

STATEMENT OF PROPOSAL: PROPOSED DELEGATION OF RESPONSIBILITIES FOR NAVIGATION SAFETY TO PORT NELSON LTD FROM NELSON CITY COUNCIL

1. SUMMARY

- 1.1. As a regional council the Council (NCC) has statutory duties under s.650A-s.650K of the Local Government Act 1974 (the Act) for navigational safety within the coastal waters of the city.
- 1.2. The delivery of navigation safety functions in Nelson has for a long time been on an informal basis. By agreement, the Port Company has agreed to allow a Port Company Manager who held the appropriate qualifications to act as and when needed in the capacity of Harbourmaster.
- 1.3. The Marico NZ Ltd report *"Nelson Harbour: Port and Harbour Marine Safety Code Navigational Risk Assessment"* (2007) noted at pg 40 that:

"The Port Nelson Marine Operations Manager has been implicitly discharging the role of Harbour Master. However, without the guidance from a formal role requirement, the Harbour Master function at Nelson has been focussed around the larger commercial movements, whilst the leisure side has gradually developed a risk profile of its own and has not been the focus of Harbour Master attention. There is a clear need for a Harbour Master at Nelson arising out of this risk assessment, especially to manage the leisure use of the harbour, which is growing."
- 1.4. The report recommended at pg 60 that:

"...this arrangement be formalised, with the Harbour Master becoming accountable to Nelson City Council for discharge of the Harbour Master role. The role will include more attention being given to the safety needs of recreational users, especially their interaction with other vessel types, than in the past."
- 1.5. Six options for the delivery of navigational safety responsibilities through the Harbourmaster were identified in a report (Document 907544) to the Council on 23 September 2010.
- 1.6. The recommended option was for the delegation of navigation safety responsibilities to Port Nelson Ltd.

Option D PNL Agreement Option 3

Delivery Model	NCC delegates all navigational safety responsibilities to PNL through transfer of power under s650J Local Government Act 1974 <ol style="list-style-type: none">1. Formal delegation2. Formal agreement over Harbour Master roles, duties, reporting3. Agreement over navigational aids (ownership and maintenance)4. Costs agreement
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- 1.7. The legal position in relation to a delegation of navigation safety is
- a. Pursuant to Section 650J (1) (b) the Council may delegate to the Port Company any functions, duties or powers (other than a power to make bylaws) that relate to navigational safety.

"Delegate to a port operator any functions, duties, or powers (other than a power to make bylaws) under this Part that relate to navigational safety."
 - b. The delegations need to clearly state the functions, duties and powers that are being delegated and that are exercisable or required to be performed by a Harbour Master, or by employees of the operator, and also clearly set out in any conditions required in the Instrument of Delegation.
 - c. The Local Government Act 2002 provides for circumstances where there is a change in the mode of service delivery. Specifically s88 directs that a *"local authority must use the special consultative procedure in relation to any proposal for an alteration... in the mode by which a significant activity is undertaken by that local authority."* (s88 (1))
 - d. One type of altered service delivery is described at s88(2)(a) as *"a change from delivery by the local authority itself to delivery of the activity by a council-controlled organisation in which the local authority is a shareholder."*
 - e. This proposal has not been included in the Nelson Community Plan so a separate Special Consultative Procedure is required. (s88(3)).

- 1.8. At its meeting on 23 September 2010 the Council resolved:

THAT the Council agree in principle to

- 1. delegate to Port Nelson Ltd (a port company under the Port Companies Act, 1988), all its functions, duties and powers (other than a power to make bylaws) under Part 39A of the Local Government Act, 1974, that relates to navigation safety***

2. adopt the Instrument of Delegation (Attachment 1 to Report 907544) and its associated Schedules

AND THAT a Statement of Proposal based on Report 907544 be advertised using the Special Consultative Procedure (section 88 Local Government Act 2002)

