

9.2 WAIMEA COMMUNITY DAM - PROJECT STATUS UPDATE

During the Full Council meeting of 22 October, Councillors agreed that this item be taken in Open Meeting and that the report and its attachments be made publicly available.

Ref Minutes MCN15-10-22

Decision Required

Report To: Full Council
Meeting Date: 22 October 2015
Report Author: Lindsay McKenzie, Chief Executive
Report Number: RCN15-10-12

1 Summary

- 1.1 This is the third of the regular update reports on the Waimea Community Dam Project.
- 1.2 This report covers the Council's decision to require the Waimea Community Dam Company (WCDL) to meet its obligations under the Funding and Support Deed that was agreed in October last year.
- 1.3 Subject to Council agreeing to the draft resolutions in this report, the consents transfer issue under the Funding and Support Deed will be resolved. WCDL has advised that it will transfer the consents to Council on the understanding that Council will agree to subsequently register WCDL's joint interest in them.
- 1.4 The report also presents WCDL's business model and sets out the initial feedback to WCDL on its proposal. The business model has been reviewed by staff and advisers. The initial feedback to WCDL has been signed off by the Council members on the Project Steering Group.
- 1.5 The feedback was that we are positive about having a joint venture (JV) as that is the sort of partnership arrangement that the Council prefers. We also advised that we see significant advantages in a Council Controlled Organisation (CCO) arrangement and are pleased that WCDL can work with that option. There are some challenges. These relate to the robustness and sensibility of the numbers WCDL has proposed; WCDL's ability to meet its obligations; fairness and equality in apportioning capital and operating costs; and consultation.
- 1.6 Given the concerns that have been raised about the Council entering into a million dollar contract with Beca and about consulting fees generally, I have included a report on consulting fee expenses from 1 July 2014 through until 31 August 2015.
- 1.7 As other work streams are on hold there is nothing of substance to report in relation to them.

WAIMEA COMMUNITY DAM - PROJECT STATUS UPDATE

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|---------------------------|
| 2 Draft Resolution |
|---------------------------|

That the Full Council

1. receives the Waimea Community Dam - Project Status Update report RCN15-10-12; and
2. notes that the Waimea Community Dam Company (WCDL) has agreed to meet its obligations under the Funding and Support Deed and transfer the resource consents for the dam to the Council; and
3. instructs the Chief Executive to register WCDL as joint holders of the consents along with the Council forthwith on receipt of the transfer of the consents from WCDL which is to occur within two working days following Council's approval; and
4. agrees to -
 - hold the Council's interest in the consents in trust for the project and not transfer that interest or encumber the consents in any way that would be contrary to the interests of the project provided WCDL gives a reciprocal undertaking ;
 - carry out the work streams required of the consent holder by the consent conditions under the direction of the Project Steering Group or future Project Management Group and meet the compliance costs of the consent holder(s) as a project cost pending a decision on the form of the final consent holding entity;
 - commence work with WCDL on a formal agreement to define the nature of the relationship and partnership, roles, responsibilities of WCDL, the Council and a Project Management Group in relation to the project for adoption by the Board of WCDL and the Council;
 - pay the (approximate) \$70,000 water user levy across to WCDL on transfer of the consents; and
 - not advancing the \$300,000 which was to be available as a loan to WCDL it being mutually agreed that this funding not be pursued; and
5. adopts (subject to any amendments agreed at the meeting) the feedback to WCDL on its proposed business model (paragraph 3.1 of this report).

WAIMEA COMMUNITY DAM - PROJECT STATUS UPDATE**3 Project Status Report****Resource Consents and the Deed**

- 3.1 Council considered a late 'in-committee report' at your 10 September 2015 meeting on WCDL's refusal to meet its obligations under a Funding and Support Deed. That Deed was signed by WCDL and the Council on 3 October 2014. At the 10 September meeting you resolved to –
- 1. advise Waimea Community Dam Limited (WCDL) that WCDL has a contractual obligation to transfer the resource consents for the Waimea Community Dam to the Council, which it must meet; and**
 - 2. instruct the Chief Executive to take the necessary measures to have WCDL meet its obligations under the Funding and Support Deed in relation to the resource consents for the project, if it fails to do so within five working days of receipt notice from the Council; and**
 - 3. agree that WCDL is to receive no funding support from Council other than that committed under the Deed until the obligations in the Deed have been met; and**
 - 4. request that the project work streams be suspended until the obligations in the Deed have been met.**
- 3.2 WCDL's Chairman was advised of the Council's decision on 14 September 2015. Mayor Kempthorne subsequently met company representatives to reinforce the messaging. A meeting of members of the Project Steering Group was held on 24 September 2015 and the following proposal was put to them to try and avoid escalating the issue.
- 3.3 On a without prejudice basis it was proposed that WCDL agree to transfer the resource consents for the Waimea Community Dam to the Council at its Board meeting on 28 September. If it did, I would recommend to the Council's 22 October 2015 meeting that the Council instruct me to register Council and WCDL as joint holders of the consents forthwith. That action by the Council would be taken in the spirit of the future partnership that is intended.
- 3.4 It was proposed that WCDL's decision to transfer the consents would need to be unconditional other than on the Council approving the recommendation to register Council and WCDL as joint holders of the consents and agreeing to -
- hold the Council's interest in the consents in trust for the project and not transfer that interest or encumber them in any way that would be contrary to the interests of the project (WCDL will need to reciprocate) ;
 - carry out the work streams required of the consent holder by the consent conditions under the direction of the PSG or future PMG and meet the compliance costs of the consent holder(s) as a project cost pending a decision on the form of the final consent holding entity;

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- commence work with WCDL on a formal agreement to define the nature of the relationship and partnership, roles, responsibilities of WCDL, the Council and a PMG in relation to the project for adoption by the Board of WCDL and the Council;
 - pay the ~\$70K water user levy across to WCDL but not the \$300K which both parties agree should be not sought/should be taken off the table.
- 3.5 Following Council approval, WCDL would need to have filed the necessary documents within 2 working days.
- 3.6 On Thursday 1 October 2015 Nick Patterson phoned me to say that the company agreed to these terms. Dennis Bush-King advises that the transfers don't present any particular technical or administrative challenges. The pro forma documents have been prepared and sent to WCDL for them to consider and execute depending what you decide.

Structure proposal – Joint Venture

- 3.7 WCDL's options for its business and funding model have been prepared by Northington Partners and Anderson Lloyd. They were received just prior to the agenda for the 10 September Council meeting closing (attached).
- 3.8 Council staff and advisers have now considered WCDL's preferred model and the issues (legal, commercial, financial) that arise. The four Council members on the PSG (Mayor, Deputy Mayor, Councillor Edgar and Councillor Higgins) have also considered the model and its implications. Three of the members met with Council's adviser David Clarke (Russell McVeagh) on 29 September 2015 and agreed on initial feedback to the company. The feedback went the next day.
- 3.9 You will recall that following all of this, Council was to consider the proposal along with staff and advisers' view of it. To assist with that David Clarke will be at your meeting on 22 October 2015 when this matter is discussed. To further assist you we have proposed to WCDL that the PSG and advisers meet before the Council meeting so that you can have the company's perspective on the feedback to consider also.
- 3.10 Here is what the feedback said –

Feedback on WCDL Proposed Structure for Dam Project

The PSG met in late August to hear about WCDL's business model for co-investment in the Waimea Community Dam with the Council. We've since received the information and advice WCDL sought from Anderson Lloyd and Northington Partners about the proposal and the options. As agreed, Council staff and advisers and its members on the PSG have met to consider their feedback to you. That follows. As you'll see we have focused on Diagram B in David Goodman's' letter.

In summary, we are positive about having a JV as that is the sort of partnership arrangement that the Council prefers. We also see significant advantages in a CCO arrangement and are pleased that WCDL can work with that option. There are some challenges that we would like to discuss with WCDL relating to the robustness and sensibility of the numbers; WCDLs ability to meet its obligations; fairness and equality in apportioning capital and operating costs; and consultation.

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The first three of these challenges are ones that all commercial partners in JVs contemplating a major capital infrastructure project must confront. We are committed to working with WCDL to do that and are confident that if we can resolve them then the structure will fall into place.

While we recognise WCDLs desire for a greater role in managing the project through the proposal you put to us for a new Project Management Group, these challenges will need to be discussed and resolved first.

Our plan is to brief the Council on 22 October 2015 on these matters. Ahead of that meeting we would like to have a working session with WCDL and its advisers. That will enable a report to Council on WCDL's ability to address the challenges we are raising and a timeframe for doing so.

