

**IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY**

CIV-2021-485-

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

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

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

BETWEEN **Timaru District Council**
First Plaintiff

AND **Whangarei District Council**
Second Plaintiff

AND **Waimakariri District Council**
Third Plaintiff

AND **The Minister of Local Government**
First Defendant

AND **The Secretary for Local Government**
Second Defendant

STATEMENT OF CLAIM:

Dated: **12 November 2021**

Solicitor:
Michael Garbett
Anderson Lloyd
Private Bag 1959, Dunedin 9054
Tel: 03 477-3973
Email: michael.garbett@al.nz

Counsel:
Jack Hodder QC
Thorndon Chambers
P O Box 1530, Wellington 6140
Tel: 04 460-0636
Email: jack.hodder@chambers.co.nz

STATEMENT OF CLAIM

The plaintiffs by their solicitor says:

Parties

- 1 The first plaintiff is a “local authority” pursuant to the Local Government Act 2002 (*LGA*).
- 2 The second plaintiff is a “local authority” pursuant to the *LGA*.
- 3 The third plaintiff is a “local authority” pursuant to the *LGA*.
- 4 The first defendant is the Minister of Local Government (the *Minister*) and has powers and responsibilities under the *LGA* and in relation to local government matters.
- 5 The second defendant is the Secretary for Local Government (the *Secretary*) and has powers and responsibilities under the *LGA* and in relation to local government matters.

Local government and democratic governance in New Zealand

- 6 New Zealand is a free and democratic society, and governed in accordance with the rule of law.
- 7 Local government is an important and longstanding component of the democratic governance of New Zealand.
- 8 Important and longstanding principles and features of the democratic governance of New Zealand at local community level include the following:
 - 8.1 local infrastructure assets are owned and/or controlled, and related services are provided, by territorial local government entities (“*local councils*”);
 - 8.2 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;
 - 8.3 local councils owe fiduciary-like obligations to their communities; and
 - 8.4 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.

- 9 Each of the plaintiffs (collectively, “*the Councils*”) is a local council as described in paragraph [8], above.

The role of local authorities under the LGA

- 10 The principles and features outlined in paragraph [8], above, are reflected in the LGA and predecessor legislation.

Democratic accountability

- 11 The purpose of local government, per s 10 of the LGA, is relevantly to:

11.1 “enable democratic local decision-making and action by, and on behalf of, communities”; and

11.2 “promote the social, economic, environmental, and cultural well-being of communities in the present and for the future”.

- 12 The role of a “local authority” under the LGA is relevantly to “give effect to the purpose of local government”, and to perform “the duties” and “exercise the rights” conferred on it (s 11).

- 13 Local authorities are required to act in accordance with certain principles in s 14 of the LGA. In particular, a local authority should:

13.1 “conduct its business in an open, transparent and democratically accountable manner” (s 14(1)(a)(i));

13.2 “make itself aware of, and should have regard to, the views of all of its communities” (s 14(1)(b)); and

13.3 “ensure prudent stewardship and the efficient and effective use of its resources in the interests of its district or region, including by planning effectively for the future management of its assets” (s 14(1)(g)).

(If the principles in s 14 are in conflict “in any particular case”, the conflict should be resolved in accordance with the principle in s 14(1)(a)(i).)

- 14 A local authority is also required to act in accordance with certain governance principles, including that a local authority “ensure that the role of democratic governance of the community... is clear and understood by elected members and the community” (LGA, s 39(a)).

- 15 Local authorities must also have governing bodies, appointed in accordance with s 41, which are “responsible and democratically accountable for the decision-making of the local authority”.
- 16 When making decisions, local authorities must “give consideration to the views and preferences of persons likely to be affected by, or to have an interest in, the matter” (s 78).
- 17 If a local authority undertakes consultation in relation to a decision, that consultation must be carried out in accordance with the principles set out in s 82. Those principles relevantly include:
- 17.1 “that persons who will or may be affected by, or have an interest in, the decision ... should be provided... with reasonable access to relevant information” (s 82(1)(a));
- 17.2 “that persons who will or may be affected by, or have an interest in, the decision... should be encouraged by the local authority to present their views” (s 82(1)(b)); and
- 17.3 “that persons who present views to the local authority should have access to a clear record or description of relevant decisions made by the local authority and explanatory material relevant to the decisions” (s 82(1)(f)).

