ATTACHMENTS

Ordinary Council meeting
Separate Attachments 1

Monday, 10 February 2025

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11.4 Tauranga City Council Submission to Local Government (Water Services) Bill

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Submission on Local Government (Water Services) Bill on behalf of Tauranga City Council (TCC)

1. Introduction

[*TCC to draft introductory paragraph about TCC and its perspective in commenting on the Bill i.e. a territorial authority experiencing significant growth which is likely to establish a multi-council CCO to deliver water services*.]

2. TCC's key concerns – Comments and Recommendations

TCC supports the core principles of *Local Water Done Well*, which emphasise maintaining local ownership of water assets, allowing councils to choose their preferred water service delivery model, and establishing a clear regulatory framework for water services providers (**WSPs**).

However, TCC is concerned that the Bill may significantly hinder the implementation of this policy, especially in its approach to water organisations (**WOs**). This is due to the excessive oversight and control able to be exerted by shareholder councils, restricting the WO's ability to function effectively and limiting the benefits that should flow from governance of the WO at arms-length from its shareholders by a board of directors appointed on the basis of their skills, knowledge and experience.[1] More generally, the Bill seems overly complex and prescriptive. The Bill also omits some key powers necessary for the WO to properly operate efficiently and effectively.

TCC's key concerns are as follows.

2.1 Excessive shareholder control over WOs

The Bill imposes undue control by territorial authority (**TA**) shareholders over WOs, undermining the WO's ability to operate effectively. This contradicts the intent of *Local Water Done Well*, which is to offer communities a genuine choice between greater TA control over water services delivery (in-house delivery) or lesser TA control (CCO delivery). The Bill largely removes any meaningful distinction between the two, and reduces incentives for TAs to establish WOs.

Under the Bill, the primary mechanisms of shareholder control are the WO's statement of expectations (**SOE**) and its water services strategy (**WSS**). The SOE is prepared by the shareholder without input from the WO.[2] It must include the shareholders' objectives for the WO, how the WO will meet those objectives, the shareholders' strategic priorities, strategic direction and expectations of outcome for the WO.[3] It may also include requirements for the WO to act in accordance with to shareholder obligations to third parties; how to conduct relationships with shareholders, communities, Māori and consumers; and when and how to engage with the community. [4] The WO must give effect to the SOE.[5]

These levers of control are unique to WOs: none applies to any other CCOs under the Local Government Act 2002 (**LGA**). Bearing in mind the aims of *Local Water Done Well*, and that by definition in choosing the CCO delivery model, communities have opted for *less* TA control over

[1] As required under clause 40 of the Bill.
[2] Clause 184.
[3] Clause 187(1).
[4] Clause 187(2).
[5] Clause 186.

the delivery of water services not more, it is unclear why this is so. In the course of preparing water service delivery plans under the Local Government (Water Services Preliminary Arrangements) Act 2024, councils as part of their service delivery options development have assumed that the new WOs would largely resemble CCOs under the LGA but with some bespoke provisions. However, this is not the case under the Bill.

In the case of the WSS, which is prepared by the WO, the shareholders may choose to include in the WO's constitution a statement that the shareholders can require amendments to a draft WSS; and that the shareholders can approve the final WSS.[6] Potentially the shareholders have final say over this document as well. The WSS contains a broad range of strategic, operational, financial and infrastructure matters, including – significantly – budgets.[7]

The Bill also states that the process for preparing a water services strategy under clause 196 applies, with all necessary modifications, to preparing a water services annual budget.[8] The effect of this subclause is to allow TA shareholders of a WO to decide whether or not they wish to comment on, require amendments to, or approve a budget prepared by the WO – these being the procedural options TAs have in relation to preparation of the WSS. It is inappropriate for the TA shareholders to retain this level of control over the activities of a WO. The WO has no autonomy to implement a WSS if, in addition, the TA shareholders retain the power to amend, or withhold approval of, the annual budget.

The Bill (rightly) defines objectives for all WSPs including WOs,[9] and financial principles that WSPs "must act in accordance with".[10] The Bill also provides for economic regulation of WSPs by the Commerce Commission. If excessive shareholder control (primarily through the statement of expectations in its current form) is added, the WO is left with very little autonomy to set its own path. Amongst other things, it will be very difficult to attract quality directors to thew WO Board in such a constrained environment.

