

## Three Waters Reform

### Submission on economic regulation and consumer protection for three waters services in New Zealand.

*Discussion Paper: Economic Regulation and Consumer Protection for Three Waters Services in New Zealand (27 October 2021) Ministry of Business Innovation & Employment (MBIE)*

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## Responses

### 1.0 Key Points

It is strongly supported provision be made for economic regulation and consumer protection safeguards for all three waters services and be applied to the Water Services Entities (WSEs).

Water is a taonga and a living entity. Our expectation is that the three waters are managed accordingly and in particular that:

- (i) Effect is given to the articles of Te Tiriti o Waitangi<sup>1</sup> with special attention given to **both** Article 2 and Article 3.
- (ii) It recognises our water sovereignty as guaranteed to us under Te Tiriti o Waitangi including making specific provision for equitable access to decision-making and representation.
- (iii) Specific provision is made for that our rangatiratanga, manaakitanga, kaitiakitanga, and mana motuhake.
- (iv) Effect is given to Te Mana o te Wai, and recognition of te mauri o te wai by the regulatory framework.
- (v) An holistic approach to outcomes applies with recognition of the four dimensions of wellbeing: inclusive of economic, social, cultural, and environmental, as well as sustainability, and that the approach is not restricted to a narrower fiscal outcome focus.
- (vi) Outcomes are sustainable, respond to climate change and natural hazards, and provide for water supply security and resilience.

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<sup>1</sup> Note: We have used *Te Tiriti o Waitangi* or *The Treaty of Waitangi* with recognition that different interpretations apply to the Māori and English versions respectively, and that the Taumata Arowai – the Water Services Regulator Act 2020 and the exposure draft of the Water Services Entity Bill refer to both.

- (vii) Social equity applies, the vulnerable are protected, and consumer voice and rights are provided for as part of the protection of consumer wellbeing.
- (viii) Specific consideration is given to avoiding inequalities for Māori whānau, hauā, iwi and communities, and for marae and papakāinga.
- (ix) Water is a special case of economic regulation for which a bespoke model and response needs to apply that recognises our values and associations, and our tikanga and mātauranga Māori is given full expression.
- (x) Māori cultural expertise and representation should be integral to the provision for economic regulation and consumer protection.
- (xi) Iwi have significant experience, investment and commitment in the management of stormwater and need to be part of decision-making and the achievement of equitable outcomes.
- (xii) There are many management entities with regulatory roles including TLAs and NZTA, Auckland Transport involved for three waters management, particularly in terms of stormwater. Co-ordinated, effective and efficient responses are needed, including clarity and alignment with the regulatory role of Taumata Arowai and having regard to the transition and transfer of stormwater assets.
- (xiii) It is a Three Waters Reform, but there is only one water with in terms of the whakapapa o te wai and all aspects of its life cycle. The three waters should be considered together with an equitable and appropriate priority applied to all.
- (xiv) Transparency and access to information, responsiveness and accountability are provided for.
- (xv) Innovation, responsiveness to innovation, efficiency challenges, best practice and positive change are enabled through the regulation.
- (xvi) Our manākitanga and kaitiakitanga is not restricted to people. The reform needs to address water quality and quantity in terms of indigenous biodiversity and the health and wellbeing of our taonga species that live in the aquatic and marine environments. This in turn affects our wellbeing.
- (xvii) Provision needs to be made to audit and monitor the performance of the regulator.

***It is requested that the purpose and framing of the legislation for economic regulation and consumer protection gives effect to Te Tiriti o Waitangi and these key points including Te Mana o te Wai, is bespoke in its application to all three waters and; its application is much broader in scope than is currently applied to the telecommunications and electricity sectors.***

With the above context we make specific responses to selected questions.

Please engage with us directly if MBIE would like further information.

