21 July 2022

Finance and Expenditure Select Committee
New Zealand House of Representatives

SUBMISSION ON THE WATER SERVICES ENTITIES BILL

About the Submitter

1. Founded by David Farrar and Jordan Williams in 2013, the *New Zealand Taxpayers' Union* mission is *Lower Taxes, Less Waste, More Transparency.*

2. We enjoy the support of more than 195,000 registered members and supporters, making us the most popular campaign group championing fiscal conservatism and transparency. We are funded by more than fifteen thousand donors with approximately five percent of our income from membership dues and donations from industry.

3. We are a lobby group not a 'think tank' or business association. Our grassroots advocacy model is based on international taxpayer-group counterparts, particularly in the United Kingdom and Canada. Our equivalent campaign organisations on the left, including Australia's Get Up, New Zealand's ActionStation, and Greenpeace.

4. The *Union* is a member of the *World Taxpayers Associations* – a coalition of taxpayer advocacy groups representing millions of taxpayers across more than 60 countries.

5. In developing this submission, we actively engaged with thousands of our members and supporters around the country. That includes a nationwide roadshow tour with 44 stops / events over a four-and-a-half-week period in June/July 2022. Peter Williams, former broadcaster who sits on our Board, spoke at a number of the events in the lower South Island. His Speech is available at https://www.youtube.com/watch?v=yZrmt-ooFO8&t=11s.

6. We have facilitated more than 55,000 individual hard-copy submissions to the Select Committee on this Bill using an online submission tool to encourage participation in this important policy debate, and note that more than 7,800 of those submitters wish to be heard by the Committee.[1]

[1] We note the Committee's decision not to accept emailed submissions on this Bill – requiring use of either the Parliamentary website, or post/delivery of hard copy submissions. As the Parliamentary website does not appear to have a API, we have delivered print outs of the submissions. For administrative efficiency, we are happy to provide the Committee's secretariate digital versions, and a spreadsheet of those who have asked to speak to their submission in person.

Level 4, 117 Lambton Quay, PO Box 10518, Wellington 6143

TAXPAYERS' UNION

Summary

7. The Union agrees some action is justified to improve the management of the locally owned water service assets but is totally opposed to the proposals contained in the Bill and recommends the Bill not be passed.

8. We give permission for the Committee to publish this submission, and wish to speak to it.

9. We also recommend the Committee conduct hearings around the country because the Bill:

    (a) is of national importance; and

    (b) with Covid, it is unreasonable to expect everyone to travel to Wellington to have their voices heard.

Policy conception illegitimate

10. The Three Waters assets were built, owned and operated by New Zealand's local authorities since they were created, post 1840.

11. The Government's proposals amount to a form of nationalisation without proper compensation, as would happen under the Public Works Act (see s.60, Basic Entitlement to Compensation, Public Works Act 1981).

12. Not only is it expropriation of community assets, the policy making process was deceitful, in that local authorities were told acquisition by the Crown of the assets would not be compulsory, when at the same time Cabinet was proceeding on the basis it would be compulsory.

13. This deceit was compounded by locking Local Government NZ into an agreement that it would not oppose the outcome of the 2021 "consultation" process, itself a total farce. The policy conception was thus entirely illegitimate and completely fails the transparency test we expect from the Government. At the same time it seriously damaged the credibility of LGNZ.

Three Waters promotion plainly dishonest

14. The advertising on TV and elsewhere in 2021 was simply dishonest. It linked the failures consumers experienced a few years ago in Havelock North, with the case for confiscating the assets of local authorities worth something in the vicinity of $100 Billion.

15. Drinking water quality is now handled by the *Taumata Arowai* established by statute before the advertising for nationalisation. This advertising was rightly criticised by the Public Service Commission. Heads should have rolled for at the Department of Internal affairs (DIA) for this dishonest waste of the taxpayers' money.

As are the Government's claims about 'ownership' and shareholdings

16. We asked expert commercial and constitutional lawyers, as well as a QC, to examine the claims by Minister Nanaia Mahuta that the Bill will preserve "ownership" of the water assets through "shares" in the four new entities.

17. We asked them to measure the claims against the usual standards required of those in the private sector: not to mislead or be deceptive. In their opinion, the claims being repeated by Ministers, and Ministers Mahuta and Robertson in particular, would amount to an offence if they were to be held to the standards of the Financial Markets Conduct Act 2013 or the Fair Trading Act 1986.

18. The legal opinion is appended to this submission. It concludes that "*The Ministers appear to have cold-bloodedly decided to confuse Councils and ratepayers with false statements*."

19. They would be prosecutable but for that they are in politicians and not 'in trade'.

20. The Bill removes nearly all the rights associated with the usual meanings of "ownership" and "shareholding". The false assurances that councils will still "own" the assets are being made either recklessly or to be deliberately deceptive.

21. Gary Judd QC, who reviewed the legal opinion, states:

> *When all the lying statements are put together, as [the appended legal opinion] does, the government's effrontery is breath-taking.*

Configuration of new entities absurd

22. The proposed four entities have been badly designed. It appears the boundaries have been influenced by tribal boundaries as of 1840, when no Three Waters assets existed.

23. Entity three for instance locks Gisborne, the Manawatu, Wellington, Nelson and *some* of Marlborough (Blenheim and Picton, for instance) together. Meanwhile, people in Seddon and Ward, in South Marlborough, are in entity four: splitting bills with the rest of the South Island, including Christchurch and Queenstown.

24. Whatever economies of scale may exist from aggregating Three Waters Assets, they will be lost if the Bill proceeds for the following reasons:

    (a) First, if as the Minister claims there will be 6000-9000 extra jobs the cost structure of the four entities will inevitably be higher than is currently the case. The savings the Government's advisor Scottish Water believes are possible, will be lost with this additional number of employees.

    (b) Second, all monopolies are at risk of becoming bloated and as the proposal will not start with effective regulatory controls, it can be expected consumer costs will increase materially, because ratepayers will have no ability to influence management. No wonder that credit rating agency Standard and Poors likes the proposal – they know their loans will be safe.

    (c) Third, in addition to being bloated there is also the very high risk the new entities will "gold plate" their operations to avoid any risk of failure. Risks such as crossing the road or driving a car are part of life. Eliminating all risks would bankrupt any country. As for the health risks, our hospitals are not full of people with food poisoning and life expectancy continues to rise.

    (d) Fourth, the good people of Gisborne find their local cost structure has been brought up to Wellington levels which is what happens with entities that are dominated by major centres.

    (e) Finally, we know that from experience all around the world, in both the public and private sectors, mergers usually cost more to implement than envisaged, produce fewer benefits, and take longer

than expected to create a working culture that is cost effective. We note this proposal is expected to cost $1.2 Billion to set up. The extra costs are just starting, and we can expect Scottish Water (and the members of the current Government) will take zero responsibility for the results when they fail to meet expectations. There will be a new set of excuses or rationalisations.

TAXPAYERS' UNION

Governance proposals convoluted and fail the accountability test

25. If there is to be aggregation of Three Water assets, governance should be determined by the owners of the assets – the local authorities elected on the basis of one vote per person of equal value.

26. The proposed involvement of iwi is problematic on several grounds.

27. First, the proposal is about iwi leadership, not Māori voting at large.

28. Second and most important, iwi are cultural and commercial entities with increasingly large assets and enterprises that interact with local authorities. Their direct involvement with Three Waters entities will create conflict of interest issues. The Bill is silent on these matters.

29. Many iwi are of the view that, under the Treaty, they own the water – not something agreed by the Key Government nor yet by the current Government. The Minister of Local Government has not denied the possibility that iwi might get royalties from the Three Waters Entities. We put this question to the Minister directly when interviewed on our podcast. She is clearly choosing not to give that assurance.