Prudent management of infrastructure assets, services

- 18 A local authority must manage its revenues, expenses, assets, liabilities, investments and general financial dealings “prudently and in a manner that promotes the current and future interests of the community” (s 101); and seek cost-effectiveness in its provision of good quality infrastructure and local public services (s 17A).
- 19 “*Infrastructure assets*” are defined as including “existing or proposed assets” “used to provide services” in relation to “water supply”, “sewerage”, “stormwater drainage”, “flood protection and control works” and “the provision of roads and footpaths” (s 101B(6)).
- 20 A local authority must specifically prepare, as part of its long-term plan, an “infrastructure strategy for a period of at least 30 consecutive financial years” (s 101B(1)). Infrastructure strategies must outline how “infrastructure assets” are to be managed, including by taking into account the need to:
- 20.1 “renew or replacing existing assets” (s 101(B)(3)(a));

- 20.2 “maintain or improve public health and environmental outcomes or mitigate adverse effects on them” (s 101(B)(3)(d)); and
- 20.3 “provide for the resilience of infrastructure assets by identifying and managing risks relating to natural hazards and by making appropriate financial provision for those risks” (s 101B(3)(e)).
- 21 Local authorities have specific obligations in relation to “water services”, which include “water supply and wastewater services” (s 124).
- 22 Local authorities are specifically obliged under s 130 to provide “water services”.
- 23 Local authorities must “from time to time” assess the provision of “water services” within its district (s 125). The purpose of such assessments is to “assess, from a public health perspective, the adequacy of water and other sanitary services available to communities” (s 126).
- 24 The Secretary may issue “performance measures” under s 261B to allow the public to “compare the level of service provided by different local authorities” (s 261A). Performance measures may be issued in relation to certain types of “infrastructure assets”: “water supply”, “sewerage”, “flood protection and control works” and “the provision of roads and footpaths”.
- 24.1 The Secretary issued “performance measures” in December 2013 (“flood protection and control works”) and February 2014 (other assets).

The plaintiffs’ infrastructure assets and rights

- 25 The Councils own, operate, control and make decisions about infrastructure assets in and for their communities, and are democratically accountable to those communities for the quality and management of such assets.
- 26 The Councils’ rights of ownership in relation to infrastructure assets include the following:
- 26.1 the exclusive ability to prevent others from interfering with such assets;
- 26.2 the exclusive possession or control of such assets;
- 26.3 the exclusive ability to manage and operate, and/or enter into contracts in relation to, such assets;
- 26.4 the exclusive ability to modify or replace the assets (and to dispose of redundant or surplus assets);

26.5 the exclusive ability to use such assets as security for borrowing; and

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

The plaintiffs' water-infrastructure assets

27 The Councils' infrastructure assets include assets related to the provision of drinking water, wastewater and stormwater services (*Water Assets*).

28 The Councils operate the Water Assets on behalf of their communities:

28.1 in accordance with their legal obligations (as outlined at [10]–[24], above);
and

28.2 to assist those communities, including in encouraging a favourable business environment for businesses in the community.

The proposals by the Secretary and the Minister

29 During 2020 and 2021, the Secretary and the Minister, through their officials in the Department of Internal Affairs and/or the Minister's office, have published proposals for restructuring the ownership of the Water Assets of local authorities (the *Proposals*).

29.1 The Proposals (or aspects of them) are outlined in the documents listed, and particularised, in Schedule 1 to this statement of claim.

29.2 Particulars of the Proposals are outlined in Schedule 1 to this statement of claim.

30 The Proposals include removal of the rights of ownership of Water Assets from local councils, and transferring these to entities not subject to direct control by local councils, nor subject to democratic accountability.

31 The Councils have concerns that, in making the published Proposals, the Minister and the Secretary have misunderstood:

31.1 the principles and features of the democratic governance of New Zealand at the local community level (as outlined in paragraph [8], above);

31.2 the role of local councils under the LGA (as outlined in paragraphs [10]–[24], above);

