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Tēnā koe Minister

WATER SERVICES LEGISLATION BILL – AMENDMENT PROPOSALS

Introduction

1. Following the Finance and Expenditure Committee's report on the Water Services Legislation Bill ("**Bill**"), we would like to draw your attention to a land access issue with the Bill that will materially impede the ability of a Water Services Entity ("**WSE**") to efficiently build new water infrastructure and significantly increase costs in doing so. There is a high risk that this will drive up water services prices for consumers.

2. The approach to land access appears to be based on the rationale that WSEs should be subject to the same regime as other utilities such as electricity and telecommunications companies. However, this does not recognise that building water pipe infrastructure is significantly different to wires. In short, there is far less flexibility to follow a course that avoids private property.

3. It is not clear why the existing land access regime is not workable. The view seems to be that water is a utility and therefore should align with other utility access regimes. Water NZ does not consider this to be the right starting point. The starting point must be the existing Local Government Act 2002 ("**LGA**") regime and good reasons are required to depart from it. Take Watercare Services Limited ("**Watercare**"), for example. Parliament already decided that Watercare exercising the same land access powers under the LGA as local authorities was acceptable. Watercare has been exercising such powers successfully for many years.

4. It is important that a WSE's ability to access private land to build infrastructure for the public good is properly balanced against the landowner's rights over their land. Water NZ submits that the current provisions achieve the correct balance, but the provisions in the Bill will not.

5. The land access provisions also come in the context of WSEs assuming greater responsibility for stormwater and, in particular, urban watercourses, in the Bill as reported back by the select committee. It seems counterintuitive to increase WSE's responsibilities as compared to local authorities at present, but give WSEs lesser powers to implement their new responsibilities.

Land access for new water services infrastructure remains not fit for purpose

6. We fear the Bill as drafted will not work when it comes to land access. The essential issue is that to build new infrastructure on, under or over private land, WSEs will need consent of

the landowner and, failing that, a court order. This compares to the current position under the LGA that only requires reasonable notice to be given with landowners, but gives landowners the ability to object in court. The Bill effectively reverses the regime from "notice and object" to "consent or court order".

7. Given the points below, we propose that the Bill should exclude the right for landowners to impose reasonable conditions, and that the Bill adopts the LGA's land access provisions currently in place. We outline our concerns and the unintended consequences below, followed by our proposed amendments to the Bill.

The new requirement for consent will inhibit WSEs delivering water service infrastructure effectively and efficiently

8. Currently, we understand from our large water services provider members that the timeframe for a shovel-ready project is about two years. That accounts for project design, resource consents and other approvals. Landowner approvals occur concurrently with the design and consent process.

9. The new requirement to obtain landowner consent (potentially with conditions) or bring District Court proceedings will represent two significant causes of project timeline delays, with project timelines estimated to extend to three years or more. In addition to the actual process of obtaining multiple consents, significant delay will occur through:

(a) The prior written consent of landowners, who can also impose "reasonable conditions".

(i) Proactively seeking consent for projects of the scale that the WSEs will be required to deliver, will be a significant exercise and consent may not always be obtainable, or obtainable on terms which are workable and acceptable to the WSE, from all relevant landowners (whether due to objections, onerous conditions or a simple failure to engage).

(ii) Landowners' expectations will vary in a project.[1] The right of landowners in the Bill to impose "reasonable conditions" will likely require the use of the District Court order process to determine whether a landowner's condition is reasonable. There will also inevitably be conflict if multiple properties are affected and impose different conditions.

(b) The District Court order process in the event that the WSE does not obtain written consent, or considers the conditions unreasonable.

(i) We understand that in the case of Watercare's experience of the existing LGA land access regime, for example, an estimated 20 percent of landowners do not respond to requests for consent or notices, with the overwhelming majority of landowners simply failing to engage or feel unequipped to provide active consent, despite the landowner having no objections. As a result, departing from the current LGA framework by requiring the WSE to seek a District Court order when

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1 Examples of conditions requested by landowners have covered "reinstatement" to a significantly upgraded standard or condition (with re-landscaping, accessory buildings, and building a swimming pool as examples), requests for works to occur at particular times or dates (which may not be achievable), works not to connect or service other properties (to prevent development by neighbours), agreement by a local authority to development on the property (for example, a fast track process), financial compensation, and alignment of works with feng shui. Such conditions would force the WSE to seek District Court orders to allow new works to proceed, at least until a body of precedent was developed.

landowner consent is not obtained is expected to generate significantly more court proceedings.

