

AFFORDABLE WATER REFORMS: GOODBYE RATEPAYER, HELLO CUSTOMER

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Overview



Affordable Water Reforms create a new legal relationship between consumers and their water services provider (WSE)



The heart of this relationship is the “service agreement” or customer contract between WSE and property owner



Main elements of the relationship will be set out in the customer contract but supplemented by:

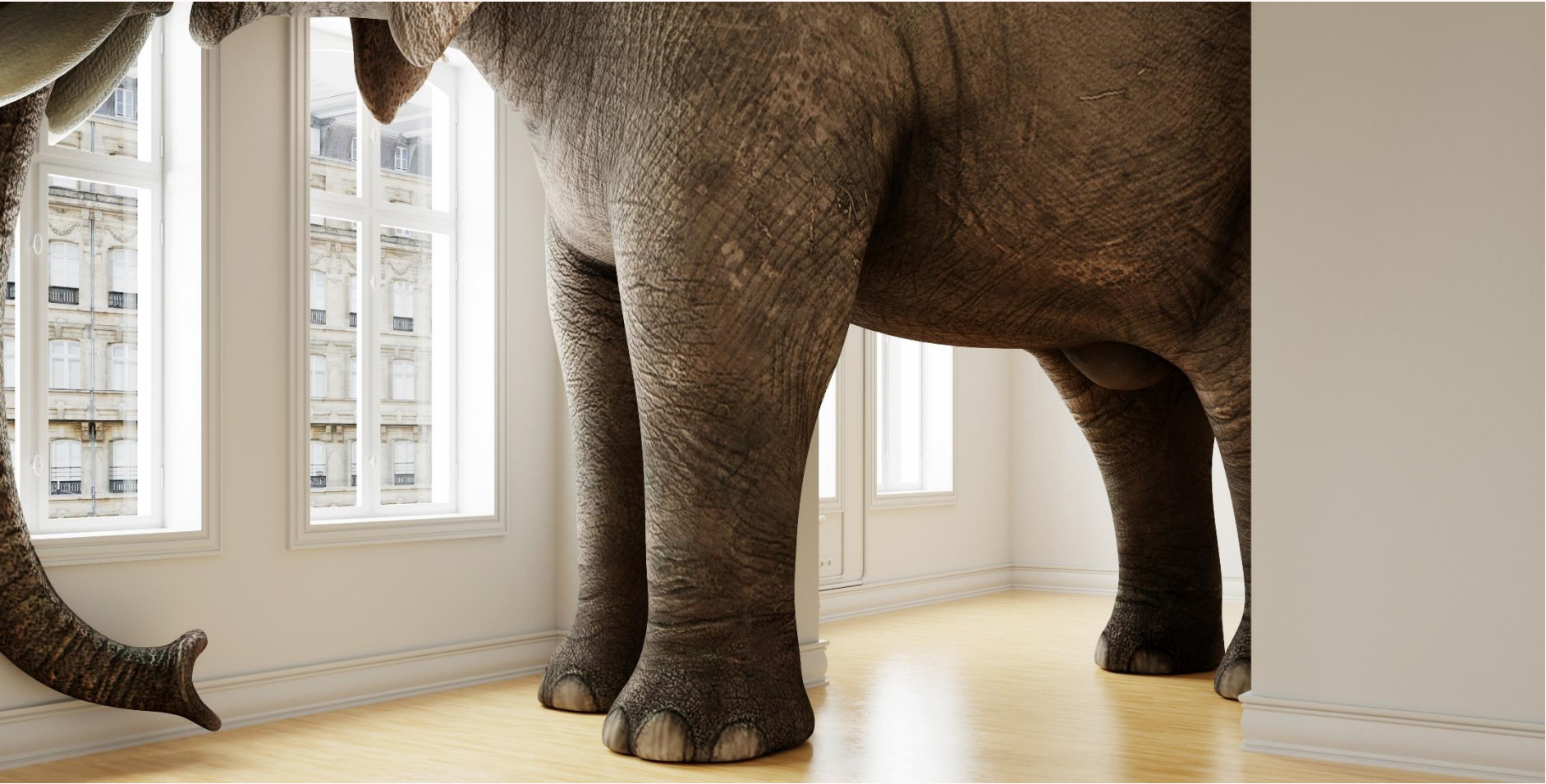
- charges fixed through a separate process but invoiced contractually

