IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

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

CIV/2021-485-641

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

SYNOPSIS OF SUBMISSIONS FOR THE DEFENDANTS

Dated: 19 May 2022

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AND **THE MINISTER OF LOCAL GOVERNMENT**

FIRST DEFENDANT

AND **THE SECRETARY FOR LOCAL GOVERNMENT**

SECOND DEFENDANT

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May it please the Court:

1. INTRODUCTION AND OUTLINE

1.1 The Government is progressing complex, multi-tiered policy and legislative reforms directed at changing the way that three waters services (drinking water, wastewater and stormwater – the **Three Waters**) will be provided to local communities in New Zealand (**the Reforms**). The Reforms are being developed by the Minister of Local Government (**Minister**), with advice from Te Tari Taiwhenua, the Department of Internal Affairs (**DIA**). They have their origin in the water contamination crisis in Havelock North in 2016.

1.2 The Reforms are about a new approach to delivering clean, safe and reliable water services for all New Zealanders. The Government policy will be implemented through legislation. The policy (and legislation) is significant, nationally focussed reform that will change the way that the Three Waters services are currently provided. All local councils have been involved in an engagement and consultation process around the Reforms. Some local councils agree with the policies being legislated as part of the Reform process, and some local councils do not.

1.3 The three plaintiff local councils (**the plaintiffs**) do not agree with the Reforms[1] – a matter not lost on the Minister, as reflected in her evidence for this proceeding:

> *5.1 I acknowledge that the plaintiffs and others in the local government sector have concerns about the Proposals, just as there are others in the sector and broader community who fully support them. This has been my experience with any major reform programme.*
>
> *5.2 The Government is committed to ensuring local authorities continue to have a vital three waters role by representing the interests of their communities at the highest level of each new water services entity alongside mana whenua, and by owning these entities on behalf of their communities.*
>
> *5.3 We are proceeding with the Proposals and legislation because all New Zealanders need safe, reliable drinking water, wastewater and stormwater services. We depend on these for the health and wellbeing of our communities and our environment.*

[1] See Bowen affidavit at [41]–[52] **[[201.0011]]**; Gordon affidavit at [25]–[38] **[[201.0033]]**; and Mai affidavit at [23]–[34] **[[201.0022]**.

1.4 The Reforms provide what is described as "background" for the plaintiffs' claims. But as will be evident from their text, the very general declarations as sought by the plaintiffs (**the Declarations**) are not tied to the Reforms. They seek statements of "components", "principles" and "features" of the democratic local governance of New Zealand, and statements of property rights in relation to "infrastructure assets" (generally, in an undefined way and without limitation to water infrastructure assets). On their own case, they simply "*describe longstanding but fundamental principles relating to democratic local governance, and to property rights*".[2] The Declarations are non-fact specific and of no practical application.

1.5 This gives rise to two fundamental hurdles for the plaintiffs:

(a) The Court's declaratory jurisdiction exists only in relation to legal rights. The Declarations relate to "components", "principles" and "features" of local government, not legal rights;

(b) To the extent there is jurisdiction to make any of the Declarations, there are multiple factors that weigh heavily against the Court exercising its discretion to do so.

1.6 In terms of discretion, the abstract nature of the Declarations makes them of no practical consequence and of no utility. The plaintiffs seek to overcome this by manufacturing a dispute for the Court to resolve. But a striking feature of this case is that (with one main exception, regarding compensation) there appears to be no real dispute about the law (although the generality of the Declarations sought, particularly in relation to infrastructure assets makes it difficult to confirm this). The heart of the dispute is about whether the Declarations are appropriately the subject of the Court's time and declaratory jurisdiction, whether they warrant the exercise of the Court's discretion, and/or whether they improperly constrain the Crown in relation to how it makes policy and/or advances legislative reforms through Parliament, in breach of the comity principle.

1.7 These challenges are the subject of the defendants' (**the Crown's**) affirmative defences in this proceeding. They are dealt with first in our submissions.

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[2] Plaintiffs' submissions at [1.4].

1.8 From the plaintiffs' submissions, it is clear that they accept that:

(a) the Reforms could be brought into being by an Act of Parliament under the concept of parliamentary sovereignty;[3]

(b) the proposed governance structure of the water service entities under the Reforms is subject to change;[4]

(c) central Government has made funding contributions to the Three Waters infrastructure;[5]

(d) local councils are creatures of statute, established and governed by or under Acts of Parliament,[6] and that their role, powers and territories have been regulated and amended by Acts of Parliament over the past 150 years or so;[7] and

(e) the Crown is actively considering the future of local government on an ongoing basis.[8]

1.9 With these acknowledgements in place, the plaintiffs are pursuing their claim for two purposes:

(a) to influence, or "*ensure the Crown [and Parliament] does appreciate*" the various "components", "principles", and "features" of local governance and the plaintiffs' property rights, as it progresses its policy making process for the Reforms, and Parliament proceeds to enact legislation to implement the Reforms;[9] and

(b) to influence possible future policy and legislation reforms also ("*the Government may apply a similar approach and justification to 'scaling up'-style reforms in the future*.")[10]

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3 Plaintiffs' submissions at [1.8] and [5.28].

4 Plaintiffs' submissions at [2.23].

5 Plaintiffs' submissions at [2.31].

6 Plaintiffs' submissions at [4.4].

7 Plaintiffs' submissions at [4.24].

8 Plaintiffs' submissions at [5.24].

9 Plaintiffs' submissions at [4.26] and [5.49(g)].

10 Plaintiffs' submissions at [2.32]. See also at [5.49(e)] "*The Councils' concerns extend to other infrastructure assets*."

1.10 The context of the Reforms is problematic for the plaintiffs, and may explain the abstract framing of the Declarations. The Reforms' context takes the proceeding across a line into Government policy making and enactment of legislation. This leads to the obvious issue that the Declarations they seek are an attempt to use the Courts to influence Parliament – which as a matter of comity should not be allowed to occur. The principle of comity between the Crown and the Courts is well established. The Crown's case is that the Declarations cross a line into the sphere of influencing policy development and legislation, and the Court should resist being pulled into that sphere.[11]

1.11 But with the Declarations removed from the Reforms context, the plaintiffs instead encounter issues of futility and impracticality for the Declarations being sought. The Declarations are not fact-specific, efficacious or capable of practical application. They do not relate to any real dispute. The Crown says that the Court should resist making declarations of this nature.

1.12 The Crown submits that the Declarations should not be made. The legislative process to come for the exposure draft of the Water Services Entities Bill (**the Bill**)[12] highlights that there is significant legislative development to follow before the final shape, governance and ownership structures for the proposed new water services entities that are the subject of the Reforms will be settled. Mr Lovett's updating affidavit further highlights this issue. Abstract declarations (particularly those not directed at legal rights) can only be intended to influence that policy and legislative process, and are otherwise of no utility.

A constitutional dimension?

1.13 The plaintiffs seek to invoke a notion of constitutional rights protection, i.e. to elevate some statutes to a higher constitutional status, to support their

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[11] The Crown's evidence is clear that this is a major policy development process and legislation is pending (as would be expected for any significant change to the service delivery mechanisms for local councils as statutory bodies) (Lovett affidavit at [7.3]) **[[201.0097]]**. That evidence includes discussion of an exposure draft of the first of a number of Bills to be introduced into the House from mid-2022 (Lovett affidavit at [6.1]) **[[201.0093]]**.

[12] Lovett affidavit at [6.10] **[[201.0097]]**.

case in favour of the Court's exercise of its discretionary declaratory jurisdiction.

1.14 The argument is no doubt intended to create a sense of higher purpose - but it is an overreach in the current context, and ultimately irrelevant to the Declarations as sought.

1.15 The notion of a distinction between 'ordinary' and 'constitutional' statutes has been endorsed by a majority of the Supreme Court[13] and it is a distinction also drawn by the English Courts.[14]

1.16 In *Fitzgerald*, the Supreme Court characterised the New Zealand Bill of Rights Act 1990 (**NZBORA**) as constitutional.[15] In *Thoburn*, the Court characterised the Magna Carta 1297, the Bill of Rights 1688, the Union with Scotland Act 1706, the Reform Acts of the 19th Century, the European Communities Act 1972, the Human Rights Act, the Scotland Act 1998 and the Government of Wales Act 1998 as examples of constitutional statutes.[16] In essence it was held that a constitutional statute:[17]

> *can only be repealed, or amended in a way which significantly affects its provisions touching fundamental rights or otherwise the relation between citizen and state, by unambiguous words on the face of the later statute*.

1.17 The Crown recognises the important role of democratically elected local authorities in relation to matters devolved to them by Parliament. The Crown is not questioning the important and adaptable roles local government plays.

1.18 But to characterise the Local Government Act 2002, the Local Electoral Act 2001 or the Local Government (Rating) Act 2002 as "constitutional" overstates the position. As the *Laws of New Zealand* commentary on the role and status of local government states, local government is not explicitly recognised within New Zealand's constitution.[18] The

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13 *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551 at [221]–[224], [231] and [250] **[[Auth]]**.
14 *Thoburn v Sunderland City Council* [2003] QB 151, [2002] 4 All ER 156 **[[Auth]]**.
15 *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551 at [221] **[[Auth]]**.
16 *Thoburn v Sunderland City Council* [2003] QB 151, [2002] 4 All ER 156 at [62] **[[Auth]]**.
17 *Thoburn v Sunderland City Council* [2003] QB 157, [2002] 4 All ER 156 at [223] **[[Auth]]**.
18 C Mitchell and D R Knight *Laws of New Zealand* 'Local Government: Role, Status, and Principles' (online ed) at [30] **[[Auth]]**. The authors cite Kenneth Palmer *Local Government in the Law of New Zealand* (Sydney, The Law Book Company, 1993) at 23 as authority for this point. See also Kenneth Palmer *Local Authorities Law in New Zealand* (online looseleaf ed, Thomson Reuters) at 37.23.8.1 **[[Auth]]**.

establishment and powers of local government arise from legislation passed by Parliament (no super majority is needed for its amendment or repeal).[19] Rightly or wrongly as a matter of policy, local government is not entrenched under New Zealand's system of government, and never has been.[20] In any event, there is no suggestion here of any implied or unclear legislative repeal. Instead, the Reforms represent a new approach to delivering water services.

1.19 The plaintiffs rely on selected excerpts from DIA reporting documents (and in particular the DIA 2019/2020 annual report) to support the importance of local government (a view which the Crown fully endorses).[21] But read in context, those excerpts reflect a much broader point about the need for cooperation and coordination across all of government where national policy objectives are at issue: "*[a]ddressing complex issues requires co-operation and co-ordination across all of government, to be better able to tackle issues and pursue national objectives*."[22]

1.20 To similar end, the plaintiffs quote the Minister when announcing the Review into the Future For Local Government in April 2021:[23]

> *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*.

1.21 Read in full, in the same press release the Minister recognises that reform to the local government sector is needed to ensure local government can optimise its democratic role and function:[24]

> *Local councils are essential to maintaining and improving our wellbeing and we need to get the right settings for them to continue delivering their important mahi. They are now facing a wave of reforms that will significantly affect their traditional roles and functions. They have told us the timing is right to determine what our system of local democracy should look like to make sure it is fit for the future, and I agree.*

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19 Kenneth Palmer *Local Authorities Law in New Zealand* (online looseleaf ed, Thomson Reuters) at 37.23.8.1 **[[Auth]]**.

20 Palmer affidavit at [25] **[[201.0050]]**.

21 Plaintiffs' submissions at [1.14].

22 At 36. The annual report also recognises the Reforms, including as: "*Both central and local government also agree there are broader challenges facing local government water services and infrastructure, and the communities that fund and rely on these services.*" "*Design of the proposed new water service delivery arrangements will be informed by discussion with local government, iwi and Māori, the wider water services sector, and communities of interest."* Department of Internal Affairs *Pūrongo Ā Tau: Annual Report 2020* (June 2020) available at <www.dia.got.nz> at 40 and 41 **[[Auth]]**.

23 Plaintiffs' submissions at [1.15].

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

1.22 That is, while the Crown recognises the importance of local government, it also recognises (as does the relevant evidence cited by the plaintiffs) the importance of reform to local government to ensure it remains fit for purpose. This is an ongoing and dynamic process.

What this case is really about

1.23 The Crown says that this case is really about the plaintiffs' policy arguments against the Reforms. The plaintiffs' case reads very much as a submission to a Select Committee – reasons why they are opposed to the changes in their roles and responsibilities which the Reforms represent, and which will be given effect to through legislation.

1.24 The plaintiffs claim that this proceeding is about:[25]

> *the potential removal of their communities' entitlements to democratic local governance of, and accountability for, the provision and management of waters services through their Water Assets" and "the potential expropriation by the Proposals of the Councils' property rights in their Water Assets.*

1.25 Not only are they plainly seeking to influence the Reforms and legislation, the suggestion that water services must be provided at a local level, and that water assets must be owned and managed at a local level, and that anything else would be undemocratic and unconstitutional, is simply wrong and inconsistent with the plaintiffs' acknowledgment that the Reforms can be brought about by legislation. Any potential reduction in local democracy relating to water services in particular, or potential removal of property rights in Water Assets (as defined in the Statement of Defence) specifically, is a policy argument against the Reforms, not the unlawful interference with a legal or enforceable right.

1.26 The plaintiffs are seeking to use the Court to influence that policy debate and the legislative process of Parliament.

1.27 The plaintiffs all but say so themselves:[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*

[25] Plaintiffs' submissions at [1.6(a)] and [1.6(b)].
[26] Plaintiffs' submissions at [4.26].

> *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.*

1.28 In fact, the plaintiffs expressly go further, to include potential future (policy and legislative) reforms also:[27]

> *For completeness, it should be noted that the Declarations sought are not limited to the Water Assets, to which the Crown's current 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.*

1.29 It is clear (not least from the plaintiffs' submissions) that Parliament can legislate to enact the Reforms. The plaintiffs say they fully respect the concept of parliamentary sovereignty and acknowledge that the Reforms could be brought into being by an Act of Parliament.[28] They are expressly not challenging the pending legislation or seeking to invalidate it.[29] In those circumstances, there is no need for declarations to 'educate' the Crown about the plaintiffs' general principles or rights. Any declarations can only be intended to interfere with policy making and legislation.

Structure of these submissions

1.30 In terms of structure, the Crown's submissions address issues of jurisdiction and discretion first. For convenience, the plaintiffs' major headings have been adopted:

(a) Part 2 provides additional background, including as to the statutory scheme, the evolution of local government service delivery, and the Three Waters Reforms;

(b) Part 3 sets out the jurisdictional and discretionary barriers to the plaintiffs' claim;

(c) Part 4 responds to the plaintiffs' submissions regarding Declarations A and B; and

(d) Part 5 responds to the issues raised in relation to Declaration C.

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27 Plaintiffs' submissions at [5.48].
28 Plaintiffs' submissions at [1.8] and [5.28].
29 Plaintiffs' submissions at [5.28].

1.31 In Part 6, the Crown responds to the plaintiffs' challenge to the expert evidence of Kenneth Palmer, to the extent this remains in contest.

2. BACKGROUND

2.1 The Crown largely accepts the background section of the plaintiffs' submissions regarding the status quo under the Local Government Act 2002 (**LGA**) for water services delivery and asset ownership. But some additional points are relevant.

The LGA is a current snapshot in time

2.2 Local government is a creature of statute. The Crown's pleading sets out much of the evolution of New Zealand local government legislation.[30] This is supplemented by the various legislation in the plaintiffs' submissions at Appendix 1, and by Part F of Mr Palmer's affidavit.[31] The LGA is simply the current incarnation of local government legislation.