2. THE STATEMENT OF PROPOSAL

Background

- 2.1. As a regional council the Council (NCC) has statutory duties under s.650A-s.650K of the Local Government Act 1974 (the Act) for navigational safety within the coastal waters of the city.
- 2.2. The delivery of navigation safety functions in Nelson has for a long time been on an informal basis. By agreement, the Port Company has agreed to allow a Port Company Manager who held the appropriate qualifications to act as and when needed in the capacity of Harbourmaster. This arrangement has served the harbour well, and because of the lack of any major incidents has not been tested as to its appropriateness or its robustness.
- 2.3. Both the Council and the Port Company have become increasingly aware of the inherent risks in the arrangement. As well there is an issue around whether the Council was appropriately discharging a key statutory function. There are significant liability and insurance issues around the navigation safety function. Therefore the function needs to be put on a formal and proper footing.
- 2.4. In November 2007 the Council and Port Nelson Ltd received the report that they had jointly commissioned from Marico NZ Ltd on the navigation safety risks and proposals for the management of boating activity in Nelson harbour. The report "Nelson Harbour: Port and Harbour Marine Safety Code Navigational Risk Assessment" was reported to the Council on 19 June 2008.
- 2.5. The Marico report noted at pg 40 that:
"The Port Nelson Marine Operations Manager has been implicitly discharging the role of Harbour Master. However, without the guidance from a formal role requirement, the Harbour Master function at Nelson has been focussed around the larger commercial movements, whilst the leisure side has gradually developed a risk profile of its own and has not been the focus of Harbour Master attention. There is a clear need for a Harbour Master at Nelson arising out of this risk assessment, especially to manage the leisure use of the harbour, which is growing."
- 2.6. The Council has benefited from the work of voluntary Launch Wardens in maintaining a safety profile with recreational boaters.
- 2.7. In 2009 the Council funded the purchase of a vessel appropriate to the needs of the Harbour Master. "Punawai" now gives the Harbour Master an on-water presence, provides an ability to enforce the Navigation and Safety Bylaws on the water, and increases the visibility of the need for care and attention by all harbour users.
- 2.8. In 2009 the Council began a process to authorise coastal permits as resource consents under the Resource Management Act 1991 for swing moorings within the Harbour and coastal marine area. Coastal permits have been approved for those swing mooring owners who participated in the process. There remain a number of swing moorings that are not

authorised under the Resource Management Act. These will be subject to compliance and enforcement action to ensure all swing mooring owners hold coastal permits or that the swing moorings are removed.

- 2.9. In 2010 the Council began the review of the Navigation and Safety Bylaws 2002 and the Marina Bylaw. A new Bylaw incorporating the Harbour and Marina areas has been advertised for public submission, a hearing has been held, and an amended bylaw is being prepared for adoption by the Council.

3. Discussion

Options for delivery of Harbourmaster services

- 3.1. The Marico report reviewed a number of options for the delivery of Harbour Master functions. At pg 46 the authors gave their opinion that:

"...a solution that assists in the delivery of a working Safety Management System for Nelson Harbour is perhaps more important than a role model that conforms to 'the present standard' NZ Harbour Master model..."

- 3.2. The report recommends at pg 60 that:

"The Harbour Master role at Nelson is presently being undertaken by the Port Company, albeit on an informal basis. Authors recommend this arrangement be formalised, with the Harbour Master becoming accountable to Nelson City Council for discharge of the Harbour Master role. The role will include more attention being given to the safety needs of recreational users, especially their interaction with other vessel types, than in the past."

- 3.3. There are several options for the delivery of Harbour Master services.