(ii) Court proceedings will inevitably add time and cost to a project (costs are discussed below). Again, based on Watercare's experience of the LGA land access regime, it takes six months from beginning engagement with landowners to obtain consent, or (if required) for the notice period or objection process to be completed .

(iii) While the District Court could grant urgency in exceptional circumstances, the process could add a further 12–24 months to a project to accommodate District Court proceedings. Delays will significantly affect bulk infrastructure projects. Furthermore, the District Court is under significant workload constraints, exacerbated by legacy COVID-19 delays, which the additional workstreams generated by the Bill's land access regime would compound.

(iv) As an example of a current project using LGA land access powers, the Central Interceptor extension in Point Erin in Tāmaki Makaurau requires access under 68 properties. The tunnel is passing through these properties at depth and, some construction laydown areas aside, most of the properties will be entirely unaware that the works are occurring. If, we assume that approximately 20 percent of landowners simply did not respond and therefore did not provide consent, that alone would amount to proceedings for 14 District Court orders. That figure does not of course include the possibility of separate proceedings for District Court orders in respect of unreasonable conditions impose by landowners.

10. As a result of the uncertainty created by the Bill's land access powers, contractor and supplier relationships would also become more difficult for a WSE to manage, in turn adding time, complexity, and cost to projects. A shovel-ready project generally requires construction contracts in place and dates arranged with contractors to commence work. It could prove difficult to negotiate and enter construction contracts for water services works when a WSE does not have land access rights from landowners secured.

There will be significant financial cost implications, risking higher water services prices

11. The land access provisions in the Bill will materially add to WSEs' costs.

12. Fundamentally, the land access regime proposed runs counter to the major purposes of the reform, that is addressing the infrastructure deficit and reducing the cost of water to New Zealanders. We are concerned that the land access regime will result in higher costs for all parties, not least consumers, and therefore higher prices for water services. The risk of higher costs because of WSEs' land access powers does not appear to have been factored into the policy decision. For example:

(a) Requiring the WSE to file court proceedings when landowner consent is not obtained will generate significant number of court proceedings and therefore associated costs. In terms of cost of District Court hearings alone, we estimate the average current cost per property to increase from an estimated $6,000 to defended hearings costing somewhere between $50,000–$80,000 for a single property and upwards of $300,000 for multiple party hearings. This is a significant additional cost to key infrastructure projects.

(b) The cost of delay is likely to be significant, particularly in an economic environment characterised by high construction costs and high demand for infrastructure construction professionals. To secure the necessary talent and expertise on large infrastructure projects, WSEs will likely have to pay contractors to sit idle whilst awaiting the outcome of any court proceedings.

(c) It is not possible to accurately quantify the expected cost of complying with any "reasonable" conditions imposed by the landowner.

The Bill underestimates the difference between water and other utilities

13. Advice to the select committee from departmental officials compared constructing or placing new water services infrastructure to service connections made by electricity or telecommunications utilities. Water NZ has previously raised the concern that "water is not the same as electricity or telecommunications".

14. Electricity and telecommunications infrastructure is generally located in the road reserve, with private property access being a rare occurrence. This is not the case for water services. Water services are fundamentally different from these utilities, for example:

(a) Water services connections cannot be made at short notice, dates and times are frequently unknown and works can take a long time to complete.

(b) Water services require significant sized pipelines and other infrastructure which cannot or is not suited to following the roading network, and must be placed in private property or local authority property (excluding roads). This is particularly relevant where the utility is wastewater or stormwater, which frequently relies on gravity feed pipes as the most efficient and environmentally appropriate engineering solution and is therefore significantly constrained by topography.

(c) Placing water services infrastructure under roads is often inappropriate also because of the size of the infrastructure, efficiency (that is direct routes which save on cost, disturbance, and have climate change benefits) or practical reasons (for example, tunnel boring machines which cannot execute 90 degree turns, so are unable to follow grid pattern roads). The size of pipes can mean that there is often simply no room in the road corridor, which already contains existing infrastructure like electricity and telecommunications.

(d) The potential impact to private property owners from water services infrastructure as compared to other utilities also differs greatly, meaning that one land access regime cannot translate across neatly. Unlike other utilities, significant water services infrastructure is often installed at such depths that it has no impact on the use of the property, whether during construction (as all work is below surface, at depth via tunnelling rather than cut and cover methods) or when operating.

(e) The majority of public stormwater and wastewater drains on private land are not covered by drainage easements in favour of the council, therefore there will be no transfer of property rights to the WSE.

