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The Research Director
Environment, Agriculture, Resources and
Energy Committee
Parliament House
George Street
BRISBANE QLD 4000

earec@parliament.qld.gov.au

Dear Sir/Madam,

**SOUTH-EAST QUEENSLAND WATER (DISTRIBUTION AND RETAIL
RESTRUCTURING) AND OTHER LEGISLATION AMENDMENT BILL 2011**

Allconnex Water (**Allconnex**) is grateful for the opportunity to provide this submission to the Environment, Agriculture, Resources and Energy Committee (**Committee**) on the *South-East Queensland Water (Distribution and Retail Restructuring) and Other Legislation Amendment Bill 2011 (the Bill)*.

Allconnex is the 'council-owned' water and wastewater distribution and retail business for the Gold Coast, Logan and Redland City Council areas.

Allconnex, has identified some elements in the Bill that may affect the workability of the legislation and the proper implementation of the retransfer, and would appreciate guidance or clarification by way of amendments to the Bill.

Further, the board members and officers of Allconnex have a statutory duty to act in the best interests of Allconnex and a positive obligation to implement the retransfer (which will necessitate Allconnex taking into account Councils' interests). The board members and officers are concerned with their ability to fully comply with such duties, and the protections afforded to them in respect of actions taken to implement the retransfer, given the current drafting of some provisions of the Bill.

The material concerns of Allconnex are set out in full in the **attached** table, but for your convenience they are also summarised below:

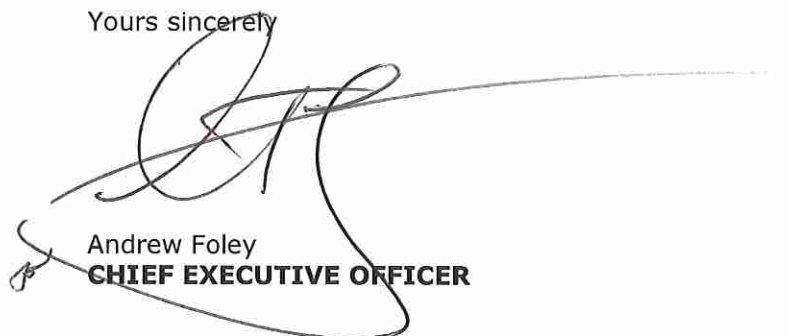
- the scope of the statutory protection for directors and officers of Allconnex is inadequate given the unique situation that Allconnex has been placed in;
- while the Bill does not appear to require Allconnex to publish any charges for 2012-2013 financial year, the Bill should remove any doubt on this issue and make clear which body has any obligations to publish charges for the 2012-2013 financial year;

- the concept of 'materially prejudice' is not defined, and, more specifically, as it is used in the context of the retransfer scheme only and not the broader retransfer process it is not clear whether the concept is a relevant consideration in respect of negotiations or other dealings (occurring 'outside' the scope of the retransfer scheme);
- there is currently no legislative basis for the authorised exchange of information between Allconnex and the withdrawn councils, and no protection from breach of contract and confidentiality claims in circumstances where parties need to exchange information prior to the Bill being enacted;
- the default position in relation to the allocation of liabilities in section 92BI of the Bill has the potential to be utilised by a council who does not wish to accept a whole liability which may otherwise be appropriate for a council to assume;
- there is no flexibility to allow Allconnex and the withdrawn councils to agree a mechanism to adjust any change in the asset and liability position which may occur between the date of the retransfer scheme, 30 April 2012, and 1 July 2012;
- there is no flexibility to allow Allconnex and the withdrawn councils to agree that it may be desirable for some of the assets and liabilities to remain with Allconnex after 1 July 2012 until dissolution; and
- there is no ability for the Minister to make regulations regarding any aspect of the retransfer to address any aspect which may have been inadvertently overlooked during the retransfer process.

The attached table addresses these matters in more detail and outlines proposed solutions to assist the Committee.

Allconnex would again like to extend its appreciation for the opportunity to engage with the Committee on the development of the Bill and would welcome an opportunity to further elaborate on the attached material issues.

