



**MATTERS FOR DECISION ON THE DRAFT LAND
TRANSPORT MANAGEMENT (REGIONAL FUEL TAX)
AMENDMENT BILL 2018**

Office of Hon Phil Twyford

Reason for this briefing	This provides you an overview of the key features of the draft Land Transport Management (Regional Fuel Tax) Amendment Bill 2018 (the draft Bill). We seek your views on the draft Bill and your agreement with the Minister of Finance.
Action required	Discuss with the Minister of Finance. Provide feedback and agree to the recommendations.
Deadline	As soon as possible.
Reason for deadline	To ensure the draft Bill reflects your views and agreement with the Minister of Finance. You are due to take a Cabinet paper to Cabinet Business Committee on 12 March 2018 to seek approval for introduction of the Bill into the House of Representatives. To enable you to do this, cross-party consultation will begin on 28 February 2018.

Contact for telephone discussion (if required)

Name	Position	Telephone	First contact
Bryn Gandy	Deputy Chief Executive, Strategy and Investment		
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MINISTER'S COMMENTS:

s 9(2)(a) of the OIA.

Date:	23 February 2018	Briefing number:	OC05655
Attention:	Hon Phil Twyford (Minister of Transport)	Security level:	In-confidence

Minister of Transport's office actions

- Noted
 Seen
 Approved
 Needs change
 Referred to
 Withdrawn
 Not seen by Minister
 Overtaken by events

Purpose of report

1. This briefing provides an overview of the key features of the draft Land Transport Management (Regional Fuel Tax) Amendment Bill (the draft Bill). We would like your feedback on the key features, and your agreement with the Minister of Finance, before Cabinet's approval for the introduction of the Bill into the House of Representatives.

Background

2. On 20 December 2017, the Cabinet Business Committee, with Power to Act, made decisions on the policy design of a regional fuel tax [CBC-17-MIN-0088 refers], including:
 - 2.1. inviting you to issue drafting instructions to the Parliamentary Counsel Office (PCO).
 - 2.2. authorising you and the Minister of Finance to jointly make final decisions on details that arise during the drafting of the Bill, consistent with the overall intent in the paper you took to that Cabinet Business Committee meeting, without further reference to Cabinet.
3. Since then we have been working with PCO and continuing to engage with stakeholders. Preparation of the draft Bill has identified a number of detailed issues. This briefing notes those issues and recommends an approach to each of them for you to discuss with the Minister of Finance, with the objective of your agreeing those issues. The decisions can then be reflected in the Cabinet paper and draft Bill we will provide you for cross-party consultation on 28 February 2018.
4. The following sections step you through the detail of the key issues we are seeking your agreement on. In the appendix we also set out a flowchart of steps to establish a regional fuel tax for a region.

Restricting the regional fuel tax to Auckland: the draft Bill provides the Governor General may not make an Order in Council approving a regional fuel tax for any region other than Auckland until 1 January 2021

5. Cabinet agreed [CBC-17-MIN-0088 refers] that:
 - legislation should enable any regional (or unitary) council to propose a regional fuel tax for its region
 - only a proposal for a regional fuel tax from Auckland Council will be approved during the current parliamentary term.
6. The Minister of Finance has publicly stated that Auckland is the extent of the Government's ambitions for a regional fuel tax. As you know, a number of councils have expressed interest in having a regional fuel tax and Hamilton City Council has started to prepare a proposal for a regional fuel tax. It has recently come to our attention that Christchurch City Council is consulting on a fuel tax as an alternative funding source in its draft Long Term Plan 2018-28.
7. Any proposal from a regional council¹ under the legislation (once enacted) for a regional fuel tax will need to be considered on its merits on a case by case basis by joint Ministers (Finance and Transport). Any decision by Joint Ministers on a proposal will be able to be

¹ For the avoidance of doubt, "regional council" in this paper includes a unitary authority.

judicially reviewed. It is important that proposals from regions are not predetermined before they are received.

