REMINDER: HIGH COURT ORDER PROHIBITING PUBLICATION OF CONFIDENTIAL INFORMATION AND NON-PARTY PUBLIC OR MEDIA FROM HAVING ACCESS TO THE COURT FILE OR ANY DOCUMENTS RELATING TO THE PROCEEDING HELD BY THE COURT AND SUBJECT TO CONFIDENTIALITY ORDERS MADE ON 24 JULY 2024.

ORDER PROHIBITING PUBLICATION OF UNREDACTED JUDGMENT EXCEPT TO THE PARTIES.

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2024-404-1590
[2024] NZHC 2623

UNDER	the Judicial Review Procedure Act 2016 and Part 30 of the High Court Rules 2016
IN THE MATTER	of an application for judicial review
BETWEEN	HOUKURA INDEPENDENT MĀORI STATUTORY BOARD Applicant
AND	AUCKLAND COUNCIL Respondent

Hearing: 24 July 2024 (further submissions received 16 August 2024)

Appearances: D M Salmon KC, Z Brentnall and D M Scholes for Applicant
S V McKechnie, Ms Wright and C J Ryan for Respondent

Judgment: 11 September 2024

[REDACTED] JUDGMENT OF WILKINSON-SMITH J

This judgment was delivered by me on 11/09/2024 at 3.30pm.
Pursuant to Rule 11.5 of the High Court Rules.

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Registrar/Deputy Registrar

Counsel/Solicitors:
D M Salmon KC, Auckland
Gilbert Walker, Auckland
Simpson Grierson, Auckland

Introduction

[1] Houkura Independent Māori Statutory Board (Houkura) applies for judicial review of the decision of Auckland Council (Council) to appoint Geoff Hunt as the chair of Watercare Services Ltd (Watercare) rather than [redacted].

[2] There are three grounds of review:

(a) the process by which the decision to appoint Mr Hunt was made breached the Council's standing orders;

(b) the Council failed to consider whether knowledge of tikanga Māori may be relevant to the governance of Watercare as required by s 57(3) of the Local Government Act 2002 (LGA); and

(c) the Council failed to consider the relationship of Māori and their culture and traditions with their ancestral land, water, sites, waahi tapu, valued flora and fauna, and other taonga as required by s 77(1)(c) of the LGA.

[3] Houkura seeks a declaration that the decision was unlawful. It asks for the decision be set aside and for orders that the Council take any steps necessary to formalise the removal of Mr Hunt as Watercare chair and to reconsider the original motion to approve the appointment of [redacted].

[4] The Council submits that the process which resulted in the appointment of Mr Hunt as chair of the Watercare board was not in breach of the standing orders and was otherwise lawful.

Background

[5] Watercare is a Council-Controlled Organisation (CCO) responsible for providing water and wastewater services to Auckland. It manages assets worth more than $15 billion. The Council has the power to appoint the board of Watercare and delegated that power to a Performance and Appointments Committee (Committee). The Committee consists of elected members including the Mayor and Deputy Mayor. It also consists of a Houkura member appointed on an ex officio basis.

[6] Houkura is an Independent Māori Statutory Board established as an independent body corporate by pt 7 of the Local Government (Auckland Council) Act 2009. Its purpose is to assist the Council to make decisions, perform functions and exercise powers by promoting cultural, economic, environmental, and social issues of significance to mana whenua groups and mataawaka of Tāmaki Makaurau and to ensure that the Council acts in accordance with statutory provisions referring to Te Tiriti o Waitangi/the Treaty of Waitangi (Treaty).

[7] On 12 March 2024, Council staff provided a report to the Committee advising of the need to recruit a new chair of Watercare. The recruitment process was subject to an appointment policy, the Appointment and Remuneration Policy for Board members of Council Organisations (Policy), which set out core competencies expected from all CCO boards. The core competencies set out in the Policy include:

(a) extensive and relevant experience of industries and customers relevant to the operations of the CCO;

(b) ability to uphold the principles of the Treaty, a readiness to promote improved outcomes for Māori and knowledge of Te Ao Māori and established Māori networks; and

(c) demonstration of appropriate accountability and responsiveness to the governing body and to the public and a commitment to public sector ethos.

[8] Specific criteria for the Watercare chair were also recommended by Council staff including strong governance experience with prior chair experience of significant organisations within the public sector; experience of the utilities industry (ideally water and wastewater); experience leading in a highly regulated industry; a track record of leading an organisation through change; and experience in the delivery of significant infrastructure and capital programmes, and management of a major asset portfolio.

[9] The report from Council staff to the Committee also noted that the chair must be able to lead Watercare's relationship with iwi. The Committee was alerted to the fact that there was a skills gap in Te Ao Māori on the Watercare board.

[10] The Committee approved the selection criteria and nominated a selection panel which included Mayor Wayne Brown together with the Council chief executive and the then Council chief of staff. The Committee also invited the Houkura chair, David Taipari, to serve on the selection panel. Mr Taipari withdrew prior to the interviewing stage and was replaced on the selection panel by Houkura deputy chair

Tau Henare. For reasons of urgency, the selection panel resolved to delegate the power to approve the criteria and shortlist candidates to a smaller panel comprising the Committee's chair, deputy chair, and the Houkura chair.