Here is a summary of our feedback:

Key structural elements of the proposal you put to us:

- *50/50 JV (DamCo)*
- *DamCo is therefore a CCO*
- *DamCo constructs, owns and operates the dam*
- *DamCo enters into water use agreements with:*
 - *TDC (for TDC urban use requirements)*
 - *WCDL (for irrigators' use requirements)*
- *WCDL in turn enters into water supply agreements with irrigators*
- *WCDL is a cooperative company*

TDC agrees with the structural elements proposed by WCDL:

- *50/50 JV reflects partnering approach to project*
- *CCO addresses PWA processes robustly*
- *Happy for WCDL to form itself as a cooperative company*

Key financial assumptions of the WCDL proposal that we question:

- *Estimated dam cost is \$65M (P50 less \$2M savings)*
- *\$20M equity from each of TDC and WCDL (\$8.7M of WCDL equity is from CIIL loan)*
- *\$8M grants from local/central government*
- *DamCo bank debt of \$17M*
- *Operational/capital funding based on:*
 - *For WCDL: expected initial uptake by irrigators*
 - *For TDC: design capacity (i.e. full uptake of all entitlement)*

The financial elements require further investigation/testing and give rise to challenges in the following areas (some of which can be ameliorated by slight structural changes while others may require alternative approaches to the financing assumptions):

Robustness of financial assumptions

It is a fundamental premise that parties to a JV for a large capital project must have a common and robust understanding and agreement of the underlying financial assumptions. To achieve that, in this case, the following aspects need to be addressed:

- *Commencing the project on a P50 (less \$2M) basis rather than a P95 basis*
 - *Heightens the risk of cost overruns without certainty or clarity on how, or if, they could be met*
 - *Is inconsistent with the original basis for TDC's contribution*

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- *Assumptions on the availability of \$2M cost savings and \$8M grants need to be robustly tested to ensure certainty, or removed from financing model*
- *Not appropriate to treat all incurred costs associated with consents, land and design as sunk costs*
- *Assessment required of Northington's 6.6% interest costs assumption over the long term*
- *Operating costs assumptions will need to be tested*
- *Uptake and pricing assumptions will need to be tested to ensure robustness of WCDL income model*

Confidence in balance sheets

In any JV, each party must have confidence in the ability of the other to have the financial capacity to meet its obligations. In this case:

- *WCDL obtains confidence from TDC's established balance sheet, its statutory powers and the robust consultation process that will precede entry into the JV*
- *TDC needs a level of confidence in WCDL's financial capability, for example by a combination of:*
 - *Confirmed funding received by WCDL from irrigators prior to commencement*
 - *Full funding (including CIIL funding) locked in and not dependent on WCDL compliance / solvency (e.g. no withdrawal of funders on WCDL default provided TDC continues with project)*
 - *Water supply agreements with irrigators assignable to DamCo in the event of WCDL default under JV*

Sharing of capital / operational costs

Apportionment of capital and operating costs must be on an equitable basis between TDC and WCDL:

- *Appropriateness of debt at DamCo level, rather than at shareholder level*
- *Consideration of cost allocation on the basis of:*
 - *Consents; or*
 - *Design capacity*
- *Environmental flow share of costs allocated across extractive users*

Consultation

Given the shift in approach since last consultation, LGA consultation requirements mean TDC will, once an investment ready proposal is developed, be required to consult on:

- *Structural elements*
- *Financing*

Consultancy Costs

- 3.11 It is alleged that Council entered into a \$1M contact with Beca in July this year. That's not so.
- 3.12 In September/October last year Council put of an RfP for professional engineering services to the project works. At that stage it was proposed that the project be rate funded as the TRMP at that stage required the Council to commit to the dam. A CCO was proposed as the vehicle for raising the irrigators cost share. WCDL hadn't got itself resourced at that stage.

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- 3.13 Beca was selected in December (the others in the running were Opus and MWH). Their contact price was \$1.156M. The contract is in 3 separable parts.
 - 1. Cost review – done
 - 2. Procurement – mostly done (not the tendering)
 - 3. Engineer to the contact – not done.
- 3.14 Whether or not Beca provides the services for each separable part is totally the project managers’ decisions. The Council is not committed to use them as engineer to the contract – nor is anyone else. Their price for this part was \$883K. It’s a 3 FTE/3 year commitment from them. Beca (and Bond is in this) has been paid \$238K since July 2014.
- 3.15 Beca know and we know that this part of the contract will only proceed if there is a decision to build. If Beca isn’t engineer to the contract then whoever is responsible (DamCo) will need to procure someone else with equivalent competence.
- 3.16 The estimated consultant fees (greater than \$10,000) for the period 1st July 2014 to 31 August 2015 is detailed below. The Morrison Low fee is the standout that requires an explanation which staff will do at the meeting.

Summary Table:

| | |
|----------------------------|------------------|
| Anderson Lloyd | \$279,180 |
| Beca | \$237,665 |
| Crighton Anderson Property | \$57,810 |
| Fletcher Vautier Moore | \$19,500 |
| Morrison Low | \$316,044 |
| The Property Group | \$68,700 |
| Tonkin & Taylor | \$319,667 |
| Russell McVeagh | \$19,370 |
| Total estimate | 1,317,979 |

Anderson Lloyd

Anderson Lloyd provided legal support for the consent application

| | |
|---------|------------------|
| Consent | \$279,180 |
|---------|------------------|

Deliverables achieved

- Consent granted

Beca

Beca won a competitive tender to provide engineering professional services for three separable portion of work. Risk & cost review, procurement strategy and engineer to contract.

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| Fee proposals that have been accepted by TDC | | Fee estimate | Spend to date |
|--|------------------------------|--------------|------------------|
| Signed December 2014 | Separable Portion 1 | \$98,700 | \$99,965 |
| | Risk and cost investigations | \$66,362 | \$77,887 |
| | Cost report | \$9,500 | \$9,500 |
| Signed May 2015 | Master programme | \$9,135 | \$8,025 |
| | Separable Portion 2 | \$32,985 | \$29,456 |
| | Procurement strategy | | |
| | disbursements | N/A | \$12,822 |
| | | TOTAL | \$237,655 |

Deliverables achieved:

- Risks and cost report
- Master programme
- Procurement strategy

Crighton Anderson Property

| | |
|--|-----------------|
| Land issues relating to property compensation for damage when drilling and geotechnical investigation where undertaken | \$57,810 |
|--|-----------------|

Deliverables achieved

- Compensation agreed with land owners

Fletcher Vautier Moore

Legal advisors

| | |
|------------------------------------|-----------------|
| Legal review and advisory services | \$19,500 |
|------------------------------------|-----------------|

Deliverables achieved

- Funding and support agreement

Morrison Low

Project Management & Governance

Morrison Low were officially brought onto the project in January 2015 to fast track the establishment of the project framework in lieu of hiring additional council staff. Previous to this they had been involved on the panel for selection of professional consultancy services for the project. Their original fee proposal (signed 28 January 2015) comprised three separable portions excluding disbursements.

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| | | Fee estimate | Spend to date |
|------------|--|-------------------------|----------------------|
| SP1 | Development of an indicative Business case | \$50,000 | \$35,100 |
| SP2 | Lead Council Controlled Organisation work stream | \$50,000 | \$22,680 |
| SP3 | Develop work stream plans Provide external support as requested | Time charge as required | \$170,105 |

In addition to this there have been further portions of work that have been managed as a variation to the original agreement:

| | | |
|--------------|---|----------|
| April - May | Establishing legal advisor to the project, tender, interview and briefing | \$32,990 |
| April - June | Project support | \$40,000 |

From July 2015 onwards it was agreed reduce their involvement

| | | |
|-------------|---------------|------------------|
| July 2015 | Total invoice | \$8,940 |
| August 2015 | Total invoice | \$6,229 |
| | Total | \$316,044 |

Deliverables achieved:

- Project framework and governance structure established
- Workstream plans in place
- Establish Terms of Reference for Project Management Group, Project Board and Project Steering Group
- Development of draft project brief and project plan
- Regular attendance at Project meetings
- Business Case (Part A) framework based on Treasury's Indicative Business Case guidelines
- Strategic project support

Tonkin & Taylor

Tonkin & Taylor are the technical lead for Dam design

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|---|------------------|
| Construction design and technical reviews | \$319,667 |
|---|------------------|

Deliverables achieved

- Dam design to 85% complete
- Technical support for Resource Consent application

WAIMEA COMMUNITY DAM - PROJECT STATUS UPDATE
Property Group

Managing property negotiations

| | |
|--|----------|
| Land issues and land purchase agreements | \$68,700 |
|--|----------|

Deliverables achieved

- Land purchase agreements are ready to send to land owners

Russell McVeagh

Legal advisors

| | |
|---------------|----------|
| Legal reviews | \$19,370 |
|---------------|----------|

Deliverables achieved

- Advice on TRMP
- Advice on PWA
- Advice on CCO

Goodman Tavendale Reid Law

 Consulting fees prior to 1st July 2014 for

Sum of Amount

| <u>Invoice</u> | <u>Discount / References / Details</u> | <u>Date</u> | |
|--------------------|--|-------------|------------------|
| 15748 | WWAC SERVICES | 15/06/2010 | \$27,476 |
| 15964 | WWAC PROFESSIONAL ATTENDANCE | 6/07/2010 | \$6,576 |
| 16204 | WWAC SERVICES | 16/08/2010 | \$2,332 |
| 16289 | WWAC PROFESSIONAL ATTENDANCES | 9/09/2010 | \$7,554 |
| 16604 | WWAC PROJECT ADVICE | 30/09/2010 | \$3,408 |
| 16947 | RESTRUCTURING ADVISE | 29/11/2010 | \$2,679 |
| 17024 | DAM CO STRUCTURE ADVICE | 20/12/2010 | \$5,855 |
| 17233 | PURHCASE LAND PROFESSIONAL SERVICES | 31/01/2011 | \$1,578 |
| 17254 | PREP MARCH COMMITTEE MEETINH | 13/03/2011 | \$4,264 |
| 17385 | SERVICES | 29/04/2011 | \$5,639 |
| 17424 | WAIMEA COMMUNITY DAM | 30/05/2011 | \$682 |
| 17425 | STRUCTURE ADVICE | 30/05/2011 | \$2,389 |
| 17829 | STRUCTURE ADVICE | 28/10/2011 | \$6,480 |
| 18226 | SERVICES | 28/02/2012 | \$5,480 |
| 18374 | STRUCTURE ADVICE | 29/03/2012 | \$3,639 |
| 18695 | WAIMEA WATER AUGMENTATION COMMITTEE | 29/05/2012 | \$10,730 |
| 18982 | STRUCTURE ADVICE | 26/07/2012 | \$9,980 |
| 19339 | GOVERNANCE STRUCTURE ADVICE | 27/09/2012 | \$6,985 |
| 61780 | SERVICES | 9/03/2011 | \$3,639 |
| Grand Total | | | \$117,368 |

WAIMEA COMMUNITY DAM - PROJECT STATUS UPDATE**Procurement**

3.17 The programme had previously noted that a registration of interest (ROI) for the main contractor would be issued on 7 October 2015. The 'slow down' in the workstreams and lack of a contracting entity has made this date unachievable. It is intended at this stage to issue an ROI in December.

