Three Waters Governance Group Report Released

The report of the joint Three Waters Governance Representation and Accountability Working Group (the Working Group) was publicly released overnight. The full report is available here.

We thank the Working Group for its commitment to keeping safe drinking water and healthy waterways, throughout New Zealand, front and centre as they considered the governance, accountability and local voice concerns. The report is an extremely helpful contribution to the reform process.

As readers work through the commentary and recommendations below, they should keep the Government's so-called bottom lines in mind. These are: the entities remain in public ownership; the entities have balance sheet separation from their local authority owners; good governance, and that any new model should protect/promote iwi/Māori rights and interests.

Some changes have already been proposed independently from the Working Group's model

The Government has made some changes based on feedback received in the August/September 'testing' with councils. The Bill presented to the Working Group (and recently sighted by the Steering Group) contained the following changes:

- greater flexibility for each Regional Representative Group (RRG) to determine its own arrangements through a constitution, rather than the original proposal, which required a number of matters to be hard wired in primary legislation
- board appointments and removals being made by a committee of the RRG, rather than an arms-length 'independent selection panel' (as was described in the original proposal)
- direct accountability of the entity to the RRG for performance of the duties imposed on the entity Board and permitting the RRG to remove Board members for failing to carry out these duties
- the Board being required to give effect to the Statement of Strategic and Performance Expectations (SSPE) issued by the RRG which provides more direct influence for the RRG over the WSEs' strategic direction and priorities (but without dictating its day-to-day operations).

As a whole the above four changes do represent a strengthening of the owner voice in the overall governance of, and direction-setting process for, the entities. They do not weaken the operational control that the entity Board and management will have.

The Report's recommendations place further barriers in the way of privatisation

The report's provisions, if adopted, would strengthen two of the Bill's provisions against the privatisation of water services:

- any sale, privatisation, merger or proposal to change ownership of an entity requires the unanimous consent of the local authority owners (and the owners will have a 'vote' for this purpose) and
- the report proposes entrenching the anti-privatisation provisions in the Bill so that any legislative amendment would require the support of 75 per cent of MPs. This is probably the closest Parliament can come to ruling out any future law change to allow for privatisation (readers might reflect on the likelihood of 75 per cent of Parliament agreeing on any controversial proposal).

The Report's proposed changes to the ownership model would allow for a form of shareholding

The Working Group proposes a significant change to the ownership model. There would be a relatively simple form of shareholding. Each owner would receive one share per 50,000 population (rounded up, so a local authority with a population of less than 50,000 would receive one share).

The 'voting rights' that attach to these shares would apply only in the case of proposals involving the sale, privatisation, merger or proposal to change ownership of an entity. So, for example, it appears voting rights would not apply to the selection of a Regional Representative Group (RRG) or board appointment committee.

There is a further protection proposed against loss of local voice. The Working Group proposes that RRG decision-making be done on a consensus basis, with 75 per cent majorities required if a decision cannot be reached within a set time.

Powers of the RRG would be extended

The Working Group proposes some clarifications around membership of RRG. The RRG would consist of a minimum of 12 and a maximum of 14 members, with selection of local authority and iwi representatives in the entity constitutions. Each RRG would be co-chaired by a local authority representative and an iwi representative.

In addition to the changes indicated above the RRG would also be given a further two levers to influence entity direction:

- the power of approval over entity statements of intent – this goes beyond the ability to comment on a draft. This gives the RRG power to not only set the

strategic direction for the entity, but also gives the RRG right of approval over how the Board interprets this at a strategic level. This is stronger than the equivalent requirement for CCOs
- the power to comment on water entities' operational direction in the Asset Management Plan and other key documents – again stronger than the equivalent provisions for CCOs.

Regional sub-RRGs are provided for in legislation. Other than 50/50 co-governance between council and iwi / hapū, composition and number of advisory groups (sub-RRGs) will be left to individual WSE constitutions.

Taken as a whole, these would strengthen the accountability of the entities to RRG quite considerably. There are risks that this might extend into direction at operational level. Note that neither the Working Group's report nor the changes already made have been discussed with the rating agencies. It will be an interesting discussion.

