

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2021-485-756

UNDER

Declaratory Judgments Act 1908, the
common law, the Court's inherent
jurisdiction and Part 30 of the High
Court Rules 2016

BETWEEN

Water Users' Group (NZ) Incorporated,
a duly incorporated society under the
Incorporated Societies Act 1908 having
its registered address for service at
Level 5, 90 The Terrace, Te Aro,
Wellington

Applicant

AND

Hon Nanaia Mahuta, of Wellington,
Minister of the Crown

First Respondent

AND

Attorney-General

Second Respondent

FIRST AMENDED STATEMENT OF CLAIM

13 April 2022

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THE APPLICANT BY ITS SOLICITOR SAYS:

Parties

- 1 The applicant, Water Users Group Incorporated, is a society duly incorporated under the Incorporated Societies Act 1908 for purposes including the bringing of this proceeding. In particular:
 - 1.1 The applicant's purpose in commencing this proceeding is to represent the public interest by bringing before the courts of New Zealand issues of law and legality of great importance to all New Zealanders.
 - 1.2 One such issue is the set of proposals that have recently been promulgated and adopted by the executive government of New Zealand as described further in this statement of claim and known as the "three waters proposals."
 - 1.3 The members of the applicant and those they represent are or will be affected directly or indirectly by the three waters proposals including:
 - (a) Among the founding members of the applicant are committee members of the Tauranga Ratepayers' Alliance, who have joined Water Users Group Incorporated on behalf of the Alliance; the Alliance being a recently incorporated body with over 500 members and supporters.
 - (b) The applicant is constituted to engage, as further members, a wide range of other organisations representing water users, as well as persons who will be affected in their own use of services by the three waters proposals.
 - 1.4 The applicant brings these proceedings in exercise of the right of individuals and entities in a free and democratic society to access the courts of justice on matters affecting the rule of law.
- 2 The first respondent, Hon Nanaia Mahuta ("the Minister") is:
 - 2.1 The Minister of Local Government; and
 - 2.2 The responsible Minister who brought the three waters proposals to Cabinet as described below.
- 3 The second respondent, the Attorney-General, is named as a respondent to represent:
 - 3.1 The Crown in right of New Zealand ("Crown").
 - 3.2 The executive government of New Zealand ("executive government"); and
 - 3.3 The Cabinet of the executive government ("Cabinet").

Background facts and circumstances

- 4 In mid-2017, the executive government commenced reviewing supply arrangements for drinking water, wastewater and stormwater as recorded in the *Three Waters Review: overview*, Department of Internal Affairs, 25 January 2019 (“Overview”).
- 5 The Overview explained that by “three waters,” the Department meant drinking water, wastewater and stormwater, together with the regulation, ownership and governance of related assets and their management and service delivery.
- 6 The applicant adopts the Department’s nomenclature and in this statement of claim uses “three waters” in the same way, viz: meaning drinking water, wastewater and stormwater, together with the regulation, ownership and governance of related assets and their management and service delivery.
- 7 The related assets and their management and service delivery (“three waters assets and services”) are currently owned, managed and delivered by New Zealand local authorities either directly or through council-controlled organisations or subsidiaries of council-controlled organisations.
- 8 The three waters assets and services:
 - 8.1 Did not exist prior to 6 February 1840; and
 - 8.2 Were established progressively after 6 February 1840 by the local authorities which currently own, manage and deliver them or by predecessor bodies or other organs of local government (“local authorities”); and
 - 8.3 Were established to provide drinking water, wastewater and stormwater services for the benefit of the residents, ratepayers and consumers of water services in the respective territories of the local authorities; and
 - 8.4 Were financed from public funds such as rates, taxes and charges.

The three waters papers

- 9 During the review of the three waters, the executive government and/or the Minister decided to make certain proposals for a new three waters service delivery system (“three waters proposals” or “new three waters service delivery system” or “new three waters service delivery model”).
- 10 The three waters proposals are contained in three papers placed before Cabinet by the Minister on or before 14 June 2021 (“three papers”) as follows:
 - 10.1 *A New System for Three Waters Service Delivery* (“Paper One”);
 - 10.2 *Designing the New Water Service Delivery Entities* (“Paper Two”);
 - 10.3 *Protecting and Promoting Iwi/Māori Rights and Interests in the New Three Waters Services Delivery Model* (“Paper Three”).

