

CROWN LAW OFFICE

9 June 2003

Secretary for Internal Affairs  
Department of Internal Affairs  
PO Box 805  
WELLINGTON

Attention: Allan Munro

Fax No: 494-0645

Dear Mr Munro

**Local Government Act 2002: Local Authority Voting**  
**Our Ref: INT008/550**

**Introduction**

1. You have sought advice on various questions concerning Clause 24 of Schedule 7 of the Local Government Act 2002. I note that these provisions will come into force on 1 July 2003.
2. In particular, you have asked whether there are substantive changes in Clause 24 from the provisions which previously applied under s 114J of the Local Government Act 1974. You have also asked whether it is possible to remedy any apparent difficulties by the use of standing orders.
3. The questions that you have asked may conveniently be paraphrased as follows:
  - 3.1 What is the effect of the omission of the words "and voting" from clause 24(1)(a)?
  - 3.2 Is it possible for the standing orders of a local authority to override clause 24(1)(a)?
  - 3.3 Is it possible for the standing orders of a local authority to override clause 24(1)(b) to provide that in the case of an equality of votes, the presiding member has a casting vote?

**Summary of advice**

4. In my opinion, Clause 24 has substantively changed the provisions currently contained in s 114J of the 1974 Act. In particular:

- 4.1 decisions are required to be made by the majority members that are present (compared with present and voting in s 114J); and
- 4.2 the Mayor or Chairperson in the case of equality of votes does not have a casting vote.
5. Moreover, in my view, the obvious changes that have been made are not themselves amenable to further change by way of standing orders. If Clause 24 does not properly reflect the intention of Parliament, then legislative amendment will be required to correct the position.

### Section 114J

6. Section 114J of the Local Government Act 1974 presently provides:

**"114J. Voting** – (1) Except where otherwise provided in this Act or in any standing orders, -

(a) All acts of a local authority shall be done and all questions before the local authority shall be decided at a meeting by the majority of such members as are present and vote thereon; and

(b) The Chairperson or other person presiding at any meeting shall have a deliberative vote and, in case of equality of votes, shall have a casting vote also.

(2) Every question coming before a local authority shall be decided by open voting."

7. For the purposes of this advice the relevant factors in the present legislation are that:
- 7.1 all acts are required to be decided at a meeting by a majority of such members **"as are present and vote thereon"**;
- 7.2 the chairperson has a deliberative vote and in the event of equality of votes also has a casting vote.
8. It is a fact that from time to time individual members of a local authority will abstain from voting. Abstention may be for a number of reasons. The dictionary definitions make it clear that abstention is the act of not doing something – i.e. not voting.
9. As s 114J stood, abstention could make no difference to a result because those who abstained were simply not counted as voting. In the example that you gave of a nine-member body with four voting in favour of a resolution, three voting against, and two abstentions, the motion would be carried.
10. In the event that there was an equality of votes among those members voting then the chairperson, as well as exercising his or her deliberative vote, also had a casting vote to resolve any deadlocks. Although the convention has been that a casting vote should be exercised in favour of maintaining the *status quo*, that convention has not always been observed.

## Clause 24

11. Clause 24 currently provides:

“(1) Unless otherwise provided in this Act or in any standing orders,-

(a) the acts of a local authority must be done, and the questions before the local authority must be decided, at a meeting by –

(i) vote; and

(ii) the majority of members that are present; and

(b) the mayor or chairperson or other person presiding at the meeting –

(i) has a deliberative vote; and

(ii) in the case of equality of votes, does not have a casting vote.

(2) To avoid doubt, in the case of equality of vote, the question is defeated and the status quo is preserved.

(3) An act or question coming before a local authority must be done or decided by open voting.”

12. There are three essential differences:

12.1 Acts are to be decided by the majority of the members **that are present**;

12.2 The Chairperson has a deliberative vote but **not** a casting vote;

12.3 Specific provision is made that in the case of equality of vote the question is defeated and the *status quo* is preserved.

13. With respect, the omission of the words “and voting” in Clause 24(1)(a)(ii) must be a drafting error. This is particularly apparent when one looks at Clause 25 which provides for voting systems for certain appointments. Clause 25(2) refers to ... the votes of a majority of the members of the local authority or committee present and voting”.

14. As presently drafted, clause 24 has an unfortunate effect. In practical terms, it means that a member who opposes a resolution does not need to declare his or her hand on a vote but can simply abstain in the hope that the motion will be defeated because of their abstention. In the example that you provided, in the event of four members voting in favour, three against, and two abstentions, the motion would be lost.

**Can that obvious omission be corrected by standing orders?**

15. In my view, and notwithstanding the views expressed by Simpson Grierson, the matter cannot be corrected in that way because the effect of the correction would

be that the specific provision in Clause 24 would be contravened. Effectively, if the Act allows standing orders to be used in this way, then the express provisions of the Act could be directly contradicted.

16. I do not think that the exception in relation to standing orders in the commencing words of clause 24(1) would allow the express provisions of the Act to be contradicted on a general basis applicable to all council activities. While clause 27 of Schedule 7 provides for the promulgation of standing orders, clause 27(2) states that the standing orders of a local authority ... "must not contravene this Act, the Local Government Official Information and Meetings Act 1987, or any other Act". While changes are undoubtedly permissible to deal with special cases by virtue of the introductory words to clause 24(1), I do not think that that power can be used to promulgate a standing order which runs directly counter to the express provisions of the Act in all cases.
17. If the matter is to be corrected, then this will need to be by way of legislative intervention and it would be my recommendation that it should be done as soon as possible.
18. I acknowledge, however, that the matter is not entirely free of doubt and that the use of the introductory words of exception in clause 24(1) may be able to be used to deal with this particular problem. In my view, however, the better means of correcting the situation would be to deal with it by legislative amendment.

