment to owners engaging with developing Māori land. In particular, the accumulation of rates creates a cycle where lack of development inhibits the ability of owners to pay rates, and existing rates arrears inhibit the owners from engaging with local authorities to promote development of their land. . . ."

We support the objectives that this *Bill* is attempting to achieve and consider that these align coherently with changes that have been made to the *Te Ture Whenua Māori Act 1993*. We must note however, that this package of reforms addresses many of the barriers to development but does little to incentivise development (though we would accept that some progress has been made through the Provincial Growth Fund).

1 As at 31 March 2020

The other area of concern that we need to signal is that this *Bill* will create additional compliance costs – though there may be some element of 'one-off' cost involved. To expand:

- determining whether land is in use (particularly given the nature of today's rating legislation incentivises gaming behaviour around this provision)
- researching whether two rating units are, or are likely to have been, from the same block of Māori freehold land (though we agree this should be a one-off cost, but could be substantial if there's no satisfactory evidence in the Māori Land Court records)
- valuing Māori land, or to be more precise resolving objections to valuations of this land (though admittedly this will be a second-order effect of more land being developed)
- creating separate rating areas, maintaining rates records for these areas and invoicing them (we also foresee some having to arbitrate debates between the owner of the underlying rating unit and the owners of separate rating areas).

Purpose clauses (clauses 3 and 52)

Purpose clauses provide a signal of Parliament's intent to those who implement legislation (i.e. local authorities) and those who are ultimately determine what it means.

We have no concerns with *clause 3* that adds a new purpose into the overall purpose of the *Rating Act*. We note that this specifically applies to the administration of the rating system, which we take to mean the processes for determining who is liable, and collection and enforcement. This is very much in keeping with the nature of the changes being made i.e. there has been no attempt to influence policy choices local authorities. The one case which straddles the line is the new remission for development, but even the fact and quantum of any remission is still a policy choice.

We are a little more concerned about the placement of the purpose clause included in the *Local Government Act* (*clause 52* of the *Bill*). The *Bill* proposes this be added to *section 102* of the *Act*. This is the clause that sets out the purpose and consultation requirements for a set of eight funding and financial policies (six mandatory, two discretionary).

The eight policies are:

- revenue and financing policy – simply put a document which sets out the local authority's policy judgements on the funding of its activities. This mandatory policy is the first step in the process that leads to the assessment of rates
- liability management policy – a document that sets out how and when a local authority will borrow, and how it manages its debt (for example, any policies on the mix of fixed vs floating rate debt)
- investment policy – a policy on how and when a local authority will acquire and liquidate financial investments
- development and financial contributions policy – a policy that sets out whether and when the council will use development contributions (a funding tool to fund the capital costs of providing for the needs of growth) and financial contributions (a tool available under the *Resource Management Act* to fund works to mitigate the environmental impacts of development)
- a policy for the remission and postponement of rates on Māori freehold land
- a local board funding policy – required only of those unitary councils that have local boards (currently only Auckland Council)
- a rates remission policy for land other than Māori freehold land – this optional policy is required only if a local authority wishes to remit (forego payment of) rates
- a rates postponement policy for land other than Māori freehold land – this optional policy is required only if a local authority wishes to postpone (defer payment of) rates.

The *Local Government Act* is constructed in such a way that each of these policies is each set out in a separate section, with *section 102* setting out requirements that apply to all eight. By amending *section 102*, the *Bill* has set the principles of Te Ture Whenua Māori as one of the objectives for all eight policies.

The Cabinet paper stated that the intent of these purpose clauses was to *"encourage users of the legislation to think about the application of the specific provisions relating to Māori land in a constructive way"* (emphasis supplied).

There are some obvious connections between some of these policies and *Te Ture Whenua Māori Act*. For example, a local authority might consider remission or postponement of development contributions on Māori freehold land that is being brought into use for housing purposes.[2]

We are uncertain that many of the above policies were ever intended to, or would be particularly effective tools for supporting the principles of *Te Ture Whenua Māori Act*. For example, we struggle to see much connection between a local authority's selected means for managing its borrowing, or how one council has agreed to fund a set of institutions specific to it, and the principles of *Te Ture Whenua Māori Act*.

Our point is that the drafting here may go some way beyond what the Government intended. The Select Committee should take further advice, but our provisional view is that *clause 52* should be deleted in toto and replaced with something that is specific to each relevant policy.

Recommendation

1. That the Committee take further advice on the intended scope of the obligations in *clause 52*.

Māori land used as a single unit (clause 11)

SOLGM understands the intent of this provision – which is to, broadly speaking, provide an equivalent to *s20* of the *Rating Act* in terms of its impact on the incidence of fixed charges. We note that local authorities could ameliorate this with remission policies (in the first reading debate Far North were mentioned as an example) but also understand why a single approach might be desirable.

