BOARD OF INQUIRY

Watercare Waikato River Water Take Proposal

IN THE MATTER OF the Resource Management Act 1991

AND

IN THE MATTER OF a Board of Inquiry appointed under s149J of the Resource Management Act 1991 to consider the application for resource consents by Watercare Services Ltd to increase abstraction of water from the Waikato River

---

SYNOPSIS OF SUBMISSIONS ON BEHALF OF THE WAIKATO RIVER AUTHORITY

9 September 2021

BUDDLE FINDLAY

Barristers and Solicitors
Wellington

Solicitors Acting: **Paul Beverley / Cerridwen Bulow**
Email: paul.beverley@buddlefindlay.com / cerridwen.bulow@buddlefindlay.com
Tel 64 4 499 4242 Fax 64 4 499 4141 PO Box 2694 DX SP20201 Wellington 6140

MAY IT PLEASE THE BOARD

1. These legal submissions are filed on behalf of the Waikato River Authority (**WRA**), a submitter to the resource consent application by Watercare Services Limited (**the applicant**) for a water take and discharge from and to the Waikato River (and associated infrastructure).

2. In December 2013 Watercare lodged the resource consent application with the Waikato Regional Council (**WRC**), and subsequently amended and lodged the application with the Environmental Protection Authority on 11 December 2020 (**the application**).

3. The application has now been referred to this Board of Inquiry (**the Board**) to determine whether resource consent should be granted.

EXECUTIVE SUMMARY

4. At the outset, the WRA confirms that it defers to Waikato-Tainui and River Iwi[1] in relation to the significant history, Treaty settlement context and cultural issues that are relevant to this process.

5. The WRA opposes the granting of the resource consents.

6. The application and the applicant's approach falls far short of what should be expected of a public authority such as the applicant.

7. The application does not assess or address cultural interests, and the nature and strength of opposition from tāngata whenua will be highly significant to the Board's decision-making. That opposition and evidence from tāngata whenua is uncontested, compelling and weighs heavily against the granting of consent.

8. The Board should not accept the applicant's attempts to minimise and dismiss those concerns.

9. There has been a lack of meaningful engagement with the WRA which reflects an underlying misunderstanding on the applicant's part of the significant Treaty settlement context and the role of the WRA as a co-governance entity.

[1] 'River Iwi' for the purposes of these submissions means Ngāti Tuwharetoa, Raukawa, Te Arawa River Iwi and Maniapoto, as well as Waikato-Tainui.

10. Given the WRA's role and functions, and the significance of Te Ture Whaimana o Te Awa o Waikato (**Te Ture Whaimana**) to any application for consent relating to the Waikato River, the WRA would have expected genuine, robust and meaningful engagement from the applicant from the outset which has not been the case at all.

11. The assessment of Te Ture Whaimana is entirely inadequate. Te Ture Whaimana should have been front and centre in the application given its status in the legislation and the Treaty settlement history and context. That has not been the case, and is exacerbated by the applicant not being informed by the WRA's views.

12. The application is inconsistent with the vision and objectives of Te Ture Whaimana, the primary direction setting document for the Waikato River, including in terms of the relationship between Waikato-Tainui and the Waikato River. That weighs heavily against the granting of consent.

13. The applicant has addressed Te Ture Whaimana in only a superficial manner and has concluded that the application is "*demonstrably consistent*" with Te Ture Whaimana. To the contrary, the application is demonstrably inconsistent with Te Ture Whaimana.

14. The Board, River Iwi, the WRA and the Waikato communities cannot have any confidence that the proposed trust arrangement will provide 'betterment' to the Waikato River, proportionate to the activity (which is a significant water take and transfer outside of the Waikato region).

15. It is not appropriate to simply identify an arbitrary monetary payment (with ongoing uncertainty as to how that payment will be administered) and assume that it will reflect and respect Te Ture Whaimana and the Treaty settlement arrangements, and will be acceptable to the River Iwi. That is not what is intended by the Waikato River arrangements, including the core principles of Te Mana o Te Awa and Mana Whakahaere.

16. As Ms Mahuta notes in her evidence, the WRA considers the applicant's approach to have been presumptuous, dismissive and disrespectful of the Waikato River, the WRA and Te Ture Whaimana.[2] The applicant has only reinforced that approach since the filing of Ms Mahuta's evidence.

[2] Statement of Evidence of T Mahuta (18.06.2021) at [47].

17. The failure to respect and reflect the Treaty settlement arrangements is particularly disappointing from a public authority, such as the applicant, which should understand and show leadership in terms of the importance of Treaty settlement arrangements generally and their relevance in the Resource Management Act 1991 (**RMA**) context.