- 11 Each paper was from the Office of the Minister of Local Government to the Chair of the Cabinet Government Administration and Expenditure Review Committee, under the name of the Minister.
- 12 Under the three waters proposals, as brought to Cabinet by the Minister, including in the three papers:
 - 12.1 The Minister used the term “three waters” with the Department’s meaning, viz: meaning drinking water, wastewater and stormwater, together with the regulation, ownership and governance of related assets and their management and service delivery; and
 - 12.2 The Minister used the term “iwi/Māori” to refer to groups of people descended from a common founding Māori ancestor having mana whenua within geographically distinct territorial boundaries (iwi), together with persons of the Māori race of New Zealand, including any descendant of such a person (Māori).
- 13 The three papers included proposals that the ownership, management and service delivery of the three waters assets and services be:
 - 13.1 Removed from the control of local authorities; and
 - 13.2 Placed under the control of new legislatively created entities.

Alleged rights and interests

- 14 The Minister’s proposals to Cabinet, contained in the three papers, included advice that:
 - 14.1 Iwi/Māori have rights and interests in the three waters under the Treaty.
 - 14.2 By implication, if not expressly, iwi/Māori have rights and interests in the three waters assets and services.
 - 14.3 Iwi/Māori have rights and interests in the new three waters service delivery model which her proposals protected and promoted.
 - 14.4 Iwi/Māori rights and interests in the three waters and/or the new three waters service delivery model had been considered throughout the development of the package of reform proposals, including considerations relating to the Treaty.
 - 14.5 The structure and mechanisms she proposed would give effective recognition to iwi/Māori rights and interests in the three waters, and the new three waters service delivery model, and would fulfil the Crown’s duty to comply with the principles of the Treaty.

Adoption of the three waters proposals by Cabinet

- 15 The three papers are sequential in form and demonstrate progressive development of policy but were all placed before Cabinet together by the Minister on 14 June 2021.
- 16 On 14 June 2021 Cabinet adopted the three waters proposals as set out in the three papers.

- 17 As publicly released, each paper was accompanied by Cabinet Minute of Decision, under the name of Michael Webster, Secretary of the Cabinet as follows:
- 17.1 CAB-21-MIN-0226 Minute, relating to Paper One (“Minutes One”);
- 17.2 CAB-21-MIN-0227 Minute, relating to Paper Two (“Minutes Two”);
- 17.3 CAB-21-MIN-0228 Minute, relating to Paper Three (“Minutes Three”).
- 18 Minutes One, Minutes Two and Minutes Three each show that Cabinet adopted the Minister’s proposal in all material respects.
- 19 The Minister presented the three papers to Cabinet as a suite of papers seeking substantive policy decisions on a comprehensive, integrated package of proposals to transform the three waters service delivery system and associated regulation: paragraph 7 of Minutes One.
- 20 The applicant relies on the three papers and the three minutes as if pleaded in full, for the full context, and on the specific paragraphs of the papers as referenced in this statement of claim.

New water services entities

- 21 In June and December 2020, Cabinet made initial decisions to create large-scale water services entities: paragraph 5 of Minutes One.
- 22 On 14 June 2021, Cabinet agreed to proceed with the creation of four large-scale water services entities as statutory entities: Minutes One, paragraphs 12, 13 and 24.
- 23 The draft entities and boundaries are:
- 23.1 Entity A comprising four territorial authorities being Auckland and those to the north of Auckland;
- 23.2 Entity B comprising 22 territorial authorities south of Auckland to Whanganui District;
- 23.3 Entity C comprising 21 territorial authorities in the rest of the North Island plus the Chatham Islands and those parts of Marlborough District and Tasman District that do not comprise the Ngāi Tahu takiwā; and
- 23.4 Entity D comprising 22 territorial authorities being those parts of Marlborough District and Tasman District that comprise the Ngāi Tahu takiwā and the rest of the South Island.
- (Paragraph 25 of Minutes One.)
- 24 Cabinet agreed that the water services entities will be responsible for:
- 24.1 All service delivery arrangements and infrastructure relating to drinking water and wastewater, including taking over the related services and assets currently held by (or managed on behalf of) local authorities;