[11] On 21 May 2024, a short list of four candidates was approved which included [redacted] and Mr Hunt. The selection panel interviewed the candidates on 20 June 2024 and unanimously recommended that the Committee appoint [redacted] as the chair of Watercare. The selection panel report listed the candidates not recommended for appointment which included Mr Hunt. In relation to Mr Hunt the panel commented:

> Mr Hunt demonstrated that he would be very capable in the role of Watercare chair especially in relation to his experience with major infrastructure programmes, however, the panel felt that [redacted] had a more compelling overall mix of skills to lead Watercare through the major legislative change ahead.

[12] The Committee met on 25 June 2024 to consider the appointment of the chair of Watercare. Eight of the Committee's 11 members were in attendance.

[13] The agenda for the meeting included the item "Appointment of the Watercare Services Limited Chair". The purpose of the agenda item stated in the covering report was "to approve the appointment of the chair for [Watercare]".

[14] A report annexing the selection panel's report and recommendation that [redacted] be appointed was presented to the Committee. The report contained a Māori impact statement which noted that [redacted] identifies as Māori with whakapapa to [redacted]. The report stated that the Houkura representative on both the selection panel and Committee ensured that a Māori perspective informed the recommendation and decision-making. The other candidates were not referred to in the Māori impact statement.

[15] After the presentation of the report, Councillor [redacted] moved the following motion to appoint [redacted], as chair of Watercare:

> That the Performance and Appointments Committee:

a) whakaae / approve the appointment of [redacted] as chair of Watercare Services Limited for a term from 1 July 2024 to 31 October 2027, subject to [redacted].

[16] The motion was seconded by Councillor [redacted]. Members of the Committee then had an opportunity to ask questions. Councillor [redacted] attended the meeting for that purpose. There is no evidence of any questions being asked at that stage.

[17] Councillor [redacted] advised that he wished to move an amendment to the original motion to approve the appointment of [redacted]. The amendment replaced [redacted]with Mr Hunt as the proposed chair of Watercare subject to satisfactory completion of all due diligence (the Amendment). Councillor [redacted] seconded the Amendment.

[18] The evidence suggests the Amendment caused consternation at the meeting. Mr Taipari deposes that he told the Committee that he had a concern about Councillor [redacted]'s motion and that it was inappropriate and out of order because it was a direct negative of the motion already moved and seconded to appoint [redacted]. An amendment which is a direct negative to a motion is a prohibited amendment under the Council's standing orders.[1]

[19] Council staff present at the meeting sought advice about the Amendment from their team leader who was watching online. The discussion was not about whether the Amendment was a direct negative, rather it was about whether the original motion had to be debated before the Amendment or whether the Amendment should be voted on first. The team leader advised that the Amendment must be voted on first.

[20] Councillor [redacted]'s motion to amend was put to a vote and carried by [redacted]. The Amendment having passed, the amended motion was then treated as the substantive motion, reading:

That the Performance and Appointments Committee:

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1 Auckland Council Standing orders of the Governing Body 2015, SO 1.5.7.

> **a) whakaae / approve the appointment of Geoff Hunt as chair of Watercare Services Limited for a term from 1 July 2024 to 31 October 2027, subject to the satisfactory completion of all due diligence.**
>
> (bold in original)

[21] Councillor [redacted] moved the motion as amended and Councillor [redacted] seconded it in place of Councillor [redacted] who withdrew support for the motion. The motion to appoint Mr Hunt was carried [redacted].

[22] Following the meeting, Mr Taipari emailed Councillor Newman expressing his concern about what had occurred at the meeting. The Council through its lawyer responded to Mr Taipari that the Amendment was made in accordance with the Council's standing orders and that the decision to appoint Mr Hunt was one legally open to the Committee. Houkura asked the Council to pause the appointment process so that the matter could be reviewed urgently. The Council declined to do so. Houkura commenced judicial review proceedings.

[23] The Council subsequently announced the appointment of Mr Hunt as chair of Watercare.

Pleadings

[24] Houkura pleads three causes of action:

(a) Illegality — breach of standing orders.

(b) Illegality — first failure to take into account a mandatory relevant consideration (s 57(3) of the LGA).

(c) Illegality — second failure to take into account a mandatory relevant consideration (s 77 (1)(c) of the LGA).

Principle applicable to judicial review

[25] Judicial review proceedings relate to the exercise, failure to exercise, or proposed or purported exercise of a statutory power.[2] The Council has the sole power to appoint directors of Watercare pursuant to Watercare's constitution. This power is a "statutory power of decision" within the meaning of s 5(2)(b) of the Judicial Review Procedure Act 2016.

[26] Illegality is one of the three broad grounds of judicial review. Public bodies must exercise their statutory powers in accordance with the statutes which confer them. Where an empowering provision states that a factor is to be considered it is a mandatory factor. Failure to consider it means that the action is unlawful.[3]

[27] Judicial review is not an opportunity to review the merits of a decision. An applicant on review must identify an error of law, failure to have regard to a relevant consideration, or regard to an irrelevancy or procedural unfairness. The decision must be made with the benefit of adequate information.[4] The decision must be one a reasonable decision-maker could reach based on the available information.[5]

[28] Judicial review often turns upon close analysis of the statute that confers the power exercised. The meaning of a statutory provision must be ascertained from the language of the provision, read in context with the statute's purpose and informed by any relevant background material.[6] If the wording of a provision is ambiguous or unclear it should be interpreted to further the legislative purpose.[7]

[29] Relief in judicial relief proceedings is discretionary, although if an error is proven there must be strong reasons to decline to grant relief.[8]

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2 Judicial Review Procedure Act 2016, s 3.
3 *CreedNZ Inc v Governor-General* [1981] NZLR 172 (CA) at 181–183.
4 *O'Keeffe v New Plymouth District Council* [2021] NZCA 55 at [30] and [59].
5 *Sutton v Canterbury Regional Council* [2015] NZHC 313 at [34] citing *Petone Planning Action Group Inc v Hutt City Council* HC Wellington CIV-2006-485-405, 10 October 2006 at [36].
6 *Allied Concrete Ltd v Meltzer* [2015] NZSC 7, [2016] 1 NZLR 141 at [55].
7 *McKenzie v Attorney-General* [1992] 2 NZLR 14 (CA) at 17.
8 *Air Nelson Ltd v Minister of Transport* [2008] NZCA 26, [2008] NZAR 139 at [60]; and *New Health New Zealand Inc v Director-General of Health* [2024] NZHC 196 at [7].

