



Waimea Irrigators Limited (WIL) submission to Tasman District Council on Funding for the Waimea Community Dam, provided for in the draft Long Term Plan (LTP) 2021-2031

Mayor King and Tasman District Councillors,

1. Waimea Irrigators Limited (WIL) are joint shareholders with Tasman District Council (TDC) in Waimea Water Limited (WWL) – the Council Controlled Organisation formed to manage the construction of the Waimea Community Dam (Dam Project).
2. WIL is a limited liability company, owned by approximately 237 shareholders, the majority of whom (but not all) have the benefit of shareholder water augmentation agreements supporting ground and surface water permits which allow them to irrigate their vineyards, farms, orchards and other businesses within the 'zone of benefit' for the Dam.
3. WIL's shareholders are not homogenous in nature - they range from owners of large-scale businesses to owners of a few hectares of land that do not generate much, if any income off that land.
4. On 12 December 2018 TDC, WIL, WWL and Crown Irrigation Investments Limited (CIIL) entered into a Project Deed to realise the Dam Project. At that time and after considerable investigative work, the cost of the Dam Project was estimated to be \$104.5M. By the date of the Project Deed in 2018 it was understood that WIL and its shareholders would be responsible for 49% of this cost.
5. As Councillors will be aware, the project cost to build the Dam was revised from \$104.5M to \$129.4M in 2020. On 22 February 2021, WWL presented another revised cost estimate range of \$148M to \$164M to complete the Dam to its shareholders, with an expected cost of \$158.4M (excluding provision for future hydro power). The estimated range takes account of the cost uncertainty associated with project risks, with key risks being the costs associated with any further Covid-19 related delays, and the scale of work required on unexposed geological features.
6. WIL's contribution to the project costs (at \$104.5M) was set at \$26M by way of shareholder equity and convertible notes, and debt funding of \$23.5M via a loan from CIIL to WWL. All of this funding, or the responsibility for it, sits with just those 237 shareholders, who are also TDC ratepayers.
7. Waimea Irrigators Limited, TDC, CIIL and WWL agreed clause 6.4 of the Project Deed for the purposes of allocating the burden of any project cost overrun. Clause 6.4 provides that

any project overrun costs will be shared 50:50 for the first \$3M, and those in excess of \$3M are to be funded by TDC. Conversely, any cost underruns would be to the full benefit of TDC.

8. The basis for clause 6.4 was WIL's intent to 'de-risk' the investment for irrigators by seeking a cap to its liability for project cost over-runs. In doing so, WIL was able to assure potential investors that the cost upside risk was capped, which was a key factor in the decision of many WIL shareholders to take up shares. The negotiated position to agree clause 6.4 entailed WIL accepting some reduction in value and control.
9. In agreeing to clause 6.4, TDC agreed to limit WIL's liability to \$1.5M, but now seeks to recover its own liability "through the back door" by target rating WIL's shareholders. WIL has never agreed that any part of a project cost over-run beyond the first \$3M can be sheeted home to irrigators via a targeted rate or any other mechanism. This is the position that WIL consistently maintained throughout the entire project agreement negotiations.
10. At no time has WIL accepted that there is an 'irrigator share' of cost over-runs not currently funded through CIIL. Further, WIL's submission on the 2018 Long Term Plan outlined our strong objection to a proposed change to the Revenue and Financing Policy to enable TDC to target rate irrigators for project cost overruns.
11. WIL has also maintained, consistently, that any additional responsibility for cost overruns beyond the first \$1.5M would place an unreasonable burden on its shareholders, whether through target rates or increases in water charges to service additional loan funding. The WIL Board remains resolute on this point.
12. The WIL Board believes that annual charges, either as target rates or water charges are a critical determinant in the uptake of water shares. It has tested this with its shareholders by way of modelling, consultation, survey and the Share Offers it has undertaken.
13. Under the project documentation, WIL is obligated to sell more water shares over time. The more shares it sells 'safeguards' its ability to repay the CIIL loans to WWL that it is responsible for and further protects TDC from potentially having to repay CIIL in the event WIL defaults on those payments.
14. WIL's shareholders have purchased water shares on the basis of information disclosed in the Product Disclosure Statement. An understanding of the relative liability for project cost overruns as per the project agreements was a key risk mitigation for potential WIL shareholders considering the purchase of shares.
15. The WIL Board's view is that either target rating or water charge increases would make the WIL's shares unaffordable and further share sales unrealistic.
16. If TDC had a different view of where the relative liabilities for project cost overruns lay then this was not communicated with WIL during the project agreement negotiations, nor was it built into the agreements themselves.
17. Clause 3.2(b) of the Project Deed imposes good faith obligations on the parties, including TDC, to facilitate the project documents. At a high level, good faith obligations mean that in performing their respective contractual obligations, parties will deal with each other

honestly, fairly, reasonably and with due regard for the interests of the other. WIL interprets this as due regard for the interests of its 237 shareholders.

18. The Court (*Heli Holdings*) has found that good faith requires “fidelity to the agreed common purpose and consistency with the justified expectations of the other party”. In other words, the parties must show loyalty to “the promise implicit in a continuing, relational commercial transaction”.
19. In WIL’s view, the target rating is contrary to clause 3.2(b) and the parties' mutual obligations of good faith and obligation not to " hinder, prevent or delay" the other parties from performing their obligations under the equity and project documents. The proposed target rate will have a significant impact on WIL's shareholders and therefore WIL to meet its obligations including, in particular, its ability to sell down further shares as it is required to do so.
20. As a general proposition, it is not unreasonable for TDC to recover that cost from its community under the LGA and LGRA as a rate, as it might do for any other cost.
21. The issue, however, is whether the proportion TDC is seeking from WIL’s shareholders (as ratepayers who irrigate) is honest, fair and reasonable in terms of the good faith obligation in the Project Deed.
22. WIL notes TDC’s statement in the Long Term Plan consultation document that it is concerned about affordability of a targeted rate for irrigators. WIL is very concerned on this point.
23. WIL requests that TDC, in making its decisions on how the funding and costs for the Project cost over runs are allocated to the community, considers the following matters:
 - a. That the proportion of project cost overrun TDC is seeking from WIL reflect the large contribution WIL shareholders have already made to funding the Dam Project.
 - b. The burden any additional targeted rate or increase in water charge will have on shareholder’s businesses and their ability to prosper, noting that businesses need time to adjust their business plans.
 - c. WIL’s ability to sell more shares and recover annual water charges.
 - d. The inequity of a targeted rate based on land value, especially for shareholders with only a few shares.
24. WIL requests that TDC, in making its decisions on how the funding and costs for the Project cost over runs are allocated to the community, considers the following options:
 - a. Placing some of the cost over runs in one or more shareholder advances to WWL, with the related financing costs to be met through the WWL water charges.
 - b. That any shareholder advances to WWL should be ‘evergreen’ advances.

- c. That any shareholder advances utilise pass through funding from CIIL and the LGFA so the benefits of concessional funding are passed on to WWL.
- d. That the General Rate be used to give effect to TDC's own 'good faith' commitments agreed in the Project documents and to enable WIL shareholders time to adjust their business plans.
- e. That TDC recognises the critical nature of the water charge, and ensures that interest cost on any advances is a district cost, noting that WIL shareholders will be a significant part of that.

Thank you for your consideration of the matters set out in this submission.