- 24.2 Services and infrastructure relating to stormwater quality and quantity, including taking over the related services and assets currently held by territorial authorities (though not including stormwater services and infrastructure related to their role as road-controlling authorities).
- (Paragraph 16 of Minutes One).
- 25 Under the three waters proposals, and as set out in more detail below:
- 25.1 Iwi/Māori will have substantial control of and/or influence with respect to three waters ownership, management and service delivery (“iwi/Māori control and influence”), and
- 25.2 Local authorities, residents, ratepayers and consumers of water services generally will have little or no such control or influence.
- 26 The proposal for iwi/Māori control and influence was a fundamental component of the Minister’s proposals from the outset: Minutes One, paragraphs 20.6, 23, 27, 58. Its detailed expression is found in the structure proposed in Paper Two.
- 27 The proposal for iwi/Māori control and influence was based on the advice set out in paragraph 14 of this statement of claim.

The structure proposed in paper two

- 28 In response to Paper Two, Cabinet agreed that:
- 28.1 The local authorities that constitute each water services entity (as described in Paper 1) would be the owners of the entity, and that this would be provided in legislation; and
- 28.2 There is no financial recognition of ownership provided for, it being noted that local authority ownership rights were instead provided for in the oversight and governance arrangements in paragraphs 11-31 of the Minute: Minutes Two, paragraphs 5-7.
- 28.3 Control of the three waters will be vested in the water services entities (“controlling entities”) governed by boards appointed by a four-person Independent Selection Panel the members of which will be appointed by a Regional Representation Group with 12 members:
- (a) Six of whom will be appointed by and represent all mana whenua of the region; and
- (b) Six of whom will be appointed by and represent all local authorities of the region
- (Minutes Two, paragraphs 11, 12, 13, 19, 22, 24, 25, 28, 29.)
- 28.4 Decisions of the Regional Representation Group will require a super majority decision of 75 percent: Minutes Two, paragraph 19.2.
- 28.5 Controlling entities will be funded through their ability to charge and collect payments from consumers and by borrowings: Minutes Two, paragraphs 32-36.

- 29 In consequence of the structure described in Paper Two, and adopted by Cabinet:
- 29.1 No decision will be able to be made by the Regional Representation Group without the support of at least some of the mana whenua representatives;
 - 29.2 Individual local authorities will have none of the ordinary rights of owners, including no say in the day-to-day governance and administration of three waters, as their role will be limited to collectively selecting six members of the Regional Representation Group; and
 - 29.3 Such influence as an individual local authority has will be further diluted according to the number of local authorities within the region.
 - 29.4 A controlling entity's governing board will have no responsibility or accountability to the local authorities of the region or to the ratepayers and other consumers of water services.

Further mechanisms enabling iwi/Māori control and influence

- 30 Under the three waters proposals, as adopted by Cabinet:
- 30.1 A controlling entity's governing board will be accountable to iwi/Māori through Te Mana o te Wai statements, which will be provided to controlling entities who will be required to prepare and publish a formal reasonable response to the statements within a prescribed timeframe, such statements being an enabling mechanism, which provide iwi/hapu/whanau with the ability to communicate their expression of te Mana o te Wai, including through other documents, which may include (but is not limited to) Iwi Management Plans, Cultural Impact Statements, and/or Statements of Mana Whenua: Paper Three, paragraph 2.3; Minutes Three, paragraphs 7.2, 17-19.
 - 30.2 It was agreed to provide references in the legislation to the principles of the Treaty, where the controlling entities [must] maintain systems and processes to ensure that, for the purposes of carrying out its functions, they have the capability and capacity to give effect to the principles of the Treaty and to engage with Māori and to understand perspectives of Māori: Paper Three, paragraph 2; Minutes Three, paragraph 7.1.
 - 30.3 The board of each controlling entity will be required to have general collective competence in understanding the principles of the Treaty of Waitangi and matauranga Māori, tikanga Māori, kaitiakitanga, and te ao Māori: Paper Three, paragraph 2.4; Minutes Three, paragraph 15.1.
 - 30.4 The board of each controlling entity will be required to have members with specific expertise in supporting and enabling the exercise of matauranga Māori, tikanga Māori kaitiakitanga, and te ao Māori with respect to the delivery of water services: Paper Three, paragraph 2.5; Minutes Three, paragraph 15.2.

