

Ko te mātāpuna o te oranga whānui kei waenga o ngā tohu o te wāhi ngaro.

Kia tarehua tonu a papa horonuku kia tukua ngā kupu maioha ngā tini roimata ki te maha kua hoa atu ki tua o pae maumahara ki te huihuinga tūturu motuhake mō tātou te ira tangata.

Anei rā ētahi pitopito aronga mai i te wā kāinga nei, kāti ake.

Submission on economic regulation & consumer protection for three waters services in New Zealand.

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TO WHOM IT MAY CONCERN

Contextual Introduction

I have been actively engaged with a *Technical Work Group* [TWG] comprised of members from Mana Whenua entities within the Tāmaki region. TWG is also ably supported by staff from Auckland Council & Watercare Services, plus third-party consultants. That engagement has been primarily based upon my role as Chair of the Mana Whenua Kaitiaki Managers Group, an operational forum between Mana Whenua of the Tāmaki region and Watercare Services Ltd. This group has been active since 2012.

A key focus of the TWG has been an analysis of the *Discussion Paper: Economic Regulation and Consumer Protection for Three Waters Services in New Zealand (27 October 2021)* Ministry of Business Innovation & Employment (MBIE).

I am an uri of Ngāti Whātua & Ngāpuhi with direct links to specific hapū & marae of both of those iwi groups. This submission is made on behalf of our immediate whānau as well as the hau kāinga of Ngāti Whakamaunga in Pakotai, Mangakāhia, Northland. This particular submission **must not be interpreted as representing the views of any other group.**

I will also state that we could not gain an advantage in trade competition through this submission. Where others make similar submissions we would also consider joint presentations for any subsequent deliberations.

Nature of Submission

We propose matters for due consideration related to economic regulation as well as consumer protection for the proposed three waters services particularly with regard to a Northland context.

The narrative of oranga relates how the Māori past was shaped by a holistic view of oranga, oranga Māori, and charts how Māori responded to challenges to it, seeking out opportunities to maintain or nurture a state of oranga based on the markers of identity, whenua and uri. Individual wellness was not guaranteed where such markers were dysfunctional, as it was one's tātai that knowledge about te ao Māori, uri, whānau, hapū, iwi, marae was founded. The most intimate social unit within which uri learned about then practiced the reciprocity associated with giving care, nurturing, as well as the provision of security.

Oranga was and still is a way of understanding and practising wellness that has struggled under the pressures of colonization to survive in theory and practice. There is indeed a state of Māori unwellness, non-oranga, mate – frame it up as *unconscious bias* such inequities generates a massive amount of financial as well as judicial resource.

There are narratives of oranga in the nineteenth century that relate how our tupuna our whēinga strove to maintain control of their oranga while the principle foundations of their iconic identity markers were disrupted, undermined, then marginalised by the state – all in the name of *we are one people*. What followed in the twentieth century are the attempts to find space for oranga through autonomous institutions.

Tenacity, resilience, persistence in the face of tremendous adversity have generated a continuous quest for options that empower cultural enrichment. It is critical to state that oranga was and is not a static conceptual framework or a completely closed system of knowledge. It was and is most definitely a dynamic living philosophy that could adjust over time to new environments. Oranga was also open to new technologies and ideas that enhanced the oranga of uri.

Responses

1.0 Key Points

It is strongly supported that provision be made for economic regulation and consumer protection safeguards for all three waters services and be applied to the Water Services Entities [WSEs].

Water is a taonga and a living entity. Our expectation is that the three waters are managed accordingly and in particular that:

- (i) Effect is given to the principles of Te Tiriti o Waitangi¹ with special attention given to both Article 2 & Article 3.
- (ii) It recognises our water sovereignty as guaranteed to us under Te Tiriti o Waitangi including making specific provision for equitable access to decision-making and representation.