Issues

[30] The issues are:

(a) Was the Amendment a direct negative and therefore prohibited under Standing Order 1.5.7?

(b) In making the decision to appoint Mr Hunt did the Council fail to consider whether knowledge of tikanga Māori may be relevant to the governance of Watercare?

(i) Is understanding or knowledge of "Te Ao Māori" synonymous with "knowledge of tikanga Māori"?

(ii) Having rejected the recommended candidate did the Committee have to consider whether knowledge of tikanga Māori may be relevant to the governance of Watercare before appointing Mr Hunt?

(c) Does s 77(1)(c) of the LGA apply to the decision under review and in particular:

(i) Was the decision a "significant decision in relation to a body of water"?

(d) If so, did the Committee fail to take into account the mandatory relevant consideration contained in s 77(1)(c) of the LGA?

Discussion

Was the Amendment a direct negative?

[31] Pursuant to the LGA, local authorities must adopt a set of standing orders for the conduct of their meetings and those of their committees.[9] Local authority meetings

[9] Local Government Act 2002, Sch 7, cl 27(1).

must be conducted in accordance with the standing orders and members of a local authority must abide by them. Standing orders govern local authority meetings as a matter of law.[10]

[32] The procedure for moving, seconding, amending, and substituting motions is contained in Standing Order 1.5. Standing Order 1.5.7 provides that every amendment must be relevant to the motion under discussion and any amendment that, if carried, would have the same effect as defeating the motion, is a direct negative and is not allowed.

[33] Houkura submits that, because the original motion was to approve the appointment of [redacted]as chair of Watercare, the Amendment to appoint Mr Hunt had the effect of defeating the original motion and was a direct negative. Houkura says that the original motion was not to appoint a chair of Watercare in the abstract but to appoint [redacted] as the chair.

[34] The Council says that rules against direct negative amendments are common in standing orders of public bodies; and that Houkura misunderstands the definition of a direct negative.

[35] There is very little guidance on what is meant by a direct negative. The New South Wales Legislative Council Practice contains the following definition:[11]

> An amendment must not be a direct negative of the question, 'as the proper method of expressing a contrary opinion is by voting against a motion without seeking to amend it'.[12] An amendment is only a direct negative if agreeing to it would have exactly the same effect as negativing the motion.

[36] In *Guide for Meetings and Organisations* by Nick Renton there is a discussion about amendments that constitute a direct negative.[13] The discussion is in relation to the relevance requirement, but gives an example that is on point:

DEFINITION

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10 *Goulden v Wellington City Council* [2006] 3 NZLR 244 (HC) at [45].

11 New South Wales Legislative Council Practice "Chapter 10 - Resolutions, Motions and Amendments" (2008) Parliament of New South Wales <www.parliament.nsw.gov.au>.

12 *Erskine May*, 23rd edn, p 398.

13 NE Renton *Guide for Meetings and Organisations: Volume 2: Guide for Meetings* (8th ed, Lawbook Co, Sydney, 2005) at ch 5.

> [5.1] An *amendment* is an alteration or proposed alteration to the terms of a motion, designed to improve the motion without contradicting it. It is brought forward by a person who is not content either to affirm or to negative the motion in its original form.
>
> [5.2] An amendment can be to leave some words out, or to leave some words out and insert others in their place, or to add new words.
>
> **FORM**
>
> …
>
> [5.5] An amendment must be relevant to the motion. Thus, in the motion:
>
> *That Mr Smith be given three months' leave of absence.*
>
> it would be in order to substitute "four" for "three", but not "Brown" for "Smith". However, relevancy depends on the circumstances and not on the form of words. For example, consider the motion:
>
> *That Ms Jones be appointed librarian*.
>
> An amendment to substitute "White" for "Jones" would be in order if the true object of this proposal was to deal with the librarianship, but not if the purpose was to find a suitable position for Ms Jones.

[37] The motion first proposed was that [redacted] be approved as chair of Watercare. The Council says that the broad purpose of the resolution set out in the agenda item was to appoint a chair of Watercare. The process logically started with a motion to appoint the recommended candidate because it had to start somewhere, but the Council's position is that the motion could be amended to propose a different candidate to fulfil the role. The Committee was not bound to accept the recommendation of the selection panel.

[38] The Council argues that the Amendment did not have exactly the same effect as negativing the original motion because it had the additional effect of appointing Mr Hunt. The Council submits that all amendments will, to some extent, negative the original motion because they are by definition proposing something different. The key is whether the amendment is proposing something which is in essence the same as voting against the motion; or proposing an alternative to achieve the same broad purpose of the resolution.