Yours sincerely



Andrew Foley
CHIEF EXECUTIVE OFFICER

Allconnex Water Submission SEQ Water (Distribution and Retail Restructuring) and Other Legislation Amendment Bill 2011

No.	Issue	Current position	Concern	Comment/Proposed solution
1.	Protections for Allconnex Board members and officers	Section 92CM of the Bill operates to exclude liability for Allconnex, a member of the board, or employee or agent of Allconnex (Indemnified Person) for a 'civil wrong, contravention of law, breach of contract or confidence' in relation to things done under the chapter [Chapter 3A] or under or in compliance with a retransfer document.	Allconnex and its Board have been acting and making decisions in contemplation of the Bill, including Chapter 3A, coming into effect. It is not clear when Chapter 3A will commence. Allconnex is concerned about the following: - it is not clear that s92CM offers protection for decisions made by Indemnified Persons, or actions done by them in anticipation of Chapter 3A or the retransfer prior to Chapter 3A coming into effect. This is because things done before Chapter 3A commences are not things done 'under the chapter'. - the Indemnified Persons are not protected from liability arising in respect of decisions made or actions done by them in the ordinary course of business in contemplation of or to implement the retransfer. This is because s92CM is directed only at protecting decisions made or actions done 'under the chapter..including in compliance with a retransfer document'. - the Indemnified Persons are not excluded from liability arising from a breach of particular duty (eg it	Allconnex seeks confirmation in the Bill that: - all Indemnified Persons have the benefit of s92CM for actions done or decisions made by them under the proposed Chapter 3A or in connection with the proposed retransfer prior to Chapter 3A coming into effect. - the Indemnified Persons are protected for liability arising from decisions made or actions taken in the ordinary course of business in anticipation of or to implement the retransfer. - Indemnified Persons are excluded from liability arising from a breach of duty (consistent with the approach adopted by the State Government in recent facilitating legislation involving statutory transfer processes). - Allconnex will not be in breach of section 92CB in circumstances where it may not be in the best interests of Allconnex to 'take all reasonable steps to mitigate' the liability of GCCC.

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			may not always be possible for Board members or officers to act in the best interests of Alconnex given that Alconnex must work to implement a policy decision of the State Government to retransfer/disestablish, which must by necessity involve it taking into account the interests of the withdrawn councils as future owners and operators of Alconnex's water business). This can be contrasted with recent facilitating legislation such as <i>the Infrastructure Investment (Asset Restructuring and Disposal) Act 2009 (IIA)</i> where explicit protection was afforded for breach of duty. the conflict between Alconnex's statutory duty to act in the best interests of Alconnex and Alconnex's statutory obligation under section 92CB to act in the interests of Gold Coast City Council to mitigate GCCC's liability to Alconnex.	
2.	Publication of future charges	Section 99ATA of the South-East Queensland Water (Distribution and Retail Restructuring) Act 2009 (Current Act) currently requires a distributor-retailer to publish on its website details of: its charges for the current financial year by 30 June in the preceding financial year; and	Clause 40 of the Bill does not commence until the end of 30 June 2012. While Alconnex will maintain on its website details of its current charges up to 30 June 2012, Alconnex has no proposed charges for the following 2012 - 2013 financial year. Therefore, Alconnex would not be publishing on	We propose that the commencement of the amendments to sections 99ATA and 99ATB of the Current Act (reflected in clauses 40 and 41 of the Bill) be brought forward so those amendments commence on the date of assent of the Bill. Assuming the date of assent is before 31 March 2012, this would impose the obligation on the withdrawn councils to publish their proposed charges for the next financial year by