¹ Note: The use of *Te Tiriti o Waitangi* or *The Treaty of Waitangi* with recognition that different interpretations apply to the Māori and English versions respectively, and that the Taumata Arowai – the Water Services Regulator Act 2020 and the exposure draft of the Water Services Entity Bill refer to both.

- (iii) Specific provision is made for our rangatiratanga, manaakitanga, kaitiakitanga, and mana motuhake.
- (iv) Effect is given to Te Mana o te Wai, and recognition of te mauri o te wai by the regulatory framework.
- (v) A holistic approach to outcomes applies with recognition of the four dimensions of oranga: inclusive of economic, social, cultural, and environmental, as well as sustainability, and that the approach is not restricted to a narrower fiscal outcome focus.
- (vi) Outcomes are sustainable, respond to climate change and natural hazards, and provide for water supply security and resilience.
- (vii) Social equity applies, the vulnerable are protected, and consumer voice and rights are provided for as part of the protection of consumer oranga.
- (viii) Specific consideration is given to avoiding inequalities for Māori whānau, hauā, iwi and communities, and for marae and papakāinga.
- (ix) Water is a special case for which a bespoke model and response needs to apply that recognises our values and associations as hau kāinga to ensure that such tikanga including ngā kōrero o te wā kāinga is given full expression.
- (x) Validated uri Māori cultural expertise and representation should be integral to the provision for economic regulation and consumer protection.
- (xi) We encourage the engagement of those uri Māori with significant experience, investment and commitment in the management of stormwater within the decision-making as well as the quest for equitable outcomes.
- (xii) There are many management entities with regulatory roles including Waka Kotahi, Auckland Transport involved in three waters management, particularly in terms of stormwater. Co-ordinated, effective and efficient responses are needed, including clarity and alignment with the regulatory role of Taumata Arowai and having regard to the transition and transfer of stormwater assets.
- (xiii) It is a Three Waters Reform, but there is only one water with reference to the whakapapa o te wai and all aspects of the life cycle. The three waters should be considered together with an equitable and appropriate priority applied to all.
- (xiv) Transparency and access to information, responsiveness and accountability are provided for.
- (xv) Innovation, responsiveness to innovation, efficiency challenges, best practice and positive change are enabled through the regulation.
- (xvi) Our manaakitanga and kaitiakitanga is not restricted to people. The reform needs to address water quality and quantity in terms of indigenous biodiversity and the health and oranga of our taonga species that live in the aquatic and marine environments. This in turn affects our oranga our well-being.
- (xvii) Provision needs to be made to audit and monitor the performance of the regulator.

It is requested that the purpose and framing of the legislation for economic regulation and consumer protection gives effect to Te Tiriti o Waitangi and these key points including Te Mana o te Wai, is bespoke in its application to all three waters and; its application is much broader in scope than is currently applied to the telecommunications and electricity sectors.

With the above context we make specific responses to selected questions. Feel free to engage directly should there be any need for further dialogue.

2.0 Responses to Selected Discussion Paper Questions

Economic regulation	
1	<p><i>What are your views on whether there is a case for the economic regulation of three waters infrastructure in New Zealand?</i></p>
	<p>We agree with the Government’s view that there is a strong case for economic regulation of the three waters infrastructure. We refer to our key points in Section 1.0 above and make the following additional comment:</p> <ul style="list-style-type: none"> • It is essential to specify delivery outcomes and provide for accountability and transparency; • Reference to Te Mana o Te Wai should be carried forward into economic regulation and consumer protection consistent with the Taumata Arowai empowering legislation and the National Policy Statement-Freshwater Management; • The legislative scope and purpose should recognise the special status of water as a taonga and a living entity and should not be restricted to fiscal outcomes; • The regulation should ensure equity, sustainability and future-proofing for both rural and urban marae in particular; • Regulation should have a broad scope in regard to the social, cultural, economic, environmental oranga, a sustainable focus and provision for equity and security water supply; • The link between economic and environmental performance should be secured; • A bespoke model is required to apply to the three waters including provision for 50 / 50 uri Māori and other representation; and, • Monitoring and compliance requirements should include reference to cultural indicators that ensures expertise is available to apply full expression to an Ao Māori lens.
2	<p><i>What are your views on whether the stormwater networks that are currently operated by local authorities should be economically regulated, alongside drinking water and wastewater?</i></p>
	<p>We agree that stormwater networks should be economically regulated. We have long-standing concerns about the management of stormwater, and through the reforms, we are actively seeking that innovative solutions apply to reduce stormwater discharge, improve the quality of discharges into receiving environments, and improvement of the management of stormwater generally. We comment:</p>

