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LEGAL OPINION

Client:	**Democracy Action**
Date:	**21 July 2022**
Subject:	**Water Services Entities Bill, clause 201: purported preservation of status quo on legal ownership of water**

SUMMARY

1. Democracy Action asked whether *clause 201 – Rights or interests in water preserved* of the Water Services Entities Bill ("**Bill**') changes the common law position that no one owns the water.

2. Minister for Local Government, Nania Mahuta has stated –

> *"The reforms that we're putting through is not about ownership rights or interests in water, it's about service delivery, and infrastructure…In fact this first bit of legislation going through the house has a preservation clause to make that quite clear" [Press Conference, 10 June 2022]*

3. The "preservation clause" in s201, as drafted does not protect existing rights and interests in water. Subsection (3) expressly subordinates them to the "performance or exercise by any person of, any duty, function, or power under this Act".

4. That means the so-called 'preservation' which appears from a casual glance to protect at least the status quo uncertainty about who owns water, may in fact have the opposite effect. It may preclude a court from applying the current law (which holds that no own owns flowing fresh water)to limit undefined iwi powers to determine what is meant by Te Mano o te Wai. The Bill does not contain criteria for exercise of those powers. The 'preservation' provision may limit a court's ability to confine the obligations to respect Te Mano o te Wai statements, of the new entities and their complicated governance bodies, so as respect older rule of law expectations, such as citizen equality of rights to use, enjoy and share practical control of water provided under the management of the new entities.

5. The preservation paragraphs are also puzzling. They contain ambiguities that may be significant, or merely a consequence of poor drafting. Paragraph 201(1)(a) refers to alleged 'assurances' given by a lawyer for the Crown in a decade old case before the Supreme Court. Neither the Bill nor the Supreme Court judgment paragraph cited in the Bill provision, contain enough information to know what those assurances might be.

6. It is possible that more information may be found in a written record of the lawyer's submission, in the Court file. Or it may be that the reference to the submission is thought to be of no practical importance. Conceivably it is a casual use of Parliament's law-making function to flatter someone who thinks the Crown made a significant concession in the case, which will be understood only by those involved.

7. Whatever the reason for the inclusion of the case reference in the provision, it is obscure and potentially dangerous (because it may require judges to invent significance for it). The full intent of the reference should be spelt out, or it should not remain in the Bill.

8. It is possible (though we think almost too indirect to be realistic) that an intent of the case reference is to justify protection for Maori interests in fresh water, which is not extended to non-Maori interests. That would allow courts to enable preferential treatment of Maori with consequential derogation for non-Maori, without conflict with the purported preservation of the status quo.

9. It is bizarre to embody in statute that incidental reference to a lawyer's submission. It treats it as if it contains some foundational admission or carefully considered concession. On the face of the judgment paragraph the submission is entirely unremarkable. The Court did not appear to give it any particular significance. It was not tested forensically or even with the kind of historical examination the Waitangi Tribunal would give to significant propositions. The judgment gives no indication that it was even contested. It did not involve a water rights question before the Court. The Court did not adjudicate on any element of that statement, and nor was it called upon to do so. It says nothing that has not been in active discussion for years (including in the Land and Water Forum).

The Bill

10. The purpose of the Bill is to establish the water entities to manage New Zealand's water services infrastructure, in implementation of the Government's Three Waters scheme. The entities will own the infrastructure. This Bill does not transfer any three waters assets from the current owners of the assets (local authorities) to these entities. The actual transfer will be contained in an amendment bill scheduled for introduction later this year.

