

TAKING OVER LAND DRAINAGE AND WATER RACE SCHEMES

A GUIDE FOR RATEPAYERS

DEPARTMENT OF INTERNAL AFFAIRS
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INTRODUCTION

Parliament has just enacted the Local Government Amendment Act (No 5) 1999 that enables the ratepayers served by local authority land drainage and water race schemes to take over the ownership and administration of those schemes from local authorities. The new provisions are contained in sections 517A to 517ZM of the Local Government Act 1974.

This booklet is intended to help ratepayers understand the issues involved in deciding whether they want to take over their scheme, and the legal requirements and procedures that must be followed to make it happen. It also makes some suggestions about how some aspects of the process might be managed to try and avoid objections and the delays they can cause.

This guide is written in plain language in an attempt to clearly explain the provisions of the Act. While every attempt has been made to reflect the legal requirements, it must be emphasised that reading this document is not a substitute for reference to the legislation itself and, on some issues, seeking formal legal advice. A number of matters on which legal advice is particularly recommended are highlighted in the booklet.

LAYOUT

This guide is in two parts. The first part, which is likely to be of greatest interest and help to scheme users, sets out the process envisaged by the legislation for the development, consideration and implementation of a proposal to transfer a scheme. The second part summarises some of the related law which deals with what can be transferred, the effect on resource consents and other legal rights, and related matters.

PROCESS

The flow diagram on page 6 sets out the major steps from the initial idea to investigate a transfer proposal to the implementation of a successful proposal. That diagram also serves as a Table of Contents and Introduction for the first Part of the booklet, with each item on the diagram referring to a major heading under which that stage, and the relevant legal requirements, are explained.

SCOPE OF LEGISLATION

Before you start, you need to know whether your scheme is covered by the new legislation. This should be easy to find out from your local authority.

The legislation provides that the transfer provisions apply to:

- All land drainage schemes vested in a council or acquired or constructed or operated by or under the control of a council under Part XXIX(29) of the Local Government Act 1974:

- Water race schemes constructed or established or deemed to be constructed under Part XXV(25) of the Local Government Act 1974.

