

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)



4 August 2022

OC220642 / T2022/1750 / HUD2022-000471

Hon Michael Wood
Minister of Transport

Action required by:
Monday, 8 August 2022

Hon Grant Robertson
Minister of Finance

Hon Dr Megan Woods
Minister of Housing

ESTABLISHMENT OF AUCKLAND LIGHT RAIL LIMITED

Purpose

To provide a draft Cabinet paper for the establishment of a Crown entity company to be added to Schedule 2 of the Crown Entities Act 2004 (CEA). This company will undertake the Detailed Planning Phase (DPP) of Auckland Light Rail (ALR).

Key points

- Joint Ministers and other Sponsors agreed that the appropriate form of ALR Unit is as a Crown entity company added to Schedule 2 of the Crown Entities Act 2004 (OC220381 / T2022/1412 / BRF21/22061366 refers).
- The draft Cabinet paper is seeking agreement on the establishment of Auckland Light Rail Limited (ALRL). With Cabinet's agreement, the Parliamentary Counsel Office (PCO) will be instructed to prepare an Order-in-Council (OiC).
- This paper also provides additional background on the process and dependencies for the establishment of ALRL.
- This paper notes that an additional Project Planning Agreement is required to support the oversight and influence (including decision making) reserved to the Crown and other Sponsors during the DPP of the ALR Project.
- Officials note key risks about the approach that Ministers may wish to consider in deciding to advance this draft Cabinet paper.

Recommendations

We recommend you:

		Minister of Transport	Minister of Finance	Minister of Housing
1	agree any changes to the attached draft Cabinet before advancing to Ministerial consultation	Yes / No	Yes / No	Yes / No
2	sign the final attached draft Cabinet paper, with any additional agreed changes, that seeks the establishment of Auckland Light Rail Limited	Yes / No	Yes / No	Yes / No
3	authorise the Minister of Transport to conduct Ministerial consultation and lodge the Cabinet paperwork on behalf of ALR Sponsoring Ministers (following final consultation with ALR Ministers)		Yes / No	Yes / No
4	<i>Minister of Transport only – if authorised</i> lodge the attached Cabinet paper for consideration at the 25 August 2022 Cabinet Economic Development Committee (DEV) meeting	Yes / No		
5	note the transfer of functions and powers to Auckland Light Rail Ltd will not occur until the Project Planning Agreement is effective	Yes / No	Yes / No	Yes / No
6	note as the ALR Unit has previously been hosted by other organisations, Ministers are advised to seek satisfaction from the Auckland Light Rail Board that the existing unit is sufficiently prepared to transition to its responsibilities as a company before signing the Project Planning Agreement	Yes / No	Yes / No	Yes / No
7	note the risks of setting up a company now, outlined in this report.	Yes / No	Yes / No	Yes / No



Gareth Fairweather
Director Auckland Light Rail, Ministry of Transport



Morgan Dryburgh
Manager, National Infrastructure Unit, the Treasury



Natasha Tod
Partnership Director, Ministry of Housing and Urban Development

Hon Michael Wood
Minister of Transport

..... / /

Hon Grant Robertson
Minister of Finance

..... / /

Hon Dr Megan Woods
Minister of Housing

..... / /

- Minister's office to complete:**
- Approved
 - Declined
 - Seen by Minister
 - Not seen by Minister
 - Overtaken by events

Comments

Contacts

Name	Telephone	First contact
Gareth Fairweather, Director, Auckland Light Rail, Ministry of Transport	s 9(2)(a)	
Chris Gulik, Auckland Strategic Adviser, Auckland Light Rail, Ministry of Transport		✓
Bruce Anderson, Programme Management Adviser, Auckland Light Rail, Ministry of Transport		
Ben Wells, Principal Advisor, National Infrastructure Unit, Treasury		
Mary Barton, Senior Policy Advisor - Places and Partnerships, Ministry of Housing and Urban Development		