11. Clause 201 of the Bill concerns rights and interests in water itself, rather than the infrastructure used in three water services. It states –

> **201 - Rights or interests in water preserved**
>
> *Purpose*
>
> (1) The purpose of this section is to achieve both of the following outcomes:
>
> (a) any rights or interests in water are preserved, consistent with assurances given by the Crown to the Supreme Court in 2012, and recorded in *New Zealand Māori Council v Attorney-General* [2013] NZSC 6, [2013] 3 NZLR 31 at [145]:
>
> (b) this Act, and duties, functions, and powers under this Act, operate effectively.
>
> *Act does not create, transfer, extinguish, or limit rights or interests*
>
> (2) No legislation in or made under this Act—

(a) creates or transfers any proprietary right or interest in water:

(b) extinguishes or limits any customary right or interest (for example, one founded on, or arising from, aboriginal title or customary law) any iwi or hapū may have in water.

Nothing in section affects duties, functions, and powers under Act

(3) Nothing in this section affects, or affects the lawfulness or validity of the performance or exercise by any person of, any duty, function, or power under this Act.

12. Notably the section purports to preserve "rights or interests in water", not just ownership of water.

POSITION AT COMMON LAW

13. At common law no one has ownership in freshwater. *Embrey v Owen (1851) 6 EX 353* is commonly cited to express that common law position –

> *"Flowing water is publici juris in this sense only, that all may reasonably use it who have a right of access to it, and none can have any property in the water itself, except in the particular position which he may choose to extract from the stream and take into his possession, and that during the time of possession only."*

14. The Court of Appeal case *Attorney-General v Ngati Apa [2003] 3 NZLR 643* revived in New Zealand the power of that common law principle in support of native title doctrine. A recent Environment Court case report shows its current force. In *Te Whanau a kai trust v Gisborne District Council* [2021] NZENVC 115 the Court held that -

> *"It remains an open question as to whether native title extends to freshwater. This particular issue is yet to be directly addressed in New Zealand by a Court of competent jurisdiction. The Ngati Apa case and the Paki cases make clear that English common law presumptions to ownership of the foreshore and seabed or the beds of rivers do not act to displace Maori customary property interests where evidence establishes that they are in place. A key issue is whether any Maori property rights that may be recognised pursuant to the doctrine of native title would have the effect of displacing the English common law presumption that flowing water is a public right, meaning that a riparian owner has no property in the water flowing through or past the land but is entitled only to the use of it as it passes for the enjoyment of his or her property."*

15. In August 2019, the Waitangi Tribunal stated in a report on a claim relating to commercial water bottlers, that Maori have rights over fresh water in New Zealand (detailed below). Tribunal decisions are not generally binding. They may contain recommendations to the Crown.

16. Additionally, there may be rights and interests in water that may not be akin to ownership. It is fair to summarise the current state of the law as uncertain. There is no authoritative judicial precedent to displace or over-rule the historical position that flowing freshwater cannot be

owned. Nor is there legislation that directly addresses the issue generally. Successive governments and some court decisions have made statements acknowledging the possibility of creation or "recognition" of ownership rights in fresh water, but all are consistent with a view that it will represent a change in the law.

17. Accordingly, no one has clear ownership rights in water that is free-flowing. The most likely interests or rights will arise for:

    17.1. those who can establish a claim of customary title;

    17.2. those who have water abutting to their land (riparian rights); and

    17.3. those who have extracted the water.

NEW ZEALAND MAORI COUNCIL v ATTORNEY-GENERAL

18. This case, referred to in Clause 201(1)(a) of the Bill, concerned the proposed removal of Mighty River Power Limited from the State Owned Enterprises Act, and the sale of 49 per cent of its shares to private investors. The NZ Maori Council argued that the decision to do so by the Government was not consistent with Treaty of Waitangi principles and that the sale of shares would materially prejudice Maori claims to water. In this particular case, the body of water at issue was the Waikato River. The Supreme Court held that the Government decision was reviewable for consistency with Treaty of Waitangi principles but the partial privatisation of Mighty River Power Ltd did not materially impair the Crown's ability to repair any Treaty of Waitangi breaches in respect of Maori interests in the Waikato River.

19. When a court considers application of a statutory provision it relates that application to the specific issues before it. This case was on the interpretation and the use of powers under two Acts, the State Owned Enterprise Act and the Mixed Ownership Amendment Act. It was not a case defining rights in water. Our courts try to avoid deliberating on hypotheticals. Interests and rights in water remain hypotheticals to this day.

