

28 July 2016

Chair  
Local Government and Environment Select Committee  
Parliament Buildings  
**Wellington**

Dear Sir/Madam,

## **SUBMISSION FOR WATER NEW ZEALAND ON THE LOCAL GOVERNMENT ACT 2002 AMENDMENT BILL (NO 2)**

### **INTRODUCTION AND OVERVIEW**

1. Water New Zealand ("Water New Zealand") appreciates the opportunity to provide a submission on the Local Government Act 2002 Amendment Bill (No 2) ("the Bill").
2. Water New Zealand is a national not-for-profit organisation which promotes the sustainable management and development of New Zealand's three waters (freshwater, wastewater and storm water). Water New Zealand is the country's largest water industry body, providing leadership and support in the water sector through advocacy, collaboration and professional development. Its 1,500 members are drawn from all areas of the water management industry including regional councils and territorial authorities, consultants, suppliers, government agencies, academia and scientists.
3. Water New Zealand notes the policy intent of the Bill is to improve local government service delivery and infrastructure provision arrangements. The increased flexibility that the Bill provides for local government structures and reorganisations are intended to enable bespoke solutions to local issues. However, Water New Zealand considers that, that additional flexibility can bring uncertainty and careful drafting is required to ensure appropriate and effective checks and balances are in place.
4. Water New Zealand is primarily concerned with changes that affect the water sector and our comments in this submission are therefore directed at changes affecting that sector. Water New Zealand has a number of overarching or general comments as well as comments on specific provisions.
5. These general issues will be discussed first, followed by comments on specific provisions. The specific changes sought by Water New Zealand to address its concerns are outlined at the end of this submission.

## **OVERARCHING / GENERAL COMMENTS**

### **Lack of uniformity**

6. The flexibility that the Bill provides may lead to a lack of uniformity (and different degrees of horizontal or vertical integration) between organisational structures applying in different areas. While that can provide benefits in terms of such structures being fit for purpose, it can also make it more complex for those that operate in more than one district or region where different structures are in place. Clear guidance as to who is responsible for what (i.e. water, transport etc.) in different areas will be important. Water New Zealand suggests that each local authority within a region be required to provide this information in a clearly identifiable place on its internet site.

### **Cross boundary issues**

7. Water New Zealand also considers that given the local government system is structured around territorial boundaries, ventures which cross territorial boundaries, like joint council controlled organisations (“CCOs”), could cause challenges for the fulfilment of the separate obligations of local authorities. While each local authority remains responsible for meeting their various requirements, Water New Zealand considers that further recognition of the potential for conflict, and a process to address any such issues would be helpful. This could include for example a requirement to refer any significant or unresolved issues to a joint committee of shareholders for determination.

### **Funding/resourcing**

8. While the Bill recognises that the Local Government Commission (“Commission”) will require funding for its new functions and responsibilities no consideration is given to the costs of reorganisation proposals on local authorities and CCOs. This may be an issue particularly when a proposal is Commission rather than local authority led and given the different size and resources of the organisations involved. Water New Zealand suggests that further consideration be given to providing funding for local authority involvement in reorganisation proposals – particularly where these are commission initiated rather than council led.

### **CCOs**

9. The Bill enables the greater use of CCOs for the provision of water and other services. Water New Zealand considers it is important that the legislative regime applying to CCOs is fit for purpose to enable the benefits of CCOs to be realised (efficiencies, economies of scale, and improvements in the levels of services), while at the same time ensuring there is transparency, accountability and effective public participation, particularly in relation to funding mechanisms.

### **Taxation**

10. The taxation rules applying to local authorities and CCOs are complex. While it is understood that the new CCO and local government structure proposals in the Bill are intended to be tax neutral, Water New Zealand is concerned that the tax implications have not been adequately considered or addressed in the Bill. Further changes are required to ensure that the tax status and implications are clear, consistent and fair.