Agreements with Landowners

3.18 The land purchase agreements are ready to issue to the land owners.

Risks

3.19 There are no additional risks identified to those previously reported.

Funding and Finance

3.20 There are no additional funding and finance matters to those listed above.

Project Management

3.21 Most work streams are in a 'slow down' mode as we awaited the result of the negotiations with WCDL on the transfer of the resource consents.

Dam Consents Compliance

3.22 Nothing new to report.

Communication

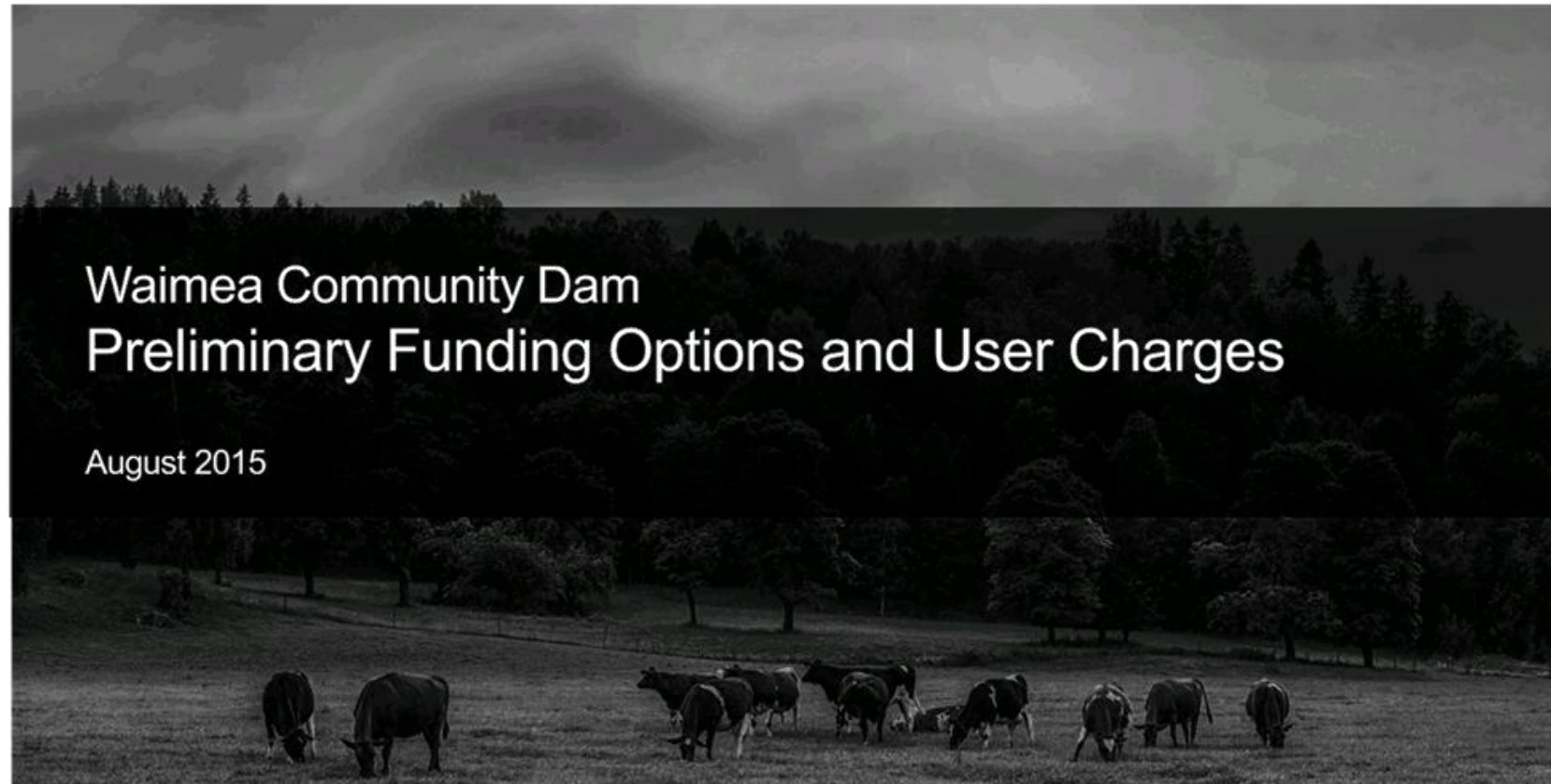
3.23 We have received feedback from some members of the public about the statements and assumptions made in the 'Water for the Waimea Basin' newsletter 18 that was circulated by Waimea Water Augmentation Committee in September. I wrote one article in the newsletter. It's been difficult to explain that although the newsletter was posted out to individual addresses contained in a Council envelope, and staff resources were used to distribute the newsletter, it's not actually a 'Council publication'. We have received criticism from some people about the content of the newsletter and praise from others.

Strategic Relationships and Governance

3.24 Nothing further to add to the report above.

4 Attachments

1. Northington - WCD - Preliminary Funding Options and User Charges (21 August 2015)
2. Anderson Lloyd WCDL Review of Proposed Structure
3. Anderson Lloyd DamCo CCO



Waimea Community Dam Preliminary Funding Options and User Charges

August 2015

Overview of the Waimea Community Dam

The required user charges under all funding options will be critically dependent on the assumed capital cost and uptake profile

Key Base Case Assumptions

- Capital cost of \$65.0m, including inflation and contingency. Construction period of 3 years.
- Total irrigable area of 6,500 hectares, with an initial uptake of 4,500 hectares on day one.
- Equity requirement of \$40.0m, assuming debt funding of \$17.0m and grants of \$8.0m.
- No hydro generation, although still some potential an NPV positive project can be pursued.

Base Case Uptake Profile (Hectares)

Table 1 sets out the base case uptake profile that has been assumed in our three preliminary funding scenarios. Full uptake is assumed in 2032 (year 12).

Table 1: Base Case Uptake Profile

| User | Usage (ha) | Post Construction Period | Uptake Year |
|--------------------------------------|--------------|--------------------------|-------------|
| Tasman District Council | 1,400 | 1 | 2021 |
| Nelson City Council | 500 | 1 | 2021 |
| Waimea Plains Irrigators (1st Group) | 2,600 | 1 | 2021 |
| Total Initial Uptake | 4,500 | | |
| Waimea Plains Irrigators (2nd Group) | 500 | 3 | 2023 |
| Waimea Plains Irrigators (3rd Group) | 500 | 6 | 2026 |
| Waimea Plains Irrigators (4th Group) | 500 | 9 | 2029 |
| Waimea Plains Irrigators (5th Group) | 500 | 12 | 2032 |
| Total Uptake | 6,500 | | |

Framework for Setting Annual User Charges

User charges are separated into:

- Fixed Operating Charges: Annual charge to recoup financing costs associated with the scheme.
- Variable Operating Charges: Annual charge to recover the schemes administration and operating expenses.

Total annual charges are set at the minimum required to cover the costs associated with financing and operating the scheme. For the commercial funding scenario, these costs include an estimate of the required return on equity.

Capital Charges for Late Entrants

We assume that irrigators who join the scheme after it has been commissioned will pay an increased capital charge, nominally based on the additional funding costs of carrying the related infrastructure "overbuild".

Potential Funding Options

We have investigated indicative user charges under three potential scheme funding options

Option 1: 50:50 Irrigators and TDC Ownership

- Total equity contribution of \$40.0m, assuming \$17.0m of debt and government grants of \$8.0m.
- Equity requirement funded by \$20.0m from Tasman District Council ("TDC") and \$20.0m from the Waimea Plains Irrigators ("Irrigators").
- Crown Irrigation Investments ("CII") provides temporary shortfall funding of \$8.7m (out of the \$20m of equity required from the Irrigators), which is repaid in line with the eventual take-up profile.

Option 2: Pro-rata Equity Contribution

- Total equity contribution of \$40.0m, assuming \$17.0m of debt and government grants of \$8.0m.
- Scheme users contribute the same capital contribution per hectare (approximately \$6,155 per hectare).
- CII provides temporary shortfall funding of \$12.3m (out of the \$28.3m of equity required from the Irrigators), which is repaid in line with the eventual take-up profile.

