

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2021-485-641

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

IN THE MATTER OF an application for declarations under the
 common law and/or the Declaratory
 Judgments Act 1908

AND IN THE MATTER OF the rights and democratic governance role of
 local government in New Zealand

BETWEEN Timaru District Council
 First Plaintiff

AND Whangarei District Council
 Second Plaintiff

AND Waimakariri District Council
 Third Plaintiff

AND The Minister of Local Government
 First Defendant

AND The Secretary for Local Government
 Second Defendant

**Submissions for the Plaintiffs (“Councils”)
in support of claim for declarations**

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1. Introduction

- 1.1. In this proceeding, the three plaintiff local councils (*Councils*) seek the exercise of the court's declaratory jurisdiction in relation to rights relating to, first, democratic local governance and, second, ownership of property.
- 1.2. The background for the proceeding is provided by central government announcements which would foreshadow action directed by the defendants (*Crown*) to adversely affect those rights in relation to the Councils' infrastructure assets owned and operated to provide drinking water, wastewater and stormwater services (*Water Assets*). The proposed actions are a matter of public controversy, frequently referred to as "Three Waters" proposals (*Proposals*).
- 1.3. As developed later in these submissions, the fact of public controversy is not of itself a bar to the exercise of the court's declaratory jurisdiction. Nevertheless, the Councils appreciate that the court will be cautious to ensure that it is not exceeding its proper role.
- 1.4. On the other hand, the context of the declarations sought is not (or should not be) controversial: they describe longstanding but fundamental principles relating to democratic local governance, and to property rights. What is surprising, at least to the Councils, is the Crown's resistance to these declarations.
- 1.5. In that context, it is useful to outline what this proceeding is about, and what it is not about.

What this case is about

- 1.6. The Councils consider that this proceeding *is* about the following matters:
 - (a) The potential removal by the Proposals of their communities' entitlements to democratic local governance of, and accountability for, the provision and management of water services through their Water Assets.

- (b) The potential expropriation by the Proposals of the Councils' property rights in their Water Assets.
- (c) The common law principles of compensation for Crown expropriations of non-Crown property.
- (d) The limits of, and discretionary factors for, the court's declaratory jurisdiction.

1.7. Conversely, the Councils consider that this proceeding is *not* about:

- (a) The desirability of reliable and good quality water services where these are provided.
- (b) The desirability of greater regulation of such water services.
- (c) The form and content of Crown consultation on the Proposals.
- (d) The resolution of different views on the economic efficiencies of the Proposals.
- (e) The resolution of differences on the defects of the governance arrangements for the new entities which would provide water services under the Proposals.
- (f) Any disregard of the conventional cavity between the judicial and legislative branches of government.
- (g) Any disregard of parliamentary sovereignty.

1.8. The last of these matters, parliamentary sovereignty, warrants some elaboration at this point. The Councils acknowledge that the Proposals could be brought into being by an Act of Parliament. Nevertheless, the Councils say that:

- (a) the Proposals would interfere with the governance and property rights previously mentioned; and
- (b) the vindication of those rights (including in relation to other Council assets), given the Crown's failure to acknowledge that interference (not least in the statement of defence),

involves matters which are properly the subject of the declarations sought.

A “constitutional” dimension

1.9. As will be seen from some of the authorities discussed later in these submissions, the Councils’ claims are related to “rights” (in the sense of voting as a primary form of local democratic accountability, and as to property ownership). The claims might also be said to have “constitutional” implications, although that categorisation is not a necessary component of the Councils’ claims. Nevertheless, even if the label “constitutional” is not applied here, the considerations that would support that classification indicate both the importance and the justiciability of the core issues.

1.10. As discussed in Part 4 of these submissions, the right to enjoy ownership of property and to be compensated for expropriation by public powers “can properly be described as a constitutional principle”.¹

1.11. Further, there is an argument that the key local democracy statutes, the Local Government Act 2002 (*LGA*), Local Electoral Act 2001 and the Local Government (Rating) Act 2002, can be appropriately classified as “constitutional statutes”. A distinction between “ordinary” and “constitutional” statutes has been recently endorsed by a majority of our Supreme Court.²

1.12. This distinction is particularly associated with the judgment of Laws LJ in *Thoburn v Sunderland City Council*:³

... a constitutional statute is one which (a) conditions the legal relationship between citizen and state in some general, overarching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights. (a) and (b) are necessarily closely related: it is difficult to think of an instance of (a) that is not also an instance of (b).

¹ *New Zealand Council of Licensed Firearms Owners Inc v Minister of Police* [2020] NZHC 1456 at [34].

² *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551 at [221]-[224] and [250].

³ [2003] QB 157 (DC) at [62].

1.13. To broadly similar effect, *Laws of New Zealand's* commentary on the constitutional role and status of local government⁴ refers to contentions of “quasi-constitutional” significance for local government – in particular, the three local democracy statutes mentioned above.⁵

1.14. Similar indications, from a governmental perspective, have been expressed by the defendants in this proceeding. For example, in the Department of Internal Affairs’ annual report for the year ended 30 June 2020, signed off by the chief executive/Secretary, one of the key outcomes identified was:⁶

New Zealand is a well-functioning democracy, across central and local government: Both central and local government have big impacts on the lives of New Zealanders. The smooth running of New Zealand’s democratic institutions is important to the accountability and transparency that gives people trust and confidence in democracy.

1.15. In April 2021, announcing the review on the “future for local government”, the Minister stated:⁷

Local government plays an important role in our democratic system, giving people a voice in the leadership of their communities and in the governance of services and publicly owned assets.

1.16. These descriptions of the democratic importance of local government are apt and uncontroversial. They are also consistent with both the language of “constitutional” or “quasi-constitutional” significance, and the concepts underpinning the Councils’ claims in this proceeding.

1.17. To repeat the point made earlier, the label “constitutional” is not definitive of itself, nor a necessary part of the Councils’ claims. This is not a case about implicit repeal or other interpretations of an Act of Parliament, as in *Thoburn* or *Fitzgerald*. It is a case

⁴ C Mitchell and D Knight *Laws of New Zealand Local Government* (online ed) at [30].

⁵ Citing M Palmer, “What is New Zealand’s constitution and who interprets it? Constitutional realism and the importance of public office-holders” (2006) 17 *Public Law Review* 133.

⁶ Department of Internal Affairs *Annual Report 2020* at 36, available at <www.dia.govt.nz> .

⁷ Hon Nanaia Mahuta “Independent review to explore future for local government” (media release, 23 April 2021), available at <www.beehive.govt.nz/release/independent-review-explore-future-local-government>.

about identifying principles, values and rights of major legal significance. In turn, these factors inform the discretionary declaratory jurisdiction invoked by the Councils' claims.

Balance of these submissions

1.18. The balance of these submissions are organised as follows:

- (a) Part 2 deals with the background to the proceeding, including the LGA and the evidence on the Councils' Water Assets and related governance and accountability, the development of the Proposals, and the Councils' concerns with those proposals.
- (b) Part 3 addresses the democratic local governance limb of the proceeding.
- (c) Part 4 addresses the property expropriation (and compensation) limb of the proceeding.
- (d) Part 5 addresses the court's declaratory jurisdiction and the justifications for the making of the declarations sought.

2. Background

Local Government Act 2002 (LGA)

- 2.1. As is well understood, the Councils and other local councils exist and operate under the LGA. Thus the LGA provides the contemporary statutory background for this proceeding. It also represents some 150 years of evolution of local government in New Zealand. Further its key provisions articulate the modern purpose and role of local government.
- 2.2. It is useful to set out the purpose of the LGA from s 3, and the purpose of local government from s 10:

3 Purpose

The purpose of this Act is to provide for democratic and effective local government that recognises the diversity of New Zealand communities; and, to that end, this Act—

- (a) states the purpose of local government; and
- (b) provides a framework and powers for local authorities to decide which activities they undertake and the manner in which they will undertake them; and
- (c) promotes the accountability of local authorities to their communities; and

provides for local authorities to play a broad role in promoting the social, economic, environmental, and cultural well-being of their communities, taking a sustainable development approach.

10 Purpose of local government

(1) The purpose of local government is-

- (a) to enable democratic local decision-making and action by, and on behalf of, communities; and
- (b) to promote the social, economic, environmental, and cultural well-being of communities in the present and for the future.

...

- 2.3. As discussed further in Part 3 of these submissions, there are important and longstanding connections between the elements identified in ss 3 and 10: local communities; local activities; promotion of communities' wellbeing; democratic local government; and accountability.
- 2.4. To give effect to the s 10 purpose of local government (see also the role of local authorities: s 11), local authorities have specific

legal status, broad powers, and a mandated focus on their communities, as spelled out in ss 12 and 14:

12 Status and powers

- (1) A local authority is a body corporate with perpetual succession.
- (2) For the purposes of performing its role, a local authority has-
 - (a) full capacity to carry on or undertake any activity or business, do any act, or enter into any transaction; and
 - (b) for the purposes of paragraph (1), full rights, powers, and privileges.
- (3) Subsection (2) is subject to this Act, any other enactment, and the general law.
- (4) A territorial authority must exercise its powers under this section wholly or principally for the benefit of its district.

...

14 Principles relating to local authorities

- (1) In performing its role, a local authority must act in accordance with the following principles:
 - (a) a local authority should-
 - (i) conduct its business in an open, transparent, and democratically accountable manner; and
 - (ii) give effect to its identified priorities and desired outcomes in an efficient and effective manner;
 - (b) a local authority should make itself aware of, and should have regard to, the views of all of its communities; and
 - (c) when making a decision, a local authority should take account of-
 - (i) the diversity of the community, and the community's interests within its district or region; and
 - (ii) the interests of future as well as current communities; and
 - (iii) the likely impact of any decision on each aspect of well-being referred to in section 10:
 - (d) a local authority should provide opportunities for Māori to contribute to its decision-making processes:

...

- 2.5. Some of the principles for local authorities and provisions as to status and powers, as set out in ss 12 and 14 of the LGA, “pick up on the character of [the] relationship” whereby local authorities

owe fiduciary or fiduciary-like obligations to their communities.⁸ There is considerable English authority to this effect,⁹ which has been followed in New Zealand.¹⁰

- 2.6. The authorities state that local authorities owe “a general duty of fairness and evenhandedness” as between ratepayers,¹¹ owing trustee-like obligations and duties to act with fidelity and in good faith.¹²
- 2.7. Further, in relation to governance principles, local authorities are not only democratically accountable but required to ensure that the community understands that they (including their elected governing boards) are responsible and democratically accountable for the decision-making of the local authority: ss 39(a) and 41(1)-(3).
- 2.8. The Councils’ pleading expressly identifies other LGA provisions relevant to this proceeding:
- (a) s 78 Community views in relation to decisions: ASoC, [16];
 - (b) s 82 Principles of consultation: [17];
 - (c) s 101 Financial management: [18];
 - (d) s 101B Infrastructure strategy: [19], [20];
 - (e) s 125 Requirement to assess water and other sanitary services: [23];
 - (f) s 130 Obligation to maintain water services: [21], [22].

⁸ C Mitchell and DR Knight *Laws of New Zealand Local Government* (online ed) at [34].

⁹ *Bromley London Borough Council v Greater London Council* [1983] 1 AC 768 (HL); *Roberts v Hopwood* [1925] AC 578 (HL); and *Prescott v Birmingham Corporation* [1955] Ch 210 (CA).

¹⁰ *Mackenzie District Council v Electricity Corp of New Zealand* [1992] 3 NZLR 41 (CA) at 47; *Waitakere City Council v Lovelock* [1997] 2 NZLR 385 (CA), in particular at 408-411 per Thomas J; and *Barton v Masterton District Council* [1992] 1 NZLR 232 (HC) at 244-245.

¹¹ *Electricity Corp of New Zealand Ltd v Waimate District Council* HC Christchurch CP47/90, 27 March 1992 at 43.

¹² *Mackenzie District Council v Electricity Corp of New Zealand* [1992] 3 NZLR 41 (CA) at 47 and 49. However, elected local authorities, although entitled to give weight to the views of, or mandate from, constituents, may not regard themselves as bound to that viewpoint: *Willowford Family Trust v Christchurch City Council* [2011] NZAR 209 (HC) at [95].

The status quo — Water Assets are owned and managed by councils

2.9. Water Assets are currently owned and managed either directly by councils (as in the case of the plaintiff Councils) or by council-controlled organisations (as in the case of, for example, Watercare in Auckland).