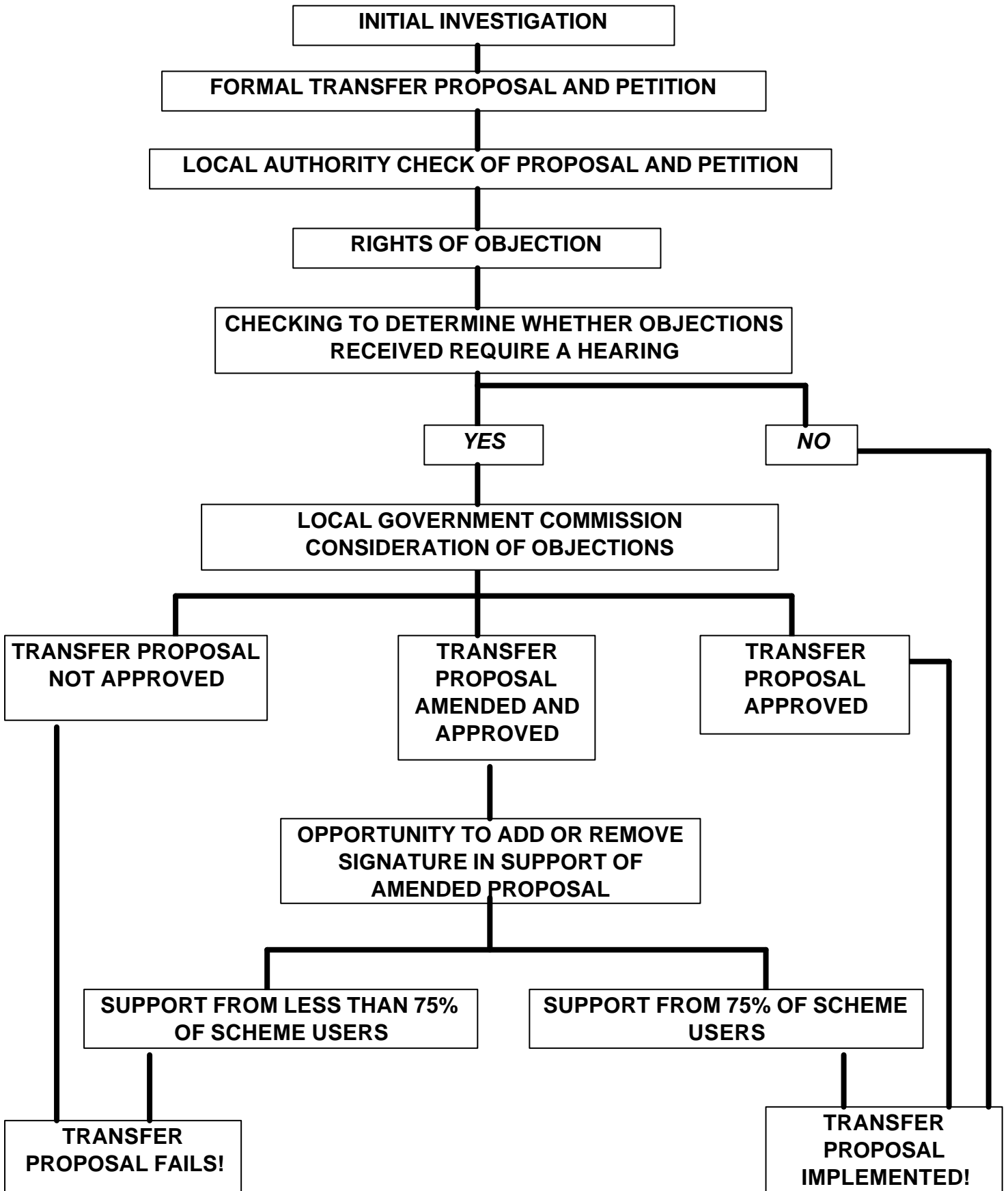
It will usually not be necessary to research under what legislation your land drainage or water race scheme was constituted. When the major reorganisations of local authorities occurred in 1989 many land drainage schemes were allocated to new district and regional councils and deemed to have been constituted under Part XXIX of the Local Government Act. The new provisions apply to all these schemes, as well as others actually constituted under the Local Government Act or its predecessors, and those included within the scope of that legislation by section 501F inserted by the new Act.

The situation in respect of Water Race schemes is somewhat different. The new take-over provisions apply to water race schemes established or constructed under Part XXV of the Local Government Act 1974 or deemed to be constructed under that Part. This last part of the definition is important because the new Act includes water races and irrigation systems constructed under the Land Drainage Act 1908 within the definition (see amendment to section 422).

OTHER RURAL WATER SUPPLY SCHEMES

The Government, and Parliament, received a number of requests to extend these procedures to rural water supply schemes that do not fall within the scope of the legislation. This was not done for two main reasons:

- One is that the Government has commissioned a major review of water supply and wastewater services, including issues relating to local authority involvement, private sector involvement, and quality standards for the supply of domestic water. It was felt inappropriate to make *legislative* changes dealing with domestic water supply arrangements until that review is completed.
- The second reason is that many rural water schemes are not administered by a local authority as a result of an Act of Parliament but because this was a requirement of Government subsidies to allow landowners to band together to establish such schemes in the 1950's, 1960's and 1970's. It is understood that while the schemes were set up and owned by the landowners themselves, the Government Departments (Ministry of Agriculture, Ministry of Works) that administered the subsidy schemes required finances to be administered by the relevant local authority, and this was done by a three way agreement involving the landowners, the Department and the local authority. The details of such agreements are likely to vary from scheme to scheme. In many if not all of these cases, legislation is unlikely to be necessary to allow the current landowners to take over the management and operation of the scheme, but even where it is, such legislation cannot proceed without details of the existing agreements in each case.



PART 1

INITIAL INVESTIGATION

Once you have established that new legislation applies to your scheme, the next steps are to work out some details, and to gather support from other scheme users. These are best done together – the more there are of you the easier it is to gather information and work out how you, the scheme users, could manage and operate the scheme. At the same time, it will be easier to get support from other scheme users if you can explain how the scheme will be operated, and how much it will cost.