20. The position of the Crown is referred to in the judgment from paragraphs 99 – 145. However Clause 201(1)(a) of the Bill only refers to paragraph 145 of the judgment. It is not set out in the Bill, but reads –

> *"Mr English summarised the Crown position as being that it acknowledges that Maori have "rights and interests in water and geothermal resources". Identifying those interests is being addressed through the "ongoing Waitangi Tribunal Inquiry" and a number of "parallel mechanisms". The Crown position is that any recognition must "involve mechanisms that relate to the on-going use of those resources, and may include decision-making roles in relation to care, protection, use, access and allocation, and/or charges or rentals for use. Currently the Ministry for the Environment has responsibility for progressing policy development around these issues. The Court should accept that is not an empty exercise."*

21. That paragraph of the judgment followed a long description of the claims of the appellants (that the partial privatisation would prejudice the Crown's ability to concede water ownership) and the Crown (that it would not, and that there were many avenues for resolution of competing interests). The judgment's report of the position does not show any concession past what had long been acknowledged, that somewhere rights and interests were likely to be found or created, that the nature and extent and eventual attributes of them were in current contention and that the Government was addressing them.

22. The Crown's position on the ownership of water is reported in paragraph 99 of the Supreme Court judgment. We set out that paragraph in full because it gives vital context -

> *The Crown's general negotiating stance has been set out in what is known as the "Red Book", a publication to inform Maori about the settlement process. To date the Crown has not been willing to negotiate for recognition of Maori property in water or for commercial redress in relation to any interference with it in the development of generating capacity. The relevant passage in the Red Book is as follows:*
>
> > *"**New Zealand law does not provide for ownership of water in rivers and lakes***
> >
> > *As noted earlier, the Crown acknowledges that Maori have traditionally viewed a river or lake as a single entity, and have not separated it into bed, banks and water. As a result, Maori consider that the river or lake as a whole can be owned by iwi or hapū, in the sense of having tribal authority over it.* ***However, while under New Zealand law the banks and bed of a river can be legally owned, the water cannot. This reflects the common law position that water, until contained (for example, put in a tank or bottled), cannot be owned by anybody****. For this reason, it is not possible for the Crown to offer claimant groups legal ownership of an entire river or lake – including the water – in a settlement."*
>
> *(emphasis added)*

23. The purpose stated in cl 201(1)(a) of the Bill is accordingly puzzling. As reported in the case judgment, what the clause in the Bill calls an "assurance" was simply counsel's explanation to the Court why one of the grounds for the NZ Maori Council's application (to hold up the privatisation) was baseless. It was to negate the claimed need for an interim order to stall the partial privatisation. There is no assurance with any material continuing effect.

24. The court referred to the Crown lawyer's statement as a summary, presumably of a more lengthy description of the processes detailed at greater length in the preceding paragraphs of the judgment.

25. It is unusual in legislation to refer to submissions made to a court case. It is particularly unusual to treat them as if they somehow stated the law. Submissions are part of the record of the court but do not form part of our common law unless they are upheld in the Court's decision. In the *NZ Maori Council* case, the Supreme Court in paragraph 146 referred to the

preceding material as "background" to its decision (whether redress was materially affected). It did not acknowledge the Counsel submission reported in paragraph as an assurance, and it did not generally comment on the validity of the submissions.

26. In trying to understand obscure or seemingly empty words in legislation, courts will look to context for guidance. They have to assume that Parliament intends what it seems to say. Lawyers will scour the legislation for clues. For example, paragraph 145 refers only to interests and rights of Maori. Paragraph 99 in contrast, refers to interests and rights beyond Maori. But such distinctions do not answer the questions.

27. On the face of it, s 201(1)(a) states that "any rights or interest in water are preserved" which would preserve any rights or interests regardless of their origin. However, this is qualified with "consistent with assurances given by the Crown in the Supreme Court in 2012".