2.10. The Councils' Water Assets are very substantial in value:

- (a) Waimakariri District Council's (*WaDC's*) Water Assets have a total approximate book value of \$602m;¹³
- (b) Whangarei District Council's (*WhDC's*) Water Assets have a total approximate value of between \$700m (approximate book value) and \$1.2b (replacement value);¹⁴ and
- (c) Timaru District Council's (*TDC's*) Water Assets have a total value of approximately \$440.3m.¹⁵

2.11. The Councils have obligations under the LGA to manage their Water Assets prudently and in a manner that promotes the current and future interests of their communities.¹⁶ Further detail about the Councils' activities in this regard, including significant improvements to their Water Assets, can be found in the affidavits given by their respective Mayors.¹⁷

2.12. Investment in Council-owned Water Assets has primarily been funded by ratepayers.¹⁸ It is accepted that, over the years, central Government has also made funding contributions to the Councils' Water Assets.¹⁹ However, those funding contributions are very small relative to the value of the assets.²⁰

¹³ Affidavit of Daniel Bruce Gordon dated 25 February 2022 (*Gordon*) at [7].

¹⁴ Affidavit of Sheryl Lorraine Mai dated 24 February 2022 (*Mai*) at [7].

¹⁵ Affidavit of Nigel Bowen dated 24 February 2022 (*Bowen*) at [8] (being fair value on a depreciated replacement cost basis).

¹⁶ See at ss 101, 17A, 101B, 124, 130, 125-126, 261B referred to (in that order) in ASoC at [18]-[24].

¹⁷ Bowen at [12]-[13]; Gordon at [10]-[15]; and Mai at [30]-[32].

¹⁸ See for example Bowen at [18]-[20]; and Affidavit of Nigel William Bowen in Reply dated 14 April 2022 (*Bowen (Reply)*) at [9]-[12].

¹⁹ See Affidavit of Michael Vincent Lovett dated 31 March 2022 (*Lovett*) at [8.2]-[8.4]; and Bowen (Reply) at [9].

²⁰ See Bowen (Reply) at [9]-[12]; and Affidavit of Sheryl Lorraine Mai in Reply dated 14 April 2022 (*Mai (Reply)*) at [5].

2.13. As the Mayor of TDC explains,²¹ planning and decision-making regarding Water Assets is closely integrated within the Council's wider strategic objectives for the community and its promotion of the 'four well-beings' (social, economic, environmental and cultural) that underpin the purpose of local government in New Zealand.²²

Accountability and responsiveness

2.14. Under the status quo, the Councils are responsive to the demands of their local communities regarding Water Assets and are directly accountable to those communities as elected representatives.

2.15. Communities influence the Councils' decision-making about Water Assets in important and interrelated ways, including by providing feedback on the proposed Long-Term Plan (of which Water Asset planning is an integral part). The Councils' respective Long-Term Plans (and associated consultation processes) ensure decisions about Water Assets are consistent with the wider strategic priorities and objectives of the district, as shaped by the views of the community.²³ This includes identifying priority projects and setting targeted rates.²⁴

2.16. The ability to consult directly with their communities enables the Councils to make decisions that are tailored to the affected people's input. By way of recent example, following public consultation in 2018, TDC decided to routinely chlorinate the water supply in areas where the community supported that action, and deferred chlorination in other areas where the community was opposed (until such time as it was mandated by the drinking water standards).²⁵

2.17. The Councils are also democratically accountable for the quality of water service-delivery in their districts, and their responses to

²¹ Bowen at [13], [14]-[17].

²² LGA, s 10 (Purpose of local government).

²³ Bowen at [16]-[17], [24]-[25]; and Gordon at [11]-[13] and [27]-[29].

²⁴ Bowen at [24].

²⁵ Bowen at [25].

issues with service-delivery are directly shaped by the expectations of their communities. The Mayors of TDC and WaDC both provide recent examples of this in their affidavits.²⁶ Relatively recently in Timaru, for example, residents complained of a discolouration issue that, although aesthetic only (safe drinking water standards were met), was clearly of concern to the community. TDC mobilised a response based on that community feedback, notwithstanding there was no immediate health threat.²⁷

2.18. In the same vein, the Councils' responses to the Proposals are directly shaped by local concerns and their communities' views. Both TDC and WaDC have proactively engaged with their communities about the Proposals.²⁸ Likewise WhDC has considered the Proposals from the particular perspective of its ratepayers and, while it acknowledges that some councils stand to benefit from economies of scale, the benefits of the Proposals for Whangārei (which has made significant investments in its Water Assets in recent times) remain unclear.²⁹

The development of the Proposals

2.19. In June 2021, the Government confirmed that it was working on a proposal to transfer responsibility for Water Assets away from local authorities and aggregate it under four new large water services entities, with each entity responsible for Water Assets and service delivery within a specified geographic area spanning multiple cities and districts.³⁰

2.20. That announcement came in the course of the Government's wider 'Three Waters Reform Programme', which has been in train since at least July 2020.³¹ Although that reform programme is not

²⁶ Bowen at [22]-[23]; Gordon at [27], [30] and [31]-[33].

²⁷ Bowen at [23].

²⁸ Bowen at [51]; and Gordon at [16]-[21].

²⁹ Mai at [3], [12] and [16]. See at [28]-[33] regarding WhDC's investments in Water Assets in the last 10-15 years. See also Mai (Reply) at [6].

³⁰ Lovett at [3.13] and fn 9, referring to <https://www.beehive.govt.nz/release/government-water-reforms-build-economic-resilience-and-save-ratepayers-money>. See also Lovett at [3.17] referring to 'Cabinet Paper One and Minute — A new system for three waters service delivery — 30 June 2021'.

³¹ For more detail regarding the Three Waters Reform Programme in the period prior to the June 2021 announcement, see Lovett at fn 1 and [3.1]-[3.12]. The reform programme

limited to the establishment of the new water service entities, it is this aspect of the proposals that underlies this proceeding.

2.21. The latest (as yet) proposed governance structure for the new water services entities is described in an exposure draft of the Water Service Entities Bill, which the Government has made available for consultation purposes (*Exposure Draft*).³² The Exposure Draft provides, in summary:

- (a) Four new (body corporate) water services entities are established³³ whose 'service areas' are the aggregate of multiple territorial authority districts (22 districts, for example, in the case of Western-Central);³⁴
- (b) Each entity will be governed by an independent professional board;³⁵
- (c) For each entity there will be a 'regional representative group' comprised of at least six regional representatives, and an equal number of territorial authority representatives and mana whenua representatives;³⁶
- (d) Territorial authorities will appoint representatives to the regional representative group in accordance with the regional representative group's constitution;³⁷
- (e) A 'board appointment committee' from within the regional representative group shall appoint and remove members of the board;³⁸

encompasses improvements to regulatory standards and the establishment of a new regulatory body, Taumata Arowai. Those aspects of the reform are outside the scope of this proceeding (the Councils support these regulatory improvements): see Bowen at [4] and [41]; and Gordon at [39]).

³² Bowen at NB 203-334.

³³ Exposure Draft at cl 9, NB 238.

³⁴ At Parts 1-4 of Sch 2, beginning NB 320.

³⁵ At cls 47-49 at NB 250.

³⁶ At cl 24, NB 243.

³⁷ At cl 26, NB 243.

³⁸ At cls 33-35, NB 246; and cls 50-60, beginning NB 251.

- (f) The 'regional representative group' will participate in the setting of the board's strategic direction and performance expectations;³⁹
- (g) The Minister must oversee and manage the Crown's interests in the water services entities and is given certain oversight powers to that end, including the power to issue a Government policy statement setting out central Government's overall direction and priorities for water services, which the water services entities *must* give effect to when performing their functions;⁴⁰
- (h) Each water service entity is said to be "owned collectively by its territorial authority owners", however the entities are not council organisations, council-controlled organisations, or local government organisations for the purposes of the LGA.⁴¹

2.22. Whilst the Government had originally indicated that councils would have the ability to opt in or out of the new water service entities model,⁴² in October 2021 Cabinet formally decided to make the transfer of Water Assets to the new entities mandatory.⁴³ This was after WhDC, for example, had formally resolved to provisionally opt out of the Proposals on the basis that there was insufficient evidence that the Proposals would benefit Whangārei ratepayers.⁴⁴

2.23. The Councils accept that the proposed governance structure of the water service entities is subject to change.⁴⁵ However, the affidavits filed by the Crown in this proceeding confirm unequivocally that ownership of Water Assets *will* be transferred to the new water service entities as part of the reforms.⁴⁶

³⁹ At cl 25, NB 243.

⁴⁰ At cl 23, NB 242; and cls 110-113, NB 272-273.

⁴¹ At cl 13(2)-(3), NB 239.

⁴² Bowen at [29]-[31]; and Bowen (Reply) at [24]-[30].

⁴³ Lovett at [4.4] referring to 'Cabinet Paper and minute — Three Waters reform Further Decisions — 18 October 2021'.

⁴⁴ Mai at [29] and SM 001.

⁴⁵ See Lovett at [6.9]-[6.10]; and Bowen (Reply) at [31].

⁴⁶ Affidavit of Hon Nanaia Cybele Mahuta dated 4 April 2022 (*Minister Mahuta*) at [2.6]; and Lovett at [3.16]. See also Bowen (Reply) at [15]-[19], [21], [31].

The Councils' concerns about the Proposals

2.24. The Councils are concerned that the Proposals:

- (a) overlook or underestimate the importance of local government as a longstanding component of democratic governance in New Zealand; and
- (b) overlook or underestimate important and longstanding principles and features of the democratic governance of New Zealand at the community level.⁴⁷

2.25. Council ownership of Water Assets enables the communities who have essentially funded these assets (via rates and charges) to influence decisions about these assets, not least by voting in the local democratic process of electing councillors who make decisions about these assets.⁴⁸

2.26. In contrast, under the Proposals, the Councils are concerned that their, and their communities', ability to influence decisions about Water Assets is significantly diluted within a layered and convoluted governance structure.⁴⁹ This structure interposes multiple degrees of separation between the public, its council, and the boards of the proposed entities, with no direct board accountability to councils or the public.⁵⁰

2.27. Under the status quo, councils are able to make decisions about Water Assets that align with and enhance their communities' long-term strategic objectives. For example, a proposed expansion to water supply infrastructure might attract industry and deliver long-term economic growth for the community.⁵¹

2.28. Under the Proposals, council representatives will be competing with other districts, mana whenua and central Government to influence the board's decision-making. The Councils are concerned that their local voice may be lost in the clamour of these multiple and divergent interests with the consequence that

⁴⁷ Bowen at [53]; Gordon at [25]; and Mai at [35]. See ASoC at [7]-[8].

⁴⁸ Bowen at [4]-[5]; and Gordon at [26]-[27], [43].

⁴⁹ Bowen at [28], [42]-[44] and [47]; and Gordon at [28].

⁵⁰ Bowen at [49]; Gordon at [30]-[31]; and Mai at [29].

⁵¹ Bowen at [45]; and Gordon at [32], [34].

their communities' interests and priorities are not reflected in the output of the regional representative group, a fortiori regarding decision-making by the board.⁵²

2.29. The Councils are concerned that local influence, particularly for smaller districts, will be so diminished under this structure that meaningful local representation and influence is effectively removed.⁵³

2.30. The Councils have made these concerns known to the Minister, and continue to do so.⁵⁴ Notwithstanding this, the Government has continued down to discount or disregard them. For example, the Exposure Draft of the bill in no way meets the Councils concerns. To the Councils, it appears the Government has a fundamentally different understanding about what local government and local democratic accountability is and means.⁵⁵ This difference in understanding is reflected in the gulf between the Proposals and the Councils' concerns.⁵⁶

2.31. Furthermore, while the Government has made clear its intention to transfer ownership of Water Assets from local authorities to the new water service entities,⁵⁷ no compensation for local authorities is proposed.⁵⁸ This is notwithstanding that investment in these assets has essentially been funded by rates paid by the community.⁵⁹ While the Councils accept that central Government has made funding contributions to Water Asset infrastructure from time to time, that is not only a very small proportion compared to

⁵² Bowen at [44] and [46]; Gordon at [28] and [35]-[36].

⁵³ Bowen at [44].

⁵⁴ See for example Bowen at [30], [32]; Mai at [12]-[13], [19], [20]-[21]; and Gordon at [21]. See also letter from Gordon to Minister Mahuta dated 21 July 2021 at DG 042; letter from Gordon to Minister Mahuta dated 28 September 2021 at DG 053 (and WaDC's submission to the Minister of the same date at DG 098); letter from Bowen and Mai to Minister Mahuta dated 15 October 2021 at NB 335; presentation to the Government by C4LD at SM 088; and letter from 30 Mayors (including the Mayors of the plaintiff Councils) to Minister Mahuta dated 16 November 2021 at DG 115.

⁵⁵ Bowen (Reply) at [39].

⁵⁶ Bowen at [33]; Mai at [35]-[36]; and Gordon at [25]-[26].