ESTABLISHMENT OF AUCKLAND LIGHT RAIL LIMITED

- 1 ALR Sponsoring Ministers and other Sponsors have noted the reasons for standing up a legal entity at this point in the project and agreed that the appropriate form of entity to carry out the detailed planning phase is a Crown entity company added to schedule 2 of the CEA [OC220381 / T2022/1412 / BRF21/22061366 refers].
- 2 This briefing provides ALR Sponsoring Ministers with a Cabinet paper seeking Cabinet's agreement to establish a Crown entity company for the DPP.
- 3 The provisional name of Auckland Light Rail Limited is being used in this version of the Cabinet paper. Officials are working with the ALR Unit to provide Sponsoring Ministers with their recommended company name option/s prior to ministerial consultation occurring next week.
- 4 This entity will absorb the roles and functions currently assigned to the ALR Unit.
- 5 The table below sets out the indicative and ambitious timetable for the establishment of ALRL. Other operational establishment matters and the transfer of functional systems (i.e. payroll, accounting etc) are being dealt with by the ALR Unit. In due course, Ministers will need to seek assurance from the ALR Board that these matters have been dealt with satisfactorily.

August 2022
Cabinet to confirm the establishment of ALRL
PCO instructions issued
Name reserved at Companies Office
September 2022
Sponsoring/Shareholding Ministers and director consents signed, Constitution approved by Ministers
Company incorporated
Ministers to confirm monitoring arrangements, Letter of Expectation, Project Planning Agreement, rescoping of the existing ALR appropriation
ALR Board to confirm Project Planning Agreement
October 2022
Order in Council confirms the company on Schedule 2 of the CEA (LEG committee, Executive Committee)
Gazetted (if 28 day rule waived)
Project Planning Agreement becomes effective, functions of ALR Unit and Ministerial Advisory Committee are transferred to ALRL
November 2022 [if 28 day rule applies]
<i>Gazetted</i>
<i>Project Planning Agreement becomes effective, functions of ALR Unit and Ministerial Advisory Committee are transferred to ALRL</i>
As soon as practicable upon establishment
ALRL provides Shareholding Ministers with their Statement of Performance Expectations and Statement of Intent

Enabling actions before establishment

Agree in-principle a Project Planning Agreement

- 6 The governance arrangements for the ALR Unit have been set up with a direct line of sight and influence required by the Crown and Sponsors to make decisions and guide the ALR Unit. However, with the establishment of ALRL the public sector oversight framework governing the entity has limited scope for Ministerial oversight and where appropriate decision-making; it falls short of what is required to reflect the intended roles of Ministers and Sponsors during the DPP of the ALR Project.
- 7 The DPP requires significant policy and strategy decisions that need to be made by, and are the reserve of, the Crown and Sponsors. This will inform the business case and ensure it meets the Sponsors objectives and, wider government and council priorities.
- 8 Influence and oversight required by the Crown and Sponsors therefore needs to be reflected in additional arrangements. This will be in the form of a Project Planning Agreement (PPA) between the Crown and Sponsors (as applicable) and ALRL. These arrangements can be appropriately tailored to reflect the phase of the project. At a minimum the following matters will be included:
 - roles and responsibilities of the Crown, other Sponsors and ALRL in relation to the ALR Project
 - scope of decision-making authority of ALRL
 - information sharing between the ALRL, Sponsors and their officials
 - funding arrangements and payment regime
 - assurance and monitoring arrangements.
- 9 The PPA will be based on the principles and approaches already agreed to in the Sponsors Agreement Heads of Terms and the ALR Board Terms of Reference.
- 10 Two areas of the PPA that will require changes from the existing arrangements and further thinking to work through what is required for a Crown entity company are the funding and monitoring arrangements. The current funding for the ALR Unit as being as a departmental appropriation will need to be rescoped, although will remain fiscally neutral. Monitoring arrangements will need to reflect the requirements of the Crown Entities Act.
- 11 Mana whenua representation on the Sponsor's Group has yet to be finalised and therefore the Sponsors Agreement has not been signed. With the establishment of ALRL, arrangements between Sponsors will need to be set out in separate instrument/s, with reference to the heads of terms previously approved by Cabinet and Auckland Council. Officials are exploring how these arrangements are best entered into, and this will determine who the contracting parties are to the PPA. Officials will bring a recommendation on this to the 16 August 2022 Sponsors meeting.