8. The draft Bill seeks to give effect to Cabinet's decision and reduce the risk of possible challenge from a regional council should joint Ministers not put in place a regional fuel tax for a region other than Auckland.
9. The draft Bill does this by not allowing the Governor General to make an Order in Council for any region other than Auckland until 1 January 2021. The Governor General will be able to make an Order in Council, on the recommendation of joint Ministers, for Auckland when the draft Bill receives Royal assent.
10. It is also not known, despite the Governor General's ability being restricted for other regions other than Auckland until 2021, how many regional councils will nonetheless submit a proposal for a regional fuel tax to joint Ministers for a decision. It is possible that joint Ministers will receive proposals from regional councils (other than Auckland) prior to 1 January 2021.
11. The draft Bill does permit regions to carry out regional fuel tax preparatory activities, and submit proposals to joint Ministers for decision, from the date of Royal assent, despite the Governor General's ability being restricted to make an Order in Council to give effect to them until 1 January 2021.
12. This could provide a way for a regional council to gauge or build community support for a regional fuel tax in its region during the first term of the government, and could create a group of well-considered proposals for you to recommend approval of at the beginning of your second term.
13. Alternatively, if you wanted to further reduce the risk of possible challenge and to send a stronger signal to regional councils that they should not consider regional fuel taxes until the start of your second term, a greater level of restriction could be provided for in the draft Bill. The draft Bill could instead not enable any region (other than Auckland) to initiate a regional fuel tax (prepare a proposal, consult on it or submit it to Ministers) prior to 1 January 2021. The restriction in the draft Bill could also be broadened to not allow a regional council (other than Auckland) to lodge a proposal with joint Ministers prior to 1 January 2021.

The draft Bill provides for a maximum tax rate that can be amended by Order in Council

14. Cabinet agreed that legislation would specify a maximum rate of tax. A regional council cannot propose a regional fuel tax in excess of the maximum rate specified in the legislation.
15. The draft Bill currently contains a maximum rate of 10 cents per litre, which is the rate that has been talked about in the context of a regional fuel tax for Auckland, including at Cabinet on 20 November 2017 [CAB-17-MIN-0510 refers]. This is the same maximum rate as was contained in the 2008 legislation.
16. Although the maximum rate is proposed to be specified in the legislation it will be able to be adjusted (either increased or decreased) by Order in Council. This provides flexibility if in the future Government determines that a different maximum rate is appropriate. An Order in Council may amend the maximum rate specified in the legislation, and is subject to confirmation by Parliament through the annual confirmation process.
17. The reason for confirmation is that the draft legislation provides a "Henry VIII" power, where the Executive amends an Act of Parliament. These powers appear in other legislation including transport-related legislation, namely for the setting of excise duty for fuel and road user charges. These powers typically attract the interest of Parliament's Regulations Review

Committee. [REDACTED]

18. Cabinet noted that the maximum rate will be agreed jointly between you and the Minister of Finance. We recommend you discuss the approach set out above with the Minister of Finance.

The draft Bill sets out what a regional council must include in its proposal for a regional fuel tax

19. A proposal must provide sufficient information so the public can see what they are getting for paying the regional fuel tax and enable members of the public to make an informed submission to the regional council on the proposal. The proposal will also be used by joint Ministers to make a decision on whether a regional fuel tax should be put in place for the region.
20. The draft Bill provides that a proposal must:
- describe the capital projects, any associated operational expenditure or debt associated with the delivery of the capital project to be funded from the regional fuel tax revenue
 - state the objectives and the effects (both positive and negative) of the projects
 - explain how the proposal is expected to contribute to the relevant Regional Land Transport Plan and the current Government Policy Statement on land transport
 - describe the costs and benefits of the projects and how they provide value for money
 - include the expected delivery date for the projects
 - include the rate of regional fuel tax and duration
 - include the forecast revenue and any forecast assumptions.
21. If a regional council makes a submission that does not fulfil these core requirements it will not be considered a proposal under the legislation. A regional council may include other information in its proposal but it must have the above core requirements.
22. When you met with officials in late 2017 you indicated, in regards to Auckland, that you wanted a regional fuel tax to fund "a programme of transport projects". You indicated you wanted legislation to enable Auckland Council to identify a programme of projects named in the refresh of ATAP (Auckland Transport Alignment Project) to be funded by the revenue from a regional fuel tax.
23. The draft Bill will require a regional council to identify projects to be funded from the regional fuel tax. However, the draft Bill will not use the language of "programme". In drafting the legislation it was found that the term "programme" would likely cause confusion with other transport programmes under the Land Transport Management Act 2003. Nonetheless, we consider the draft Bill delivers your objective in regards to Auckland in terms of allowing the funding of multiple projects.
24. We have made Auckland Council aware these proposal requirements.