## 2.0 Responses to Selected Discussion Paper Questions

### Economic regulation

1

*What are your views on whether there is a case for the economic regulation of three waters infrastructure in New Zealand?*

We agree with the Government's view that there is a strong case for economic regulation of the three waters infrastructure. We refer to our key points in **Section 1.0** above and make the following additional comment:

- It is essential to specify delivery outcomes and provide for accountability and transparency.
- Reference to Te Mana o Te Wai should be carried forward into economic regulation and consumer protection consistent with the Taumata Arowai empowering legislation and the National Policy Statement-Freshwater Management.
- The legislative scope and purpose should recognise the special status of water as a taonga and a living entity and should not be restricted to fiscal outcomes.
- The regulation should ensure equity, sustainability and future-proofing for both rural and urban marae in particular.
- Regulation should have a broad scope in regard to the social, cultural, economic, environmental wellbeings, a sustainable focus and provision for equity and water supply security.
- The link between economic and environmental performance should be secured.
- A bespoke model is required to apply to the three waters including provision for 50/50 Mana Whenua and other representation.
- Monitoring and compliance requirements should include reference to cultural indicators and ensure that expertise is available to apply and give full expression to a Te Ao Māori lens.

2

*What are your views on whether the stormwater networks that are currently operated by local authorities should be economically regulated, alongside drinking water and wastewater?*

We agree that stormwater networks should be economically regulated. We have long-standing concerns about the management of stormwater, and through the reforms, we are actively seeking that innovative solutions apply to reduce stormwater discharge, improve the quality of discharges into receiving environments, and improvement of the management of stormwater generally. We comment:

- The services provided by the WSEs as suppliers should all be regulated.
- The scope and purpose of the legislation proposed and giving effect to Te Mana o Te Wai should apply to stormwater – a much wider focus than, for example, flood risk management.
- Recognition and proactive (preventative) responsiveness to the effects and potential effects of climate change and coastal hazards.

- Provision for monitoring and compliance through regulation is supported.
- Innovation should be a feature in regulating stormwater including efficiency challenges, the use and reuse of stormwater, and an outcome focus that is beneficial for receiving environments.
- Specific attention is required to improve the treatment interventions for stormwater and making provision for green outfalls and the maintenance of stormwater infrastructure.
- Performance measures should support the four wellbeings (social, cultural, economic and environmental), and recognise Māori values and cultural indicators for environmental quality.
- There should be water clarity, it should be safe to swim in, and we should be able to exercise our practices including for mahinga kai.
- There are multiple suppliers of stormwater services and complexity in terms of how regulation may apply. We therefore support the use of charters [Question 44] as one means of co-ordination.
- Stormwater does not have identifiable customers in the same way as drinking water and wastewater and that presents a risk for underfunding and underinvestment. Provision therefore needs to be made to assure there will be a sufficient level of investment to manage the quality of stormwater services.
- We refer to Discussion Paper Cl. 256 that *'both Taumata Arowai, the economic regulator, and the consumer protection regulator will have responsibility for different aspects of the quality of water services received by consumers.'* [Cl.256] And we support:
 

*'... the development of a 'regulatory charter' that sets out the system objectives, roles of key players, and how the system objectives will be delivered and monitored. Strategy, delivery, and performance/risk management functions are often advanced by a 'council of regulators' or similar coordination arrangements that involve key policy and regulatory bodies meeting regularly to share information about system performance and discuss system issues that require coordination across agencies.'* [Cl.258]

4

*What are your views on whether economic regulation should apply to community schemes, private schemes, or self-suppliers? Please explain the reasons for your views.*

We agree that *'...that the application of economic regulation should be restricted to the new Water Services Entities and not apply to community schemes, private schemes, or self-suppliers.'* [Cl. 63]. We comment that:

- We do not see a cost / benefit or compliance cost justification to apply economic regulation, for example to marae and private Māori land, where owners and consumers are the same people.
- Compliance support is in any case likely to be needed for some marae in meeting regulatory requirements through Taumata Arowai. Additional economic regulatory compliance controls are not seen as beneficial.