- 12 The PPA is currently being prepared. The transfer of responsibilities from the Ministerial Advisory Committee (and the ALR Unit) to ALRL will be contingent on the signing of the PPA. Without the PPA, ALRL would not be able to access funding, nor would Ministers be able to have the heightened level of oversight or influence expected of this project.

Instruct PCO

- 13 The attached draft Cabinet paper seeks agreement for Officials to instruct PCO to draft an OiC to add ALRL to Schedule 2 of the CEA 2004. A second OiC will also be prepared to make ALRL subject to the Ombudsman Act 1975. The OiC will then be taken to LEG committee of Cabinet and then the Executive Council.

Time limiting the company

- 14 The main purpose of ALRL is to deliver a business case and associated advice and activities to Sponsors. This will inform the Crown's final investment decisions. Officials recommend that ALRL has a sunset clause in its establishment. That clause would see the company wound up should the decision be made not to progress the project.
- 15 Further policy advice on the final delivery arrangements for the construction and operation phases will be provided during the detailed planning phases. It is expected that the governance arrangement and current organisational capability would transition into any new arrangements.

Company constitution

- 16 A Constitution is currently being prepared and will be provided to Ministers for approval.

Shareholder and Director consents

- 17 Once Cabinet agrees to the formation of the Crown company, shareholding Ministers will be asked to sign consent forms.
- 18 The current board of the ALR Unit was established as a Ministerial Advisory Committee and this has been acting as the governing body of the ALR Unit. The attached draft Cabinet paper proposes that the existing board members continue and become the board of ALRL. These board members will be asked to sign director consent forms for the company.

Register Company

- 19 Once the consents have been completed a company can be registered. The next step after registration is for that company to be added to Schedule 2 of the CEA.

Waive of the 28 Day Rule

- 20 Cabinet requires that secondary legislation must not come into force until at least 28 days after it has been notified in the New Zealand Gazette. (See [Cabinet Manual 7.96–7.99.](#))

- 21 This rule reflects the principle that the law must be publicly available before it comes into force. However, there are some instances where it is acceptable for you to seek a waiver of the 28-day rule from Cabinet.
- 22 Officials recommend that the Cabinet paper with the OiC seeks Cabinet agreement to waive the 28 Day rule. A waiver of the 28-day rule will be sought on the basis that adding a company to Schedule 2 of the CEA will have little or no effect on the public as it;
- does not require the public to comply, or provides only benefit
 - is in effect operating but as a Ministerial Advisory Committee.
 - needs to commence early to allow ALRL to undertake procurement processes in its own name

Readiness

- 23 The ALR Unit needs to undertake preparatory works before ALRL is established. To date, the ALR Unit has had service and systems (e.g. payroll, human resources, finance and contract management) provided by Waka Kotahi and the Ministry of Transport.
- 24 Officials are working with the Unit to ensure that it understands the services currently provided on its behalf by other agencies. This will allow the unit to prepare itself to undertake these responsibilities. Some services currently provided to the Unit may continue until ALRL becomes operational or by agreement until ALRL has set up its own systems.
- 25 In addition, the Ministry of Transport and Waka Kotahi have undertaken compliance responsibilities on behalf of the ALR Unit. With the establishment of the company, these will become the responsibility of ALRL, meeting obligations under the Financial Reporting Act (2013) and the Official Information Act (1982).
- 26 The ALR Board and ALR Unit will be responsible for ensuring their readiness for the transfer to a company form. Whilst officials can provide support, we have advised the unit to seek independent advice on these matters.
- 27 Prior to the establishment of ALRL, we recommend that Ministers receive assurance from the incoming board of ALRL that the entity has, upon establishment, the ability to successfully operate as a company or has appropriate plans in place for the transfer of functions. If the ALR Board cannot provide that assurance, officials recommend delaying the transfer of responsibilities to ALRL until such time as that assurance can be provided

On Gazetting

Signing of the Project Planning Agreement

- 28 The PPA will have been developed earlier and agreed in principle by the signatories. It is proposed that on or about the day of Gazetting that the PPA would be signed. This would transfer responsibilities from the ALR Unit to ALRL . The transfer would be conditional on the signing of the agreement (and any 28-day obligations).