It is important to remember that, if scheme users take over the ownership and operation of the scheme themselves, they will not have the resources of the local authority to draw on. Nor, apart from some powers of entry necessary for the maintenance and operation of the scheme, will they have the legal powers that the local authority has. The operation of the scheme will be dependent on co-operation and contracts amongst the scheme users, and this will be particularly important in funding the operation of the scheme without the benefit of the rating powers of the local authority.

The legislation does not require any particular type of arrangement for the future management and operation of the scheme. It is left up to the scheme users in each situation to work out whether they wish to set up a company, an incorporated society or a trust, and whether they want to contract someone else to undertake maintenance and other works, or whether they can do it themselves. If the local authority is willing, the new owners can even contract it to undertake some or all of the operation and maintenance work. These are complex issues on which it will be important to get good advice, including legal advice, on the advantages and disadvantages of different options fairly early in the development of ideas.

It is also important to recognise that the law requires the local authority to provide some assistance in the development of a transfer proposal where there is evidence of support for that proposal amongst scheme users. The appropriate way for demonstrating support at this early stage will vary according the number of scheme users involved, and might include written letters of support in some instances or a meeting of scheme users in others. It is important to remember that no-one is being asked to commit themselves at this stage – what is required is evidence of sufficient interest for those developing the proposal, and the local authority, to put some effort into preparing a detailed proposal.

FORMAL TRANSFER PROPOSAL AND PETITION

The formal procedures under the legislation start with the lodging of a formal transfer proposal with the local authority. The legislation sets out the matters that must be covered by a proposal, and these are outlined below. This may seem like a lot of detail, but two things must be borne in mind. The first is that scheme users are being asked to make a commitment to the proposal by signing their support. It is important that the proposal sets out in full how the transfer is going to take place, what will be transferred, and how the scheme will operate in the future.

The second important feature of the proposal is that if there are no objections, insufficient objections (less than 5%), or the Local Government Commission determines that the proposal should proceed, the proposal will become a transfer plan that must be implemented. It is therefore important that it be comprehensive and complete.

Content of Transfer Proposal

The transfer proposal must:

- (a) Identify the land drainage scheme or water-race scheme to be transferred and include a plan or other description sufficient to identify the scheme concerned:
- (b) Identify the scheme users by reference to the land or property served by the scheme:
- (c) State whether scheme users intend:
 - (i) To have the scheme transferred to themselves as tenants in common; or
 - (ii) To have the scheme transferred, by their direction, to a body corporate comprised of those scheme users or acting on their behalf; or
 - (iii) To have the scheme transferred, by their direction, to persons appointed by them to hold the scheme in trust on their behalf:
- (d) Identify the scheme assets and scheme liabilities:
- (e) Identify the scheme assets and liabilities proposed to be transferred with the scheme:
- (f) Identify the scheme assets not necessarily used exclusively for the scheme by the local authority, that the proposer(s) considers should be purchased as part of the transfer:
- (g) Identify the price proposed to be paid or the method for determining the price that should be paid for the scheme assets:
- (h) Propose a procedure for the transfer of such of the scheme assets and liabilities as are proposed to be transferred with the scheme and a timetable for their transfer:
- (i) Identify any rights conferred by designations under operative district plans applying to any land relating to the scheme:

- (j) Identify any rules or proposed rules in any regional plan or proposed regional plan relating to the scheme:
- (k) Identify any resource consents relating to the scheme, including any water permits or discharge permits that have become resource consents under section 386 of the Resource Management Act 1991:
- (l) Identify any leases, easements, permits, or rights of any kind in respect of any scheme assets or scheme liabilities.

Transfer Petition

At the same time as the transfer proposal is lodged with the local authority, a petition of support for the proposal must also be lodged.

Who can sign?

Any person who is a ratepayer for a property within the scheme is entitled to sign the petition. Where there is more than one ratepayer for a property (for example, joint owners) either or both can sign the petition but only one name will be counted for each property. It is essential that everybody who signs the petition includes, as well as their signature, their full name and the address in respect of which they are a ratepayer within the scheme.

How many must sign?