[39] There is no doubt the Amendment had the practical effect of preventing the appointment of [redacted]. In that sense, it did have the effect of defeating the original

motion. That, however, ignores the narrow application of the rule against direct negatives as illustrated by Renton. The example given by Renton is directly on point and although in no way binding, it is instructive. Where an amendment achieves the broad purpose of a resolution, the fact that it changes the way in which the purpose is achieved does not make it a direct negative.

[40] The agenda item in this case was the appointment of a chair for Watercare. It was not to find a new role for [redacted]. The original motion sought to achieve the appointment of a chair by appointing [redacted]. The purpose of the Amendment was not to stop a chair of Watercare being appointed. It was not even directly to stop [redacted] being appointed. It was to appoint Mr Hunt. An indirect consequence of that was that [redacted] would not be appointed. Where an amendment achieves the broad purpose of the motion, it is not a direct negative even though one aspect of the motion is defeated by the amendment. Such an amendment has a negative effect on that aspect, but it is an indirect consequence of the way in which the broad purpose is achieved.

[41] Houkura complains that there was a plan by a small number of councillors to support Mr Hunt as chair of Watercare rather than [redacted]. On the evidence that was undoubtedly the case. That evidence includes a text message from Councillor [redacted] to Councillor [redacted]. Councillor [redacted] sent the text message during the 25 June Committee meeting. The text message reads "Please don't leave until the vote is taken – otherwise [redacted] may get through." Houkura sought leave to admit the text message as new evidence. The Council did not oppose the admission of the text message but said it was not relevant to any issue to be determined and, if admitted notwithstanding the apparent lack of relevance, it should be given minimal weight.

[42] Houkura submits that the text message is evidence that Councillor [redacted]'s motivation in moving the Amendment was to prevent the appointment of [redacted] rather than to appoint Mr Hunt. Houkura says that the message demonstrates that the Amendment was a direct negative. I do not agree that the text message has any bearing on whether the Amendment was, or was not, a direct negative. That is a matter of statutory interpretation. The correct definition of a direct negative does not change

depending upon the motivation for proposing an amendment. If an amendment is a direct negative, it is prohibited regardless of the motivation for bringing it. If is not a direct negative, it cannot be transformed into one by the motivation of the proposer.

[43] Councillor [redacted] did not broadcast his intention to propose the Amendment. That was a political decision on his part but not an unlawful one. All members of the Committee were aware of the agenda item and had the opportunity to attend the meeting and to vote. If they chose not to attend the meeting, they lost the opportunity to vote.

[44] The Amendment was made because sufficient councillors voted for it. The appointment of Mr Hunt was made because sufficient councillors voted for it. The recommendation of [redacted] was just that, a recommendation. There was never any guarantee that the motion to appoint [redacted] would be passed. It was always subject to the usual political process including the potential for an amendment of the motion to propose a different candidate as chair of Watercare.

[45] The Amendment was not a direct negative, and as a result the first ground of review fails.

In making the decision to appoint Mr Hunt did the Council fail to consider whether knowledge of tikanga Māori may be relevant to the governance of Watercare?

[46] Section 57 of the LGA provides:

> 57 **Appointment of directors**
>
> (1) A local authority must adopt a policy that sets out an objective and transparent process for—
>
> (a) the identification and consideration of the skills, knowledge, and experience required of directors of a council organisation; and
>
> (b) the appointment of directors to a council organisation; and
>
> (c) the remuneration of directors of a council organisation.
>
> (2) A local authority may appoint a person to be a director of a council organisation only if the person has, in the opinion of the local authority, the skills, knowledge, or experience to—

(a) guide the organisation, given the nature and scope of its activities; and

(b) contribute to the achievement of the objectives of the organisation.

(3) When identifying the skills, knowledge, and experience required of directors of a council-controlled organisation, the local authority must consider whether knowledge of tikanga Māori may be relevant to the governance of that council-controlled organisation.

[47] Section 57(3) uses the word "must" which connotes a mandatory requirement.[14] It was added as an amendment to s 57 in 2019. Specific examples given by the Minister of Local Government in Committee of where tikanga Māori may be relevant to the governance of a CCO included Watercare.[15] That does not mean that the Council was bound to conclude that knowledge of tikanga Māori is relevant to the governance of Watercare. The obligation is only to consider whether such knowledge may be relevant.

[48] The Council argues that s 57(3) is a reference back to s 57(1) which is concerned with the development of a policy for the appointment of directors of a CCO. The Council says that the mandatory consideration in s 57(3) has no application to s 57(2). It says that s 57(3) should be interpreted as a requirement to consider whether knowledge of tikanga Māori may be relevant when setting the policy and criteria for appointment of directors of a CCO and not at the stage that a particular candidate is considered for appointment.

[49] The Council says that the requirement in s 57(3) was satisfied because the Committee turned its mind to the relevance of knowledge of tikanga Māori when setting the policy for appointment of directors of CCOs generally and when setting specific criteria for the appointment of the directors and chair of Watercare. The Council says this is demonstrated by the fact the Policy and criteria identified "knowledge of Te Ao Māori" as a core competency. The Council accepts that no consideration was given to knowledge of tikanga Māori, as distinct from understanding or knowledge of Te Ao Māori, but says that the two concepts are so

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14 *Dorbu v New Zealand Law Society* [2011] NZAR 174 (HC) at [14].
15 (26 September 2019) 741 NZPD 14525.

closely aligned that reference to understanding or knowledge of Te Ao Māori is indistinguishable from knowledge of tikanga Māori.