Solution

15. WSEs will need to undertake much needed new water services infrastructure works. A workable and efficient land access regime is vital. We are concerned that the current provisions of the Bill will undermine the intent of the water services legislation. We maintain that the land access provisions in the Bill should align more closely with the

existing LGA process which currently governs how new water services infrastructure land access is obtained in New Zealand. Considering the above practical considerations, Water NZ asks that you lend your support to one or more of the following simple solutions.

Option 1

16. Amending clause 200(2) of the Bill and adding a new clause 203 to align with section 181 LGA process, and deleting the ability of a landowner impose "reasonable conditions" on their consent (as we propose at the **Appendix**).

17. This would remove the requirement for a WSE to obtain prior written consent of the owner or a Court order before it can construct or place water services infrastructure on, over, or under land. As statutory bodies exercising public actions, WSEs will be subject to the full range of public accountability mechanisms, including judicial review and the Ombudsman which will provide reassurance that WSEs will exercise their powers legally and for proper purposes.

18. Connected to the above, consequential amendments to delete clause 202 to take account of changes that remove the "reasonable conditions" aspect of land access – as also proposed at the **Appendix**.

Option 2

19. Although less workable, we suggest the following alternative amendments if you were not minded to accept the above ideas:

(a) Ensuring the consent and court order land access mechanism in the Bill applies *only* to new infrastructure works *on or close to the surface* on private property. Instead, the Bill's land access powers should *not* apply to new infrastructure works *at depth* because there is in reality no effect on the landowner. We suggest the the provision could apply at an appropriate depth as determined with advice from experts, maybe 1.5 metres or deeper. Wording to this effect is at the **Appendix**.

(b) Amending clauses 203 and 204 to provide for appeal to the Environment Court instead of to the District Court, and for matters to be referred in the first instance to a review panel or an Environment Court Commissioner (with water services experience). This proposal would likely create a faster court order procedure. This second option would still mean increased costs and delays to critical bulk infrastructure projects but would be an improvement on the current provisions of the Bill, which we believe are not workable and will add costs. We propose wording at the **Appendix**.

(c) If the Bill continues to allow landowners to impose "reasonable conditions" when granting land access for a WSE, then amending the Bill so that it contains an express list of what would not constitute a "reasonable condition". This would involve a new subclause 200(7). We propose this wording at the **Appendix.**

Updating start dates in a notice of intention

20. The land access regime for existing infrastructure, which mirrors the existing LGA provision, looks workable but we noticed an issue with the proposed amendment to allow a WSE to update the original date and time of access as per clause 201(2) of the Bill.

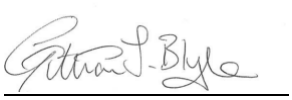
21. We support the change, given the practical reality is that the specific date and time of works may change due to external or unforeseen circumstances. However, as drafted, if the WSE were to update the date and time of access, the WSE might be obliged to wait a

further 15 working days before the proposed work is to start, even if the WSE has already given the landowner 15 days-notice. We suggest that this is a technical error in the drafting and can be resolved by making it clear that an amendment to the date and time does not "reset" the clock – please see the **Appendix** for drafting suggestions.

22. Ultimately and with your support the issues raised in this letter could be the subject of a Supplementary Order Paper on the Bill introduced at the Committee of the Whole House. Water NZ and our members would be happy to work with your staffers and officials from Te Tari Taiwhenua | Department of Internal Affairs on the details of any such Supplementary Order Paper.

23. We thank you for your time considering the issues raised in this letter. My colleagues and I would be more than pleased to discuss these or any related issues with the Bill. In the first instance please contact Nicci.Wood@waternz.org.nz.

Ngā mihi nui



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Appendix
Proposed changes to text of Water Services Legislation Bill

OPTION 1

Land access

We propose the amendment of clause 200(2) to as follows:

(2) A water services entity ~~may~~ must not exercise the power to carry out work specified in subsection (1)(a) unless it has ~~only~~—

(a) ~~with~~ obtained the prior written consent of~~, and in accordance with any reasonable conditions imposed by,~~ the owner of the land; or

(b) if it ~~has obtained an order under~~ complied with the requirements of section 203~~4~~ ~~authorising it to carry out the work~~."

