Tauranga City Council

Water Services Economic Efficiency and Consumer Protection Bill

24 February 2023

Section 1:

1. Introduction

Tauranga City Council (TCC) forms part of Entity B Water Services Entity (WSE) that will be known as Western-Central Water Services, along with 21 other Councils. The city has a population of 155,200, making it the second largest Council in Entity B.

TCC 3 water assets, as of 30 June 2021, are valued at $1.53 billion, with debt of $447 million. The capacity to continue to service a high-growth city is the major concern of our staff and Commission.

Subject to the comments below, TCC supports the Bill.

2. Water Reform Reset

We note that Cabinet has asked the new minister of Local Government to report back on how to refine the reforms. The Prime Minister has signalled that any change to the structure would likely include a change to the governance structure and that the Government will work with authorities on this. https://www.nzherald.co.nz/nz/politics/pm-chris-hipkins-to-announce-bonfire-of-the-policies-today-rnztvnz-merger-gone-income-insurance-scheme-changing/E4RYAKQ27JD53B7LHUCTOXUQYY/.

In respect of Māori representation, DIA have confirmed that engagement / representation will be with iwi and post settlement groups. This is unlikely to accurately represent the kaitiaki of particular whenua or taonga. The legislative description implies a national 'one size fits all' and does not allow for local representation on 'local' whenua or taonga. TCC / Te Rangapū position is for a partnership 'place based' approach with the primary focus being the appropriate utilisation and care of the local assets and kaitiakitanga over the natural resource, not necessarily ownership.

We recommend that:

2.1 Local Government Ownership and Shareholding

that the Bill amend the governance arrangements set out in the Act to establish the new entities as statutory bodies in the ownership of local authorities with the initial shareholding based on the value of the net assets transferred (water asset values less associated debt). The shareholding would then be adjusted over time by increasing by area for each 10,000 additional population. This would ensure that the initial asset value and future growth are reflected in the shareholding of each area, whilst allowing for the scale of consolidation and efficiency for the Water Services Entity to provide for water services.

2.2 Place Based kaitiakitanga for Māori

that Māori representation and participation is based on a partnership "place based" approach with the primary focus being the appropriate utilisation and care of the local assets and kaitiakitanga over the natural resource, not necessarily ownership.

The suggested "place based" approach is:

- Determine the area or "place" under consideration

- Undertake an analysis to determine kaitiaki - likely to be iwi and / or Hapū, possibly marae groups, or adjacent landowner. Every situation could potentially be different
- Engage directly with those kaitiaki in the management of water services at "place" or over a particular water resource
- Ensure kaitiaki views are contingent to any decision making.

2.3 Stormwater Timeline

TCC support the transfer of all three waters to WSEs to align with Te Mana o te Wai obligations and also deliver the expected Three Water reform outcomes. The Bill provides clarity in some areas regarding the transfer of stormwater services, whilst raising issues and questions in others, which are noted in Section 2 below.

In order to ensure an effective and efficient stormwater service for our communities, TCC's position is that the timeline for transferring stormwater assets, debt and services should be extended. The complexities of transferring stormwater assets and services, as well as understanding WSE and Council's ongoing obligations in delivering a cohesive stormwater service for customers requires further consultation and time.

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Anne Tolley
Commission Chair
Tauranga City Council

Section 2:

TCC now addresses matters specific to the WSEECP Bill. We have provided some drafting recommendations and examples which may assist the Committee but are not necessarily complete solutions to the issues discussed below.

Submission of Tauranga City Council - Water Services Legislation Bill

Topic 1: Purpose of Parts 2 and 3

1. The purpose of Part 2 of the Bill (clause 12) does not adequately acknowledge the nature of water infrastructure services, the water services entities who provide them, or the wider water services regulatory landscape. In particular:

    - "Consumer demands" are not the only driver of quality for water infrastructure services. There are also health, environmental (including climate change) and broader societal drivers, the latter in particular being set by the WSE's Regional Representative Group (**RRG**)
    - The reference to extracting "excessive profits" fails to recognise that most (if not all) water services entities will not have a profit motive. For example, most / all will not have shareholders interested in maximising dividends
    - As there is no ability to extract excess profits the purpose should focus on providing a level of service (effectiveness) the needs of consumers at the minimum cost (efficiency).