The Māori Land Court will play a critical role in adjudicating whether a particular group of rating units were previously part of the same block of land. Indeed, the information held by the court is literally the only basis for making such a determination. We imagine that this may require some detailed investigation of the information held by the court, and accordingly that making an application will not be costless.

Both *clauses 11* and *54* refer to the role of the court in determining whether rating units were previously part of the same block of land. *Clause 54* also gives the court the power to decline to make such a determination where satisfactory evidence is unavailable.

2 Powers to remit and postpone development contributions are available under the *Local Government Act*, they are quite separate from powers to remit and postpone rates.

At that point the issue will then become a matter of whether the rating units "were likely to have been" part of the same block of land. The court has no statutory role making such an assessment. The legislation has not set out any criteria, or process for assessing the likelihood that rating units were part of the same block of land (or otherwise). We can see this, very subjective judgement, creating tensions between a local authority and a potential claimant. One obvious criterion that local authorities would consider is the geographical proximity of the rating units (all things being equal rating units that are contiguous or close together would be more likely to have come from the same block). A second might be their proximity to the same road access or transport link.

Recommendation

2. That an additional provision be added to *clause 11* specifying criteria that may be used to assess whether two or more rating units are likely to have been part of the same block of Māori freehold land.

Abandoned land (clauses 33 and 35)

These two clauses represent a step forward in being able to collect rates arrears where land is in use, but where the owners cannot be located or are deceased. It will create some compliance cost in tracing the owners back to 1967 and establishing their relationship to the current owners.

Clause 35 – section 65A effectively disincentivises any arrears collection action taking place on 'abandoned land' which ceased to be Māori land under *Part 1* of the *Māori Affairs Amendment Act 1967* unless the user of such land:

a) voluntarily complies to pay the rates on such land, and
b) is proved to be an owner of the land or by the descendants of the persons, who beneficially owned the land immediately before the land ceased to be Māori land.

The scope of *section 62A* is better directed toward "any person using the land".

Powers to write off (clause 39)

SOLGM supports the clause that provides local authorities with the discretionary power to write off rates that:

- cannot, in the chief executive's opinion, be recovered or
- where liability on a block of Māori freehold land has passed from a deceased owner to their heir(s).

We particularly support the discretionary nature of the power – both in terms of whether to write-off and how much to write-off. For example, a local authority may become aware of an inheritance of land as per the proposed new *section 90B* but also be aware that there is a substantial stream of income or economic benefit off the land.

Local authorities currently have no statutory power to write-off rates – it becomes a 'bad debt' only when statute-barred under the *Limitation Act*. These provisions minimise the costs of continuing to attempt enforcement on rates year after year when the local authority knows fully well it will never be able to collect the rates. The Cabinet documentation notes how rates and penalties may accumulate quickly, even over six years.

Remission for development (clause 48)

Clause 48 sets out a new, specific, power and obligation on local authorities to consider remission of rates on Māori freehold land under development. Local authorities could do this as part of a remission policy under the existing legislation, but policies remission for development tends to be more generalised.

We support this provision in principle – noting that the obligation is to consider an application taken the listed factors into account. A local authority is not required to adopt a specific policy, and therefore is able to tailor to circumstance. As a matter of good practice, we would strongly recommend that local authorities build elements of this requirement into their remission policy on Māori freehold land. We consider that this would cut down the degree of special pleading that provisions like this can be open to.

The jury is still out on the effectiveness of rates remission as a tool for promoting economic development in the long-term. For every positive story one sees, there's a counter-story. Once extended, remission can be very difficult to remove, especially where the developer has become a major employer in the district. And the second order impacts of development can't always be, or aren't, identified.

Noting the preceding paragraph, we submit that the legislation should clearly state that there is no requirement or expectation that a remission would continue once income or other economic benefits are accruing to the owners or occupiers of the land.

Recommendation

3. That an additional provision be added to *clause 48* clarifying that there is no requirement or expectation that remission would continue once the development is generating an income or other economic benefit.

Unused Māori freehold land (clause 50 and schedule 1AA)

Clause 50 makes a number of amendments to *schedule 1* of the *Rating Act*. Chief amongst these is the proposed *114A* which moves unused Māori freehold land into the non-rateable category. This is further supported by *Part 1* of the new *schedule 1AA* which will extinguish liability for the existing arrears on unused land.