- The services provided by the WSEs as suppliers should all be regulated;
- The scope and purpose of the legislation proposed and giving effect to Te Mana o Te Wai should apply to stormwater – a much wider focus than, for example, flood risk management;
- Recognition and proactive responsiveness to the effects and potential effects of climate change and coastal hazards;
- Provision for monitoring and compliance through regulation is supported;
- Innovation should be a feature in regulating stormwater including efficiency challenges, the use and reuse of stormwater, and an outcome focus that is beneficial for receiving environments;
- Specific attention is required to improve the treatment interventions for stormwater and making provision for green outfalls and the maintenance of stormwater infrastructure;
- Performance measures should support the four oranga [social, cultural, economic & environmental] & recognise hau kāinga values as well as cultural indicators for environmental quality;
- There should be water clarity, it should be safe to swim in, and we should be able to exercise our practices including mahinga kai & kohinga rauemi;
- There are multiple suppliers of stormwater services and complexity in terms of how regulation may apply. We therefore support the use of charters [Question 44] as one means of co-ordination;
- Stormwater does not have identifiable customers in the same way as drinking water and wastewater and that presents a risk for underfunding and underinvestment. Provision therefore needs to be made to assure there will be a sufficient level of investment to manage the quality of stormwater services;
- We refer to Discussion Paper Cl. 256 that *'both Taumata Arowai, the economic regulator, and the consumer protection regulator will have responsibility for different aspects of the quality of water services received by consumers.'* [Cl.256] And we support:
'... the development of a 'regulatory charter' that sets out the system objectives, roles of key players, and how the system objectives will be delivered and monitored. Strategy, delivery, and performance/risk management functions are often advanced by a 'council of regulators' or similar coordination arrangements that involve key policy and regulatory bodies meeting regularly to share information about system performance and discuss system issues that require coordination across agencies.' [Cl.258].

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What are your views on whether economic regulation should apply to community schemes, private schemes, or self-suppliers? Please explain the reasons for your views.

We agree that *'...that the application of economic regulation should be restricted to the new Water Services Entities and not apply to community schemes, private schemes, or self-suppliers.'* [Cl. 63]. We comment that:

- We do not see a cost / benefit or compliance cost justification to apply economic regulation, for example to marae and private Māori land, where owners and consumers are the same people;

- Compliance support is in any case likely to be needed for some marae in meeting regulatory requirements through Taumata Arowai. Additional economic regulatory compliance controls are not seen as beneficial;
- While regulation should only apply to the WSEs initially, there should be provision adaptation whereby it may be appropriate or there are specific reasons to include others;
- Provision for equity is an important determinant. All too often we see private schemes e.g. wai extracted with disregard to the taonga that it is. Manaaki does not come into the equation for example when we run out of water at the marae with private schemes which have created their own water dam selling water for profit. That is clear inequity. We are very clear to keep the WSE and regulators independent but as noted earlier the same 50 / 50 representation arrangement is required for a true Te Tiriti o Waitangi partnership;
- Equity in support for infrastructure provision and the sustainability of infrastructure for marae and papakāinga is required and provision made for this to occur as an outcome of the reform;
- Water supply resilience is a serious issue for some marae where there may be water source or catchment area constraints with a view to having access to other water sources as may be required. Those marae that do not have sustainable water infrastructure are compromised in times of droughts that have become more frequent. Water, in most cases, has to be purchased;
- The importance of supply resilience is not restricted to marae. Water security is critical for all life-forms that includes the orange of all facets of uri. whānau, hapū, iwi lifestyles which also applies to the wider community; and,
- Preferential water allocation to private schemes is not supported. In this context, water or access to water **MUST** not be treated as a tradable commodity.