- 30.5 Officials are required to continue a high-level principle of partnership with iwi/Māori to give effect to the principles of the Treaty of Waitangi on the transition and implementation, and officials are required to work with Ngāi Tahu on features of a South Island water services entity whose boundaries will align with the takiwā, including during the legislative drafting process referred to in the Minute: Paper Three, paragraphs 22 and 24.
- 30.6 Controlling entities will be required to fund and support capability and capacity of mana whenua within their boundary to participate in relation to three waters service delivery: Paper Three, paragraph 2.6; Minutes Two, paragraph 20, Minutes Three, paragraph 20.
- 30.7 The funding and support referred to in the previous paragraph will give mana whenua the right to receive a form of return from the controlling entities, a right which no one else has.

Justifications for iwi/Māori control and influence

- 31 The Minister's justifications for proposing structures and mechanisms to recognise the rights and interests of iwi/Māori were:
 - 31.1 The existence of iwi/Māori rights and interests in the three waters and the new three waters service delivery model, and
 - 31.2 The Crown's duty to protect those rights and interests to give effect to the Treaty.
- 32 Cabinet's justifications for accepting the Minister's proposals were:
 - 32.1 The existence of iwi/Māori rights and interests in the three waters and the new three waters service delivery model; and
 - 32.2 The Crown's duty to protect them to give effect to the Treaty.
- 33 From the outset, a fundamental element of the reforms was the inclusion of "mechanisms to recognise the rights and interests of iwi/Māori": Paper One, paragraphs 13.4, 29, 68.4, 72.3; Minutes One, paragraph 21.2.
- 34 The papers show that the rights and interests of iwi/Māori requiring recognition by "mechanisms" are their rights and interests qua iwi/Māori.
- 35 The papers show that the rights and interests of iwi/Māori requiring recognition by "mechanisms" are their rights and interests under the Treaty.
- 36 In the three papers and associated minutes, all references to rights and interests of iwi/Māori by the Minister and Cabinet respectively are references to Treaty rights and interests.
- 37 In this statement of claim, all references to rights and interests of iwi/Māori are references to the Treaty rights and interests the existence of which are claimed or assumed to exist in the three papers and associated minutes.
- 38 The structure and associated mechanisms proposed in Papers Two and Three, as pleaded in paragraphs 33-38 (structure) and 39-45 (associated mechanisms), facilitated the recognition of those alleged Treaty rights and interests.

- 39 Paper Three is titled Protecting and Promoting Iwi/Māori Rights and Interests in the new Three Waters Service Delivery Model.
- 40 The title is indicative of the assumption in the papers and associated minutes of the existence of iwi/Māori Treaty rights and interests in the three waters.
- 41 The title is indicative of the assumption in the papers and associated minutes of iwi/Māori Treaty rights and interests in the new three waters service delivery model.
- 42 The title is indicative of the intention to legislate special privileges for iwi/Māori based on the pretended existence of iwi/Māori rights and interests in the three waters and/or the pretended existence of iwi/Māori rights and interests in the new three waters service delivery model.
- 43 Paper Three claims to summarise “iwi/Māori rights and interests in the three waters service delivery reforms”: Paper Three, paragraph 2.
- 44 In paragraph 8 of Paper Three, as part of the executive summary, the Minister states:
- An important part of this work has been to ensure recognition of the rights and interests of iwi/Māori in the three waters. Water can be a taonga of particular significance and importance to Māori, and the Crown has a duty to protect iwi/Māori rights and interests under the Treaty of Waitangi / Te Tiriti o Waitangi (the Treaty / Te Tiriti), and existing and subsequent Treaty settlements. The Crown has responsibilities under the principles of Te Tiriti to protect such a relationship and allow for an appropriate exercise of tino rangatiratanga alongside kāwanatanga. The Crown also has broad responsibilities to protect taonga, the exercise of tino rangatiratanga and kāwanatanga, and the principles of Te Tiriti.*
- 45 Paragraph 10, also part of the executive summary, states that the paper focuses “on how iwi/Māori rights and interests feature in the proposed reforms,” and it “explains how iwi/Māori rights and interests have been considered in the development of the overall reform package, and seeks agreement to specific mechanisms for addressing rights and interests in the new service delivery model.”
- 46 As foreshadowed by paragraphs 8 and 10 of the Paper, Paper Three continues throughout to assume that iwi/Māori have rights and interests in the three waters under the Treaty.
- 47 Paragraph 22 of Paper Three states that Crown Law advice was that there are two significant Treaty principles applicable to the Three Waters Review partnership and active protection.
- 48 The Minister relied on this advice to claim Crown obligations enunciated in paragraphs 22-24, and generally in the papers in particular Paper Three, for the assertion of iwi/Māori rights and interests in the three waters and the new three waters delivery system.

