Three Waters: New body corporate model reduces government accountability

Think Piece 39: September 2022

This is the first in a series of think pieces on water reform. This think piece focuses on the institutions, instruments and information.

15 Status of water services entities

Body corporate and separate legal entity

- (1) A water services entity—
 - (a) is a body corporate; and
 - (b) is accordingly a legal entity separate from the entity's board members, the entity's employees, the Crown, the entity's regional representative group, and the entity's territorial authority owners; and
 - (c) continues in existence until it is dissolved by an Act.

Section 15 of the Water Services Entities Bill.

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References are provided <u>here</u>.

The Three Waters Reform proposes to introduce a completely new institution to deliver public services. The Explanatory Note to the Water Services Entities Bill before the Finance and Expenditure Select Committee makes clear that the body corporate model is a 'new public service delivery model'. Importantly, this institution will not be owned by the Crown or directly owned by local government. It is a new and surprisingly experimental option to manage an asset of such importance to the long-term future of the country.

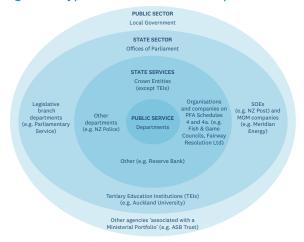
The Bill proposes a body corporate model, which is commonly used to manage apartment buildings. Interestingly, the Unit Titles (Strengthening Body Corporate Governance and Other Matters) Amendment Act 2022 was recently strengthened to improve governance – illustrating the governance challenges that exist under this model. Importantly, it is not a corporate governance model where shareholders vote for the Board, the Board selects the Chief Executive and an AGM ensures a free flow of information.¹

If the Water Services Entities Bill is passed as written, the Government will establish four of these new types of entities. None of the four will be owned or controlled by the Crown at all, nor directly by the wider public sector. The water entities have no place on the Public Service Commission's (PSC's) public sector map (see Figure 1). This means:

- The Government is moving public sector assets to four independent entities to manage because they do not believe our current system of government is capable of the task. The four entities are responsible for writing their own constitution and their own strategy without the normal checks and balances (such as a responsible minister signing off goals and objectives) or public accountability (such as an AGM). It illustrates that this Government has little faith in our existing systems and/or officials.
- This is a clear signal that the current Government has little trust in the Ministry of Health and Ministry for the Environment to regulate water quality. They have instead established a Crown entity to regulate drinking water, Taumata Arowai, under the Water Services Regulator Act 2020 (see Figure 2: Timeline of water reform).
- This is not a co-governance model, as the Crown is not involved as either an owner or manager (unless there is a state of emergency etc.). Hence, it is unclear how the proposed structure recognises both parties of Te Tiriti.

All of this indicates a serious shift away from Government trusting the public sector to deliver services. Consolidating assets is not the same as centralising assets. The Bill, in effect, further extends the Crown's arm rather than making the Crown accountable. It means that the Crown's responsibility (if the new public service delivery model goes pear-shaped) is very distant at the very time when climate change will further stress the system. If it was me, I would be keeping water very close, ideally through the establishment of a ministerial portfolio in the form of a Minister of Water.² This way, a member of Cabinet will be responsible for the delivery of water services, and deliver durable public policy in a non-partisan way.

Figure 1: Types of institutions in the public sector (PSC)³



Outstanding questions

- 1. How will each body corporate water entity gain revenue, borrow funds and insure assets? Will government provide funds?
- 2. What will the balance sheet for each body corporate water entity and each council look like? How will the asset value be determined for transferring to the body corporate water entity? Will debt related to those assets be transferred as well?
- 3. How will funding priorities be determined between pipes, between locations, and between different groups in the community?
- 4. How will linkages between body corporate water entities be managed e.g. sharing technologies, expertise and resources?
- 5. How will potential conflicts of interest (e.g. access, fees, quality, flow and property development) between governance entities and external parties be identified, recorded and managed?
- 6. If this new public service delivery model fails, can we go back to the status quo? How would failure be defined, and by whom?

Figure 2: Timeline of water reform



2020 2021

torrential volume of water [flying] 20 metres into the air, flooding the central street'. This is one of a number of incidents where pipes have burst in Wellington.

Mar 2021: DIA holds nationwide workshop series three: Reform Programme Update and Test Emerging Policy Proposals.

28 Jan 2021: A Wellington pipe bursts, causing a

23 Apr 2021: Local Government Minister Nanaia Mahuta announces Review into the Future for Local Government, an independent review of local government's role over the next 30 years.

20 May 2021: \$296 million to councils from the 2021 Budget package for transition and implementation, to meet any costs associated with the transition of the three waters reform.

29 Jun 2021: First council (Whangārei District Council) opts out of the Three Waters reform.

15 Jul 2021: \$2.5 billion Three Waters Support Package: \$2 billion as part of the 'better off' component to support the three waters service reform, and focus on community wellbeing; \$500 million through the 'no worse off' fund to ensure that no local authority is financially worse off as a result of the reform.

