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Commerce Commission

Wellington

Via email: wai@comcom.govt.nz

Tēnā koutou katoa

Economic regulation of Tiaki Wai – Consultation on recommending performance requirement regulation

Water New Zealand (Water NZ) welcomes the opportunity to submit on the Commerce Commission's consultation on whether to recommend to the Minister of Commerce and Consumer Affairs that performance requirement regulation be imposed on Tiaki Wai.

Water NZ is a national not-for-profit organisation which promotes the sustainable management and development of New Zealand's three waters (drinking water, wastewater and stormwater). Water NZ is the country's largest water industry body, providing leadership and support through advocacy, collaboration, and professional development. Its ~3,400 members are drawn from across the water management industry, including council-controlled organisations, regional councils and territorial authorities, consultants, suppliers, government agencies, academia, and scientists.

Water NZ supports the objective of improving long-term sector performance through regulations and acknowledges that performance requirement is a regulatory tool that, in the right circumstances, can produce better outcomes for consumers than transparency and information disclosure alone. We recognise that the Commission has identified a credible and material risk profile for Tiaki Wai and that appropriately designed performance regulation can play an important role in providing incentives to invest in improving service delivery outcomes.

However, Water NZ recommends that the consultation would benefit from greater clarity regarding the potential scope, application, operation, and implications of the proposed performance requirements. Greater visibility of these matters would enable a more meaningful assessment of whether the eventual performance requirements will be fit for purpose, proportionate to the risks identified, and capable of achieving the outcomes that would justify their imposition.

While this consultation is directed at the risk profile identified for Tiaki Wai, the regulatory approach adopted here has the potential to establish patterns and precedents with

implications for the wider water sector. This consideration is central to Water NZ's submission position on the issues we raise.

This submission addresses the following issues:

- The process concern arising from the sequencing of consultation on whether to impose the regulatory power before the content of any requirements is known
- Insufficient visibility of the proposed performance requirement regime; and
- Cumulative compliance burden and the need for a holistic proportionality assessment.

Detailed feedback on each of these issues is set out below.

1. Insufficient visibility of the proposed performance requirement regime

The consultation paper is explicit that this consultation concerns whether performance requirement regulation should be imposed on Tiaki Wai, rather than the content of any future requirements. Water NZ acknowledges that sections 57G and 57H of the Commerce Act establish this two-step process. However, the statutory test the Commission must apply under section 57H(1)(a) is a comparative one of whether performance requirement regulation, in addition to information disclosure regulation, would better promote the purpose of Part 4 of the Commerce Act than information disclosure regulation alone. It is difficult to meaningfully undertake this comparative assessment without visibility of what the performance requirements would actually involve in practice.

The consultation paper recognises that performance requirement regulation is distinct from delivery reporting, and that setting delivery requirements in specific areas would create stronger incentives for Tiaki Wai to act than disclosure obligations alone. However, acknowledging that delivery requirements create stronger incentives than reporting does not, of itself, establish that the specific requirements likely to be imposed in this case would better promote the purpose of Part 4 of the Commerce Act. The comparative question requires some understanding of what those requirements would target, how they would be structured, and what outcomes they are intended to achieve, none of which are available in the consultation document.

While the Commerce Act sets out in schedule 7, clause 19(4) what a performance requirement may include, the consultation document does not indicate where within that broad scope the Commission intends to focus in the case of Tiaki Wai. The consultation paper provides a single illustrative example at paragraph, namely “*mandating delivery of a specific information system by a specified milestone date,*” but a single example does not substitute for guidance on the Commission's intended focus. The broad nature of the statutory definition makes visibility of the intended application of the power particularly important for interested parties to undertake the assessment.

Meaningful assessment of the proposed regime requires visibility of at least the broad parameters within which the power is likely to be exercised in this instance, the types of matters under consideration, the intended regulatory outcomes, and the anticipated scope of application. This information will allow interested parties to adequately assess proportionality, feasibility, compliance burden, cost impacts, implementation risks, or the potential for unintended consequences.

Recommendation

Water NZ recommends that the Commission provide indicative parameters regarding the categories of performance requirements likely to be considered should performance requirement regulation be recommended under section 57H. This need not involve exhaustive detail or binding commitments regarding future requirements. However, the consultation should provide sufficient visibility of the likely scope, operation, and practical implications of the regime to enable comparative statutory assessment to be properly conducted to support informed engagement by affected entities.

At minimum, the Commission should outline:

- the types of matters potentially contemplated for regulation;
- the intended regulatory outcomes;
- the anticipated approach to determining future requirements; and
- how future requirements would be developed, including the role of consultation, information disclosure, proportionality considerations, and interaction with existing regulatory frameworks.

2. Cumulative Compliance Burden and proportionality

Water NZ acknowledges the Commission's assessment that the compliance costs associated with performance requirement regulation are outweighed by the benefits of intervention. However, the consultation paper does not appear to assess those costs within the context of the cumulative regulatory obligations proposed for Tiaki Wai.