- other regulatory and planning documents (in lieu of bylaws)



Overview

- Some other matters fall outside customer contract but are covered by the Water Services Entities Act 2022 (WSEA) e.g.
 - water infrastructure contributions
 - trade wastes services
- Result is a hybrid contractual/statutory model
- This presentation discusses key elements of this new legal relationship





LOCAL WATER DONE WELL



National's plan

- Repeal Three Waters
- Scrap water services entities
- No co-governance
- Restore Council ownership and control but with Government oversight
- Councils devise their own financially sustainable model

Current legal relationship

Currently, water services are generally provided by councils to their communities under 1 of 2 models:

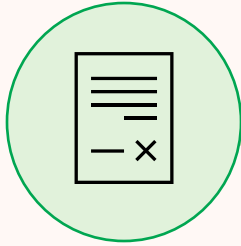


Council/ratepayer statutory model



Water company/customer contractual model

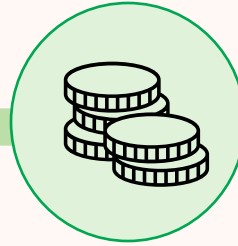
Council/ratepayer statutory model



By far the most common, this exists everywhere except in Auckland



Council provides water services to its district, as a core activity, under the Local Government Act



Council charges for services using rates. Rates are set by the elected councillors following a public consultation process



Water rates are payable by the ratepayer (i.e. landowner or tenant under long lease (10+ years)) but also run with the land

Council/ratepayer statutory model

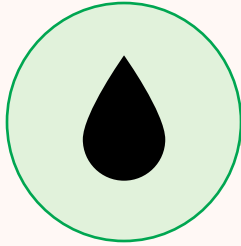
Other elements of the relationship governed by council bylaws or the LGA itself e.g. rules relating to connections and disconnections

Services can be provided directly by the council or through a water services provider (e.g. Wellington Water)

Development contributions payable by developers are charged under separate contributions policy adopted under LGA

Trade wastes discharges and associated charging normally regulated under a trade wastes bylaw

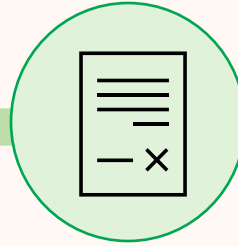
Water company/customer contractual model



Model used in Auckland with Watercare Services Limited, a CCO wholly owned by Auckland Council



Watercare owns water and wastewater services infrastructure and provides services direct to its customers



Auckland Council (Healthy Waters) owns and operates stormwater infrastructure



Auckland Council has 'backstop' responsibility under LGA to ensure that existing water services continue to be provided

Water company/customer contractual model

The customer-facing entity is Watercare, not the Council. Service level agreement between the Council and Watercare covers aspects of their relationship

Watercare has a contract with each of its customers. Contract covers all aspects of the relationship including charges (similar to any utility service agreement). No water rates set by Council

Customer contract also covers infrastructure growth charges (therefore no DCs for water/wastewater infrastructure in Auckland)

A limited Water and Wastewater Services Bylaw is made by Auckland Council to cover residual matters not able to be included in a contract e.g. responsibilities of people who may not be customers

A customer contract outside Auckland without the WSEA?