[50] The Council also agrees that, at the meeting on 25 June 2024 when Mr Hunt was appointed, the Committee did not consider whether knowledge of tikanga Māori may be relevant to the governance of Watercare when assessing if Mr Hunt had the requisite skills, knowledge, and experience. It says consideration was had to the relevance of Te Ao Māori when the policy and criteria were developed, and the s 57(3) obligation was discharged prior to the 25 June meeting.

[51] Houkura says that the Committee did not consider whether knowledge of tikanga Māori may be relevant at any stage either when setting the policy and criteria or when deciding to appoint Mr Hunt. That is because Houkura says that seeking candidates with an understanding or knowledge of Te Ao Māori is not the same as considering whether knowledge of tikanga Māori is relevant to the governance of Watercare.

[52] It is correct that the Policy for appointment of directors to CCOs sets out core competencies including "[to] uphold the principles of the Treaty of Waitangi, readiness to promote improved outcomes for Māori, knowledge of Te Ao Māori and established Māori networks."[16] At cl 8.7.1 of the Policy, under the sub-heading "Identification of skills, knowledge, and experience", it is stated that, once a vacancy has been established, the Committee will identify the skills, knowledge and experience required for the position including "whether knowledge of Tikanga Māori may be of relevance to the governance of the CCO (as required by s 57 (3) of the LGA)". This is the only overt reference to knowledge of tikanga Māori anywhere in the Policy or in the criteria for the board or chair of Watercare.

[53] The Policy adopted by the Council sets an expectation that the appointment process will consider knowledge of tikanga Māori as required by s 57(3) but that does not establish that such consideration actually occurred. The Council says the requirements of cl 8.7.1 of the Policy were satisfied in a series of meetings of the

[16] Appointment and Remuneration Policy for Board members of Council Organisations at cl 6.1.

Committee between August 2023 and March 2024 when the criteria for appointment of board members and for the chair of Watercare were decided.

[54] At meetings in November 2023 and February 2024, the Committee considered the criteria for appointment of board members generally and at a meeting on 12 March 2024, the Committee identified core competencies for the Watercare chair.

[55] The need for competence in Te Ao Māori and suitability to lead relationships between Watercare services and iwi were brought to the Committee's attention by Council staff. The criteria agreed by the Committee to assess candidates for suitability as a board member of Watercare included "understanding of Te Ao Māori and established Māori networks".

[56] The Māori impact statement in a report dated 14 November 2023 stated:

> 25. Kia ora Tāmaki Makaurau sets as a mahi objective that: "Mana whenua and Māori are active partners and participants at all levels of the council group's decision making". This objective is considered as part of the decision making for each of the confidential items on the agenda.
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> 26. An Independent Māori Statutory Board member is involved in the appointment process by being a member of the selection panel. This ensures that a Māori perspective informs the recommendations of the selection panel during the shortlisting, interviewing and appointment processes.
>
> 27. The Independent Māori Statutory Board is also represented on this committee. This ensures a Māori perspective is brought to the decision-making process, and that the Independent Māori Statutory Board's views are considered by the committee.

[57] The additional criteria for the appointment of the Chair for Watercare were set out in a report dated 12 March 2024.

[58] The Māori impact statement in the 12 March 2024 report stated:

> 24. Kia ora Tāmaki Makaurau sets as a mahi objective that: "Mana whenua and Māori are active partners and participants at all levels of the council group's decision making".
>
> 25. Watercare Services Limited has no current board members who identify as Māori. The board has ensured that Māori perspectives are considered in decision making by seeking additional advice from the Watercare Services executive.

> 26. Candidates who can add understanding of Te Ao Māori are sought through the ongoing director recruitment process and suitability to lead the relationships between Watercare.

[59] There is no reference to tikanga Māori in any of the reports. The references are to "Te Ao Māori and established Māori networks". The Council says that the lack of any specific reference to whether knowledge of tikanga Māori may be relevant, as distinct from Te Ao Māori, does not mean that knowledge of tikanga Māori was not considered. The Council resists any distinction between the phrases "knowledge of tikanga Māori" and "understanding of Te Ao Maōri" and says the language Council staff used in the reports to the Committee was "Te Ao Māori" because of the Council's understanding that Te Ao Māori encapsulates several Māori concepts including tikanga Māori. The Council suggests that the issue is one of semantics and the failure to use the word tikanga instead of Te Ao Māori is immaterial.

[60] The Council cites *Hugh Green Ltd v Auckland Council* where it was held:[17]

> it is not necessary for the decision-maker to list out, chapter and verse, every matter taken into account, for example, by referencing every individual plan section or provision considered. Nevertheless, the Court must be satisfied that the decision-maker *has* taken into account mandatory relevant considerations, even if not stated in the formal record of the decision …
>
> (emphasis in original)

[61] The Council also relies on *Henry v The Minister of Justice* where it was said:[18]

> [88] The issue is whether the Minister, having appointed a panel to advise him on selection by assessing [expressions of interest] and conducting interviews, was required to instruct the panel to take into account the desirability of promoting diversity in the membership of the Human Rights Commission. I consider that s 29(2)(b) did not require the Minister to give the panel an explicit instruction to this effect. The obligation is on the Minister to take this mandatory relevant consideration into account when recommending an appointment. The evidence indicates that diversity was a reason for having a panel, the panel members were very familiar with promoting diversity in a number of ways, given their public sector experience, and that the panel did, in fact, consider diversity in their deliberations on shortlisting candidates. In those circumstances, I do not consider there has been any breach of the Minister's obligation under s 29(2)(b).