Te Tiriti concerns are also a significant feature of the report

In addition to changes described above, the report makes eight further recommendations that go to the Treaty relationship or would better infuse Te Mana o Te Wai into the Bill. This includes:
- the Crown and Minister are required to give effect to Te Tiriti and its principles when exercising powers and functions under the legislation (including in issuing the government policy statement and in monitoring, review and intervention powers.
- the Crown, in developing its policy statement, should engage with its Te Tiriti partner, separate from any public consultation.
- a guarantee in legislation that nothing creates or transfers proprietary interests in water, or limits, extinguishes, or otherwise adversely affects or constrains iwi or hapū authority over, or rights and interests in, water.
- Treaty settlement mechanisms related to current legal provisions such as in the Resource Management Act and Local Government Act are carried across in the reform legislation.
- the Crown provides equitable resourcing to enable the full and effective participation of iwi and hapū in the three waters.
- Te Mana o te Wai is an overarching objective guiding decision making, planning, governance, accountability, and service delivery. This should be defined in the Bill to ensure that Te Mana o te Wai encompasses the interconnection with, and the health and well-being of, all water bodies affected by three waters. It should be given effect to at all levels of the framework, including by the Minister in developing the GPS; by the RRG in the development of the SSPE and SOI; in asset management plans and infrastructure strategies.

- the Crown furthers work to design inclusive communications and processes to support the embedding of Te Mana o te Wai in the community.

What Happens Next?

The recommendations are advice to the Government by an independent group. In the coming weeks the Government will consider these recommendations and amend the draft legislation as its decisions necessitate. Our sense is that adopting a majority of these recommendations would require significant change to the Bill as it stands.

A major part of the Government's assessment of the report will be it evaluating the recommendations against the above four bottom lines. In particular, we expect there will be robust discussion with S&P Global (advisors on capital markets issues – particularly the achievement of balance sheet separation)

Our understanding is that the Bill is currently scheduled for introduction in mid-late May, meaning that submissions will likely be required around the start of the official election period.

List of Recommendations

1. The Crown acknowledges the contribution of councils and begins a communications campaign to explain the 'need for change' the nation.

2. The Resource Management Act reforms are kept consistent with the three waters reforms.

3. That councils be given shares - one per 50,000 people represented, rounded up - in each of the four water entities. Councils will be needed to vote on any proposal for sale, privatisation, merger or other proposal to change ownership. This vote must be unanimous. (The body of the report notes that these shares would be non-voting except in the case of the proposals listed earlier in this paragraph)

4. Alongside other privatisation protections, a majority of 75 per cent of MPs in Parliament would be required to repeal or amend provisions of the Bill concerning privatisation of water entities (i.e. public ownership would be 'entrenched' in the legislation)

5. Councils are prohibited from providing financial support to, or for the benefit of, water entities - including by way of guarantee, indemnity or security, or the lending of money or provision of credit or capital.

6. The Crown should further clarify what constitutes a "major transaction" to be raised to the RRG for consideration.

7. Instead of one chair of the RRG, there are co-chairs, with one from councils and one from mana whenua.

8. RRG decisions are to be made by consensus. When time runs short, a 75 per cent majority vote can be taken as agreed by co-chairs.

9. Water entities should fund the RRG's administrative costs.

10 and 11: The RRG puts together a Statement of Strategic and Performance Expectations (SSPE), which includes alignment with the Government Policy Statement (GPS), direction from regulators, local community priorities within the region from council strategies, Te Mana o te Wai statements, and alignment with RMA. It should receive all the information it needs to do this, and be able to seek further information as needed. The SSPE, issued annually, covers a period of three years.

12: RRGs be given the power to approve water entities' Statement of Intent (SOI).

13: RRGs be given powers to comment on water entities' operational direction in the Asset Management Plan and other key documents.

14: The SSPE scope be clarified in legislation. It would not extend to directing entity projects, investment or management.

15: Water entities should provide minimum six-monthly reports to their RRG on performance against the SSPE and SOI, with individual entity constitutions able to specify more requirements.