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A) What are your views on whether the purpose statement for any economic regulation regime for the water sector should reflect existing purpose statements in the Telecommunications Act and Part 4 of the Commerce Act given their established jurisprudence and stakeholder understanding?

B) What are your views on whether the sub-purpose of limiting suppliers' ability to extract excessive profits should be modified or removed given that Water Services Entities will not have a profit motive or have the ability to pay dividends?

C) Are there any other considerations you believe should be included in the purpose statement, or as secondary statutory objectives?

D) What are your views on how Treaty of Waitangi principles, as well as the rights and interests of iwi / Māori, should be factored into the design of an economic regulatory regime for the three waters sector?

We refer to our comments in **Section 1.0** and in relation to **Question 1** above. We further comment:

- Purpose wording is usually in terms of the long-term benefit to consumers. This should not be interpreted narrowly on financial terms, rather it should recognise and provide for interests which are holistic in terms of social, cultural, economic and environmental oranga;
- On that basis, the existing purpose statements in the Telecommunications Act and Part 4 of the Commerce Act are insufficient thus excluding the use thereof as a start point;
- There is no mandate to achieve profit so the reference to preventing excessive profit is inappropriate. The focus should be on viability, quality of service, and sufficient funding to achieve outcomes in terms of the previously stated oranga. This is consistent with the purpose of the Three Waters Reforms. Water take for profiteering has been a contentious issue for decades. Water should not, therefore, be treated as a commodity;
- We have outlined proposed purpose statement inclusions in our reply to **Question 1** above. We note that a bespoke purpose statement will need to be developed to ensure the description of wai Māori as a living entity, is our taonga and is our life force;
- Implementation of Te Tiriti o Waitangi, as well as the rights and interests of uri Māori should be integral to these reforms. The principle of manaaki applies to all humanity *kia kua tētahi e mahue ki waho – no one is excluded*. Statutory and regulatory support for the reforms should have consistency including giving effect to the principles of Te Tiriti o Waitangi and giving effect to Te Mana o Te Wai;
- The principles of the Treaty of Waitangi have been determined by Courts and processes other than tikanga-based processes. It is Te Tiriti o Waitangi itself that needs to be implemented;
- The orientation of the Discussion Paper is on the needs of human beings. There needs to be consideration of water quality as well as water quantity necessary to support indigenous biodiversity that also provides for our taonga species that need that same water. In turn, the health and oranga of our taonga species within the water-based ecosystem also determines the health and oranga of our people in fact of all humanity;
- The significance for water generally as well as to uri Māori should be recognised as a matter to be proactively identified and addressed through regulation. In this context the analysis of regulatory proposals should assess potential positive or negative impacts of regulation on uri Māori where existing as well as any future Treaty settlements must be enacted; and,
- Effect should be given to Te Mana o te Wai as well as enhancing te mauri o te wai through active responses. Further consideration is needed as to how these aspects are addressed at the regulator level rather than leaving it with WSEs, councils and Taumata Arowai.

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Who do you think is the most suitable body to be the economic regulator for the three waters sector? Please provide reasons for your view.