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17 *Hugh Green Ltd v Auckland Council* [2018] NZHC 2916 at [228].
18 *Henry v The Minister of Justice* [2019] NZHC 1493.

[62] The Council says that the way in which the selection panel was comprised, which included a member of Houkura appointed ex officio, demonstrates the required consideration of whether knowledge of tikanga Māori may be relevant to the skills, knowledge and experience required of directors of Watercare. It says that the Committee plainly considered the relevance of tikanga Māori through the Policy it adopted, the references to Te Ao Māori in the criteria and the inclusion of a Houkura member on the selection panel. The Council submits it is not plausible that the Committee considered the relevance of Te Ao Māori without considering the relevance of tikanga Māori.

[63] Mr Taipari in his evidence for Houkura disputed the Council's position. He explained that tikanga Māori is the bedrock of the Māori world. Translated literally it means the "right" Māori way of doing things. It is a set of values, principles, understandings, practices, norms and mechanisms from which a person or community can determine the correct action. Te Ao Māori is generally translated as Māori world view. Tikanga Māori is an integral part of Te Ao Māori, but Te Ao Māori is a wider concept. Mr Taipari says that "knowing something about the 'Māori world' is no substitute for knowledge of tikanga". Houkura submits that seeking candidates with an understanding of "Te Ao Māori" is not the same as considering whether knowledge of tikanga Māori is relevant to the governance of Watercare.

[64] In *Tyler v Attorney-General* it was said that "Judicial review of the exercise of local authority powers is a standard and straight forward question of statutory interpretation."[19]. In enacting the amendment to s 57 of the LGA and adding s 57(3), Parliament specifically chose the phrase "knowledge of tikanga Māori". I do not accept the Council's position that understanding, or knowledge of Te Ao Māori is synonymous with knowledge of tikanga Māori. Knowledge of tikanga Māori is a more specific requirement. Simply identifying as Māori or understanding Te Ao Māori does not equate to a knowledge of tikanga Māori. In my view, the Council erroneously conflated the two concepts.

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[19] *Tyler v Attorney-General* [2000] 1 NZLR 211 (CA) at [23]. "Judicial review of the exercise of local authority powers is a standard and straight forward question of statutory interpretation." Per *Mackenzie District Council v Electricity Corp of New Zealand* [1992] 3 NZLR 41 (CA) at 43.

[65] A requirement in a statute to consider a particular matter requires giving "genuine attention and thought" to that matter although it does not mean that a particular recommendation must be accepted.[20] Where there is a statutory requirement to have regard to a particular matter, that matter may in the end be rejected or accepted only in part. It cannot however be "rebuffed at the outset by a closed mind so as to make the statutory process some idle exercise".[21] Had the Council given genuine attention and thought to the relevance of knowledge of tikanga Māori to the governance of Watercare, the distinction between the wider concept of Te Ao Māori and the more specific concept of knowledge of tikanga Māori would have been better understood.

[66] In circumstances where the Council does not accept that there is any distinction between Te Ao Māori and tikanga Māori, I cannot find that the mandatory relevant consideration in s 57(3) was given effect when the policy and criteria for appointment were developed. The distinction is important. In some organisations a general knowledge of Te Ao Māori might suffice. In others a more specific expertise in tikanga Māori may be relevant. That is what must be considered and was not considered in respect of Watercare. The Council cannot have given consideration to a requirement that it fundamentally misunderstood.

[67] I also do not agree that s 57(3) was irrelevant at the time that the Committee made the decision that Mr Hunt had the skills, experience, and knowledge necessary for appointment as chair of Watercare.

[68] The appointment of directors of a CCO is permitted by s 57(2) of the LGA which provides:

> (2) A local authority may appoint a person to be a director of a council organisation only if the person has, in the opinion of the local authority, the skills, knowledge, or experience to—
>
> (a) guide the organisation, given the nature and scope of its activities; and

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20 *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA) at 551.

21 At 551.

(b) contribute to the achievement of the objectives of the organisation.

[69] That section is immediately followed by s 57(3) of the LGA which provides:

> (3) When identifying the skills, knowledge, and experience required of directors of a council-controlled organisation, the local authority *must* consider whether knowledge of tikanga Māori may be relevant to the governance of that council-controlled organisation.
>
> (emphasis added)

[70] Section 57(3) was enacted by amendment to s 57 in 2019. The placement of the new subsection suggests that the mandatory consideration in s 57(3) was not intended to be limited to the policy setting stage. *Burrows and Carter Statute Law in New Zealand* says that, when amendments insert or add sections to a statute, "Normally this is done, in full accord with the textual method, by inserting the new sections in their appropriate place in the principal or target statute".[22] If it were intended that the new subsection would relate only to the development of the policy for the appointment of directors in general, it would more naturally be placed after s 57(1), which relates to the adoption of a policy, and numbered s 57(1A).

[71] The wording of s 57(1) is also incongruous with the interpretation which the Council seeks. Section 57(1) directs the Council to adopt a policy that sets out an objective and transparent process to identify and consider the skills, knowledge or experience required of directors, and for the appointment and renumeration of directors. Section 57(1) is not concerned with actually identifying the skills, knowledge, or experience of directors, it is concerned to mandate the adoption of a policy to do so. Section 57(2) by contrast is concerned with the assessment of whether a candidate has the necessary skills experience and knowledge to be appointed.