16: RRGs can provide additional requirements for water entity board appointees.

17: Conflict of interest requirements for RRG and WSE board appointments should to be stated in the bill.

18: The Bill should include twice-yearly entity board performance reviews, with an option for additional reviews in individual WSE constitutions.

19: RRG size should be between 12 and 14 members. (Not between six and double the number of councils, as the exposure draft bill suggests) with composition and appointment left to individual water entities and outlined in their constitution. Government should further consult with the working group on this.

20: RRGs should be required to include a mix of urban, provincial, and rural council representatives.

21: Iwi representatives should be appointed on a tikanga basis, reflecting whakapapa affiliations through waka groupings. Entity D (Ngāi Tahu) reflects hapū groupings.

22: Entity A's RRG has a bespoke arrangement: 14 members with 50:50 Council and iwi / hapū composition. There should be four Auckland Council representatives, four Tāmaki Makaurau iwi / hapū representatives, one representative from each Northland Council and three iwi / hapū representatives from Te Tai Tokerau. However, a minority of members of the working group expressed concerns that keeping majority voting of 75 per cent would mean Auckland Council could not be outvoted, leading to an imbalance of power.

23: The Crown provides financial support to councils to allow them to fulfil their RRG roles.

24: A competency requirement for RRG members, with details left to individual WSE constitutions.

25: Regional sub-RRGs are provided for in legislation. Other than 50/50 co-governance between council and iwi / hapū, composition and number of advisory groups (sub-RRGs) will be left to individual WSE constitutions.

26: Each WSE and its RRG is governed by a single constitution, with modifications requiring co-governance RRG consensus agreement.

27: The Crown consults the Working Group as they draft the default constitutions.

28: RRGs given authority to comment on investment prioritisation through consultation with the WSE.

29: WSEs can engage with councils on the development of the WSE Asset Management Plan, and respond to council comments.

30: A national Water Services Ombudsman is established, with a tikanga-based dispute resolution process.

31: The Crown and Minister are required to give effect to Te Tiriti and its principles when exercising powers and functions under the legislation (including in issuing

the government policy statement and in monitoring, review and intervention powers.

32: The Crown, in developing its policy statement, should engage with its Te Tiriti partner, separate from any public consultation.

33: A guarantee in legislation that nothing creates or transfers proprietary interests in water, or limits, extinguishes, or otherwise adversely affects or constrains iwi or hapū authority over, or rights and interests in, water.

34: Treaty settlement mechanisms related to current legal provisions such as in the Resource Management Act and Local Government Act are carried across in the reform legislation.

35: The Crown provides equitable resourcing to enable the full and effective participation of iwi and hapū in the three waters.

36, 37 and 38: Te Mana o te Wai is an overarching objective guiding decision making, planning, governance, accountability, and service delivery. This should be defined in the Bill to ensure that Te Mana o te Wai encompasses the interconnection with, and the health and well-being of, all water bodies affected by three waters. It should be given effect to at all levels of the framework, including by the Minister in developing the GPS; by the RRG in the development of the SSPE and SOI; in asset management plans and infrastructure strategies.

39: The Crown furthers work to design inclusive communications and processes to support the embedding of Te Mana o te Wai in the community.

40: Because strategic direction for entities comes from so many places, legislation should include "strengthened provisions around the content of the government policy statement, and consultation requirements", to mitigate the risk of disconnected priorities.

41: The Crown should consult with the RRGs in developing the GPS, and follow the standard consultation process including with communities.

42: The Bill includes provision for a non-voting Crown liaison to the RRG.

43: The Crown will provide sufficient financial support to the entities to ensure 'balance sheet separation' from councils.

44: The Crown confirms to iwi and councils the size of investment required to address historic degradation of waterways and inequalities in water service provision, along with a plan on how fixing this will be funded.

45: The Crown should have an ongoing role to support and invest in water services.

46: A review of the three waters structure is undertaken five years after water service entities begin operating.

47: The Crown should formally test the recommendations outlined in this report with S&P to ensure balance sheet separation.