Option A

Council Staff Option

Delivery Model

NCC appoints as staff positions all or some of the following

1. Harbourmaster
2. Deputy Harbourmaster (most likely contract position)
3. Assistant Harbourmaster
4. Launch Wardens

Implications

1. NCC needs to determine how to fund the positions and to establish cost recovery mechanisms (if any)
2. Agreement with PNL over navigational aids (ownership and maintenance)
3. Warrants for staff
4. Job descriptions and employment agreements
5. Accommodation and normal office running costs

Option B**PNL Agreement Option 1**

Delivery Model

NCC enters into a formal Agreement of Engagement with PNL for appropriately qualified PNL staff to hold dual positions for:

1. Harbourmaster & Port Nelson Manager (Status Quo)
2. Assistant Harbourmaster
3. NCC appoints Launch Wardens

Implications

1. Warrants for staff
2. Agreement of Engagement specifies roles, duties, reporting and costs, job description
3. Agreement with PNL over navigational aids (ownership and maintenance)
4. Costs agreement

Option C**PNL Agreement Option 2**

Delivery Model

NCC enters into a formal Agreement of Engagement with PNL for appropriately qualified PNL staff to hold Harbourmaster position but NCC appoints

1. Assistant Harbourmaster – NCC staff position for recreational boating
2. Launch Warden

Implications

1. Warrants for staff
3. Agreement of Engagement specifies roles, duties, reporting and costs, job description
4. Agreement with PNL over navigational aids (ownership and maintenance)
5. Costs agreement
6. Requires formal agreement about relationship, authorities etc between Assistant Harbourmaster and Harbourmaster

Option D**PNL Agreement Option 3**

Delivery Model

NCC delegates all navigational safety responsibilities to PNL through transfer of power s650J Local Government Act 1974

1. Formal delegation
2. Formal agreement over Harbour Master roles, duties, reporting
3. Agreement over navigational aids (ownership and maintenance)
4. Costs agreement

Implications

1. Reporting mechanism
2. Accountability mechanism
3. Review of delegation mechanism

Option E**Contract with Other HM option**

Delivery Model

NCC enters into agreement with Marlborough/Wellington to contract HM services.

Implications

Formal contract or delegation

Option F**Joint Contract with Tasman District Council (TDC)**

Delivery Model

NCC enters into a joint agreement with TDC to contract Harbourmaster services

Implications

1. Tension between recreation boating focus of TDC and commercial/recreation mix of Nelson Harbour
2. Capability of one Harbourmaster to cover all the combined waters especially in peak summer period
3. Qualifications required for Nelson functions significantly different to recreation boating focus of Tasman functions
4. Need to determine basis of cost-share
5. Issues around staff appointment and management between the two Councils
6. Administration of two different bylaws
7. Options exist to combine bylaws so a common regulatory regime applies for Tasman Bay waters.
8. Accountability issues with two Councils and their expectations

The legal position with delegation of a statutory responsibility

- 3.4. Pursuant to Section 650J (1)(b) the Council may delegate to the Port Company any functions, duties or powers (other than a power to make bylaws) that relate to navigational safety.

"Delegate to a port operator any functions, duties, or powers (other than a power to make bylaws) under this Part that relate to navigational safety."

- 3.5. The delegations need to clearly state the functions, duties and powers that are being delegated and that are exercisable or required to be performed by a Harbour Master, or by employees of the operator, and also clearly set out in any conditions required in the Instrument of Delegation.
- 3.6. The Local Government Act 2002 provides for circumstances where there is a change in the mode of service delivery. Specifically s88 directs that a *"local authority must use the special consultative procedure in relation to any proposal for an alteration... in the mode by which a significant activity is undertaken by that local authority."* (s88 (1))
- 3.7. One type of altered service delivery is described at s88(2)(a) as *"a change from delivery by the local authority itself to delivery of the activity by a council-controlled organisation in which the local authority is a shareholder."*
- 3.8. This proposal has not been included in the Nelson Community Plan so a separate Special Consultative Procedure is required. (s88(3)).

Implications arising from a delegation

- 3.9. Conflicts of Interest

On the face of it a staff member of a Port Company operating under commercial imperatives could be seen to have a conflict of interest in managing the water space within the harbour, and in determining the priority to be given to various water users.

The potential for conflict is not seen by the Marico Report as a significant issue. Schedule 2 of the Instrument of Delegation sets out the conditions under which any conflict of interest will be managed. Provided those conditions are met and provided a register of written delegated authority when staff have a primary responsibility to either the Port Company or the harbour safety function is kept, then any potential conflict can be identified and dealt with in a transparent and accountable manner.