For the transfer proposal to be accepted, the number of valid signatures must be greater than 50% of the number of separately rateable properties within the district. However this figure should be regarded as an absolute minimum, and as many signatures as are possible should be obtained, for two reasons:

- Co-operative management of the scheme is likely to be very difficult, if not impossible, without the positive support and participation of all or almost all of the ratepayers in the scheme. Every effort should therefore be made to address the concerns of other scheme users and bring them on board at this early stage.
- While greater than 50% support is the legal minimum to have a transfer proposal accepted, a higher threshold exists if the proposal is modified following consideration of objections. If this should happen, 75% support is required for the proposal to proceed. While there will be a further opportunity for scheme users to add their signatures at that stage, supporters who do not like the modifications can have their name removed as well. A proposal that achieves unanimous or nearly unanimous support at the outset is unlikely to face this situation but, if it does, it is also far more likely to survive it.

Copies Of Transfer Proposal To Affected Parties

As well as lodging the Transfer proposal and the Transfer Petition with the local authority, the proposers of the transfer are required to deliver a copy of the Transfer Proposal (not the petition) to a number of other persons and organisations who may have an interest. This must be done as soon as practicable. Copies must be sent to:

- Every scheme user, which means the occupier of every property served by the scheme as well as the operator of any other drainage system or water supply system that depends on the scheme proposed to be transferred; and
- Every local authority in whose district the scheme is wholly or partly situated or which might otherwise be affected by the transfer of that scheme. It is not necessary to deliver another copy to the local authority that has control of the scheme. If the scheme to be transferred is currently operated by a district council, a copy of the Transfer Proposal should be delivered to the regional council, if there is one. If the scheme is close to a regional boundary, it may be safer to also send a copy to the adjacent regional council. Similarly, if the transfer of a regional council scheme is proposed, the local district council must be served with a copy and it would be prudent to also include any other local authority whose boundaries are close to the scheme. If you are not sure whether a local authority will be interested in the proposal, it is better to give them a copy than have the proposal fall over because you failed to do so.

LOCAL AUTHORITY CHECK OF PROPOSAL AND PETITION

When the local authority from which the scheme is proposed to be transferred receives the Transfer Proposal and Transfer Petition, the local authority must check:

- That the Proposal includes all the information required by law. If it doesn't, the local authority must return the Proposal to the proposer with a written indication of the matters that have not been adequately covered. The proposer may amend the Proposal and resubmit it.
- Whether the Proposal is the same, or very similar to one filed with the local authority in the previous three years which did not proceed. If it is, the petition and the proposal have no effect. This does not include Proposals that were returned to the proposer for amendment as described above.
- That the Petition contains the required number (more than 50% of the number of properties served by the scheme) of valid signatures. If this number is not reached, then both the Petition and the Proposal are of no effect. There would be nothing to stop further signatures being gathered and the Petition and Proposal being resubmitted. As noted earlier, much higher than 50% support is likely to be required if the transfer and subsequent management of the scheme are to be successful.

RIGHTS OF OBJECTION

A right of objection to any aspect of a Transfer Proposal is given to every scheme user (in other words every occupier of a property served by the scheme, and the operator of any other dependent scheme) and to any local authority affected by the scheme. After the local authority has checked the Transfer Proposal and Petition, it must notify all these people of the Proposal and of their right to object. They must also notify those persons that the proposer is required to have supplied them with a copy of the proposal, and give them the address to contact the proposer if required. The deadline for lodging objections with the local authority is set by the local authority and must be at least 6 weeks after notice of the proposal and right to object.

LODGING AN OBJECTION

There are a number of basic legal requirements that every objection must satisfy:

- (a) Objections must be made in writing. Although objectors are later given a right to appear in person and speak in support of their objection, it is important that the important points and arguments are stated clearly in the written objection.
- (b) The objection must state the basis on which the objector is entitled to object – in the case of ratepayers this will be that they occupy property (give details) served by the scheme in question.
- (c) The objection must be signed by the objector, who must also clearly state his/her name and the address of the property he/she occupies.
- (d) As well as lodging the objection with the local authority by the specified deadline, every objector must deliver or post a copy of the objection to the proposer of the transfer or their representative (the name and address for this can usually be found on the Transfer Proposal itself).