⁵⁷ See above at [2.23]; and Bowen (Reply) at [15]-[18].

⁵⁸ The 'support package' to be granted to local authorities to support their transition to the new model is not intended to compensate local authorities by providing funding equivalent to the value of their Water Services assets: Lovett at [3.25].

⁵⁹ Bowen at [48]-[50]; Gordon at [37]; and Mai at [24]-[25].

the total value of this infrastructure, but irrelevant to the concept of ownership (as discussed in Part 4 of these submissions).⁶⁰

2.32. The Government has sought to justify its Proposals on the grounds that 'scaling up' responsibility for Water Services assets will achieve economic benefits and efficiencies.⁶¹ Putting to one side the question of whether that claim is justified, the Councils are concerned that, unless the importance of local government and democratic accountability is affirmed, the Government may apply a similar approach and justification to 'scaling up'-style reforms to other infrastructure assets in the future, resulting in an ongoing erosion of community influence on decision making about the assets they fund and use.⁶²

2.33. TDC and WhDC have consulted with their communities about the Proposals and received strong feedback that their communities are opposed to ceding control of Water Assets from locally accountable councils to a remote new entity.⁶³

2.34. The concerns outlined above are not isolated to the Councils. For example, the Councils' concerns about loss of community ownership and control have been raised by Mayor of Auckland Phil Goff⁶⁴ and by the 31-strong council members of 'Communities 4 Local Democracy', a group established in direct response to the Government's Proposals.⁶⁵

⁶⁰ Bowen (Reply) at [9]-[13]; and Mai (Reply) at [5].

⁶¹ See for example Lovett at [3.9], [3.1].

⁶² Bowen at [52]-[53]; Gordon at [42], [44]; and Mai at [3].

⁶³ Bowen at [51]; and Mai at [16]-[21].

⁶⁴ Bowen (Reply) at [6] and NB2 629 and 631.

⁶⁵ Bowen (Reply) at [7]-[8].

3. Democratic Local Governance

- 3.1. This Part of these submissions addresses the democratic local governance aspects of the Councils' claims for declarations.
- 3.2. The essential submission for the Councils is that democratic local governance is not only longstanding and important but reflects key principles and values which are entitled to judicial recognition and, where appropriate, remedy. (Whether the declarations sought are an available and appropriate remedy here is addressed in Part 5 of these submissions.)

The pleadings

- 3.3. The Councils' claims and the Crown's responses are conveniently addressed by reference to the pleadings.
- 3.4. The starting point is that New Zealand is a free and democratic society: ASoC [6]. Albeit stating what must be obvious, the language of "free and democratic society" is of course consciously drawn from the NZBORA, s 5; and "the rule of law" is fundamental to our entire political and legal system, and illustratively explicit in the Senior Courts Act 2016, s 3(2).
- 3.5. With the origins of elected local government in New Zealand dating back to the 19th century (see *Appendix 1*), it must also be self-evident that it is an important and longstanding component of the democratic governance of New Zealand: ASoC [7]. This pleading is later incorporated into the Declaration A sought: ASoC [39].
- 3.6. The statement of claim proceeds to list four relevant principles and features of local democratic governance: ASoC [8]. These are later listed as the components of Declaration B sought by the Councils: ASoC [39].
- 3.7. Of particular relevance for this Part 3 is the principle that local councils are democratically accountable to their communities: ASoC [8.2].

- 3.8. The reflections of democratic accountability of local councils to their communities in the LGA (and in predecessor legislation) are then outlined in ASoC [10]-[17].
- 3.9. The democratic accountability of the Councils in relation to infrastructure assets is pleaded at ASoC [25]. These assets include “Water Assets”: ASoC [27].
- 3.10. The Crown’s “Proposals”, including the potential removal of ownership and control of Water Assets to new entities, *not* subject to democratic accountability, are then pleaded: ASoC [29]-[30].
- 3.11. The Proposals in turn give rise to the Councils’ pleaded “Concerns”:
- (a) that the Proposals reflect Crown misunderstandings of (relevantly for this Part) local democratic governance: ASoC [31];
 - (b) that the Proposals are based on disputed assumptions (relevantly for this Part) about the inadequacy of local democratic governance as a system for managing local infrastructure assets: ASoC [32];
 - (c) that the approach and assumptions evidenced by the Proposals would or may extend to infrastructure assets other than Water Assets: ASoC [33]-[34].

The relevance of democratic governance

- 3.12. The topic of democratic governance is profoundly connected with that of the existence and exercise of public powers (including by way of control of public assets). Democracy means, in particular, that those expected to respect such powers are entitled to participate in determining the identity of those who are responsible for the exercise of those powers. In particular, that participation takes the form of regular elections.
- 3.13. Put another way, elections reflect the free choices of those subject to public powers, and confer democratic legitimacy on

election winners as those entitled to exercise (and to be responsible for the exercise of) public powers.⁶⁶

3.14. These dynamic connections between public powers (including control of public assets), regular elections, accountability and democratic legitimacy, apply no less to local government in New Zealand (and comparable countries) than to central government.

3.15. Further, and importantly, the protection of those democratic dynamics includes recognition that they would be eroded by indirect and/or partial transfer of power (and assets) to entities which are not democratically accountable to those affected – here, local communities. Such transfers would defeat the purpose of voting: that those entitled to vote are relevantly governed by their elected representatives.⁶⁷

International instruments and democratic accountability

3.16. As is well known, the “democratic dynamics” described above are reflected in the United Nations International Covenant on Civil and Political Rights (1966) (*ICCPR*).⁶⁸ Article 25 (participation in public affairs) provides:

Article 25

Every citizen shall have the right and opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot,

⁶⁶ See Geddis *Electoral Law in New Zealand: Practice and Policy* (Lexis Nexis, 2007), ch 1; and Atkinson *Adventures in Bureaucracy: A History of the Vote in New Zealand* (Univ of Otago Press, 2003), Introduction, Conclusion, and Appendix A (Key dates in electoral reform 1852-2002).

⁶⁷ See Rishworth et al, *The New Zealand Bill of Rights* (Oxford Univ Press, 2003), ch 10 at p 263.

⁶⁸ The ICCPR's Art 25 followed the broadly similar Art 21 in the UN's Universal Declaration of Human Rights (1948) (*UNDHR*). New Zealand accepted the UDHR in 1948, and ratified the ICCPR in 1978. The presumption that Acts of Parliament should be read, so far as possible, as being consistent with New Zealand's relevant international obligations has been stated by the Supreme Court on several occasions: see most recently *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551 at [116], [225], [250].

guaranteeing the free expression of the will of the electors;

- (c) To have access, on general terms of equality, to public service in his country;

3.17. Article 25 of the ICCPR has been generally recognised as applying to local/municipal elections no less than national elections: see *Appendix 3* to these submissions.

3.18. A number of other international instruments recognise that democratic dynamics extend to *all* levels of government: see *Appendix 2* to these submissions. Perhaps most directly, the Commonwealth's Charter states:

Parliaments and representative local governments and other forms of local governance are essential elements in the exercise of democratic governance.

Democracy, legitimacy and common law values

3.19. While local government is not explicitly recognised in the Constitution Act 1986 or in NZBORA, both of which are essentially directed to central government, it is self-evident that general democratic principles and values are inherent and fundamental in each of those statutes.

3.20. Consider also the Electoral Act 1993, the LGA and the Local Electoral Act 2001.

3.21. The relevant LGA provisions are noted in the Councils pleadings: see ss 11, 12, 14, 39(a), 41, 78, 82.

3.22. The "principles" set out in s 4 of the Local Electoral Act emphasise the matters going to the democratic dynamics discussed earlier:

4 Principles

- (1) The principles that this Act is designed to implement are the following:

(aa) representative and substantial electoral participation in local elections and polls:

(a) fair and effective representation for individuals and communities:

(b) all qualified persons have a reasonable and equal opportunity to-

- (i) cast an informed vote:

- (ii) nominate 1 or more candidates:
- (iii) accept nomination as a candidate:
- (c) public confidence in, and public understanding of, local electoral processes through-
 - (i) the provision of a regular election cycle:
 - (ii) the provision of elections that are managed independently from the elected body:
 - (iii) protection of the freedom of choice of voters and the secrecy of the vote:
 - (iv) the provision of transparent electoral systems and voting methods and the adoption of procedures that produce certainty in electoral outcomes:
 - (v) the provision of impartial mechanisms for resolving disputed elections and polls.

3.23. The underlying point has been made pithily by Professor Philip Joseph in criticising the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010:⁶⁹

Democratic decision-making in local government is ingrained in the national psyche and a legitimate expectation of the citizenry. Its suspension in Canterbury for a period in excess of three and a half years is, itself, a rule of law issue. Representative democracy and independent courts are the twin pillars of the legal system. The abrogation or suspension of the former, even at local government level, has menacing implications.

3.24. Recalling that the NZBORA is a non-exhaustive (s 28) outline of certain rights and freedoms which are being “affirmed” (s 2), judicial recognition of democratic dynamics and democratic values is widespread and not limited to the NZBORA context.

3.25. See, for example:

- (a) *Ministry of Transport v Noort*;⁷⁰
- (b) *Shaw v Commissioner of Inland Revenue*;⁷¹
- (c) *Brooker v Police*;⁷² and

⁶⁹ Philip Joseph “Environment Canterbury Legislation” [2010] NZLJ 193 at 196.

⁷⁰ [1992] 3 NZLR 280 (CA) at 271 per Cooke P.

⁷¹ [1999] 3 NZLR 154 (CA) at [15]-[16].

⁷² [2007] NZSC 30, [2007] 3 NZLR 91 at [120] per McGrath J.

(d) *Ngaranoa v Attorney-General*.⁷³

3.26. Also see, generally, the leading texts on NZBORA:

- (a) Butler and Butler, *The New Zealand Bill of Rights Act: Commentary* (Lexis Nexis, NZ, 2015), ch 12;
- (b) Rishworth et al, *The New Zealand Bill of Rights* (Oxford Univ Press, 2003), ch 10.

3.27. The idea of representative government as self-government, and of the right of suffrage as fundamental in a free and democratic society (because it is preservative of all rights) is well established in the USA.⁷⁴

3.28. In the High Court of Australia, universal adult suffrage (although not explicit in the Constitution's "chosen by the people" language) has been held to be an "irreversible evolution" and "long established fact" of constitutional significance, as part of the system of representative government based on democratic elections.⁷⁵

3.29. In the United Kingdom, in *Hipperson v Newbury District Electoral Registration Officer*, a case involving residential voting qualifications for those in a long-running protest encampment, Sir John Donaldson MR (for the Court of Appeal) stated:⁷⁶

Voting rights lie at the root of parliamentary democracy. Indeed, many would regard them as a basic human right. Nevertheless they ... have to be conferred, or at least deferred ...

3.30. In *Moohan v Lord Advocate*, a case involving whether prisoners could vote in a Scottish independence referendum, Lord Hodge JSC (for the majority) recognised "the right to vote as a basic or constitutional right".⁷⁷ However, that did not provide a means for

⁷³ [2018] NZSC 123, [2019] 1 NZLR 289 per Elias CJ (dissenting).

⁷⁴ See, for example, *Reynolds v Sims* 84 S Ct 1362 (1964) at 1380-1384.

⁷⁵ See *Rowe v Electoral Commissioner* [2010] HCA 46, 243 CLR 1, for example, at [18]-[20] per French CJ and [325]-[330] per Crennan J.

⁷⁶ [1985] 1 QB 1060 (EWCA) at 1067G.

⁷⁷ [2014] UKSC 67, [2015] AC 901 at [33].

judicially extending the franchise beyond that provided by parliamentary legislation.⁷⁸

3.31. As is well understood, the absence of a written constitution does not mean the absence of legal principles of “constitutional” significance, including the protection of Parliamentary accountability.⁷⁹

3.32. More recently still, the Supreme Court of Canada has produced a relevant and helpful discussion of underlying unwritten constitutional principles, including “democracy and the rule of law”.⁸⁰

3.33. The division in *City of Toronto v Attorney-General of Toronto* was over whether the court could hold unconstitutional, as inconsistent with the principle of democracy, legislation which substantially redrew municipal wards during a local election campaign. The majority’s conclusion was negative.⁸¹ However, the existence of the unwritten principle was not acknowledged unanimously.

3.34. The minority judgment discusses the principle in more detail, and is helpful here notwithstanding that the Councils are not seeking to invalidate legislation. Thus, as Abella J (for the minority) stated:

[86] Elections are to democracy what breathing is to life, and fair elections are what breathe life into healthy democracies. They give the public a voice into the laws and policies they are governed by, and a chance to choose who will make those laws and policies. It is a process of reciprocal political discourse.