It is also questionable whether TA shareholders will be equipped to meaningfully and competently contribute on the WO array of matters covered by the SOE and WSS, given that their water services expertise will have largely if not completely disappeared on transfer of water services delivery to its WO. It is inefficient for TAs and WOs each to have to maintain qualified water services staff, if the TAs have decided to establish a WO.

In TCC's view it will be sufficient for WOs to have the following accountabilities:

- WO statutory objectives;
- WO statutory requirements (see clause 2.2 below);
- an SOE set by the shareholders but of a more limited ambit, and without the WO having a statutory obligation to give effect to it;
- a WSS which the TLA has the opportunity to comment on (but not to approve);
- annual reporting and shareholder performance monitoring;
- regulation by Commerce Commission; and
- Government oversight and backstop.

[6] Clause 196.
[7] Clause 194 and Schedule 3.
[8] Clause 202(2).
[9] Clause 15
[10] Clause 16.

Recommendations:

- Greater alignment with standard CCO governance structures under the LGA, ensuring a better balance between oversight and operational efficiency.
- Reduce shareholder control over WOs, particularly in setting strategic priorities through the SOE (clause 187) and influence over the WSS (clause 196).
- Remove the power for shareholders to modify or approve a WO's budget (clause 202).
- Limit the accountability requirements for WOs to those listed above.

2.2 No requirement to act in accordance with objectives

The Bill contains (in clause 15) a list of objectives for WSPs, and these are necessary to set the high-level framework within which WSPs will operate. However, the Bill would also benefit from the inclusion of operating requirements or principles, which are engaged at the level of specific decision-making. This would establish base-level standards or principles to be complied with, applying to all WSPs nationwide. The Bill does not contain a requirement for WSPs to act in accordance with the statutory objectives. It is anomalous for there to be a requirement for WSPs to "act in accordance with" the financial principles specified in clause 16, but no similar obligation to "act in accordance with" clause 15 objectives.

Such provisions are common in legislation e.g. s 14 of the Local Government Act 2002 and s 18 of the Taumata Arowai – Water Services Regulator Act 2020.

The present statutory vacuum in this area means that for WOs, shareholders will have greater scope to dictate operating principles or requirements through the SOE. This is an illustration of the problem discussed under 2.1 above. Instead, the Bill should clearly define these operating principles, ensuring they apply consistently across all WOs, and protect WOs from the changing preferences of individual shareholders from time to time (potentially, every 3 years with local government elections).

Recommendations:

- Reword clause 15 to specify that all WSPs must act in accordance with the objectives set out in that clause.

2.3 Insufficient provision for Māori and mana whenua involvement in WSP decision-making

The Bill should not leave the relationship between a WO and iwi/Māori solely to the discretion of individual shareholder councils, through the statement of expectations.[11] Instead, it should establish a universal operating principle (see 2.2 above) that all WSPs must carry out their functions in a manner that meaningfully partners and engages with Māori. Leaving it up to shareholders to determine how their WOs will partner and engage with Māori risks an inconsistent approach across New Zealand, where some iwi and hapū are meaningfully engaged by WSPs, while others in different parts of the country are excluded.

The Bill as drafted also results in an incoherent distinction between in-house WSPs – who will be subject to the normal LGA requirements about iwi involvement and engagement[12] – and WOs, who will only have to partner and engage with Māori to the extent its shareholders

[11] Clause 187(2)(a).
[12] See for example s81 of the LGA which requires a local authority to establish and maintain processes to provide opportunities for Māori to contribute to the decision-making processes of the local authority.

require. While local variations in how engagement occurs are both likely and appropriate, the Bill must at least establish a clear minimum requirement to ensure meaningful partnership and engagement with Māori.

Recommendation:

- Include in the clause 15 objectives a requirement that a WSP must perform its functions in a way that partners and engages meaningfully with Māori.