30. Granting royalties for water which mostly originates from the skies, by entities substantially controlled by iwi, would be a degradation of our democratic system.

31. By current New Zealand standards most Governments in the world are corrupt in varying degrees. We do not want ours to create arrangements that could facilitate corrupt practices. Over the past 100 years or so New Zealand has created a high-quality democracy which has incorporated special arrangements for Māori, that has achieved positive recognition by ratings agencies abroad.

32. This is now all at risk with the Three Waters proposals.

33. The last 500 years have shown that a well-regulated market economy along with quality democracy produces the best results for the most citizens. The alternatives favour special groups whether they be monarchies, theocracies or tribal.

34. Quality systems of governance allow owners to replace boards where it is agreed they have failed. Under the Bill this would not be possible without iwi agreement, even though they will have no ownership stake.

35. The Bill fails the transparency and accountability test.

Alternative proposal

36. We accept there will need to be significant investment in Three Waters assets, as there are with housing, roads, hospitals, and schools etc. We note the "Communities4Local Democracy" question whether it is $180 Billion as claimed by the Minister and officials.

37. We also accept some integration of Three Waters operations is desirable over the next few years to achieve better economies of scale. But this should not be a "shot gun" marriage.

38. In 1988 the BBC's 'Yes, Prime Minister' popularised the politician's syllogism. Paraphrased, it can be summarised:

    (a) We must do something.

    (b) This is something.

    (c) Therefore, we must do this.

TAXPAYERS' UNION

39. Scores of politicians prior to 1988, and since, have fallen into the same trap in making the case for any proposed reform. Pitting the status quo against their own preferred policy outcome, and suggesting, often explicitly, that they are the only two choices available.

40. This false dichotomy has been the context of much of the debate around the Government's proposed Three Waters reform programme. Those in favour of the reforms have pointed to well-publicised failures of water infrastructure in some metropolitan and rural areas as all the argument they need for centralisation, while ignoring the potential for worse performance under the control of the four new water services entities.

41. Instead of this Soviet style amalgamation, the Government should withdraw the Bill, and resume discussions with the sector about like/adjacent local authorities pooling their assets in a logical way. Legislation should then follow the outcome of these discussions.

42. We look forward to addressing the Committee.

Yours faithfully,
New Zealand Taxpayers' Union Inc.

Jordan Williams
Executive Director
jordan@taxpayers.org.nz

Encl.

FRANKS | OGILVIE
COMMERCIAL & PUBLIC LAW

PO Box 10388
The Terrace
Wellington
New Zealand

Legal Opinion

To:	New Zealand Taxpayers' Union
From:	Stephen Franks, Brigitte Morten
Date:	20 July 2022
Subject:	**Have Ministers broken the law in statements on the Water Services Entities Bill?**

SUMMARY

1. Ministers have repeatedly asserted that Councils will have "ownership" of the four new "entities" (actually bespoke statutory corporations) to take over three waters assets under Minister Mahuta's scheme. The Water Services Entities Bill (the "**Bill**") contains statements that Councils will "co-own" the corporations in "shares" to be allocated to them. In this opinion the assertions that Councils will share ownership are referred to as the "Claims".

2. The claims are false, misleading and deceptive. The Councils will have none of the bundle of rights that define and are conferred by ownership in any sense familiar to lawyers, or understood as the common significance of ownership. Councils are expressly denied the rights of possession, control, derivation of benefits, and disposition that are the defining attributes of ownership.

3. In our opinion the Claims would constitute an offence by the Ministers if they were under the obligations of honesty found in the Financial Markets Conduct Act 2013 ("**FMCA**") and the Fair Trading Act 1986. But that law confines the liability to people "in trade'. If the Ministers were prosecuted they would have the defence that what they have said is in politics and not in trade.

4. Though "in trade" has an extended meaning, it would be over-strained to make it cover the Ministers in these circumstances. In addition Councils are in a category of prospective investors who the law consider to be sophisticated enough not to need the protection of particular securities law disclosure standards.

5. Accordingly we think the Ministers have immunity to fair dealing law with respect to the Claims, despite apparently ignoring the normal ethical standards for communication regarding shares and other investments.

6. In our opinion the Claims will remain untrue, misleading and deceptive even after the Bill becomes law. That is because the word "own" and its derivatives, and "share", have important and well understood meanings. Even the MPs considering the Bill are likely to assume that the

words carry in the Bill at least some of their ordinary meaning. But they appear in a Bill that expressly negates or contradicts the essential elements and concepts that define those words in both ordinary and legal usage.

7. The Claims of continuing Council ownership appear designed to reassure Councils and their ratepayers. They are so patently misleading that the persons and bodies making them must be either recklessly or deliberately deceptive. The Bill seems calculated to deceive Parliamentarians, and when it becomes law, to deceive New Zealanders generally.

8. There is a possibility that a court could hold some members of the Working Group on Governance liable for contravention of the Financial Markets Conduct Act, or the Fair Trading Act. The Group members appear to have been complicit in making untrue claims. If they were company promoters, brokers, accountants, lawyers or bank staff trying to peddle shares under the Bill as if they confer ownership they could be liable to prosecution by the Financial Markets Authority, or the Commerce Commission.

9. We think that work by the Working Group involved at least the professionals on the Group, in providing services that were "in trade" within the meaning of the FMCA and the FTA. Those statutes set out minimum standards of honesty for people in trade. They may be enforceable with respect to misleading statements from consultants and other experts engaged by the government to be held out as authoritative.

10. DIA officials and LGNZ appear also to have colluded in the misleading and deceptive conduct. The Public Service Commissioner and LGNZ members respectively should be asked to remedy this.

QC Review of this Opinion

11. At your request this opinion has been reviewed by Gary Judd QC before its release to NZ Taxpayers' Union. He was consulted because he has been obliged to become familiar with government papers and the Bill in preparation for the Water Users' Group case seeking a declaration from the High Court, on the veracity of government claims that Treaty rights and interests oblige the adoption of co-governance for water infrastructure.

12. He has authorised us to report that he endorses its reasoning and conclusions, adding "When all the lying statements are put together, as your opinion does, the government's effrontery is breath-taking."

YOUR REQUEST

13. NZ Taxpayers' Union has requested analysis of claims by Minister of Local Government, Nanaia Mahuta (and her ministerial colleagues), that local authorities will continue to own three waters assets in the Three Waters Scheme.

14. The claims have been made most often by Minister Mahuta. But the same or similar claims have been made by Minister of Finance, Grant Robertson. Some have also been effectively repeated or endorsed by the Prime Minister. They have appeared in Cabinet Papers, in the Minister's Working Group report and on the website of the Department of Internal Affairs.

15. See table 1 attached for details of many of the claims.

16. The Claims have been made repeatedly since the Scheme was first proposed but the share mechanism to give purported support for the claim of 'ownership' has developed over time. For the purposes of this analysis, we rely upon the arrangements stated *in Cabinet Paper: Strengthening representation, governance and accountability of the new water services entities* (19 April 2022), and the Bill.

17. You ask whether a "share" a territorial authority (in this opinion referred to as a "**Council**") is to be allocated will confer "ownership" as Claimed. Specifically:

    a) will the Councils collectively "own" the entities as asserted;

    b) will a Council continue to own the three waters infrastructure on behalf of its community;

    c) do the shares together create "a public shareholding structure that makes community ownership clear, with shares held by councils on behalf of their communities"[1], or with "Councils being the shareholding owners on behalf of their communities"[2]; and

    d) do the shares and the Bill ensure "councils still retain their ownership interests"[3]?