2.3 Under the current LGA, the role of local authorities is expansive, as articulated in section 11:

> ***11 Role of local authority***
> *The role of a local authority is to—*
> *"(a) give effect, in relation to its district or region, to the purpose of local government stated in section 10; and*
> *"(b) perform the duties, and exercise the rights, conferred on it by or under this Act and any other enactment."*

2.4 This role has changed alongside changes in Government and Government policy since the LGA's enactment in 2002. Relevantly, section 11 was supplemented in 2010,[32] by s 11A, which stated:

> ***11A Core services to be considered in performing role [****repealed 2019****]***
>
> *In performing its role, a local authority must have particular regard to the contribution that the following core services make to its communities:*
>
> *(a) network infrastructure:*
> *(b) public transport services:*
> *(c) solid waste collection and disposal:*
> *(d) the avoidance or mitigation of natural hazards:*
> *(e) libraries, museums, reserves, recreational facilities, and other*

30 SOD, Schedule 3 **[[101.0041]]**.
31 In particular, [26]–[31] **[[201.0050]]**.
32 Local Government Act 2002 Amendment Act 2010, s 5 **[[Auth]]**.

community infrastructure.

2.5 After section 11A was enacted, the purpose of local government under section 10 was amended from a focus on the "four well-beings",[33] to instead include as a purpose:

> ***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 meet the current and future needs of communities for good-quality local infrastructure, local public services, and performance of regulatory functions in a way that is most cost-effective for households and businesses.*
> ….

2.6 Of note, section 11A (a) referred to "network infrastructure" as a core service, which was (and is) defined in s 197(2) to mean "*the provision of roads and other transport, water, wastewater, and stormwater collection and management*".[34]

2.7 Section 11A was repealed on 14 May 2019, at the same time as the four well-beings were restored as a purpose of local government in section 10 (and references to "good quality local infrastructure" were removed).[35] This changed the framework and boundaries for the role and purpose of local government.

2.8 This reinforces that the role of local government at any time is subject to change by Parliament. The LGA as currently enacted is simply the current formulation of the role that Parliament has set for local government.

The LGA already enables multi-council provision of services

2.9 Section 17A requires a local authority to review the cost effectiveness of infrastructure and other services in conjunction with any significant change to service levels, or within two years of expiry of any contract relating to delivery or within six years of a previous review.

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[33] The "four well-beings" were as follows (in section 10 of the LGA as at 27 November 2010) **[[Auth]]**:
10 Purpose of local government
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.*

[34] For further discussion on s 11A, see Kenneth Palmer *Local Authorities Law in New Zealand* (online looseleaf ed, Thomson Reuters) at 37.1.3.2 **[[Auth]]**.

[35] Local Government (Community Well-being) Amendment Act 2019 **[[Auth]]**.

2.10 This obligation is complemented by an obligation on the Secretary for Local Government to make rules specifying performance standards in relation to water supply, sewerage and disposal, stormwater drainage, flood protection, and the provision of roads and footpaths. The intent is to enable the public to compare levels of service by different local authorities.[36]

2.11 Section 12 of the LGA confers the legal status and powers of local authorities for the purpose of performing their role under section 11. Of note, in relation to the required "place of benefit" (the local district, or region) for the exercise of powers (sections 12(4) and (5)), the local place of benefit provisions do not (a) prevent two or more local authorities engaging in a joint undertaking, a joint activity, or a co-operative activity; or (b) prevent a transfer of responsibility from one local authority to another in accordance with the LGA; or (c) restrict the activities of a council-controlled organisation.[37]

2.12 In other words, even under the LGA currently, a local authority could contract with other local authorities to provide different mechanisms for delivery of the Three Waters services that do not necessarily involve one local authority providing services in its own district.

2.13 Similarly, section 17 (regarding transfer of responsibilities) enables a regional council to transfer one or more of its responsibilities to a territorial authority, and enables a territorial authority to transfer a responsibility to a regional council by agreement.[38] The respective bodies must be satisfied after a consultation procedure that the benefits will outweigh any negative impacts, having regard to a list of relevant matters which include "*the financial, disruption, and opportunity costs of implementing the proposed transfer at the proposed time*".[39]

2.14 Importantly, nothing in section 17 limits the ability of a local authority to delegate the exercise of a responsibility to another local authority or to

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36 LGA, ss 261A and 261B (inserted 27 November 2010) **[[Auth]]**. The 2021-22 Annual Report of Wellington Water sets out the details of performance as required by the rules (issued 2014). See also Kenneth Palmer *Local Authorities Law in New Zealand* (online looseleaf ed, Thomson Reuters) at 37.6.3.2 and 37.6.15 **[[Auth]]**.

37 See also Kenneth Palmer *Local Authorities Law in New Zealand* (online looseleaf ed, Thomson Reuters) at 37.1.3.3 **[[Auth]]**.

38 See also Kenneth Palmer *Local Authorities Law in New Zealand* (online looseleaf ed, Thomson Reuters) at 37.1.4.1 **[[Auth]]**.

39 LGA, s 17(4A)(c) **[[Auth]]**.

enter a contractual agreement with another local authority for performance of any activity or function.

2.15 Mr Palmer's affidavit provides evidence of the range of models for local government service delivery in New Zealand, including in relation to the Three Waters, and including under the current LGA provisions.[40] In particular, Mr Palmer highlights the examples of Wellington Water (established in September 2014 as a council-controlled organisation to provide and manage the Three Waters services for Hutt, Porirua, Upper Hutt and Wellington City Councils, South Wairarapa District Council and Greater Wellington Regional Council);[41] and Watercare Services Limited in Auckland (which has regional responsibility as a council-controlled organisation for provision of Three Waters services in the Auckland Region).[42]

2.16 To similar end, further powers of delegation within a local authority are found in Schedule 7, clause 32 of the LGA. These powers include delegation to another local authority, organisation or person of the enforcement, inspection, licensing, and administration related to bylaws and other regulatory matters.[43] A local authority has the power, by necessary implication, to contract out the provision of services, where consultants are required for the undertaking, including of public works.[44]

2.17 This reflects the important principle relating to local authorities in section 14(1)(e) of the LGA:

> *(e) a local authority should actively seek to collaborate and co-operate with other local authorities and bodies to improve the effectiveness and efficiency with which it achieves its identified priorities and desired outcomes;*

Local government service delivery has evolved in many areas across time

2.18 Outside of Three Waters service delivery, Mr Palmer deposes to a number of major reforms in other areas of local government service delivery over

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40 See Palmer affidavit section I **[[201.0056]]**.
41 Palmer affidavit at [50]–[54] **[[201.0057]]**. The CCO is jointly owned by the six councils as equal shareholders, and each council has a member on the regional Wellington Water Committee.
42 Palmer affidavit at [55] **[[201.0057]]**.
43 See also Kenneth Palmer *Local Authorities Law in New Zealand* (online looseleaf ed, Thomson Reuters) at 37.5.8.2 **[[Auth]]**.
44 LGA, s 12 **[[Auth]]**. See also Kenneth Palmer, *Local Authorities Law in New Zealand* (Thomson Reuters, Wellington, 2012), ch 10 **[[Auth]]**.

the last 50 years which highlight the primacy of the policy decisions of the Government of the day, and the plenary powers of Parliament in enacting laws to reflect that policy. His affidavit includes, by way of example:

(a) changed services delivery for Fire and Emergency Services – nationalised in 1975, but previously subject to local board control;[45]

(b) changed services delivery for Harbour Boards – replaced in 1988 by Port companies, with assets distributed to (mainly) the companies and local authorities, and shares vested in local authorities (and then able to be privatised);[46]

(c) changes to local government structure by the Local Government Commission (established in 1945), including several major area amalgamations, and the reduction of 30 local authorities in the Auckland region down to seven territorial authorities and the Auckland Regional Council.[47]

The Reforms provide a further formulation of the role set for local government, to be enacted through legislation.

2.19 The plaintiffs' background submissions on the Reforms largely focus on their concerns with the merits of the Reforms.[48]

2.20 Michael Lovett, who is the Deputy Chief Executive of the Local Government branch of DIA, provides additional context and detail on the Reforms themselves. In summary, Mr Lovett explains that:

(a) The Reform proposals were many years in the making (as elaborated in the Minister's evidence),[49] but first formally announced by the Minister in June 2021 with a statement that the Government was working alongside local government and iwi on a policy proposal to combine New Zealand's 67 council-owned and

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45 Palmer affidavit at [57] **[[201.0058]]**. See also Kenneth Palmer *Local Authorities Law in New Zealand* (online looseleaf ed, Thomson Reuters) at 37.22.1 **[[Auth]]**.

46 Palmer affidavit at [58] **[[201.0058]]**. See also Kenneth Palmer *Local Authorities Law in New Zealand* (online looseleaf ed, Thomson Reuters) at 37.15.13.1 and 37.15.13.2 **[[Auth]]**.

47 Palmer affidavit at [59]–[67] **[[201.0058]]**. See also Kenneth Palmer *Local Authorities Law in New Zealand* (online looseleaf ed, Thomson Reuters), ch 37.23 **[[Auth]]**.

48 Plaintiffs' submissions at [2.24]–[2.34].

49 Hon Mahuta affidavit at [2.1]–[2.6] **[[201.0113]]**.

managed water service providers into a small number of publicly owned providers.[50]

(b) The policy development was informed by extensive analysis from the Water Industry Commission for Scotland (**WICS**) (including based on detailed information from local councils),[51] and by reports from:

(i) advisory/management consulting firms Farrierswier and Beca to provide independent assurance of the WICS methodology, assumptions and approach and its relevance for the New Zealand context;[52]

(ii) Deloitte (in terms of the effects of the Reforms on the economy and affected industries);[53]

(iii) AON to understand whether insurance considerations should influence potential water services entity boundary decisions;[54] and

(iv) Standard & Poors (**S&P**) to test six hypothetical design scenarios and assess potential credit rating implications for the Government and local authorities associated with the reform programme.[55]

(c) The Minister then confirmed (reflecting substantive policy decisions made by Cabinet) the Government's proposal to establish four publicly owned entities to take responsibility of drinking water, wastewater and stormwater infrastructure across New Zealand.[56]

(d) A key feature of the Reforms is to transfer the responsibility for the delivery of water services to the four new water services entities (which are divided on geographic lines).[57] Ownership of water services assets (and also territorial authorities' water services

50 Lovett affidavit at [3.1] **[[201.0071]]**.
51 Lovett affidavit at [3.1] **[[201.0071]]**.
52 Lovett affidavit at [3.6]–[3.8] **[[201.0073]]**.
53 Lovett affidavit at [3.9] **[[201.0074]]**.
54 Lovett affidavit at [3.10] **[[201.0074]]**.
55 Lovett affidavit at [3.10]–[3.11] **[[201.0074]]**.
56 Lovett affidavit at [3.13] **[[201.0075]]**.
57 Lovett affidavit at [3.18] **[[201.0077]]**; *Cabinet Paper and Minute CAB-21-MIN-0226: A new system for three waters service delivery, 14 June 2021*, minute at [16] **[[305.2536]]**.

liabilities) will be transferred to the new public entities to achieve the operational and financial autonomy required to ensure balance sheet separation.[58]

(e) In particular, Cabinet agreed in June 2021 that:

(i) that the four new water services entities would be created as statutory entities;[59]

(ii) although water services asset ownership would transfer to these four new entities there is a bottom-line requirement that each entity remains in collective local authority ownership, with legislative protections against privatisation,[60] and ongoing public governance oversight and accountability;[61]

(iii) there would be a strengthened system of oversight and stewardship of Three Waters assets, investment and service delivery, including through a Government Policy Statement; an oversight framework involving representatives of local authorities and mana whenua from within the geographical area served by the respective entities; governance by an independent board of directors; and a Regional Representative Group would be established for each water services entity[62] (the details of which have changed already in the course of the policy development, and including in the preparation of the exposure draft Bill).[63]

(f) The Government has engaged, and continues to engage extensively with local government and other stakeholders on the policy proposals to inform its future policy decisions.[64] This engagement has included a partnership approach between the

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58 Lovett affidavit at [3.16] **[[201.0076]]**.
59 Lovett affidavit at [3.17] **[[201.0076]]**.
60 *Cabinet Paper and Minute CAB-21-MIN-0226: A new system for three waters service delivery, 14 June 2021* at [68.2] **[[305.2560]]**.
61 Lovett affidavit at [3.19] **[[201.0077]]**. Cabinet has since made further decisions about the ownership, governance and accountability of the water services entities. These decisions are outlined in the updating affidavit of Michael Lovett and in *Cabinet Paper and Minute CAB-22-MIN-0144: Strengthening representation, governance and accountability of the new water services entities, 19 April 2022*, annexed to the updating affidavit **[ML2, 017]**.
62 Lovett affidavit at [3.20]–[3.21] **[[201.0077]]**.
63 See Lovett updating affidavit.
64 Lovett affidavit at [4.3], [4.7] and Part 5 **[[201.0081]]**.

Crown and Local Government New Zealand (**LGNZ**) (formalised through a Heads of Agreement); a joint Central-Local Government Three Waters Steering Committee; an extremely experienced Working Group on Representation, Governance and Accountability of New Water Services Entities (**the RGA Working Group**); and a range of other working groups to work through the concerns raised.[65]

(g) The collaborative approach based on shared objectives between the Crown and LGNZ has set a platform for significant and ongoing engagement by the Crown with councils, iwi, industry bodies and other stakeholders, allowing for extensive sharing of material and feedback between all parties.[66]

(h) This ongoing engagement is noteworthy as there are significant residual policy matters to be determined as well as more detailed features of regulatory design. In addition, not all matters will be settled through the Three Waters reform programme alone – other reform programmes will play a part.[67]

2.21 In terms of engagement to date, the Minister and DIA have been able to test both the policy settings and the legislative drafting at a relatively early stage through the development of an exposure draft Bill, provided to the RGA Working Group to assess and provide feedback on the drafting details and more detailed features of water services entity design. Mr Lovett refers in his evidence to a number of specific aspects of the exposure draft Bill:[68]

(a) *Part 2, subpart 1, which establishes the water services entities and sets out their functions and objectives. The objectives include supporting and enabling housing and urban development. This part also sets out a number of "operating principles" for each water services entity which include "*partnering and engaging early and meaningfully with territorial authorities and their communities; and co-operating with, and supporting, other water services entities, infrastructure providers, local authorities, and the transport sector*".*[69]

(b) *Part 2, subpart 4, which establishes the Regional Representative Groups I mentioned earlier in describing the Proposals and*

65 Lovett affidavit at [5.14]–[5.27] **[[201.0089]]**.
66 Lovett affidavit at [5.8]–[5.10] **[[201.0086]]**.
67 Lovett affidavit at [5.26] and Part 9 **[[201.0092]]**.
68 Lovett affidavit at [6.3] **[[201.0094]]**.
69 Draft Bill, clause 12 **[[306.3323]]**.