2. Health, environmental and societal requirements also impact on the provision of water infrastructure services, not just the need for efficiency and responsiveness to consumer demands. The Commerce Commission (**Commission**) will need to take into account, amongst other things, the costs that environmental and public health regulation by regional councils and Taumata Arowai respectively impose on WSEs.

3. The purpose of Part 3 (clause 60) should refer to consumer demands, as the purpose of Part 2 does. "Improvements" should not mean continuous improvements in service quality beyond what consumers are happy with, as consumers would ultimately bear the cost of that.

Recommended / Example Amendments

Provision	Recommendation / Example	Reason
Clause 12	**12. Purpose of this Part** The purpose of this Part is to promote the long-term benefit of consumers in markets referred to in section 11 by promoting outcomes that are consistent with outcomes produced in competitive markets so that regulated water services providers— (a) have incentives to innovate and to invest, including in replacement, upgraded, and new assets; and (b) have incentives to improve efficiency and provide services at a quality that reflects consumer demands <u>and meets applicable health, environmental and societal requirements in the provision of water infrastructure services</u>; and (c) share with consumers the benefits of efficiency gains in the supply of water infrastructure services, including through lower prices; and (d) are limited in their ability to extract excessive profits<u>, to the extent they may operate on a for-profit basis</u>.	Reflect wider set of considerations that bear on provision of regulated water services, not just efficiency and meeting consumer demands. Recognise that WSEs are not profit-making entities.

	(e) focus on providing an effective level of service that meets the demands of the consumers at an efficient price.	
Clause 60	**60. Purpose of this Part** The purpose of this Part is to provide for consumer protection and improvements in the quality of service provided to consumers by regulated water services providers and drinking water suppliers, reflecting consumer demands.	Continuous improvements in quality come at a cost and should not exceed what consumers demand.

Topic 2: Interaction with Other Regulatory Regimes

4. Related to topic 1, the Bill does not expressly require the Commission to take account of the requirements water services entities face under other regulatory and pseudo-regulatory regimes when the Commission exercises its functions under the Bill. These requirements may come from Taumata Arowai (as to drinking water safety), from regional councils and local authorities (as to environmental outcomes) or through governance structures, e.g., the RRG for WSEs. At present, clause 4(2) simply says that the Commission may consider, analyse, and use information provided by statutory WSEs or Taumata Arowai, which does not sufficiently recognise the relevance of Taumata Arowai's regulatory role.

5. Clause 4 should be amended to rectify this. Although not exactly appropriate, a starting point for new drafting could be section 54V of the Commerce Act 1986, which relates to the interaction between the Electricity Authority and Commission in relation to the Commission's price-quality regulation of Transpower and electricity distributors. An alternative, more straight-forward, approach is suggested below.

Recommended / Example Amendments

Provision	Recommendation / Example	Reason
Clause 4	Insert a new clause 4(2A) as follows: The Commission must take into account, before exercising its powers or performing its functions under this Act, decisions or recommendations made by: (a) Taumata Arowai under the Taumata Arowai – the Water Services Regulator Act 2020; and (b) a regional council or consent authority under the Resource Management Act 1991 in relation to any water infrastructure service or water services entity; and (c) the regional representative group for a statutory water services entity.	Commission should take account of the requirements WSEs face under other regulatory and pseudo-regulatory regimes.

Topic 3: Scope of Regulated Water Services Providers

6. There is a contradiction between clauses 13 and 54 (as to regulated water services providers under Part 2) and clauses 61 and 62 (as to regulated water services providers under Part 3). Clauses 13 and 61 say subsidiaries and other related entities of the statutory and designated WSEs are automatically regulated whereas clauses 54 and 62 say (or at least strongly imply) the Minister has to designate them as regulated. We think it would be appropriate for subsidiaries and successors to be automatically regulated and interconnected bodies corporate other than subsidiaries to be regulated only if designated.

7. Drinking water suppliers are regulated under Part 3 even if not a regulated water services provider for the purposes of Part 3. This is potentially confusing, and the confusion could be avoided by incorporating drinking water suppliers in the definition of regulated water services provider in clause 61.