- 3.10. Accountability

A concern may arise that with a delegation to a commercial operator the Council, as a public body required to operate in the public (rather than a private) interest, may have surrendered its ability to impose checks and balances so that the delegatee is accountable for the exercise of the delegation. Schedule 2 to the Instrument of Delegation sets out the conditions around the exercise of the delegation. That specifies the

relationship with the Council as delegator, and the nature and timing of reporting.

All the functions and activities of the Harbourmaster are subject to review and oversight by Maritime New Zealand with respect to compliance with maritime law.

The Council will still be required to identify the delegation and report on the Harbour Safety activity in its Annual Report which is a public document setting out the year's results for all Council activities.

Notwithstanding any delegation the Council cannot in law absolve itself of its responsibilities under the Act for navigation safety matters. It is in the Council's interest to have in place robust and reliable accountability and reporting mechanisms to assure itself of the proper discharge of the delegation. That is the role of the Instrument of Delegation and its associated Schedules.

3.11. Insurance

The Council maintains insurance cover for Harbour Master activities and for wreck removal. The level of cover has been recently reviewed by the Council's insurers and increased. It would be prudent for the Council to maintain insurance cover at a level to be recommended by its insurer even with a delegation of navigation safety powers to the Port Nelson Ltd.

The cost of this insurance cover is part of the cost of the Harbour Safety activity account.

The Port Company would need to take advice on any insurance cover it may need.

3.12. Payment for services

Discussions with Port Nelson Ltd indicate that the cost of providing Harbour Master services (staff time and any training) will be covered by the Company.

The costs of running "Punawai" including insurance, survey and depreciation are properly covered by the Council under the terms of the Instrument of Delegation. "Punawai" is a capital asset of the Council.

Payments of any infringement fines or fines arising from prosecutions come to the Council under the terms of the Instrument of Delegation.

3.13. Instrument of Delegation

This is an essential document in support of the delegation of powers and includes three schedules.

- a) Schedule 1 specifies the powers being delegated
- b) Schedule 2 sets out the conditions under which the delegation will operate including
 - Reporting requirements
 - Engagement in the regional council Special Interest Group (Harbour Masters)
 - Engagement with the media

- c) Schedule 3 sets out the financial arrangements between the Council and the Port Company

The Instrument of Delegation effectively covers off the operational parts of the relationship between the Council and the Port Company.

4. Conclusion

- 4.1 The present arrangement for the delivery of navigation safety in Nelson harbour and the provision of Harbour Master services need review and need to be placed on a proper footing.
- 4.2 The present informal arrangements based on goodwill and co-operation will not, over the long run, serve the best interests of the Council as a regional council, the Port Company as a commercial entity, and ultimately the commercial and recreational boating community.
- 4.3 A clear decision as to who will discharge the responsibility for navigation safety is a significant decision for the Council and the Port Company.
- 4.4 The instrument of Delegation and its associated schedules provide a sound basis for the exercise of the delegation and provide a framework for managing accountabilities, conflicts of interest and reporting.
- 4.5 Any agreement to delegate to Port Nelson Ltd the Council's harbour safety responsibilities is a change in mode of service delivery and is required to be consulted on through the Special Consultative Procedure (s88 Local Government Act 2002).

Attachments

Attachment 1: Instrument of Delegation

Nelson City Council

Instrument of Delegation

Delegation under the Local Government Act 1974 from the Nelson City Council to Port Nelson Ltd

Pursuant to section 650J of the Local Government Act 1974,

The Nelson City Council

Hereby delegates to

Port Nelson Ltd

The powers set out in Schedule 1 until:

1. 30 June 2020; or
 2. the delegation is voluntarily surrendered; or
 3. this delegation is revoked in writing by the Nelson City Council;
- whichever comes first.

This delegation is subject to the conditions set out in Schedule 2. The breach of any condition shall invalidate the exercise of the delegated functions and powers.