Board and other governance arrangements continue

- 29 The transition from Ministerial Advisory Committee to Crown entity company would also see the existing skills-based board becoming the board of ALRL. The board as a collective and the members individually will be subject to the provisions of the CEA.

Actions to be completed once responsibilities transferred to ALRL

Transfer of any assets and liabilities

- 30 Once established all rights, obligations and liabilities currently held by the Ministry of Transport on behalf of the ALR Unit would be transferred to the new Crown entity company. The ALR Unit currently does not hold any capital assets and its liabilities will be minimal.

Constitution tabled in the House

- 31 The CEA requires the Constitution of a Schedule 2 Crown entity company to be presented to the House of Representatives. We will do this once the Constitution has been finalised and the company established.

Land acquisition

- 32 Once established, as a legal entity, ALRL will be able to deal with land directly (i.e. buy, hold, and sell).

- 33 As part of Budget 2022, Cabinet approved a ^{s 9(2)(i)} [REDACTED]

- 34 A decision by Cabinet is first required to confirm the role of ALRL ^{s 9(2)(f)(iv)} [REDACTED]

- 35 This is a live issue that officials are currently working through with the ALR Unit.

^{s 9(2)(f)(iv)} [REDACTED]

Statement of Intent (SOI), Statement of Performance Objectives (SPE) and Letter of Expectation

- 37 ALRL will prepare an SOI and SPE for joint Ministers. Officials recommend that you provide ALRL with a letter of expectations (LOE) to assist them in the development of these documents. We will provide a draft letter for ALR Sponsoring Ministers consideration.

- 38 The LOE will work in concert with the PPA for setting out Ministerial expectations and the governance of the project.

Policy work will determine the best structural options for the final delivery arrangements

- 39 A work programme has been initiated and will continue to resolve policy questions related to the final delivery arrangements for the construction and operation of ALR. Decisions made during the detailed planning phase will have direct bearing on the options and preferred solutions.

Risks to setting up a company now

- 40 There are some risks to setting up the company now that Ministers may wish to consider before proceeding with the draft cabinet paper, including:

40.1 **Sequencing of decisions** – some of the reasons to move to establishing a company at this point are still subject to decisions by Ministers or are the subject of further advice (OC220381 / T2022/1412 / BRF21/22061366 refers). The sequencing of these decisions means that the case for setting up the company now is not as strong as it would be if these decisions were confirmed first. These decisions include:

- Early land acquisition – as set out above, initiating early land acquisition is a key argument for setting up the company. s 9(2)(f)(iv)

[REDACTED]

- s 9(2)(f)(iv)

[REDACTED]

40.2 **Budget information** – as discussed in this report, there are preparatory works required before ALRL is established and, at present, the unit have not provided Ministers with a Master Budget for the detailed planning phase, which should include the forecast corporate costs of the setting up and running a company for this phase. We consider that a final master budget should be presented in advance of the ALRL being established, to give Ministers comfort about the costs considerations of setting up a company, and these costs may remain a risk during the phase.

40.3 **Company incentives** – experience throughout the history of setting up Crown companies suggests that there could be a risk that a company has a biased towards seeing themselves continue to exist in the scenario where a decision is being considered discontinue or replace the company. The draft cabinet paper attempts to help manage this risk by being clear about the default conditions for discontinuing the company, and when decisions will be made. Even so, this possible bias for entrenchment remains a risk.

Consultation

- 41 Sponsors considered the future form of ALR at its 6 July 2022 meeting. ALR Sponsoring Ministers confirmed their direction for the establishment of a Schedule 2 Crown entity company through briefing OC220381 / T2022/1412 / BRF21/22061366. This briefing and the attached Cabinet paper gives effect to that decision.
- 42 Officials from the Ministry of Transport, Treasury, and Ministry of Housing and Urban Development have jointly prepared this briefing and the associated Cabinet paper.
- 43 The Public Service Commission has been consulted on the Cabinet paper. The ALR Unit have been consulted on the recommendations in the Cabinet paper.

PROACTIVELY RELEASED BY
TE MANATŪ WAKA MINISTRY OF TRANSPORT