8. Clause Section 66(c) suggests a designation for Part 3 could make a water services entity subject to other legislation ("prescribed consumer protection legislation") the entity would not otherwise be subject to. The designation should only apply Part 3, not other legislation (compare clause 59(a)).

9. When the Commission is considering recommending a water services entity be regulated or deregulated under Part 2 (clauses 47 and 48), or the timing of price-quality regulation (clause 49), the Commission should be expressly required to consider the likely costs of regulation versus the likely benefits of it (along with the other matters to be considered, which should be mandatory considerations). There is no minimum size for regulated water services providers under Part 2, and it is possible the case for regulating or continuing to regulate a smaller provider would not stack up under a cost-benefit analysis.

10. The same applies to regulation under Part 3 (clause 64). We note there is no deregulation process for Part 3. There should be, as there is for Part 2.

Recommended / Example Amendments

Provision	Recommendation / Example	Reason
Clause 48(5)	Amend as follows: (5) In carrying out a review, the Commission must~~may~~ consider— (a) whether the purpose of this Part would be better met if 1 or more unregulated water services entities were subject to 1 or more forms of regulation under this Part in respect of 1 or more water infrastructure services; and (b) whether the likely benefits of that regulation for that unregulated water services entity outweigh the likely costs of it; and (c) any other information that the Commission believes to be relevant.	Commission should be required to take into account both costs and benefits of regulation.

Topic 4: Timing of Information Disclosure, Quality, and Price-Quality Regulation

11. Information disclosure regulation may prove to be sufficient to incentivise and promote the efficient provision of water infrastructure services by regulated water services providers. The Bill should not assume quality or price-quality regulation is necessary, or that it will be necessary by particular deadline dates, as it does now. There should be a Ministerial gateway - quality and price-quality regulation should only happen if the Minister, on advice from the Commission taking into account the likely costs and benefits, decides it should. Only if the Minister decides there needs to be quality or price-quality regulation should a deadline be set for it.

12. Input methodologies for each type of regulation (information disclosure, quality, and price-quality) should be consulted on and finalised before that type of regulation starts. While clause 28(2) of the Bill requires the Commission to give public notice of a draft input methodology, and consult interested parties before finalising the input methodology, there is no guarantee any of that will happen before the corresponding regulation applies. In fact, the Bill does not require input

methodologies for quality regulation at all (see clause 25(1)(b) which says the Commission "may" determine input methodologies in respect of quality regulation) and clause 26(2) expressly states that information disclosure regulation can start before there are information disclosure input methodologies. If this approach is a reflection of the Commission's limited capacity to get through the work necessary to implement Part 2 in time to meet the deadlines in the Bill, then that strongly suggests the deadlines are too tight.

13. It is unclear what extent of regulation would meet the deadlines in the Bill, given that a clause 15 determination may only apply to a subset of regulated water services providers and / or a subset of water infrastructure services (clause 15(2)). For example, would information disclosure regulation for one of the statutory water services entities for stormwater infrastructure services only be sufficient to meet the 1 July 2027 deadline for information disclosure regulation? There is a related question around what it means to "make" a clause 15 determination (or the services quality code under Part 3). Would a determination be considered made for the purposes of the relevant deadline if it does not come into effect until after the deadline?

14. Clause 20(2) should be amended to introduce a minimum duration for the second and subsequent regulatory periods. Four years would be appropriate, and consistent with the minimum duration of price-quality paths under section 53M of the Commerce Act 1986.

15. To avoid potential regulatory duplication, quality regulation should not be allowed to exist at the same time as price-quality regulation for the same regulated water services provider and water infrastructure service.

Recommended / Example Amendments

Provision	Recommendation / Example	Reason
Clause 19	Amend as follows: **19 When initial section 15 determinations must be made** (1) The Commission must make initial determinations under section 15,— (a) in relation to information disclosure regulation, no later than 1 July 2027; and (b) in relation to quality regulation, only if directed by the Minister to do so and by no later than the start of a~~the first~~ regulatory period directed by the Minister; and (c) in relation to price-quality regulation, only if directed by the Minister to do so and by no later than the start of a ~~the second~~ regulatory period directed by the Minister. ~~(2) The Commission may make the initial section 15 determination relating to information disclosure regulation in accordance with subsection (1)(a) even if the initial input methodologies for information disclosure regulation have not yet been made (see section 18(1)).~~ (3) The Commission must consult interested parties before making an initial section 15 determination.	Bill should not assume regulation is required by a particular date, and Minister should be required to be satisfied benefits of regulation outweigh costs. Input methodologies should be required before the corresponding type of regulation starts.
Clause 20	Amend subclause (2) as follows: (2) The duration of subsequent periods must be determined by the Commission and must be no shorter than 4 years and no longer than 6 years.	Minimum period required in order for regulation to be effective.