In drawing up an objection, it is important to realise that the legislation is framed to allow transfers to proceed provided this can be done in a way that is fair to all scheme users and does not have negative impacts on the responsibilities of local authorities. It is therefore very important for objectors to accurately identify the particular aspects of the transfer proposal to which they object, to give clear concise reasons for their objections, and wherever possible to suggest solutions or modifications to the proposal which would address these issues. These will assist the Local Government Commission, in considering objections, to understand them and identify ways of allowing the transfer proposal to proceed that meet everyone's concerns and interests.

CHECKING OF OBJECTIONS

Within 7 days of the closing of objections, the local authority must check whether it has received objections from:

- 5% of scheme users; or
- the operator of any dependent scheme; or
- any local authority.

If any of these conditions is met, then all objections together with the Transfer Proposal are referred to the Local Government Commission. This is an independent body appointed by the Minister of Local Government to investigate and rule on certain local government matters, including reorganisations and boundary alterations.

If no objections or insufficient objections to require reference to the Local Government Commission are received, then the Transfer Proposal becomes a Transfer Plan, and the scheme **MUST** be transferred in accordance with that plan as soon as practicable.

The local authority is required to advise the proposer, every other scheme user and every affected local authority, whether the Transfer Proposal is required to be referred to the Local Government Commission.

LOCAL GOVERNMENT COMMISSION CONSIDERATION OF OBJECTIONS

The Local Government Commission must give the transfer proposers (or their representatives), and every objector a reasonable opportunity to present their case to the Commission. The Commission may also hear from any other group or person that it thinks may be able to assist it. The Commission would normally hold hearings locally, both to make it easier for persons appearing before it, and so the scheme itself can be inspected if necessary. The Commission is obliged to give all persons who may wish to appear reasonable notice of the time and place of the meeting. If this is to happen, though, it is important that both the objectors and the proposers provide full details of how they can be contacted.

The Local Government Commission must consider:

- The Transfer proposal; and
- Each objection received; and
- All other relevant information presented to, or obtained by, the Commission in terms of criteria set out in the legislation.

The criteria are –

- the purposes of local government as set out in the Local Government Act (see section 37K)
- the purposes of these new procedures which are stated in the Act to be:
“To enable any land drainage scheme or water-race scheme to be transferred to the ownership and responsibility of the ratepayers served by the scheme, where that is the wish of those ratepayers; and
“To ensure that the manner in which any such scheme is transferred protects-
.. *the interests of all ratepayers served by the scheme; and*
.. *the public interest in the effective operation of this Act and other Acts by local authorities.*
- Consideration of any negative impact on drainage or water race schemes dependent on those to be transferred;
- The extent to which the transfer would be oppressive, unfairly discriminatory or prejudicial to any scheme user; and
- The impact on the statutory functions, powers and duties of any local authority.

When it has heard all objections, and carried out any further investigation or negotiations it thinks fit, the Commission must determine whether –

- The Transfer Proposal is to proceed in its present form; or
- The Proposal is to be amended in ways specified by the Commission; or
- The Proposal is not to proceed.

The Commission’s determination is final, although the Local Government Act 1974 does provide a right of appeal to the High Court against the Commission on a point of law only.

Notice of Commission's Determination

Copies of the Commission's determination and explanation of its reasons must be sent to the proposer or the proposer's representative, all scheme users and local authorities affected by the transfer proposal. A copy must also be made available for public inspection at the office of the Commission.

EFFECT OF COMMISSION APPROVAL OF PROPOSAL WITHOUT MODIFICATION

If the Commission determines that the Transfer Proposal should proceed without modification, then the proposal becomes a TRANSFER PLAN and must be implemented as soon as practicable by the local authority.

EFFECT OF COMMISSION DETERMINATION THAT PROPOSAL SHOULD NOT PROCEED

If the Commission determines that the Transfer Proposal should not proceed, the Proposal ceases to exist and no similar proposal may be submitted in relation to that scheme for 3 years.

EFFECT OF COMMISSION MODIFICATION OF TRANSFER PROPOSALS

If the Commission determines that the Transfer Proposal can proceed, but modifies it, all scheme users must be given a chance to reconsider their support for the transfer. This enables those who did not support it initially to change their mind where their concerns or doubts have been addressed. At the same time, anyone who signed the original petition but does not support the changed proposal can withdraw their support.