Option 3: Commercial Model

- Total equity of \$30.0m provided by external investor(s), assuming \$27.0m of debt and government grants of \$8.0m.
- Scheme users contribute no capital but pay a higher annual rate per hectare to provide the external investor with a commercial rate of return.
- CII provides temporary shortfall funding of \$12.3m (out of the \$30.0m of equity required from the external investor(s)), which is repaid in line with the eventual take-up profile.

Option 1

50:50 TDC and Irrigator Ownership



Option 1a: Summary Outputs

Key Assumptions

| Assumption | Value |
|---------------------------------|-----------------|
| Full Uptake | 2032 (12 Years) |
| Annual Water Price Increase | 2.00% |
| Debt Funding Cost | 6.60% |
| Repay Debt During Uptake Period | Yes |

Funding Summary (\$m)

| | |
|----------------------------------|--------------|
| Scheme Construction Cost | \$65m |
| Assumed to be funded by: | |
| Grants | \$8m |
| Debt Funding | \$17m |
| Waimea Plains Irrigators (+ CII) | \$20m |
| Tasman District Council | \$20m |
| Total Funding | \$65m |

Forecast Annual Charges

| Assumed Uptake (%) | | 69.2% | 76.9% | 84.6% | 92.3% | 100% |
|---|--------|--------------|--------------|--------------|--------------|--------------|
| Annual Charge per Hectare | FY2015 | FY2021 | FY2023 | FY2026 | FY2029 | FY2032 |
| 1st Take Up Group | \$335 | \$370 | | | | |
| 2nd Take Up Group (FY2023) | \$300 | | \$345 | | | |
| 3rd Take Up Group (FY2026) | \$261 | | | \$318 | | |
| 4th Take Up Group (FY2029) | \$195 | | | | \$252 | |
| 5th Take Up Group (FY2032) | \$150 | | | | | \$206 |
| Variable Charge | \$156 | \$172 | \$161 | \$155 | \$151 | \$148 |
| Total Charge per Hectare (Nominal) | | \$542 | \$505 | \$473 | \$403 | \$354 |
| Total Charge per Hectare (\$2015) | | \$491 | \$401 | \$322 | \$312 | \$303 |

Initial Equity Contribution for Irrigators

| | FY2021 | FY2023 | FY2026 | FY2029 | FY2032 |
|---|---------|---------|---------|---------|---------|
| Annual Increase (%) | | 10% | 15% | 20% | 25% |
| Equity Contribution per Hectare (Nominal) | \$4,348 | \$4,783 | \$5,000 | \$5,218 | \$5,435 |

Option 1b: Summary Outputs (No Debt Repayment Until Full Uptake)

Key Assumptions

| Assumption | Value |
|---------------------------------|-----------------|
| Full Uptake | 2032 (12 Years) |
| Annual Water Price Increase | 2.00% |
| Debt Funding Cost | 6.60% |
| Repay Debt During Uptake Period | No |

Forecast Annual Charges

| Assumed Uptake (%) | | 69.2% | 76.9% | 84.6% | 92.3% | 100% |
|---|--------|--------------|--------------|--------------|--------------|--------------|
| Annual Charge per Hectare | FY2015 | FY2021 | FY2023 | FY2026 | FY2029 | FY2032 |
| 1st Take Up Group | \$310 | \$342 | | | | |
| 2nd Take Up Group (FY2023) | \$290 | | \$333 | | | |
| 3rd Take Up Group (FY2026) | \$250 | | | \$305 | | |
| 4th Take Up Group (FY2029) | \$185 | | | | \$239 | |
| 5th Take Up Group (FY2032) | \$175 | | | | | \$240 |
| Variable Charge | \$156 | \$172 | \$161 | \$155 | \$151 | \$148 |
| Total Charge per Hectare (Nominal) | | \$514 | \$494 | \$460 | \$390 | \$388 |
| Total Charge per Hectare (\$2015) | | \$466 | \$390 | \$312 | \$302 | \$293 |

Initial Equity Contribution for Irrigators

| | FY2021 | FY2023 | FY2026 | FY2029 | FY2032 |
|---|---------|---------|---------|---------|---------|
| Increase (%) | | 10% | 15% | 20% | 25% |
| Equity Contribution per Hectare (Nominal) | \$4,348 | \$4,783 | \$5,000 | \$5,218 | \$5,435 |

Option 2

Pro-rata Equity Contribution



Option 2a: Summary Outputs

Key Assumptions

| Assumption | Value |
|---------------------------------|-----------------|
| Full Uptake | 2032 (12 Years) |
| Annual Water Price Increase | 2.00% |
| Debt Funding Cost | 6.60% |
| Repay Debt During Uptake Period | Yes |

Funding Summary (\$m)

| | |
|----------------------------------|--------------|
| Scheme Construction Cost | \$65m |
| Assumed to be funded by: | |
| Grants | \$8m |
| Debt Funding | \$17m |
| Nelson City Council | \$3m |
| Waimea Plains Irrigators (+ CII) | \$28m |
| Tasman District Council | \$9m |
| Total Funding | \$65m |

Forecast Annual Charges

| Assumed Uptake (%) | | 69.2% | 76.9% | 84.6% | 92.3% | 100% |
|---|--------|--------------|--------------|--------------|--------------|--------------|
| Annual Charge per Hectare | FY2015 | FY2021 | FY2023 | FY2026 | FY2029 | FY2032 |
| 1st Take Up Group | \$340 | \$375 | | | | |
| 2nd Take Up Group (FY2023) | \$300 | | \$345 | | | |
| 3rd Take Up Group (FY2026) | \$261 | | | \$318 | | |
| 4th Take Up Group (FY2029) | \$195 | | | | \$252 | |
| 5th Take Up Group (FY2032) | \$150 | | | | | \$206 |
| Variable Charge | \$156 | \$172 | \$161 | \$155 | \$151 | \$148 |
| Total Charge per Hectare (Nominal) | | \$547 | \$506 | \$473 | \$403 | \$354 |
| Total Charge per Hectare (\$2015) | | \$496 | \$401 | \$322 | \$312 | \$303 |

Initial Equity Contribution for Irrigators

| | FY2021 | FY2023 | FY2026 | FY2029 | FY2032 |
|---|---------|---------|---------|---------|---------|
| Increase (%) | | 10% | 15% | 20% | 25% |
| Equity Contribution per Hectare (Nominal) | \$6,154 | \$6,769 | \$7,077 | \$7,385 | \$7,692 |

Option 2b: Summary Outputs (No Debt Repayment Until Full Uptake)

Key Assumptions

| Assumption | Value |
|---------------------------------|-----------------|
| Full Uptake | 2032 (12 Years) |
| Annual Water Price Increase | 2.00% |
| Debt Funding Cost | 6.60% |
| Repay Debt During Uptake Period | No |

Forecast Annual Charges

| Assumed Uptake (%) | | 69.2% | 76.9% | 84.6% | 92.3% | 100% |
|---|--------|--------------|--------------|--------------|--------------|--------------|
| Annual Charge per Hectare | FY2015 | FY2021 | FY2023 | FY2026 | FY2029 | FY2032 |
| 1st Take Up Group | \$315 | \$348 | | | | |
| 2nd Take Up Group (FY2023) | \$290 | | \$333 | | | |
| 3rd Take Up Group (FY2026) | \$250 | | | \$305 | | |
| 4th Take Up Group (FY2029) | \$185 | | | | \$239 | |
| 5th Take Up Group (FY2032) | \$175 | | | | | \$240 |
| Variable Charge | \$156 | \$172 | \$161 | \$155 | \$151 | \$148 |
| Total Charge per Hectare (Nominal) | | \$520 | \$494 | \$460 | \$390 | \$388 |
| Total Charge per Hectare (\$2015) | | \$471 | \$390 | \$312 | \$302 | \$293 |

Initial Equity Contribution for Irrigators

| | FY2021 | FY2023 | FY2026 | FY2029 | FY2032 |
|---|---------|---------|---------|---------|---------|
| Increase (%) | | 10% | 15% | 20% | 25% |
| Equity Contribution per Hectare (Nominal) | \$6,154 | \$6,769 | \$7,077 | \$7,385 | \$7,692 |

Option 3

Commercially Funded Model



Option 3: Summary Outputs

Key Assumptions

| Assumption | Value |
|---------------------------------|-----------------|
| Full Uptake | 2032 (12 Years) |
| Annual Water Price Increase | 2.00% |
| Debt Funding Cost | 6.60% |
| Repay Debt During Uptake Period | Yes |

Funding Summary (\$m)

| | |
|--------------------------|--------------|
| Scheme Construction Cost | \$65m |
| Assumed to be funded by: | |
| Grants | \$8m |
| Debt Funding | \$27m |
| Equity Funding (+CII) | \$30m |
| Total Funding | \$65m |

Forecast Annual Charges

| Assumed Uptake (%) | | 69.20% | 76.90% | 84.60% | 92.30% | 100% |
|---|--------|----------------|----------------|----------------|----------------|----------------|
| Annual Charge per Hectare | FY2015 | FY2021 | FY2023 | FY2026 | FY2029 | FY2032 |
| 1st Take Up Group | \$750 | \$828 | | | | |
| 2nd Take Up Group (FY2023) | \$750 | | \$862 | | | |
| 3rd Take Up Group (FY2026) | \$750 | | | \$914 | | |
| 4th Take Up Group (FY2029) | \$750 | | | | \$970 | |
| 5th Take Up Group (FY2032) | \$750 | | | | | \$1,030 |
| Variable Charge | \$156 | \$172 | \$161 | \$155 | \$151 | \$148 |
| Total Charge per Hectare (Nominal) | | \$1,000 | \$1,023 | \$1,069 | \$1,121 | \$1,178 |
| Total Charges per Hectare (\$2015) | | \$906 | \$890 | \$877 | \$867 | \$858 |