High importance is given to the appointment of the economic regulator and in particular to respond to the holistic and broader scope of purpose that we have referred to **Section 1.0** and **Question 1**. It needs to have the necessary expertise in relation to the taonga and living entity status of water. We make the following comments:

- The Government refers to three options for the role of economic regulator including the Taumata Arowai, the Commerce Commission [potentially with a Water Commissioner], or a new water economic regulatory authority. The Discussion Paper notes that high performing

economic regulators are independent, transparent and expert; are accountable and share information. [Cl. 141];

- In regard to any of these options we submit that there are at least five requirements:
 - (i) There needs to be clarity on how the role of the Taumata Arowai as a service regulatory authority relates to and interacts with economic regulation.
 - (ii) Specific subject matter expertise is required including mātauranga and tikanga mai i te ao Māori pertaining to water and on how to give effect to Te Mana o Te Wai.
 - (iii) Provision needs to be made for 50% uri Māori representation.
 - (iv) We have indicated that water is a special case and that the regulatory response is appropriately different than that for telecommunications or electricity for example.
 - (v) There is precedent and existing co-governance models that are in place between the Crown and uri Māori that can be considered including those that apply within Tāmaki Makaurau. One current example specific to Tāmaki Makaurau is the Tupuna Maunga Authority.
- With this context, and as identified in the Discussion Paper, there are pros and cons to the different economic regulator options;
- We take a long-term view and are mindful of the significance of water and scale of this reform. In this regard, a new economic regular presents advantages as a bespoke and designed for purpose model as a non-Crown entity. We draw attention to our framing in this regard in **Section 1.0** and in our response to **Question 1**. A dedicated regulator [independent non-Crown entity could be established to have good water sector capacity including making provision for 50% uri Māori representation. We observe that the Taumata Arowai does not have economic regulation expertise and that the Commerce Commission does not have water sector expertise;
- We question the Discussion Paper view that Taumata Arowai as a Crown entity does not have the necessary independence to assume the economic regulation role. This option could be further investigated and could apply subject to statutory protections and principles being applied with particular regard to accountability, public reporting and transparency, and its capacity to meet the five requirements listed above. We support that Taumata Arowai is a service regulator and has requirements in place to give effect to Te Mana o te Wai and must have capability in regard to Te Tiriti of Waitangi and its principles and perspectives of Māori and tikanga Māori; and,
- We generally do not support the option of the Commerce Commission and consider that the legal and regulatory capacity that it could otherwise provide could also be achieved through a new bespoke economic regulatory authority.

Consumer protection

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- A) ***What are your views on whether additional consumer protections are warranted for the three waters sector?***
- B) ***What are your views on whether the consumer protection regime should contain a bespoke purpose statement that reflects the key elements of the regime, rather than relying on the***

purpose statements in the Consumer Guarantees Act and Fair Trading Act? If so, do you agree with the proposed limbs of the purpose statement?

Regulatory provision for consumer protections is warranted and essential. Provision should include a legislative statement of the objectives of the consumer protection regime. The natural monopoly means that consumers cannot switch to another supplier. We comment:

- Uri Māori values can inform the objectives of a consumer protection regime;
- Additional consumer protections are a priority and especially for water. A driver for the reform was drinking water being contaminated which should have been prevented at that time and certainly in the future;
- We require equitable services, trust and confidence in these WSE and the economic regulator for future generations;
- Elements of objectives which are supported include: enhancing the quality of water services, consumer voice, consumer redress when standards not met, and transparency of charges for consumers [Cl.166];
- A consumer protection regime should have a bespoke purpose statement with principles to be recognised through consumer protection including:
 - Water as a taonga;
 - Manaakitanga;
 - Water with te mana o te wai is paramount it is our life force, and there would be no life without water;
 - Te mauri o te wai – must be respected. Where compromised, the wai must be improved and enhanced;
 - Water use and allocation should be based on fair-equity of access to all people;- and,
 - Avoid inequalities and deprivations with specific regard to Māori communities.
- Provide for *Lifeline legacies*. Access to water is one of these. Worst case scenario modelling is required to provide for security of support such as in the case of drought. *Lifeline legacies* is about recognising the need for water to maintain our cultural way of life, and providing lifeline services to the wider community;
- In this context, provision for resourcing is necessary to assure that water security is provided for marae, to recognise uri Māori rights and interests, and to protect vulnerable communities. There should be supported access to recourse and remedy where these purposes are not being achieved; and,
- Access and management of water allocation is important in terms of equity and water security. This can be particularly important in rural areas where marae are reliant on aquifers.