#### **Casting vote**

19. In my view, the clear intention of Clause 24 is that the Chairperson is not to have a casting vote in the case of equality of votes. Indeed, Clause 24(2) expressly provides for what is to happen in the case of equality of vote.
20. Frankly I have some difficulty in seeing why Clause 24(1)(b) is needed at all. If it was omitted, then the Chairperson of the meeting would have a deliberative vote by virtue of Clause 24(1)(a) and Clause 24(2) would then make specific provision in the case of equality.
21. That problem is compounded when one looks at Clause 25 which essentially reproduces s 114K in the 1974 Act. Clause 25 and s 114K have a particular provision for determining matters in the event of an equality of votes. Section 114K provided that s 114J(1)(b) conferring a casting vote on the Chairperson did not apply to s 114K matters. Clause 25(3)(a) rather surprisingly provides that Clause 24(1)(b) does not apply in the same circumstances. The effect of that provision is that whereas the casting vote was removed by Clause 24(1)(b), the removal does not apply in respect of Clause 25 matters so that a casting vote may be conferred where none previously existed.
22. Even if it was possible to deal with the earlier problems by way of standing orders, that is not possible in respect of Clause 24(2) because of the absence of the introductory words used in Clause 24(1). Those introductory words must only apply to Clause 24(1) and cannot be extended to the whole of the clause.
23. I also note that the current standing order in NZS 9202:2001 expressly follows the wording of s 114J of the 1974 Act. One would expect that standing orders promulgated after 1 July 2003 would be required to comply with the 2002 Act.

24. I also note from the Simpson Grierson material that there appears to have been an intention by Parliament to amend the pre-existing situation by specifically providing that in general there would be no casting vote. I note that *Hansard* apparently records a speech in opposition by an Opposition Member of Parliament but then records that Parliament voted in favour of the change.

**Would a Court interpret Clause 24 to resolve the problems?**

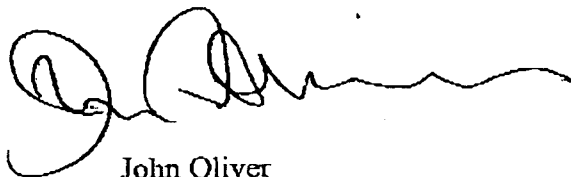
25. I have considered the possible application of *Northland Milk Vendors Association Inc v Northern Milk Limited* [1988] 1 NZLR 530. In that case, the Court of Appeal held that the Courts can in a sense fill gaps in an Act but only in order to make the Act work as Parliament must have intended.
26. In my view, a Court would be most unlikely to effectively add the words “and voting” to Clause 24(1)(a). That is because the clause as presently enacted works, albeit with a presumably unintended result. Effectively, therefore, there is no gap to fill, at least by way of judicial intervention. The effect of the clause because of the omission is simply not what the drafter presumably intended although the clause itself is workable.
27. I note that a problem of a similar nature arose in *North Shore City Council v Governor-General, Minister of Local Government, and Local Government Commission* (High Court, M1847/97, Auckland Registry, 8 December 1997, Elias J). I am **including** a copy of the decision for your information and assistance with the original of this advice.
28. I appeared for the Minister in that proceeding. In that case, there was an argument about the scope of s 37ZZA(3) of the Local Government Act 1974. At page 3 of the decision, Her Honour observed that the legislative drafter had used a shortcut device to adapt procedures under the Act for “principal local authority” approval of reorganisation schemes to a new procedure for approval by the Commission. Unfortunately, surplus words remained in the adapted provisions so that a right of appeal and a stay were incorporated where they had not existed before. As counsel, I invited Her Honour to read down the surplus words that had obviously been included in error. Her Honour considered those matters at pages 15-17 of her decision and refused to read down the provisions in that way.
29. In finalising this opinion, I have reviewed my submissions in that case. Those submissions highlighted the absurdity that would result and noted that Parliament must be presumed not to legislate to create absurdity. In this case, the words used do not produce an absurdity but, rather, an inconvenient and inappropriate result. However, Clause 24 is still workable and I would anticipate that a Court faced with the problem that has arisen here would take the same approach as in *North Shore City Council*.

**The remedy**

30. It is clear that if the current difficulties are to be resolved then this will need to be done by way of legislation.
31. In my view, the following amendments are necessary:

- 31.1 The addition of the words "and voting" after the word "present" in Clause 24(1)(a)(ii);
- 31.2 The amendment of Clause 24(1)(b) so that it reads:  
  
"the mayor or chairperson or other person presiding at the meeting has a deliberative vote only".
- 31.3 Alternatively, clause 24(1)(b) should be deleted;
- 31.4 Clause 24(2) could then remain in its present form;
- 31.5 Clause 25(3)(a) should be deleted as to do otherwise would deprive the Chairperson of his or her deliberative vote if Clause 24(1)(b) remains in some form.
32. The errors and omissions in these clauses are not capable of being amended by Standing Orders.
33. In my submission, the necessary legislation should be put forward as soon as possible. Whether or not the legislation will be contentious is, of course, a matter that will need to be taken into account. While there could be no doubt about the amendment to Clause 24(1)(a), the loss of the casting vote procedure may be contentious for some local authorities. If there is any element of contention, then it is my understanding that an amendment could not be included in a Statutes Amendment Bill.
34. Please feel free to discuss this matter further with me if you wish.

Yours sincerely



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