28. That requires us to know what those assurances were. We do not know. We have not found the submissions of Counsel for the Crown in internet searching. If they are to be casually 'confirmed' or adopted by Parliament, as this clause seems to intend, we should all know just what those assurances might be, if they go further than the uninformative and apparently spent terms of paragraph 145. The Bill's explanatory note offers nothing extra.

29. Sub clause (a) adds what is probably intended to be a further qualification "and recorded in New Zealand Maori Council v Attorney-General [2013] NZSC 6, [2013 3 NZLR 31 at [145]". That seems to mean that the assurance is what is set out at paragraph 145 of the judgment. But as explained above, there is no pertinent assurance. Certainly not one of the kind of weight that needs or justifies reinforcement in statute. So it may be argued that the case reference and paragraph are just identifying detail, and they do not qualify the width of the reference to what Counsel for the Crown may have said.

30. A second, though less likely interpretation is that the case reference is additional. That the primary assurance is what the Court was told, in all its unrecorded detail, and the third limb of the description merely adds the paragraph 145 elements, as weak as they may be.

31. In summary, it is arguable that the second qualification "and recorded" is consistent with the primary source of the legal position being the Crown's unpublished submissions. On that view the Bill's reference to what the Supreme Court recorded in paragraph 145 is merely a direction to that submission.

32. The assurances given by the Crown were apparently in relation to protection of Maori rights or interests, and those summarised at paragraph 145 were specifically so. It is arguable therefore that the Act works to preserve the rights and interests of Maori, but does not provide the same protection to non-Maori rights and interests.

FORM OF CLAUSE CAUSES CONFUSION

Use of reference to Supreme Court submission

33. There is a general rule of law principle that law should be accessible. The Crown submissions in the case are not accessible. Rule 8 (1) of the Senior Courts (Access to Court Documents) Rules 2017 states that every person has the right to access the formal court record relating to a civil proceedings. However, to exercise this right there is an application process to be followed. Submissions are not automatically publicly accessible.

34. On the most limited interpretation of cl 201(1)(a) the law is accessible. If the "assurance" is only what is contained in paragraph 145, it is accessible. But that is too anodyne or trivial to be worth recording in statute. For the provision to be important enough to warrant embodiment, it must mean more. Therefore, a person wanting to understand their rights and interests cannot merely read the Bill. They need the case, and probably also access to court files. The submissions referred to in the judgement (and Bill) are not currently in the public domain.

35. Additionally, submissions are usually extensive and it could be difficult for a person to determine exactly which parts of the submissions may apply as consistent with their interests and which may not.

36. The Bill appears to mischaracterise the status of the Crown's submissions. As we read the judgment, the Crown did not provide "assurances" in their submissions. They stated the Crown's position and the process followed for Treaty negotiations. This case was not directly on the question of general rights in water so the position was untested. The Bill in its effect seems to elevate the Court's recital of the circumstances first into obiter dictum (what is expressed by a judge but is not essential to the decision) and then statutorily give a kind of deemed status as precedent or a declaration of law. From the Bill alone a reader might be forgiven for assuming the "assurance" was legally binding or bargained consideration or a quid pro quo for the decision. That kind of significance is not indicated in the judgment.

37. This unusual statutory elevation of the status of the submission strengthens the need for access to the full submissions to determine the implications of the proposed statute, for their rights and interests.

38. If the submission is confined to what is set out in paragraph 145 of the judgment, it was not a Crown concession. If there is any element of "assurance" in the paragraph, it was that the Government's policy processes to develop ways to recognise interests in water "was not an empty exercise". Is that the "outcome" the Bill is to enshrine? We can see no basis for anything more in the nature of preservation of "rights or interests in water".

DEVELOPMENTS SINCE 2012

39. There have been legal developments regarding water rights and interests over the last decade. The following does not provide a full outline of these developments but it shows that the position now is not the same as when it was considered in *NZ Maori Council*.