OPPORTUNITY TO ADD OR REMOVE SIGNATURE OF SUPPORT FOR AMENDED PROPOSAL

When the local authority receives a modified Transfer Proposal from the Commission, it must notify every scheme user:

- that the Commission has modified the transfer proposal,
- that the Commission is required to send every user a copy of the modified proposal and explanatory statement;
- that the modified proposal and explanatory statement are available for public inspection at the offices of both the local authority and the Commission;
- that any scheme user who signed the transfer petition can have their name deleted by applying in writing to the local authority before a specified date (which must be between four and six weeks from the date of the notice);
- that any scheme user who was not a signatory to the initial transfer petition and now wishes to add their name to the transfer petition can apply to have their name added by the same specified date.

Within 7 days of the specified date the local authority must add and delete names in accordance with written requests, and count the number of signatories who now support the petition. If the number of valid signature is 75% or more of the number of properties in the scheme, the transfer petition becomes a TRANSFER PLAN and must be implemented as soon as practicable by the local authority. If the number of signatures is less than 75%, the proposal becomes void and no similar proposal may be submitted in relation to that scheme for 3 years.

PART 2

IMPLEMENTATION OF TRANSFER PLAN

The process described in the preceding pages has identified three different circumstances in which a transfer proposal becomes a transfer plan. They are:

- If there are no objections or insufficient objections to require the proposal to be referred to the Local Government Commission; or
- If the proposal is referred to the Local Government Commission to consider objections and the Commission approves it without modifications; or
- If the proposal is referred to the Local Government Commission to consider objections and the Commission approves it with modifications and, after public notice, the modified proposal gains or retains support from 75% of scheme users.

Where a Transfer Plan involving the transfer of a land drainage or water-race scheme is given effect to the local authority must on the transfer day:

- Transfer to the person or group of persons to whom the scheme is transferred, the scheme assets and scheme liabilities; and
- Vest in the person or group of persons to whom the scheme is transferred any rights conferred by designations under district plans applying to any land transferred under the transfer plan; and
- Grant to any person or group of persons to whom the scheme is transferred leases, easements, permits, consents or rights of any kind in respect of any scheme assets or scheme liabilities as provided for by the transfer proposal, the amended transfer proposal, or the Commission's determination.

Transfer of Assets and Liabilities

Scheme assets that are fixed to, or are under or over, any land may be transferred whether or not any interest in the land is also transferred. Where any such asset is so transferred the asset and the land are to be regarded as separate assets each capable of separate ownership. (It is important to note that a recent Court Decision has ruled that fixed drainage scheme assets constructed and operated by a local authority belong to the owner of the land and not the local authority, although the latter has statutory powers to operate and maintain them. Such assets will not, therefore, be capable of being transferred to the new scheme owners by the local authority, and without local authority powers, the new owners will need to secure the agreement of landowners to use those assets. Refer *Bay of Plenty Regional Council v Begley* (Thomas, Barker and McGechan JJ, 13 May 1997, Court of Appeal, CA 260/95))

Where a scheme asset or liability is transferred to the scheme owner the local authority remains liable to any third party as if the asset or liability had not been transferred. In such case the scheme owner must indemnify the local authority in respect of any liability which may arise.

Transfer Of Land

The provisions of the Resource Management Act 1991 and the Local Government Act 1974 relating to subdivisions do not apply to subdivisions necessary to allow the transfer of land in the implementation of a Transfer Plan. It should also be noted that, provided the land continues to be used for the land drainage or water race scheme, land that was compulsorily taken under the Public Works Act by the local authority does not have to be offered back to the original owners before it can be transferred. If all or any part of the land ceases to be required for such purposes, sections 40 and 41 of the Public Works Act 1981 shall apply as if the owner of the land were the local authority and the land had not been transferred.

The Registrar-General of Land must endorse on every certificate of title transferred to any person or group of persons the effects of the previous paragraph.