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		its proposed charges for the next financial year by 31 March in the preceding financial year. Under clause 40 of the Bill it is proposed to extend these obligations from distributor-retailers to an SEQ service provider.	its website details of any charges that may be proposed after 30 June 2012. Allconnex assumes that the withdrawn councils (captured by the proposed definition of "SEQ service provider") would publish details of their proposed charges for the 2012 – 2013 financial year and that they would do so by 31 March 2012. However, because clause 40 of the Bill is proposed not to commence until the end of 30 June 2012, there would be no obligation on the withdrawn councils to do so.	31 March 2012. Allconnex's view is that section 99ATA does not impose an obligation on Allconnex to publish any proposed charges for the 2012-2013 financial year because Allconnex does not propose to make any such charges. However, to remove any doubt on this issue, we also propose that the Bill introduce an additional provision making it clear that Allconnex has no obligation to publish charges or proposed charges for any period after 30 June 2012.
3.	"Material prejudice"	Section 92AY of the Bill requires the retransfer parties to give the Minister a statement (the certification statement) certifying all of the assets, liabilities and instruments that the withdrawn councils are to receive under the scheme. The certification statement must also comply with section 92AZ. Section 92AZ(1)(b)(iv) requires that either: - the scheme does not, to the knowledge of all the retransfer parties, materially prejudice the interests of any third party; or - if the scheme materially prejudices the interests of any third party, the consent of all third parties so prejudiced has been obtained. Section 92AZ(2) provides that for	Allconnex notes that as 'materially prejudice' is not defined in the Bill, it not clear how the retransfer parties should determine whether the scheme 'materially prejudices' the interests of any third party. Further, Allconnex notes that section 92AZ(1)(b)(iv) appears to consider the concept of material prejudice in the context of the 'scheme' only, and not in the context of the broader retransfer process. This creates some further uncertainty which is demonstrated by the example below. Allconnex understands that in some circumstances a contract which is in place between Allconnex and a counterparty prior to the retransfer may need to be 'split' (i.e. terminated and renegotiated as several separate	Allconnex is seeking clarification in the Bill in relation to: - what may constitute a 'material prejudice' of the interests of a third party. - whether the concept of material prejudice need only be considered in respect of the transfer scheme itself, and not other negotiations which may occur 'outside' of the transfer scheme (to enable parties to agree the retransfer scheme).

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		subsection (1)(b)(iv)(A), the fact of a transfer to a withdrawn council, is not, of itself, a material prejudice to a third party.	contracts) to facilitate the retransfer. These renegotiated contracts may then be included in the retransfer scheme agreed by the retransfer parties. Allconnex notes that if a contract is terminated and renegotiated into several separate contracts, the counterparty may incur additional administration and management costs as a result of managing several contracts in place of one contract. It is not clear if these additional costs would be a 'material prejudice', and in any case even if considered to be a 'material prejudice', Allconnex notes that these additional costs could be viewed to arise outside of the scheme (i.e. in separate negotiations between Allconnex and the relevant counterparty) rather than under the scheme itself.	
4.	Exchange of information and confidentiality	Section 92BS of the Bill contains a regime for the authorised exchange of information/disclosure of information between the retransfer parties. This regime is complimented by section 92CM which protects an entity in exchanging or disclosing information under the regime, such that nothing done under chapter 3A, including a thing done under or in compliance with a transition document, makes a relevant entity liable for...a breach of a contract or confidence. Allconnex is a 'relevant entity'.	As Allconnex will need to disclose information to withdrawn councils prior to the Bill being enacted to enable those withdrawn councils to have sufficient time to undertake due diligence and make other relevant enquiries in relation to documentation of Allconnex, there is no legislative basis for the authorised exchange of information, and no protection from breach of contract or confidentiality, in these circumstances. Further it is not practical for Allconnex to obtain consent from all	Allconnex seeks clarity in the Bill that protections afforded to Allconnex in respect of the exchange or disclosure of information required or desirable to implement the retransfer will also apply where the retransfer timeline necessitates information being exchanged between the parties prior to the Bill being passed.