18. If the scheme does not preserve Council or "community" ownership is there is any legal remedy against a Minister for false, misleading or deceptive statements to the contrary.

ANALYSIS

Is the Government correct to have stated that Councils will have shares in the entities?

19. The Government has stated the following on the shareholding arrangement:

    a) "Minute of Decision - **noted** that the Working Group recommended collective ownership of each water services entity by local communities, through a direct shareholding interest allocated to their territorial authorities, and this approach would:

        i) provide a tangible expression of ownership that is recognisable by communities and territorial authorities; and

        ii) strengthen protections against privatisation;"[4]

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[1] Minute of *Cabinet Paper: Strengthening representation, governance and accountability of the new water services entities* (19 April 2022), 16

[2] Minute of *Cabinet Paper: Strengthening representation, governance and accountability of the new water services entities* (19 April 2022), 21

[3] Newstalk ZB, Nanaia Mahuta: Co-governance on Three Waters reflects our Treaty obligations.

[4] Cabinet Paper: Strengthening representation, governance and accountability arrangements of the new water service entities, 19 April 2022- minute

b) "…provide for a public shareholding structure that makes community ownership clear, with shares held by councils on behalf of their communities"[5]

c) "As the iwi representatives recognize, the proposed reforms do not involve the seizure of assets or disenfranchisement of communities in connection to those assets. These assets will remain in community ownership. The proposals to strengthen community ownership of the entities (and their assets) through a public shareholding structure, in which territorial authorities hold shares on behalf of their communities, should help to reinforce this important message, and embed it in the legislation."[6]

d) "By extension, enduring public ownership of our water entities protects water and the public interest in these significant assets. The Crown has Treaty obligations to meet, which is why we support the working group's suggestions to strengthen oversight at the regional level but I want to be clear - that ownership of the entities themselves will remain with councils alone through a shareholding model." – Minister of Local Government, Nanaia Mahuta.[7]

e) "At the heart of councils' concerns have been the issues of ownership and voice. By accepting the majority of the recommendations made by the independent Working Group on Representation, including a shareholding plan, we have listened to these concerns and modified our proposals accordingly." – Minister of Finance, Grant Robertson.[8]

f) "Hon Nanaia Mahuta: Councils collectively will continue to own their assets under the three waters reform. The working group have helpfully recommended that this assurance be strengthened through a new public shareholding structure. The shareholding structure will allocate to councils, reflective of the size of their community, one share per 50,000 people in their area."[9]

g) "Will communities still own the water infrastructure? Councils will collectively own the water services entities providing services for their district, on behalf of their communities."[10]

20. The most pertinent clause of the Water Services Entities Bill states –

> Section 15 –
>
> A water services entity is co-owned in shares by territorial authority owners
>
> (2) A water services entity is co-owned –
>
> (a) by the territorial authorities in its service area; and
>
> (b) in shares allocated and reallocated under section 16

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[5] Cabinet Paper: Strengthening representation, governance and accountability arrangements of the new water service entities, para 2

[6] Cabinet Paper: Strengthening representation, governance and accountability arrangements of the new water service entities, para 22

[7] Three waters: Councils to be shareholders as government accepts recommendations

[8] Beehive release: Council ownership of waters entities confirmed

[9] Hansard: Question No.10 – Local Government

[10] Three Waters Reform: key questions, essential facts

(3) Shares allocated or reallocated to, and held by, a territorial authority owner cannot, for any reason, be sold, or otherwise transferred.

21. Other clauses state -

a) Section 93 –

(2) The Constitution cannot –

(b) Confer decision-making rights weighted by shares held by a territorial authority owner for any matter:

(c) Confer on a territorial authority owner (in its capacity as a holder of shares in a water services entity, or any other capacity), a regional representative group, or a regional representative any right, title, or interest (legal or equitable) in the assets, security, debts, or liabilities of a water services entity.

b) Section 115 –

(1) The Minister, a territorial authority owner, a regional representative or a regional representative group cannot direct a water services entity or a board member or an employee of a water services entity –

(a) in relation to the performance or exercise of a duty, function, or power under this Act; or

(b) to require the performance or non-performance of a particular act or the bringing about of a particular result, in respect of a particular person or persons.

c) Section 116 –

(2) In order to perform or exercise its duties, functions or powers under this Act a water services entity must not do any of the following –

(b) divest its ownership or other interest in a water service except in accordance with Schedule 4:

d) Section 166 –

(1) A territorial authority owner (in its capacity as a holder of shares in a water services entity, or any other capacity), a regional representative group, or a regional representative –

(a) Has no right, title, or interest (legal or equitable) in the assets, security, debts, or liabilities of a water services entity (and the constitution cannot confer any such right, title, or interest – see also sections 15(3) and 93(2)(c)); and

(b) Must not receive any equity

(c) return, directly or indirectly, from a water services entity; and

(d) Must not give a water service entity any financial support or capital; and

(e) Must not lend money or provide credit to a water services entity; and

(f) Must not give any person any guarantee, indemnity, or security in relation to the performance of any obligation by a water services entity.

e) Schedule 1, Part 1, Clause 1 Interpretation

> Water services reform means –
>
> (a) The establishment of water services entities to deliver water services in accordance with this Act; and
>
> (b) The transfer of interests in, and the ownership of, infrastructure assets from local government organisations to the water services entities.

f) Schedule 3 requires the water services entities to engage with the territorial authorities on –

   i) Asset management plan proposals (Clause 7);

   ii) Funding and pricing plan proposals (Clause 13);

   iii) Infrastructure strategy proposals (Clause 19);

Definitions of a share, and ownership

22. As set out above clause 15(2) of the Bill says that the Councils own the entities in shares. After passage of the Bill, Ministers will be able to claim that is conclusive. When an Act says that the Councils own the entities in shares, then they do, within the unique meanings of that statute. Parliamentary supremacy gives the power claimed by Humpty Dumpty. As Lewis Carroll wrote in Through the Looking Glass,

> *"When I use a word,' Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean — neither more nor less.'*
> *'The question is,' said Alice, 'whether you can make words mean so many different things.'*
> *'The question is,' said Humpty Dumpty, 'which is to be master — that's all."*

23. The fact that a word is given an artificial meaning in an Act does not determine the fairness or correctness or honesty of its use elsewhere. Fair and honest communicators ask themselves what language is likely to mean to the people to whom it is addressed. We form our opinion on what meanings are likely to have been taken from the claims, by ordinary people and Councillors, and compare that with what the terms "owner" and "share" mean in the Bill.

24. We assess the ordinary meanings of the terms from consideration of:

   a) an orthodox review of dictionary definitions;

   b) the conventional definitions and uses in other statutes of the terms and related terms; and

   c) the commonly recognized attributes of "ownership" and "shares".

25. Because it does not define the relevant words, we can only determine what the words mean in the Bill as a residual. What does the Bill leave, of the elements or incidents or rights normally

held by an owner and holder of a share? They mean what is left after applying the provisions which negate or exclude or supersede the normal rights of ownership, and attached to shares.

Dictionary definitions

26. Dictionary definitions are the first resort to understand common language usage, for lawyers, courts and regulators as well as for lay people.

27. The New Zealand Law Dictionary defines 'ownership' as –

> *"The right to the exclusive enjoyment of a thing. It may be absolute, in which case the owner may freely use or dispose of his property, or restricted, as in the case of joint ownership. Beneficial ownership is the right of enjoyment of property, as distinguished from legal ownership."*

28. The online Oxford English Dictionary defines 'owner ' as –

> 1. *"A person who holds something as his or her own: a possessor or proprietor; a person who has the rightful claim or title to a thing.*
> 2. *…"*

29. Wikipedia, commonly used by lay persons as a first point of reference states –

> *"Ownership is the state or fact of legal possession and control over property, which may be any asset, tangible or intangible. Ownership can involve multiple rights, collectively referred to as title, which may be separated and held by different parties"*

30. The Bill does not confer any of those rights or expectations on Councils with respect to the entities it says they own. It expressly negates them all.