- 31.3 the rights of ownership of local councils in relation to infrastructure assets (as outlined in paragraph [26], above).
- 32 Further, the Councils are concerned that the Proposals are based on disputed assumptions that, in relation to infrastructure assets (including Water Assets):
- 32.1 local authorities do not have a proper understanding of the assets they use to deliver local public services, and that local authorities lack sufficient information about those services;
- 32.2 local democracy inappropriately limits the ability of local authorities to properly finance delivery of local public services;
- 32.3 new developments for infrastructure for services within local communities should primarily be subject to considerations of efficiency, assessed nationally or across multiple local authority territories;
- 32.4 local authorities (and local communities) should not have full control over what, when and where new development takes place within their local communities;
- 32.5 accordingly, local authorities cannot or should not fulfil their role under the LGA; and
- 32.6 accordingly, democratic decision-making by local communities does not best serve the needs of those communities; and
- 32.7 generally, as particularised in Schedule 1 to this statement of claim.
- 33 The Councils are also concerned that the Proposals, approach and assumptions referred to in paragraphs [29] and [32], above, will extend to infrastructure assets other than Water Assets, such as roads, flood protection schemes and the assets used for the collection and disposal of solid waste.
- 34 The Councils' concerns, as set out in paragraphs [31]–[33], above, are not accepted by the Minister or the Secretary.
- 35 In the circumstances, it is appropriate that the future conduct of the Councils, other local councils, the Secretary and the Minister, be informed by declarations as to the legal rights and responsibilities of the Councils to their local communities and in respect of their infrastructure assets (including Water Assets).

The public education campaign

- 36 The Secretary, the Minister and the DIA have been directed by the Cabinet to prepare and implement a nationwide information and education campaign about the Proposals (the *Campaign*).
- 37 The purpose of the Campaign is to provide information to the public about the Proposals, why the Proposals have been made, and to build community support for the Proposals.
- 38 The Campaign (particularised in Schedule 2 to this statement of claim) is ongoing and includes:
- 38.1 multiple websites;
- 38.2 a Facebook page; and
- 38.3 advertisements in newspapers, on television, on YouTube and on other traditional and social media.

First Cause of Action: declarations about Councils' local governance role, ownership rights

- 39 The Councils repeat paragraphs [1]–[35], above, and accordingly seek declarations that:
- 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 ("*local councils*");
- (b) local councils are responsive/and democratically accountable to their communities for their ownership, stewardship and decision-making in relation to local infrastructure assets and related services;
- (c) local councils owe fiduciary-like obligations to their communities; and
- (d) local government infrastructure assets have generally been wholly or materially funded as a result of rates or charges or rentals paid

by generations of persons (including businesses) located in their communities.

- C. The Councils' rights of ownership in relation to infrastructure assets include the following:
- (a) the exclusive ability to prevent others from interfering with such assets;
 - (b) the exclusive possession or control of such assets;
 - (c) the exclusive ability to manage and operate, and/or enter into contracts in relation to, such assets;
 - (d) the exclusive ability to modify or replace the assets (and to dispose of redundant or surplus assets);
 - (e) the exclusive ability to use such assets as security for borrowing; and
 - (f) the exclusive entitlement to receive full, fair and objectively and independently assessed compensation for any infrastructure assets removed by legislation from the ownership (in particular, the rights of ownership outlined in (a)-(e), above) of such assets.

Second Cause of Action: declarations about public education Campaign

- 40 The Councils repeat paragraphs [1]–[38], above, and say further that:
- 41 In preparing and implementing the Campaign, the Secretary and the DIA are obliged to act lawfully.
- 42 It would be unlawful for the Campaign to include the publication of incorrect or misleading information in relation to:
- (a) the rights and obligations of local authorities under the law, including the LGA and as a quasi-fiduciary;
 - (b) the LGA principles of local democracy;
 - (c) the democratic accountability of local authorities; or
 - (d) the prudent management of Water Assets, and the provision of associated good quality services, by the Councils.
- 43 Accordingly, the Councils seek declarations that:

- (A) In preparing and implementing the Campaign, the Secretary and the DIA are obliged to act lawfully.
- (B) It would be unlawful for the Campaign to include the publication of incorrect or misleading information in relation to:
- (a) the rights and obligations of local authorities under the law, including the LGA and as a quasi-fiduciary;
 - (b) the LGA principles of local democracy;
 - (c) the democratic accountability of local authorities; or
 - (d) the Councils' prudent management of their Water Assets, and their provision of associated good quality services.

The plaintiffs also seek the following relief on each cause of action:

- costs; and
- any other relief the court considers just.

Dated 12 November 2021

This **STATEMENT OF CLAIM** is filed by **MICHAEL GARBETT**, solicitor for the plaintiffs, of the firm Anderson Lloyd. The address for service of the plaintiffs is at the offices of Anderson Lloyd, Level 12, Otago House, 477 Moray Place, Dunedin 9016.