Scheme Revenue and Rates

The legislation does not provide for the transfer of any endowment land relating to the scheme, but provides that the revenue from such land shall be paid to the new owners by the local authority. Where a local authority collects such revenue on behalf of the scheme users, the local authority is entitled to deduct from such revenue all reasonable costs and expenses incurred in the collection.

The timing of the transfer is important in terms of the provisions relating to rates levied for the purposes of the scheme. Where the transfer occurs during the financial year, the local authority may continue to levy and collect rates during that year but must pay to the scheme user all rates collected by the local authority and not expended by it on the scheme prior to the transfer. If the transfer occurs before any rates have been levied by the local authority in that year, no rates are levied but any expenditure by the local authority after 1 July must be reimbursed by the new owners.

Where a local authority collects revenue on behalf of the scheme users, the local authority is entitled to deduct from such revenue all reasonable costs and expenses incurred in the collection.

Transfer of Rights and Designations

Activity Permitted As Of Right

The legislation states explicitly that where any land drainage or water race scheme is transferred:

- The use of any land on which the scheme is situated and used for drainage purposes or water race purposes is deemed to be a permitted activity within the meaning of the Resource Management Act 1991; and
- Where any designation is vested in any person or group of persons through the transfer, they may apply under section 167 of the Resource Management Act 1991 for approval

as a requiring authority within two years of the transfer and until that time they shall be deemed to be a requiring authority under the Act.

Existing Easements Also Transferred When Scheme Changes Hands

Any existing easements, agreements, or rights in respect of land that relate to land drainage works, drainage channels, water races, or other scheme facilities are deemed to be included in the transfer even if they are not registered.

The new scheme owners can request the local authority to indicate by registered notice the existence of any relevant easements, agreements, or rights and the fact that they have been transferred to the scheme owner. The notice shall indicate as near as possible the true position or course of the land drainage works, drainage channels, water race, or other facilities to which the easement, agreement, or right relates.

Transfer Of Water Permits

Where a local authority transfers a land drainage or water race scheme any permit held by the local authority to dam any river or stream or to divert, take, use, or discharge water for the purposes of the scheme is deemed to be transferred to the new owners of the scheme. Every permit transferred continues to be subject to the same conditions which applied before the transfer.

Rights Of Entry to Any Land Drainage Or Water Race Scheme

While scheme users taking over land drainage and water race schemes are generally required to operate and manage them without the statutory powers of local authorities, an exception has been made in respect of powers of entry onto land to gain access to the land drainage or water race scheme. In exercising this power, the scheme owners, or their agents, may do anything necessary for operating, inspecting, maintaining, or repairing the scheme.

This power is, however, subject to the following conditions:

- (a) Entry to the land may only be made by the scheme owner or any other person authorised by the scheme owner in writing, either specifically or as a member of a class authorised by the scheme owner:
- (b) Reasonable notice must be given of the intention to enter the land:
- (c) Entry may be made only at reasonable times:
- (d) The person entering must carry evidence of his or her authority and must produce such evidence on initial entry or if required to do so.

The above conditions do not apply where entry is necessary in circumstances of probable danger to life or property. However the occupier of the land must be notified as soon as practicable, whether before or after the entry is made.

Any authorised person entering the land must take all reasonable steps to avoid disturbing any stock on the land or damaging or destroying any fences, buildings, trees, or other property that doesn't belong to the scheme user. The scheme owner is liable for any damage or loss suffered by the property owner because of any authorised person entering the property.

Following the transfer of a scheme, the local authority must give the scheme owner a certificate specifying the land which is subject to rights of entry under the Act.

REVOCATION OF SPECIAL ORDERS CONSTITUTING DRAINAGE AND WATER RACE AREAS

On the transfer of any land drainage or water race scheme every special order made by the local authority in relation to the scheme is automatically revoked.

Every part of any drainage district, water race district, irrigation district that is part of any transferred land drainage or water race scheme is deemed to be excluded from that drainage or water race area.

The local authority must by special order change the boundaries of any drainage area or water race area to reflect the revocations of special orders and exclusions from drainage or water race areas.

For Further Information:

Please contact:

Local Government Services
Department of Internal Affairs
P O Box 805
Wellington
Phone: (04) 495 7200
Fax: (04) 495 7287

Local Government Commission
P O Box 5362
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