Meaning of owner under the Water Services Act

31. The Bill's use of the term owner is inconsistent with the use in its sister legislation, the Water Services Act 2021. Under that Act, owner, in relation to a drinking water supply, means the person who has effective control of the drinking water supply. The matters that may be considered when determining effective control of a drinking water supply include whether the person:

    a) owns the drinking water infrastructure;

    b) owns or has long-term control of the land on which the infrastructure is based;

    c) directs or has control over decisions about the funding or maintenance of the infrastructure, or collects fees, levies or other charges from consumers in relation to the infrastructure; and / or

    d) controls how the management of the supply is resourced (for example, if it has the power to subcontract work).

32. That definition of ownership by reference to effective control is a conventional approach. It draws on the normal and natural import of the term.

Statutory examples of ownership through shares

33. Most people's first reaction on hearing the word "share" in a legal context would be to think about shares in a company. Whilst the Bill explicitly states that the entities will not be companies, the Companies Act 1993 that sets out the rights and powers attaching to shares, provides a reference for what is normally meant by the use of 'share'. Section 36 of the Companies Act states -

> **Rights and powers attaching to shares**
>
> (1) Subject to subsection (2), a share in a company confers on the holder—
>
> (a) the right to 1 vote on a poll at a meeting of the company on any resolution, including any resolution to—
>
> (i) appoint or remove a director or auditor:
>
> (ii) adopt a constitution:
>
> (iii) alter the company's constitution, if it has one:
>
> (iv) approve a major transaction:
>
> (v) approve an amalgamation of the company under section 221:
>
> (vi) put the company into liquidation:
>
> (b) the right to an equal share in dividends authorised by the board:
>
> (c) the right to an equal share in the distribution of the surplus assets of the company.

34. A Council's shares under the Bill do not confer any of those rights. Most of them are expressly negated. To the extent that outsiders to the corporation can control or influence any of those processes, the power has been given to the regional representative group. That group is expressly dissociated from shareholding.

35. Nor do Council's shares confer other rights of company share ownership developed since the establishment of the company form 170 years ago. Many of them are now embodied in our Companies Act 1993. They commonly include:

a) rights to control the corporation, by way of votes at meetings of shareholders or otherwise. The limited right to be part of what is required to be a unanimous decision by Councils to refer a proposal for disposal of assets to a 75% poll by Council electors is not evidence of control. It is instead evidence of absence of control. Even electors do not have control. They cannot initiate a poll. It is not clear that the outcome of such a poll is binding. Those voters are expressly not shareholders and they are denied any right or interest in those assets;

b) other (residual) rights directly to manage the corporation by resolutions over-riding board management, or binding on the board. Councils have no such rights;

c) entitlement with all shareholders to expect from directors fiduciary duties of loyalty to the corporation (as the body of shareholders). They go along with power to appoint the

stewards of their investment (directors) and to terminate their appointments. Councils have no such rights;

d) the basic right to draw a return on capital invested. The Bill instead places obligations on the corporations to fund "capacity' among iwi non-owners, to exercise control functions. Councils are expressly denied rights to a return;

e) pre-emptive rights to protect against dilution of equity. The Bill contains no protections against the incurring of debt in amounts or on terms that may effectively dilute equity; and

f) reservations of certain decisions to shareholders as protection against Board temptations to related party dealings and other transactions that put the interests of third parties ahead of the best interests of the corporation and its shareholders. The Bill offers no such rights.

36. The Bill provides for periodic automatic "re-allocation" of Council shares, as population numbers served by the entities change in relative terms. Without compensation. The Bill does not ban privatisation despite Ministers' statements identifying that as a primary purpose of the scheme and the co-governance structure. This highlights the Bill's denial to Councils as nominal "owners", of rights frequently governed in company constitutions:

a) to sell or dispose of the shares. There is a prescribed procedure to consider "privatisation" in Schedule 4 of the Bill. But it seems not to contemplate arrangements for disposal of the shares to the advantage of Councils, or their communities;

b) to prevent or to control the issue or redemption of shares;

c) to a return of capital should the corporation sell part or all of its business or otherwise have surplus equity; and

d) to share the residual value of the corporation's enterprise should it be wound up.

37. To sum up, the core characteristic of equity of a company is the shareholders' right to the residual – whatever is left after satisfying all prior contractual and other claims, from the proceeds of winding up or disposal. They usually have protections against dilution of their interests. And when shares are genuine, and property, they cannot be deprived of them without consent or at least without compensation. The Bill is not just silent on those issues. It negates those expectations.

38. Section 2 of the Commerce Act 1986 defines a share -

> **share** means a share in the share capital of a company or other body corporate, whether or not it carries the right to vote at general meetings; and includes—
>
> (a) a beneficial interest in any such share:
>
> (b) a power to exercise, or control the exercise of, a right to vote attaching to any such share that carries the right to vote at meetings of the company:
>
> (c) a power to acquire or dispose of, or control the acquisition or disposition of, any such share:
>
> (d) a perpetual debenture and perpetual debenture stock

39. The shares referred to in the Bill would not satisfy that definition in the Commerce Act. Though it is perhaps arguable that the share is itself "a beneficial interest" even that is not clear. This definition is of limited relevance as it functions in the Commerce Act mainly as an anti-avoidance provision. It is applied to discourage collusive activity for anti-competitive purposes. It is not clear that there are powers to vote at a meeting. The right to participate with other Councils in deciding whether to refer to an elector poll, a proposal to sell water services assets (not even the shares), is not necessarily a vote at a meeting.

Other approaches to categorise so-called "shares" and the Claims' use of "owner"

40. Disputed categorizations of securities commonly focus on the boundaries between equity, debt, and managed investments. The distinguishing features of each tend to fall on a spectrum or continuum. At one end are "classical" shares. They collectively confer all the normal rights of ownership. The most distinctive characteristic of a share is its entitlement to a share in the residual value of the enterprise, after satisfaction of liabilities to employees, creditors and government (tax). Shareholders bear the cost or losses and take the rewards from the enterprise taking on the risk that its assets will become less than the amount of those liabilities. Even redeemable preference shares with fixed dividends that have few or no voting rights (except on winding up) are commonly treated as equity because they rank behind debt holders on winding up.

41. At the other end of the spectrum are secured instruments that confer no control rights (other than covenants defining default, and provisions for enforcement after default). Such instruments entitle the holder to a fixed return before shareholders and lower ranked creditors.

42. In this case the proposed shares do not even get onto that spectrum. They carry no control rights or dividend or return rights or rights to the residual. In our opinion, if the matter fell to be determined under the securities law, a court would hold that it is seriously misleading to refer to the instruments as shares. The word connotes some minimum rights and expectations that are expressly denied to the holders of these instruments.

Are there ownership rights (regardless of whether they flow from a 'share')?

43. The Claims say that Councils will retain ownership. We have considered whether the Bill confers any rights in the 'bundle' commonly treated as characteristic of a property interest, whether or not they flow from the so-called shares, which in our opinion are not shares.