[72] By virtue of s 57(2) the Council may only appoint a candidate that it considers has the skills, knowledge, or experience necessary to guide the organisation and contribute to the achievement of the objectives of the organisation. In order to comply with s 57(2), the Council must assess the skills, knowledge, or experience of the prospective candidate. Section 57(3) makes sense as a requirement which applies at

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[22] Ross Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, Lexis Nexis, Wellington, 2021) at 886.

the stage that the Council makes the assessment of whether a candidate has the necessary skills, knowledge, or experience.

[73] Taking a purposive approach to statutory interpretation, I also cannot accept the Council's submission that s 57(3) has no bearing on s 57(2). The Council's interpretation would permit it to disregard the mandatory consideration at the stage it actually appoints a director of a CCO. Such an interpretation does not meet either the purpose of the provision or the Treaty obligations of partnership, good faith, and honest cooperation.

[74] In interpreting legislation New Zealand Courts presume that Parliament intends to legislate in accordance with the principles of all treaties to which New Zealand is a signatory.[23] In *Attorney-General v Mair* Baragwanath J said that New Zealand legislation is "presumed to conform with our obligations under treaties, of which the Treaty of Waitangi is paramount."

[75] In *Ngaronoa v Attorney-General* the Court of Appeal said that:[24]

> even where the Treaty is not specifically mentioned in the text of particular legislation, it may, subject to the terms of the legislation, be a permissible extrinsic aid to statutory interpretation.
>
> (footnote omitted)

[76] In *New Zealand Māori Council v Attorney-General* it was said that the Treaty enacts a relationship akin to partnership and central to this is the obligation of good faith, the obligation to work out answers in a spirit of honest cooperation.[25] Each party accepts a positive duty to act in good faith, fairly, reasonably, and honourably towards each other.[26]

[77] Section 57 (3) was enacted to make councils accountable to local communities and in particular to introduce some requirements to meet obligations to Māori. There is no requirement that a local authority prefers a candidate with knowledge of tikanga

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23 *Attorney-General v Mair* [2009] NZCA 625 at [85]–[88] per Baragwanath J dissenting.
24 *Ngaranoa v Attorney-General* [2017] NZCA 351, [2017] 3 NZLR 674 at [46].
25 *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 (CA) at 704.
26 *Te Rūnanga O Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301 (CA) at 304.

Māori but there is a requirement that it actually considers whether such knowledge may be relevant. Implicit in that is a requirement to actually understand what is meant by a knowledge of tikanga Māori.

[78] The mandatory consideration in s 57(3) may be delegated to a selection panel to perform. The Committee may rely on the selection panel having undertaken the mandatory consideration in recommending a particular candidate. If the Committee accepts the recommendation, it need not independently consider whether the candidate has the requisite skills, knowledge, and experience. Providing the selection panel has considered the relevance of tikanga Māori to the governance of the CCO before recommending the candidate, the requirement will be satisfied.

[79] In rejecting the recommended candidate, however, the Committee could no longer rely on the delegation of its obligations to the selection panel. In choosing a candidate that was not recommended the Committee could not proceed on the basis that the candidate necessarily met the requirements of s 57(2). The Committee had to independently consider whether it was satisfied of the requirements in s 57(2) including the mandatory consideration required by s 57(3). That required the Committee to give actual consideration to whether knowledge of tikanga Māori may be relevant to the governance of Watercare when deciding if Mr Hunt had the necessary skills, knowledge, and experience as set out in s 57(2). It would have been quite proper for the Committee to decide that it prioritised other skills over knowledge of tikanga Māori. But it could not ignore a mandatory consideration.

[80] It is clear, and accepted by the Council, that no consideration was given to whether knowledge of tikanga Māori may be relevant to the governance of Watercare at the time Mr Hunt was appointed. It follows that the Committee, in making the decision to appoint Mr Hunt on the delegated authority of the Council, failed to take into account a relevant mandatory consideration and the decision was unlawful.

Does s 77(1)(c) of the LGA apply to the decision under review?

[81] The third ground of review is that the Committee failed to take into account the mandatory relevant consideration contained in s 77(1)(c) of the LGA.

[82] Section 77(1) of the LGA provides that:

> (1) A local authority must, in the course of the decision-making process:
>
> (a) seek to identify all reasonably practicable options for the achievement of the objective of a decision; and
>
> (b) assess the options in terms of their advantages and disadvantages; and
>
> (c) if any of the options identified under paragraph (a) involves a significant decision in relation to land or a body of water, take into account the relationship of Maori and their culture and traditions with their ancestral land, water sites, waahi tapu, valued flora and fauna, and other taonga.

[83] The Council says that s 77(1)(c) did not apply to the decision to appoint the chair of Watercare because it was not a significant decision in relation to land or a body of water in terms of s 77(1)(c) of the LGA.

[84] Houkura submits that the decision appointing a chair of Watercare is a significant decision in relation to land or a body of water because Watercare is responsible for the construction and maintenance of water infrastructure. Houkura says that this involves the excavation of land both above and below sea level. As an example, Houkura cites the Central Interceptor Project currently being undertaken by Watercare which involves creating a 16-kilometre tunnel from Māngere to Herne Bay through the Manukau Harbour. Houkura also points to the fact that Watercare decides how fresh water is sourced, including where dams are built and whether water is required from the Waikato River. It manages the discharge of wastewater and is tasked with reducing wastewater overflows, including into the Waitematā and Manukau Harbours.

