

GUIDANCE MATERIAL

TRANSFER AGREEMENT TEMPLATE (ALL SERVICE DELIVERY MODELS EXTERNAL TO COUNCIL)

BACKGROUND	<p>The Local Water Done Well legislation provides councils with flexibility to determine the optimal structure and delivery method for water services in their service area. This could mean establishment of a new financially and operationally independent water organisation ("Water Organisation") to whom responsibility for providing water services may be transferred.</p> <p>Councils will need to choose to transfer infrastructure and related assets, liabilities, responsibilities, resource consenting processes, and contracts to these new Water Organisations in order for the Water Organisations to provide water services.</p> <p>Councils must identify employees whose employment relates to the water services being transferred to the Water Organisation, and provide for the Water Organisation to offer employment to such identified employees.¹</p> <p>The Local Government (Water Services) Bill provides that there will be no tax consequences for the transfer.²</p>
WHO IS THIS TEMPLATE FOR?	<p>This Transfer Agreement is a contract between each council and the Water Organisation it has established or become a shareholder in, to enable the transfer of various matters from the council to the Water Organisation. The Transfer Agreement is also required to specify matters that are not being transferred, arrangements to manage shared interest matters, and arrangements relating to whether the council or Water Organisation will undertake charging and revenue collection. This template also provides for the council and Water Organisation to provide ad hoc services to one other, for example for transitional office services.</p>
PURPOSE OF THIS DOCUMENT / TEMPLATE	<p>This Transfer Agreement details the specific responsibilities, infrastructure and related assets, liabilities, resource consenting processes, contracts and employees and other matters to be transferred by the council to the Water Organisation, and when and how the transfer will occur. It provides that all listed matters will be transferred, and specifically excluded matters will not transfer. Any other matters that are not specified in this template will not be deemed to transfer to the Water Organisation.</p> <p>The consideration to be paid for the transferring matters will need to be determined by council, but the council (in respect of the period up to transfer) and Water Organisation (in respect of the period post-transfer) pay their respective apportionments, such as rent, electricity etc., and receive any relevant revenues, in respect of the transferring matters. This template also limits the council's liability to the consideration paid for the assets.</p> <p>The Transfer Agreement must specify whether the council or the Water Organisation will hold the final decision-making powers in relation to the Water Organisation's capital and operating expenditure, as well as level of charges and revenue recovery for the water services it provides.³ The template specifies this</p>

¹ See [clause 1 of Schedule 1] of the Local Government (Water Services) Bill.

² [Clause 214] of the Local Government (Water Services) Bill.

³ [Schedule 2, clause 7] of the Local Government (Water Services) Bill.

in Schedule 3, but also provides for the detail of these decision-making powers to be included in the Constitution, which provides information on the nature of shareholder involvement in preparing and finalising a Water Services Strategy and the Water Services Annual Budget (with those documents including, amongst other matters, the level of capital and operating expenditure, as well as the level of charges and revenue recovery, for the water services that the Water Organisation provides).⁴ The decision as to who will hold the final decision-making powers on those matters may have significant implications because:

- the “decision-making local government water service supplier” (of which there may be more than one) will also be the regulated supplier subject to economic regulation by the Commerce Commission; and
- if decision-makers are not on the board of the Water Organisation, they should be cautious in respect of being considered deemed directors (which could attract director's duties) under the Companies Act 1993; and
- it may affect borrowing arrangements with the LGFA (for example, it may be a factor for consideration in any bespoke arrangement between the LGFA and a Water Organisation regarding the application of financial covenants).

This Transfer Agreement establishes an Interface Governance Group to be the first point of contact in relation to managing ongoing matters of shared interest. Each party may appoint representatives to the Interface Governance Group in accordance with this Transfer Agreement.

In relation to ad hoc services, this Transfer Agreement provides a framework for the parties to agree to provide services to each other under a separately agreed Service Order.

KEY CONSIDERATIONS FOR COUNCILS

Before completing this Transfer Agreement, councils should:

- understand the current state of their water services networks;⁵
- identify which matters **will not** be transferred to a water entity, and which matters **will** be transferred (including responsibilities related to providing water services);
- decide whether the council (or, where the Water Organisation has multiple council shareholders, those councils together) or Water Organisation will be the responsible decision-maker regarding the Water Organisation's capex and opex, and level of charges and revenue recovery;
- have publicly consulted on their proposed approach to water services delivery, including their asset management approach; and
- consider how any existing contract, agreements, or arrangements between council and a third party (including iwi, hapu, or other Māori organisation) that relate to providing water services will apply in relation to the Water Organisation.⁶

After completing this Transfer Agreement, councils and WOs must:

⁴ See B4 & A2 Guidance Material – Constitution.

⁵ Required in the Water Services Delivery Plan by s 13 Local Government (Water Services Preliminary Arrangements) Act 2024.

⁶ [Clause 39] of the Local Government (Water Services) Bill.

- adopt the Transfer Agreement by resolution;⁷
- be aware of prohibitions on losing control, selling or disposing of significant infrastructure, including that water services assets cannot be used as security;
- ensure that the Transfer Agreement provides transparency to the parties, and can be readily ascertained by the public in accordance with [clause 12(1)] of the Local Government (Water Services) Bill.

How to use this document / template

Complete the Transfer Agreement with the required information eg name of the Water Organisation. The Council will have to make decisions on the following key issues to complete this template

DECISIONS	
Specific matters to be transferred	<input type="checkbox"/>
Specific matters to be excluded from transfer	<input type="checkbox"/>
Who will make decisions about expenditure, revenue and charging	<input type="checkbox"/>
Specific shared interest arrangements	<input type="checkbox"/>
The purchase price for the transfer	<input type="checkbox"/>
Who will collect water charges	<input type="checkbox"/>
What ad hoc services and deliverables council(s) may provide to the Water Organisation	<input type="checkbox"/>
What ad hoc services and deliverable the Water Organisation may provide to council(s)	<input type="checkbox"/>
Invoice details for transferor and transferee	<input type="checkbox"/>
Who they will appoint to the Interface Governance Group	<input type="checkbox"/>

This Transfer Agreement will not constitute a "new transfer agreement" for the purposes of clause 13 of the Local Government (Water Services) Bill – a new transfer agreement is required where the council has already established and entered into a transfer agreement with a water organisation and the new transfer agreement must meet further statutory requirements.

The Department can provide further information or support to councils if required. Please contact wmdp@dia.govt.nz.

Please note that neither this guidance nor the Transfer Agreement template constitutes legal advice. If unsure as to their position on any matter, councils should consider obtaining their own independent legal advice. Councils wishing to access LGFA funding are encouraged to contact the LGFA in relation to shareholder decision-making and related matters.

⁷ [Clause 11(4)] of the Local Government (Water Services) Bill.