44. In relation to the infrastructure, the scheme is unambiguous. Neither the shares nor the governance arrangements will preserve or confer any rights for a Council or its ratepayers to:

    a) the use, possession or control of any three waters infrastructure, whether it is presently held by the Council or otherwise;

    b) to manage and operate any such infrastructure;

    c) to derive any income from it;

d) too enter into contracts in relation to it, to modify or replace it, or to dispose of it;

e) to determine who may access or operate the infrastructure;

f) to determine the contracts including price, for Council area residents and other users of services provided by the infrastructure and employees operating it;

g) to borrow secured against the infrastructure; or

h) to security in ownership, that can be taken only for proper public purposes and for full and fair compensation.

45. These are characteristics or rights that typically distinguish ownership of physical assets from other interests. Some of those rights may be granted to another by an owner. For example a lease may permit the lessee to manage and operate equipment and to take the income from users (subject to paying the rent). But the owner has what are called the residuary rights – the value of the permanence of ownership until the owner wishes to transfer ownership.

46. Under the scheme, Councils will not have any ownership rights. Nor will "communities". A Council might be able to influence decisions on some of those matters usually governed by ownership if it collaborates politically with enough other Councils to secure influential appointments on the nominating regional representative body, and indirectly the Board. But that is a political power. It is not conferred by the proposed scheme. It is obviously subject to the likely bloc power of the iwi nominees, to the representative bodies, and subject to the de facto veto power created by the requirements for 75% majorities on some decisions.

47. The engagement requirements set out in Schedules 3 and 4 of the Bill do not require the entities to act upon the views of Councils.

Conclusions on the claims about shares and ownership

48. In our opinion there are no reasonable justifications for the claims. Ministers have falsely described what the Bill does.

49. Persuasion is not honest if it knowingly uses legal language to lay people or ordinary citizens likely to lead them to materially incorrect conclusions. Conceivably such use could be honest if there was also special care to ensure the recipients know clearly that the words do not carry their normal meanings. We have seen no evidence of any such care. It appears from the repetition and context that instead there was care to avoid the kind of explanation that would prevent a false understanding.

Do Ministers' Claims breach any fair dealing laws?

Financial Markets Conduct Act

50. Even if the Bill conferred genuine ownership of a Three Waters entity on a Council, through its shares in the entity, it is not legally correct to say that the Council or its ratepayers or residents get or retain ownership of the entity's assets, through those shares in the entity. The Bill expressly negates any such inferences, presumable for the avoidance of doubt.

51. The law is so strict on misstatements about share market securities that commercial lawyers would strongly advise clients never to talk loosely about shares giving rights or claims to the assets of a company.

52. As set out above, the claims were more egregious than that. There is nothing in the Bill other than the bare use of the terms 'share' and 'owner', to justify claims that Councils, or their communities, would retain any rights that can be fairly or accurately described as ownership. The detail of the Bill carefully contradicts the ordinary and plain meanings of those terms.

Application to the Crown

53. Broadly, the FMCA seeks to regulate conduct when dealing with financial products. Shares are a financial product.[11]

54. Sections 19 to 22 inclusive set out the prohibitions on misleading and deceptive conduct, and false and misleading representations. The Ministers' claims would be illegal, if they referred to securities governed by the FMCA, and if the claims were made "in trade". In Section 18 of the Act, "trade" is defined to mean "any trade, business, industry, profession, occupation, activity of commerce, or undertaking".

55. The Courts take a broad reading of "in trade", in part to protect against market manipulation. Political, educational and religious activities may all occur in trade but political debate and comment in itself is not in trade.[12]

56. However, it would be difficult to argue that there is any commercial or trade nature to the promotion and issuing of these 'shares'. Councils are not purchasing them. They will involuntarily suffer the loss of their three water assets to the entities but the shares are not offered with any exchange value. The shares will be vested by statute, without reference to the value of the assets taken under the Bill. The population basis for allocation will have not necessary relationship to the value of the assets expropriated.

Unsubstantiated representations

57. The Fair Dealing provisions in Part 2 of the Financial Markets Conduct Act 2013 create liability for statements or other information that is false, misleading, deceptive or confusing by reason of its form or context or the omission of any other information that is material in the form or context in which it is made, published or provided.

58. Section 23 prohibits unsubstantiated representations.

59. In our opinion the repeated Claims of the Ministers are misleading, deceptive, confusing and unsubstantiated -

    a) The limited rights of a Council under the Bill are not akin in any way to the rights obtained when acquiring a share; and

[11] FMCA s7

[12] *Solid Energy New Zealand Ltd v Mountier* [HC] 2007

b) None of the rights of a Council provide any form of 'ownership' possession, control or benefit.

60. If the Government was held to the standard applicable to the marketing and description of financial products, the Claims would not satisfy the FMCA.

Unsolicited Offers

61. Section 34 of the FMCA prohibits unsolicited offers of securities to persons who are not acting in trade. But for some express exclusions in subsection 34(2), section 34 could apply to Councils who have received unwelcome offers the Minister has told them they cannot refuse. Section 34(2) however, excludes offers to local authorities, by reference to Schedule 1 of the FMCA:

a) clause 3(2)(d) deems a local authority to be a government agency (through clause 40) and therefore a wholesale investor;

b) clause 11 excludes offers for no consideration; and

c) clause 22 excludes offers by the Crown. It is not clear that this exclusion would apply, but the point is not worth exploring because of the exclusion of deemed wholesale investors.

Fair Trading Act

62. With provisions similar to those in the FMCA against misrepresentation, the FTA regulates conduct when providing goods or services. The FTA has a provision limiting the overlapping coverage with the FMCA. Broadly, under section 48S conduct that contravenes FMCA provisions for regulated disclosure statements, and against market manipulation (routinely administered by the Financial Markets Conduct Authority) does not contravene the fair dealing provisions of the FTA (sections 9-13). That limited exclusion leaves it open to prosecute for breaches of sections 19 to 23 of the FMCA, or sections 9 to 13 of the FTA, for the same misrepresentations.

63. As explained above, despite the Government telling Councils they are to get "shares", they do not satisfy the plain language definition of shares and probably do not satisfy the FMCA definitions. If they are not securities for FMCA purposes, arguably it would be better to use the FTA for potential enforcement action against dishonest statements about the scheme and what Councils are to get.

64. Section 9 of the FTA states -

> No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

65. This test does not require an intent to mislead or deceive. It is enough that the conduct has that effect. This section applies to anyone whose conduct is "in trade". It may not matter whether they supply goods or services.

66. Nevertheless, we think Ministers are unlikely to be liable for the falsehoods in the Claims, under the FTA. That is on the same reasoning as would be likely to apply to the term "in trade" in the FMCA. A court would find against liability for Ministers because their representations are not "in trade". The Government is not currently supplying a water service. It is seeking to sell a scheme for an Act to deprive Councils of their water businesses. But that does not mean the Ministers' Claims constitute engaging "in trade".

67. We note that Ministers have obligations in the Cabinet Manual and the Standing Orders. For example, Clause 2.56 of the Cabinet Manual requires Ministers to "act lawfully and to behave in a way that upholds, and is seen to uphold, the highest ethical standards". And under Standing Order 418(b), members must not deliberately mislead the House. Neither are enforceable in court.

Possible liability of Government Officials

68. Taumata Arowai is the new regulator for the water standards, but we have not seen any pertinent "ownership" commentary from that body. However, the Water Services Act 2021 which establishes that body does rely on conventional understandings of ownership in section 12 as discussed above.

69. The Department of Internal Affairs is responsible for the Three Waters work programme. DIA is responsible for the Three Waters website (threewaters.org.nz) and material on www.dia.govt.nz and social media. These websites make statements about the scheme including:

    a) "The Bill locks in council ownership of the WSEs on behalf of the communities, by making councils the sole shareholders"[13]

    b) "Public ownership of water entities via council shareholding has been confirmed, and the accountability to local communities strengthened."[14]

    c) "Under the reforms the new water entities will be owned by councils on behalf of the communities they serve."[15]

70. It is unlikely that these statements are being made 'in trade', on the same analysis that shelters Ministers. Accordingly they are unlikely to attract liability for the Department under the FTA or FMCA.