11. Water New Zealand supports the submission of the Society of Local Government Managers ("SOLGM") in relation to taxation matters and endorses the recommendations made in that submission; particularly in relation to the tax status and treatment of multiply owned, substantive and water CCOs.

## **COMMENTS ON SPECIFIC PROVISIONS**

12. In addition to the above high level issues, there are a number of specific issues arising with the wording of particular provisions in the Bill.

### **Clauses 4 and 5 definitions**

13. The definition of "corporate accountability information" in clause 4 includes "the extent to which the local authority satisfies the expectations of citizens and customers". Water New Zealand considers that this wording introduces a significant element of uncertainty as it is not clear what such information should comprise and sets a threshold which is very difficult to measure. Water New Zealand considers that this wording should be deleted from the definition.
14. The definition of "substantive council controlled organisation" in clause 5 includes a CCO "agreed by all shareholders to be a substantive council controlled organisation". This is a very broad discretion unfettered by any quantitative or qualitative requirements. Given the definition already includes a CCO which owns or manages assets with a value more than \$10m, and water and transport services CCO's; it is submitted that such a broad catchall is unnecessary. Water New Zealand suggests that this text be removed from the definition.

### **Clause 7 – Section 17**

15. This clause inserts a new subsection (3B) which requires a local authority proposing to transfer or accept a transfer of responsibility relating to the delivery of water, wastewater, storm water or transport, to obtain the written agreement of the Commission before commencing consultation. It is not clear why such a requirement is imposed particularly given one of the purposes of the Bill was to enable council-led reorganisation schemes. There are no provisions containing criteria to guide when and how the Commission should make its decision to agree or not. There is also no specific process provided to challenge any refusal to give such approval. Water New Zealand considers that such a requirement is unnecessary and should be deleted, but that if it is retained, further guidance be provided as to what factors the Commission must consider and the timeframes in which the Commission must make a decision.

### **Clause 16 – Section 31A**

16. The replacement section 31A gives the Minister increased powers to dictate what the commission can and cannot do as it gives the Minister the power to:
  - (a) Specify expectations for the Commission including which matters or geographic areas are to have high priority for investigation; and
  - (b) Determine matters or geographic areas that must not be the subject of an investigation by the Commission.

17. This is a broad discretion and there is no requirement for the Minister to consult before making such determinations, and no specific criteria to guide the Ministers decision-making. If such powers are to remain, Water New Zealand considers that further thought should be given to appropriate restrictions on the powers. For example, one such restriction might include not recommending investigating a region which has been the subject of a successful reorganisation proposal in the last say two years.

#### **Clause 19 – Section 35A**

18. Subsection (2) states that information held by the Commission for an investigation, the resolution of a dispute, or the determination of an appeal or objection under section 19R of the Local Electoral Act is not official information for the purposes of the Official Information Act until the investigation, resolution or determination has been completed. While some of the information obtained through these processes will undoubtedly be sensitive, not all or even the majority of it will be. To impose a blanket ban on the application of the Official Information Act seems like a very blunt approach – particularly as the Act itself provides for withholding information where necessary for maintaining the effective conduct of public affairs, negotiations, the confidentiality of advice, etc. Water New Zealand considers that such a ban is unnecessary and should be removed.