- While regulation should only apply to the WSEs initially, there should be provision adaptation whereby it may be appropriate or there are specific reasons to include others.
- Provision for equity is an important determiner. All too often we see private schemes e.g. farmers take wai from our awa and disregard to the taonga that it is. Manaaki does not come into the equation for example when we run out of water at the marae and a private schemes which have created their own water dam are selling water or profiting from it. There is no justice there so we are very clear to keep the WSE and regulators independent but as noted earlier the same 50/50 representation arrangement is required for a true Te Tiriti o Waitangi partnership.
- Equity in support for infrastructure provision and the sustainability of infrastructure for marae and papakāinga is required and provision made for this to occur as an outcome of the reform.
- Water supply resilience is a serious issue for some marae where there may be water source or catchment area constraints with a view to having access to other water sources as may be required. Our marae may not have sustainable water infrastructure and when we have droughts, which are a lot more common than ever before, we have to buy in our water. We rely on water tanks in many cases.
- The importance of supply resilience is not restricted to marae. Water security is critical our way of life and well-being including whānau whenua and whānau business, and also applies to the wider community.
- Preferential water allocation to private schemes is not supported and, in this context, water or access to water should not be treated as a tradable commodity.

10

*A) What are your views on whether the purpose statement for any economic regulation regime for the water sector should reflect existing purpose statements in the Telecommunications Act and Part 4 of the Commerce Act given their established jurisprudence and stakeholder understanding?*

*B) What are your views on whether the sub-purpose of limiting suppliers' ability to extract excessive profits should be modified or removed given that Water Services Entities will not have a profit motive or have the ability to pay dividends?*

*C) Are there any other considerations you believe should be included in the purpose statement, or as secondary statutory objectives?*

*D) What are your views on how Treaty of Waitangi principles, as well as the rights and interests of iwi / Māori, should be factored into the design of an economic regulatory regime for the three waters sector?*

We refer to our comments in **Section 1.0** and in relation to **Question 1** above. We further comment:

- Purpose wording is usually in terms of the long-term benefit to consumers. This should not be interpreted narrowly on financial terms, rather it should recognise and provide for Māori interests which are holistic and extend to social, cultural, economic and environmental wellbeings.

- On that basis, the existing purpose statements in the Telecommunications Act and Part 4 of the Commerce Act are insufficient and should not be used as a start point.
- There is no mandate to achieve profit so the reference to preventing excessive profit is not appropriate. The focus should be on viability, quality of service, and sufficient funding to achieve outcomes in terms of the four wellbeings. This is consistent with the purpose of the Three Waters Reforms. Water take for profiteering has been a contentious issue for decades and water should not be treated as a commodity.
- We have outlined proposed purpose statement inclusions in our reply to **Question 1** above. We note that a bespoke purpose statement will need to be developed to ensure the description of te wai as a living entity, is our taonga and is our life force.
- Implementation of Te Tiriti o Waitangi, as well as the rights and interests of iwi/Māori should be integral to the reforms. The principle of manākitanga applies to all peoples. Statutory and regulatory support for the reforms should have consistency including giving effect to the principles of Te Tiriti o Waitangi and giving effect to Te Mana o Te Wai.
- The principles of the Treaty of Waitangi have been determined by Courts and processes other than tikanga based processes. It is Te Tiriti o Waitangi itself that needs to be implemented.
- The orientation of the Discussion Paper is on the needs of human beings. There needs to be consideration of water quality and quantity necessary to support indigenous biodiversity and to provide for our taonga species that need the water. In turn, the health wellbeing of our taonga species within water determines the health and wellbeing of our people.
- The significance for water generally and to Māori should be recognised as a matter to be proactively identified and addressed through regulation. In this context the analysis of regulatory proposals should assess potential positive or negative impacts of regulation on iwi/Māori and, Treaty settlements should be recognised and/or enabled.
- Effect should be given to Te Mana o te Wai and enhancing te mauri o te wai through active responses. Further consideration is needed as to how these aspects are addressed at the regulator level rather than leaving it with WSEs, councils and Taumata Arowai.