Within the first 18 months of establishment, Tiaki Wai will be subject to a substantial and overlapping set of regulatory requirements, including:

- enduring information disclosure regulation;
- Tiaki Wai-specific additional information disclosure requirements;
- performance dashboards and operations and maintenance reporting;
- quarterly fault metrics and delivery reporting;
- an asset management maturity and capability assessment;
- an asset management improvement plan subject to independent verification;
- capital and operating expenditure forecasts subject to independent verification;
- and

- performance requirement regulation, should the Minister accept the Commission's recommendation.

Water NZ is of the view that the cumulative regulatory package should be assessed as a whole, including whether the combined compliance burden, implementation complexity, and operational demands remain proportionate overall.

We note that in the additional ID consultation, the Commission carefully considered whether more extensive disclosure requirements would risk diverting resources away from core establishment and service delivery functions. Water NZ is of the view that the same proportionality lens applied to the ID package would be equally valuable when assessing the broader regulatory package proposed for Tiaki Wai as a whole.

Recommendation

Water NZ recommends that, in considering whether performance requirement regulation should be imposed on Tiaki Wai, the Commission assess the cumulative effect of the broader regulatory package proposed to apply to the entity, including aggregate compliance burden, implementation sequencing, governance and operational impacts, and overall proportionality relative to the identified risk profile.

Water NZ further recommends that the Commission set out, in its final recommendation to the Minister, how it has assessed the cumulative effect of the regulatory package as a whole, including whether the aggregate cost and operational impact on Tiaki Wai and its consumers is proportionate to, and outweighed by, the expected benefits of the combined interventions proposed.

3. Additional important considerations

In addition to the substantive issues addressed above, Water NZ notes that there are several other practical and regulatory considerations relevant to assessing whether performance requirement regulation should be imposed. These matters are important to understanding the likely implications of the proposed regime and should form part of the Commission's overall assessment.

a. Operational Autonomy and the Role of Governance

- Water NZ notes that performance requirement regulation represents a significant form of regulatory intervention within the Commission's broader regulatory toolkit. By enabling the imposition of mandatory performance obligations, the regime has the potential to reduce the operational flexibility available to an organisation to respond and adapt to changing delivery circumstances over time.

- This is a particularly important consideration for a newly established entity operating within a complex infrastructure environment where delivery outcomes may be influenced by factors outside the direct control of the organisation, including contractor availability, capability constraints, supply chain pressures, and broader market conditions. Water NZ notes that the Commission itself has recognised many of these factors as relevant to Tiaki Wai’s delivery context in the additional information disclosure consultation document (paragraphs 3.13–3.15).
- Water NZ considers the degree of intervention represented by performance requirement regulation, and its potential implications for organisational flexibility in a complex and evolving operating environment, are relevant considerations in assessing whether this form of regulation is proportionate and appropriate at this stage.

b. Exit Pathway

- Water NZ notes that the consultation paper does not address the circumstances under which performance requirement regulation would be lifted once imposed, or what criteria Tiaki Wai would need to satisfy to demonstrate that the conditions justifying the regulation no longer apply.
- While the current consultation is focused on whether performance requirement regulation should be imposed, Water NZ is of the view that proportionality over time is also relevant to that assessment. In particular, consideration should be given to whether the regime includes appropriate mechanisms for review, reassessment, or removal where the underlying risks or circumstances supporting the intervention materially change.
- The absence of a clearly articulated pathway for reassessment or removal creates a risk that regulation introduced in response to establishment-phase risks may become entrenched beyond the period for which it is proportionate or warranted.

c. Compliance and enforcement

- The consultation paper also does not address how compliance with any future performance requirements would be monitored, assessed, or enforced in practice. These matters are all relevant to assessing the proportionality and workability of the proposed regime.
- This is particularly relevant given the Commission’s acknowledgement in the additional information disclosure consultation that the costs associated with regulatory compliance are ultimately borne by consumers (paragraph 2.15.3). Water NZ therefore recommends that greater visibility of the likely compliance

and enforcement framework is relevant to assessing whether performance requirement regulation is appropriate and proportionate in this instance.

Concluding remarks

Water NZ supports the Commission's objective of promoting the long-term interests of consumers through well-designed economic regulation. We recognise the seriousness of the risk profile identified for Tiaki Wai and share the Commission's interest in seeing Tiaki Wai establish itself in a way that delivers improved outcomes for Wellington consumers over the long term.

Water NZ also notes that the approach taken in this process has implications beyond Tiaki Wai. As the first instance of performance requirement regulation being considered under the new water services economic regulation regime, the decisions made here are likely to inform how the regulatory toolkit is applied across the sector in future. Water NZ submits that establishing sound process and proportionality principles at this early stage is in the long-term interests of the sector, consumers, and the integrity of the regulatory framework itself.

Water NZ welcomes further engagement with the Commission on the issues raised in this submission and remains available to provide additional information or clarification as needed.



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Water New Zealand