



Water Service Entities Bill

22nd July 2022

Intro

There is compelling evidence that New Zealand's water services are under-performing. Te Waihanga considers that improving the performance of three waters services requires reform.

In 2020, Te Waihanga commissioned a [Special Report on Waters Reform in New Zealand](#), which provided a broad examination of the current state of New Zealand's three waters infrastructure in the context of the government's proposed reforms.

The report sets out the case for reform, examines the benefits of consolidating services, expresses the need for economic, environmental and health regulation (including support for the establishment of Taumata Arowai), and makes a series of recommendations for successfully implementing reform.

Our submission should be read in conjunction with this report, and with Rautaki Hanganga o Aotearoa, the recently published New Zealand Infrastructure Strategy which can be read online by visiting <https://strategy.tewaihanga.govt.nz/>

Specific provisions in Rautaki Hanganga o Aotearoa relating to New Zealand's water infrastructure include:

Good incentives are needed to provide quality water infrastructure at an affordable cost (p.76).

Water and wastewater metering and water conservation can reduce water use and wastage (p. 76).

Improve water infrastructure pricing and provision in cities (S3.1).

Reduce pressure on water infrastructure through better water management and conservation (s3.2)

Purpose of three waters reforms

The stated purpose of the government's reform programme is to **improve the safety, quality, resilience, accessibility, and performance of three waters services.**

Te Waihanga, the New Zealand Infrastructure Commission, **supports this purpose.**

While we support the stated purpose of the reforms, there are some aspects of the government's proposal we believe merit further consideration. These can be classed as General and Bill-specific issues and are detailed below.

General:

Further Detail Required

We understand that future legislation will provide greater detail on how the proposed Water Services Entities will operate.

The following is a non-exhaustive list of matters of interest to Te Waihanga that we hope will be addressed:

- The role and powers of the economic regulator
- How bylaws will be replicated
- Funding and principles for pricing (including the role of demand management)
- Access to private property for maintenance and control of water catchments
- Integration with existing and proposed resource management processes

- Customer agreements and the responsibilities of consumers, particularly where these are not clear (e.g., tenancies)
- Incentives for the Water Services Entities to promote water conservation (noting that their principal funding source is the sale of water)
- Public assurance that the full costs of water services are removed from property rates levied by councils
- Clarity as to how public services, such as water for firefighting, will be funded
- The potential merits of distinguishing between wholesale and retail operations
- A consistent approach to data standards
- A determination of powers required to address uneconomic water schemes, including the option of transferring rural schemes back to users.

Balance Sheet Separation

Recommendation 12 in Rautaki Hanganga o Aotearoa recommends that water service entities be allowed to “use their balance sheet capacity to finance infrastructure for growth, as well as funding asset renewals and improvements in water quality.”

At present, the ability to debt-finance improved water infrastructure or water asset renewals can be constrained by wider local government debt to revenue limits. Councils that have taken on debt for other activities can face limits to their ability to access capital for needed three waters infrastructure improvements. We agree that this is a challenge facing the three waters sector.

The Water Services Entities Bill proposes to address this by establishing balance sheet separation between water service entities and local governments. Under this approach, debt taken on by local governments would not constrain water service entities’ ability to borrow, and vice versa. This would increase water service entities’ access to capital, provided they can also to generate appropriate revenue streams from new investments (which could include volumetric charging, betterment levies or connection charges for new users).

However, partly due to the requirement for balance sheet separation, water service entities are a novel form of statutory entity, rather than an existing, familiar structure such as a council-controlled organisation. It is difficult to predict how this new structure will operate in advance of its implementation, especially if local resistance continues. After implementation, it may be necessary to adjust elements of this structure to ensure that it is achieving its desired purpose.

In this context, legislation should not be overly prescriptive about how water services entities should be structured and governed. The current legislation contains a number of elements that could be perceived as overly prescriptive. While these requirements may be beneficial, there is a risk that they may make it difficult to adjust and improve over time. We recommend that these requirements be critically assessed to avoid preventing water service entities from evolving as circumstances change.

Some examples of requirements that may be considered unnecessarily prescriptive include:

- The comprehensive list of matters that must be included in Water Services Entities constitutions
- A statutory requirement for Regional Representative Groups to appoint a sub-committee to appoint directors and manage the performance of the Board
- Specification of the number of council (and mana whenua) representatives allowed on Regional Representative Groups
- The establishment of a consumer forum and consumer engagement stocktake (clauses 203 and 204).

A final observation: recent reports released by the Future for Local Government panel have highlighted that the relationship between central and local government is not as positive as it could be¹. Tensions between levels of government have the potential to create a range of problems and inefficiencies, particularly in the many areas where cooperation and coordination is required (such as the provision of transportation). The level of detailed prescription in the Water Services Entities Bill, as described above, is not helpful to this relationship, as it tends to reinforce the impression that central government does not trust local government.