The draft Bill requires a regional council to consult the public on its proposal in accordance with the ordinary consultation procedures contained in the Local Government Act 2002

25. The draft Bill provides that a regional council must consult the public on its draft proposal. Consultation with the public is one way the proposal can be tested and any issues or weaknesses highlighted, worked through and resolved before the proposal is submitted to joint Ministers. Public consultation is also a way a regional council builds support, or identifies opposition, for a regional fuel tax. Responsibility for gaining public support for a regional fuel tax rests with the regional council, not central government.
26. The Local Government Act 2002 provides consultation procedures specially designed to enable effective democratic local government decision making. It provides for two different procedures:
 - ordinary consultation procedures
 - special consultation procedures.
27. The draft Bill provides that a regional council will be required to carry out public consultation in accordance with the ordinary procedures provided in the Local Government Act 2002. This differs from the 2008 legislation, under which the special consultative procedures were required to be used. The draft Bill enables a regional council to choose to use the special consultation procedures should a regional council decide they are appropriate in their region.
28. Special consultative procedures are used currently by local government primarily in regard to bylaws and long-term plans. Such consultation takes one month to complete and typically involve hearings: people have the opportunity to present their views in person. Auckland Council has expressed the view that the special consultation procedures would not allow it to achieve an implementation date of 1 July 2018.
29. Ordinary public consultation requirements in the draft Bill reflect the consultation requirements on local government in the Land Transport Management Act 2003 for other land transport planning matters (namely, in regard to the adoption of a Regional Land Transport Plan). A regional council is obliged during the regional land transport planning to use, at a minimum, the ordinary consultation process. Our view is that the ordinary consultative procedures are sufficient to consult on a regional fuel tax. We note that where a regional fuel tax is being introduced in a more conventional timeframe, it is likely that consultation would take place as part of the long-term plan process, which involves the special consultative procedures.
30. After public consultation, a regional council will decide whether to make adjustments to its proposal. If the adjustments, following public consultation, are material the regional council may need to re-engage with the public. This is to ensure that proposals are thoroughly worked through at the regional level before they are submitted to joint Ministers.
31. Following public consultation, a regional council will decide whether to submit its proposal to joint Ministers for a decision. The draft Bill provides a regional council must provide a report to joint Ministers detailing the results of consultation along with its proposal. This is intended to provide a way for joint Ministers to gauge the level of public support (or otherwise) for the proposal.

The draft Bill gives joint Ministers complete discretion on approving a proposal from a regional council for a regional fuel tax

32. The draft Bill provides joint Ministers a broad discretion to either:

- recommend an Order in Council be made by the Governor General to put a proposal into effect
 - refer a proposal back to a regional council for reconsideration
 - decline to recommend to the Governor General that an Order in Council be made.
33. The broad discretion is intended to provide the opportunity for joint Ministers to operate at a high level. Matters of detail are meant to have been worked through before the proposal is submitted to joint Ministers (by the regional council through public consultation). Joint Ministers cannot make their own amendments to a proposal. This aims to reduce the prospect of Ministers also being contacted by parties to make changes to the proposal before the Order in Council is made.
34. The draft Bill deliberately provides no criteria or matters that must be taken into account by joint Ministers when making a decision on a proposal. The decision is at the sole discretion of joint Ministers. It is possible that a regional council could seek a judicial review of a decision by joint Ministers to decline or refer a proposal back to the regional council. Providing broad discretion is intended to signal to a Court that this is a policy and political decision solely at the discretion of joint Ministers.

The draft Bill allows for a regional fuel tax to be reviewed by the regional council prior to expiry and Joint Ministers to review a regional fuel tax at any time

35. The draft Bill provides that both regional councils and joint Ministers have a review role in respect to a regional fuel tax scheme once it is in place. Once a regional fuel tax is in place it becomes 'a scheme'.
36. A regional council must review its scheme, including whether it should be extended beyond the current end date, one year before the expiry. Cabinet agreed to a mandatory review before the end of the ten year period to determine whether the scheme should expire or be renewed. This is intended to ensure that regional councils do not come to Ministers just before the expiry of their scheme requesting an extension without having properly consulted with their citizens or properly considered the need for a continued regional fuel tax or its alternatives. It is possible after a review a regional council will make another proposal for a regional fuel tax.
37. Separately, joint Ministers will have the ability to review a regional fuel tax scheme at any time. Giving Ministers the ability to review a regional fuel tax once it is in place is intended to act as a check on the use of the revenue by a regional council. This is important to ensure that regional councils use the revenue from a regional fuel tax for the projects set out in the original proposal for the life of the regional fuel tax scheme.
38. If joint Ministers form the view that a regional council is not carrying out the scheme according to the proposal, then joint Ministers may notify the regional council of their concerns. If, six months later, joint Ministers are still not satisfied that the regional council is carrying out the scheme, then they can recommend that the regional fuel tax scheme be terminated. Termination is a dramatic intervention, and the six month period is to enable the regional council to either convince joint Ministers that their concerns are unfounded, or to prepare a variation to the original proposal reflecting the changed circumstances it presumably faces.
39. A regional council, after a proposal is approved and when a regional fuel tax is in place, may vary the projects, the rate of tax (subject to the maximum specified in the legislation) and the duration of the scheme. Should a regional council wish to vary the scheme, it must set out the change and any relevant information and consult the public before submitting it to joint