71. Public officials are required to follow the Code of Conduct for the State Services. The code is brief but does require public servants to "be honest". Guidance for the Code states that -

> *"honesty is frequently associated with professional courage. We must not act with guile for administrative convenience or to conform to political arrangements…We*

[13] www.dia.govt.nz/Three-Waters-Reform-Programme, accessed 11 July 2022.
[14] Twitter @threewatersnz, 3 May 2022
[15] Twitter @threewatersnz, 10 November 2022

must be careful about providing only some of the facts about an issue if we anticipate that we may encourage misunderstanding."

72. The Code is not directly enforceable by the Courts. The Public Service Commissioner is empowered to act independently to investigate and report on matters relating to departmental performance, which can include performance not adhering to the Code. For the Commissioner to act here, where officials have used similar wording to Ministers, would call for "professional courage". That kind of honesty may be in short supply.

Possible liability of the Working Group on Representation, Governance and Accountability

73. Some members of the Working Group on Representation, Governance and Accountability may not be immune from liability under sections 9 to 13 of the FTA. Those paid as experts to prepare and deliver a report to the Government and for public release, are likely to have been acting, "in trade" for the purposes of the FTA. They will not benefit from the immunity we think will protect the Ministers, for misleading or deceptive representations in the report.

74. In announcing the recommendations of the Group (which were accepted by the Government) the Chair of the Group, Doug Martin, made a number of claims –

    a) "A key recommendation of the Working Group is a public shareholding model that would **clarify ownership of water assets, with Councils owning all the shares in the new Water Services Entities on behalf of their communities**."

    b) "A major concern we heard from our communities, iwi and hapū was about the privatisation of New Zealand's water services. The **public shareholding** model will strengthen protections against privatisation requiring unanimous shareholder approval for any such proposal."

    c) "We are proposing a model that places our waters and the health of our communities at the centre of all decision making, it **retains public ownership** and ensures local representation." [16]

    (emphasis ours)

75. The Working Group on Governance proposed shareholding arrangements that it must have known were spurious. Their recommendations, incorporated in to the Bill, help to create and reflect the false assurance in the purported creation of so-called shares. They exploit the misconceptions likely to flow from the statements about shares and ownership, without explanation of the powerlessness of Council/shareholders (and their ratepayers) and the inconsistency of their alleged ownership with any common understanding of the rights of owners.

76. Further, the Group knew of the context in which media and the public would be trying to appreciate the significance of their report. The law is clear, that statements must be assessed

[16] Three Waters Working Group, *Media Release: Working Group Recommends Significant Changes to Three Waters Reform* [9 March 2022]

in context, that they can be misleading by omission of matters or detail that is important for reasonable understanding, and that they will be read through the eyes of the recipients.

77. It is notable that prior to the Working Group on Governance delivering their report, Ministers denied an intention for shareholding. For example:

> *Christopher Luxon: Does she agree that ownership rights entail financial recognition, a formal shareholding, and control of assets; and will councils have those rights under her model?*
>
> *Hon GRANT ROBERTSON: On behalf of the Minister, the member is aware that, for example, formal shareholding rights are not part of this. The only reason to have those would be if you intended to sell those shares.*
>
> *Christopher Luxon: Does she agree that businesses are owned by shareholders, who have a defined number of shares and know how much of the business they actually own, and, if so, how can her collective ownership model seriously be described as ownership?*
>
> *Hon GRANT ROBERTSON: On behalf of the Minister, it's called public ownership; but I'm not surprised that the member doesn't understand that.*
>
> *Christopher Luxon: Which of her Government's various definitions of Crown ownership, public ownership, local ownership, and now collective ownership—if any—mean that councils would keep any control of their local water assets?*
>
> *Hon GRANT ROBERTSON: On behalf of the Minister, councils will collectively own the water service entities. What we are changing here is decades-long under-investment in our water infrastructure that has made people sick and has meant that people are paying far more than they need to in support of their water. The easy answer here is to do nothing. That's the Opposition's path. We are actually getting on with giving New Zealanders better water.*[17]

78. The Bill that sets out the shareholding arrangement does not provide any new rights that would confer genuine ownership. Yet the Group became complicit in public statements, including the Ministers' Claims that attributed or implied serious reassurance and significance to the new element of shareholding. As explained above, there is no substance in the so-called shareholding.

79. The courts have interpreted section 9 broadly. The leading authority is the Supreme Court decision in Red Eagle Corp Ltd v Ellis [2010] NZSC 20 -

> *The test is "whether a reasonable person in the claimant's situation – that is, with the characteristics known to the defendant or of which the defendant ought to have been aware – would likely have been misled or deceived. If so, a breach of s 9 has been established."*

[17] Hansard: Question No.11 – Local Government

80. The words 'mislead' and 'deceive' are given their ordinary meanings: to cause a person to go wrong or to be lead astray, or to make a person believe what is false. The conduct may apply to a misrepresentation even if the statement is technically true.

81. In this matter, a reasonable consumer could be a concerned voter (anyone enrolled to vote in the general election or local authority election) or ratepayer. This covers a wide range of people. It may be argued that those making or permitting or being parties to the misrepresentation should be able to assume some room for political puffery. They may claim entitlement to rely on interpretation by journalists or others with some access to securities or commercial law advice. Such arguments are not consistent with the approaches taken by the courts to date.

82. Even if there was an inclination to excuse some puffery, or to expect some injection of corrective technical advice into public debate and understanding, it would not benefit those who may be culpable for misrepresentation in this case. Knowledge of the normal characteristics of shares, and the rights of owners, could make one more likely to be materially misled by the Claims. Only close analysis of the Bill (its "fine print") discloses the complete negation of the normal rights of a shareholder and of ownership.

83. As explained in the earlier parts of this opinion, a reasonable reader of the Claims, and of the Working Group on Governance's statements, would conclude that the Bill would provide that:

    a) councils will maintain (collective) ownership in three waters assets; and

    b) they would do so through a shareholding arrangement in which they would be allocated shares.

84. Councils will not have ownership rights. Their nominal shares will not convey any ownership rights or powers. The Claims purport to offer rights that are expressly denied by the Bill, and as previously indicated in the Cabinet Papers.

Possible Liability of Local Government New Zealand

85. LGNZ is an incorporated society that includes amongst its members local authorities. They are mostly funded through membership dues and some government project funding. They operate as a not-for-profit. They have played a large role in the Three Waters scheme including negotiating memorandums of understanding between its members and the Government, providing information to its members on the scheme. LGNZ public statements have included "Water assets will remain publicly owned by councils"[18].

86. LGNZ could be found to be acting 'in trade' in its provision of representation and advisory services. As set out in their constitution, their role includes promoting the national interests of local government, and to provide full, accurate and timely information to members. The provision of inaccurate information (like the above statement) to members could arguably be a misrepresentation made in trade.

[18] "Three Waters – drinking, waste and storm" (https://www.lgnz.co.nz/reforms/three-waters/) accessed 11 July 2022

Penalties

87. You asked about potential penalties for false statements about securities.

88. Penalties are not relevant to Ministers because they have a defence, though we note that conduct of the kind seen in this case can result in swingeing penalties. Under the FMCA, the Financial Markets Authority may take steps to suppress the material containing misleading statements, and seek injunction from the Court if required. The Courts may also order compensation to aggrieved persons who have suffered a loss as a result.