Summary Results



Outputs Summary

| | 50:50 TDC and Irrigator Ownership | | Pro-rata Equity Contribution | | Commercial Model |
|--|-----------------------------------|----------------|------------------------------|----------------|------------------|
| | Option 1a | Option 1b | Option 2a | Option 2b | Option 3 |
| Funding Summary (\$m) | | | | | |
| Grants | \$8.0m | \$8.0m | \$8.0m | \$8.0m | \$8.0m |
| Debt Funding | \$17.0m | \$17.0m | \$17.0m | \$17.0m | \$27.0m |
| Tasman District Council | \$20.0m | \$20.0m | \$9.0m | \$9.0m | Nil |
| Nelson City Council | Nil | Nil | \$3.0m | \$3.0m | Nil |
| Crown Irrigation Investments | \$8.7m | \$8.7m | \$12.3m | \$12.3m | \$12.3m |
| Waimea Plains Irrigators | \$11.3m | \$11.3m | \$16.0m | \$16.0m | Nil |
| Commercial Funder | Nil | Nil | Nil | Nil | \$17.7m |
| Total Funding | \$65.0m | \$65.0m | \$65.0m | \$65.0m | \$65.0m |
| Irrigators Summary (per hectare) | | | | | |
| Initial Capital Contribution ¹ | \$4,348 | \$4,348 | \$6,154 | \$6,154 | Nil |
| Initial Annual Charges (2015 Dollars) | \$491 | \$466 | \$496 | \$471 | \$906 |
| Assumed Annual Cost of Servicing Equity Contribution | \$370 | \$370 | \$523 | \$523 | Nil |
| Total Annual Charges Per (2015 Dollars) | \$861 | \$836 | \$1,019 | \$994 | \$906 |

1. Capital contribution for irrigators who join the scheme at inception.



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20 August 2015

*Tabled at Special
156 meeting on 24/8.*

The Directors
Waimea Community Dam Limited
PO Box 2244
Stoke
NELSON 7041

By email - nick@wai-west.co.nz

Dear Nick

Review of proposed structure - Joint Venture with Tasman District Council ("TDC") - Waimea Community Dam Limited ("WCDL")

I refer to our recent meeting and now write to review the proposed joint venture structure, comparing it with the original proposed structure, with other schemes and also considering the need or otherwise for WCDL to be a co-operative under the Co-operative Companies Act 1996. I also suggest a third option, to consider. I will advise separately on whether Damco must be a CCO.

1. Old Structure

- 1.1 **Attached** and marked Diagram A is the previously proposed structure with Damco, operating as a co-operative company with water users including TDC being shareholders directly in that company.
- 1.2 The share capital was divided into A and B shares, with A shares held by water users (including TDC) and B Shares being held by a charitable trust representing the "environment layer" of water. The A shareholding equated to 70% and the B shareholding equated to approximately 30% of the share capital.
- 1.3 TDC shareholding ranged between 18-25% as an A shareholder being representative of its water requirements.

2. New Joint Venture Structure

- 2.1 You have proposed a new structure based on there being a s a 50-50 joint venture going forward, between WCDL representing water users on the one hand and TDC on the other.
- 2.2 **Attached** at diagram B is a diagram of the proposed joint venture structure.
- 2.3 The JV Co will own the dam. WDCL will be a co-operative (either actual or in principle) owned by the water users requiring augmented water supplies.
- 2.4 The water users will enter into Water Supply Agreements with WDCL for the augmented water. WDCL in turn will enter into an agreement with Damco for the supply of augmented water from Damco.



- 2.5 TDC will contract directly with Damco, for the town supply. The same will be the case for Nelson City Council ("NCC"), if they require water.
- 2.6 Assuming the estimated cost of \$65 million, this money will be funded as follows:
- | | |
|---|---------------------|
| (a) Shareholder equity: | |
| (i) Tasman District Council - | \$20,000,000 |
| (ii) Waimea Community Dam Limited - | \$20,000,000 |
| (b) Balance to fund - | \$25,000,000 |
| (c) Assume NCC/Government Grants/rights to purchase - | \$8,000,000 |
| (d) Bank funding required - | <u>\$17,000,000</u> |
| Total | \$65,000,000 |
- 2.7 Assuming total annual costs of \$1,664,000 over 4,500 hectares (or hectare equivalent), the annual per hectare cost is \$370 plus GST. Water users will effectively repay the debt through the water charges.
- 2.8 I will now analyse the new proposed structure with reference to the old structure, and the need or otherwise for WCDL to be a co-operative. I will also set a third option (Diagram C) as an alternative to Diagram B.
3. **Comparative analysis**
- 3.1 A key change under new proposed structure is the removal of the charitable trust holding 30% of the capital in the form of B Shares. This is a significant change and simplification of the model.
- 3.2 The purpose of the charitable trust and the B shares was to provide comfort to environmental stakeholders including iwi, Fish and Game and DoC through representation via the Trust and negative control in respect of certain key environmental decisions, which would need to be approved by the B shareholders, such as a change to the minimum flow. In a practical sense, it was also a way of keeping these key stakeholders inside the tent, as they represented potential objectors to the consent.
- 3.3 As events have transpired, the company has obtained the consent without the structure in place, or with the structure a condition of the consent.
- 3.4 Most environmental issues, including minimum flow are now dealt with pursuant to the consent and it is simply a matter of ensuring that the new structure complies with the consent conditions. In this regard we note that the consent only covers the dam and the individual take consents are unaffected. In terms of the evidence submitted during the consent process, Murray King's evidence provided "*In the event a consent is granted and other aspects of the project are confirmed (such as funding and land acquisition), the governance and constitutional arrangements of WCDL would change to reflect its ongoing role to construct, own and operate the Lee dam, most likely as a co-operative company and/or Council Controlled entity.*"
- 3.5 I believe the wording is very broad and covers the current structure, albeit the dam and consent holding entity with now be a JV with WCDL being a joint venture partner.
- 3.6 The minimum flows will be regulated by the Regional plan which will provide for banding. Those water users that have shares in WCDL will have higher banding and more reliable



water than those water users who do not have shares. Those without shares **will** be the first to be rationed in dry conditions. The minimum flows will be linked to the dam level and release regime.

- 3.7 It follows that in terms of the consent application process and the terms of consent itself, there is no need to have B shares or a charitable trust holding the B shares.
- 3.8 The other key change is the move to a joint venture model with the water users no longer being direct shareholders in Damco but rather shareholders in WCDL which in turn owns a 50% share in Damco. This makes it easier to manage Damco with it having only 2 shareholders as opposed to more than a 100.
- 3.9 On the other hand, the interposing of another company (in the form of WCDL) rather than the water users having direct ownership in Damco adds another layer of complexity. The joint venture agreement will be a complex document and the drafting lengthy. The structure means two boards, rather than one.
- 3.10 Another disadvantage is that it makes it more difficult for the capital raising entity (WCDL) to be a co-operative under the Co-operative Companies Act 1996, as that company is not supplying the augmented water, but rather Damco is. For a company to qualify as a co-operative company it must be providing goods or services, to the shareholders. The shareholders (or at least 60%) need to be transacting shareholders.
- 3.11 This issue, however, can be remedied by Damco entering into a supply agreement with WCDL which in turn provides individual supply agreements to the water end users. A joint venture structure, therefore, does not prevent WCDL becoming an actual co-operative (if it is determined that this was necessary).
- 3.12 There is also a precedent on the form at Barr Hill Chertsey Irrigation Limited (BCI) which is a co-operative company in a joint venture with Ashburton District Council.
- 3.13 Another potential key disadvantage that results from the new proposed structure is that ownership in the dam is disproportionate to funding. The dam will be owned 50-50 with both parties contributing \$20,000,000. The remaining \$25,000,000 will be contributed through \$8,000,000 in grants and \$17,000,000 of debt. The shareholders of WCDL will be paying a disproportionate amount of the debt through the water charges. The WCDL shareholders represent initially 2600 hectares and Tasman District Council only 1,400 hectares. If we exclude Nelson City Council's projected 500 hectares, the irrigators are paying 65% (2600/4000) of the debt to TDC's 35% (1400/4000).
- 3.14 With regard to the water supply agreement between Damco and WCDL it is likely that this agreement will be "take or pay" in favour of Damco for at least 2600 hectares, effectively shifting the significant part of the financial burden to WCDL.
- 3.15 While it is arguably reasonable for all shareholders to wear their proportionate share of the environment layer (with result that the B shareholding and environment layout is no longer required), arguably an inequity arises if the ultimate ownership in the key asset (being the dam) is disproportionate to the debt repayment and funding burden.
- 3.16 This can be addressed by changing the ownership of the joint venture to better reflect ultimate contribution or alternatively changing the charging mechanism whereby debt servicing (principal interest) is paid proportionate to the joint venture shareholding (joint venture share) , but operational variable costs are met relative to water purchased. This flexibility could be dealt with in the joint venture agreement and water supply agreements. However, you may take the view that this disadvantage is the cost water users must pay to get the water and TDC is not requiring a return for its investment other than more reliable water for the town supply.