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			counterparties to contracts or other affected parties prior to the disclosure of any confidential information (for withdrawn councils for the purposes of their own due diligence and to enable them to provide relevant statutory certifications).	
5.	Default/fall back position for successor to Allconnex liabilities	Section 92BI of the Bill operates such that if a retransfer scheme does not provide for succession of a liability: • (2) if, under a transition document, the liability was transferred from a withdrawn council to Allconnex, that council is the successor; or • (3) otherwise, the withdrawn councils are Allconnex's proportional joint successor for the asset or liability. Section 92AD provides that where withdrawn councils are expressed to be Allconnex's proportional joint successor, all of them are its joint successor, rateably in accordance with their participation rights under Allconnex's participation agreement immediately before the retransfer.	Allconnex is concerned that the fall back position contained in section 92BI (3) of the Bill could be manipulated to lead to an outcome where a withdrawn council receives a windfall gain and other withdrawn councils are disadvantaged. For example, if a council does not wish to accept a liability (e.g. a debt which relates specifically to an asset located in that council's geographical area), notwithstanding that it may otherwise seem appropriate for that council to assume the liability, the fall back position disincentivises that council from reaching an agreement. If the transfer scheme does not provide for the council to be the successor of that liability it will be split between the councils in accordance with their participation rights (and the council will receive a windfall gain).	Allconnex considers it may be more appropriate for the legislation to recognise that in circumstances where a debt relates specifically to an asset, that debt should be transferred to the withdrawn council to whom the asset is also transferred. The parties should still be required to seek to agree the matter in a retransfer scheme in the first instance, but failing such agreement, if the liability can be specifically identified as relating to an asset which is to be transferred to a specific withdrawn council, the debt should also be transferred to that same withdrawn council.
6.	Certification Statement – content requirements	Under s92AR of the Bill, Allconnex and the withdrawn councils must enter into a retransfer scheme by 30 April 2012 which, amongst other things, transfers all	It is inevitable that the assets, liabilities, and instruments of Allconnex will change between 30 April 2012 and 30 June 2012. Allconnex is concerned that	Allconnex is seeking confirmation in the Bill that the retransfer scheme and certification statement can accommodate changes in the asset, liabilities and instruments of Allconnex

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		Allconnex's assets, etc at the end of 30 June 2012. In addition, under s 92AY and 92AZ, Allconnex and the withdrawn councils must execute a certification statement, at the time they enter into the retransfer scheme which, amongst other things, certifies that they have identified all relevant assets, etc.	there is currently no flexibility to allow Allconnex and the withdrawn councils to agree a mechanism for making any adjustments in the certification statement/retransfer scheme to reflect the change in position of the assets, liabilities and instruments of Allconnex during this period.	between the date of the retransfer scheme and 30 June 2012.
7.	Residual assets and liabilities	Under s92AR of the Bill, the retransfer scheme requires that all of Allconnex's assets, employees (other than its CEO), instruments and liabilities are transferred at 30 June 2012.	During the process of negotiating the retransfer scheme, Allconnex and the withdrawn councils may determine that it is more advantageous for certain assets or liabilities to remain with Allconnex following 30 June 2012. For example, this could be because a significant procurement contract is reaching a critical milestone immediately following retransfer. Alternatively, there may be cost-savings associated with retaining software licences for an additional specified period.	Allconnex is seeking some flexibility in the Bill to allow for Allconnex and the withdrawn councils to agree that in certain circumstances it may be desirable for an asset or a liability to be retained by Allconnex following the retransfer, prior to dissolution.
8.	Regulation making power	There is currently no power for the Minister to make regulations about any aspect relating to the retransfer. This is in contrast to recent State Government legislation facilitating asset sales such as the IIA and the Airports Act.	Allconnex is concerned that there may be matters which, despite the best intentions of Allconnex and the withdrawn councils, are overlooked as part of the retransfer scheme process, and in relation to which are not capable of being cured through the current statutory regime.	Allconnex is proposing that the Minister be granted a power to make regulations to assist in remedying any oversights and assisting Allconnex and the withdrawn councils achieve a streamlined transition.
9.	Timing of Ministerial approval of the retransfer staff	Allconnex and the withdrawn councils are required to comply with the retransfer staff support framework which must first be	Allconnex is concerned that the retransfer staff support framework will not receive Ministerial approval in	Allconnex seeks confirmation that the retransfer staff support framework will receive Ministerial approval in sufficient time to enable it to comply

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	support framework	approved by the Minister.	sufficient time to allow it and the withdrawn councils to comply with it prior to 30 June 2012.	with the framework prior to 30 June 2012.
10.	Penalty for failing to comply with a retransfer direction	Under s92BD of the Bill, the Minister may give a retransfer direction on or before 30 June 2013 in respect of certain aspects of the retransfer. A penalty is imposed for failure to comply with the retransfer direction.	Allconnex does not believe that a penalty is appropriate in the retransfer context. Allconnex notes that recent facilitating legislation for disposal of Queensland infrastructure assets, IIA, did not impose a penalty on a particular entity or their board for failing to comply with a direction.	Allconnex seeks guidance as to the rationale for imposing a penalty on it for failing to comply with a retransfer direction.