[87] The rules of an election, including the electoral boundaries and the timelines for campaigns, structure the process of reciprocal dialogue between candidates and voters in their electoral districts. The final act of voting, itself a form of political expression, is the culmination of the process of deliberative engagement throughout an election period. The stability of the electoral process is therefore crucial not only to political legitimacy, but also to the rights of candidates and voters

⁷⁸ At [35].

⁷⁹ See *R (Miller) v Prime Minister* [2019] UKSC 41, [2020] AC 373, for example, at [39], [46].

⁸⁰ *City of Toronto v Attorney-General of Toronto* 2021 SCC 34 of [49] per Wagner CJ and Brown J (for the 5:4 majority).

⁸¹ See [76]-[78] (contrast the minority’s view: [166]-[170], [179]-[182]).

to meaningfully engage in the political discourse necessary for voters to cast an informed vote, and for those elected to govern in response to the expressed views of the electorate.

- 3.35. On the democratically accountable nature of municipalities, and the irrelevance of councils being creatures of statute, see paras [114]-[120].

Restating the Councils' position

- 3.36. To restate the Councils' position on the democratic local governance limb of their case:

- (a) In a democratic society, as New Zealand is, the legitimacy of public rules (i.e., laws) and the exercise of public powers is ultimately based on democratic principles: those governed participate in choosing those making the rules and exercising the powers.
- (b) That "choosing" and legitimacy involves regular elections (now) by universal suffrage: the dynamics and principle of democratic governance.
- (c) Those dynamics and that principle apply no less to local government than to central government.
- (d) That principle is well recognised in international instruments, in the NZBORA, the LGA and other New Zealand legislation, and in New Zealand and overseas case law.
- (e) Erosion of, or derogations from, the principle is a matter of quasi-constitutional significance, of which the courts can and should take careful and protective notice.

4. Property Rights — “Taking” and Compensation

- 4.1. The second major limb of this proceeding relates to the Councils’ rights as property owners. This limb is not mutually exclusive of the first limb, democratic local governance: it is very largely through their owned assets that local councils provide infrastructure and associated services, and for which they are democratically accountable to their local communities (which, in a virtuous circle, have been the essential source of funds to acquire and/or develop those assets).
- 4.2. The property rights involved in asset ownership are, the Councils submit, both well-established and unremarkable. However, what is remarkable is the Crown’s explanation of its Proposals in terms which fail to accept that these involve a “taking” of the Councils’ property rights which triggers a common law obligation to pay full and fair compensation.

The pleadings

- 4.3. The Councils’ statement of claim pleads the key elements of their “property rights” case:
- (a) Local councils own (relevantly) local infrastructure assets which have generally been predominantly funded from local communities over generations: ASoC [8.1], [8.4], [19].
 - (b) Local councils are democratically accountable to their communities for their ownership, stewardship and decision-making in relation to those assets: ASoC [8.2], [18], [25].
 - (c) The Councils’ rights of ownership involve the usual exclusive control, and entitlement to compensation if taken by or under legislation: ASoC [26].
 - (d) These infrastructure assets include the Water Assets which are the subject of the Crown’s Proposals: ASoC [27], [29]-[30].
 - (e) The Councils are concerned that, given (a)-(d), above, the Proposals reflect misunderstandings by the Crown of their

ownership rights, and these misunderstandings may extend to other infrastructure assets: ASoC [31], [32], [33].

4.4. In its statement of defence, the Crown:

- (a) declines to plead to the core pleading of ownership of local infrastructure assets as an important and longstanding principle of democratic governance: SoD [8(a), (d)], [23]; (see also Reply [8]);
- (b) asserts a “local government statutory foundation and framework” which elaborates on the truism that local government entities have been and are established and governed by or under Acts of Parliament: SoD [8(b)], [21], [25]; (see also Reply [25]);
- (c) states that local infrastructure assets have been contributed to by “a range of parties including central Government”, albeit without particulars: SoD [8(c)];
- (d) admits democratic accountability for local councils’ ownership, stewardship and decision-making in relation to local infrastructure assets: SoD [8(b)(iii)] (inferentially), [25(c)], [27];
- (e) asserts that the rights of ownership pleaded by the Councils are “too vague and not explicit enough ... to plead to” and “do not fully reflect the position”: SoD [26]; (see also Reply [26]);
- (f) admits that the Councils’ infrastructure assets include the Water Assets, to which the Proposals relate: SoD [27], [29];
- (g) obfuscates (“some restructuring of the asset ownership framework”) but ultimately appears to admit that the Proposals involve removal of local councils’ rights of ownership of Water Assets, and transfer of these to new entities not subject to democratic local accountability: SoD [30];

- (h) “acknowledges” that the Councils have the “concerns” pleaded in the ASoC, but says that the Crown is “cognisant of the legal position of the Councils ... as set out in the LGA”: SoD [31], [32], [33]; (see also Reply [31] and [33]).

Property rights: use of assets as one pleases

- 4.5. The general principle that underpins the Councils’ case is well recognised. Our Supreme Court has endorsed the following description:⁸²

Subject to inconsistent legislation and compliance with the general law it is the right of every person to use his assets as he pleases and to be compensated if they are expropriated for public purposes.

- 4.6. The rights of ownership relied on by the Councils, pleaded (non-exclusively) at ASoC [26], are conventional but either not pleaded to or (possibly) denied in the Crown’s SoD.

- 4.7. The nature of property rights was addressed recently by the High Court of Australia in *Hocking v Director-General of the National Archives of Australia*,⁸³ in the context of correspondence between Her Majesty the Queen and the then (1974) Governor-General of Australia. The leading judgment stated:⁸⁴

The relationship [of “property”] with a subject matter is in some contexts best understood in terms of a ‘bundle of rights’. In other contexts, it is best understood in terms of a “legally endorsed concentration of power”.

- 4.8. In a lengthier discussion of property rights in his concurring judgment in *Hocking*, Edelman J focused on the right to exclude:⁸⁵

The essence of a property right to, or “property”, in, a chattel as the right to exclude others also flows from the requirements for a property right in the chattel, namely that a person have (i) a sufficient degree of physical control (sometimes described as “factual possession”) to the exclusion of others and (ii) a manifested intention to exercise that control personally (i.e. not on behalf of another) in a manner that “exclude[s] unauthorised interference. These two requirements have been recognised as essential for a property right to a physical

⁸² *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112, [2007] 2 NZLR 149 at [43].

⁸³ *Hocking v Director-General of The National Archives of Australia* [2020] HCA 19, (2020) 379 ALR 395.

⁸⁴ At [89] per Kiefel CJ, Bell, Gageler and Keane JJ.

⁸⁵ At 206. See the complete discussion at [194]-[206].

thing for thousands of years. They are the reason the common law has long refused to recognise as a property right the mere “custody” of a chattel where the custodian holds the chattel for another.

4.9. The concept of property rights has been developed in detail by many scholars, including:

(a) Kevin Gray, “Property in thin air”;⁸⁶ and

(b) Henry E Smith, “Property as the law of things”.⁸⁷

4.10. Nevertheless, in any credible analysis, the Councils’ rights of ownership include the specific incidents pleaded in the ASoC (with the last derived from the general principle discussed further below):

26 The Councils’ rights of ownership in relation to infrastructure assets include the following:

26.1 the exclusive ability to prevent others from interfering with such assets;

26.2 the exclusive possession or control of such assets;

26.3 the exclusive ability to manage and operate, and/or enter into contracts in relation to, such assets;

26.4 the exclusive ability to modify or replace the assets (and to dispose of redundant or surplus assets);

26.5 the exclusive ability to use such assets (excluding assets within the scope of s 130(3) of the LGA) as security for borrowing; and

26.6 the exclusive entitlement to receive full, fair and objectively and independently assessed compensation for any infrastructure assets removed by legislation from the ownership (in particular, the rights of ownership outlined above) of such assets.

4.11. Expropriation is generally in issue when a public authority exercising public powers takes private property for public purposes. The Public Works Act 1981 (*1981 Act*) is perhaps the best-known illustration of the power – and of the consequent entitlement to compensation. Indeed, the relevant compensating

⁸⁶ (1991) 50(2) Camb LJ 252, for example, at 292-299.

⁸⁷ (2012) 125 Harv LR 1691, for example, at 1709-1713.

public authority may be the Crown or a local authority: see 1981 Act, s 60(1).

- 4.12. Nevertheless, the principle is one based on the importance of property ownership concepts, and their protection against superior legal authority (the sum of these matters being a matter of public as well as private interest). This applies no less to local councils than to private individuals where the Crown seeks to remove property rights in the name of a (superior) public interest, including seeking compensation for interference with property rights. Local councils have broad general powers (LGA, s 13). These will include holding property.
- 4.13. To take a simple example, if a road of national significance requires the taking of the corner of a truck depot site, the Crown roading agency is not relieved from the requirement to compensate because the site is owned by a local council rather than a private company. Local authorities are not within the exceptions to compensation entitlement specified in s 61 of the 1981 Act.
- 4.14. To restate the common law principle: if central government powers are used to deprive lawful owners of property rights, such owners are entitled to proper compensation for that deprivation. The strength of this common law principle deserves emphasis, as do its underlying values.
- 4.15. Generally, the principle is relevant where a statutory or prerogative power is to be interpreted.⁸⁸ Hence the well-established rule of construction that, unless the contrary intention is clearly expressed by Parliament the courts will not interpret legislation as taking (or permitting the taking of) property without proper compensation. In other words, it is presumed that Parliament does not intend to derogate from the underlying common law principle of undisturbed property rights.

⁸⁸ On the prerogative, see *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75 (HL).

Caselaw

4.16. This analysis was explained, including in terms of fundamental common law rights and the principle of legality, by Elias CJ in *New Health New Zealand v South Taranaki*⁸⁹ and in *Fitzgerald v R.*⁹⁰

4.17. Other relevant New Zealand appellate authorities include:

(a) *Cropp v Judicial Committee*;⁹¹

(b) *Estate Homes Ltd v Waitakere City Council*;⁹²

(c) *SMW Consortium (Golden Bay) Ltd v Chief Executive of Ministry of Fisheries*;⁹³ and

(d) *Nicholas v Commissioner of Police*.⁹⁴

4.18. The English line of authorities includes:

(a) *Central Control Board (Liquor Traffic) v Cannon Brewery Ltd*;⁹⁵

(b) *Attorney-General v De Keyser's Royal Hotel*;⁹⁶

(c) *Belfast Corporation v OD Cars Ltd*;⁹⁷ and

(d) *Burmah Oil Co Ltd v Lord Advocate*.⁹⁸

4.19. In Canada, the strength of the common law principle was demonstrated in the leading decision in *Manitoba Fisheries v R.*⁹⁹

- *Commentary*

4.20. Unsurprisingly, the common law principle has powerful support from leading jurists:

⁸⁹ [2018] NZSC 59, [2018] 1 NZR 948 at [292]-[293].

⁹⁰ [2021] NZSC 131, [2021] 1 NZLR 551 at [51], n 72 and [209].

⁹¹ [2008] NZSC 46, [2008] 3 NZLR 774 at [26]-[27].

⁹² [2006] 2 NZLR 619 (CA) at [128]-[134].

⁹³ [2013] NZCA 95 at [31].

⁹⁴ [2017] NZCA 473, [2018] NZAR 172 at [40].

⁹⁵ [1919] AC 744 (HL) at 752.

⁹⁶ [1920] AC 508 (HL) at 542.

⁹⁷ [1960] AC 1090 (HL) at 523.

⁹⁸ [1965] AC 75 (HL) at 103, 161-162, 166.

⁹⁹ [1979] 1 SCR 101 at 109, 118. See also *British Columbia v Tener* [1985] 1 SCR 533 at [12].

- (a) Blackstone: nothing “engages the affections of mankind, as the right of property”.¹⁰⁰
- (b) Professor Philip A Joseph: presumptions of interpretation “operate as constitutional principles or rights”;¹⁰¹ compensation for property taking an “international constitutional norm”.¹⁰²
- (c) Sir Rupert Cross: “constitutional principles”.¹⁰³
- (d) Burrows and Carter: presumptions “operate as a kind of judicially created Bill of Rights”.¹⁰⁴
- (e) Professor (now Justice) Russell Brown: “common law rule ... that ... compensation for a taking must be paid absent clear statutory language to the contrary”;¹⁰⁵ “common law accepted the state’s power to acquire ... private property (in a forcible manner) for a public purpose, such power could be exercised only on payment of compensation”.¹⁰⁶ .
- (f) Professor Kevin Gray: “an historic and freestanding common law doctrine related to takings”.¹⁰⁷
- (g) The authors of *De Smith’s Judicial Review*: compensation for taking is a “constitutional” right.¹⁰⁸

¹⁰⁰ William Blackstone, *Commentaries on the Laws of England* (Philadelphia, JB Lippincott Co, republished 1893) book 2 at ch 1.