40. Maori may argue that reverting to a position statement in 2012 dismisses the development of the Treaty of Waitangi jurisprudence since then. Notably, in 2017 the Te Awa Tupua Act granted legal personality to the Whanganui River. This was in resolution of a longstanding dispute between Whanganui Iwi and the Government. Assigning legal personality

acknowledged that Whanganui Iwi had some rights and interests in the river, but avoided determining whether they amounted to ownership. Instead it established that the River would have two guardians; a Government and Whanganui Iwi representative.

41. In 2019, the Waitangi Tribunal released the Stage 2 Report on the National Freshwater and Geothermal Resources Claims (the Stage 1 Report being a precursor to the *NZ Maori Council* case). The Tribunal concluded that the Resource Management Act was a breach of the Treaty and as a result a number of the features of the RMA relating to freshwater were also a breach. Some of these findings have reportedly been incorporated in to the development of the RMA reform bills that are scheduled for introduction to Parliament later on this year (which is likely to be at the same time as this Bill is going through its final stages of enactment).

42. Additionally, there has also been significant attention to the rights and interests of water bottlers. In the High Court appeal of *Te Runanga o Ngati Awa v Bay of Plenty Regional Council, Ngati Awa* challenged the decision by the Council to allow a water bottler, Creswell, to extract water from the Otakiri aquifer and to expand their bottling plant. The case focused mostly on environmental issues however the Court acknowledged that water is a taonga and Otakiri was in an area of particular significance to Ngati Awa. However, the Court found that the extraction of the water would "not unreasonably prevent the exercise of kaitiakitanga".

43. There have also been developments for non-Maori rights and interests in water. The Water Services Act 2021 provided the new regulatory framework for drinking water safety, assigns responsibilities to "owners" of water supplies. It does not explicitly state that an "owner" has the rights of ownership over the water supply. However, the definition of ownership in section 12 of the Water Services Act, relies on "effective control" in a way that recognises the practical reality that people use water in ways that express the bundle of rights that normally identify ownership, including of the extracted freshwater.

Inherent inconsistency of the Bill

44. Section 201 purports to protect the current interests and rights in water. However, other sections of the Bill create new interests and rights in water assets or extinguishes them. As an example:

    44.1. section 15(2) changes the interests and rights of a territorial authority from one of current ownership of specific assets to one of "co-ownership" based on a population share allocation;

    44.2. section 27(3) creates new governance roles for mana whenua representatives on the regional representative group; and

    44.3. section 140 provides mana whenua, whose rohe or takiwa includes a freshwater body in the service area of a water services entity to provide such entity with a Te Mana o te Wai statement.

45. The attribution of mana whenua with authority over water in their rohe is a conspicuous establishment of practical powers of control. The Bill is unclear about the extent of mana whenua authority. The effect of mana whenua status is variously described or cited in the

Three Waters scheme Cabinet Papers, the Bill and the Water Services Act 2021. It entitles mana whenua representatives to demand that secular authorities respect values that would until recently have been seen as spiritual and matters of unenforceable personal preference. Mana whenua status and Te Mana o te Wai statements support new and vague obligations of Taumata Arowai and the four new service entities to have regard to or to give effect to or to implement the wishes or instructions of bodies empowered to assert, define (or invent) the obligations.

46. The Regulatory Impact Assessment for Three Waters (May 2021) at paragraph 35 states –

> *"However, Te Mana o te Wai can only be achieved when the relationship of tanga whenua to water is recognised and provided for."*

47. In our opinion it is fair to say there are now so many existing and proposed repetitions of obligations to respect claims about Te Mana o te Wai, that they may be characterised as an accrual for iwi of important elements of the "bundle of rights" that define ownership.