#### **Clause 22**

19. Clause 22 inserts new sections 56A to 56W. Water New Zealand has comments on a number of these provisions:
- (a) Section 56A requires a local authority that is proposing to become a shareholder in a multiply owned water services CCO to obtain the written agreement of the Commission before starting consultation on the proposal. As noted above for clause 7, it is not clear why such a requirement is imposed particularly given one of the purposes of the Bill was to enable council-led reorganisation schemes. There are no provisions containing criteria to guide when and how the Commission should make its decision to agree or not. There is also no specific process provided to challenge any refusal to give such approval. Water New Zealand considers that such a requirement is unnecessary and should be deleted but that if it is retained further guidance be provided as to what factors the Commission must consider and the timeframes in which the Commission must make a decision.
  - (b) Section 56F states that local authorities have to hold and exercise ownership interests in a water services CCO directly and not through a holding company or other subsidiary of the local authority. Water New Zealand assumes this is because under the Bill such CCOs can be transferred some of the local authorities' powers (such as rights of access, to carryout works on private land etc.) and there is therefore a desire to have a more direct ability to enforce obligations. However, the Bill does not spell out what would happen if a CCO fails to perform and what powers councils (or joint committees established under section 56W) have to step in. Indeed, under new section 56I(2) a shareholding local authority is prohibited from performing or exercising any duty or power conferred on a water services CCO by order in council – unless the water services CCO delegates that responsibility duty or power to the local authority. Water New Zealand suggests that further consideration be given as to how any

non-performance can best be addressed. One such example may be by reserving the power of a local authority to step in and undertake a responsibility duty or power in the event of any non-performance.

- (c) Section 56H states that a water services CCO must not pay a dividend or distribute any surplus to shareholders. However, this restriction does not apply to any other CCOs including transport. It is not clear why water is singled out for differential treatment. If there is no specific policy rationale warranting separate treatment, Water New Zealand considers this restriction should apply to all other CCOs (except council controlled trading organisations which operate for the purpose of making a profit).
- (d) Section 56K enables water services CCOs to propose bylaws but gives the local authority (or joint committee) power to decline to make such bylaws if in its opinion the bylaw does not meet the requirements. There is no specific provision which provides a CCO with a right to object to or appeal such a decision. While a CCO could seek to judicially review such a decision, Water New Zealand considers that providing an objection process would be a more cost effective and efficient process.
- (e) Sections 56S(3)(b), 56T(3)(b) and 56U(1) all require local authority accountability policies which apply to substantive CCOs to include a statement about how the CCO contributes to “any relevant objectives and priorities of central government”. Water New Zealand considers that referring to objectives and priorities of central government introduces a significant element of uncertainty as it is not clear what these are, how these are determined, and who determines them. Water New Zealand also queries whether giving effect to central government priorities which are not provided for through legislation is appropriate. Water New Zealand considers that such references should be deleted.

## **Clauses 24 and 25**

- 20. Under proposed new section 61C – a CCO can, if its service delivery agreement or statement of intent allows it, require a shareholding local authority to contribute a certain level of operational funding. There are also then provisions to enable more or less funding to be contributed with the agreement of both parties. Water New Zealand questions whether it is necessary and appropriate for this to be a requirement. An alternative may be to require a CCO to make a request for a certain level of funding along with the reasons to support that request, and to require council to provide that funding if certain criteria are met. These could include matters such as alignment with long term plan etc. Such a provision could also provide greater clarity on the timing of any such funding.

### **Development contributions and capital charging**

- 21. New section 61D prevents a substantive CCO (including a water services CCO) from imposing a capital charge for connections to or use of infrastructure or services provided by that organisation.<sup>1</sup> Instead development contributions are proposed as the method to meet capital costs. Under section 63A CCOs can prepare a development contributions policy to cover the charges which the territorial authority is obliged to adopt under section 63B - provided it meets all the relevant legislative requirements. So while the CCO is primarily in control of the

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<sup>1</sup> It is noted that for Auckland water CCOs this prohibition only comes into effect 18 months after the Bill receives royal assent as per section 2 of the Bill.

policy decisions in relation to capital charges, territorial authorities are in charge of administering the policy and collecting the development contributions, which they must then pay to the CCO.

