

Wellington Regional Council  
28 MAY 2003

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27 May, 2003

Dr D J Watson  
Divisional Manager, Transport  
Greater Wellington  
PO Box 11646  
**WELLINGTON**

Dear Dave

## **PROPOSED AMENDMENTS TO PASSENGER TRANSPORT SERVICE CONTRACTS**

1. This opinion is provided in accordance with the request by the Transport Committee for a legal opinion on key issues associated with the policy that, in principle, all future operator contracts with passenger transport operators include a clause to allow the Council to reduce any contract payments to the operator, being amount equal to the loss in the Council's patronage income resulting from, in the sole discretion of the Council, an operator's poor performance and that the criteria for such performance be specified in any such contracts.
2. I appreciate the suggestion relating to the Council's power to reduce any contract payments to the operator came from views I expressed in my letter of 8 April 2003 regarding the Tranz Rail contract and the breaches which had occurred. The suggestions I made, though arising out of the Tranz Rail contract, were not directed only at Tranz Rail but would be of general application to all passenger service operators.
3. Present contracts require the provision of services in accordance with the specified requirements of Greater Wellington (GW). However, the present contracts do not specify what is to happen in the event of a failure by the operator to provide the contracted service. The result of the absence of any specific clause is to leave at large the remedies open to GW in the event of breach by the operator. These could range from a claim for damages (in practice involving a deduction from later payments) or cancellation of the contract. The latter would involve relying on the provisions of the Contractual Remedies Act 1979. Under that Act, an innocent

party to a contract, may cancel the contract if the other party repudiates it (i.e. refuses to perform an essential part of the contract or there will be a significant disadvantage to the innocent party in being required to perform the balance of the contract having regard to the nature of the breach by the wrongful party) or there is a substantial breach by the other party. Inevitably this test may give rise to argument. It is likely to be only on rare occasions that an operator will be so seriously in default that GW can safely cancel the contract without the prospect that its actions will be challenged. Essentially, therefore, GW will generally be faced with claiming damages for any breach.

4. The nature of a contract for the provision of passenger services for members of the public is such that it could give rise to dispute as to the proper measure of damages for breach by the operator. The beneficiaries of the contract are essentially the operator and members of the public utilising the services (and, rather indirectly, members of the public whose use of the transport network is enhanced by the provision of the contracted service). In a sense, though GW is a contracting party, it really facilitates the provision of the service for its constituents. GW's loss could probably be only be related to the lesser sum it might have paid for the lesser service actually provided and it may be even argued that the intermittent failure by an operator to provide a particular service would result in no measurable loss.
5. It is to avoid arguments about the measure of loss to GW that I suggested there would be merit in prefixing the amount to be deducted from an operator who fails to provide particular services. Thus, an operator who failed to provide the minimum services required under the contract would suffer a proportionate reduction in any payment due by GW. This is necessarily a somewhat crude measure as there may be a level of service below which the very viability of that service and the adverse effect on other contracted services may be at issue. Since Transfund's criteria for granting subsidies are now "output" based, it is clear that GW is dependant on enhanced operator performance if services are to be extended and improved. There may, therefore, be merit in giving operators an incentive to increase patronage by providing for them to share in the patronage funding subsidies directly related to their services. This would require negotiating a lower base payment to allow for the loss to GW of the "operator's share" of that subsidy.
6. I appreciate the reservations of members of the Committee that there could be difficulty in quantifying or specifying "poor performance". I consider this potential difficulty can be largely avoided. It is my view that the contract should provide for the circumstances in which GW may cancel the contract or deduct moneys by failure by the contractor to provide the minimum services or maintain specified standards and in which the operator would be entitled to additional payment for increase patronage or otherwise providing and enhanced service. This approach would involve specifying each of the circumstances so that use of the term "poor performance" or any cognate would be avoided, as would be the need to incorporate generalised terms. In my view, most circumstances should be able to be adequately defined by reference to the criteria utilised in determining the need to require the service or by which tenderers for any specified services are to be adjudged. The approach would be to incorporate into future contracts specified

performance standards. The inclusion of provisions to secure these objectives would be an improvement on the present form of the contract.

7. I trust this addresses the key issues and I am happy to deal with any other matters you may require.

Yours faithfully,  
**OAKLEY MORAN**

  
**J. W. Tizard**