*includes for each of those Regional Representative Groups the collective duty to "*perform or exercise its powers, functions, and duties under this Act wholly or principally for the benefit of all communities in the entity's service area and, in doing so, [they] must take into account (a) the diversity of the communities and the diversity of the communities' interests, within the entity's service area; and (b) the interests of future as well as current communities within the entity's service area*".*[70]

(c) *Part 4, which covers financial and accountability matters, and at subpart 4 in particular which sets out reporting obligations in detail including the requirement for the Board of each new water services entity to prepare a statement of intent, asset management plan, funding and pricing plan, and infrastructure strategy.*

(d) *Part 6, subpart 1, which governs the engagement requirements for each water services entity, including requirements for at least one consumer forum (and possibly several per entity, on the basis of, for example, parts of a service area, or a particular class of consumers), for consumer engagement stocktakes by each entity.*

2.22 At the time of filing his first affidavit, Mr Lovett's evidence was that territorial authorities would not be shareholders in the water services entities under the exposure draft Bill although ownership would be provided for in the legislation.[71]

2.23 In his updating affidavit, Mr Lovett refers to more recent Government policy decisions following consideration of a series of recommendations by the RGA Working Group.[72] Individual responses to each of the RGA Working Group recommendations is provided in the *Government Response to Three Waters Working Group on Representation, Governance and Accountability recommendations*.[73] Cabinet's decision is recorded in Cabinet Paper and Minute *CAB-22-MIN-0144: Strengthening representation, governance and accountability of the new water services entities, 19 April 2022*.[74]

2.24 In terms of asset ownership and accountability for water service provision, Mr Lovett highlights some of the key policy changes recently decided by Cabinet:[75]

70 Draft Bill, clause 32 **[[306.3329]]**.
71 Lovett affidavit at [6.4] **[[201.0095]]**.
72 As detailed in [5.14]–[5.26] of the Lovett affidavit **[[201.0089]]**.
73 Lovett updating affidavit at **[ML2, 001]**.
74 Lovett updating affidavit at **[ML2, 017]**.
75 Lovett updating affidavit at [9].

(a) The Reforms will provide for a public shareholding structure that makes community ownership clear, with shares allocated to councils reflective of the size of their communities (one share per 50,000 people);[76]

(b) The role of the Regional Representative Group has been further strengthened and clarified, with joint oversight from local councils and mana whenua to ensure community voice and provide tighter accountability from each water services entity board;[77]

(c) There has been confirmation that board members of the Water Services Entities are to be appointed based on competency;[78]

(d) There are changes to strengthen connections to communities, including through local sub-committees feeding into the Regional Representative Group, to ensure all communities' voices are considered as part of investment prioritisation;[79] and

(e) There is greater recognition of Te Mana o te Wai – the health and wellbeing of New Zealand's waterways and waterbodies – as a korowai, or principle, that applies across the water services framework.[80]

2.25 Three key things are apparent from Mr Lovett's evidence:

(a) First, the policy and legislation development is active and ongoing (and remains subject to change) – these are not theoretical proposals that may be pursued sometime in the future. The Minister's evidence confirms this.[81] She deposes of her intention to introduce legislation to Parliament in mid-2022. The most recent revised policy and legislation timeframe is designed "*to ensure that the full suite of legislation needed to implement the Proposals into law is enacted prior to the 2023 General Election and in advance*

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76 *CAB-22-MIN-0144: Strengthening representation, governance and accountability of the new water services entities, 19 April 2022*, minute at [13] **[ML2, 019]**.

77 *CAB-22-MIN-0144: Strengthening representation, governance and accountability of the new water services entities, 19 April 2022*, minute at [25]–[66] **[ML2, 021]**.

78 *CAB-22-MIN-0144: Strengthening representation, governance and accountability of the new water services entities, 19 April 2022*, minute at [101] **[ML2, 029]**.

79 *CAB-22-MIN-0144: Strengthening representation, governance and accountability of the new water services entities, 19 April 2022*, minute at [61] **[ML2, 024]**.

80 *CAB-22-MIN-0144: Strengthening representation, governance and accountability of the new water services entities, 19 April 2022*, minute at [85]–[90] **[ML2, 027]**.

81 Hon Mahuta affidavit at [3.7] and Part 4 **[[201.0115]]**.

of the 1 July 2024 operational go-live date for the proposed new Water Services Entities."[82]

(b) Second, the Government is highly engaged with the local government sector and informed by a range of expertise. This is not a case where the Crown requires educating as to the "principles" and "features" of local governance, or as to the statutory changes that will be needed before it (and Parliament) proceed with the Reforms. The Crown is cognisant of the current general and legal position, and is proposing the changes to the law necessary to effect its decisions on the Reforms. The Minister's evidence confirms this.[83]

(c) Thirdly, the sequencing of policy proposal, detailed design, transition and implementation processes for the Reforms is following a fairly typical large-scale sector reform or transformation process.[84]

3. DECLARATORY RELIEF

Introduction and summary

3.1 The Crown's position is that the affirmative defences provide a complete answer to the plaintiffs' claims. That is, the Court, with respect:

(a) cannot make Declarations A and B as its declaratory jurisdiction is limited to legal rights. This jurisdiction does not extend to the ability to make declarations about "components", "principles" and "features" of local government. Alternatively, even if it had the jurisdiction to make such declarations, it should not do so for reasons of: comity, lack of utility, lack of a dispute, lack of practical consequences and unfairness; and

(b) should not make Declarations C for reasons of comity, lack of utility, lack of a dispute, lack of practical consequences and unfairness.

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82 Lovett updating affidavit at [13]. *CAB-22-MIN-0144: Strengthening representation, governance and accountability of the new water services entities, 19 April 2022*, paper at [219]–[228] **[[ML2, 067]]**.
83 See Hon Mahuta affidavit at Part 4 **[[201.0116]]**.
84 Lovett affidavit at [5.11] **[[201.0087]]**.

Jurisdiction

3.2 The plaintiffs seek to rely on both the Declaratory Judgments Act 1908 (**DJA**) and the inherent jurisdiction. But neither permits the Court to make the declarations sought about principles and theories, rather than legal rights. The Crown says this is a complete answer to Declarations A and B. [85]

Discretion

3.3 As to discretion, section 10 of the DJA is acknowledged as serving as an important counterpoint to the Court's otherwise broad jurisdiction to make declarations. [86] The established judicial approach is for section 10 to enable a wide ranging and flexible discretionary assessment to the appropriateness of invoking the declaratory procedure in any case. [87]

3.4 The plaintiffs correctly acknowledge that in the inherent jurisdiction the Court looks to the same factors as are relevant under the section 10 discretionary assessment. [88]

3.5 The Crown says that these factors weigh overwhelmingly against exercise of the jurisdiction to make any or all of the Declarations sought.

3.6 The Crown submits, on discretion, that: [89]

(a) The Court should decline to make Declarations A and B regarding "components", "principles" and "features" of democratic governance as they are too general and insufficiently fact specific, do not relate to a live dispute, and are of no utility or practical consequence to the parties or public.

(b) The Court should decline to make the declarations as to existing property rights (Declarations C(a) to (e)), as these are of no utility, have no practical consequence to the parties or the public, engage the comity principle, and would be unfair. There is no real dispute

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85 SOD at [44] and [45] **[[101.0032]]**.

86 Rachael Schmidt-McCleave "Court's discretion: under section 10 and under its inherent jurisdiction" in Peter Blanchard (ed) *Civil Remedies in New Zealand* (online ed, Thomson Reuters, Wellington, 2011) at 51.14.3 **[[Auth]]**. See also *Re Chase* [1989] 1 NZLR 325 (CA) at 333 per Cooke P **[[Auth]]**.

87 Rachael Schmidt-McCleave "Court's discretion: under section 10 and under its inherent jurisdiction" in Peter Blanchard (ed) *Civil Remedies in New Zealand* (online ed, Thomson Reuters, Wellington, 2011) at 51.14.3 **[[Auth]]**.

88 Plaintiffs' submissions at [5.4].

89 SOD at [44] and [45] **[[101.0032]]**.

between the parties as to the existence of these rights under the LGA. The dispute here is really about whether as a matter of Government policy, as expressly to be given effect to by legislation, those rights should evolve and change, as they always have. That is not a matter for the Court.

(c) The Court should decline to make the declaration as to the compensation issue (Declaration C(f)), as this relates to a prospective matter (to come through a legislative process) not existing legal rights, and is again of no utility. Moreover, it is clearly wrong as a matter of law as there is no entitlement to compensation. The plaintiffs' case here seems to be more about whether the Councils *should* receive compensation (not whether they have an existing entitlement) – and that is a policy matter for Parliament, not the Court, to determine.

Jurisdiction

3.7 The Crown's jurisdictional affirmative defence relates to Declarations A and B (with the possible exception of B(c), which in any case should not be made for other reasons relating to the Court's discretion).

3.8 The plaintiffs seek to rely on:

(a) section 2 of the DJA, and the inherent jurisdiction, for all declarations;[90] and

(b) section 3 of the DJA, at least for the "property rights limb" of their case – Declaration C.[91]

Courts only make declarations as to legal rights

3.9 The plaintiffs acknowledge that the DJA section 2 jurisdiction is directed to binding declarations of "legal" rights, but assert this requirement is satisfied.[92] The Crown says this is not correct for Declarations A and B.

90 Plaintiffs' submissions at [5.7] and [5.14].
91 Plaintiffs' submissions at [5.8].
92 Plaintiffs' submissions at [5.15].

3.10 The Supreme Court decision in *Ngāti Whātua Ōrākei Trust v Attorney-General* (***Ngāti Whātua Ōrākei***)[93] provides recent clarity as to the scope of the Court's declaratory function, (as well as application of the comity principle, which is addressed later). In *Ngāti Whātua Ōrākei*, the appellants were seeking declarations relating to legal rights which they claimed according to tikanga and Treaty settlement negotiations with the Crown. The decisions of the High Court and Court of Appeal related to strike out applications – the lower Courts struck out all the declarations on the basis that they unacceptably trespassed into the realm of Crown policy and the power of the Crown to introduce legislation.[94] The Supreme Court considered whether or not the High Court had jurisdiction to consider the claims seeking declaratory relief.

3.11 The principal issue for determination in the Supreme Court was whether the claim should be permitted to proceed on the basis that it was properly characterised as a claim for the recognition of various rights rather than as a challenge to the decision to legislate.[95] The Court held that the appeal should be allowed in part, with the result that Ngāti Whātua Ōrākei could pursue its claim for declarations as to its rights.[96]

3.12 It was common ground that the function of the courts includes making declarations as to rights.[97] The Court stated that:[98]

> *It would be overbroad to suggest that the fact a decision may, potentially, be the subject of legislation would always suffice to take the advice leading up to that decision out of the reach of supervision by the courts. That would be to ignore the function of the courts to make declarations as to rights. In that respect, it is relevant that the observations in Milroy were made in the context of acceptance by counsel for the appellants that the officials' advice did not affect the rights of any person or have the potential to do so.*

3.13 The Chief Justice reiterated the point, stating separately:[99]

> *Where claims of right or legal interest are made in our constitutional order, it is the function of the courts to determine them. Occasion to make such determination may arise in a number of ways, including in claims for redress for infringement of rights, in claims to restrain the exercise of*

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93 *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116 **[[Auth]]**.
94 *Ngāti Whātua Ōrākei Trust v Attorney-General* [2017] NZHC 389, [2017] 3 NZLR 516 at [135]–[138] and [142]–[143] **[[Auth]]**; and *Ngāti Whātua Ōrākei Trust v Attorney-General* [2017] NZCA 554, [2018] 2 NZLR 648 at [84]–[107] **[[Auth]]**.
95 *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116 at [2] **[[Auth]]**.
96 *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116 at [3] **[[Auth]]**.
97 *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116 at [34] **[[Auth]]**.
98 *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116 at [46] **[[Auth]]**.
99 *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116 at [78] **[[Auth]]**.

public powers which impact upon rights, or under the jurisdiction of the High Court to declare what the law is.

3.14 In the recent substantive High Court decision in *Ngāti Whātua Ōrākei* (subsequent to the strike out decision) Justice Palmer summarised the position:[100]

> *The Woolfs' authoritative text on The Declaratory Judgment explains that "[a] declaratory judgment is a formal statement by a court pronouncing upon the existence or non-existence of a legal state of affairs". Declarations are a well-established form of relief in the common law and are now a routine remedy in judicial review. As Elias CJ said in the Supreme Court in these proceedings in 2018, "[w]here claims of right or legal interest are made in our constitutional order, it is the function of the courts to determine them." The majority stated that:*
>
> > *It is common ground that the function of the courts includes making declarations as to rights. Nor is there any dispute that it may be possible for Ngāti Whātua Ōrākei to advance a claim in relation to customary rights.*

3.15 In essence this reflects earlier Court of Appeal judgments that have found *"[i]t 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*".[101]

3.16 This aligns with the principle of justiciability in the context of judicial review. Professor Philip Joseph has described justiciability as considering "*the aptness of a question for judicial solution*".[102] A non-justiciable issue is one "… *inherently unsuitable for judicial determination by reason only of its subject matter*."[103]

3.17 New Zealand courts have identified issues of non-justiciability as arising when:[104]

(a) the Court lacks a "legal yardstick" against which to assess the issue under review; and/or

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100 *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)* [2022] NZHC 843 at [451] (footnotes omitted) **[[Auth]]**.

101 *Re Chase* [1989] 1 NZLR 325 (CA) at 342–343 **[[Auth]]**.

102 Philip A Joseph *Joseph on Constitutional and Administrative Law in New Zealand* (online ed, Thomson Reuters, Wellington, 2021) at 2.22.5.2 citing English commentator Geoffrey Marshall **[[Auth]]**.

103 *Shergill v Khaira* [2014] UKSC 33, [2015] AC 359 at [41] **[[Auth]]**.

104 See *Curtis v Minister of Defence* [2002] 2 NZLR 744 (CA) at [27] (discussed below) **[[Auth]]**; and *Hamilton City Council v Waikato Electricity Authority* [1994] 1 NZLR 741 (HC) at 757 **[[Auth]]** where Hammond J observed: *"Administrative law holds that some things are 'non-justiciable'. That term seems to encompass two things. First, whether judicial techniques lend themselves to articulating and resolving whatever it is that is in issue. Second, there is a problem of legitimacy: whether the judicial branch is crossing the line into the proper area of the executive, thereby infringing what is sometimes referred to as the separation of powers doctrine."*

(b) when, to pronounce on the issue's legality, the Court would step outside its proper constitutional role (and into that of the executive or Parliament).

3.18 The rationale for justiciability is well summarised in *De Smith's Judicial Review*:[105]

> *Judicial review has developed to the point where it is possible to say that no power – whether statutory, common law or under the prerogative – is any longer inherently unreviewable. Courts are charged with the responsibility of adjudicating upon the manner of the exercise of a public power, its scope and its substance. … Nevertheless, there are certain decisions which the courts cannot or should not easily engage. Courts are limited (a) by their constitutional role and (b) by their institutional capacity.*
>
> *[In respect of the court's constitutional role,] [t]he principle of the separation of powers confers matters of social and economic policy upon the legislature and the executive, rather than the judiciary. Courts should, therefore, avoid interfering with the exercise of discretion by the legislature or executive when its aim is the pursuit of policy. It is not for judges to weigh utilitarian calculations of social, economic or political preference.*
>
> *…*
>
> *In respect of the institutional capacity of the courts, there are some decisions which they are ill-equipped to review – those which are not ideally justiciable or, in other words, "not amenable to the judicial process", or indeed those which are better able to be determined by other bodies, including Parliament.*

3.19 The institutional limits of the court identified by the authors of *De Smith* are sometimes referred to as the need for a "yardstick". This phrase has its (New Zealand) origins in *Curtis v Minister of Defence* where Tipping J clearly demarcated the Court's role in issues of politics or policy. His Honour held:[106]

> *The touchstone for judicial intervention will always be lawfulness. In making the kinds of decisions now under discussion, those concerned must act lawfully but this means that the decision must be susceptible of assessment in terms of legality before the Courts can become involved.*
>
> *…*
>
> *A non-justiciable issue is one in respect of which there is no satisfactory legal yardstick by which the issue can be resolved. That situation will often arise in cases into which it is also constitutionally inappropriate for the Courts to embark.*

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105 Harry Woolf and Others *De Smith's Judicial Review* (8th ed, Sweet and Maxwell, London, 2018) at [1-034], [1-035] and [1-040] (footnotes omitted) **[[Auth]]**.