22. The regulatory impact statement indicates that the rationale for requiring local authorities to collect and administer a CCO's capital charges is so that such charges are subject to the same reconsideration and appeals process as for development contributions.<sup>2</sup> Water New Zealand questions whether this is the most efficient and appropriate process of administering and collecting CCO capital charges particularly as it appears to involve double handling and extra administrative costs for territorial authorities. It also appears to be inconsistent with the "arms-length" relationship which is meant to exist between local authorities and CCOs. A better alternative could be enabling the CCO to set, administer and collect the capital charges directly. This could be achieved by providing for the relevant provisions from the development contributions regime in the Local Government Act 2002 (LGA) to apply to a CCO in relation to capital charges as if the CCO were a territorial authority imposing development contributions. In this way the reconsideration and objections process would also apply to such charges.
23. Water New Zealand suggests that further consideration be given to the method of administering and collecting capital charges and in particular to whether enabling CCOs to administer and collect these charges directly as development contributions would be a more efficient and appropriate process. If however, the process proposed in the Bill is to proceed, Water New Zealand considers that changes are required to:
- (a) Section 63A to provide for consultation with the affected territorial authorities during the drafting of the amendment to the development contributions;
  - (b) Section 63B to:
    - i. Impose a timeframe regarding when payment should be made;
    - ii. Enable separate amendments for the development contribution policies of each shareholding local authority rather than a single amendment covering all. This will better recognise that such policies can and do differ significantly between local authorities;
    - iii. Provide greater clarification around how territorial authorities can recover their administrative costs – the process proposed in the Bill of deducting such costs from the development contributions is at odds with the development contribution requirements in the LGA which limit such contributions to growth related charges;
    - iv. The LGA to enable CCOs to participate in objections and reconsideration processes, and to update other provisions such as the definition of development agreement to include reference to the new substantive and water services CCOs; and
  - (c) Provide an ability to refer any disputes between substantive CCOs and their shareholding local authorities regarding the content of any proposed amendments to development contributions policies to the Local Government Commission for resolution under new section 31H.

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<sup>2</sup> Regulatory Impact Statement, Department of Internal Affairs, 9 June 2016, page 30.

### Long term plan consultation

24. New section 63E requires a local authority that is a shareholder in a CCO to allow the board of the CCO a “reasonable opportunity” to comment on the proposed content of the local authority’s long term plan before it starts the formal consultation process. Water New Zealand sees two issues with this section. The term “reasonable opportunity” introduces an element of uncertainty giving rise to questions of what is reasonable, and who determines it. Water New Zealand considers that this clause needs clarification around the extent and timing of the consultation required.

### **Clause 33 – Additional performance measures**

25. Clause 33 amends section 261B by adding a new subsection that permits the Minister to direct the Secretary to make rules that specify performance measures and to review the effectiveness of rules made under this section. While supporting the policy intent, Water New Zealand considers that further clarification and guidance is required around these new powers. Water New Zealand supports the submission and endorses the recommendations of SOLGM in this regard.

### **Schedule 2 – Amendments to Schedule 3**

26. Under clause 21A the reorganisation plan can provide for the establishment of joint committees and where it does so the plan *may* specify committee membership, terms of reference, delegations and when and how changes can be made to these matters. In order to provide certainty, Water New Zealand considers that there should be a mandatory requirement for the plan to specify these matters where a joint committee is established.
27. New clause 22C(2) states that the Commission must approve a local authority led reorganisation plan unless the plan is not accompanied by the required documentation or the Commission considers on reasonable grounds that certain provisions were not complied with or that the plan does not have the support of affected communities. No guidance is provided as to how the latter (i.e. community support) is determined, and what degree of support is required (majority, significant etc.). It is also notable that such a requirement does not apply to Commission led schemes. Given the consultation requirements already built into the process, and the requirements to consider impacts on communities (under clause 11 of the schedule), Water New Zealand considers that the requirement for community support (clause 22C(2)(b)(ii)) should be deleted.