Ministers for a decision. It is important that a regional council is subject to similar procedural requirements as for a proposal so seeking a variation does not become a way for a regional council to do something different to what was put to the community. The level of rigor of consultation required for any variation will need to be in proportion to the significance of the variation proposed.

The draft Bill provides an operational role for the NZ Transport Agency

40. It is important that there is a level of Crown oversight of a regional fuel tax scheme once it is in place, and that Ministers are readily able to get information on the operation of the scheme. It is therefore important that central government has an administrative role.
41. The draft Bill gives the NZ Transport Agency functions relating to collection, distribution and rebating regional fuel tax. The draft Bill provides enforcement and auditing functions, to ensure the tax is being paid by fuel distributors and rebate claims for off-road use are lawful. The NZ Transport Agency also has a function in providing you any transport project advice on a proposal from a regional council deciding on a proposal submitted to you, including the alignment of the proposal with the Government Policy Statement on land transport, the National Land Transport Programme and any relevant Regional Land Transport Plan.
42. The main functions of the NZ Transport Agency in the draft Bill relate to:
 - collection – fuel distributors provide monthly returns to the NZ Transport Agency within 20 days of the end of the month following the supply of the fuel, and payment before the end of that month
 - distribution – NZ Transport Agency distribute funds to a regional council within ten days following the month in which the regional fuel tax was paid to it
 - rebates – the draft Bill provides the power for regulations to enable NZ Transport Agency to pay rebates for petrol and diesel used off-road
 - enforcement and auditing – the draft Bill provides powers for inspection and enforcement and offence provisions.
43. We will brief you separately on making regulations via Order in Council for rebates for fuel used off-road. Regulations will provide, amongst other things, who is entitled to a rebate.
44. Following discussion with the NZ Transport Agency we recommend a de minimus rule be set for rebates. This would mean that no rebate could be claimed for less than the suggested amount of \$20 – the same de minimus which applies to refunds of Road User Charges. The reason for setting a de minimus is that the costs of administering the claim become disproportionate to the amount paid out. It is important to manage administration costs carefully, because they are deducted from the revenue paid on to the regional council. Administration costs which are too high defeat the policy objective of raising revenue to fund transport infrastructure.
45. The draft Bill provides that the NZ Transport Agency will deduct its on-going costs and expenses from regional fuel tax revenue. This deduction will be subject to a limit set by joint Ministers. The draft Bill will also provide the joint Ministers with a role in setting the level of reserves for the payment of rebates. We will provide you with separate advice on these two matters.
46. The draft Bill provides that the NZ Transport Agency must pay the Crown \$1 million from regional fuel tax revenue. This is to repay the Crown for the set-up costs appropriated to allow NZ Transport Agency to implement the legislation, as agreed by Cabinet.

47. We have been working with the NZ Transport Agency on how best to implement these functions in time for 1 July 2018 implementation.

Offences and penalties

48. The draft Bill proposes that a person may be liable for a fine not exceeding \$10,000 or in the case of a body corporate to a fine not exceeding \$100,000 when in breach of certain provisions relating to regional fuel tax. This includes when a person fails to file a return, fails to pay a regional fuel tax or provides false information to the NZ Transport Agency.
49. Cabinet approval will be required for these offences and penalties. We propose to include this in the draft Cabinet paper which we will provide you to seek approval from Cabinet to introduce the Bill.
50. We are working with the Ministry of Justice to ensure it is comfortable with the proposed offences and penalties included in the draft Bill.