89. Under the FTA, individuals can be fined up to $200,000 and corporates up to $600,000 for misrepresentation.

CONCLUSION

90. If the Government was held to standards it applies to others in the FMCA or Fair Trading Act, the Claims would be actionable. Ministers appear to have cold-bloodedly decided to confuse Councils and ratepayers with false statements.

91. Nevertheless, in our opinion, Ministers are immune from FMCA and FTA liability for that conduct. If it is considered that prosecution for deception would be salutary, it could be directed against the members of the Working Group on Governance who were engaged professionally.

92. That may seem unfair when the responsible Ministers are immune. However, that has long been the situation for business-people. Much higher standards of honesty have been demanded of them, than our political and bureaucratic leaders have been willing to require of themselves. Our democracy generally assumes that the remedy for political deceit comes at the ballot box.

93. If salutary proceedings are under consideration, you may care to ask first that:

    a) the two responsible regulatory authorities investigate prosecution; and

    b) the Public Service Commissioner investigate apparent collusion by public servants in politically inspired deception.

Wellington 20 July 2022

TABLE 1: Government statements on 'ownership'

Date	Source	Quotation
14 June 2021	Cabinet Paper: Proactive release of Cabinet material related to progressing the three waters service delivery reforms, 14 June 2021	**Proposed ownership, oversight and governance structure of the new water services entities** 4. **noted** that given the public nature of the assets and service delivery needs, ownership of the water services entities has been framed in the context of collective local authority ownership, on behalf of communities; 5. **agreed** that the local authorities that constitute each water services entity (as described in Paper 1) would be the owners of the entity, and that this would be provided in legislation 6. **agreed** that there is no financial recognition of ownership, and no shareholding is provided for Entity design scenarios that were explored 29. It also retains community ownership of water services by providing local authorities with collective ownership of the proposed entities. **Overview of the proposed structure of the new water services entities** 32.1 maintaining public ownership and protecting against privatisation
23 September 2021	Hansard: Question No. 4 – Local Government	Hon NANAIA MAHUTA: The issue is now for councils to consider the proposal in a way that they will continue to own the assets—albeit within the reform that's being proposed—and have greater oversight in the way in which efficient governance of those assets can deliver community benefits; that is the proposal in front of councils. We've shifted significantly the discussion into a space where, I believe, even councils cannot ignore the opportunity they have ahead of them.
28 September 2021	Hansard: Question No. 10 – Local Government	Hon NANAIA MAHUTA: My expectation was to work in partnership with local government, and, to that end, right from the beginning I've maintained that a public ownership model that would safeguard against privatisation is the starting point.
29 September 2021	Nanaia Mahuta won't rule out forcing councils into Three Waters reforms	Fears about ownership were a misconception, she said. "Councils will still own assets under the proposed reform, albeit alongside other councils, and while they have talked a lot about losing assets, in fact much of the infrastructure's a liability because there's been underfunding of waters infrastructure for some time now."
26 October 2021	Hansard: Question No. 10 – Local Government	Nicola Willis: How much of the proposed entity A would Auckland Council own and therefore Auckland ratepayers have control over? Hon GRANT ROBERTSON: On behalf of the Minister, I don't have the specific percentages in front of me but what I can say is that local authorities will be the owners collectively on behalf of their communities. It is also very important for us on this side of the House to make sure we protect the public ownership of these entities lest the National Party ever get in Government and try and hock them off.

		Hon GRANT ROBERTSON: On behalf of the Minister, I am very confident that the legislative proposals that we have ensure that public ownership is guaranteed.
27 October 2021	Beehive release: Government to protect vital public water services for future generations	"It is a bottom line for the government that the entities remain in public ownership," said Nanaia Mahuta.
27 October 2021	Hansard: Question No. 5 – Local Government	Hon NANAIA MAHUTA: This model also ensures water services stay in public ownership. Assets will remain collectively owned by councils. I'll say it again: assets will remain collectively owned—
27 October 2021	Hansard: Question No. 11 – Local Government	Hon NANAIA MAHUTA: To the first part of the question, in order to ensure a public ownership model of water service entities and to safeguard against privatisation, the design of these entities will not be of a shareholding nature or distribute dividends to councils. But let me be very clear: councils currently own water assets. Those assets will transfer and be collectively owned by councils under their respective entity. **Hon NANAIA MAHUTA**: The simple answer is that there will be no shareholding or dividend opportunity under any of these entities, because we are giving an absolute assurance to ratepayers that this is a public model and that we are safeguarding against privatisation.
28 October 2021	Hansard: Question No. 9 – Local Government	Hon NANAIA MAHUTA: Members need to be aware—and I; it may be remiss of not having clarified it—that councils will not lose control of their assets. They will continue to own their assets alongside a group of other councils under the water service entities. But let's be very clear: when assets transfer to these water service entities, so does debt and liability.
10 November 2021	Beehive release: Working group to ensure local voice in Three Waters reform	"It's a bottom line for the government that water services entities continue to be publicly-owned, have operational and financial autonomy to make much needed investment, and have oversight from local authorities and mana whenua. It is essential that our water services allow for local influence and democratic accountability." – Nanaia Mahuta

10 November 2021	Hansard: Question No.11 – Local Government	Christopher Luxon: Does she agree that ownership rights entail financial recognition, a formal shareholding, and control of assets; and will councils have those rights under her model? Hon GRANT ROBERTSON: On behalf of the Minister, the member is aware that, for example, formal shareholding rights are not part of this. The only reason to have those would be if you intended to sell those shares. Christopher Luxon: Does she agree that businesses are owned by shareholders, who have a defined number of shares and know how much of the business they actually own, and, if so, how can her collective ownership model seriously be described as ownership? Hon GRANT ROBERTSON: On behalf of the Minister, it's called public ownership; but I'm not surprised that the member doesn't understand that. Christopher Luxon: Which of her Government's various definitions of Crown ownership, public ownership, local ownership, and now collective ownership—if any—mean that councils would keep any control of their local water assets? Hon GRANT ROBERTSON: On behalf of the Minister, councils will collectively own the water service entities. What we are changing here is decades-long under-investment in our water infrastructure that has made people sick and has meant that people are paying far more than they need to in support of their water. The easy answer here is to do nothing. That's the Opposition's path. We are actually getting on with giving New Zealanders better water.
12 November 2021	MAHUTA ON THREE WATERS	Taxpayer's Union Interview with Nanaia Mahuta TU: How does taking water assets off councils save money? NM: Because of economies of scale. We need to solve under-investment. Water has to be financially sustainable. We're not taking the assets. TU: What do mean you're not taking the assets? Councils lose ownership except in name. NM: Councils will own the assets. We have to prevent privatisation. Economies of scale. TU: What ownership rights will councils have? NM: Councils will set strategic performance expectations. There will be good governance. Water won't compete with other council services for funding.