Errors of law

- 49 The rule of law requires that the law be capable of applying equally to all persons unless there are legally valid reasons to differentiate between them.
- 50 The rights and interests of iwi/Māori which the structure and “mechanisms” would create are not rights and interests of iwi/Māori qua New Zealanders and are not capable of applying equally to all New Zealanders.
- 51 The Minister’s proposals are inconsistent with the principle pleaded in paragraph 49 above.
- 52 The treaty obligations of the Crown relate only to legitimate Treaty interests.
- 53 It is an error of law, and irrational, to proceed directly from the general proposition that *water can be a taonga of particular significance and importance to Māori* to the conclusion that iwi/Māori have rights and interests in the three waters which the Crown has a Treaty duty to protect.
- 54 Except as set out below, and apart from their general rights and interests as members of New Zealand society:
- 54.1 Iwi/Māori do not have special rights and interests in the three waters under the Treaty.
- 54.2 Iwi/Māori do not have special rights and interests in the new three waters service delivery model under the Treaty.
- 55 The exceptions are that:
- 55.1 Identified iwi or hapu can have rights and interests in bodies of water in accordance with tikanga, which recognises the customary rights, interests and obligations of hapu or iwi over water within their rohe.
- 55.2 Iwi or hapu rights and interests in bodies of water must be established as of 6 February 1840 and have continued to be exercised to the present day without alienation.
- 56 To the extent that such iwi and/or hapu rights and interests exist, the Minister’s reference to the rights and interests of iwi/Māori in all water is not consistent with, undermines and contradicts the tino rangatiratanga of individual iwi/hapu over their water within their rohe and is accordingly inconsistent with Article 2 of the Treaty.
- 57 If and to the extent there are waters within the three waters in respect of which identified iwi or hapu had rights and interests as indicated in paragraph 55, the Minister needed to identify them and appropriately recognise them and the iwi or hapu that benefits from those rights and interests, and it was an error of law for the Minister to base her recommendations on the proposition that there can be a conglomerate able to be described as iwi/Māori who or which had rights and interests in all water and the three waters, as she does when she states “An important part of this work has been to ensure recognition of the rights and interests of iwi/Māori in the three waters” (refer paragraph 44 above).