Recommendation:

Legislation should avoid being overly prescriptive about how water services entities should be structured and governed, except insofar as needed to achieve balance sheet separation between water service entities and local governments.

Bill-specific Issues:

In addition to the general issues raised above there are also a number of specific issues to raise, as follows:

Clause 6: The definition of Water Services includes **Stormwater**.

The characteristics of stormwater services are very different from drinking water and wastewater services. Drinking water and wastewater have clearly defined users; there are a variety of pricing mechanisms available to incentivise efficient resource use (such as volumetric charging to reduce demand or trade waste charges to moderate the quality of effluent); and the ownership of infrastructure is relatively easily defined.

In contrast, the 'users' of stormwater services are difficult to define and will include a range of upstream exacerbators and downstream beneficiaries who are not physically connected to reticulated stormwater networks. Pricing mechanisms to incentivise good behaviour (such as buffering outflows and/or treating the quality of runoff) have challenges and the success of networks relies on assets which are in third party ownership, including roads as secondary flow paths, parks and reserves used for high flow detention and waterways held by a variety of owners.

Given this complexity, Te Waihanga is currently undertaking further work on the options for funding and pricing stormwater infrastructure services. While spillovers associated with stormwater suggest funding from centralised funds may be advantageous, such an approach could remove incentives for users to adopt technologies that may mitigate stormwater runoff (for instance, through incentivising more permeable surfaces). A sensible assessment of the trade-off between funding simplicity and the use of prices to appropriately incentivise behaviour that limits costly infrastructure investment is required

The transfer of responsibility for three waters services is scheduled to occur on 1 July 2024. This appears to be a very tight timeframe, and we are conscious that there is a significant amount of work required if this target date is to be achieved. The Stormwater Technical Working Group (STWG) – Transition Plan Report (25 August 2021) highlights the complexity of transitioning stormwater arrangements to the Water Services Entities and sets out a range of actions required during the transition phase. The report notes that the required timeframe to transition these arrangements is 3+ years – considerably more time than will be available to the WSE's if the transition is required to be undertaken by 1 July 2024.

The STWG provides an extensive list of further work required during the transition and implementation phases. Te Waihanga has not undertaken any analysis on whether the benefits of including stormwater in the first phase of reforms outweigh the risks, however we are concerned that achieving the 1 July 2024 operational deadline may be compromised if the unique issues posed by stormwater distract

attention from potable water and wastewater services. On the other hand, if the timeframe is met, we have concerns that the quality of decisions made will be compromised to meet the deadlines.

Recommendation:

That the Department of Internal Affairs carefully consider the costs, benefits, and risks of progressing with the inclusion of stormwater on the same timescale as potable water and wastewater.

Clause 11(a): Cost efficiency and resource efficiency are important goals, and distinct from organisational efficiency and financial sustainability. We recommend adding cost and resource efficiency to this objective.

Recommendation:

That Clause 11(a) is rewritten as follows: "deliver water services and related infrastructure in a cost and resource efficient, and financially sustainable manner".

Clause 13(c): Transparency is an essential feature of investment decision making, particularly where regulated infrastructure providers are entitled to recover the cost of those investments from users. Water Services Entities should be required to disclose the investment logic and business case that support all significant investments in water infrastructure.

Recommendation:

Add an additional sub-clause (iv): "business cases and investment decisions regarding significant capital works"

Clause 14: The requirement to provide funding is extremely broad. Clause 91(j) clarifies that the reimbursement of expenses relates to 'reasonable expenses', however for clarity Clause 14 should also specify that only actual and reasonable costs and expenses can be claimed. In addition, we suggest that any remuneration paid to members of a regional representative group and/or regional advisory panel should be disclosed publicly and subject to review by the Remuneration Authority.

Recommendation:

Amend Clause 14 to refer to 'actual and reasonable costs and expenses' and add members of the regional representative group and regional advisory board to clause 162(1)(a).

Clause 16: The allocation of one share to each territorial authority for every 50,000 population (or part thereof) is intended to 'provide a tangible expression of ownership that is recognisable by communities and territorial authorities.' However, the shares have no practical utility beyond this 'tangible expression', apart from allowing councils (not the RRG) to vote on issues relating to privatisation of assets. Even in these situations the unanimous vote of all councils is required, and therefore the number of shares held by a council is irrelevant.

We therefore question why a recalculation of shares is required every five years, and why provisions are necessary to cater for councils to be 'created, adjusted, altered, or abolished'. It would be simpler if councils were allocated a single share to confirm ownership of the entities.

Recommendation:

Delete Clause 16 and add a new Clause "Each territorial owner shall be allocated one share in a water services entity".

Clauses 17 - 20: Section 12 of the Local Government Act 2002 provides local government with a power of general competence, allowing councils flexibility to respond to the needs of their communities and

reducing the potential for legal challenge. In contrast, Clause 17 constrains water services entities to actions that are incidental to, or related to, the provision of three waters services in their area. There are a range of water-related activities that Water Services Entities could be involved in, such as productive waters or providing specialist services to other WSEs. Under a Council Controlled Organisation, the council owners would have the flexibility to approve activities beneficial to their communities. Under this statutory entity model that flexibility has been removed.