106 *Curtis v Minister of Defence* [2002] 2 NZLR 744 (CA) at [23] and [27] **[[Auth]]**.

3.20 That is, both in terms of constitutional role and intuitional capacity, the Court's focus is to determine issues that are "*susceptible of assessment in terms of legality*" or "*lawfulness*". The focus in the DJA on declarations as to legal rights and interests reflects this.

3.21 Returning to *Ngāti Whātua Ōrākei*, the Supreme Court held that it was possible to identify public law decisions in that case which could be the subject of challenge without interference with parliamentary proceedings. It found "*there are live issues as to the nature and scope of the rights claimed which Ngāti Whātua Ōrākei should be permitted to pursue in the usual way*."[107] That is, the Supreme Court's focus was on whether Ngāti Whātua Ōrākei should be able to seek to establish rights.

3.22 The Court identified the following rights were relied upon and about which declarations were sought in the statement of claim:

(a) Ngāti Whātua Ōrākei's rights arising either out of the Treaty or customary rights in relation to the various properties in the Tāmaki isthmus over which Ngāti Whātua Ōrākei had a right of right of first refusal and to lands in the same area transferred to the Crown in October 1840 – namely that Ngāti Whātua Ōrākei has ahi kā and mana whenua in relation to the these lands.

(b) Rights arising from the Ngāti Whātua Ōrākei Claims Settlement Act 2012..

(c) A challenge to the application in future cases of the Crown's overlapping Treaty claims policy.

(d) A claim raising issues about the approach to be taken to the giving of a notice under section 120 of the Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014.

(e) Associated claims to particular processes which are said to flow from the asserted rights.

3.23 The Court held rights were at issue in the first four of these matters and they should be allowed to proceed to substantive hearing.

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[107] *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116 at [48] **[[Auth]]**.

3.24 The primary reasons for the Supreme Court's decision were that:

(a) underlying the statement of claim was the assertion of Ngāti Whātua Ōrākei's rights arising either out of the Treaty of Waitangi or customary rights in relation to the 2006 right of first refusal land and the 1840 transfer land. It was not inevitable that settlement of future such claims would be by legislation: there were rights in issue and it had to be open to Ngāti Whātua Ōrākei to have its status over the area claimed clarified;[108]

(b) there was reference to rights arising from the 2012 Settlement Act;[109]

(c) it was possible to discern a challenge to the application in future cases of the Crown's overlapping claims policy. Ngāti Whātua Ōrākei had a continuing live interest in how the policy was to be applied;[110] and

(d) there was a claim raising issues about the approach to be taken to the giving of a notice under s 120 of the Collective Redress Act which was independent of the particular decisions to legislate to transfer two specified properties to a different hapū.[111]

3.25 That is, all of the matters allowed to proceed to substantive hearing were directed at legal rights.

3.26 The last matter (relating to two heads of relief for claims for particular processes, above at paragraph 3.22(e)) was struck out as "*the relief sought can only be characterised as a challenge to a decision which has been made to legislate to transfer the relevant properties albeit the illegality is said to arise because of some prior lack of process*."[112] This matter is returned to below under the discussion of comity.

3.27 At this point, it is instructive to compare the specificity of the rights-based declarations sought by Ngāti Whātua Ōrākei in relation to the rights at

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108 *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116 at [53] **[[Auth]]**.
109 *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116 at [55] **[[Auth]]**.
110 *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116 at [59] **[[Auth]]**.
111 *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116 at [60] **[[Auth]]**. See *Ngāti Te Ata v Minister for Treaty of Waitangi Negotiations* [2017] NZHC 2058 where Whata J had earlier concluded that decisions under s 120 were reviewable.
112 *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116 at [66] **[[Auth]]**.

paragraph 3.22(a) to (d) above, with the generality of the Declarations sought by the plaintiffs in this proceeding. As reflected in the recent substantive High Court hearing, Ngāti Whātua Ōrākei sought declarations that:[113]

> *(a) Ngāti Whātua Ōrākei have ahi kā and mana whenua in relation to 2006 RFR Land and the 1840 Transfer Land.*
>
> *(b) When applying the Overlapping Claims Policy in a way which relates to and/or may affect 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) Crown development of Proposals to include the land in the 2006 RFR Land and the 1840 Transfer Land in a proposed 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.*
>
> *(d) In order to comply with tikanga in that situation when contemplating or developing Proposals, or making decisions under its Overlapping Claims Policy to offer any interest in land within the 2006 RFR Land or the 1840 Transfer Land as part of a proposed Treaty settlement with an iwi other than Ngāti Whātua Ōrākei, and whether involving s 120 of the Collective Act or not, the Crown must:*
>
> *(i) appropriately consult with Ngāti Whātua Ōrākei as the iwi having ahi kā;*
>
> *(ii) acknowledge the ahi kā of Ngāti Whātua Ōrākei as the iwi having ahi kā;*
>
> *(iii) decline to include the land in the proposed settlement if there is evidence that the transfer of the land would unjustifiably erode the mana whenua of Ngāti Whātua Ōrākei as the iwi having aki kā; and*
>
> *(iv) decline to include the land or recognise an interest in land in the proposed settlement where the land has previously been the subject of a gift to the Crown, unless Ngāti Whātua Ōrākei, the gifting iwi, has provided its consent to the transfer.*

3.28 In the High Court, Palmer J was inclined to make a declaration in respect of the rights claimed in (a), but framed with more specificity:[114]

> *Ngāti Whātua Ōrākei currently have ahi kā and mana whenua in relation to the area identified in Map 1 of this judgment in central Tāmaki Makaurau, with all the obligations at tikanga that go with that, according*

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113 *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)* [2022] NZHC 843 at [83] **[[Auth]]**.
114 *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)* [2022] NZHC 843 at [461] **[[Auth]]**.

> *to the tikanga and historical tribal narrative and tradition of Ngāti Whātua Ōrākei*.

3.29 Justice Palmer declined to make the declarations (b), (c) and (d) on the basis they were inaccurate statements of the law (as reflected in the substantive judgment).[115]

3.30 In any event, the *Ngāti Whātua Ōrākei* declarations contrast starkly with the general declarations sought in relation to "components", "principles" and "features" in the current proceeding. These are not declarations as to legal rights:

> *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.*

3.31 While Declaration C does relate to legal rights i.e. property rights, the Declarations are at the highest possible level of generality. They are not related to any types of assets or service delivery, or dispute over any aspect of those rights.

The Declaratory Judgments Act

Section 3 of the DJA

3.32 Section 3 of the DJA confers two theoretical sources of jurisdiction for declaratory orders:

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115 His Honour granted leave to make submissions on specific alternative declarations: *Ngāti Whātua Ōrākei Trust v Attorney-General (No 4)* [2022] NZHC 843 at [645] **[[Auth]]**.

(a) Where *the Crown* has done or desires to do any act the validity, legality, or effect of which depends on the construction or validity of any statute; or

(b) Where *the Councils* claim to have acquired any right under any such statute, or claim to be in any other manner interested in the construction or validity thereof,—

such person may apply to the High Court by originating summons for a declaratory order determining any question as to the construction or validity of such statute, or of any part thereof.

3.33 Option (a) does not apply, even acknowledging the plaintiffs' claim to have acquired property rights under the LGA.[116] Given the necessary acknowledgement of Parliamentary supremacy and that the Reforms could validly be the subject of an Act of Parliament, this is not a situation where the Crown desires to do something the validity or legality of which depends on the construction of the LGA or any other statute.

3.34 Option (b) does not apply either. Only the Declarations in C as to claimed property rights could possibly engage this option. Despite the (unsupported) claims in the plaintiffs' submissions, the "components", "principles", and "features" of local governance claimed to underpin Declarations A and B self-evidently do not give rise to legally enforceable rights. Declarations A and B speak to general ownership and accountability "components", "principles", and "features", but say nothing about the types of assets and service delivery they apply to. And neither could they – there is no legal right that water services must be delivered by (and water assets must be owned by) local councils.

3.35 Neither do Declarations A and B arise from the Court's determination of any question as to the construction or validity of the LGA or any other statute. The attempt to crochet together a range of general statements of voting rights under domestic and international law (such as the New Zealand Bill of Rights Act, the Senior Courts Act, and the United Nations International Covenant on Civil and Political Rights (1966) (**ICCPR***)*[117] does not overcome the issue. The plaintiffs do not seek a declaration

[116] Plaintiffs' submissions at [5.7].
[117] See plaintiffs' submissions Part 3 and Appendices 2 and 3.

about the right to vote in local elections. They seek a declaration that 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 (generally).

3.36 Only the Declarations in C as to claimed property rights could possibly engage option (b) above. However, once again those declarations do not raise a question as to the **construction or validity** of the LGA. The plaintiffs do not seek to raise any issue in this regard. They have not identified any provision of the LGA which is ambiguous or that requires clarification. Their proceeding is not about construction of an existing statute.

Section 2 of the DJA

3.37 Section 2 states:

> *No action or proceeding in the High Court shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the said Court may make binding declarations of right, whether any consequential relief is or could be claimed or not.*

3.38 That the Court has broad jurisdiction to make binding declarations of legal rights under section 2 is not in dispute. But to reiterate the fatal flaw in Declarations A and B: the Councils do not seek binding declarations of legal rights; they seek declarations of broad "components", "principles", and "features" – values even.[118] For the reasons discussed, matters of components, principles, features and values of democratic governance fall squarely into the camp of being inherently "non-justiciable" for the purposes of the DJA (or any declaratory jurisdiction).

3.39 While section 2 of the DJA has been described variously as a "wide jurisdiction", wider than under section 3 (and not limited to the express section 3 situations where relief may be obtained), and one that should not be whittled down by "ungenerous interpretation",[119] section 2 retains the threshold requirement of pronouncing "on the rights … of the parties".[120] Declarations A and B do not relate to rights at all.

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118 Plaintiffs' submissions at [3.2].

119 See *Re Chase* [1989] 1 NZLR 325 (CA) at 330 per Cooke P **[[Auth]]**; and *Peters v Davison (No 2)* (1998) 18 NZTC 13,656 (HC) at 13,669 **[[Auth]]**.

120 *Kung v Country Section NZ Indian Association Inc* [1996] 1 NZLR 663 (HC) at 665 **[[Auth]]**.

3.40 Declarations A and B should be dismissed as the Court does not have jurisdiction to make them. However, in the event the Court is nevertheless minded to confront the substantive statutory interpretation issues, or to consider making Declarations in C in any event, the defendants address the exercise of the Court's discretion below.

Inherent jurisdiction

3.41 The plaintiffs also rely on the Court's inherent jurisdiction to grant declaratory relief, arguing that it includes circumstances beyond where there are rights and duties of, and owed between, relevant parties.[121]

3.42 Although the inherent jurisdiction is wide, it is also not unlimited. The plaintiffs correctly acknowledge that in the inherent jurisdiction the Court looks to the same factors as are relevant under the DJA section 10 discretionary assessment (addressed below).[122]

3.43 The plaintiffs rely on *Peters v Davison (No.3)*[123] to support their claim that the inherent jurisdiction does not require the plaintiff to show that their strict legal rights are affected by the matter in issue.

3.44 But *Peters v Davison (No.3)* was a judicial review proceeding where there were contested errors of law by a Commission of Inquiry to be resolved. This was a significant reason for the inherent jurisdiction being engaged; it was also relevant to the Court that there was some practical utility for the declarations being sought.[124]

3.45 The Court in *Peters v Davison (No. 3)* held that relief should not be denied solely because Mr Peters' rights were not personally affected.[125] The situation (and the declarations in question) in the *Peters* case are distinct from the current proceeding where there are no alleged errors of law, there is no decision being challenged, and no public wrong or injury alleged or sustained.

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121 Plaintiffs' submissions at [5.17]–[5.18].
122 Plaintiffs' submissions at [5.4].
123 *Peters v Davison (No 3)* [1999] 2 NZLR 164 (CA) **[[Auth]]**.
124 *Peters v Davison (No 3)* [1999] 2 NZLR 164 (CA) at 187–188 **[[Auth]]**. See also discussion in Rachael Schmidt-McCleave "Court's inherent jurisdiction to make declarations" in Peter Blanchard (ed) *Civil Remedies in New Zealand* (online ed, Thomson Reuters, Wellington, 2011) at 51.14.7 **[[Auth]]**.
125 *Peters v Davison (No 3)* [1999] 2 NZLR 164 (CA) at 188 **[[Auth]]**.

Discretion

3.46 Section 10 of the DJA provides:

> *The jurisdiction hereby conferred upon the High Court to give or make a declaratory judgment or order shall be discretionary, and the said Court may, on any grounds which it deems sufficient, refuse to give or make any such judgment or order.*

3.47 The appropriate test to apply to section 10 has been accepted as that laid down by the Court of Appeal in *NZ Insurance Co Ltd v Prudential Assurance Co Ltd*[126], where McCarthy P held that:[127]

> *The jurisdiction to make orders under the Declaratory Judgments Act is wholly discretionary. The cases defining the attitude of the courts in the exercise of that discretion are numerous and they establish certain guidelines which will generally be followed. The Court will not answer purely abstract questions in anticipation of an actual controversy. It will not deal with mixed questions of fact and law. The procedure is designed to provide a speedy and inexpensive method of obtaining a judicial interpretation where the matter in dispute cannot conveniently be brought before the court in its ordinary jurisdiction and where a declaratory judgment would be appropriate relief. But the procedure should not be adopted where the party who institutes them can without real difficulty have the matter in dispute disposed of in an ordinary action.*

3.48 In *Reid v Reid* the Court of Appeal framed the "guidelines" for section 10 in the following terms:[128]

> *In the exercise of the discretion under s 10 the Courts have developed guidelines which will generally be followed and materially for present purposes they will not decide purely abstract questions in anticipation of an actual controversy, and so will not interpret statutory powers in the abstract or answer hypothetical questions which may arise under an agreement.*

3.49 As noted above, the plaintiffs accept that the considerations under section 10 of the DJA apply equally to discretionary considerations under the Court's inherent jurisdiction.

No utility

3.50 It is long established that a Court will not grant declarations that are overly broad, or of no practical utility or application.[129] In *Department of Internal Affairs v Whitehouse Tavern Trust Board* White J said:[130]

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126 *New Zealand Insurance Co Ltd v Prudential Assurance Co Ltd* [1976] 1 NZLR 84 (CA) **[[Auth]]**.
127 At [85] (footnotes omitted) **[[Auth]]**.
128 *Reid v Reid* (1985) 1 FRNZ 571 at 573 **[[Auth]]**.
129 *Commerce Commission v Telecom Mobile Ltd* [2004] 3 NZLR 667 (HC) at [126] and [132] **[[Auth]]**.
130 *Department of Internal Affairs v Whitehouse Tavern Trust Board* [2015] NZCA 398, [2015] NZAR 1708 at [80] (footnote omitted) **[[Auth]]**.

The requirement that the declaration have utility means that it should be fact-specific, efficacious and capable of practical application.

3.51 Declarations A and B are not fact-specific, efficacious, or capable of practical application:

(a) They are statements of the theoretical role of local government at the broadest possible level and statements the plaintiffs say are not "*controversial*".[131] There is no attempt to relate them to the factual context in which they are sought: the Reforms and the proposed transfer of water services assets to water services entities.

(b) Further, the Declarations do not acknowledge the qualifying fact (accepted by the plaintiffs) that local authorities are creatures of statute:[132]

> *… 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*.

3.52 Similarly, the Declarations in C are not fact-specific, efficacious or capable of practical application:

(a) Again, they do no more than state broad (and according to the plaintiffs, uncontroversial) principles of property ownership without regard to specific assets which may in turn require an examination of specific parts of the LGA. There is no attempt to relate them to the specifics of the Three Waters Reforms.