Consequential amendments to delete clause 203 and replace with the following new clause as follows:

Section 203

(1) For the purposes of section 201(2)(b) the requirements are as follows:

(a) the water services entity must give notice in writing to the owner and occupier of the land of the intention to carry out the works in accordance with section 201:

(b) if, within 20 working days after the notice is given, the owner serves on the water services entity a written objection to the proposed works, and their reasons for objecting, the water services entity must—

(i) appoint a day for hearing the objection; and

(ii) give to the objector reasonable notice of the day, time, and place of hearing so as to enable the objector to attend the hearing:

(c) the water services entity must hold a meeting on the day appointed, and may, after hearing any person making any objection, if present, determine—

i) to abandon the works proposed; or

(ii) to proceed with the works proposed, with or without any alterations that the water services entity thinks fit.

(2) A person who is aggrieved by a determination of the water services entity under subsection 1(c) to proceed with the works proposed (with or without alterations) may appeal to the Environment Court against the determination within 10 working days after the date of the determination.

(3) Pending the decision of the court on the appeal, the water services entity must not proceed with the works.

Consequential amendments to delete clauses 200(3) and 204 to remove reference to conditions.

OPTION 2

200 Power to carry out work in relation to water services infrastructure on, over, or under land

…

(2A) Notwithstanding subsection (2), unless an application is made evidencing otherwise to the District Court's reasonable satisfaction, subsections (2), (3) and (4) shall not apply to a water services entity exercising its powers under subsection (1) in relation to any water services infrastructure built at a depth based on expert advice.

203 Application to ~~District Court~~ [Three Waters Environment Court Commissioner] to carry out work

...

(2) The water services entity may apply to the ~~District Court~~ [Three Waters Environment Court Commissioner] for an order under section 204 authorising it to carry out the work.

(3) The water services entity must give the owner of the land at least 10 working days' notice of its intention to apply to the ~~District Court~~ [Three Waters Environment Court Commissioner] under this section.

203A [Three Waters Environment Court Commissioner]

(1) This section sets out the role of the Three Waters Environment Court Commissioner.

(2) The [Three Waters Environment Court Commissioner] shall be an Environment Court Commissioner or Commissioners appointed to sit without an Environment Court Judge under section 280 of the Resource Management Act 1991 to consider applications under section 203.

(3) Where any matter comes before the Three Waters Environment Court Commissioner for determination, the Three Waters Environment Court Commissioner—

(a) must first consider whether an attempt has been made to resolve the matter by the use of mediation; and

(b) must direct that mediation or further mediation, as the case may require, be used before the Three Waters Environment Court Commissioner investigates the matter, unless the Three Waters Environment Court Commissioner considers that the use of mediation or further mediation—

(i) will not contribute constructively to resolving the matter; or

(ii) will not, in all the circumstances, be in the public interest; or

(iii) will undermine the urgent or interim nature of the proceedings; or

(iv) will be otherwise impractical or inappropriate in the circumstances; and

(c) must, in the course of investigating any matter, consider from time to time, as the Three Waters Environment Court Commissioner thinks fit, whether to direct the parties to use mediation.

(4) Where the Three Waters Environment Court Commissioner gives a direction under subsection (1)(b) or subsection (1)(c), the parties must comply with the direction and attempt in good faith to reach an agreed settlement of their differences, and proceedings in relation to the request before the Three Waters Environment Court Commissioner are suspended until the parties have done so or the Three Waters Environment Court Commissioner otherwise directs (whichever first occurs).

203B Appeal to the Environment Court

(1) Any party may, within 15 working days of the exercise of any power under this section, apply in writing to an Environment Judge for leave to make an application for a review of the exercise of that power by a fully constituted Environment Court.

(2) If leave is granted by an Environment Judge, the party may, within a further 7 working days, apply in writing for a review of the exercise of that power by a fully constituted Environment Court.

(3) The Environment Court, on any such review, may substitute or set aside the Environment Commissioner's decision and make such further or other orders as the case may require.

203C Powers of police

(1) Upon receipt of request in writing from the relevant water services entity, the New Zealand Police shall have the power to enforce an order from the Three Waters Environment Court Commissioner or the Environment Court."

New subsection 200(7) to provide examples of conditions that are not reasonable, as below:

"For the purposes of section 200(2) and (3), a condition is unreasonable if, (without limitation) the owner —

(a) requires the payment of an amount or other consideration, other than compensation determined in accordance with section 218; or

(b) imposes on the water services entity a condition or precondition which:

(i) requires reinstatement of the land or improvements on it which would result in betterment;

(ii) imposes conditions which are more onerous or contradict any conditions of a resource consent (if held) for the works or the water services infrastructure;

(iii) imposes restrictions on future access to or use of the water services infrastructure by the water services entity;

(iv) requires the works take place during particular times or dates which cannot reasonably practicably be complied with by for the water services entity."