¹⁰¹ Phillip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at [26.5.11].

¹⁰² Phillip Joseph “Property Rights and Environmental Regulation under the Resource Management Act 1991” (commissioned by the Ministry for the Environment, 1999) at [7.1].

¹⁰³ J Bell and G Engle (eds) *Cross on Statutory Interpretation* (3rd ed, Butterworths, London, 1995) at 166. See *B (A Minor) v Director of Public Prosecutions* [2000] 2 AC 428 (HL) at 470.

¹⁰⁴ RI Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, LexisNexis, Wellington, 2021) at 431-432.

¹⁰⁵ Russell Brown “Possibilities and Pitfalls of Comparative Analysis of Property Rights Protections and the Canadian Regime of Legal Protection Against Takings” in Susy Frankel (ed) *Learning from the Past, Adapting to the Future: Regulatory Reform in New Zealand* (LexisNexis, 2011) at 163–164.

¹⁰⁶ Russell Brown “Legal incoherence and the extra-constitutional law of regulatory takings” (2009) 3 IJLBE 179 at 182-183.

¹⁰⁷ Kevin Gray “Can environmental regulation constitute a taking of property at common law?” (2007) 24 EPLJ 161 at 166.

¹⁰⁸ Lord Woolf and others *De Smith’s Judicial Review* (8th ed, Sweet & Maxwell, London, 2018) at 614-618.

NZ Council of Licensed Firearms Owners (COLFO)

4.21. In a similar vein, this Court has recently stated that the principle “can properly be described as a constitutional principle”: *New Zealand Council of Licensed Firearms Owners Inc v Minister of Police (COLFO)*.¹⁰⁹

4.22. In *COLFO*, Cooke J also traced the pedigree of the principle back to Magna Carta and Grotius;¹¹⁰ and rejected the Crown’s submission that their absence from the NZBORA made property rights of a lower form or order of right.¹¹¹

The Crown’s responses

4.23. The Crown’s main points responding to the property rights limb of the Councils’ case were outlined in the earlier summary of the statement of defence. Some other points are made in Mr Lovett’s affidavit. By way of interim reply (these matters may be developed differently or further in the Crown’s submissions to come), the following may be said on behalf of the Councils.

- *Local councils as “creatures of statute”*

4.24. As noted earlier, it is a truism that local councils are creatures of statute and that their role, powers and territories have been regulated and amended by Acts of Parliament over the past 150 years or so (SoD, [8(b)(i)-(iii), 21]). This merely reflects the realities of (a) recognition of parliamentary sovereignty, (b) the statutory foundation of most entities and regulation of activities in New Zealand, and (c) statutes being frequently amended in a parliamentary democracy over such a timeframe. But it diverts attention from the continuity of core principles of law and democracy.

4.25. Similarly, the Crown’s pleading of the statutory framework provided in (now) the LGA, and that local council’s assets are used to provide services to their local communities, are truisms

¹⁰⁹ [2020] NZHC 1456.

¹¹⁰ At [33].

¹¹¹ AC [37].

and of no assistance on the real issues in this proceeding (SoD [25], [26]).

- *Ownership rights may be modified or removed ...*

4.26. The Crown's pleading that the Councils' rights of ownership in infrastructure assets "may be modified or removed from time to time", implicitly by Act of Parliament, is incongruous in the context of this proceeding (SoD 26(g)). The proceeding is directed to ensuring that the Crown does appreciate the nature of local democracy and property rights, and that there are existing legal (and constitutional) principles and values involved, and to be properly understood, before Parliament determines to legislate away such matters totally or in material part.

- *The Proposals would be based on New Entities in public ownership ...*

4.27. The Crown appears to place some weight on the idea that its Proposals involve transfer of local councils' Water Assets (which consequently means loss of councils' democratic accountability – a two-sided concept) to "New Water Service Entities" which will remain in public ownership (SoD, [30(b)]).

4.28. The implication may be that none of the principles relied on by the Councils in this proceeding, including as to property rights, are engaged if an asset held by a local council (admittedly not a private sector entity) is transferred to another entity established by legislation (and not a private sector entity). If that is the implication, it is simply confused about the nature of property rights and associated common law principles as well as about the importance of *local* democratic accountability. Ownership matters, as do the identity and accountability of the owner.

- *The Crown has been consulting/collaborating ...*

4.29. The Crown's activities by way of consultation on its Proposals ('collaborating' with a range of groups) feature at length in the statement of defence (SoD [31]). Again, this invites a diversion: as the evidence for the Councils makes clear, the essential points of loss of local democratic accountability and loss of property

rights in relation to Water Assets are evidently immovable Crown positions.¹¹²

- *Mr Lovett's evidence*

4.30. In his affidavit, Mr Lovett articulates some of the Crown's pleaded points addressed above. In particular, he provides two paragraphs under the heading "Compensation" ([11.7]-[11.8]).

4.31. First, Mr Lovett asserts that the Mayors' evidence referring to "taking" or "expropriating" assets is "not accurate in this context". He offers three reasons:

- (a) Funding for Water Assets has come from "multiple sources", including central government grants and subsidies. He provides no particulars or assessments as to the materiality of such grants and subsidies. Nor does he deny the simple fact of ownership of those assets by the Councils.
- (b) The Water Assets are currently "in public ownership through local authorities", and will remain in public ownership "through the new water service entities". The "public ownership" point has been addressed earlier. But it is a novel (and unexplained) concept that the Councils' assets are not subject to property rights because they are not in "private" ownership, but can be held "through" any public entity. This is simply wrong, and, given Mr Lovett's role, concerning.
- (c) Further, local authorities may expect to be relieved of the burden of funding assets required to provide these water services (and residents will be better off). This is, with respect, another *non sequitur*: it does not purport to offer any kind of valuation analysis; and, more importantly, disregards the importance of democratic *local* governance of, and accountability for, *local* council-owned assets.

¹¹² Bowen (Reply) at [15]-[21].

Restating the Councils' position

4.32. To restate the Councils' position on the property rights limb of their case:

- (a) The exercise of property rights, and full compensation if they are expropriated by central government, is properly described as a matter of constitutional principle.
- (b) Perhaps the central feature of property rights is exclusive control of (here) tangible assets, albeit subject to specific statutory or contractual limits or exceptions.
- (c) As local councils under the LGA, the Councils hold and exercise the orthodox rights of property owners in their infrastructure assets – the Crown's "creatures of statute" label is irrelevant.
- (d) The property rights relating to the Councils' infrastructure assets are not "owned" by "the public", nor owned by local communities "through" a Council.
- (e) Property rights are entirely distinguishable from any concept of "public ownership" – especially where the connection is indirect and without control or accountability (as in the Crown's Proposals).
- (f) Stating the obvious, ownership rights may be unrelated to sources of funding for the relevant asset.

5. Declaratory Relief

5.1. The Councils seek declarations which reflect both the “democratic local governance” and “property rights” limbs of this proceeding. While the “property rights” are rights which belong to the Councils themselves, the rights involved in “democratic local governance” are sought on behalf of their respective communities and residents.

5.2. The following declarations (together *the Declarations*) are sought, pursuant to the Declaratory Judgments Act 1908 (*DJA*) and the inherent jurisdiction:¹¹³

A Local government is an important and longstanding component of the democratic governance of New Zealand.

B Important and longstanding principles and features of the democratic governance of New Zealand at local community level include the following:

- (a) local infrastructure assets are owned and/or controlled, and related services are provided, by local councils;
- (b) local councils are responsive/and democratically accountable to their communities for their ownership, stewardship and decision-making in relation to local infrastructure assets and related services;
- (c) local councils owe fiduciary-like obligations to their communities; and
- (d) local government infrastructure assets have generally been wholly or materially funded as a result of rates or charges or rentals paid by generations of persons (including businesses) located in their communities.

C The Councils’ rights of ownership in relation to infrastructure assets include the following:

- (a) the exclusive ability to prevent others from interfering with such assets;
- (b) the exclusive possession or control of such assets;

¹¹³

ASoC at [39].

- (c) the exclusive ability to manage and operate, and/or enter into contracts in relation to, such assets;
- (d) the exclusive ability to modify or replace the assets (and to dispose of redundant or surplus assets);
- (e) the exclusive ability to use such assets (excluding assets within the scope of s 130(3) of the LGA) as security for borrowing; and
- (f) the exclusive entitlement to receive full, fair and objectively and independently assessed compensation for any infrastructure assets removed by legislation from the ownership (in particular, the rights of ownership outlined in (a)-(e), above) of such assets.

5.3. The DJA binds the Crown.¹¹⁴ Claims for relief under the DJA involve a two-step process.¹¹⁵

- (a) *Jurisdiction*: First, the Court must determine whether the matter in respect of which a declaration is sought falls within the jurisdiction conferred by either s 2 or 3 of the DJA. Each provision provides for a distinct jurisdiction.
- (b) *Discretion*: Second, the Court must determine whether it is appropriate to exercise the discretion to make a declaration. Section 10 provides that the jurisdiction in both s 2 and s 3 is discretionary.

5.4. In the inherent jurisdiction, the Court looks to the same factors as relevant under the s 10 discretionary assessment.¹¹⁶

5.5. The matters raised by the defendants in the First and Second Affirmative Defences traverse points relevant to both jurisdiction and discretion. However, none of these matters prevent the engagement of the DJA jurisdiction and/or the inherent jurisdiction, nor do they weigh against the exercise of the discretion in favour of making the Declarations.

¹¹⁴ Crown Proceedings Act 1950, s 5(2) and sch 1.

¹¹⁵ *Reid v Reid* (1985) 3 NZFLR 643 (CA) at 644–645; and *Matamu v Si'itia* [2016] NZHC 2516 at [68].

¹¹⁶ *Bartle Group Ltd v New Zealand Transport Agency* [2020] NZHC 35 at [55]; and Rachael Schmidt-McCleave "Declaratory Relief" in Peter Blanchard (ed) *Civil Remedies in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2011) 575 at 584–585.

Jurisdiction

5.6. The Councils invoke the declaratory jurisdiction under: (1) s 3 of the DJA; (2) s 2 of the DJA: and (3) the inherent jurisdiction.

- *Section 3 jurisdiction*

5.7. As is evident from its text, s 3 confers a specific jurisdiction to make “declaratory orders” determining any question relating to the validity, legality or effect of a statute, etc.¹¹⁷ In *Mandic v Cornwall Park Trust Board*, the Supreme Court made clear that this jurisdiction is not to be narrowly interpreted. The only threshold is that the plaintiff “has done or desires to do any act the validity, legality, or effect of which depends on the construction or validity of any statute [etc.]” or that the plaintiff “claims to have acquired any such right under statute [etc.]”.¹¹⁸

5.8. The specific jurisdiction in s 3 is engaged in this case, at least in respect of the “property rights” limb. The Councils “claim to have acquired ... right[s] under ... statute”, namely rights relating to the ownership of property under the LGA. The Councils are accordingly entitled to apply for a declaratory order determining any question as to the construction of the relevant statute.¹¹⁹

5.9. Importantly, access to the s 3 jurisdiction does not depend on there being an existing dispute or *lis*.¹²⁰ The assertion in the First Affirmative Defence that the Declarations do not relate to a live dispute is not a bar to accessing the jurisdiction.¹²¹

¹¹⁷ *Matamu v Si'itia* [2016] NZHC 2516 at [71]. See also *Attorney-General v Taylor* [2018] NZSC 104, [2019] 1 NZLR 213 at [97] per Elias CJ.

¹¹⁸ *Mandic v Cornwall Park Trust Board* [2011] NZSC 135, [2012] 2 NZLR 194 at [5]–[9] per Elias CJ, with whom Blanchard, Tipping, McGrath and William Young JJ agreed at [82]. See also the discussion in Rachael Schmidt-McCleave “Declaratory Relief” in Peter Blanchard (ed) *Civil Remedies in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2011) 575 at 583–584 discussing the wider approach to declaratory relief.

¹¹⁹ Traditionally, applications for declaratory orders under s 3 were brought by way of proceedings on originating summons whereas declarations under s 2 were brought by ordinary proceedings, but “in practice this is a distinction without a difference”. As the High Court has recognised, “regardless of whether the declaration is sought under the Act, at common law or through this Court’s inherent jurisdiction it remains a matter for the Court’s discretion: *Matamu v Si'itia* [2016] NZHC 2516 at [75]. See also Rachael Schmidt-McCleave “Declaratory Relief” in Peter Blanchard (ed) *Civil Remedies in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2011) 575 at 594.

¹²⁰ *Mandic v Cornwall Park Trust Board* [2011] NZSC 135, [2012] 2 NZLR 194 at [9], agreed to by the other judges at [82].