- 3.17 An third alternative structure attached and marked Diagram C takes out the WCDL and has water users investing directly in Damco. The water users (including CIL) would have water user agreements directly with Damco and the right to appoint 2 directors. TDC would have the right to appoint 2 directors. The directors would agree an independent chairperson as is the case for the JV structure in Diagram B.
- 3.18 The issue with this structure is giving both groups 50% share. This could be achieved by issuing different classes of shares being Infrastructure Shares to both Groups (\$20 million each) and then water shares at a low value of \$1 giving the right to irrigate one hectare or hectare equivalent. The water shares would be non- voting with voting rights and ability to appoint directors with the Infrastructure shares.
- 3.19 Having different classes of shares in an irrigation company is very common for a variety of reasons. It means that Damco still is a JV of sorts, at an ownership and control level, but with one company. The issue is whether in taking away one layer (i.e. WCDL), we have complicated the governance of Damco with multiple shareholders.
4. **Co-operative Companies Act 1996**
- 4.1 The key reasons for irrigation companies becoming co-operative companies under the Co-operative Companies Act 1996 are as follows:
- (a) the ability to issue shares at a lower nominal value instead of a fair value (as would be otherwise required by the Companies Act 1993);
 - (b) the ability to require a shareholder to surrender their shares in the event that they fail to comply with the terms of the Water Supply Agreement; and
 - (c) the ability to issue an evergreen prospectus.
- 4.2 The main advantage of an evergreen prospectus is the ability to mop up new shareholders as they come in without the need to issue a new prospectus each time a new shareholder wishes to subscribe for more shares. Given the proposed banding structure of the Regional Plan, it seems likely that the non-shareholding water users may regret their decision not to uptake shares in WCDL in the first offer and following rationing, seek shares. However, the FMCA has not carried over the evergreen of properties exemption under the older Securities Act 1978. As such, a key advantage for co-operative comparison no longer exists.
5. **Variable Water Charges**
- 5.1 I understand that different land uses will use different quantities of water and WCDL needs the flexibility to charge variable rates.
- 5.2 The projected water charge on a per hectare basis is \$370 plus GST. You seek to maintain this as an average but may vary rates under or above this rate to recognise lower water users (such as grape) on the one hand and higher water users (such as Dairy) on the other.
- 5.3 This can be achieved through flexibility in the charging provisions in the water user agreement.
6. **Conclusion**
- 6.1 In conclusion the benefits of the proposed structure are as follows:
- (a) it allows for a 50/50 contribution by water users and TDC;
 - (b) it limits the water user's contribution to \$20million;



- (c) the water users have their own vehicle making governance of Damco easier with just two shareholders;
- (d) it greatly simplifies the capital structure by removing of B shares and the charitable trust; and
- (e) doesn't preclude the possibility of WCDL becoming a co-operative, though the advantages of being a co-operative are now diminished.

6.2 Disadvantages of the proposed structure are as follows:

- (a) complexity with the additional layer of the joint venture, rather than water users owning shares directly in Damco;
- (b) the debt servicing obligations are disproportionate to ultimate ownership in the joint venture asset in the form of the dam, with result that TDC arguably receives a windfall in terms of debt repaid;
- (c) the structure may result in WCDL assuming a greater liability to pay for water than it has on sold to shareholders in WCDL, through a "take or pay" agreement with Damco.

7. Recommendation

- 7.1 The JV structure vehicle advantages arguably outweigh the disadvantages, limiting the water user investment to (50%) \$20million and simplifying governance with two shareholders in Damco.
- 7.2 A key disadvantage in our view relates to the charging structure which means WCDL and its shareholders assume a greater proportion of the debt funding e.g. 65% versus 50% ownership. In addition, the funding risk may be transferred to WCDL through a "take or pay" between Damco and WCDL.
- 7.3 CIIL can assist with an underwrite of dry shares, but they are unlikely to be interested in paying water charges on these dry shares with the result that the interest cost on the unallocated dry shares will need to be spread amongst the wet shareholders pending uptake.
- 7.4 The directors may take the view that these disadvantages are the necessary price of getting the project going and the cost of augmented water to the water users, who at the end of the day will only be charged on a cost recovery basis, there currently being no intention for Damco to make a return for TDC. IF TDC did seek to make a return, then there would need to be, in our view, a reassessment of the allocation of debt servicing and funding risks between the parties.
- 7.5 Diagram C represents an alternative to the JV in Diagram B. This structure removes the extra layer in the form of WCDL but maintains 50/50 JV ownership and a shared board by introducing two classes of shares. The issue to consider is whether direct ownership in Damco by multiple shareholders unduly complicates the governance of Damco in terms of obtaining shareholder approval.
- 7.6 My recommendation is to proceed with option B or C with caution. An independent chair of Damco will be critical and clear rules in the JV agreement and water supply agreement between Damco and WCDL(if option B) ensuring all charging is on a cost recovery basis.
- 7.7 We further recommend that TDC's legal advice with respect to the Regional Plan be peer reviewed by us as WCDL's solicitors.

ANDERSON LLOYD

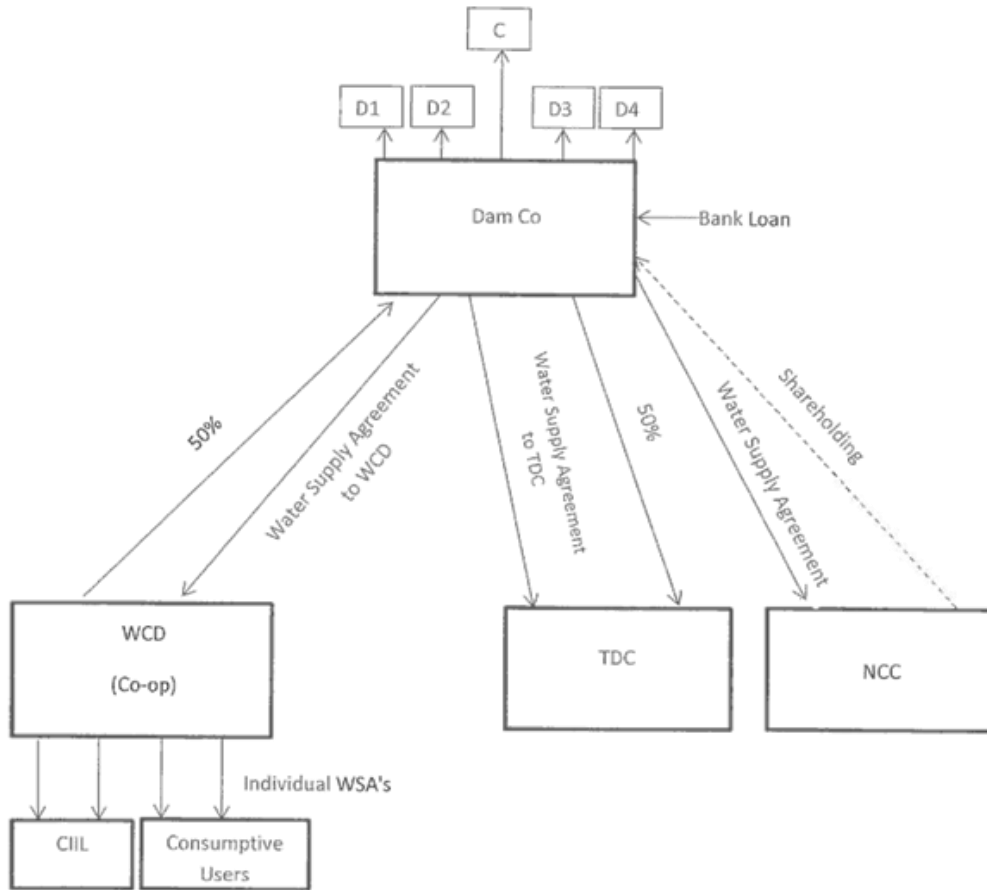
I hope these comments are of assistance.

Yours faithfully
Anderson Lloyd



David Goodman
Partner
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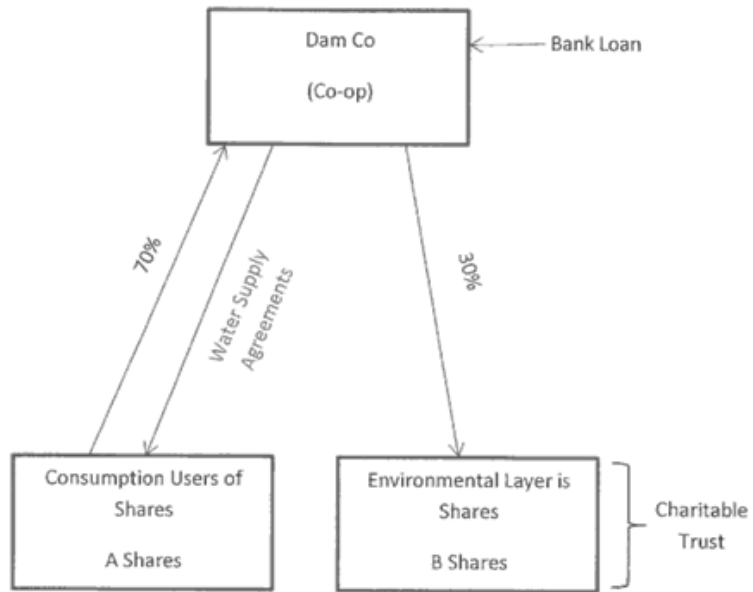
Diagram B



- Dam Co is an incorporated Joint Venture between TDC and WCD;
- WCDL and TDC have power to appoint 2 directors each;
- Chairperson would be an independent;
- CIIL would invest as a dry shareholder.