(b) Nor, as will be set out below, do they consider the statutory context of, or restrictions in respect of, ownership of the infrastructure assets (apart from a brief mention at C(e)). See section 130 of the LGA by way of example. There is not even a definition in the statement of claim or declarations as to what the plaintiffs intend to be captured by the term "infrastructure assets". That is, is it the section 101B(6) definition pleaded at paragraph 19 of the ASOC or something wider?

(c) The claimed dispute between the parties does not exist – as to which, see below.

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131 Plaintiffs' submissions at [1.4].
132 Plaintiffs' submissions at [4.24].

(d) Further, the Declarations at C all seem to lead up to the Declaration in C(f) in particular, regarding compensation. But, as below, this Declaration is wrong as a matter of law and, in any event, depends upon Parliament's intent formed as a result of policy and confirmed by the specific terms of the relevant legislation.

(e) If Parliament choses not to provide compensation (in circumstances where ownership does change), that is not something which the Court can inquire into (and the Court is not being asked to do so here).

3.53 In *Simpson v Whakatane District Court*[133], Asher J made clear that the Court's discretionary jurisdiction is not to be exercised to declare law generally or give advisory opinions:[134]

> *However, it is equally clear that this broad discretionary jurisdiction will not be exercised to declare law generally or give advisory opinions; but is confined to declaring contested legal rights, subsisting or future, of the parties represented in the litigation before it and not those of anyone else: Gouriet v Union of Post Office Workers [1978] AC 435. This proposition was set out by Lord Diplock at p 501:*
>
> > *The early controversies as to whether a party applying for declaratory relief must have a subsisting cause of action or a right to some other relief as well can now be forgotten. It is clearly established that it need not. Relief in the form of a declaration arises generally superfluous for a plaintiff who has a subsisting cause of action. It is when an infringement of the plaintiff's rights in the future is threatened or when, unaccompanied by threats, there is a dispute between parties as to what their respective rights will be if something happens in the future, that the jurisdiction to make declarations of right can be most usefully invoked. But the jurisdiction of the Court is not to declare the law generally or to give advisory opinions; it is combined to declaring contested legal rights, subsisting or future, of the parties represented in the litigation before it and not those of anyone else.*

3.54 It is simply wrong that the Declarations are about "*rights of major legal significance which require protection and judicial recognition*" and "*the Court's findings will have real effects on the rights of the parties inter*

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133 *Simpson v Whakatane District Court (No 2)* [2006] NZAR 247 (HC) **[[Auth]]**.

134 *Simpson v Whakatane District Court (No 2)* [2006] NZAR 247 (HC) at [42] **[[Auth]]**. And at [43] referring to *Turner v Pickering* [1976] 1 NZLR 129 (HC) at 141: "*In New Zealand it has been stated very firmly that a discretion of the Court to make a declaratory order will not be exercised where the declaration will have no useful purpose*." **[[Auth]]**.

se".[135] As the plaintiffs' submissions acknowledge, none of the pleaded rights prevent Parliament from enacting the Reforms through legislation.

No dispute and no practical consequences/too abstract

3.55 *Blanchard on Civil Remedies in New Zealand* reiterates the purpose of the Court's jurisdiction under the DJA is to make a declaration of right and not to interpret Acts or other instruments in the abstract or give "advisory opinions".[136] The role of the courts is not to be "*available to provide a free or subsidised opinion service to the public*", given that court time is a "precious commodity" and the New Zealand system is adversarial and not inquisitorial.[137]

3.56 In relation to declarations sought under the Court's inherent jurisdiction also, judges have consistently said that they will not provide relief on theoretical matters and that there must be a concrete situation that provides a real issue of dispute. Zamir and Woolf in *The Declaratory Judgment* state:[138]

> *The primary role of the courts is, and always has been, to resolve existing disputes between the parties where the courts' decision will have immediate and practical consequences for at least one of the parties. There are more than enough cases of this sort fully to occupy the time of the courts and, not unnaturally, the judges have vigorously objected to attempts made from time to time to divert them from what they regard as their task, that of deciding real issues, into deciding theoretical or hypothetical issues. There have, therefore, been a number of cases where the court has refused to grant a remedy because the issues were regarded as being theoretical or hypothetical…*

3.57 There have been varying approaches in the New Zealand courts under the DJA, the common law or on judicial review. But the courts have generally recognised that the purpose of their declaratory jurisdiction is "not to decide abstract questions distant from actual controversy".

3.58 By way of example:

(a) In *Auckland City Council v Attorney-General*,[139] the plaintiff applied for a declaration under the DJA asking the Court to interpret the

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135 Plaintiffs' submissions at [5.27].

136 Rachael Schmidt-McCleave "Declaratory Judgments Act 1908" in Peter Blanchard (ed) *Civil Remedies in New Zealand* (online ed, Thomson Reuters, Wellington, 2011) at 51.14.2 **[[Auth]]**.

137 *Simpson v Whakatane District Court (No 2)* [2006] NZAR 247 (HC) at [22] **[[Auth]]**.

138 Lord Woolf and Jeremy Woolf *The Declaratory Judgment* (4th ed, Sweet & Maxwell, London, 2011) at [4–35] **[[Auth]]**.

139 *Auckland City Council v Attorney-General* [1995] 1 NZLR 219 (HC) **[[Auth]]**.

provisions of section 42 of the Public Works Act 1981. Justice Thorp recognised the considerable judicial disagreement as to whether the Court has jurisdiction in terms of section 2 to give "advisory opinions" or whether the court should be confined to "*determining issues presently requiring determination as between parties represented before it*".[140] In that case the declaration was not sought with reference to any particular property but rather for the purpose of guidance as to the disposition of all properties that the Council might in the future deem to be surplus lands. Justice Thorp declined to find he had jurisdiction, holding that it was inappropriate for the Court to employ section 2 of the DJA to interpret a statute "in the round".[141] While the remedy of declaration was a broad one in terms of jurisdiction, the court should be slow to act in a purely advisory role in the "absence of a proper contradictor".[142]

(b) Similarly, in *Social Tonics Assocation of NZ Inc v Manukau City Council*,[143] Andrews J declined to grant the application by the plaintiff (an incorporated society representing producers and distributors of party pills) for declarations relating to certain provisions of the Sale of Liquor Act 1989 because there were heavily disputed facts, and the Court would be required to answer hypothetical or abstract questions:[144]

> *… the range of possible circumstances to which the declarations sought may apply (that is, on-licence, off-licence, application for new licence, application for renewal of licence) supports the conclusion that the declarations sought are hypothetical and abstract.*

3.59 In this proceeding, the plaintiffs claim both that access to the DJA section 3 jurisdiction does not depend on there being an existing dispute or lis[145], ***and*** that in any event there are plainly live disputes between the parties

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140 *Auckland City Council v Attorney-General* [1995] 1 NZLR 219 (HC) at 222 **[[Auth]]**.

141 *Auckland City Council v Attorney-General* [1995] 1 NZLR 219 (HC) at 223 **[[Auth]]**.

142 *Auckland City Council v Attorney-General* [1995] 1 NZLR 219 (HC) **[[Auth]]**. See also *Proprietors of Hiruharama Ponui Block Inc v Attorney-General* [2003] 2 NZLR 478.

143 *The Social Tonics Association of NZ Inc v The Manukau City Council* HC Auckland CIV-2007-404-5613, 20 December 2007 **[[Auth]]**. See also *The Secretary for Internal Affairs v Kilbirnie Tavern Ltd* HC Wellington CIV-2007-485-1988, 14 November 2008.

144 *The Social Tonics Assocation of NZ Inc v The Manukau City Council* HC Auckland CIV-2007-404-5613, 20 December 2007 at [82] **[[Auth]]**.

145 Plaintiffs' submissions at [5.9]. But note that the Supreme Court's statement in *Mandic v Cornwall Park Trust Board* [2011] NZSC 135, [2012] 2 NZLR 194 at [9], that "*[a]ccess to the jurisdiction does not depend on there being an existing dispute. Nor is it necessary that there be a lis*" is in relation to the jurisdictional issue; not the exercise of discretion under section 10 **[[Auth]]**.

on the pleadings.[146] The plaintiffs seek to frame those disputes in terms of whether they have legal rights. In response, it is relevant that:

(a) The references to the first affirmative defence and Mr Lovett's evidence misstate the Crown's position to create a controversy where there is not one.

(b) The first affirmative defence is about whether the Declarations relate to legal rights between the parties, as opposed to whether the plaintiffs have 'legal' property rights. Mr Lovett's evidence was directed at the policy involved and in response to the references in the plaintiffs' evidence to "taking", "appropriation" and/or "expropriation" rather than whether "statutory" or "public" property rights are "true" rights.[147]

(c) The same point arises at paragraphs 5.15 and 5.24 of the plaintiffs' submissions, where they say the "*Crown inaccurately claims in its First Affirmative Defence that the Declarations do not relate to 'legal' rights*" and "*[i]f 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*."

(d) The Crown's position is not that the property rights are not 'legal' rights, rather that the plaintiffs are not seeking declarations in relation to legal rights as between the Councils and the Crown in any practical sense – just very broad declarations of legal principles and declarations in the abstract.

Comity

3.60 The Crown's second affirmative defence relies upon the comity principle. That is, that the courts will refuse to exercise their discretion to grant declaratory relief where to do so would be contrary to public policy. The Crown pleads by way of second affirmative defence that the Court should not be intervening or seeking to constrain:[148]

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146 Plaintiffs' submissions at [5.10].
147 See, for example, Gordon affidavit at [37] **[[201.0037]]**; Mai affidavit at [25] **[[201.0022]]**; Bowen affidavit at [48] **[[201.0012]]**.
148 SOD at [45] **[[101.0032]]**.

(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.

3.61 Joseph describes the principle of comity (or non-interference) as follows:[149]

> *The principle of non-interference in legislative process is necessary for maintaining institutional comity between the branches of government. The principle is a separation-of-powers construct and a corollary of the courts' disclaimer of jurisdiction to review legislation. The courts will not allow their processes to be used so as to inhibit the free functioning of Parliament.*

3.62 Yet the plaintiffs' submissions explicitly state they intend the declarations to be used to inform the parliamentary process – that 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*".[150] Any declarations can only be intended to interfere with policy making functions and the parliamentary process.

3.63 As will be evident from the above discussion (and the focus of the Supreme Court's decision in *Ngāti Whātua Ōrākei)*, the Court's role (in determining lawfulness/declaring legal rights) and the operation of the comity principle (non-interference in the areas of the executive, or Parliament) are complementary.

3.64 In terms of the comity principle, both the recent Court of Appeal decision in *Ngāti Mutunga o Wharekauri Asset Holding Co Ltd v Attorney-General*[151] (*Ngāti Mutunga*) and the Supreme Court in *Ngāti Whatua*

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149 Philip A Joseph *Joseph on Constitutional and Administrative Law in New Zealand* (5th ed, Thomson Reuters, Wellington, 2021) at 17.16.4.2 (footnote omitted) **[[Auth]]**, citing *Bilston Corp v Wolverhampton Corp* [1942] 1 Ch 391; *Rothmans of Pall Mall (NZ) Ltd v Attorney-General* [1991] 2 NZLR 323 (HC); *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 (CA); *New Zealand Maori Council v Attorney-General* [1996] 3 NZLR 140 (CA); *Thomas v Bolger (No 2)* [2002] NZAR 948 (HC); *Comalco Power (New Zealand) Ltd v Attorney-General* [2003] NZAR 1 (HC); and DG McGee "The legislative process and the courts" in PA Joseph (ed) *Essays on the Constitution* (Brookers, Wellington, 1995) at 84.

150 Plaintiffs' submissions at [4.26].

151 *Ngāti Mutunga O Wharekauri Asset Holding Co Ltd v Attorney-General* [2020] NZCA 2, [2020] 3 NZLR 1 **[[Auth]]**.

Ōrākei noted that there remain questions about the exact scope, qualifications and basis of the principle of non-interference in parliamentary proceedings and its application.

3.65 On the jurisdictional point, the Supreme Court sounded "a note of caution" about undue judicial deference to parliamentary proceedings where the decisions in question are somewhat distant from, for example, the decision of a Minister or Cabinet to introduce a bill into the House.[152] But that is not the position for the Reforms in this proceeding.[153]

3.66 At [112] Elias CJ framed it as follows:

> *If the relief sought in the proceeding is discretionary (as declaratory relief is) the fact that the court determination is likely to be overtaken or that the subject matter of the litigation is under active consideration in Parliament may well be relevant in considering whether the relief sought should be granted, although a decision to decline relief in exercise of discretion will often not be a matter capable of assessment on preliminary inquiry. I discuss the declaratory relief sought under the final heading of these reasons. For present purposes however it is enough to reject the suggestion that a Bill before Parliament constitutes a bar to the jurisdiction of the court.*

3.67 And at [126]:

> *This is not, of course, to say anything about whether the discretion should be exercised to grant relief. A court can withhold discretionary relief when there are reasons to think that it is inappropriate. I do not think however that the courts should be quick to see inappropriateness where there are claims of rights to be determined, especially if the parties will otherwise not be able to have them resolved.*

3.68 In *Ngāti Mutunga* the Court of Appeal noted the caution in *Ngāti Whātua Ōrākei* regarding undue judicial deference to parliamentary proceedings. But in that case the challenge concerned the consistency of the Kermadec Ocean Sanctuary Bill (which was before Parliament) with the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992. The proceeding required the Court to inquire into the intention of the Bill (and the Prime Minister in advancing it), to draw inferences about the effect of the Bill on the rights pleaded, and sought relief in relation to the rights-consistency with the Bill's terms and purposes. The Court of Appeal found that the principle of non-interference was clearly engaged:[154]

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152 *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116 at [46] **[[Auth]]**.
153 See Crown's submissions at [2.18]–[2.24].
154 *Ngāti Mutunga O Wharekauri Asset Holding Company Ltd v Attorney-General* [2020] NZCA 2, [2020] 3 NZLR 1 at [27] **[[Auth]]**.

> *The simple point is, courts may declare rights, and these may relate to the rights-consistency of government action, and even proposed government action. But they may not relate to the rights-consistency of proposed legislation. For example, a government proposal to exercise an existing lawful power in a particular way may be the subject of court declarations. The difficult area is where the proposed government action is really a proposal to legislate. In principle, declaratory proceedings of this nature are simply not permitted. The point at which a government proposal crystallises into what is in substance a proposal to legislate may be a matter for debate. But it is not one that needs to be resolved in this case.*

3.69 Standing back, these cases make clear that the crux of the test is whether a proposal is "in substance a proposal to legislate",[155] and if so, whether the relief sought sufficiently relates to that proposal to legislate.[156]

3.70 In considering the boundaries of the principle, the courts can take into account the timing, distance and remoteness of decisions from the introduction of legislation. Not all decisions proximate to the introduction of legislation will be considered outside the boundary – it depends whether there are legal rights and interests that the courts could appropriately make declarations about.[157]

3.71 In *Ngāti Whātua Ōrākei*, as noted above at paragraphs 3.9 to 3.15 under the "rights" discussion, the first four of six declarations sought related to the relevance of tikanga in the Treaty settlement process and the extent to which tikanga should affect the way the Crown dealt with other iwi in the Tāmaki isthmus. Those first four heads of relief were allowed to remain.

3.72 But the last two heads sought relief relating to claims for processes specific to actual land assets on the isthmus which were intended to be transferred to other iwi in proposed settlements. They were struck out by the majority of the Supreme Court because, the majority found, those aspects were specific to settlements which would inevitably be given effect by legislation. This was despite the fact that no bills had been introduced into the House to give effect to these settlements.