48. They have more importance than they would if the law was clear about ownership of water. The law continues to deny that anyone can own fresh water. It was essentially a fiction, applying the bundle of rights analysis or description of ownership. The Crown and its delegates (e.g. local authorities) exercised practical power to control water uses that were effectively akin to an impaired form of ownership. Courts recognised that, noting that the Crown assumption of authority to govern electricity generation, to issue miners rights, to regulate uses and discharges, involved rights that underscore the exclusion of ownership to those without such rights. Such use rights have been recognised by the courts as sufficient in impact to show that common law rights were superseded at least to the extent that any common law rights were inconsistent with the use rights.

49. It might have been expected that with normal evolution, and a practical view of ownership on the bundle of rights approach, by now our law would have recognised that fresh water was in fact capable of being owned, and that de facto ownership rights were evident in many places. Instead, over the past two decades, successive governments have made statements denying that they, or anyone, owns water. .

50. The result is a vacuum. The official emphasis on there being no ownership of water has been widely acknowledged as untenable as a long term position. Practice has assumed that local authorities and government agencies with powers to administer and allocate water right can act like owners. Now those powers are subject to somewhat inchoate duties to consult and have regard to competing iwi expressions of will, with asserted mana whenua rights. The Crown refusal to assert ownership leaves a vaccum into which the new iwi rights can grow.

NO PROTECTION PROVIDED

51. The Bill deals with rights and interests in three waters assets. Section 201 purports to deny any effect on ownership of water. But subsection (3) subordinates that protection to the exercise of powers in the Bill. Bodies created to deal with water must necessarily act as if they

own the water they use, temporarily perhaps. The purported denial of any effect on "ownership" of water has limited effect to that extent.

52. There is a wider and probably more significant derogation from the apparent protection. Under s 140 interests and rights in a geographical area that contain freshwater give specified mana whenua a new interest in the water assets. Section 140 prevails over the assurance in subsection 201(2) by virtue of subsection 201(3). Subsection (3) states –

> Nothing in this section affects, or affects the lawfulness or validity of the performance or exercise by any person of, any duty, function, or power under this Act.

53. This means that should an entity or anyone acting under powers in the Bill, take an action that changes a right or interest in water, clause 201 cannot be used to challenge that action.

54. For example, immediately after the purported preservation (in clause 201) of the ownership status quo, clause 202 of the Bill entitles mana whenua whose rohe or takiwa includes a freshwater body to provide a Te Mana o te Wai statement for water services. There is no limit to the number of statements an entity must refer to but they must respond to them with a plan that sets out how they will give effect to them. Should such a plan impact a person's rights or interests in water (Maori or non-Maori) section 201 will not provide protection.

55. In New Zealand's recent past, the potential for use of Te Mana o te Wai powers to create plans would have attracted sustained lawyer criticism. The Water Services Act and this Bill empower them to be used without limiting criteria. There are no carefully articulated constraints to reduce the risk that in practical effect they operate as Henry VIII provisions, delegations of what is effectively a legislative power. Henry VIII provisions are generally considered to be constitutionally undesirable. New Zealand now has a structured mechanism for review and control of powers conferred in subordinate legislation. No such protections against abuse (or even against the facilitation of corruption) have been specified for Te Mana o te Wai statements.

CONCLUSION

56. Clause 201appears to state that the Bill will leave any existing water rights or interests undisturbed. However, the reference to a submission in a case a decade ago creates uncertainty. It is carelessly, or deliberately obscure. The obscurity or ambiguity is dangerous. A court may be obliged to interpret the clause in ways that –

    56.1. Deny equality to non-Maori and Maori rights and interests in water;

    56.2. Demand judicial creativity, in a way that could allow the expansion of rights and interests by Maori in water and three waters assets outside the control of Parliament;

    56.3. Will be unexpected, given that we have not seen the inaccessible submissions that could be held to hold the substance of the alleged assuranc

57. *Clause 201 – Rights or interests in water preserved* also contains subclause (3) that can negate most of whatever preservation is purported by subclause (1). Clause 201 does not protect existing rights and interests in water. Subclause (3) may leave some operation for subclause (2) but it does not prevent exercises of power under the Act that fall short of "legislation in or made under this Act" from creating or extinguishing rights and interests in water that could amount to ownership.