Feb 2022: Wellington Water announces some water treatment plants no longer providing fluoridation. Independent inquiry in progress (due mid-2022).

Feb 2022: National Transition Unit established, and Board members announced. The NTU will implement 'the Government's decisions on Three Waters reform through a consistent and coordinated nationwide approach to transition'.

7 Mar 2022: DIA publishes Recommendations from the Working Group on Representation, Governance and Accountability of New Water Services Entities (47 recommendations). DIA publishes the Government Response (by recommendation).

19 Jul 2022: \$44 million fund established to ensure councils have enough resourcing to set up the three waters system.

1 Aug-1 Oct 2021: Government allows time for LGNZ to consider proposals: 'At the request of LGNZ, the Government set aside a period from 1 August 2021 to 1 October 2021 for local authorities to consider the impact of the reform proposals on them and their communities, and to provide feedback on the proposed model.'

10 Nov 2021: Minister Mahuta establishes Working Group on Representation, Governance and Accountability to address local government concerns regarding lack of representation, governance, and accountability. The group consists of Local Government and iwi representatives.

15 Nov 2021: Taumata Arowai is now operational as the water services regulator.

3 Dec 2021: Water Users' Group (NZ) Incorporated files a statement of claim in the High Court against Minister of Local Government Nanaia Mahuta and David Parker as the Attorney-General. The applicant claims, among others that: 'A declaration that the Minister was wrong in law to assert that a Crown duty to act in accordance with the principles of the Treaty required the Cabinet to adopt her recommendations to put in place structures and mechanisms to confer special interests in the three waters on iwi/Māori'.

8 Dec 2021: Working Group to give recommendations on the exposure draft of the Water Services Entities Bill by 28 February 2022.

14 Jun 2021: CAB-21-MIN-0226, A New System For Three Waters Service Delivery: Paper One. Proposals on p. 16 include 'to establish a new service delivery model, with four, new, publicly-owned water services entities'.

14 Jun 2021: CAB-21-MIN-0227, Designing the New Water Service Delivery Entities: Paper Two.

12 Jul 2021: CAB-21-MIN-0269, Delivering the three waters reforms.

2022

18 Oct 2021: CAB-21-MIN-0419, Further decisions on the three waters reforms. Cabinet agrees to 'all in' approach to three waters reform.

8 Dec 2021, DEV-21-MIN-0268: Water Services Entities Bill: Exposure Draft and Working Group Process. Cabinet agrees to provide an exposure draft of the Water Services Entities Bill to the Working Group.

3 Aug 2020: Resource Management (National Environmental Standards for Freshwater) Regulations 2020.

6 Aug 2020: Taumata Arowai-the Water Services

Regulator Act 2020.
The purpose is to 'establish Taumata Arowai-the Water Services Regulator and provide for its objectives, functions, and governance arrangements' (s 3) and its functions are to: 'provide national-level oversight, leadership, communication, and co-ordination in relation to (i) drinking water safety and regulation, including the management of risks to sources of drinking water; and (ii) the environmental performance, management, and regulation of drinking water, wastewater, and stormwater networks' (s 11).

of this Act, as stated in s 3, is to ensure that consumers of drinking water are provided safe water by suppliers through a range of mechanisms and frameworks including a 'drinking water regulatory framework that is consistent with internationally accepted best practice'

2021

4 Oct 2021: Water Services Act 2021. The purpose

2021

14 Jun 2021: CAB-21-MIN-0228,

Protecting and Promoting Iwi/

Māori Rights and Interests in the

New Three Waters Service Delivery

Model: Paper Three.

2 Jun 2022: Water Services Entities Bill before the House.

2022

2021 2022

Aug 2020: National Policy Statement for Freshwater Management 2020. Replaces the National Policy Statement for Freshwater Management 2014



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8 Jul 2020: Three waters infrastructure stimulus package established, providing \$710 million to support local authorities with 'economic recovery relating to COVID-19, and to address persistent issues facing the three waters sector, through a combination of infrastructure investment stimulus and service delivery reform'.

July 2020: Three Waters Reform

Programme is launched: the three-

year programme to reform local

government three waters service

delivery arrangements.

Jul/Aug 2020: DIA holds nationwide workshop series one: Introduction to the Reform Programme and Stimulus Package.

Aug 2020: Memorandum of Understanding: Three Waters Services Reform signed by Crown and eligible local authorities 'sets out the principles and objectives that the Parties agree will underpin their ongoing relationship to support the improvement in three waters service delivery for communities with the aim of realising significant public health, environmental, economic, and other benefits over the medium to long term'.

Sep/Oct 2020: DIA holds nationwide workshop series two: Hui-ā-motu Reform Programme overview and introduction to Taumata Arowai.

2020

CAB-20-MIN-0521: Progressing the Three Waters

14 Dec 2020,

2020

2020

(as amended in 2017).