Clause 25(1)	Amend as follows: (1) The Commission- ~~(a)~~ must determine at least 1 input methodology in respect of each information disclosure regulation under subpart 4, quality regulation under subpart 5, and price-quality regulation under subpart 6. ~~And~~ ~~(b) may determine input methodologies in respect of quality regulation under subpart 5.~~	Input methodologies for quality regulation should be required, not optional.
Clause 26(2)	Delete	Inappropriate for information disclosure regulation to start before there are information disclosure input methodologies that have been consulted on.

Topic 5: Directive Performance Requirements

16. The role of an economic regulator should be to incentivise and make recommendations to the regulated entity, not to directly control the regulated entity's business. Some of what is anticipated for performance requirements in quality and price-quality regulation (clauses 39(3)(b) and 42(3)(b)) crosses inappropriately into directive control. Of particular concern is the potential for the Commission to direct regulated water services providers as to:

- their approach to risk management
- their approach to asset condition and remaining life
- making particular investments
- asset management policies and practices
- ring-fencing revenue for Commission-approved investments only.

17. The Bill should not provide for this type of directive control. The Commission is not an expert in the delivery of water infrastructure services or any of the other utilities it regulates.

18. By way of example, Transpower may apply to the Commission for approval of a major capex project under the Transpower Capital Expenditure Input Methodology Determination 2012 made by the Commission under Part 4 of the Commerce Act. Transpower's application must include a proposed investment and compare the costs and benefits of it to the costs and benefits of other investment options that would meet the investment need. The Commission must either approve or not the proposed investment (clauses 3.3.4 and 3.3.5). The Commission is conspicuously not empowered to approve any of the other investment options or direct Transpower to carry out any particular investment (even the proposed investment if approved).

Recommended / Example Amendments

Provision	Recommendation / Example	Reason
Clause 39(3)(b)(i)–(iii), (vi) and (vii)	Delete	Bill should not allow Commission to direct regulated water services providers in the performance of their operations.

Clause 42(3)(b)(i)–(iii), (vi) and (vii)	Delete	Bill should not allow Commission to direct regulated water services providers in the performance of their operations.

Topic 6: Pricing Principles and Methodologies

19. The Bill should be clear whether or not it is within the ambit of the Commission's powers to determine pricing principles or pricing methodologies for regulated water services providers. Although the Bill does not expressly allow for this, it is arguably within the general functions of the Commission in clause 4.

20. We do not consider the Commission should be empowered to determine pricing principles or pricing methodologies because this would confuse the regulatory landscape for regulated water services providers and reach too far into their operations. A provision similar to clause 4(3) should expressly carve this out of the Commission's functions. That would be consistent with Subpart 8 of Part 2 which leaves funding and pricing plans up to the providers (subject to Commission input) and contemplates there will be "charging principles" coming from somewhere else.

Recommended / Example Amendments

Provision	Recommendation / Example	Reason
Clause 4	Insert new clause (3A) as follows: (3A) To avoid doubt, the Commission's functions under this Act do not extend to determining pricing principles or pricing methodologies applicable to, or used by, regulated water services providers.	Commission should not be empowered to determine a regulated water service provider's pricing principles or pricing methodologies.

Topic 7: Service Quality Code

21. The full scope of what may be in the service quality code should be specified in clause 70. At the moment the only specific content is the penalty rate for unpaid debt. Merely saying that the rest must "promote the purpose of this Part" is too vague.

22. The Bill assumes a regulated service quality code is necessary, and thus requires the Commission to make one by 1 July 2027 (clause 69). However, consistent with Part 7 of the Telecommunications Act 2001 relating to retail quality codes for telecommunications providers (section 236(1) in particular), the Commission should only be empowered to make a regulated code if the water services industry has failed to regulate, or adequately regulate, itself.