2.4 Overly complex charging provisions, including in relation to development contributions

The Bill contains a detailed set of provisions for charging and imposing development contributions.[13] However, these provisions are overly prescriptive and inappropriate for WOs, who will be operating commercially as limited liability companies. This level of prescription creates administrative inefficiencies, limits flexibility, and increases risk of legal non-compliance.

The charging provisions should be significantly simplified, at least for WOs. The Bill also needs to clarify that WOs are not restricted to using the charging mechanisms in the Bill but are able to charge (including impose development contributions) on a contractual basis if they wish. This is the basis on which Watercare requires infrastructure growth charges in Auckland, which are the equivalent of development contributions. Legislation is not required to impose contractual charges of this nature.

Recommendations:

- Simplify the charging provisions in the case of WOs and remove any unnecessary prescription.
- Clarify that WOs may charge, including require development contributions, on a contractual basis if they wish.

2.5 Inadequate powers of entry onto private land

The Bill's proposed regime for accessing private land[14] does not strike a practical balance between landowner rights and the operational needs of WOs, making it unworkable in practice. There is no general power for a WO to enter land, even for non-intrusive actions.[15] Instead, WOs must follow a rigid notice procedure, and if consent is denied, unreasonable conditions are imposed, or no agreement is reached, the matter must escalate to the District Court. Until a decision is made, entry is prohibited—even for basic tasks like visual inspections.

In other respects as well, the procedure under the Bill is more onerous for WOs than that which currently exists under the LGA.[16] It is unclear why a different regime has been designed, when the LGA framework is well-understood and generally operates well.

The Bill will significantly impede WOs' daily operations, delaying water infrastructure projects and increasing costs compared to the current LGA framework. These added costs and delays will ultimately be passed on to the households and businesses that will be the WO's customers, making water services less affordable and slowing economic growth.

[13] Clauses 76-109.
[14] Clauses 116-121.
[15] The power of entry on clause 116 is more limited.
[16] See section 181 and Schedule 12 of the LGA.

Recommendations:

- Adopt the powers of entry provisions in the LGA.
- Introduce a general right of entry for non-intrusive actions, as currently exists under the LGA (section 171).
- Limit the prescribed notice and consent process (clauses 116 to 117) to cases involving physical works.
- Adjust the appeal standard in clause 120(5) to require *adequate consideration of alternatives* rather than proving *no practical alternative exists*, ensuring critical infrastructure can be built efficiently.

2.6 Lack of a streamlined process for making changes to planning documents

The Tauranga City Plan includes provisions related to three waters infrastructure, incorporating relevant standards from the Infrastructure Development Code (**IDC**) that must be met through subdivision applications. These standards cover key infrastructure requirements such as pipe flow velocities, minimum gradients, and minimum pipe diameters. Additionally, the City Plan contains provisions ensuring compliance with conditions in discharge consents and comprehensive stormwater consents.

Under the Bill, the National Environmental Standards (**NES**) will replace the IDC provisions to create a nationally consistent framework for new three waters infrastructure. This change will result in duplication and potential conflicts with the Tauranga City Plan, requiring TCC to undertake a complex and lengthy Schedule 1 plan change under the Resource Management Act 1991 (**RMA**) to align the plan with the NES. This requirement is unnecessary and will impose significant time and cost burdens on councils.

The Bill should contain a clear, streamlined process that enables councils to update district plans efficiently—either by allowing direct alignment with national standards or by eliminating duplication without the need for a full plan change process. This would obviate the need for TCC and other councils to undertake costly and time-consuming *fait accompli* consultation process, where it has no choice but to align with the NES or other requirement arising from these reforms.

There is precedent for such an approach. When the government removed minimum parking requirements through the National Policy Statement for Urban Development, councils were allowed to make the necessary changes without a full plan change process, under section 55 of the RMA.

Recommendation:

- Provide that councils may update district plans to bring them in line with the NES or other requirements consequential on the Bill's enactment, without a full plan change process.

2.7 Lack of clarity about the scope of a "stormwater network" and "stormwater service"

The Bill's definition of "stormwater network" creates ambiguity about whether an overland flowpath on private land is considered part of the stormwater network. This has considerable implications for WSPs. Clause 167(1) requires a stormwater risk management plan to include a map of the stormwater network, which, depending on the interpretation of the definition, may encompass all overland flowpaths that connect in any way to a WSP-owned drain. Clause 164

says that a WSP's responsibility for stormwater network management "extends to overland flow paths and watercourses that are a part of (sic) the network."