### **Schedule 4 – New Schedule 8**

28. Clause 2 of new Schedule 8 requires the board of a substantive CCO (including a water services CCO) to give effect to any shareholder comments on the statement of intent unless they are unlawful, contrary to the constitution or propose conflicting priorities for the CCO. For other CCOs there is only a requirement to consider the comments rather than give effect to them, and there is no requirement to give reasons as to why any comments have not been adopted. Water New Zealand assumes that the reason for the differentiation relates to the different degrees of control, with there being greater control over substantive CCOs due to direct ownership holdings as opposed to other CCOs. However, Water New Zealand considers that one standard could be developed to apply to all CCO types which required consideration of the



comments and whether they were unlawful etc. and a requirement to give reasons for any decision to not give effect to those comments.

29. Under new Schedule 8A there are a broad range of powers that can be conferred on a water service CCO (by order in council) including rights of access and to do works on private land as well as Public Works Act 1981 (“PWA”) powers. While Water New Zealand supports the ability to transfer such powers to the CCOs carrying out these works, Water New Zealand considers there are a couple of issues that require further clarification/consideration. There is a need to ensure that:
- (a) Officers of the CCO as well as the CCO itself are able to exercise the powers to access land etc.; and
  - (b) The local authority also retains the ability to utilise these powers in case they are needed e.g. in the case of non-compliance by the CCO. If such a change is adopted, Water New Zealand also considers that the issue of liability should be clarified, in that the local authority will not be liable for any damage or loss arising from any non-compliance by the CCO and will only be liable for any powers or works it exercises or undertakes itself.

### Other matters

30. Unlike transport CCO’s (see new section 56P) water services CCOs are not deemed to be a requiring authority and network utility operator under s 167 of the Resource Management Act 1991 (“RMA”) Water New Zealand questions why water services CCOs are treated differently, particularly since both types of CCOs are given PWA powers under the Bill. Water New Zealand considers it would be more appropriate for both types of CCO to be treated consistently and for both to be deemed requiring authorities.

### CHANGES SOUGHT

31. Given the issues noted above, Water New Zealand requests that the following changes or changes to similar effect or which are appropriate to address the concerns expressed above are made to the Bill:
- (a) A new provision be introduced to require every local authority to provide information in a clearly identifiable place on its internet site as to which local government and CCO organisations are responsible for which activities within the district/region.
  - (b) New provisions be introduced which recognise the potential for conflict between different organisations responsibilities within a district or region and which introduce a process to address any such issues – such as through a requirement to refer any such issues arising in the context of a multiply owned CCO to a joint committee of shareholders for determination.
  - (c) Further changes be made to address taxation issues in accordance with the recommendations made in the submission by SOLGM.
  - (d) Clause 4 - amend the definition of “corporate accountability information” as follows:

**corporate accountability information**, in relation to a local authority, means information relating to the corporate governance of the local authority and indicators of the overall effectiveness of the local authority in performing its role, ~~and includes the extent to which the local authority satisfies the expectations of citizens and customers~~



- (e) Clause 5 - amend the definition of “substantive council-controlled organisation” as follows:

*substantive council-controlled organisation—*

*(a) means a council-controlled organisation, other than a council-controlled trading organisation, that is wholly owned, or wholly controlled, by 1 or more local authorities, and that—*

*(i) owns or manages assets with a value of more than \$10 million; or 5*

*(ii) is a water services council-controlled organisation; or*

*(iii) is a transport services council-controlled organisation; or*

*~~(iv) is agreed by all shareholders to be a substantive council-controlled organisation; but~~*

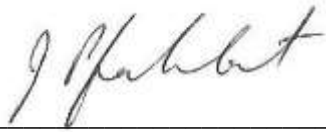
*(b) does not include a substantive council-controlled organisation of the 10 Auckland Council*