If WSEA repealed, Auckland's contractual model may still be applied outside Auckland

However, WSEA parameters will no longer apply

Restoring Council ownership and control doesn't rule out a contractual model

Councils can provide water services on a contractual basis, under s12 LGA general power of competence – although none do at present

Customer contract, should the WSEA survive

Requirement of consistency with WSEA may give rise to difficult issues

Agreement not entered into on an individual basis like a conventional contract. Instead, it automatically applies to consumers when published on WSE's website, and water services are provided to that consumer

WSE must carry out prior statutory engagement process, and must have regard to feedback, but no power for consumer to refuse or reject contract



New legal relationship - charging

- Charges set by WSE Board with tariff list published on website.
- Subject matter of charges very broad. Can relate to:
 - water, wastewater, stormwater supply services
 - connection charges for any of the 3 waters services
 - infrastructure contributions
 - meeting the WSE's costs in performing and exercising its duties, functions and powers

New legal relationship - charging

- Charging principles in section 336 (non-exclusive):
 - Reflect the costs of service provision, including by:
 - promoting the efficient use of resources:
 - charging different groups of consumers differently only if:
 - those groups receive different levels or types of services; or
 - the cost of providing services to those groups is different; and
 - Simple, transparent, and easy for consumers to understand; and
 - Consistent with any Commerce Commission input methodologies or determinations





New legal relationship - charging

- Echoes procedure for councils setting rates, but significantly less prescriptive.
- Broad outline of proposed charges must be signalled in a funding and pricing plan, which has been consulted on, but nature and level of the charges themselves are within the WSE's broad discretion.
- Charges invoiced and payable in the same way as contractual charges, except WSEA itself establishes liability to pay (and to pay penalties etc in the event of default).
- Water charges are personal to the “bill payer” and do not run with the land (unlike water rates). No apparent mechanism for making incoming owners liable for past charges.



Water Infrastructure Contributions (WICs)



Similar to existing council DC regime, but more streamlined

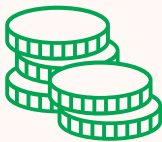


WSE must adopt infrastructure contributions policy, which is part of FPP. Therefore, some engagement with stakeholders and community. Legal requirements less onerous than for DC Policy but still a significant undertaking for WSEs and clear risk of judicial review if not properly prepared



Commerce Commission role in setting methodologies or making determinations which WICs must be consistent with

Water Infrastructure Contributions (WICs)



WSEA sets out trigger events for when WIC may be required (eg when resource consent or building consent for development is granted). Again, more flexible version of DC framework currently available to councils



WICs are not part of the contractual relationship. Landowner's liability to pay WICs arises directly under WSEA



Example of hybrid (contract + statute) relationship



Trade waste services

- WSE must adopt trade waste plan including trade waste activities which are allowed, restricted or prohibited
- Trade waste discharger must have trade waste permit
- Permits issued on application, and by reference to trade waste plan
- Trade waste charges set in same way as other charges – must be in accordance with FPP and charging principles
- Liability for charges arises under WSEA – not part of customer contract
- Regime broadly similar to present day (with trade waste bylaws replaced by trade waste plan)

Other regulatory and policy tools

- Customer contract and other mechanisms already discussed are supplemented by additional planning and regulatory tools:
 - controlled drinking water catchment plan
 - stormwater management strategy – stormwater management plan; stormwater risk management plan; stormwater network rules
 - water supply and wastewater services rules
 - rules regulating works near infrastructure
 - development code
- Range of content potentially broader than presently covered by bylaws
- How much of this, if any, stays under National's plan?
- Should councils be given these powers instead of, or in addition to, bylaw powers?

Conclusions

- Legal relationship between WSE and customer is complex, with many elements
- Heart of relationship will be a customer contract – it will set out main terms and conditions
- Fundamental shift from council/ratepayer to WSE/customer relationship
- Charges are set outside the contract and liability to pay is statutory rather than contractual
- Infrastructure charges and trade wastes regimes are similar to current LGA regimes, but more streamlined

Conclusions

- A raft of regulatory and other instruments is available to WSEs (instead of bylaws)
- Overall, reforms proposed a hybrid (contract + statute) approach
- For WSEs (or councils, assuming they now will retain ownership and control) key is determining *where* matters can or should be addressed
Many aspects of the contractual model may still be worth pursuing outside Auckland, if/when WSEA repealed



Questions?