[85] Mr Taipari deposes that the identity of the chair is of particular significance to Māori as the chair is expected to engage personally with the iwi of Auckland — rangatira to rangatira. Houkura submits that any option for the achievement of appointing the next chair of Watercare involves a significant decision in relation to land and a body of water. Houkura says that the Committee was therefore required to take into account the relationship of Māori and their culture or traditions with their ancestral land, water sites, waahi tapu, valued flora and fauna and other taonga in assessing those options.

[86] Having found for Houkura in respect of the second cause of action, it is unnecessary for me to decide the third cause of action.

[87] I do, however, agree with the Council's position that s 77(1)(c) is not engaged merely because a matter is of particular significance to Māori.

[88] I further agree that the interpretation which Houkura argues for is inconsistent with the plain meaning of the section and with the scheme of the LGA. Section 60A of the LGA requires a CCO to take into account the relationship of Māori and their culture and traditions with their ancestral land, water, sites, waahi tapu, valued flora and fauna, and other taonga before making a decision that may significantly affect land or a body of water. The protection in s 77(1)(c) is not required at the stage that directors of CCOs are appointed because all CCOs are required to take into account the same matters when making a significant decision about land or a body of water.

[89] The LGA must be read as a whole, and the interpretation of s 77(1)(c) which Houkura seeks strains the apparent meaning of the section beyond what is necessary or justified.

[90] I do not agree that a decision appointing the chair of Watercare is a significant decision "about land or a body of water." It is a decision about governance of an organisation that will make such decisions.

Relief

[91] The Court has a discretion as to whether or not to grant relief. The default position is to grant relief and there must be strong grounds to refuse relief.[27]

[92] Houkura seeks the following relief:

(a) A declaration that the Committee's decision to appoint Mr Hunt was unlawful.

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[27] *Air Nelson Ltd v Minister of Transport*, above n 8, at [60].

(b) An order setting aside that decision and Mr Hunt's appointment as the chair of Watercare.

(c) Orders that:

(i) the Council takes any steps necessary to formalise the removal of the Watercare chair; and

(ii) once such steps have been taken, the Committee reconsider the original motion to appoint [redacted].

(d) Any other relief the Court sees fit and costs.

[93] The Council submits that the Court should exercise its discretion to decline to grant relief. It says that in judicial review proceedings public law remedies are discretionary.[28] The Council also resists the grant of relief because Houkura did not raise any objection on the grounds of illegality at the time the decision to appoint Mr Hunt was made. Further, the Council says because Houkura has a member on the Committee, it has democratic options available to it to pursue an outcome similar to the relief it seeks through the Court. The Council says that Houkura could seek to bring a notice of motion pursuant to Standing Order 2.5.1 which provides:

> **2.5.1 Member's notice of proposed motion**
>
> A member may give notice of a motion that the member proposes to move at a meeting.
>
> The member must:
>
> a) sign the notice of motion
>
> b) state which meeting he or she proposes should consider it
>
> c) deliver the notice to the chief executive at least five clear working days before that meeting.
>
> The member may provide background information to support the proposed motion.
>
> (See also Standing Order 1.9.1)

[28] *AJ Burr Ltd v Blenheim Borough Council* [1980] 2 NZLR 1 at 4.

[94] The Council also submits that the Court may decline relief where the remedy would prejudicially affect third parties.[29] The Council says that if relief were to be granted, prejudice would be suffered by Watercare and Mr Hunt. The Council says that Watercare is facing a period of significant regulatory change and any disruption to its governance should be avoided. Granting relief would also cause prejudice to Mr Hunt for reasons beyond his control.

[95] It is true that Houkura did not raise any objection to the Amendment on the basis of a failure to consider whether knowledge of tikanga Māori may be relevant to the governance of Watercare. However, I consider that the way in which the Amendment was raised did have an element of ambush about it and Houkura simply did not have sufficient time to formulate its objection to what was occurring. I consider that the Council created that time pressure.

[96] It is also correct that the Court should be slow to intervene in the democratic decisions of an elected body, particularly where there are democratic options available. In this case, however, the decision was unlawful because the Committee did not have regard to a mandatory relevant consideration. If relief is not granted that decision remains the status quo which could well influence any further democratic process. In my view, that would undermine Parliament's purpose in enacting the mandatory consideration.

[97] While the relief sought does cause prejudice to Mr Hunt as a third party and does create delay for Watercare, that is a feature of the Committee's decision to proceed with the appointment having been notified of Houkura's intention to review it.

[98] I agree, however, that the relief sought by Houkura is inappropriately directive in nature. In the circumstances I grant the following relief:

(a) The Committee's decision to appoint Mr Hunt is declared unlawful.

(b) The decision appointing Mr Hunt as chair of Watercare is set aside.

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[29] *Calvert & Co v Dunedin City Council* [1993] 2 NZLR 460.

[99] It is important to note that this decision is not about whether candidates with knowledge of tikanga Māori should be preferred over other candidates. This decision also says nothing about which candidate should be the chair of Watercare. That is entirely a matter for the democratically elected body to decide. This decision is purely about process. Local authorities must make decisions according to law. When Parliament mandates that a matter must be considered in the decision-making process that matter must be given real consideration whether it involves tikanga Māori or any other matter.

Costs

[100] Houkura is entitled to reasonable costs and disbursements. If the parties are unable to agree on costs, I make the following directions:

(a) any application for costs is to be made by memorandum to be filed and served within **20 working days** of the date of this judgment;

(b) any reply from the Council to be filed and served by memorandum within a further **10 working days**; and

(c) memoranda as to costs are **not to exceed five pages**.

[101] I will then deal with the issue of costs on the papers.

Wilkinson-Smith J