¹²¹ SoD at [44(a)].

5.10. In any event, there are plainly live disputes between the parties on the pleadings. While the Councils claim they have legal rights relating to property, the First Affirmative Defence claims the rights relied on are not “legal”.¹²² Similarly, the sworn evidence for the Crown deposes to the view held by Crown officials that “statutory” or “public” property rights are of a different character to (presumably) “true” property rights, and so thereby more vulnerable to expropriation.¹²³

5.11. Finally, while the s 3 jurisdiction is unavailable where there are questions of fact to be determined,¹²⁴ this case does not involve disputed facts. The contest is a dispute as to legal rights. If the Court considers there are contested facts, the s 2 jurisdiction is nevertheless available.

- *Section 2 jurisdiction*

5.12. Section 2, a “stand-alone provision”,¹²⁵ confers a jurisdiction to make “declaratory judgments” distinct from, and wider than, the jurisdiction recognised by s 3.¹²⁶ Caselaw describes it as a “catch-all provision” which, in effect, permits a court “to make a declaration in any circumstance not covered by s 3 directly”.¹²⁷

5.13. In *Re Chase*, Cooke P said this jurisdiction “should not be restricted by interpretation”, provided always that it is read together with s 10.¹²⁸ Relying on this dictum, in *Ambrose v Attorney-General*, Winkelmann J (as she then was) observed that she could “not see any reason in principle why [the s 2] jurisdiction

¹²² SoD at [44(c)] and see also [44(d)].

¹²³ Lovett at [8.1]-[8.4] and [11.7]-[11.8]. The same claim is made in the defendants’ pleadings: see SoD at [26(g)].

¹²⁴ *Mandic v Cornwall Park Trust Board* [2011] NZSC 135, [2012] 2 NZLR 194 at [9] (agreed to by the other judges at [82]) – “[an] application for declaratory order is inappropriate when there are questions of fact to be determined (as is implicit in the terms of s 3)”. See also *Matamu v Si’itia* [2016] NZHC 2516 at [71] and *Ambrose v Attorney-General* [2012] NZAR 23 (HC) at [33].

¹²⁵ *Attorney-General v Taylor* [2018] NZSC 104, [2019] 1 NZLR 213 at [97] per Elias CJ.
¹²⁶ *Association of Dispensing Opticians NZ Inc v Opticians Board* [2000] 1 NZLR 158 (CA) at [13]. Overruled in *Siemer v Heron* [2011] NZSC 133, [2012] 1 NZLR 309 on a different point.

¹²⁷ *Matamu v Si’itia* [2016] NZHC 2516 at [71], citing *Johnston v Johnston* [1991] 2 NZLR 608 (HC); *Simpson v Whakatane District Court (No 2)* [2006] NZAR 247 (HC); and *Ambrose v Attorney-General* [2012] NZAR 23 (HC).

¹²⁸ *Re Chase* [1989] 1 NZLR 325 (CA) at 330 per Cooke P. See the discussion in Rachael Schmidt-McLeave “Declaratory Relief” in Peter Blanchard (ed) *Civil Remedies in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2011) 575 at 580.

should not extend to declarations which require determinations of mixed fact and law". The extent of factual contest would be relevant to the exercise of the discretion.¹²⁹

5.14. The Councils invoke the s 2 jurisdiction in addition to the s 3 jurisdiction, and also in the alternative to the extent the Declarations are not directly covered by s 3.

5.15. Further, to the extent the s 2 jurisdiction is directed to binding declarations of "legal" rights, this requirement is satisfied.¹³⁰ The Crown inaccurately claims in its First Affirmative Defence that the Declarations do not relate to "legal" rights.¹³¹ The declarations in "C" relate to existing property rights held by the Councils (and other local councils). The declarations in "A" and "B" relate to fundamental constitutional rights of the electorate, including the fiduciary-like obligations owed by councils to their voters. Such obligations are plainly legal obligations, and the corresponding rights vested in voters are plainly legally enforceable. "There is no doubt" the Declarations can be sought under s 2 "without there being any compensation or other relief sought".¹³²

5.16. Relevant to both the s 3 and the s 2 jurisdiction are ss 9 and 11 which state, respectively, that any declaration under the DJA may be given "by way of anticipation with respect to any act not yet done or any event which has not yet happened" and that neither DJA jurisdiction shall "be excluded by the fact that the ... Court has no power to give relief in the matter to which the judgment or order relates". In particular, s 9 is a complete answer to the Crown's surprising claim in the First Affirmative Defence that the Declarations should not be made as they "relate to prospective matters not existing legal rights".¹³³

¹²⁹ *Ambrose v Attorney-General* [2012] NZAR 23 (HC).at [35]. However, Winkelmann J did not need to determine the availability of the jurisdiction in such a case as the outcome of *Ambrose* turned upon the exercise of the Court's discretion: at [35].

¹³⁰ See *Johnston v Johnston* [1991] 2 NZLR 608 (HC) at 616–617, citing *Gouriet v Union of Post Office Workers* [1978] AC 435 (HL). But note the comments of Chambers J in *Telecom Corporation of New Zealand Ltd v Commerce Commission* [2012] NZCA 278 at [294]–[295] about how the law has moved on in some respects since *Gouriet*. SoD at [44(c)].

¹³² *Simpson v Whakatane District Court (No 2)* [2006] NZAR 247 (HC) at [41].

¹³³ SoD at [44(d)]. Indeed, Courts routinely make declarations regarding future issues to provide authoritative guidance to parties: see for example *Earthquake Commission v*

- *Inherent jurisdiction*

5.17. Finally, the Councils invoke the inherent jurisdiction, which is similarly broad. As the caselaw states, it is not “a legitimate function of the High Court ... to renounce or narrow inherent jurisdiction.”¹³⁴

5.18. As discussed, the Crown’s claim that the Declarations do not relate to “legal” rights is wrong. However, even if the Crown’s claim was accurate, the inherent jurisdiction would still be available. As *Peters v Davison* confirms, in its discussion of the availability of common law declarations of right, it is not necessary for the plaintiff to show that their strict legal rights are affected by the matter in issue. In that case, the Court of Appeal rejected as inaccurate the proposition that the Court can make a common law declaration only if there are rights and duties of, and owed between, relevant parties.¹³⁵

- *Summary*

5.19. In sum, a broad approach to jurisdiction is appropriate. It is the discretionary exercise at step two that serves as a “balance to the otherwise broad jurisdiction ... to make declarations”.¹³⁶ The Declarations sought fall within the broad jurisdiction provided for in all or at least one of the following jurisdictional avenues: (1) s 3; (2) s 2; and (3) inherent jurisdiction.

Discretion

5.20. Section 10 provides that the Court may refuse to exercise the discretion “on any grounds which it deems sufficient”. It is trite to say that the discretion must be exercised according to principle.

Insurance Council of New Zealand Inc [2014] NZHC 3138, [2015] 2 NZLR 381; *Coburn v Human Rights Commission* [1994] 3 NZLR 323 (HC); and *Wybrow v Chief Electoral Officer* [1980] 1 NZLR 147 (CA).

¹³⁴ *Re Chase* [1989] 1 NZLR 325 (CA) at 333 per Cooke P.

¹³⁵ *Peters v Davison* (1999) 2 NZLR 164 (CA) at 187–188. See the discussion in Rachael Schmidt-McLeave “Declaratory Relief” in Peter Blanchard (ed) *Civil Remedies in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2011) 575 at 582 noting that the Court of Appeal in *Peters* “took an expansive view of standing”.

¹³⁶ Rachael Schmidt-McLeave “Declaratory Relief” in Peter Blanchard (ed) *Civil Remedies in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2011) 575 at 585. See also *Re Chase* [1989] 1 NZLR 325 (CA) at 333 per Cooke P”.

Over time, the courts have referred to a range of considerations which may guide the discretion.

5.21. The considerations applicable to this case are discussed below. As noted, these considerations are relevant to the exercise of the discretion under ss 2 and 3 and the inherent jurisdiction.

- *Genuine dispute and practical consequences*

5.22. The courts were traditionally reluctant to make declarations where no genuine dispute existed between the parties.¹³⁷ The dictum in *Mandic* that access to the s 3 jurisdiction does not depend on there being an existing dispute, undermines the earlier reluctance. Nevertheless, any uncertainty of approach is of no moment in this case where there is plainly a dispute between the parties as to the legal rights and principles which the Councils assert.

5.23. Related to the need for a genuine dispute, is that declarations will not be given in the abstract or in relation to hypothetical or theoretical matters, where the court's decision would amount to an "advisory opinion" with no immediate and practical consequences for at least one of the parties.¹³⁸ The First Affirmative Defence claims the Declarations should be denied for this reason.¹³⁹

5.24. However, the disputes that exist between the parties as to the relevant legal rights are plainly of consequence. If the Crown's internal view is correct, and the rights relied upon are not sufficiently "legal" to warrant judicial declaration, then obviously that will affect the extent to which the Crown respects them during the policy-making process. It is also trite to say that, if the property rights held by the Councils are not "true" property rights, then the Crown will in future continue to act upon the assumption

¹³⁷ See the authorities cited in Rachael Schmidt-McLeave "Declaratory Relief" in Peter Blanchard (ed) *Civil Remedies in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2011) 575 at 588–589.

¹³⁸ See the authorities cited in Rachael Schmidt-McLeave "Declaratory Relief" in Peter Blanchard (ed) *Civil Remedies in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2011) 575 at 589–592.

¹³⁹ SoD at [44(b)].

that such property rights are more vulnerable to transfer and need not be compensated for. As the Councils' witnesses depose, the logic underpinning the Proposals is at least equally applicable to other infrastructure owned and controlled by local councils, such as roading and rubbish.¹⁴⁰ Notably, none of the Crown's witnesses denied these concerns in their evidence; and of course, the Crown is actively considering the future of local government on an ongoing basis.

5.25. Additionally, if the Crown considers in future that other such infrastructure would, like Water Assets, benefit from economies in scale and national aggregation, then these concerns will crystallise and the rights of the Councils and local communities will once again be engaged. More generally, the Crown's position that "statutory" property rights may more easily be "modified or removed" has obvious implications for a range of Crown entities and state-owned enterprises.¹⁴¹

- *Utility*

5.26. The First Affirmative Defence claims the Declarations should not be made as they "do not have utility".¹⁴² Utility is relevant to the discretion, but significant utility is not required. In *Re Chase*, Henry J said:¹⁴³

I accept that the Courts have an increasing role to play in today's society and that on occasions it may be appropriate for them to inquire into and adjudicate on matters of public importance which relate to past events even when the adjudication has a very limited utility, but utility there should be.

...

In my view it can seldom if ever be a function of the Court to make findings on issues which bear no relationship in a real sense to the rights of the parties inter se and the absence here of a right requiring protection, enforcement, or even judicial recognition is I think so

¹⁴⁰ Bowen at [52]-[53]; and Gordon at [44].

¹⁴¹ SoD at [26](g).

¹⁴² SoD at [44(e)].

¹⁴³ *Re Chase* [1989] 1 NZLR 325 (CA) at 342-343 per Henry J. This is not a case, like *Brightwell v Accident Compensation Corporation* [1985] 1 NZLR 132 (cited by Henry J), where the purpose of seeking the declaration was to persuade a change of legislation. As these submissions make clear, the Councils are not seeking to invalidate the legislation.

strong a factor in the exercise of the discretion as to be fatal to the case for the administrator.

5.27. For reasons discussed, the Councils ask the Court to make the Declarations about rights of major legal significance which require protection and judicial recognition, in circumstances where the Court's findings will have real effects on the rights of the parties *inter se*. The Declarations in "C" set out the practical consequences that flow from the Declarations in "A" and "B". These are capable of "practical application", thereby illustrating their utility.¹⁴⁴

5.28. The utility of the Declarations is further reinforced by the fact there are no alternative remedies available.¹⁴⁵ The Councils, as they are bound to do, respect fully the concept of parliamentary sovereignty. Accordingly, they acknowledge that the Proposals could be brought into being by an Act of Parliament and do not seek to invalidate such legislation. Nevertheless, the Councils say the Proposals (and any Act implementing them) will interfere profoundly with the pleaded governance and property rights. The only avenue for vindication of those rights is the declaratory jurisdiction.

- *Public policy (and comity)*

5.29. The courts will refuse to exercise the discretion where to do so would be contrary to public policy.¹⁴⁶ The public policy concerns here relate to matters of comity, and are reflected in the Second Affirmative Defence, where the Crown says the Declarations

¹⁴⁴ *Department of Internal Affairs v Whitehouse Tavern Board* [2015] NZCA 398, [2015] NZAR 1708 at [80]. *Whitehouse Tavern Board* concerned declarations under the Judicature Amendment Act 1972. The Court noted the position was different under s 3 of the DJA, citing *Mandic*. It is clear from *Mandic* that "utility" is not a jurisdictional threshold for s 3 declarations. However, "utility" is a factor that may be relevant to the discretion.