Documents for service on the plaintiffs may be left at that address for service and must be:

- (a) posted to the solicitor at Private Bag 1959, Dunedin 9054; and
- (b) emailed to the solicitor at michael.garbett@al.nz and counsel at jack.hodder@chambers.co.nz.

SCHEDULE 1: PARTICULARS OF THE PROPOSALS

- A1 The Proposals include the following documents:
- A1.1 14 December 2020, CAB-20-MIN-0521.01 Minute: Progressing the Three Waters Service Delivery Reforms, Cabinet Office;
 - A1.2 14 December 2020, Cabinet Paper: Progressing the three waters service delivery reforms, Office of the Minister of Local Government (“**December 2020 Paper**”);
 - A1.3 May 2021, Department of Internal Affairs *Three Waters Regulatory Impact Assessment* (“**RIS**”);
 - A1.4 June 2021, Department of Internal Affairs *Transforming the system for delivering three water services: the case for change and summary of proposals* (“**Case for Change**”);
 - A1.5 June 2021, Department of Internal Affairs, “Local Dashboard” <app.powerbi.com> (“**Local Dashboard**”);
 - A1.6 14 June 2021, CAB-21-MIN-0226 Minute: A New System for Three Waters Delivery: Paper One, Cabinet Office (“**June 2021 Minute 1**”);
 - A1.7 14 June 2021, Cabinet Paper: A New System for Three Waters Service Delivery: Paper One, Office of the Minister Local Government (“**June 2021 Paper 1**”);
 - A1.8 14 June 2021, CAB-21-MIN-0227 Minute: Designing the New Water Service Delivery Entities: Paper Two, Cabinet Office (“**June 2021 Minute 2**”);
 - A1.9 14 June 2021, Cabinet Paper: Designing the New Water Service Delivery Entities: Paper Two, Office of the Minister Local Government (“**June 2021 Paper 2**”);
 - A1.10 14 June 2021, CAB-21-MIN-0228 Minute: Protecting and Promoting Iwi/Māori Rights and Interests in the New Three Waters Service Delivery Model: Paper Three, Cabinet Office;
 - A1.11 14 June 2021, Cabinet Paper: Protecting and Promoting Iwi/Māori Rights and Interests in the New Three Waters Service Delivery Model: Paper Three, Cabinet Office;
 - A1.12 18 October 2021, CAB-21-MIN-0419 Minute: Three Waters Reforms: Further Decisions; and

- A1.13 18 October 2021, Cabinet Paper: Further decisions on the three waters reforms.
- A2 The Proposals include the following changes to the manner in which water services are delivered:
- A2.1 four statutory water service entities will be established, with the Water Assets transferred to these entities;
 - A2.2 service delivery will be aggregated into these entities “in order to deliver scale efficiencies, address capability and capacity challenges... and enable investment to be delivered in a way that is affordable for communities” (June 2021 Paper 1 at [13.1]);
 - A2.3 the Water Assets will be owned and operated by the entities “on behalf of local authorities” (Case for Change at 2);
 - A2.4 local authority “ownership” will not provide any “level or form of financial benefit, such as a dividend”, nor will there be any financial benefit that reflects “different levels of investment in local authority areas over time” (June 2021 Paper 2 at [45.1] and [45.4]);
 - A2.5 “local authority ownership rights are... provided for in the oversight and governance arrangements” which apply to these entities (June 2021 Minute Two at [7]);
 - A2.6 local authorities “will have less influence over water service entities than currently... particularly in areas of governance, and operational and financial decision making” (December 2020 at [140]);
 - A2.7 local authorities will have “a joint oversight role” with mana whenua (Case for Change at 24);
 - A2.8 central government will be able to directly influence the entities strategic direction through a “Government Policy Statement”, and by means of ministerial direction on matters relating to their performance (June 2021 Minute 1 at [65]–[66]); and
 - A2.9 “consumer and community influence” is limited to consultation on “key strategies and plans” and via a “consumer forum” (Case for Change at 25).
- A3 The Proposals are premised on assumptions that:
- A3.1 Water Assets, and the ability of local authorities to deliver water services, face “significant challenges” and that these challenges can

only be met resolved by “major, transformational reform” (December 2020 Paper at [4]);