29 March 2022	Hansard: Question No. 9 – Prime Minister	Rt Hon JACINDA ARDERN: In making that change and developing entities across the country that will have the role of maintaining public ownership of our critical water assets but ensuring that we have regional representation, we've put forward a proposal that that regional representation consist of mana whenua, as happens in local government every day, alongside local authority representatives.
19 April 2022	Cabinet Paper: Strengthening representation, governance and accountability arrangements of the new water service entities	**Minute of Decision** **Part A** **Ownership and major transactions (relating to Working Group recommendations 3 to 6)** 12. **noted** that the Working Group recommended collective ownership of each water services entity by local communities, through a direct shareholding interest allocated to their territorial authorities, and this approach would 12.1 provide a tangible expression of ownership that is recognisable by communities and territorial authorities; and 12.2 strengthen protections against privatisation; **Cabinet Social Wellbeing Committee Proposal** 2. In particular, I am seeking decisions to strengthen the proposed ownership, representation, governance and accountability arrangements for the new entities in the legislation. Key changes relate to the Working Group's recommendations to: 2.1 provide for a public shareholding structure that makes community ownership clear, with shares held by councils on behalf of their communities 16. I am seeking a number of decisions to strengthen the proposed ownership, representation, governance and accountability arrangements for the new entities. If agreed, most of these changes would be included in (or enabled by) the draft Water Services Entities Bill. These changes are designed to address the Working Group's recommendations in the following key areas: 16.1 a public shareholding structure that makes community ownership clear, with shares held by councils on behalf of their communities – to provide a tangible expression of ownership that is recognisable by communities and territorial authorities 21. It is important to note that the iwi representatives on the Working Group support the recommendation that public ownership of the water services entities should be reflected by councils being the shareholding owners on behalf of their communities. 22. As the iwi representatives recognize, the proposed reforms do not involve the seizure of assets or disenfranchisement of communities in connection to those assets. These assets will remain in community ownership. The proposals to strengthen community ownership of the entities (and their assets) through a public shareholding structure, in which territorial authorities hold shares on behalf of their communities, should help to reinforce this important message, and embed it in the legislation.

		Engagement with Standard & Poor’s throughout the Working Group process 8. **noted** that: 8.1 the Working Group met with Standard & Poor’s to understand how various arrangements might influence their assessment of council control and influence over a water services entity and whether balance sheet separation could be achieved, and the Working Group made some alterations to their earlier thinking to mitigate known risks to achieving balance sheet separation; **Part A: Working Group report, and proposals to strengthen representation, governance and accountability arrangements** 41. The Working Group has developed a set of 47 recommendations to enhance the reform proposals and deliver stronger representation, governance and accountability. These recommendations cover the following main areas: 41.1 A public shareholding structure that makes community ownership clear, with shares held by councils on behalf of their communities. This structure also strengthens protections against privatisation because councils would have to unanimously agree to privatisation for it to be considered further. 45. “…The Mayor’s preference is to retain the current council-controlled organization model, and for Auckland Council to have a controlling interest in the entity. The Mayor’s minority report notes that this position is supported by a poll of Auckland residents.” 50. The Working Group has not suggested retaining a council-controlled organization model, and has recognized and understood that achieving balance sheet separation is an essential component of the reforms. 52. ….these reforms offer far more benefit for Auckland ratepayers and residents than would be achievable under the current council-controlled organisation model. 53. The Working Group met with Standard & Poor’s to understand how various arrangements might influence their assessment of council control and influence over a water services entity and whether balance sheet separation could be achieved. 58. Continued public ownership of water service delivery arrangements, and protection from any future privatisation, has been bottom lines since we began these reforms. 60. The Working Group has recommended that ownership of each entity by local communities is best expressed through a direct shareholding interest in the entity. That interest would be allocated to, and held by, territorial authorities in the entity’s service area on a population basis of one share for every 50,000 people (rounded up, to reflect proportionality – with a one share minimum for every

		territorial authority). The benefit of a minimum shareholding is to assure smaller councils with a low ratepayer base that the interests of their communities are important. 61. …It is important to note that iwi representatives on the Working Group support the recommendation that public ownership of the water services entities should be reflected by councils being the shareholding owners on behalf of their communities. 78. Importantly, iwi leaders on the Working Group strongly support ongoing public ownership, reflected by councils being the shareholding owners of the entities on behalf of their communities. 146. I note that Standard & Poor’s will consider the level of control and influence that councils exert in a holistic manner. Certain recommendations on their own many not risk balance sheet separation, but when taken as a whole may increase the linkage between an entity and its owner councils.
29 April 2022	Three waters: Councils to be shareholders as government accepts recommendations	"By extension, enduring public ownership of our water entities protects water and the public interest in these significant assets. The Crown has Treaty obligations to meet, which is why we support the working group's suggestions to strengthen oversight at the regional level but I want to be clear - that ownership of the entities themselves will remain with councils alone through a shareholding model." – Nanaia Mahuta "That's because councils are used to it in their own work and understand its value. In turn, iwi on the working group were supportive of the clarity of council ownership of the assets on behalf of their communities." – Nanaia Mahuta
29 April 2022	Beehive release: Council ownership of waters entities confirmed	“At the heart of councils’ concerns have been the issues of ownership and voice, By accepting the majority of the recommendations made by the independent Working Group on Representation, including a shareholding plan, we have listened to these concerns and modified our proposals accordingly.” – Grant Robertson “This is the best option to deliver the clean, safe and affordable drinking water New Zealanders deserve while also retaining community ownership and protecting against future privatisation.” – Nanaia Mahuta
29 April 2022	Three waters: Councils to be shareholders as government accepts recommendations	That's because councils are used to it in their own work and understand its value. In turn, iwi on the working group were supportive of the clarity of council ownership of the assets on behalf of their communities." – Grant Robertson

1 May 2022	Nanaia Mahuta: Co-governance on Three Waters reflects our Treaty obligations	"All councils will still retain their ownership interests, however we're aggregating the value of that interest in order to leverage the debt financing of the significant scale of costs and infrastructure."- at 8.57 "We wanted to ensure a number of things were going to be achieved on the way through. A public ownership model that safeguarded against privatisation that we could achieve a level of scale and aggregation to separate balance sheets between, from the Councils in order to debt finance..''- at 12:04
3 May 2022	Hansard: Question No.10 – Local Government	Tangi Utikere: What assurance can she give that local council assets aren't being taken away from them? Hon NANAIA MAHUTA: Councils collectively will continue to own their assets under the three waters reform. The working group have helpfully recommended that this assurance be strengthened through a new public shareholding structure. The shareholding structure will allocate to councils, reflective of the size of their community, one share per 50,000 people in their area. So, for example, Auckland Council will hold 35 of the 40 shares in entity A, and smaller councils with a population base of 50,000 or less will secure one share. This share structure is a tangible expression of an ongoing connection for local communities and councils to their waters infrastructure. The shares will not deliver a dividend and cannot be sold or transferred. This provides an additional layer of protection against privatisation of water infrastructure alongside co-governance provisions. Simon Watts: Other than the ability to vote on privatisation, can she give one example of how her proposed shareholding schemes for local councils allow them to make decisions about their water assets? Hon NANAIA MAHUTA: The decision-making process that ensures that community priorities are reflected will be at the regional representative group level and also through the establishment of sub-regional groups. It will enable communities to prioritise what is important to them, what needs to be invested in.
Government websites references to ownership		
	Three Waters Reform Programme Website	The Government has confirmed it will create four publicly owned water entities for the benefit of all New Zealanders. These new entities will work with councils and communities to deliver better health and wellbeing outcomes for our communities and protect our environment for generations to come. Key facts: Water assets will stay in the hands of all New Zealanders. Under the reforms the new water entities will be owned by councils on behalf of the communities they serve. Water services will be publicly owned & locally managed. "Pipes will stay in the ground, local employees will look after them and a public referendum will protect against privatisation."

	Department of Internal Affairs [Three Waters Reform: key questions, essential facts]	*Will communities still own the water infrastructure?* Councils will collectively own the water services entities providing services for their district, on behalf of their communities. Communities will therefore retain an influence on three waters assets and services through their council and through other consumer and community interest forums. *How can communities be sure these assets will not be privatised?* Continued public ownership of these water services is a bottom line for the Government. Safeguards against future privatisation will be written into legislation to maintain ongoing ownership of the new entities by local authorities elected by communities. Beyond that, the Government will make communities the ultimate guardians of public ownership through a public referendum with any future proposal for privatisation requiring 75 per cent of votes in favour to carry it.