

Where is the Three Waters reform headed?

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With the public submissions on the Water Services Entities Bill (the Bill) now closed it is an opportune time to consider, at a high level, where the Bill and the Three Waters reform is heading.

The Bill is process and procedure driven. To a degree, this makes sense for a Bill focused on the establishment of four new publicly owned entities. However, while structuring of the water entities is important, there are some critical matters that remain outstanding for the Three Waters reform to deliver, and the Water Service Entities (WSEs), to succeed.

The \$40b asset transfer question

According to Water New Zealand's 2020-2021 review, there are more than \$40b in three waters assets across Aotearoa New Zealand. These assets sit on the balance sheets of local authorities and several entities. Those balance sheets will, in turn, have other line items, including other (water related and non-water related) assets, debt and community equity.

The Bill outlines what the four WSEs, which will inherit these assets, will look like, and explains how these entities will be established, governed, operated and regulated.

Unfortunately, however, the Bill is light on transition detail at this stage. That is why we are left wondering how these assets and the corresponding liabilities are going to be transferred from the local authority concerned to the relevant WSE.

It is too early to answer that with any precision.

The explanatory notes to the Bill acknowledge that it will need to be followed by further legislation to *'provide for... the transfer of asset, liabilities from local authorities to the new water services entities'*. The Bill also looks at the WSEs preparing allocation schedules that will be folded into the establishment of water services plans for approval by the Department of Internal Affairs.

The WSEs will rely on the local authorities concerned for the provision of information and, no doubt, there will be a degree of consultation with local authorities as to which assets and liabilities are to be transferred. We expect there will be detailed discussions about how any necessary transition and ongoing shared services/infrastructure arrangements are to work. Ultimately though, the final say will be with the WSEs and the Department of Internal Affairs, and it remains to be seen what the effect will be on the local authority and community left behind.

Clear purpose for WSEs

WSEs have a long list of objectives, functions and operating principles, along with layers of detailed processes to be followed.

The Bill provides for the Government Policy Statement and requires statement of strategic and performance expectations (both of which must be given effect to). In addition, there are broad requirements to give effect to the principles of Te Tiriti o Waitangi, and Te Mana o te Wai (TMOTW). The TMOTW statements must provide clear direction and, to be effective, must be developed early to ensure that the WSEs can benefit from the guidance provided from their establishment.

So, WSEs have a complex web of strategic requirements to navigate in undertaking their role and functions. It is easy to see how these strategic requirements could come into conflict. What is not clear is what happens when they do? How do the WSEs determine which matters take precedence?

The purpose clause in the Bill offers limited assistance in interpreting these key provisions. Nor does the purpose clarify the key goals for the whole Bill. Furthermore, we believe the Bill would benefit from more detailed consideration as to the various objectives, functions and principles, especially in relation to the fundamental issues the Bill is designed to address.

The devil will be in the detail - the constitution is key

The Bill includes high level guidance on how appointments and governance for WSEs will work but much of the detail will be left to the WSEs' constitutions.

Under clause 91 of the Bill, a WSE's constitution is to provide for many matters including the composition and operating

procedures of the WSE. This includes a regional representative group, a regional advisory group, a board, and a dispute resolution mechanism between members of each of the bodies and between the bodies themselves.

Importantly, these constitutional provisions will set out the checks and balances in the governance and supervision of the WSEs. While this model differs from a conventional board governance model, there are plenty of analogous structures which WSEs can look to when structuring their constitutions.

It remains to be seen how the development of the constitutions will achieve processes and the necessary appointments needed to ensure the success of the WSEs and the delivery of a governance structure that unites communities.

So, where to next?

As the Select Committee and Government consider the submissions on the Bill, the focus remains on planning and progressing, in a very tight timeframe, the delivery of the transitional regimes and establishment of the WSEs. This will be complex and may pose a political risk to the Government if it is not done right. Resourcing at central and local government levels and for Māori is especially tight, especially given other reforms currently underway.

It is likely given time pressures that a 'triaged' approach will be adopted focusing on the 'must haves' for establishment. But this approach comes with extra pressure, and uncertainty, for the WSEs and their governance bodies on establishment. The WSEs must hit the ground running and the risk of overloading them at the start line, means they may stumble before they can walk, let alone run.

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