- 58 The Minister's papers do not identify and demonstrate the existence of iwi/Māori rights and interests in the three waters or any aspect thereof.
- 59 To the extent that such rights do exist (as outlined in paragraph 55 above), the three waters proposal for four entities if incorporated in legislation would subvert the rights, interests, and obligations of iwi/hapu according to tikanga by depriving individual iwi/hapu (except Ngāi Tahu) of direct influence and control over water within their rohe and instead would deal with water on a pan-Māori basis within the boundaries of each entity.
- 60 For the reasons pleaded in paragraphs 53-59 above, it was an error of law, or mixed law and fact, for the Minister to assert that iwi/Māori have rights and interests in the three waters, in the three waters assets and services, and/or the new three waters service delivery model.
- 61 As iwi/Māori do not have, or the Minister's papers failed to demonstrate how they have, rights and interests in the three waters, the three waters assets and services, and/or the new three waters service delivery model, the Minister was wrong in law to assert that the structures and other mechanisms which she recommended were necessary to recognise the rights and interests of iwi/Māori as aforesaid.
- 62 The principles of the Treaty impose mutual and reciprocal duties of good faith, fairness, reasonableness, and honour.
- 63 It is irrational, and an error of law, for the Crown to justify conferring special interests on iwi/Māori on the ground that the Crown is required by the principles of the Treaty to do so, in circumstances where it would represent a breach of the reciprocal duties for iwi/Māori to demand such special interests.
- 64 Further or alternatively to paragraph 63, the Crown owes a Treaty duty to all New Zealanders to act with good faith, fairness, reasonableness, honour and justice.
- 65 Taking property held by local authorities for the benefit of their residents without distinction as to race, to place it under the substantial or effective control or influence of iwi/Māori, who have no rights or interests in that property different or superior to the rights or interests of residents generally, would be unfair, unreasonable, and dishonourable.
- 66 Further or alternatively to paragraph 65, taking property held by local authorities for the benefit of their residents without distinction as to race, to place it under the substantial or effective control or influence of iwi/Māori, who have no rights or interests in that property different or superior to the rights or interests of residents generally, is a breach of the Crown's Treaty duty to all New Zealanders to act with fairness, reasonableness, honour, and justice.
- 67 The Minister's advice to Cabinet failed properly to explain, acknowledge, and respect the principles of the Treaty in the respects pleaded in paragraphs 62-66.
- 68 If the Treaty principle of partnership, to which the Minister referred in paragraph 22 of Paper Three, is the principle stated in paragraph 62 above, it does not require the Crown to introduce "mechanisms" to protect and promote iwi/Māori rights and interests in the three waters and/or the new three waters service delivery systems.

- 69 If the Treaty principle of partnership, to which the Minister referred in paragraph 22 of Paper Three, is the principle stated in paragraph 62 above, the proposals infringe the principle, for the reasons pleaded in paragraphs 63-66 above.
- 70 There is no other principle of partnership which could justify the Minister's proposals.
- 71 There is no principle of active protection which could justify the Minister's proposals.
- 72 In consequence of the matters pleaded in paragraphs 68-71, the Minister was wrong in law to assert that a Crown duty to act in accordance with the principles of the Treaty required the Cabinet to adopt her recommendations to put in place structures and other mechanisms to confer on iwi/Māori special interests in the three waters, in the three waters assets and services, and/or the new three waters service delivery model.
- 73 As the Minister's advice to Cabinet was grounded on the failures and erroneous claims identified in paragraphs 49-72, Cabinet's agreements to her proposals were likewise based on errors of law.

ACCORDINGLY, THE APPLICANT CLAIMS:

- (a) A declaration that the Minister's advice to Cabinet was wrong in law.
- (b) A declaration that iwi/Māori do not have rights and interests in the three waters, and/or the three waters assets and services, and/or the new three waters service delivery model.
- (c) Further or alternatively, a declaration that the Minister has not identified and demonstrated the existence of any iwi/Māori rights and interests in the three waters and/or the three waters assets and services, and/or the new three waters service delivery model.
- (d) A declaration that the Minister was wrong in law to assert that a Crown duty to act in accordance with the principles of the Treaty required Cabinet to adopt her recommendations to put in place structures and mechanisms to confer special interests on iwi/Māori.
- (e) A declaration that Cabinet's agreement to adopt the Minister's recommendations to put in place structures and other mechanisms to confer special interests in the three waters and/or the three waters assets and services, and/or the new three waters service delivery model on iwi/Māori was based on errors of law.
- (f) A declaration that Cabinet's adoption of the Minister's recommendations is a breach of the Crown's obligations to act with reasonableness, fairness and justice to all New Zealanders.
- (g) A declaration that there is no Treaty principle of partnership requiring the Crown to recognise iwi/Māori rights and interests in the three waters and/or the three waters assets and services, and/or the new three waters service delivery model.

- (h) A declaration that there is no Treaty principle of active protection requiring the Crown to recognise iwi/Māori rights and interests in the three waters and/or the three waters assets and services, and/or the new three waters service delivery model.
- (i) A declaration giving such directions as the Court thinks just to aid Cabinet in its reconsideration of the issues.
- (j) Costs.