Topic 8: Consumer Complaints Process

23. In clause 59(c) it is unclear what the "consumer quality complaints service" is, as distinct from the consumer disputes resolution service. As this is the only place in the Bill where the consumer quality complaints service is mentioned, we expect this is a mistake.

24. Detailed regulation of water services providers' internal consumer complaints processes and information disclosure / reporting about consumer complaints (as contemplated in clause 73(1)) is unnecessary as these matters are more appropriately dealt with in the rules of the approved consumer disputes resolution service. For example, the rules of the Energy Complaints Scheme run by Utilities Disputes Limited (the approved dispute resolution scheme for electricity and gas under

the Electricity Industry Act 2010 and Gas Act 1992 respectively) contains detailed rules covering these matters. These types of rules should be included in the list in clause 3(1) of Schedule 2 of the Bill.

25. The rules of the consumer disputes resolution service are likely to contain jurisdictional limits and exclusions (as the rules of the Energy Complaints Scheme do, and as contemplated in clause 3(1)(c) of Schedule 2 of the Bill). Clause 74 should acknowledge those jurisdictional limits and exclusions, so as not to suggest there are no limits on the kind of complaint the consumer disputes resolution service can deal with.

26. Only the consumer who made the relevant complaint should have standing to appeal a determination of the consumer disputes resolution service, not any consumer (clause 78(1)).

Recommended / Example Amendments

Provision	Recommendation / Example	Reason
Clause 59(c)	Amend as follows: (c) ~~a consumer quality complaints service and~~ a consumer disputes resolution service:	Apparent drafting mistake.
Clause 74(2)	Add paragraph (f) as follows: (f) the complaint is outside the jurisdiction of the consumer disputes resolution service as provided for in the rules of the service.	The likely jurisdictional exclusions and limits of the service should be acknowledged.
Clause 78(1)	Amend as follows: (1) A consumer <u>referred to in section 77</u> may, within the time allowed under section 79(1), appeal to the court against any determination referred to in section 77.	Only the affected consumer should have right of appeal.
Clause 3(1) of Schedule 2	Add paragraphs (o) and (p) as follows: (o) requirements for the internal complaints handling processes of regulated water services provider sand drinking water suppliers: (p) requirements for reporting by regulated water services providers and drinking water suppliers about consumer complaints.	Rules for internal complaints handling and reporting should be in the rules of the consumer disputes resolution service.

Topic 9: Enforcement and Appeals

27. While the enforcement provisions in the Bill are broadly in line with those under similar regulatory regimes, we make the following observations:

- Clause 89(2) contradicts clause 88(1) by allowing compensation orders against a relevant person who has not been ordered to pay a pecuniary penalty
- Clause 98 (order requiring information disclosure requirement to be complied with) duplicates the earlier provisions about injunctions (clauses 90 in particular), as do aspects of the rectification provisions in clause 105
- There should be a limitation period for the Commission issuing an infringement notice (clause 111). Compare the 12-month limitation period under section 156D(1) of the Telecommunications Act
- It is unclear why some determinations, notably determinations as to information disclosure and quality regulation, are excluded from merits appeals (clause 118(1)). All determinations should be subject to merits appeals

- There is some duplication and inconsistency between clause 136 and Subpart 4 of Part 4 in terms of the Commerce Act provisions relating to enforcement, remedies and appeals that apply under the Bill.

Topic 10: Miscellaneous

28. The definition of "water services entity" in clause 7 is circular. It should presumably be "an entity that provides one or more water services (whether or not the entity is a regulated water services provider)".

29. There is some inconsistency in the type of assurance required to support disclosure. Sometimes a statutory declaration is referred to instead of, or as well as, the more typical Management or Board certification in a prescribed form. Compare clauses 34(3)(a), 38(2)(d) and 39(3)(b)(ix).

30. Clause 42 should state that a price path can only apply to the price of water infrastructure service(s) (i.e., not unregulated goods or services a regulated water services provider may also provide). Clause 42(4) does not deal with this as it only covers quality standards, incentives, and performance requirements.

31. The provisions in Subpart 8 of Part 2 about the scope and timing of regulation are, unhelpfully, separated from related provisions in clauses 21 to 23 and Subpart 9, which makes the Bill difficult to follow and understand.