¹⁴⁵ Rachael Schmidt-McLeave "Declaratory Relief" in Peter Blanchard (ed) *Civil Remedies in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2011) 575 at 593, citing J Zamir and Lord Woolf *Declaratory Judgment* (2nd ed, Sweet & Maxwell, London, 1993) at 189.

¹⁴⁶ See the authorities cited in Rachael Schmidt-McLeave "Declaratory Relief" in Peter Blanchard (ed) *Civil Remedies in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2011) 575 at 592.

should not be made as “the Court should not intervene in or seek to constrain the Crown” in relation to:¹⁴⁷

- (a) how the Crown makes policy;
- (b) how the Crown advances legislative reforms including in relation to the allocation, operation and ownership of resources; and/or
- (c) the development and introduction of legislation.

5.30. The Councils submit the Declarations are properly sought and do not infringe principles of comity and separation of powers. Some context is useful.

5.31. As the United Kingdom Supreme Court explained in *R (Miller) v Prime Minister*, “almost all important decisions made by the executive will have a political hue”.¹⁴⁸ That does not however prohibit the courts from scrutinising such decisions; indeed, doing so will often be constitutionally necessary, as it is the role of the courts to supervise the conduct of the executive to ensure that conduct is lawful. Instead, the correct question to focus on is whether the matters in issue are justiciable.¹⁴⁹ It is only if the matter is not justiciable, because outside the proper role of the court, that comity concerns properly arise. So the Court must analyse whether the proceeding properly engages the court’s ordinary constitutional functions and is thereby justiciable, or not.

5.32. It has always been the role of the courts to say what the law is. As the Court of Appeal emphasised in *Attorney-General v Taylor* and *Electoral Commission v Tate* “the last word on any question of law rests with the courts”¹⁵⁰ and the fact the legislation to be interpreted has “political” content or is “politically controversial” is not an excuse for the court to refuse to provide an authoritative ruling on interpretation.¹⁵¹ This is crucial for the rule of law. In

¹⁴⁷ SoD at [45].

¹⁴⁸ *R (Miller) v Prime Minister* [2019] UKSC 41, [2020] AC 373 at [31].

¹⁴⁹ See the discussion in *R (Miller) v Prime Minister* [2019] UKSC 41, [2020] AC 373 at [28]–[35].

¹⁵⁰ *Attorney-General v Taylor* [2017] NZCA 215, [2017] 3 NZLR 24 at [56], citing HWR Wade and CF Forsyth *Administrative Law* (8th ed, Oxford Univ Press, Oxford, 2000) at 29.

¹⁵¹ *Electoral Commission v Tate* [1999] 3 NZLR 174 (CA) at [32]–[37].

Tate, the Court of Appeal said further that, while “there may be a number of sound reasons why a declaratory judgment or order should be refused”, the courts “cannot ... refuse to give or make a declaratory judgment or order on a ground which is inconsistent with the Courts’ essential function. Broadly speaking, that function is to interpret and apply the law ...”.¹⁵² This essential function, the Court said, “has implications for the rule of law”.¹⁵³

5.33. This role necessarily extends to areas which are the prerogative of the executive, as *Miller* and the Canadian case of *Canada v Khadr* demonstrate.¹⁵⁴ As the Supreme Court emphasised in *Khadr*, the power of the courts to review exercises of executive prerogative “reflects the fact that in a constitutional democracy, all government power must be exercised in accordance with the Constitution”.¹⁵⁵ The courts are of course sensitive to their proper role: as emphasised in *Khadr*, “the Government must have flexibility” in determining when and how to use its prerogative powers.¹⁵⁶ If however the exercise of a power infringes on “constitutional norms” then “courts clearly have the jurisdiction and the duty” to declare that.¹⁵⁷ Indeed, declarations may be appropriate “even in situations where other forms of relief would be inconsistent with the separation of powers”.¹⁵⁸

5.34. This leads to the Second Affirmative Defence. The Declarations seek authoritative rulings as to the status of the legal rights of the Councils, of certain fundamental constitutional norms and of the consequences that flow from this. The Court’s “essential function” – to declare what the law is – is engaged. Following the principles in *Miller*, *Taylor*, *Tate* and *Khadr*, the Court plainly does have a role in determining what the law is here. The mere fact that the Declarations are sought against the backdrop of Crown policy-

¹⁵² *Electoral Commission v Tate* [1999] 3 NZLR 174 (CA) at [30]–[31].

¹⁵³ *Electoral Commission v Tate* [1999] 3 NZLR 174 (CA) at [32].

¹⁵⁴ *Canada v Khadr* 2010 SCC 3, [2010] 1 SCR 44.

¹⁵⁵ *Canada v Khadr* 2010 SCC 3, [2010] 1 SCR 44 at [37].

¹⁵⁶ *Canada v Khadr* 2010 SCC 3, [2010] 1 SCR 44 at [37].

¹⁵⁷ *Canada v Khadr* 2010 SCC 3, [2010] 1 SCR 44 at [36].

¹⁵⁸ *Mikisew Cree First Nation v Canada* 2018 SCC 40 at [47], citing *Canada v Khadr* 2010 SCC 3, [2010] 1 SCR 44 at [2].

making (the Proposals) cannot, without more oust the Court's role.

5.35. In both *Miller* and *Khadr*, the courts granted declaratory relief, seeing the declarations in those cases as a proper and necessary exercise of the Court's constitutional function. Unlike in *Miller* or *Khadr* however, the Court in this case is not asked to rule that the Proposals themselves are unlawful: this proceeding does not ask for a ruling on the specific lawfulness of an exercise of prerogative power, and the Proposals are not directly impugned by the Declarations. Yet the defendants claim, without detail, that the Declarations impugn Crown prerogative. Such a generalised claim is not only inconsistent with principle, but plainly inconsistent with the leading authority in this area, the Supreme Court's recent decision in *Ngāti Whātua Ōrākei Trust v Attorney-General*.¹⁵⁹

5.36. In *Ngāti Whātua Ōrākei*, the appellants sought declarations relating to legal rights which they claimed according to tikanga and pursuant to Treaty settlement negotiations with the Crown. The lower Courts struck out all the declarations as unacceptably trespassing into the realm of Crown policy and the power of the Crown to introduce legislation: anything preparatory to the legislative process was necessarily outside the proper role of the courts.¹⁶⁰

5.37. However, the Supreme Court unanimously rejected the lower Courts' approach. Both the majority and Elias CJ (writing separately) emphasised that the declarations sought by the appellants engaged the fundamental role of the courts: they sought declarations as to legal rights claimed by the appellants, a feature lacking in some other earlier cases.¹⁶¹ The courts could

¹⁵⁹ *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116.
¹⁶⁰ *Ngāti Whātua Ōrākei Trust v Attorney-General* [2017] NZHC 389, [2017] 3 NZLR 516 at [135]–[138] and [142]–[143]; and *Ngāti Whātua Ōrākei Trust v Attorney-General* [2017] NZCA 554, [2018] 2 NBZLR 648 at [84]–[107].

¹⁶¹ *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116 at [34], [46] and [48] per the majority and [78] and [115]–[116] per Elias CJ. An example of an earlier case was *Milroy v Attorney-General* [2005] NZAR 562 (CA) where it was conceded that no rights were in issue.

not simply abdicate their fundamental constitutional role given this context, a point accepted by counsel for the Crown.¹⁶²

5.38. Importantly, the majority accepted that even where legislation was before the House, declaratory relief could still be appropriate: the mere fact that such a Bill was under parliamentary consideration “could not operate as a ban on consideration of all related issues”.¹⁶³ It also stressed that comity had a “rather more direct temporal link” than had been accepted in earlier case law, and that comity was founded on the basic need to guarantee free speech in Parliament as a Bill proceeded through the House.¹⁶⁴

5.39. The difference between the majority and Elias CJ turned on a close analysis of the specific terms of the declarations in that case, with the majority striking out only two declarations (Elias CJ would have allowed all six declarations to go to trial). The two declarations that were struck out were drafted as follows:

(e) a declaration that the Ngāti Paoa Decision, the Revised Ngāti Paoa Decision and Marutūāhu Decisions have been developed and made inconsistently with Crown’s obligations to make those decisions in accordance with tikanga; and

(f) a declaration that the Ngāti Paoa Decision, the Revised Ngāti Paoa Decision and Marutūāhu Decisions have been developed and made inconsistently with the Treaty of Waitangi and its principles, and Ngāti Whātua Ōrākei’s rights as affirmed by the United Nations Declaration on the Rights of Indigenous Peoples.

5.40. The majority held that “in context” these two challenges could only be interpreted as amounting to a specific attack on the decision to legislate by the Crown in respect of two particular properties (properties which the Crown wished to transfer to a different hapū from the appellant).¹⁶⁵ The legislation would validate those specific decisions. It was for this reason that the declarations

¹⁶² See *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116 at [34] noting that it was common ground that the function of the courts includes making declarations as to rights.

¹⁶³ *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116 at [44].

¹⁶⁴ *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116 at [47].

¹⁶⁵ *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116 at [66].

were seen as inappropriate. Importantly, each declaration specifically impugned a distinct decision by the Crown to legislate for a specific outcome, in respect of specific property.

5.41. Pausing, none of the Declarations now sought in any way impugn a specific legislative proposal by the Crown (and none specifically refer to the Proposals). They certainly do not impugn any granular decision which is part of a broader policy process, nor do they relate to specific property.

5.42. The declarations which the majority allowed to proceed to trial in *Ngāti Whātua Ōrākei* included the following:

- (a) a declaration that Ngāti Whātua Ōrākei has ahi kā and mana in relation to the 2006 RFR [right of first refusal] Land and the 1840 Transfer Land;
- (b) a declaration that when applying its overlapping claims policy to any land within the area of the 2006 RFR Land and the 1840 Transfer Land the Crown must act in accordance with tikanga, and in particular Ngāti Whātua Ōrākei tikanga;
- (c) a declaration that Crown development and making of offers to include land in the 2006 RFR Land and the 1840 Transfer Land in a proposed Treaty settlement with iwi who do not have ahi kā in respect of that land must be made in accordance with tikanga, and in particular Ngāti Whātua Ōrākei tikanga;

5.43. Pausing again, it will be seen that these declarations can be said to constrain the Crown's policy process, insofar as they state that the Crown's policy process had to be conducted according to specific legal requirements. They state specific consultation requirements the Crown must meet during the policy process, and specific legal rights (and particularly the ahī kā roa of the appellant) that must be adhered to during the policy-making process. To this extent, these declarations go considerably further than any of the Declarations sought by the Councils. Yet the Supreme Court considered them unobjectionable. Put simply, the Supreme Court had no difficulty with the proposition that declaratory relief might require the Crown to respect legal rights and obligations during the policy-making process.

- 5.44. Accordingly, following *Ngāti Whātua Ōrākei*, the correct approach is to closely analyse whether the declarations directly relate to or impugn a specific legislative proposal that is, or may soon be before, Parliament.¹⁶⁶ The Declarations sought do not do this, and are appropriately limited to the pleaded rights and the consequences which flow from those rights.
- 5.45. Importantly, nothing in the Declarations prevents the Crown from introducing any legislation or promulgating any policy. The Declarations preserve Crown flexibility as to how it chooses to use its prerogative, but clearly outline the legal rights of the Councils as they exist under the status quo and delineate the legal consequences of those rights. As the Supreme Court of Canada noted in *Khadr*, declaratory relief will often strike an appropriate balance between the competing concerns at play in this area because it preserves the ability of the Crown to choose *how* it implements the law as declared by the Court.¹⁶⁷
- 5.46. Following the Declarations, the Crown will still have considerable flexibility as to how it develops policy (and parliamentary sovereignty means that an Act may ultimately be enacted which overrides the declared legal rights). Any (unspecified) impact on the Crown's specific ability to develop the Proposals is simply the natural corollary of the fact that the legal rights and responsibilities referred to in the Declarations are just that: *legal* rights and responsibilities.
- 5.47. In short, it is simply not enough for the defendants to assert that, merely because the Declarations are sought against the context of the Proposals, they must therefore be illegitimate. Such an approach is plainly at odds with *Ngāti Whātua Ōrākei* and flouts fundamental principle. The Second Affirmative Defence should be rejected.
- 5.48. For completeness, it should be noted that the Declarations sought are not limited to the Water Assets, to which the Crown's current

¹⁶⁶ See generally *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116 at [46]–[47] and [66].