DSG-903099-5-8-V1

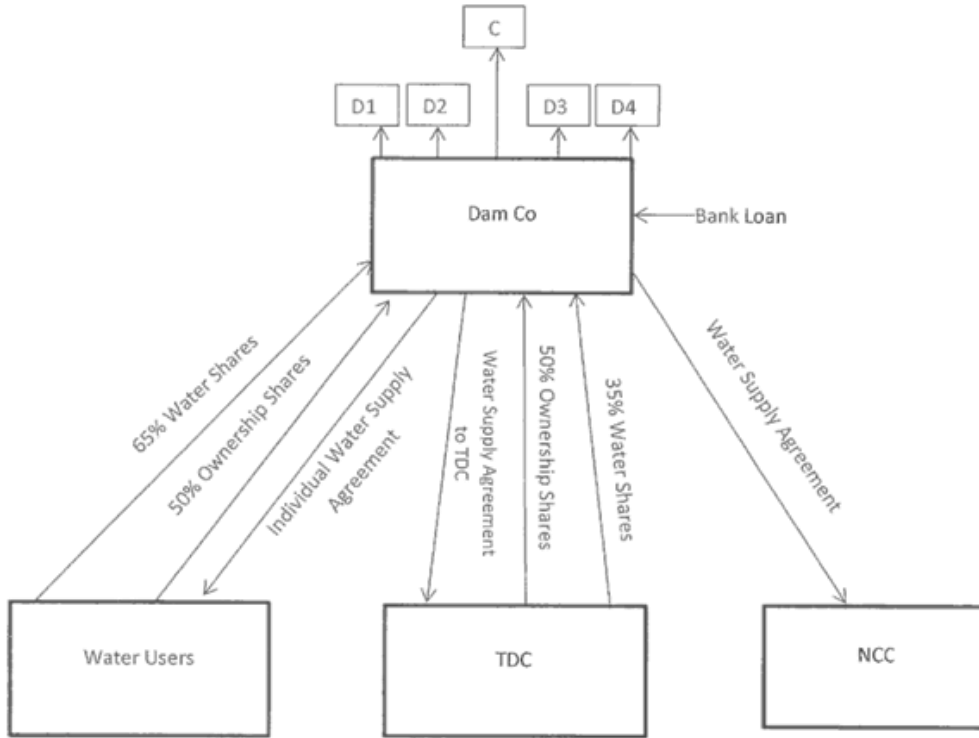
Diagram A



n.b TDC would have 50% control of board so Dam Co would be a CCO.

DSG-903099-5-7-V1

Diagram C



Dam Co is an incorporated Joint Venture between TDC and WCD

Water users and TDC have power to appoint 2 directors each through infrastructure shares

DSG-903099-5-11-V1



20 August 2015

For: Nick Patterson

Waimea Community Dam Limited
PO Box 2244
Stoke
NELSON 7041

By email - nick@wai-west.co.nz

Dear Nick

Damco - CCO

I refer to our recent telephone discussion and I write to advise on whether Damco will be a CCO.

Definition of CCO

- Section 6 of the Local Government Act 2005 provides

6 *meaning of council-controlled organisation and council organisation:*
(1) *in this Act, unless the context otherwise requires,-*
council-controlled organisation means a council organisation that is—
(a) a company—
(i) in which equity securities carrying 50% or more of the voting rights in a meeting of shareholders of the company are—
(A) held by 1 of more local authorities; or
(B) controlled, directly or indirectly by 1 or more local authorities; or
(ii) in which 1 or more local authorities have the right, directly or indirectly 50% or more of the directors of the company; or
**(b) an entity in respect of which 1 or more local authorities have, whether or not jointly or with other local authorities or persons,-
(i) control, directly or indirectly, of 50% or more of the votes at any meeting of the members or any controlling body of the entities; or
*(ii) the right, to directly or indirectly to appoint 50% or more of the trustees, directors or managers (however described) of the entities."***

- Therefore, applying the definition under section 6 to the proposed structure of Damco, Damco will be a CCO by virtue of the TDC holding 50% of the shares. It's sufficient that TDC either holds 50% of the shares or has the ability to appoint 50% or more of the directors. These two tests are in the alternate. It is not necessary for TDC to satisfy both, for TDC to become a CCO.
- The obvious solution is to drop the council down to 49.99% of equity with both parties having the right to appoint two directors and an independent chairperson. In this way Damco avoids being caught by either the ownership or control tests set out in clause 6(1)(a) and 6(1)(b).
- Damco would still be a council owned organisation simply by virtue of having council ownership, but the requirements for a simple council owned organisation are much reduced compared to a CCO.



5. Whether TDC **will** agree to accepting a slightly smaller shareholding necessary to avoid Damco being a CCO is another matter. Assuming that TDC will insist on Damco remaining a CCO, we set out the consequences under the Local Government legislation below. The other issue is whether Damco will be a "council-controlled trading organisation (CCTO)". A CCTO means a CCO that operates a trading undertaking for the purpose of making a profit. Damco will trade on a cost recovery basis and therefore there is an argument that it's not a CCTO. However, on the other hand, it may be necessary for Damco to make a small profit simply to repay debt with depreciation not being sufficient to meet capital repayment obligations under the bank loan. The answer as to whether Damco is a CCTO is not clear, at this point.

Requirements of CCO's under the Local Government Act

6. Part 5 of the Local Government Act sets out requirements in relation to the running of CCO's. In particular it establishes:
- "(a) requirements for the governance and accountability of council-controlled organisations and council organisations; and*
- (b) procedures for the transfer of the local authority undertakings to council-controlled organisations."*
7. Section 56 of the Local Government Act provides that the establishment of a CCO (i.e Damco) requires the Local Authority to undertake consultation in accordance with section 82. The consultation required may be undertaken as part of another proposal or as part a Long Term Plan.
8. I attach a copy of section 82 setting out the consultation process for your information. Section 56(2) provides that the consultation required may be consultation as part of another proposal or as part of a Long-Term Plan. It may be that the TDC have already undertaken the necessary consultation with the LTP.
9. With a CCO or council organisation, a council must adopt a policy for the appointment of their directors to a CCO or CO (as the case may be) and to ensure they have the appropriate knowledge and experience (section 57).
10. The role of a director in a CCO is to assist the organisation to meet its objectives and any requirements in its statement of intent (section 58(1)).
11. The principal objective of a CCO is to –
- "(a) achieve the objectives of its shareholder's, both commercial and non-commercial, as specified in the statement of intent; and*
- (b) be a good employer; and*
- (c) exhibit a sense of social and environmental responsibility by having regard to the interest of the community in which it operates and by endeavouring to accommodate or encourage these, when able to do so;*
- (d) if the council-controlled organisation is a council controlled trading organisation, conducts its affairs in accordance with sound business practice."*
12. All decisions relating to the operation of a CCO must be made by, or under the authority of, the board of the organisation in accordance with its Statement of Intent and its constitution (section 60).
13. Section 62 which provides, that the TDC will not be able to guarantee, indemnify or give security in respect of the performance of any obligation of the CCO's. This provision would prevent the TDC guaranteeing the obligations of Damco to the bank. Given the current



competitiveness of the banking market in the irrigation sector, it is entirely possible that the bank will lend on the project without TDC's guarantee. The previous structure assumed banking would be available without TDC's guarantee.

14. TDC cannot lend money to Damco if it is the CCO on terms that are more favourable than TDC itself would obtain if it was borrowing the money (section 63).
15. CCO must have a Statement of Intent which complies with Schedule 8 of the Local Government Act. The Statement of Intent effectively prescribes the objectives of the CCO. The draft Statement of Intent must be approved by the shareholders on or before the 30 June in each year and creates an added layer of administration (section 64). Attached is a copy of Schedule 8 setting out the requirements for Statements of Intent.
16. TDC as a shareholder in Damco will be required to undertake performance monitoring of Damco to ensure that it is achieving TDC's objectives for Damco following the Statement of Intent (section 65). This provision applies to CCO's and CO's.
17. A CCO is required to provide half yearly reports (section 66).
18. The annual report for each financial year for a CCO is a public document. In addition, the financial statements will need to be audited (section 69). We imagine the accounts of Damco would have been audited in any event.
19. Perhaps of more concern is the auditor must be the Auditor General as CCO falls in the definition of a "public entity" as defined by section 4 of the Public Audit Act 2001 (section 70).
20. The Local Government Official Information and Meetings Act 1987 and the Ombudsman Act 1975 applies to CCO's (section 71).
21. In summary, if Damco is a CCO, then it will be subject to certain restrictions and compliance provisions in the Local Government Act. Of concern is the consultation requirement in terms of the setting up of Damco as a CCO, though the TDC may have already have dealt with this. The prohibition of TDC providing any guarantee and public access to company information by virtue of the public annual report and application of the Local Government Official Information and Meetings Act 1987 and the Ombudsman Act 1975, may also be issues.
22. On balance, your board may take the view that is preferable that Damco is not CCO, particularly as CCO is not a "local authority" for the purposes of the Public Works Act, and will still need to rely on this TDC or Requiring Authority status to access Public Works provisions. As such, there is no Public Works advantage in Damco having a CCO.