- A3.2 “information on the health and performance of three waters infrastructure has historically been limited and of variable quality” (Local Dashboard);
- A3.3 local authorities are unlikely to voluntarily address these challenges, and that “under the current arrangements most councils and communities will not have the funding or the operational capacity to eliminate the infrastructure deficit” (RIS at 5);
- A3.4 “advanced asset management is unlikely to be fit-for-purpose at a small scale... and resource constraints are barriers to improvement in smaller local authorities” (RIS at 41);
- A3.5 local authorities “operate in a political environment, in which investment decisions are made by elected representatives” so that investment decisions are made on a limited and suboptimal basis (June 2021 Paper 1 at [47]);
- A3.6 “councillors are elected to represent community interests, not for their governance skills — therefore, they may not have the mix of skills and experience needed to deliver best practice governance of these complex, critical water assets” (RIS at 43);
- A3.7 existing consultation and decision-making requirements imposed on local authorities “are not fit for purpose” in the context of reform of water services, and they are not fit for purpose because “councils are expected to take account of community interests” rather than national interests (December 2020 paper at [89]);
- A3.8 respecting existing community boundaries leads to “economic inefficiencies and capacity challenges, due to a lack of organisational scale, the dispersed nature of service delivery arrangements... and the inability to make strategic... decisions across district and regional boundaries” (June 2021 Paper 1 at [51.2]); and
- A3.9 reform of the manner in which the delivery water services is regulated is “unlikely to be successful” unless existing delivery of water services by local authorities is restructured (December 2020 paper at [19]).

SCHEDULE 2: PARTICULARS OF THE CAMPAIGN

- B1 The Campaign includes the following media:
- B1.1 A website specifically created for the Campaign <threewaters.govt.nz> (“**Three Waters Website**”);
 - B1.2 Webpages created by DIA for the Campaign <dia.govt.nz/Three-Waters-Reform-Programme>;
 - B1.3 A Facebook page specifically created for the Campaign <facebook.com/ThreeWatersNZGovt> (“**Facebook**”);
 - B1.4 a variety of YouTube advertisements and television advertisements (“**Video Advertisement**” — a version may be found at <https://www.youtube.com/>);
 - B1.5 newspaper advertisements featuring similar imagery to that used in the Video Advertisement; and
 - B1.6 information documents intended to summarise the Proposals in short form, including a “Frequently Asked Questions” document (“**FAQ**”).
- B2 The Campaign includes a variety of media intended to build community support for the Proposals:
- B2.1 Videos and images depicting existing Water Assets as anthropomorphised pipes that are “sick”, and which discharge green liquid unfit for human consumption (Video Advertisement);
 - B2.2 Public statements that New Zealand would have rivers “filthy with slime” and would be a “a stink as place” without the Proposals being implemented (Video Advertisement);
 - B2.3 Public statements that there are “nasties in the water” which prevent some communities from accessing “safe and reliable drinking water” (Three Waters Website — More Information);
 - B2.4 Public statements that the cost of upgrading Water Assets “is beyond the reach of most communities under the current arrangements” (Three Waters Website — More Information);
 - B2.5 Public statements that councils have failed to maintain Water Assets and will not take any steps to upgrade Water Assets, to the detriment of their communities. This includes specific statements that:

- (a) the average household water cost without reform by 2051, for ratepayers of the first plaintiff, would be \$5,030.00, but that the Proposals would only increase cost to \$1,640.00 in 2051 (Three Waters Website — Affordability);
 - (b) the average household water cost without reform by 2051, for ratepayers of the second plaintiff, would be \$4,060.00, but that the Proposals would decrease cost from \$1,860.00 (currently) to \$800.00 (in 2051) (Three Waters Website — Affordability);
 - (c) the average household water cost without reform by 2051, for ratepayers of the third plaintiff, would be \$3,000.00, but that the Proposals would only increase cost to \$1,640.00 in 2051 (Three Waters Website — Affordability);
- B2.6 Public statements that “Water Services will be Publicly Owned & Locally Managed” (Facebook Post 2 November 2021);
- B2.7 Public statements that the entities referred to at [A2.1] above “will be owned by councils on behalf of the communities they serve” (Facebook Post 7 October 2021);
- B2.8 Public statements that “The Government is not confiscating, buying or selling assets” and that the government is not “taking assets off of communities” (FAQ);
- B2.9 that “the right time” to consult communities about the Proposals is during a select committee process (Facebook Post 1 November 2021);
- B2.10 that the entities referred to at [A2.1] above will be more accountable to their local communities than local authorities, because the entities will have to “directly consult... at a level that will likely exceed the current requirements on local government” (FAQ); and
- B2.11 that “Local Priorities & Voices [are] Guaranteed” following the Proposals (Facebook Post 27 September 2021).