¹⁶⁷ *Canada v Khadr* 2010 SCC 3, [2010] 1 SCR 44 at [39].

Proposals are drafted. As noted earlier, the Councils' evidence includes the ongoing concerns that the Crown's "misunderstanding" of democratic local governance and property rights may in future be applied to other infrastructure assets.¹⁶⁸

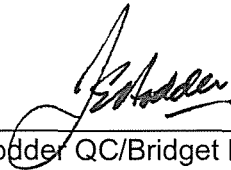
Restating the Councils' position

5.49. To restate the Councils' position on the application of the Court's declaratory jurisdiction to this proceeding:

- (a) The Councils seek declarations of rights and principles of legal, and arguably constitutional, significance, as the appropriate means of promoting the rule of law.
- (b) Insofar as the focus is on "rights", the relevant democratic local governance (and accountability) rights are sought to be affirmed on behalf of the Councils' respective communities and residents; and the relevant property rights are those of the Councils themselves.
- (c) The source of the jurisdiction invoked by the Councils is the DJA (s 2 for all matters; and s 3 for the property rights) and/or the inherent jurisdiction. The utility and breadth of the jurisdiction is well recognised in modern jurisprudence.
- (d) The Declarations' context ought not to be controversial, but the Crown's resistance to them is indicative of their importance: there are fundamental differences between the parties on whether the rights and principles incorporated in the Declarations sought exist and are of major legal significance, or of none.
- (e) These differences between the Councils and the Crown involve matters continuing beyond the current Three Waters Proposals. The Councils' concerns extend to the future erosion of rights and accountabilities in relation to other infrastructure assets.

¹⁶⁸ Bowen at [52]-[53]; and Gordon at [44].

- (f) The Declarations sought do not seek to call into question parliamentary sovereignty, nor the comity between the legislative and judicial branches of government.
- (g) The Declarations sought do not seek to impermissibly trespass on the Crown's policymaking process. Rather they seek to clarify the legal context and, at least in part, assist the Crown (and Parliament).



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APPENDICES

APPENDIX 1: A LONG HISTORY OF ELECTED LOCAL GOVERNMENT¹⁶⁹

1. Municipal Corporations Act 1876 (as enacted)	
Section 51	Mayor to be elected by burgesses.
Section 65	Council to be elected by burgesses.
Section 92	Auditors to be elected by burgesses.
Sections 38 and 39	Every person aged 21 and over whose name appears on the burgess roll entitled to vote at every election occurring in the relevant borough or ward. Number of votes dependent on value of rateable property, except only one vote per burgess for election of mayor.
2. Counties Act 1876 (as enacted)	
Section 58	Councillors to be elected by county electors of each riding of the county.
Sections 40 and 41	Every person aged 21 and over whose name appears on the electors' roll of a riding shall be a county elector. Every person whose name appears on the valuation roll of any road district in respect of rateable property within a riding, or on the list of electors of an outlying district, or on the list of miners' rights also entitled to be enrolled as a county elector for such riding. Every county elector entitled to vote at every election of a member of the county council for the riding in which they are enrolled. Number of votes dependent on value of rateable property.
3. Municipal Corporations Act 1908 (as enacted)	
Section 25	Mayor to be elected.
Section 40	Councillors to be elected.
Sections 6 and 7	Every person (male or female) aged 21 and over to be on district electors list if holding a freehold, rating or residential qualification. Once authenticated, district electors list becomes district electors roll.

¹⁶⁹ For a discussion of the expansion of the local government franchise over time, see Graham Bush "The Local Government Electoral Process: An Historical Overview" (1999) 50(2) Political Science 149.

Section 15	Every person on district electors roll entitled to vote and each elector to have only one vote.
4. Town Boards Act 1908	
Section 20	Members to be elected.
Sections 14,15 and 18	<p>Every person on electoral roll for any riding of the county and who owns or occupies property situated within the district entitled to vote at elections of members of the Town Board prior to any rate being levied by the Board.</p> <p>Thereafter, ratepayers of the district and no others entitled to vote. For the purposes of elections by the ratepayers, persons aged 21 and over and enrolled on valuation roll as occupier of any property shall be an elector. Number of votes dependent on value of rateable property.</p>
5. Municipal Corporations Act 1933 (as enacted)	
Section 23	Mayor to be elected.
Section 35	Councillors to be elected.
Sections 6 and 12	Every person (male or female) aged 21 and over to be on district electors list if holding a freehold, rating, residential or occupier's qualification. Once authenticated, district electors list becomes district electors roll.
Sections 15 and 17	Every person on district electors roll entitled to vote and each elector to have only one vote unless specially provided otherwise.
6. Municipal Corporations Act 1954 (as enacted)	
Section 40	Mayor to be elected.
Section 54	Councillors to be elected.
Sections 29 and 35	Every person (male or female) aged 21 or over to be on district electors list if holding a freehold, rating or residential qualification. Once authenticated, district electors list becomes district electors roll.
Section 37	Every person on district electors roll entitled to vote and each elector to have only one vote unless specially provided otherwise.
7. Counties Act 1956 (as enacted)	
Sections 30 and 37	County councillors to be elected.

Sections 46, 48 and 50	Every person aged 21 and over and whose name appears on the roll of electors of a riding entitled to vote at any election. Persons with ratepayer's and residential qualification also entitled to be enrolled as county elector.
8. Local Government Act 1974 (as enacted)	
Sections 46 and 52	Regional councillors to be elected.
Section 168	District community councillors and community councillors to be elected.
9. Local Government Act 2002 (LGA) and Local Electoral Act 2001 (LEA)	
LGA, section 41	Members of a regional council and members and mayor of a territorial authority to be elected.
LEA, section 20	Every person whose name appears on electoral roll of any district of a territorial authority or in the local government area of any other local authority as a residential elector or a ratepayer elector is entitled to exercise one vote at every election.

APPENDIX 2: RIGHT TO VOTE IN INTERNATIONAL INSTRUMENTS

Universal Declaration of Human Rights	
Article 21	<p>1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.</p> <p>2. Everyone has the right of equal access to public service in his country.</p> <p>3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.</p>
International Covenant on Civil and Political Rights	
Article 25	<p>Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:</p> <p>(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;</p> <p>(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;</p> <p>(c) To have access, on general terms of equality, to public service in his country.</p>
United Nations Convention on the Elimination of All Forms of Discrimination against Women	
Article 7	<p>States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right:</p> <p>(a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies;</p> <p>(b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government;</p> <p>(c) To participate in non-governmental organizations and associations concerned with the public and political life of the country.</p>

International Convention on the Elimination of All Forms of Racial Discrimination	
Article 5(c)	<p>In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:</p> <p>(c) Political rights, in particular the right to participate in elections-to vote and to stand for election-on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;</p>
Commonwealth Charter	
Article I	<p>We recognise the inalienable right of individuals to participate in democratic processes, in particular through free and fair elections in shaping the society in which they live. Governments, political parties and civil society are responsible for upholding and promoting democratic culture and practices and are accountable to the public in this regard. Parliaments and representative local governments and other forms of local governance are essential elements in the exercise of democratic governance.</p> <p>We support the role of the Commonwealth Ministerial Action Group to address promptly and effectively all instances of serious or persistent violations of Commonwealth values without any fear or favour.</p>

APPENDIX 3: APPLICATION OF ICCPR RIGHT TO VOTE AT ALL LEVELS OF GOVERNMENT

1. In its *Concluding observations on the initial report of Haiti*, the United Nations Human Rights Committee (HRC) recorded its concern “that the legal framework for the holding and conduct of legislative and municipal elections in Haiti, originally scheduled for 2011, has still not been put in place by the State party. The Committee considers that this situation deprives Haitian citizens of their right to vote and be elected at periodic elections in accordance with the Covenant (art. 25).” The Committee said: “The State party should, as a matter of urgency, take the necessary steps to organize the legislative and municipal elections due to have been held in 2011, in order to ensure that citizens have effective access to their rights under article 25 of the [ICCPR]”.¹⁷⁰
2. In *Concluding observations of the Human Rights Committee – Malawi*, the HRC expressed “concern at the fact that local government elections have not taken place since 1995, when they should be held once every five years, as required by the Local Government Elections Act (art. 25)”.¹⁷¹
3. In *Debreczeny v The Netherlands*, the HRC considered a case submitted by a Dutch police sergeant whose election to a municipal council was considered invalid under the Dutch Municipalities Act, which provides that membership in a municipal council is incompatible with employment as a civil servant in subordination to local authorities.¹⁷² The HRC considered this restriction reasonable and therefore found no violation of the right to be elected pursuant to art 25(b) of the ICCPR.¹⁷³ The HRC’s decision presupposes that the art 25(b) right applies at the level of municipal elections.
4. In *Ignatane v Latvia*, the HRC considered a case submitted by a Latvian citizen of Russian origin who stood for local elections in Riga. She was struck off the list by the Riga Election Commission on the basis she did

¹⁷⁰ Human Rights Committee *Concluding observations on the initial report of Haiti* UN Doc CCPR/C/HTI/CO/1 (21 November 2014) at [20].

¹⁷¹ Human Rights Committee *Consideration of reports submitted by States parties under article 40 of the Covenant: Concluding observations of the Human Rights Committee (Malawi)* UN Doc CCPR/C/MWI/CO/1 (18 June 2012).

¹⁷² *Debreczeny v The Netherlands* Comm No 500/1992 UN Doc CCPR/C/53/D/500/1992 (1995).

¹⁷³ *Debreczeny*, above n 172, at [9.2]–[9.3].

not have the required proficiency in the official language. The HRC considered that Mrs Ignatane “is a victim of a violation of article 25, in conjunction with article 2 of [the ICCPR]”.¹⁷⁴

5. In *Mátyus v Slovakia*, the HRC considered a case submitted by a candidate for municipal elections in a Slovakian town.¹⁷⁵ The Town Council had established five voting districts for the election of a total of 21 representatives. The applicant alleged that the number of representatives in each district was not proportional to the number of inhabitants. The HRC concluded the right of the applicant to be elected by equal suffrage had been violated. Interestingly, the HRC found a breach of art 25(a) and (c), not art 25(b).¹⁷⁶ Professor Nowak writes that this “might be an indication that the Committee does not consider municipal elections to be governed by the right to vote in Art 25(b)”.¹⁷⁷ However, in the *Concluding observations on the initial report for Haiti*, the HRC expressed concerns about violations of the art 25(b) right to vote in relation to local as well as central elections (discussed above).
6. In *Katashynskiy v Ukraine*, the HRC considered a case submitted by Mr Katashynskiy who stood as a candidate in local elections.¹⁷⁸ He claimed he was denied his right to be elected as a result of lost ballots in one of the polling stations, in which he had won the majority of votes. The HRC found that his rights had been breached under art 25 of the ICCPR read alone and in conjunction with art 2(3).¹⁷⁹
7. In *Burgoa v Plurinational State of Bolivia*, the HRC considered a case submitted by Rebecca Burgoa under art 25. Ms Burgoa was deemed ineligible to stand for election to the office of mayor for the Province of Cercado, based on a residency requirement.¹⁸⁰ The HRC found that her disqualification as a candidate for mayor unduly restricted her rights under art 25, in violation of that provision.¹⁸¹

¹⁷⁴ *Ignatane v Latvia* UN Doc CCPR/C/72/D/884/1999 (31 July 2001) at [7.5]. Note that the HRC refers to art 25 in general, rather than a specific sub-paragraph of art 25.

¹⁷⁵ *Mátyus v Slovakia* Comm No 923/2000 UN Doc A/57/40 Vol II.

¹⁷⁶ *Mátyus*, above n 175, at [9.2]–[9.3].

¹⁷⁷ Manfred Nowak *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd revised ed, NP Engel Publishers, Arlington Virginia, 2005) at 582, n 84.

¹⁷⁸ *Katashynskiy v Ukraine* UN Doc CCPR/C/123/D/2250/2013 (31 August 2018).

¹⁷⁹ *Katashynskiy*, above n 178, at [7.2]–[7.3].

¹⁸⁰ *Burgoa v Plurinational State of Bolivia* UN Doc CCPR/C/122/D/2628/2015 (2 May 2018).

¹⁸¹ *Burgoa*, above n 180, at [11.5].

8. In *Tanganyika Law Society v United Republic of Tanzania*, the African Court on Human and Peoples' Rights found that a requirement that candidates for election in presidential, parliamentary or local government elections must belong to a political party violates art 13 of the African Charter of Human Rights. Article 13, which reflects art 21(1) of the UNDHR and art 25(a) of the ICCPR, provides that "Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law".¹⁸²

¹⁸² *Tanganyika Law Society v The United Republic of Tanzania* Application No 009/2011 African Court of Human Rights, 14 June 2013 at [111].