17

*Who do you think is the most suitable body to be the economic regulator for the three waters sector? Please provide reasons for your view.*

High importance is given to the appointment of the economic regulator and in particular to respond to the holistic and broader scope of purpose that we have referred to **Section 1.0** and **Question 1**. It needs to have the necessary expertise in relation to the taonga and living entity status of water. We make the following comments:

- The Government refers to three options for the role of economic regulator including the Taumata Arowai, the Commerce Commission (potentially with a Water Commissioner), or a new water economic regulatory authority. The Discussion Paper notes that high performing economic regulators are independent, transparent and expert; are accountable and share information. [Cl. 141]
- In regard to any of these options we submit that there are at least five requirements:

- (i) There needs to be clarity on how the role of the Taumata Arowai as a service regulatory authority relates to and interacts with economic regulation.
  - (ii) Specific subject matter expertise is required including mātauranga and tikanga Māori pertaining to water and on how to give effect to Te Mana o Te Wai.
  - (iii) Provision needs to be made for 50% Mana Whenua representation
  - (iv) We have indicated that water is a special case and that the regulatory response is appropriately different than that for telecommunications or electricity for example.
  - (v) There is precedent and existing co-governance models that are in place between the Crown and Māori that can be considered including those that apply within Tāmaki Makaurau. One example specific to Tāmaki Makaurau is in place for the Maunga Authority.
- With this context, and as identified in the Discussion Paper, there are pros and cons to the different economic regulator options.
  - We take a long-term view and are mindful of the significance of water and scale of this reform. In this regard, a new economic regular presents advantages as a bespoke and designed for purpose model as a non-Crown entity. We draw attention to our framing in this regard in **Section 1.0** and in our response to **Question 1**. A dedicated regulator (independent non-Crown entity could be established to have good water sector capacity including making provision for 50% mana whenua representation. We observe that the Taumata Arowai does not have economic regulation expertise and that the Commerce Commission does not have water sector expertise.
  - We question the Discussion Paper view that Taumata Arowai as a Crown entity does not have the necessary independence to assume the economic regulation role. This option could be further investigated and could apply subject to statutory protections and principles being applied with particular regard to accountability, public reporting and transparency, and its capacity to meet the five requirements listed above. We support that Taumata Arowai is a service regulator and has requirements in place to give effect to Te Mana o te Wai and must have capability in regard to Te Tiriti of Waitangi and its principles and perspectives of Māori and tikanga Māori.
  - We generally do not support the option of the Commerce Commission and consider that the legal and regulatory capacity that it could otherwise provide could also be achieved through a new bespoke economic regulatory authority.

## Consumer protection

- 21
- A) *What are your views on whether additional consumer protections are warranted for the three waters sector?*
  - B) *What are your views on whether the consumer protection regime should contain a bespoke purpose statement that reflects the key elements of the regime, rather than relying on the purpose statements in the Consumer Guarantees Act and Fair Trading Act? If so, do you agree with the proposed limbs of the purpose statement?*

Regulatory provision for consumer protections is warranted and essential. Provision should include a legislative statement of the objectives of the consumer protection

regime. The natural monopoly means that consumers cannot switch to another supplier. We comment:

- Māori values can inform the objectives of a consumer protection regime.
- Additional consumer protections are a priority and especially for water. A driver for the reform was drinking water being contaminated which should have been prevented at that time and certainly in the future.
- We require equitable services, trust and confidence in these WSE and the economic regulator for future generations.
- Elements of objectives which are supported include: enhancing the quality of water services, consumer voice, consumer redress when standards not met, and transparency of charges for consumers. [Cl.166]
- A consumer protection regime should have a bespoke purpose statement with principles to be recognised through consumer protection including:
  - Water as a taonga
  - Manākitanga
  - Water with te mana o te wai is paramount it is our life force, and there would be no life without water
  - Te mauri o te wai - the mauri of water should be respected and improved and enhanced
  - Water use and allocation should be fair-equity of access to all people
  - Avoid inequalities and deprivations with specific regard to Māori communities
- Provide for *Lifeline legacies*. Access to water is one of these. Worst case scenario modelling is required to provide for security of support such as in the case of drought. *Lifeline legacies* is about recognising the need for water to maintain our cultural way of life, and providing lifeline services to the wider community.
- In this context, provision for resourcing is necessary to assure that water security is provided for marae, to recognise iwi/Māori rights and interests, and to protect vulnerable communities. There should be supported access to recourse and remedy where these purposes are not being achieved.
- Access and management of water allocation is important in terms of equity and water security. This can be particularly important in rural areas where marae are reliant on aquifers.