Conclusion

23. On the basis of a 50% shareholding by TDC, Damco is a CCO in accordance with 5.6(1) of the Act.
24. As a CCO, Damco will be subject to an additional regulatory and administrative layer as prescribed by part 5 of the Local Government Act. It is preferable that Damco is not a CCO and the position can be entirely fixed by TDC accepting 49.99% shareholding.
25. If the TDC insists on Damco being a CCO then, while the additional CCO requirements under the Local Government Act may create some additional cost and time (e.g. requiring and approving Statement of Intent, audit by Auditor General's office), the requirements should be manageable.
26. It is hoped that the consultation requirements for a new CCO have already been dealt with as part of the Long Term Plan. If not, there could be unnecessary delay undertaking the necessary consultation. We would recommend making enquiries of TDC on this point.



If you have any more queries, please do not hesitate to contact me.

Yours faithfully
Anderson Lloyd

A handwritten signature in black ink, appearing to read "D Goodman".

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New Zealand Legislation

Local Government Act 2002

• Warning: Some amendments have not yet been incorporated

Consultation

82 Principles of consultation

- (1) Consultation that a local authority undertakes in relation to any decision or other matter must be undertaken, subject to subsections (3) to (5), in accordance with the following principles:
 - (a) that persons who will or may be affected by, or have an interest in, the decision or matter should be provided by the local authority with reasonable access to relevant information in a manner and format that is appropriate to the preferences and needs of those persons;
 - (b) that persons who will or may be affected by, or have an interest in, the decision or matter should be encouraged by the local authority to present their views to the local authority;
 - (c) that persons who are invited or encouraged to present their views to the local authority should be given clear information by the local authority concerning the purpose of the consultation and the scope of the decisions to be taken following the consideration of views presented;
 - (d) that persons who wish to have their views on the decision or matter considered by the local authority should be provided by the local authority with a reasonable opportunity to present those views to the local authority in a manner and format that is appropriate to the preferences and needs of those persons;
 - (e) that the views presented to the local authority should be received by the local authority with an open mind and should be given by the local authority, in making a decision, due consideration;
 - (f) that persons who present views to the local authority should have access to a clear record or description of relevant decisions made by the local authority and explanatory material relating to the decisions, which may include, for example, reports relating to the matter that were considered before the decisions were made.
- (2) A local authority must ensure that it has in place processes for consulting with Māori in accordance with subsection (1).
- (3) The principles set out in subsection (1) are, subject to subsections (4) and (5), to be observed by a local authority in such manner as the local authority considers, in its discretion, to be appropriate in any particular instance.
- (4) A local authority must, in exercising its discretion under subsection (3), have regard to—
 - (a) the requirements of section 78; and
 - (b) the extent to which the current views and preferences of persons who will or may be affected by, or have an interest in, the decision or matter are known to the local authority; and
 - (c) the nature and significance of the decision or matter, including its likely impact from the perspective of the persons who will or may be affected by, or have an interest in, the decision or matter; and
 - (d) the provisions of Part 1 of the Local Government Official Information and Meetings Act 1987 (which Part, among other things, sets out the circumstances in which there is good reason for withholding local authority information); and
 - (e) the costs and benefits of any consultation process or procedure.
- (5) Where a local authority is authorised or required by this Act or any other enactment to undertake consultation in relation to any decision or matter and the procedure in respect of that consultation is prescribed by this Act or any other enactment, such of the provisions of the principles set out in subsection (1) as are inconsistent with specific requirements of the procedure so prescribed are not to be observed by the local authority in respect of that consultation.

Local Government Act 2002 No 84 (as at 26 March 2015), Public Act 82 Principles of... Page 2 of 2

Section 82(1)(f): replaced, on 8 August 2014, by section 23 of the Local Government Act 2002 Amendment Act 2014 (2014 No 55).

<http://www.legislation.govt.nz/act/public/2002/0084/latest/DLM172327.html>

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New Zealand Legislation
Local Government Act 2002

• Warning: Some amendments have not yet been incorporated

Schedule 8
Statements of intent

ss 64(1), (4), 65(2)

1 Purpose of statement of intent

The purpose of a statement of intent is to—

- (a) state publicly the activities and intentions of a council-controlled organisation for the year and the objectives to which those activities will contribute; and
- (b) provide an opportunity for shareholders to influence the direction of the organisation; and
- (c) provide a basis for the accountability of the directors to their shareholders for the performance of the organisation.

2 Statements of intent for council-controlled organisations

The board of a council-controlled organisation must deliver to its shareholders a draft statement of intent on or before 1 March each year.

Compare: 1974 No 66 s 594S

3 Completion of statements of intent

The board must—

- (a) consider any comments on the draft statement of intent that are made to it within 2 months of 1 March by the shareholders or by any of them; and
- (b) deliver the completed statement of intent to the shareholders on or before 30 June each year.

Compare: 1974 No 66 s 594U

4 Modifications of statements of intent by board

The board may, by written notice, modify a statement of intent at any time if the board has first—

- (a) given written notice to the shareholders of the proposed modification; and
- (b) considered any comments made on the proposed modification by the shareholders or by any of them within—
 - (i) 1 month after the date on which the notice under paragraph (a) was given; or
 - (ii) any shorter period that the shareholders may agree.

Compare: 1974 No 66 s 594V(1)

5 Modifications of statements of intent by resolution of shareholders

- (1) Despite any other provision of the Act or of the constitution of any council-controlled organisation, the shareholders of a council-controlled organisation may, by resolution, require the board to modify the statement of intent by including or omitting any provision or provisions of the kind referred to in clause 9(1)(a) to (j), and any board to whom notice of the resolution is given must comply with the resolution.
- (2) Before giving notice of the resolution to the board, the shareholders must consult the board concerned as to the matters to be referred to in the notice.

Compare: 1974 No 66 s 594V(2)

6 Statement of intent required if exemption granted under section 7 revoked

If an exemption granted under section 7 is revoked, the council-controlled organisation must,—

- (a) if there is more than 6 months remaining in the financial year, prepare a statement of intent for that financial year; or
- (b) if there is not more than 6 months remaining in the financial year, prepare a statement of intent for the following financial year.

7 Obligation to make statements of intent available

A completed statement of intent and each modification that is adopted to a statement of intent must be made available to the public by the board within 1 month after the date on which it is delivered to the shareholders or adopted, as the case may be.

Compare: 1974 No 66 s 594W

8 Savings of certain transactions

A failure by a council-controlled organisation to comply with any provision of this schedule or with any provision in a statement of intent does not affect the validity or enforceability of any deed, agreement, right, or obligation entered into, obtained, or incurred by that organisation.

Compare: 1974 No 66 s 594Y

9 Contents of statements of intent

- (1) A statement of intent must, to the extent that is appropriate given the organisational form of the council-controlled organisation, specify for the group comprising the council-controlled organisation and its subsidiaries (if any), and in respect of the financial year immediately following the financial year in which it is required by clause 3(b) to be delivered and each of the immediately following 2 financial years, the following information:

- (a) the objectives of the group; and
- (b) a statement of the board's approach to governance of the group; and
- (c) the nature and scope of the activities to be undertaken by the group; and
- (d) the ratio of consolidated shareholders' funds to total assets, and the definitions of those terms; and
- (e) the accounting policies of the group; and
- (f) the performance targets and other measures by which the performance of the group may be judged in relation to its objectives; and
- (g) an estimate of the amount or proportion of accumulated profits and capital reserves that is intended to be distributed to the shareholders; and
- (h) the kind of information to be provided to the shareholders by the group during the course of those financial years, including the information to be included in each half-yearly report (and, in particular, what prospective financial information is required and how it is to be presented); and
- (i) the procedures to be followed before any member or the group subscribes for, purchases, or otherwise acquires shares in any company or other organisation; and
- (j) any activities for which the board seeks compensation from any local authority (whether or not the local authority has agreed to provide the compensation); and
- (k) the board's estimate of the commercial value of the shareholders' investment in the group and the manner in which, and the times at which, that value is to be reassessed; and
- (l) any other matters that are agreed by the shareholders and the board.

- (2) If a council-controlled organisation has undertaken to obtain or has obtained compensation from its shareholders in respect of any activity, this undertaking or the amount of compensation obtained must be recorded in—

- (a) the annual report of the council-controlled organisation; and
- (b) the annual report of the local authority.

- (3) Any financial information, including (but not limited to) forecast financial information, must be prepared in accordance with generally accepted accounting practice.

Compare: 1974 No 66 s 594T

10 Additional content of statements of intent

- (1) This clause applies to a council-controlled organisation that provides services in relation to the following groups of activities:

- (a) water supply;
- (b) sewerage and the treatment and disposal of sewage;
- (c) stormwater drainage;
- (d) flood protection and control works;
- (e) the provision of roads and footpaths.

(2)

Local Government Act 2002 No 84 (as at 26 March 2015), Public Act Schedule 8 Stat... Page 3 of 3

The council-controlled organisation's statement of intent must, in relation to each group of activities described in subclause (1), include a statement of the intended levels of service provision that complies with clause 4(a) and (c) of Schedule 10 as if—

- (a) the reference to a long-term plan were a reference to the statement of intent; and
- (b) the reference to a local authority were a reference to a council-controlled organisation.

Schedule 8 clause 10: added, on 27 November 2010, by section 47 of the Local Government Act 2002 Amendment Act 2010 (2010 No 124).

<http://www.legislation.govt.nz/act/public/2002/0084/latest/DLM176025.html>

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