There is also uncertainty as to the scope of a "stormwater service" in the context of roads. Roads often serve as critical overland flowpaths in a district and, functionally, are part of the stormwater network. However, the definition of "stormwater service" in the Bill seems to exclude roads and transport corridors. It is also unclear whether it is only stormwater infrastructure (such as drains) located within the transport corridor which is excluded from the definition. There may be features like a stormwater pond adjacent to the corridor that serve a stormwater function related to the transport network.

Recommendations:

- Clarify the scope of the "stormwater network" definition by:
  - Deleting from subclause (b) of the definition the words "includes any of the following that is part of, or related to, the infrastructure referred to in paragraph (a)"; or
  - Replacing those words with "any of the following that that receives stormwater from, or take stormwater to, other infrastructure in the network" (the form of words used in clause 167(1)(f)).
- Clarify the intended scope of the "transport corridor" exclusion from the definition of "stormwater service".

2.8 Lack of power to require development contributions for capex a territorial authority expects a WO to incur

TAs such as TCC need the Bill to ensure that until a WO's establishment, they can continue to require development contributions for capital expenditure which they expect the WO to incur after its establishment. This could be, for example, a capital project that at present the TA's LTP signals is to be undertaken in the late 2020s.

Clause 13(1) of Schedule 1 of the LGA says that the methodology for calculating development contributions is based on the capital expenditure that *the local authority expects to incur* during or after the period of its LTP. It does not refer to capital expenditure that the local authority *expects a WO* to incur. Where it is proposed that a WO will be established, the anticipated capital expenditure on water assets following establishment will be capital expenditure of the WO, not the TA. Unless the TA can recover the contributions during that interim period, there will be an under-recovery which the WO will inherit.

Recommendations:

- Add a transitional provision amending clause 1 of Schedule 13 of the LGA to ensure that, pending establishment of a WO, TAs can require development contributions for capital expenditure it expects the WO to incur after establishment.

2.9 Overall, the Bill's unnecessary complexity, detail and lack of clarity

The Bill is highly detailed and complex, contradicting its stated purpose (in clause 3) of establishing a "flexible, cost-effective, financially sustainable, and accountable" framework for local government water services.

As already submitted, in many cases, WOs could be governed by the existing CCO provisions in the LGA, supplemented by a small number of bespoke provisions specific to their role, alongside general company law that is applicable to all corporate utility providers. Watercare operates under this model, with a small number of provisions in Part 5 of the Local Government (Auckland Council) Act 2009, including cross-references to powers conferred on local authorities under the LGA 1974 and 2002. The Bill states that subpart 1 of Part 3 of the Bill does not apply to Watercare – thereby confirming the appropriateness of Watercare not having to operate under these provisions. [17]

The Bill's complexity introduces inefficiencies, compliance burdens, and legal uncertainty. A streamlined approach—leveraging existing LGA provisions wherever possible—would better support the Bill's purpose in clause 3. A level of regulation which is arguably greater than that currently applying to councils is contrary to the broad aim of placing WOs on a more independent and commercial footing.

There is also some inconsistent treatment of in-house council WSPs and WOs without any apparent reason for the difference. The overall relationship between the Bill and the LGA, which is especially relevant for in-house council WSPs, is unclear. For TAs which are WSPs it should be possible to largely rely on the existing LGA provisions which govern all activities of TAs rather than to create a parallel regime which increases the complexity of the TA's operations and compliance obligations.

Recommendations:

- Review the Bill to reduce the complexity, detail and level of prescription and the uncertainty of application.
- Consider splitting the Bill into separate Parts which apply (1) to all WSPs; (2) to in-house council WSPs only; and (3) to WOs, ensuring clarity about the differences between the delivery models and the relationship of each to other legislation.
- Simplify provisions applying to WOs, where appropriate relying on existing CCO provisions in LGA.

[17] Clause 59(1).