This is the provision that is likely to attract most comment (positive and otherwise) in the submission process. The provision has the potential to remove land that is unlikely to ever be used for an economic purpose – Ngā Whenua Rāhui kawenata, landlocked land, sites that are wahi tapu, or are of genuine historical or cultural significance. Given the locations of much of this land the most likely uses would be agriculture or silviculture – yet as the Regulatory Impact Statement notes, around 17 percent is suitable as arable land. Further we know 20 percent of Māori freehold land is landlocked, and around 13 percent is subject to a Ngā Whenua Rāhui kawenata (some may meet both criteria).

While we don't doubt that the write-off of existing arrears will be controversial the likelihood is that only a minority of this would ever be enforceable (even with the amendment we suggest to the enforcement process).

We accept there are perceptions that rates arrears are a barrier to owners of Māori freehold land engaging with local authorities to develop land. But equally we need to report that there are equally concerns that while this *Bill* and changes in *Te Ture Whenua Māori Act* remove barriers to development of Māori land, there is little in either that incentivises development.

The provision is also potentially open to gaming behaviours. Some types of use are more transitory or moveable – for example grazing stock can be moved, items stored on the land can be moved. This could become an issue when communities are aware a revaluation is in progress.

We add that this issue is not confined to Māori freehold land. It is a fact of human nature that people are incentivised to tell local authorities of changes in the use of their properties when it's in 'their favour' (for example, if they think the new use might be non-rateable, or change a differential category from a higher to a lower category).

While the *Rating Act* puts ratepayers under an obligation to advise local authorities when a rating unit is sold or leased, there is no equivalent obligation to advise if a ratepayer changes the use. We have raised this with Government, most recently to the Productivity Commission review, and consider that the above changes make this an essential change. This would also be a useful provision to support administration of the rating system in general.

Recommendation

4. That a new *section 33A* be added to the *Rating Act* that requires ratepayers to notify their local authority when the use of a rating unit or separate rating area changes (including a move from being unused into use).

Enforcement

The *Bill* provides owners of Māori land with a considerable package of assistance to . develop land for use. It appears that existing arrears will effectively be statute-barred from collection. Additionally, local authorities will be required to consider providing remission for land in development – albeit on terms and conditions that the local authority sets. We would also expect owners of land-locked Māori freehold land to approach local authorities to invest in network infrastructure to service the land – for example, to provide road access where none currently exists.

Remission and postponement policies are a form of income redistribution – all things being equal, if a local authority remits rates for one category of land, those must come from ratepayers that own other categories of land. It then follows that the *Bill* calls on communities to make an investment in the development of Māori freehold land. The return on this investment will come in the form of employment opportunities, and in an enhanced ability to contribute to the cost of running a democratic society (both national and local).

As a counterpoint, we would expect to see some strengthening of the provisions around enforcement of rates on land that is returning income or some other form of economic benefit to the owner.

To be clear, we do not recommend extending the ability to enforce rates by forced sale or lease of the rating unit. We accept that would be inconsistent with the principles of the Treaty and *Te*

Ture Whenua Māori Act. Rather, we recommend that the provisions that govern the so-called charging order process could be strengthened to require more from owners who are receiving economic benefit from their land.

Section 100 of the *Rating Act* lists a set of factors that the Māori Land Court must consider when deciding whether to make a charging order. There is no mention of the income or other economic benefits which are derived from ownership of the land – though the use of the land is included as a factor. We submit that this is vital information, actually necessary, to enforce a charging order as steps such as appointing a receiver or Ahu Whenua Trust can only be taken if the land is generating income.

The court has relative discretion in determining whether or not to make a charging order – it is more fettered when coming to enforcement. We submit that there would be a community expectation that the court would make an order if income were coming off the land. We would strengthen the provisions by adding a requirement that the court make a charging order if income is derived from the land. We accept there may be exceptional cases where this is not reasonable and would include a safeguard allowing the court to decline making a charging order where it is manifestly unjust to do so.

We view these amendments as the counterpoint to the statutory extinguishing of liability for rates on unused Māori land, and the new remission requirements.

Recommendation

5. That the *Bill* amend *section 100* of the *Rating Act* by adding a new *subsection 100(1)(da)* relating to the income or other economic benefits derived from the land.

6. That the *Bill* amend the *Rating Act* to require the Māori Land Court to make a charging order where there is income or other economic benefit derived from the land, except where the court considers it unjust to do so.

SOLGM

Professional excellence in local government

New Zealand Society of Local Government Managers (SOLGM)

Level 9, 85 The Terrace
Wellington

PO Box 10373
Wellington 6143

Phone 04 978 1280
info@solgm.org.nz • www.solgm.org.nz