Signed at Nelson this day of 2010

NOTE: Attach resolution of the Council to the Instrument of Delegation

Schedule 1 to the Delegation to Port Nelson Ltd

Local Government Act 1974

Section	Summary of Power, function or Responsibility	Delegate
650C	General powers of harbourmasters and enforcement officers	Harbour Master
650G	Offences	Harbour Master
650K	Removal of wreck	Harbour Master on instruction from the Council

Summary Proceedings Act

Section	Summary of Power, function or Responsibility	Delegate
	Infringement fines under Harbour Safety Bylaw 218	Harbour Master

Schedule 2 to the Delegation to Port Nelson Ltd

In exercising the delegated power pursuant to this delegation, the following conditions must be complied with in every case:

1. The delegated powers may only be exercised in respect of navigational safety within the region of the Nelson City Council as defined by the Local Government Act 2002.
2. The vessel 'Punawai' may be used by Port Nelson Ltd in fulfilling the functions of Harbour Master.
3. The delegated powers must not be exercised in any case where the delegate has a conflict of interest with respect to their role and responsibilities with Port Nelson Ltd.
4. In the event that the delegate is exercising a Port Nelson Ltd role he/she is unable to fulfil the role of Harbourmaster at the same time.

5. At all times when the Harbourmaster is fulfilling a Port Nelson Ltd role he/she must in writing appoint a Deputy Harbourmaster for that period he/she is fulfilling the Port Nelson Ltd role.
6. In exercising the delegated powers, the delegate must only collect and store information sufficient to record the exercise of the delegated powers and must ensure compliance with all statutory obligations, including the Local Government Official Information and Meetings Act 1987 and Privacy Act 1993.
7. In exercising the delegated powers, the delegate must record details of each incident or inspection on the forms or form prescribed by the Divisional Manager Planning and Consents or his successor from time to time.
8. In exercising the delegated powers the delegate must comply with the Nelson City Council's Customer Promise and standards for engagement with its community.
9. The delegate has the authority to respond to media enquiries with respect to navigational safety provided all such interactions are reported to the Divisional Manager Planning and Consents or his successor.
10. The delegate must provide the Council with information, in a format and within a timeframe acceptable to the Divisional Manager Planning and Consents/Executive Manager Regulatory or his/her successor, of all matters relating to the exercise of the delegated power:
 - a) A bi-annual report at 31 December and 30 June each calendar year of Harbour Master activities including
 - Patrol hours
 - Number of fines imposed
 - Summary of incidents by type
 - Issues identified by harbour users
 - Advice on education/enforcement initiatives
 - Advice on the serviceability and equipping of 'Punawai'
 - b) Timely reporting of significant incidents
 - c) A draft annual budget for the operation and maintenance of the Harbour Master vessel 'Punawai'.
 - d) A draft annual budget for education and publicity items, signage, and marker buoys.
 - e) An annual plan of work or initiatives proposed to be undertaken for any financial year.
11. The delegate has a responsibility to participate in the Regional Council Harbour Master Special Interest Group and to brief the

Divisional Manager Planning and Consents/ Executive Manager Regulatory or his/her successor on significant issues.

12. The delegated power may only be sub-delegated to employees of Port Nelson Ltd under the following conditions
 - a) The delegation is to persons holding the necessary qualifications to act as Harbour Master as required by maritime rules.
 - b) The delegation is to persons holding the necessary warrants of appointment from Nelson City Council.
13. Any sub-delegation may only be made on such terms as permitted by this delegation and may not extend beyond the expiry date of this delegation.

Schedule 3 to the Delegation to Port Nelson Ltd

In exercising the delegated power pursuant to this delegation, the following conditions with respect to financial matters must be complied with in every case:

1. The vessel "Punawai" remains a capital asset of Nelson City Council and funding the depreciation of the vessel will remain the responsibility of Nelson City Council.
2. All infringement fines imposed by the Harbour Master is income to the Nelson City Council Harbour Safety Activity Account
3. All Pilotage Exemption Certificate income is to be held by Port Nelson Ltd and made available to fund Harbour Master activities provided for in the annual plan and budget.
4. All other costs lie where they fall.