Recommendation:

Consider options to provide WSE's with greater flexibility to respond to community demands by inserting a clause equivalent to Section 12 of the Local Government Act 2002, subject to the approval of their council owners.

Clause 26 and Part 4 (Subpart 1): We question whether the Minister should have a role in issuing Government Policy Statements. Our concern is that this minimises the role of the Regional Representative Group, adds an additional, unnecessary layer of bureaucracy, and could have potential for politicisation (see our comments on Clause 115, below).

It is worth noting that unlike Scotland, where Scottish Water is wholly owned by the Scottish Government, the New Zealand government will have no direct interest in New Zealand's Water Services Entities.

Recommendation:

That provision for Government Policy Statements is removed from the Bill.

Clause 115: It is important that Water Services Entities have the freedom to supply services independent of local or national political direction. Te Waihanga has observed that decision making autonomy is positively correlated with enhanced infrastructure performance. We therefore strongly support this clause and note that it will need to be updated if the provision for Government Policy Statements is removed as per our feedback on Clause 26.

Recommendation:

Clause 115 is supported but may need to be updated pending changes to Clause 26 regarding Government Policy Statements.

Part 4 (Subpart 3) – Te Mana o te Wai statements for water services:

Clause 140 requires significant work and further detail:

- No direction is provided on the scope, format, or objectives of a Te Mana o te Wai Statement (TMOTWS). This is likely to create confusion and conflict due to differing expectations.
- There is no limit to how many Te Mana o Te Wai statements could be issued to a WSE. The geographical area covered by some WSE's will encompass hundreds of individual hapu, iwi and combinations of 'groups of iwi or hapu', this section appears to be impractical and likely to be ineffective as drafted.
- There is provision for any or all of the statements to be revised by any individual or group "at any time". This appears to be an impractical and unmanageable requirement, particularly given the board of WSE's are expected to action the requirements in Clause 141 "as soon as practicable after receiving the TMOTWS..."
- There is no direction provided as to how WSE's should act when a TMOTWS conflicts with other direction provided to the WSE by its Board, an RRG, a resource consent requirement, a National Policy Statement or National Environmental Standard, a regulator or other community or

business interest group. Direction on how to reconcile conflicting direction from the various stakeholders will assist with efficient and coherent decision making by WSE's.

- If the intention/purpose of Part 4 (subpart 3) is that WSE's act in accordance with TMOTWS, then coordination and rationalisation of the TMOTWS will be essential. There is currently no mechanism outlined for how this will be achieved which implies it will be the responsibility of the WSE to interpret an unlimited number of TMOTWS which can be revised an unlimited number of times, with no schedule and in no prescribed format, with no agreed scope.

Clause 141

- Water Services Entities (WSE) must 'give effect to Te Mana o te Wai' but could receive multiple different interpretations of what that means. They are required to receive and publish a response to each Te Mana o te Wai Statement, which invariably means conflicting statements will receive a response which is unable to comply with the requirements of Clause 141.

Recommendation:

While we support the need to define what WSE's need to do to give effect to Te Mana o te Wai, this Subpart requires considerable further work to address the matters raised above. There are practical engineering implications regarding for example, preferences on how wastewater discharges are handled which require consistency and certainty given the long-lived nature of water assets and further obligations on WSE's set out in clause 148(d). This subpart would benefit from consideration of what these practical implications are likely to be and the development of a 'model TMOTWS' could assist with helping all parties understand what might be included and the extent to which iwi, hapu and combined groups could benefit from collaborating on the development of a combined TMOTWS for their WSE.

Clauses 147 to 152 – Planning: asset management plan and Planning: funding and pricing plan:

We note that these clauses may need to be amended to ensure harmonisation with the expectations and requirements of a future economic regulator, for example if price-quality paths are introduced.

Recommendation:

Ensure that clauses 147 to 152 align with the proposed introduction of an economic regulator for water services.

Clauses 153 to 155 – Planning: infrastructure strategy:

In order to provide coordinated strategic planning for critical infrastructure and lifeline utilities, it is important that Water Services Entities be required to have regard for the New Zealand 30 Year Infrastructure Strategy produced by Te Waihangā in accordance with Subpart 3 of the New Zealand Infrastructure Commission/Te Waihangā Act 2019.

Recommendations:

Amend Clause 154 (1) to require that the infrastructure strategy identify:

- expected demand drivers and resource availability over the period
- how the WSE will respond to the effects of climate change including mitigating its own emissions and adapting its own infrastructure to accommodate the effects of climate change.

That Water Services Entities are required to have regard to the New Zealand Infrastructure Strategy published by Te Waihangā in the preparation of Infrastructure Strategies.