3.73 The Court held that "*[i]n context, the relief sought can only be characterised as a challenge to a decision which has been made to*

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155 *Ngāti Mutunga O Wharekauri Asset Holding Company Ltd v Attorney-General* [2020] NZCA 2, [2020] 3 NZLR 1 at [27] **[[Auth]]**.

156 *Ngāti Mutunga O Wharekauri Asset Holding Company Ltd v Attorney-General* [2020] NZCA 2, [2020] 3 NZLR 1 at [33] **[[Auth]]**.

157 *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116 at [46]–[47] **[[Auth]]**.

legislate to transfer the relevant properties albeit the illegality is said to arise because of some prior lack of process"[158] (our emphasis).

3.74 In the current proceedings, the plaintiffs acknowledge they cannot challenge the rights-consistency of the proposed legislation implementing the Reforms itself. But it is difficult to see the Declarations as anything other than an attempt to circumvent this issue by seeking abstract declarations of general principles relating to matters that the plaintiffs already know will be unaffected by the proposed legislation.

3.75 The Crown's submission is that "*in context, the relief sought can only be characterised as a challenge to a decision which has been made to legislate"* to implement the Reforms as they move through the policy and parliamentary process. There is nothing to be gained from the general Declarations other than to influence the policy decisions and Parliament's passage of the legislation.

3.76 The plaintiffs rely on a range of cases as "context" to argue that the Declarations do not infringe principles of comity and separation of powers.[159] But none are directly apposite.

3.77 This is not a case where to make the Declarations the Court is scrutinising decisions made by the executive to ensure they are lawful, engaging the Court's ordinary jurisdiction and functions (as was the case in *R (Miller)*[160] and *Canada v Khadr*[161]). The Declarations arise in a context of Government policy and legislative reform,[162] not challenged executive decision-making. Further, the plaintiffs acknowledge that local councils are creatures of statute, established and governed by or under Acts of Parliament[163] and the Three Waters Reforms could (as the Government proposes, including through impending legislation) be brought into being by an Act of Parliament under the concept of parliamentary sovereignty.[164]

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158 *Ngāti Whātua Ōrākei Trust v Attorney-General* [2018] NZSC 84, [2019] 1 NZLR 116 at [66] **[[Auth]]**.
159 Plaintiffs' submissions at [5.31]–[5.44].
160 *R (Miller) v Prime Minister* [2019] UKSC 41, [2020] AC 373 **[[Auth]]**, cited in the plaintiffs' submissions at [5.31].
161 *Canada v Khadr* 2010 SCC 3, [2010] 1 SCR 44 **[[Auth]]**, cited in the plaintiffs' submissions at [5.33].
162 The Minister has confirmed that the Reforms constitute the culmination of long-running Government proposals (Hon Mahuta affidavit at [1.4]) **[[201.0112]]**, and that as matters of Government policy the Reforms have been considered, shaped and approved by Cabinet (Hon Mahuta affidavit at [3.1]–[3.6]) **[[201.0114]]**.
163 See plaintiffs' submissions at [4.4].
164 See plaintiffs' submissions at [1.8] and [5.28]. The Minister's evidence confirms that the Reforms will be enacted through legislation, drafting instructions have already been issued to the Parliamentary Counsel

3.78 The Court is not being asked here to consider circumstances where the exercise of the prerogative power infringes on constitutional norms as was also the case in *Canada v Khadr* and *R (Miller)*. Again, the plaintiffs acknowledge this difference.[165] It is incongruous to nevertheless seek declarations where the policy being advanced in the Reforms is plainly within the executive's and Parliament's powers and does not itself impinge on any constitutional rights.

Unfairness

3.79 There is an additional reason why the Declarations should not be made that brings together many of the preceding points. It would be unfair to the Crown (and indeed the public) to make the declarations sought as they do not convey the complete picture.

3.80 This can be illustrated by focussing on Declarations C(a) to (e). The Crown accepts that the plaintiffs currently have some property rights in relation to the Three Waters infrastructure currently owned by them. The Crown says, as below, that Declarations C(a) to (e) are not accurate in relation to those assets because they fail to have regard to the LGA context and provisions. But even if they were modified to reflect the LGA, they would simply state the existing (then undisputed) law as to the Council's rights in relation to those assets. They would not convey the full legal position that the plaintiffs seem to accept in this proceeding i.e. that councils are creatures of statute, that their rights in relation to the Three Waters infrastructure exist only as a result of statute, that Parliament is supreme and can amend or remove those rights – including without compensation if it makes that clear.

3.81 The declarations sought do not convey this. It would be entirely unfair to the Crown (and the public) to make declarations that are sought "*to clarify the legal context and…assist…Parliament*"[166] without giving the full picture.

Office and that she anticipates the Bill will be introduced to the House in mid-2022. (Hon Mahuta affidavit at [4.1]–[4.3]) **[[201.0116]]**.

165 Plaintiffs' submissions at [5.35].

166 Plaintiffs' submissions at [5.49(g)].

4. DEMOCRATIC LOCAL GOVERNANCE

4.1 The plaintiffs' case for Declarations A and B is that democratic local governance is longstanding and important and reflects key principles and values which are entitled to judicial recognition, and, where appropriate, remedy.[167]

4.2 The Crown generally does not dispute the "components", "principles" and "features" referred to in Declarations A and B. As is reflected in the pleadings:

(a) At [6] of its Statement of Defence, the Crown "*admit[s] as a general principle that New Zealand is a free and democratic society, and governed in accordance with the rule of law*"; and

(b) At [7] of its Statement of Defence, the Crown "*admit[s] as a general principle that local government is an important and longstanding component of the democratic governance of New Zealand*".

4.3 Much of Part 3 of the plaintiffs' submissions is also not in dispute:

(a) DIA reporting documents are open as to the importance of local government:[168]

> *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.*

(b) The Minister is open as to the importance of local government:[169]

> *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.*

(c) The Crown:

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167 Plaintiffs' submissions at [3.2].

168 Department of Internal Affairs *Pūrongo Ā Tau: Annual Report 2020* at 36, available at <www.dia.govt.nz>.

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

(i) acknowledges that the ICCPR and a number of other international instruments recognise that democratic dynamics extend to all levels of government. Appendix 2 of the plaintiffs' submissions is uncontroversial;

(ii) agrees that New Zealand is a free and democratic society and that the "rule of law" is fundamental to our political and legal system;[170] and

(iii) is not proposing to redraw council or voting boundaries (as was the case in *City of Toronto*).[171]

4.4 The Crown has not misunderstood the importance of local democratic governance generally or in the Reform process.[172]

4.5 Importantly, nothing in the Reforms will change the operation of the Electoral Act 1993, the Local Electoral Act 2001, NZBORA, the idea of representative government as self-government, the right of suffrage as fundamental in a free and democratic society,[173] or "*the right to vote as a basic or constitutional right*".[174]

4.6 But none of this is relevant to the nature or scope of services delivered (and assets owned) by local councils. The scope of services, and specific functions and powers of local government, have always evolved and changed over time as reflected through legislation.[175] The democratic accountability mechanisms for local authorities; their decision-making structures, governance, funding; the obligations for local authorities to provide services to their communities; and the ownership and scope of local infrastructure assets have also evolved and changed over time.[176]

4.7 The plaintiffs' submissions make various acknowledgements in this regard that:

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170 Plaintiffs' submissions at [3.4].
171 *City of Toronto v Attorney-General of Ontario* 2021 SCC 34 **[[Auth]]**, referenced in plaintiffs' submissions at [3.33].
172 See Part 2 of the Crown's submissions, in particular, at [2.20]–[2.24].
173 Plaintiffs' submissions at [3.27]–[3.29].
174 Plaintiffs' submissions at [3.30].
175 SOD at [8](b)(ii)] **[[101.0019]]**. As discussed in the Crown's submissions at [2.2]–[2.8].
176 SOD at [8](b)(iii)] **[[101.0019]]**.

(a) the Three Waters Reforms could be brought into being by an Act of Parliament under the concept of parliamentary sovereignty;[177]

(b) the proposed governance structure of the water service entities under the Reforms is subject to change;[178]

(c) local councils are creatures of statute, established and governed by or under Acts of Parliament,[179] and that their role, powers and territories have been regulated and amended by Acts of Parliament over the past 150 years or so;[180] and

(d) the Crown is actively considering the future of local government on an ongoing basis.[181]

4.8 It is incongruous, therefore, that the Declarations do not recognise these concessions; they are at best incomplete without this broader context. Once again, they do not present the whole picture.

The "fiduciary-like" duties of local councils

4.9 Some specific comment is necessary on Declaration B(c) as sought by the plaintiffs: that "*local councils owe fiduciary-like obligations to their communities*."[182]

4.10 The Crown does not dispute that fiduciary or even a vague notion of "fiduciary-like" obligations may be owed by local councils in some specific circumstances. But this does not make the overall relationship one of a fiduciary nature.

4.11 When a fiduciary relationship of any kind is established, the scope of the fiduciary's obligations is determined by the nature and extent of the task for which responsibility has been assumed by the fiduciary, and the reliance or trust which had been placed by the beneficiary upon or in the fiduciary. This requires a "meticulous examination of the facts" of each individual case.[183]

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177 Plaintiffs' submissions at [1.8] and [5.28].
178 Plaintiffs' submissions at [2.23].
179 Plaintiffs' submissions at [4.4].
180 Plaintiffs' submissions at [4.24].
181 Plaintiffs' submissions at [5.24].
182 Declaration B(c).
183 *Cook v Evatt (No 2)* [1992] 1 NZLR 676 (HC) at 685 **[[Auth]]**. See also the discussion in Charles Rickett *Laws of New Zealand* 'Equity: Fiduciaries' (online ed) at [96]–[102].

4.12 In *Cook v Evatt (No. 2),* the High Court has summarised the fundamental principles affecting the existence and scope of fiduciary obligations as follows:[184]

> *(a)The existence and scope of fiduciary obligations are not to be determined by placing the instant case into a preconceived category and then invoking the duties thought to attach to that category; they must be tailored to the particular case after a meticulous examination of its own facts.*
>
> *(b)The essence of a fiduciary relationship is an inequality of bargaining power brought about by the trust or confidence reposed in, and accepted by, the fiduciary to perform some function for another's benefit in circumstances where the beneficiary lacks the power adequately to control or supervise the exercise of that function (for formulations to similar effect see Hospital Products Ltd v United States Surgical Corporation (1984) 58 ALJR 587; RP Austin, "Commerce and Equity - Fiduciary Duty and Constructive Trust" (1986) Oxford J Legal Studies 444). One application of that principle is that persons will generally assume fiduciary obligations in circumstances where they may benefit from a transaction and know that the other party is relying upon them for guidance and advice with respect to that transaction.*
>
> *(c)When that test is applied to certain relationships - of which directors to companies, trustees to beneficiaries and solicitors to clients are examples - the inherent nature of the relationship will make fiduciary obligations inevitable. In others there may not be any relationship customarily understood to attract fiduciary obligations as a matter of course. In the latter cases fiduciary obligations may nevertheless flow from the particular circumstances affecting the parties and the transaction in question.*
>
> *(d)Even where a fiduciary relationship is established, the scope of the fiduciary's obligations is determined by the nature and extent of the reliance or trust which had been placed by the beneficiary upon or in the fiduciary. Again, this requires a meticulous examination of the facts of each individual case.*
>
> *(e)In most cases beneficiaries will have trusted their fiduciaries to avoid using the fiduciary office to gain a personal advantage ("the use of fiduciary position" rule) or placing themselves in positions where the fiduciaries' interests would conflict with those of the beneficiaries on those matters where, by virtue of the trust relationship, the beneficiaries would be at the mercy of the fiduciaries ("the conflict of interest rule"). The latter does not mean avoidance of all conflicts of interest. An examination of the individual facts will be necessary before it will be possible to define the precise scope of the trust which had been placed in the fiduciary and hence the areas within which a conflict would be impermissible.*
>
> *(f)In those cases where fiduciaries have entered into transactions with beneficiaries, the latter will usually have relied upon the former to disclose those facts known to the fiduciaries which would be likely to influence the beneficiaries in their decision to enter into the proposed transaction and, if so, on what terms ("the non-disclosure rule"). Again,*

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[184] *Cook v Evatt (No 2)* [1992] 1 NZLR 676 (HC) at 685 **[[Auth]]**.

> *the scope of the reliance in this respect will be a question of fact to be determined in each case.*

4.13 This highlights that Declaration B(c) as sought is an over-reach. There is simply no *general* fiduciary-like relationship between local authorities and their constituents as a matter of law.

4.14 In the local government context, in *Waitakere City Council v Lovelock,* Justice Thomas expressed his doubts as to such an overarching general relationship or duty:[185]

> *…[t]he fiduciary or quasi-fiduciary obligation may not be relevant in all circumstances. The facts of cases vary sufficiently significantly to make any general rule unwise.*

4.15 Any fiduciary-like obligations must be construed with reference to the details of the facts of the case. To the extent that the Declarations sought by the plaintiffs seek to reflect a general fiduciary-like obligation between local authorities and their communities, they are incorrect. The term "fiduciary-like" begs the question – what is the precise nature of the obligation?

4.16 The plaintiffs refer to a number of cases in which a fiduciary relationship involving a council was established, but these are (reflecting the legal position as set out above) fact-specific.[186] They are largely directed at the existence of a fiduciary-like obligation between a local council and its ratepayers in relation to the collection and use of public funds provided by those ratepayers.

4.17 There is no dispute that local authorities in certain specific circumstances have been treated as owing fiduciary-like duties to ratepayers, "*particularly when collecting and expending public funds*."[187]

4.18 The English authorities used by the plaintiffs frame the fiduciary-like obligations by reference to the expenditure of ratepayers' funds.[188]

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185 *Waitakere City Council v Lovelock* [1997] 2 NZLR 385 (CA) at 411 **[[Auth]]**.

186 Plaintiffs' submissions at [2.5]–[2.6].

187 C Mitchell and D R Knight *Laws of New Zealand* 'Local Government' (online ed) at [34] **[[Auth]]**.

188 *Bromley London Borough Council v Greater London Council* [1983] 1 AC 768 at 165 per Lord Diplock: "*it is well established by the authorities… that a local authority owes a general fiduciary duty to the ratepayers from whom it obtains moneys needed to carry out its statutory functions, and that this includes a duty not to expend those moneys thriftlessly but to deploy the full financial resources available to it to the best advantage…"* **[[Auth]]**; Comments in *Roberts v Hopwood* [1925] AC 578 (HL) were made in the context of whether certain payment of sums of money, purporting to be wages, made by the council to its workforce were contrary to law. Lords Buckmaster and Atkinson recognise that a public authority owes a duty both to the ratepayers and to its employees at 589 and 595 **[[Auth]]**. Lord Sumner states that the authority has a duty towards the public whose money and local

4.19 The New Zealand authorities cited by the plaintiffs all establish a *"fiduciary duty to ratepayers"* in the context of where a local authority is making rating decisions.[189]

4.20 But an abstract statement that councils owe general fiduciary-like obligations to their communities is simply too wide. It does not define the content of that duty or obligation. It could create unforeseen consequences and provide a launch pad for future litigation.

4.21 Further, the nature and scope of any such fiduciary obligation is dictated by the relevant establishing statute. In *Waitakere City Council v Lovelock* President Richardson noted that *"[i]n rating matters that fiduciary duty is of course exercised within and for the purposes of the legislation*",[190] and went on to cite Lord Scarman in *Bromley London Borough Council v Greater London Council* that "*the general law [must] be adapted and applied in a way consistent with the statute. Indeed, if there be a clash, the statute prevails as the legislative will of Parliament.*"[191]

4.22 Therefore, to the extent that fiduciary-like duties exist in any specific circumstances, they too must adapt in accordance with other law including legislation. Declaration B(c) as sought does not recognise this.