- (f) Clause 7 – amend to delete proposed new section 17(3B) or alternatively be amended to provide guidance as to the factors the Commission must consider when deciding whether to agree to a transfer and the timing of any such decision.
- (g) Clause 16, section 31A – further consideration be given to whether restrictions on the Ministerial powers should be imposed and if so what such restrictions should be.
- (h) Clause 19, section 35A – delete in its entirety or amend to confirm that the Official Information Act 1981 applies to investigations, dispute resolution processes and determinations in the normal manner.
- (i) Clause 22:
- i. Section 56A - delete in its entirety or alternatively amend to provide guidance as to the factors the Commission must consider when deciding whether to agree to a transfer and the timing of any such decision.
  - ii. Sections 56F and 56I – amend to indicate local authority powers in the event of any non-performance.
  - iii. That the restriction in section 56H on water services CCOs making a surplus or paying a dividend to shareholders also be applied to other CCO's (except council controlled trading organisations).
  - iv. Section 56K – be amended or that additional provisions be added to provide a right of objection and a process should any bylaw proposed by a water CCO be declined.
  - v. Sections 56S(3)(b), 56T(3)(b) and 56U(1) – delete reference to “any relevant objectives and priorities of central government”.
- (j) Clauses 24 and 25:
- i. Section 61C – consideration be given to amending the requirement to provide funding so that council has to provide funding but only if it meets certain criteria – such as the works are aligned with the long-term plan.
  - ii. Sections 63A and 63B – consideration be given to the method of administering and collecting capital charges and in particular to whether enabling CCOs to administer and collect these charges directly as development contributions would be a more efficient and appropriate process. Or alternatively if the current process is to remain, that changes are made to clarify the matters noted in paragraph 23 above (consultation, timeframes, administrative costs, development contribution provisions in the LGA, dispute resolution).

- iii. Section 63E – delete in its entirety or if it is retained amend to clarify the extent and timing of the consultation.
  - (k) Clause 33 - changes be made to address the address the additional performance measures issues in accordance with the recommendations made in the submission by SOLGM.
  - (l) Schedule 2 (which sets out amendments to Schedule 3):
    - i. Clause 21A(3) amend as follows:
      - The reorganisation plan ~~may~~ must specify—*
        - (a) the membership of a committee;*
        - (b) the terms of reference of a committee;*
        - (c) any delegations to the committee;*
        - (d) when and how the matters in paragraphs (a) to (c) may be varied.*
    - ii. Clause 22C(2)(b)(ii), delete in its entirety.
  - (m) Schedule 4 – amend clause 2 of new schedule 8 to read as follows:
    - The board must—*
      - (a) consider any comments on the draft statement of intent that are made by the shareholders, or by any of them, on or before 1 May in the year preceding the year to which the draft statement relates; and*
      - ~~(b) in the case of a substantive council-controlled organisation, give effect to those comments, unless~~*
        - (b) not give effect to shareholder comments where:*
          - (i) to do so would be unlawful; or*
          - (ii) to do so would be contrary to the organisation's constitution; or*
          - (iii) the comments propose conflicting priorities for the organisation.*
        - (c) provide reasons for any refusal to give effect to shareholder comments.*
  - (n) Schedule 4 – new Schedule 8A amend to clarify that:
    - i. The officers of the CCOs will be able to exercise the powers of access, etc. which are proposed to be conferred on the CCOs;
    - ii. The local authority will:
      - Still have some residual powers, duties and responsibilities under these sections, for example in the event of non-compliance by a water services CCO;
      - Not be liable for any damages or loss arising from any non-compliances by the CCO;
      - Only be liable for any damages or loss arising from powers or works it exercises or undertakes itself.
    - (o) That a provision similar to section 56P be introduced to apply to water services CCOs so that they are deemed to be requiring authorities and network utility operators under the RMA.
    - (p) Such other or further consequential changes which may be required as a result of the above changes.
32. Water New Zealand also requests that consideration be given to funding for local authorities costs in participating in reorganisation proposals, particularly where the proposals are initiated by the Commission.

## CONCLUSION

33. Water New Zealand thanks the Committee for the opportunity to provide comments on the Bill and wishes to be heard in support of its submission.

A handwritten signature in black ink, appearing to read 'J Pfahlert', written over a horizontal line.

John Pfahlert  
Chief Executive