Parliamentary process

51. Once we have your feedback on the matters raised in this briefing paper on the draft Bill we will instruct PCO to finalise the draft Bill. Cabinet authorised you jointly with the Minister of Finance to make final decisions on details that arise during the drafting of the Bill, consistent with the overall policy intent without further reference to Cabinet. You therefore should discuss this briefing and the key features of the draft Bill with the Minister of Finance.
52. Once we have your feedback and the agreement of the Minister of Finance, we will then have a draft Bill for you to take to Cabinet Business Committee on 12 March 2018 to seek approval for introduction. We will prepare a Cabinet paper to enable you to do this.
53. Once Cabinet has approved the introduction of the Bill, we will provide materials for the introduction of the Bill. It would be appropriate for you to issue a press release on the introduction of the Bill into the House. We will discuss communication opportunities and any further needs separately with your office.
54. At the commencement of your introduction speech you must nominate the select committee to consider the Bill. We recommend the Bill is referred to the Transport and Infrastructure Select Committee.
55. You will want to give an instruction that the select committee reports back on the Bill within two months. As this is for a period of less than four months, there will be an unlimited time debate on the instruction. We anticipate first reading and debate will take appropriately two weeks.
56. To enable an implementation date of 1 July 2018 at all stages through the Parliamentary process the Bill will need to be prioritised by the Leader of the House.

Recommendations

57. We recommend that you:

- (a) **discuss** this briefing with the Minister of Finance Yes/~~No~~
- (b) **agree** that the Bill enables all regions to prepare a proposal, consult the public on the proposal and submit it to Ministers for decision. Yes/~~No~~
- (c) **agree** that the draft Bill enables joint Ministers to make a decision on a regional fuel tax and recommend a recommend an Order in Council to the Governor General for Auckland when the Bill receives Royal assent Yes/~~No~~
- (d) **agree** that the draft Bill contains a provision that the Governor General may not make an Order in Council approving a regional fuel tax for any region other than Auckland until 1 January 2021 Yes/~~No~~
- (e) **agree** that the draft Bill provides for a maximum tax rate of 10 cents and that the maximum rate can be amended by Order in Council Yes/~~No~~
- (f) **agree** that the draft Bill requires a proposal to provide:
- a description of the capital projects, any associated operational expenditure or debt associated with the delivery of a capital project to be funded from regional fuel tax revenue. Yes/~~No~~
 - a statement of the objectives and effects (both positive and negative) of the proposal Yes/~~No~~
 - a description of the costs and benefits of the projects and how they provide value for money Yes/~~No~~
 - the delivery date for the projects Yes/~~No~~
 - the rate of regional fuel tax and duration Yes/~~No~~
 - the forecast revenue and any forecast assumptions Yes/~~No~~
- (g) **agree** that the draft Bill requires a regional council to consult the public on its proposal in accordance with the ordinary consultation procedures contained in the Local Government Act 2002 and that a regional council may use the special consultation procedures if it chooses Yes/~~No~~
- (h) **agree** that the draft Bill provides joint Ministers a broad discretion to recommend an Order in Council approving a proposal, refer a proposal back to the regional council for reconsideration or decline to recommend an Order in Council for a proposal Yes/~~No~~

- (i) **agree** that the draft Bill allows for a regional fuel tax scheme to be reviewed by the regional council prior to expiry and Joint Ministers to review a regional fuel tax scheme at any time to ensure compliance with the proposal. Yes/~~No~~
- (j) **agree** that the draft Bill requires fuel distributors to file monthly returns within 20 days of the end of the month and requires payment before the end of the month, and that the NZ Transport Agency will distribute funds to a regional council within ten days after every month. Yes/~~No~~
- (k) **agree** that the draft Bill provides a role for joint Ministers in setting the level of NZ Transport Agency's deduction for costs and reserves for the payment of rebates from regional fuel tax revenue. Yes/~~No~~
- (l) **agree** that the NZ Transport Agency not be required to pay out rebates of less than \$20. Yes/~~No~~
- (m) **note** regulations will need to be made to set out eligibility for rebates for petrol and diesel used off-road and that the draft Bill provides powers for making regulations. Yes/~~No~~
- (n) **direct** officials to prepare a Cabinet paper for approval to introduce the Bill into the House of Representatives. Yes/~~No~~
- (o) **agree** to issuing a press release when Bill is introduced into the House of Representatives. Yes/~~No~~
- (p) **copy** to the Associate Minister of Transport Minister Genter. Yes/~~No~~
- (q) **copy** to the Minister of Finance. Yes/~~No~~
- (r) **copy** to the Minister of Local Government. Yes/~~No~~

PP 
 Marian Willberg
 Manager, Demand Management

MINISTER'S SIGNATURE:



DATE: 3.3.18

Appendix: Flowchart of steps to establish a regional fuel tax for a region

1. Below is an overview of the steps to establish a regional fuel tax provided in the draft Bill. This is a slightly-simplified version of the approach which appeared in the 2008 regional fuel tax legislation (now repealed). It is designed to ensure a high level of local engagement with the proposal whilst maintaining ministerial decision-making rights.