4.23 Importantly, the existence of general fiduciary-like obligations is not relevant to which services or assets a council must provide or own; or owe obligations in respect of.

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business they administer at 604 **[[Auth]]**. Lord Atkinson at 595 states: "*a body charged with the administration for definite purposes of funds contributed in whole or in part by persons other than members of that body, owes in my view, a duty to those latter persons to conduct that administration in a fairly businesslike manner with reasonable care, skill and caution, and with a due and alert regard to the interest of those contributors who are not members of the body. Towards these latter persons the body stands somewhat in the position of trustees or managers of the property of others.*" **[[Auth]]**; *Prescott v Birmingham Corporation* [1955] Ch 210 (CA) at 235: "*Local authorities are not, of course, trustees for their ratepayers, but they do, we think, owe an analogous fiduciary duty to their ratepayers in relation to the application of funds contributed by the latter.*" **[[Auth]]**.

189 *Mackenzie District Council v Electricity Corp of New Zealand* [1992] 3 NZLR 41 (CA) at 47: the Court held that the local authority has "*a fiduciary duty to the ratepayers to have regard to their interests*" **[[Auth]]**; *Waitakere City Council v Lovelock* [1997] 2 NZLR 385 (CA) at 396 the Court confirmed that the "*fiduciary duty to ratepayers… requires that council loyally and in good faith have regard to the interest of all its ratepayers and so consider in good faith matters raised by particular groups of ratepayers and then balance all the interests when exercising its rating powers.*" **[[Auth]]**; *Barton v Masterton District Council* [1992] 1 NZLR 232 (HC) at 245: "*…but the language used makes it clear that in both spending and levying funds, fiduciary obligations are involved.*" **[[Auth]]**; *Electricity Corporation of New Zealand Ltd v Waimate District Council* HC Christchurch CP47-90, 27 March 1992 at 36: "*a local authority owes a duty of a fiduciary kind, in essence a duty of fairness, to all its ratepayers."* **[[Auth]]**. The "'*general duty of fairness and evenhandedness' as between ratepayers"* which the plaintiffs state *Electricity Corporation of New Zealand Ltd v Waimate District Council* establishes at para 2.7 of their submissions, in fact exists "*when it comes to determining differing obligations of types or groups of property to pay differential rates.*" (at 43) **[[Auth]]**.

190 *Waitakere City Council v Lovelock* [1997] 2 NZLR 385 (CA) at 396 **[[Auth]]**.

191 *Waitakere City Council v Lovelock* [1997] 2 NZLR 385 (CA) at 397 **[[Auth]]** citing *Bromley London Borough Council v Greater London Council* [1983] 1 AC 768 at 837–838.

4.24 Thus, Thomas J in *Waitakere City Council v Lovelock* stated that:[192]

> *… [a]s sovereignty remains with the people the elected government remains answerable to them in the exercise of their delegated power… Local government can be perceived as the agent or fiduciary of the people performing a task and exercising the powers of government which have been developed to it [from central government] on trust for the people it represents*.

That is, fiduciary-like obligations are both subject to statute, and devolve from and arise out of authorities' statutory obligations.

Local democracy and the Reforms

4.25 As drafted, the Declarations are removed from the Reforms context. Nevertheless, the plaintiffs do at times seek to situate their claim in the context of ownership of general infrastructure assets. In this regard, paragraphs 3.12-3.15 of the plaintiffs' submissions appear to draw a particularly long bow. Here, the plaintiffs contend:

(a) "*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*";[193]

(b) "*These dynamic connections between public powers (including control of public assets), regular elections, accountability and democratic legitimacy, apply no less to local government … than to central government*";[194]

(c) "…*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.*"[195]

4.26 The argument seems to be that water services and other infrastructure assets must be owned at a local level, that anything else would be

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192 At 410 **[[Auth]]**.
193 Plaintiffs' submissions at [3.12].
194 Plaintiffs' submissions at [3.14].
195 Plaintiffs' submissions at [3.15].

undemocratic and unconstitutional. However, which infrastructure assets are owned locally or not is plainly a matter of policy as implemented by legislation. To explain further:

(a) A key theme of the plaintiffs' case appears to be that *local* democratic accountability for *local* council-owned assets is particularly important and seemingly necessary. While it obviously makes sense that councils should be directly democratically accountable for the assets that they directly own, under the Reforms (at this stage) the assets would no longer be directly council-owned, although the non-financial shares in each water services entity will be held by territorial authorities. That is a policy decision which is not the Court's domain.

(b) Further, the amount of local democratic accountability there should be for provision of water services (including through local council elections)[196] really has no bearing on whether the general declarations should be made as declarations of legal rights. Any potential reduction in local democracy relating to water services is a policy argument against the Reforms, not the unlawful interference with a legal or enforceable right.

(c) In any event, there are numerous examples of matters which affect local communities but are subject to democratic accountability at a national level – social security payments, policing, education, some roading, the subsidy of pharmaceuticals, medical care (although subject to district boards too), and more recently fire services.[197]

4.27 Further, as explained in the Background section of these submissions (Part 2), the accountability, ownership and governance provisions regarding the proposed water services entities have recently been changed by Cabinet in response to the RGA Working Group report.[198]

4.28 The recent changes to the governance, ownership and accountability of the water service entities underline the ongoing change and development in the Reform process.

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196 See for example, plaintiffs' submissions at [3.15] and [3.36].
197 Palmer affidavit at [56]–[60] **[[201.0058]]**.
198 Crown's submissions at [2.21]–[2.24].

4.29 To summarise the Crown's position in relation to the Declarations at A and B:

	Declaration sought	**Reasons relief should be refused**
A.	Local government is an important and longstanding component of the democratic governance of New Zealand.	Lack of jurisdiction: not a declaration of legal rights or interests Discretion should not be exercised on the basis of: • lack of live dispute • lack of practical consequence to the parties or the public • lack of utility • comity
B.	Important and longstanding principles and features of the democratic governance of New Zealand at local community level include the following:	Lack of jurisdiction (for all of B): • not a declaration of legal rights or interests • intended to constrain the Crown in relation to the development and introduction of legislation
(a)	local infrastructure assets are owned and/or controlled, and related services are provided, by local Councils ("local councils");	In addition, discretion should not be exercised on the basis of: • lack of live dispute • lack of practical consequence to the parties or the public • lack of utility • comity
(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;	As above
(c)	local councils owe fiduciary-like obligations to their communities; and	In addition, discretion should not be exercised on the basis of: • lack of live dispute • lack of practical consequence to the parties or the public • lack of utility • unforeseen consequences and application • misstates the legal position; too broad • comity

	Declaration sought	Reasons relief should be refused
(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.	In addition, discretion should not be exercised on the basis of: • lack of live dispute • lack of practical consequence to the parties or the public • lack of utility • comity

5. PROPERTY RIGHTS – "TAKING" AND COMPENSATION

5.1 Declaration C seeks broad declarations in relation to:

(a) the nature and extent of the plaintiffs' ownership rights in relation to infrastructure assets (a) to (e); and

(b) the plaintiffs' exclusive entitlement to compensation for any infrastructure assets removed by legislation from the plaintiffs' ownership (f).

5.2 As detailed in relation to Declarations A and B, the matters raised by Declaration C are matters of disputed policy and (with the exception of Declaration C(f)) not disputed legal rights. None are properly the subject of declarations.

Nature and extent of ownership rights

Broad principles

5.3 The Crown accepts and respects the broad common law principles in relation to property rights contained in the leading cases and commentary referred to by the plaintiffs. Further, the Crown does not assert that property rights are not "legal" rights,[199] nor does the Crown deny that the plaintiffs currently own infrastructure assets (including the Water Assets, as defined in the ASOD) and have associated rights (recognised and constrained by legislation and common law principles). There is no real

[199] Plaintiffs' submissions at [5.10].

legal dispute between the parties in relation to any specific rights arising from the infrastructure assets.

Declarations sought

5.4 The Declarations of the plaintiffs' rights of ownership sought are not in relation to legal rights as between the plaintiffs and the Crown, but rather broad declarations of legal principles or rights in the abstract.

5.5 As described above in Part 3, this Court has neither the jurisdiction nor should it consider it necessary or appropriate to exercise its discretion to make such declarations, given the principles of utility and comity.

5.6 In addition to above points, the infrastructure assets exist within a complex legislative and regulatory framework. Any "rights of ownership", such as those detailed in the Declarations sought at C(a) to (e) (noting that the Crown has not pleaded to them on the basis that they are too vague and not explicit enough)[200], therefore also sit within a complex framework of restrictions on those rights and corresponding obligations.

5.7 The plaintiffs do not have the right to use the infrastructure assets 'as they please' or have 'peaceful enjoyment' of those assets.[201] The repeated use of the term "exclusive" in the Declarations sought is misleading. The term belies the fact the plaintiffs' rights in relation to the infrastructure assets are subject to significant limitations reflecting the public nature of the assets and the purpose for which the plaintiffs own them.

5.8 The plaintiffs own, operate, govern and/or control infrastructure assets to varying degrees within the asset ownership framework[202] under the infrastructure assets legislation.[203] The following are significant constraints applicable to the Three Waters infrastructure assets that the plaintiffs' Declarations (and submissions) do not fully reflect:

(a) Under section 130(2) of the LGA there is an obligation for local government organisations that provide water services to

200 SOD at [26] **[[101.0025]]**.
201 Plaintiffs' submissions at [4.5] and Legislation Guidelines at [4.4] **[[Auth]]**.
202 SOD at [25(a)] **[[101.0024]]**.
203 SOD at [25(a) and (b)] **[101.0024]]**.

communities within their districts or regions to maintain water services.[204]

(b) Under section 130(3) of the LGA, in order to fulfil that obligation, a local government organisation must:

(i) not use assets of its water services as security for any purpose;

(ii) not divest its ownership or other interest in a water service except to another local government organisation; and

(iii) not lose control of, sell, or otherwise dispose of the significant infrastructure necessary for providing water services in its region or district unless, in doing so, it retains its capacity to meet its obligations.

(c) The asset ownership framework, under the infrastructure assets legislation, has always been subject to change, in accordance with the principle of parliamentary sovereignty, and the ordinary course of legislative amendment from time to time. This is particularly evidenced by the history of extensive legislative amendments affecting service delivery and corresponding asset ownership[205] and the range of reforms currently being considered by the Government described in Mr Lovett's evidence as having "*the potential to reshape our system of local government*".[206]

5.9 The infrastructure assets are in public ownership <u>through</u> local authorities and councils owning the assets <u>on behalf of</u> their residents.[207] The plaintiffs' denial of this characterisation denies the realities of the limitations and obligations which exist in the LGA, described above.[208]

5.10 The preceding paragraphs are by no means a complete description of the asset ownership framework in which the infrastructure assets (and the plaintiffs' rights in respect of those assets) exist. Rather, they simply

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204 As noted in the Lovett affidavit at [6.5] **[[201.0095]]**, clause 96 of the exposure draft Bill broadly mirrors existing provisions in section 130 LGA restricting ownership rights of local authorities.
205 See, for example, Palmer affidavit at Part I **[[201.0055]]**.
206 Lovett affidavit at [10.1] **[[201.0102]]**.
207 Lovett affidavit at [11.7(b)] and [11.8] **[[201.0106]]**.
208 Plaintiffs' submissions at [4.31(b)] and [4.32(d)].

demonstrate that the Declarations sought fail to acknowledge the full context in which the infrastructure assets exist and the Reforms are being developed.

5.11 The abstract Declarations C(a) to (e) in relation to broad rights, particularly in the absence of recognition of corresponding applicable restrictions and obligations, are of no utility and, indeed, misleading to both the plaintiffs and the general public. Even if some limited form of declaration were made it would be, at best, be a partial snapshot of certain (undisputed) rights at a certain point of time; the full picture (given the real nature of this proceeding) would require an acknowledgment that Parliament can, through legislation, change those rights.

5.12 Finally, it is noted that Declarations C(a) to (e) (rights of ownership) are in relation to "infrastructure assets" but it is not certain what the plaintiffs mean by this term. The use of this term in the Declarations appears to be because of the plaintiffs' concern of the 'scaling-up' style reforms being extended to infrastructure assets other than those affected by the Reforms.[209] It is also noted, however, that not all assets related to the provision of water services will necessarily fall within this asset group for the purposes of the Reforms.[210] This misalignment further indicates the absence in these proceedings of a live dispute in relation to specific legal rights as between the plaintiffs and the Crown.

No entitlement to compensation

Presumption of compensation

5.13 The common law principle of compensation for the expropriation of property is a presumption of interpretation of statutory power, not an absolute legal right or entitlement. That presumption may be rebutted by legislation. Declaration C(f) sought by the plaintiffs is plainly wrong as a matter of law.

5.14 This statement of principle is not controversial (and not directly challenged by the plaintiffs) and is consistent with the Supreme Court's approach in *Waitakere City Council v Estate Homes Ltd.*[211] Discussing the common

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209 ASOC at [33] **[[101.0052]]** and plaintiffs' submissions at [2.32].
210 SOD at [27] **[[101.0026]]**.
211 *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112, [2007] 2 NZLR 149 **[[Auth]]**.

law presumption of statutory interpretation, the Court described the general principle as:[212]

> *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.*

5.15 The Legislation Guidelines also reflect this position and provide the additional gloss that where compensation is not paid, there must be cogent policy justification:[213]

> ***Chapter 4: Fundamental constitutional principles and values of New Zealand law***
> *…*
> *4.4 Respect for property*
>
> *New legislation should respect property rights*
>
> *People are entitled to the peaceful enjoyment of their property (which includes intellectual property and other intangible property). The law actively protects property rights through the criminalisation of theft and fraud and through laws dealing with trespass, and other property rights. The Government should not take a person's property without good justification. A rigorously fair procedure is required and compensation should generally be paid. If compensation is not paid, there must be cogent policy justification (such as where the proceeds of crime or illegal goods are confiscated). The law may allow restrictions on the use of property for which compensation is not always required (such as the restrictions on the use of land under the Resource Management Act 1991).*

5.16 Such policy decisions are, of course, purely the domain of the legislature.

5.17 The Crown acknowledges the framework for compensation for expropriation of property provided for the in the Public Works Act 1981. This is also consistent with the position outlined above at paragraph 5.13 and set out in the Legislation Guidelines.

5.18 It is noted that the Supreme Court in *Waitakere City Council v Estate Homes Ltd* referred to the "presumption of interpretation". The Court was discussing the principle in the context of statutory interpretation: in that case, a question of interpretation of the LGA and the Resource

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212 *Waitakere City Council v Estate Homes Ltd* [2006] NZSC 112, [2007] 2 NZLR 149 at [43] per McGrath J **[[Auth]]**.

213 Legislation Design and Advisory Committee *Legislation Guidelines* (September 2021) at [4.4]. The Legislation Guidelines are adopted by the Legislation Design and Advisory Committee and endorsed by Cabinet as the government's key point of reference for assessing whether draft legislation conforms to accepted legal and constitutional principles.

Management Act 1991. Where the interpretation is uncertain, an interpretation resulting in compensation is to be presumed.

5.19 The present issue is not a matter of statutory interpretation. Rather, it is a matter of policy decision-making and legislative process: as discussed above at paragraphs 3.60 to 3.78, squarely not matters for this Court to consider.