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What are your views on whether minimum service level requirements should be able to vary across different types of consumers?

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What are your views on whether the regulatory regime should include a positive obligation to protect vulnerable consumers, and that minimum service level requirements are flexible enough to accommodate a wide range of approaches to protecting vulnerable consumers?

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What are your views on how Treaty of Waitangi principles, as well as the rights and interests of iwi / Māori, should be factored into the design of a consumer protection regime for the three waters sector?

Minimum service levels for consumers are required, including the ability to tailor provisions such as for vulnerable consumers, and to recognise the rights and interests of uri Māori. Responsiveness and flexibility to tailor approaches should be built into the regime. Provision should be made to give effect to the principles of Te Tiriti o Waitangi as integral to the regime. We refer to our response to **Question 10D** above which addresses the same question in relation to the economic regulation. We further comment:

- Analysis is needed as to the needs of Māori communities and this is not reflected in the Discussion Paper;
- We draw attention to and support the [Cl.188] quote in Cabinet Paper Three:

‘...the rights and interests of Māori as consumers of water services need to be considered, predominantly under Article Three of the Treaty. There are good reasons for general mechanisms of consumer protection and advocacy to specifically address the interests of Māori, particularly as they relate to historic inequity and the specific interests of Māori who are not mana-whenua within the boundary of a specific entity, including urban Māori.’
- Apply the principle of manaakitanga;
- Provide protections for vulnerable consumers;
- Recognise the rights and interests of uri Māori. As an Article 3 matter, ensuring equitable outcomes and avoiding unintended impacts on uri Māori and the environment is essential. Article 2 rights require active protection of water as a taonga;
- There should be a minimum service level requirement that takes into account western science and kōrero tuku iho indicators and monitoring;
- Provision should also be made for stricter standards to apply as may be appropriate in the local context of the WSEs;
- Our whānau hauā, marae, whānau living in poverty, and our most vulnerable need to be assured that their water supply will be sustained. A wide range of approaches to protecting our most vulnerable should apply; and,
- It is imperative that Te Tiriti o Waitangi rights and interests of uri Māori are factored in without compromising current or future Treaty settlements.

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What are your views on whether the regulator should be required to incentivise high-quality consumer engagement?

Yes it must. A major issue for us has been lack of access to decision-making processes. The reforms need to address this at every level including through consumer protections and representation. The voice of uri Māori needs to be heard at the right level, at the right time. The supplier and regulator need to be responsive to that. We further comment:

- The principles of manaakitanga and kaitiakitanga apply;

- The WSEs need to be incentivised to be effective in their engagement with Mana Whenua, the wider community, and stakeholders; and,
- Clarity is needed on how high quality engagement is supported such as in regard to our marae and papakāinga;

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Do you consider that there should be special considerations for traditionally under-served or vulnerable communities? If so, how do you think these should be given effect?

We apply the principle of manaakitanga and submit that the supplier should give special consideration to underserved all vulnerable communities. Regulatory provision should put in place protection mechanisms that actively enable participation including dispute resolution processes. *‘Māori and Pasifika communities are also over-represented in these vulnerable populations in New Zealand.’* [Cl. 237]. Additionally we comment:

- Support may be required to provide uri Māori due access to dispute resolution and support, financial and in kind, to participate fairly in regard to consumer protections that apply;
- Ngā kōrero tuku iho needs to be recognised with particular regard to giving effect to Te Mana o Te Wai and local statements which may apply and must be given effect to by suppliers;
- There are far too many instances where our communities have been treated unjustly in terms of Te Mana o te Wai; and
- There is opportunity through regulatory reform to correct past and contemporary events.