25

*What are your views on whether minimum service level requirements should be able to vary across different types of consumers?*

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*What are your views on whether the regulatory regime should include a positive obligation to protect vulnerable consumers, and that minimum service level requirements are flexible enough to accommodate a wide range of approaches to protecting vulnerable consumers?*

27

*What are your views on how Treaty of Waitangi principles, as well as the rights and interests of iwi / Māori, should be factored into the design of a consumer protection regime for the three waters sector?*

Minimum service levels for consumers are required, including the ability to tailor provisions such as for vulnerable consumers, and to recognise the rights and interests of iwi/Māori. Responsiveness and flexibility to tailor approaches should be built into the



regime. Provision should be made to give effect to the principles of Te Tiriti o Waitangi as integral to the regime. We refer to our response to **Question 10D** above which addresses the same question in relation to the economic regulation. We further comment:

- Analysis is needed as to the needs of Māori communities and this is not reflected in the Discussion Paper.
- We draw attention to and support the [Cl.188] quote in Cabinet Paper Three *'...the rights and interests of Māori as consumers of water services need to be considered, predominantly under Article Three of the Treaty. There are good reasons for general mechanisms of consumer protection and advocacy to specifically address the interests of Māori, particularly as they relate to historic inequity and the specific interests of Māori who are not mana-whenua within the boundary of a specific entity, including urban Māori.'*
- Apply the principle of manākitanga.
- Provide protections for vulnerable consumers.
- Recognise the rights and interests of iwi / Māori. As an Article 3 matter, ensuring equitable outcomes and avoiding unintended impacts on Māori and the environment is essential. Article 2 rights require active protection of water as a taonga.
- There should be a minimum service level requirement that takes into account western science and mātauranga Māori indicators and monitoring.
- Provision should also be made for stricter standards to apply as may be appropriate in the local context of the WSEs.
- Our whānau hauā, marae, whānau living in poverty, and our most vulnerable need to be assured that their water supply will be sustained. A wide range of approaches to protecting our most vulnerable should apply.
- It is imperative that Te Tiriti o Waitangi rights and interests of iwi / Māori are factored in and that gives effect to Treaty settlements are not compromised.

31

*What are your views on whether the regulator should be required to incentivise high-quality consumer engagement?*

Yes it should. A major issue for us has been lack of access to decision-making process. The reforms need to address this at every level including through consumer protections and representation. Our voice needs to be heard at the right level, at the right time and the supplier and regulator need to be responsive to that. We further comment:

- The principles of manākitanga and kaitiakitanga apply.
- The WSEs need to be incentivised to be effective in their engagement with Mana Whenua, the wider community, and stakeholders.
- Clarity is needed on how high quality engagement is supported such as in regard to our marae and papakāinga.

40

*Do you consider that there should be special considerations for traditionally under-served or vulnerable communities? If so, how do you think these should be given effect?*

We apply the principle of manākitanga and submit that the supplier should give special consideration to underserved and vulnerable communities. Regulatory provision should put in place protections which actively enable their participation including dispute resolution processes. *'Māori and Pasifika communities are also over-represented in these vulnerable populations in New Zealand.'* [Cl. 237]. Additionally we comment:

- Support may be required to provide Māori due access to dispute resolution and support financial and in kind to participate fairly in regard to consumer protections that apply.
- Mātauranga Māori needs to be recognised with particular regard to giving effect to Te Mana o Te Wai and local statements which may apply and must be given effect to by suppliers.
- We are aware of many stories where our communities have been treated unjustly in terms of Te Mana o te Wai.
- There is opportunity through regulatory reform to correct past and contemporary events.