5.20 The Reforms (in whatever future form they may take) will be put into effect by clear and unambiguous legislation.[214] The plaintiffs have not challenged the authority of Parliament to legislate in this respect. Indeed, they seem to accept this.[215]

5.21 For completeness, this principle was recognised in *New Zealand Council of Licensed Firearms Owners Inc v Minister of Police*, when Cooke J (after referring to the possibility that some acts of Parliament could be unlawful) put it this way: "… *as McGechan J observed in* Westco Lagan Ltd v Attorney-General *the right to property is not within the ambit of any such limits on any extreme exercises of Parliamentary power. This is recognised in some formulations of the right, which refer to it as a right to compensation only to the extent that Parliament has not clearly abrogated it".* Further, his Honour noted *"it is certainly true that there is no [obligation to provide compensation] in the sense that Parliament can always legislate inconsistently with the right to receive compensation for a deprivation of property."*[216]

5.22 *Westco*[217] is an example of expropriation without compensation. The Forests (West Coast Accord) Act 2000 cancelled the West Coast Accord – an agreement for the perpetual supply of Rimu for sawmilling. Section 7 provided that no compensation was payable by the Crown to any person for "any loss or damage arising from the enactment". The plaintiff sought, inter alia, an interim injunction against submission of the Bill if passed to the Governor-General for Assent, on the basis that clause 7 was expropriation without compensation and breached sections 21, 27(1) and 27(3) of NZBORA.

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214 Lovett affidavit at [6.9] and [6.10] **[[201.0097]]**.
215 Plaintiffs' submissions at [1.8] and [5.28].
216 *New Zealand Council of Licensed Firearms Owners Inc v Minister of Police* [2020] NZHC 1456 at [125] per Cooke J **[[Auth]]**.
217 *Westco Lagan Ltd v Attorney-General* [2001] 1 NZLR 40 (HC) **[[Auth]]**.

5.23 McGechan J struck out the claim, recognising Parliament's power to enact laws expropriating property without compensation:

> *[95] First, in principle, provided Parliament proceeds according to mandatory law governing the procedure for enacting legislation ("manner and form") Parliament is Sovereign and can pass any legislation it sees fit. In particular, Parliament can enact laws expropriating property without compensation. In doing so, it can step right through existing laws and rights, obliterating remedies which otherwise would exist. The Courts, providing Parliament proceeds according to law in the way described, cannot stop Parliament making such legislative changes. […]*

5.24 The plaintiffs' submissions are directed (or mainly directed) at the question of whether there is a cogent policy justification for any transfer of property in the Reforms. However, the assessment of that question is not a matter for this Court (as detailed above) and in any event is premature (as detailed further below at paragraph 5.39). It is solely for the Crown to decide whether compensation is given, against the background of the complex policy background of the Reforms.

5.25 In these circumstances, where there is no role for the Court in considering the Crown's policy decision-making and the legislative process, the only remaining subject matter for the Declaration is that of general legal principle. It is submitted that even an accurate declaration of the general legal principles in relation to the presumption of compensation (such as those outlined at paragraphs 5.13 to 5.14 above) is without jurisdiction, wholly unnecessary and inappropriate.

No "taking"

5.26 The presumption of compensation only applies in relation to property <u>taken</u> by the Crown. In addition to the reasons set out in the preceding section, for completeness, it is submitted that common law principles relating to compensation do not apply in these circumstances. This is because the Reforms do not contemplate any "taking" of the infrastructure assets (although such an assessment is futile in any event, given the Reforms are subject to change). This further supports the conclusion that a declaration in relation to compensation, even if only made as a declaration of general legal principles (which we submit is not appropriate), is not warranted.

5.27 The Court of Appeal has held that denial of privileges will not suffice as a "taking". In *Auckland Acclimatisation Society Inc v Sutton Holdings Ltd* the Court held that the fact the Water and Soil Conservation Act 1967 prevented landowners from diverting natural water on their land did not "take" or deprive them of anything.[218] Rather, it denied them a privilege. There could be "no moral claim or expectation of compensation" in those circumstances.[219] This position is mirrored in the Legislation Guidelines (acknowledging the law may allow restrictions on the use of property for which compensation is not always required, such as under the Resource Management Act 1991).

5.28 As described in the evidence of Mr Lovett, the Reforms provide for a nuanced transfer of responsibility for the delivery of water services to four new water services entities.[220] Significantly, public ownership of the relevant assets and democratic accountability to the communities they service is maintained.[221] Ownership of the water services assets (and also territorial authorities' water services liabilities) will be transferred to the new public entities to achieve operational and financial autonomy required to ensure balance sheet separation.[222] Even at a broad principles level, the Reforms are evidently distinguished from the clear "taking" of private property scenarios considered in the leading cases and commentary referred to by the plaintiffs.

5.29 However, the crux is in the detail. In the present circumstances the critical details relating to the structures of ownership, control and accountability is very much subject to change. The most recent changes include amendments to the Reforms that significantly affect the ownership structure and control/accountability framework.[223] The Reforms remain subject to further changes by Cabinet and as they track through the parliamentary processes (including the Select Committee submission process).[224]

5.30 The futility of Declaration C(f) sought, even if it fully and accurately captured the relevant legal principles, is particularly apparent when this

218 *Auckland Acclimatisation Society Inc v Sutton Holdings Ltd* [1985] 2 NZLR 94 (CA) at 99 **[[Auth]]**.
219 *Auckland Acclimatisation Society Inc v Sutton Holdings Ltd* [1985] 2 NZLR 94 (CA) at 99 **[[Auth]]**.
220 Lovett affidavit at [3.16] **[[201.0076]]**.
221 Lovett affidavit at [3.15] **[[201.0076]]**.
222 Lovett affidavit at [3.16] **[[201.0076]]**.
223 Lovett updating affidavit at [9].
224 Lovett updating affidavit at [12].

element of the principle is considered: the details of the very elements of the Reforms relevant to those principles are subject to change over the coming months. This futility, combined with challenges of applying the legal principles even on a broad assessment, makes a declaration of general legal principle (which we submit in and of itself is without jurisdiction and not appropriate) unwarranted.

No policy rationale

5.31 In addition, for completeness, the Crown submits that the policy rationale underpinning the common law principles in relation to compensation is not engaged by the Reforms. This provides yet more weight to the conclusion that a declaration in relation to compensation, even if only made as a declaration of general legal principle (which we submit in and of itself is without jurisdiction and not appropriate), is unwarranted.

5.32 It should be uncontroversial that these common law principles were developed to protect private citizens from a disproportionate burden being imposed by the State. This principle was explicitly recognised by Baragwanath and Goddard JJ in the Court of Appeal's judgment in *Waitakere City Council v Estate Homes Ltd*,[225] and is reflected in the Legislation Guidelines (referred to above at paragraph 5.15). In *New Zealand Council of Licensed Firearms Owners Inc v Minister of Police* Cooke J concluded:[226]

> *At its heart the principle [of presumption of compensation] recognises a fundamental principle of individual liberty … the focus should be on the impact on the person being deprived of property …*

5.33 The plaintiffs' submissions obfuscate to get around the challenges of jurisdiction, utility and comity and create the appearance of a controversy. They suggest the Crown is arguing a "*novel (and unexplained) concept that the Council's assets are not subject to property rights because they are not in 'private' ownership, but can be held 'through' any public entity*".[227]

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225 *Estate Homes Ltd v Waitakere City Council* [2005] NZCA 271, [2006] 2 NZLR 619 at [128] per Baragwanath and Goddard JJ **[[Auth]]**.

226 *New Zealand Council of Licensed Firearms Owners Inc v Minister of Police* [2020] NZHC 1456 at [46] **[[Auth]]**.

227 Plaintiffs' submissions at [4.31(b)].

5.34 This misses the point (and the associated criticism of Mr Lovett is unfair). The Crown has not suggested that public ownership rights do not exist. It does accept the broad common law principles in relation to property rights referred to by the plaintiffs. It does acknowledge rights of ownership (albeit undefined in this proceeding) exist in relation to the infrastructure assets – subject to the relevant legislation and regulatory processes.

5.35 But, clearly, there is a distinction that can be drawn between public and privately owned assets from a policy perspective (and whether the policy rationale of the presumption of compensation is engaged). Even acknowledging the complexities of the Reforms, the transfer of ownership of assets owned for the benefit of the public among public entities as provided for in the Reforms is clearly distinguished from the scenario of expropriation of property by the State from a private citizen.

5.36 To list (not exhaustively) some of the features of the Reforms relevant to this distinction: the end users (local residents) of the assets remain the same, the purpose for which the assets exist remain the same, and the control and accountability (by local residents) is maintained.[228] These distinctions were (and are) clearly relevant to the Crown's policy assessment of how to structure the Reforms (including whether compensation is given) (which, as noted above at paragraph 5.19 is not a matter for this Court's consideration).

5.37 In their submissions, the plaintiffs say [the policy rationale] "*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*".[229] However, the plaintiffs' submissions fail to take into account the nuance of how the Reforms interact with the common law principles of compensation. They have not identified any authority (or rational basis) for their assertion extending the common law principles of compensation to transfers of ownership between public entities or in relation to transfers of property continued to be held on behalf of the public.[230]

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228 Lovett affidavit at [6.3] to [6.6] **[[201.0094]]**. The nature and extent of control and accountability is obviously of concern to the plaintiffs and will be the subject of continued consultation. Again, this difference of view is indicative of the nuance in the Reforms and the degree to which they remain subject to change.

229 Plaintiffs' submissions at [4.12].

230 Plaintiffs' submissions at [4.12]. See Lovett affidavit at [11.8] **[[201.0107]]**.

5.38 The hypothetical example given by the plaintiffs is not comparable or helpful,[231] referring to circumstances where the underlying purpose and use of the property is being fundamentally changed. In their submissions, the plaintiffs appear to conflate general principles of property rights with the specific principles relating to compensation for expropriation. The latter has clear limitations and underpinning policy rationale.

5.39 There is no clear basis for the plaintiffs' contention that the common law principles in relation to compensation apply in these circumstances. To the contrary, there are evident policy arguments distinguishing the present circumstances from the well-established principles. Furthermore, any application of the principles to the Reforms is futile, given they are subject to change. The entanglement between the Crown's policy decision-making and Parliament's legislative process in relation to the Reforms, and the applicability of the policy rationale (in this context) behind the common law principles relating to compensation, is clearly indicative of the challenges the plaintiffs' declaratory relief faces: the questions being asked of this Court are ultimately questions of policy not law. In these circumstances, a declaration of general legal principle (which we submit in and of itself is not appropriate) is unwarranted.

5.40 To summarise the Crown's position in relation to the Declarations at C:

	Declaration sought	**Reasons relief should be refused**
C	The Council's rights of ownership in relation to infrastructure assets include the following:	
(a)	the exclusive ability to prevent others from interfering with such assets;	• Lack of jurisdiction • Discretion should not be exercised on basis of lack of utility and comity • Misleading because does not reflect full statutory context or that Parliament can change these rights
(b)	the exclusive possession or control of such assets;	As above
(c)	the exclusive ability to manage and operate, and/or enter into contracts in relation to, such assets;	As above

[231] Plaintiffs' submissions at [4.12].

(d)	the exclusive ability to modify or replace the assets (and to dispose of redundant or surplus assets);	As above
(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	As above
(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.	• Lack of jurisdiction • Discretion should not be exercised on basis of lack of utility and comity • Incorrect as a matter of law – there is no legal entitlement to compensation. • Application of principles in relation to compensation to Reforms a matter of policy not for this Court • Presumption of compensation not engaged: no taking and no policy rationale

6. EVIDENCE CHALLENGE

6.1 The plaintiffs challenge the affidavit of Mr Palmer on the basis that it is:

(a) a summary of the law and/or opinions on the legal position, thus amounting to impermissible submission in the guise of evidence; and

(b) opinions that are not substantially helpful in understanding other evidence or ascertaining any fact of consequence to the determination of the proceeding.

6.2 Sections 23 to 26 of the Evidence Act 2006 (**Evidence Act**) establish the rules of expert evidence. 'Expert' is defined in the Evidence Act as "*a person who has specialised knowledge or skill based on training, study, or experience.*"[232]

6.3 Section 25(1) states that:

> *An opinion by an expert that is part of expert evidence offered in a proceeding is admissible if the fact-finder is likely to obtain substantial help from the opinion in understanding other evidence in the proceeding*

[232] Section 4(1) **[[Auth]]**.

or in ascertaining any fact that is of consequence to the determination of the proceeding.

6.4 The substantial helpfulness criterion is central to section 25. An assessment of the substantial helpfulness in the expert evidence context requires a consideration of the relevance, probative value and reliability of the evidence.[233]

6.5 The focus of Mr Palmer's evidence is "*to outline (and in some parts condense significant detail about) the history and evolution of the law in this area, as context for the Court's determination of the issues ….*"[234] He provides this evidence in effect as an expert legal historian regarding the evolution of local government though its myriad governing legislation, primarily in New Zealand. He also provides expert evidence of the evolution of models for local government service delivery by way of central Government policy reform and legislation. With over 50 years of academic and legal practice in this specialist field, he is well qualified, in the Crown's submission, to provide relevant, reliable expert assistance of probative value to the Court in this regard.

6.6 That said, in light of the plaintiffs' acceptance in submissions that the Reforms are not unlawful; they can be enacted by Parliament, as has been the case for the evolution of local government law over the last 150 years,[235] the Crown does not now have a need to rely on significant aspects of Mr Palmer's evidence. Only Parts F and I are referred to in the Crown's submissions: Part F for the historical position; and Part I for his evidence of the range of models for local government service delivery in New Zealand over time, including in relation to the Three Waters. Neither of these subject matter areas is expert evidence on the meaning of current domestic law, or otherwise objectionable.

6.7 The expert evidence is, on the other hand, of substantial help to the Court in proving a condensed understanding of the range and level of change in local government structure and service delivery over time, through evolving legislative regimes. With the plaintiffs' unreserved (dismissive) acceptance of these points, the evidence is less necessary.

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233 *Mahomed v R* [2010] NZCA 419 **[[Auth]]**; *Pora v R* [2015] UKPC 9, [2016] 1 NZLR 277 at [41] **[[Auth]]**; and *Lundy v R* [2018] NZCA 410 **[[Auth]]**.

234 Palmer affidavit, para [5] **[[201.0044]]**.

235 Plaintiffs' submissions at [1.8]. [4.4], [4.24] and [5.28].

6.8 There is precedent for the use of historians, including lawyers or law academics, as experts on legal history in New Zealand, particularly in the context of disputes between Māori and the Crown. By way of example, in *Proprietors of Wakatu Incorp v Attorney-General*,[236] both the plaintiffs and the defendant/Crown relied on evidence (without objection) from a Professor of Law on the basis of their expertise as an expert legal historian. The experts gave evidence as to interactions between Crown and iwi in the 1800s:

(a) For the plaintiffs, "*Professor David Williams gave expert evidence in his capacity as a professor of law and an eminent legal historian"*;[237] and

(b) "*For the Crown, evidence was given by three historian witnesses: … Professor Alan Ward, another pre-eminent legal historian*."[238]

6.9 On that basis, the Crown submits that the Court can and ought to draw assistance from the expert evidence of Mr Palmer, in particular Parts F and I, to the extent it considers this to be helpful.

DATED at **Wellington** on 19 May 2022

M Colson QC / B A Davies / B T Haddleton
Counsel for the defendants

236 *Proprietors of Wakatu Incorp v Attorney-General* [2012] NZHC 1461 **[[Auth]]**.
237 *Proprietors of Wakatu Incorp v Attorney-General* [2012] NZHC 1461 at [57] **[[Auth]]**.
238 *Proprietors of Wakatu Incorp v Attorney-General* [2012] NZHC 1461 at [64] **[[Auth]]**.