18. For the WRA, granting consent in this context would reinforce that an entity can apply for consents of this magnitude in this manner and that the Treaty settlement arrangements make no real difference in practice, despite what was involved for Waikato-Tainui and the River Iwi in securing those settlements.

19. It is respectfully submitted that the Board must decline the applications as being fundamentally flawed in a number of respects and inconsistent with the statutory framework (including the Treaty settlement legislation) under which this decision is to be made.

TREATY SETTLEMENT CONTEXT: THE WAIKATO RIVER ARRANGEMENTS

20. The Waikato River arrangements arise out of significant and lengthy negotiations between the Crown and the five Iwi of the Waikato River.

21. The evidence provided on behalf of Waikato-Tainui is both powerful and critical to understanding the history and context to the Waikato River Treaty settlement arrangements. That includes the evidence of Ms Flavell, Mr Papa and Ms Colliar, Mr Morgan (who was the Waikato-Tainui co-negotiator for that Treaty settlement), and Mr Solomon.

22. Ms Mahuta, the Co-Chair of the WRA, also explains the background to the negotiations. In 1987, her father (Sir Robert Mahuta) filed a claim in the Waitangi Tribunal relating to the grievances suffered by Waikato-Tainui, including from the significant raupatu (confiscation) of tribal lands. That resulted in the settlement of the raupatu claims in 1995, but that did not settle claims in respect of the Waikato River. In 2004, Ms Mahuta's mother (Lady Raiha Mahuta) was appointed as co-negotiator for the Waikato River claims, which culminated in the significant Waikato-Tainui river settlement in 2010.[3]

[3] Statement of Evidence of T Mahuta (18.06.2021) at [14]-[17].

23. Relevant to this application, the Waikato River settlement negotiations specifically addressed the following grievance:[4]

> *in providing a legislative framework for land use planning, water use planning and resource planning which failed to properly take into account Waikato-Tainui concerns for the Waikato River and which were inappropriate for the protection of Waikato-Tainui rights guaranteed by the Treaty.*

24. Those negotiations resulted in deeds and ultimately three Acts of Parliament:

    (a) the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 (**Waikato-Tainui River Settlement Act**);

    (b) the Ngāti Tūwharetoa, Raukawa, and Te Arawa River Iwi Waikato River Act 2010; and

    (c) the Ngā Wai o Maniapoto (Waipā River) Act 2012.

25. The preamble to the Waikato-Tainui River Settlement Act sets out an important reminder of the history and context of grievances, Crown Treaty breaches and the consequent impacts on the river and the people. RMA processes and consent hearings are specifically identified in that preamble.

26. Ms Mahuta and the evidence provided on behalf of Waikato-Tainui explains the significance of the Treaty settlement for the people of Waikato-Tainui.

27. The significance of the Waikato River and the Treaty settlement is reflected in the "*Statement of significance of the Waikato-River to Waikato Tainui*" in the Waikato-Tainui River Settlement Act which states (among other things):[5]

> *(3) The Waikato River is our tupuna (ancestor) which has mana (spiritual authority and power) and in turn represents the mana and mauri (life force) of Waikato-Tainui. The Waikato River is a single indivisible being that flows from Te Taheke Hukahuka to Te Puuaha o Waikato (the mouth) and includes its waters, banks and beds (and all minerals under them) and its streams, waterways, tributaries, lakes, aquatic fisheries, vegetation, flood plains, wetlands, islands, springs, water column, airspace, and substratum as well as its metaphysical being. Our relationship with the Waikato River, and our respect for it, gives rise to our responsibilities to protect te mana o te Awa and to exercise our mana whakahaere in accordance with long established tikanga to ensure the wellbeing of the river. Our relationship with the river and our*

[4] Statement of Evidence of T Mahuta (18.06.2021) at [15(e)].
[5] Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, s 8(3).

respect for it lies at the heart of our spiritual and physical wellbeing, and our tribal identity and culture.

28. The overarching purpose of the Waikato-Tainui River Settlement Act is to: [6]

restore and protect the health and wellbeing of the Waikato River for future generations.

29. As Ms Flavell confirms, two of the key mechanisms arising out of the settlement, and that are particularly relevant to this application, are:[7]

(a) the establishment of the WRA; and

(b) Te Ture Whaimana – the vision and strategy for the Waikato River.

The Waikato River Authority

30. The WRA was established as an independent statutory authority under the Waikato-Tainui River Settlement Act and the Ngāti Tūwharetoa, Raukawa, and Te Arawa River Iwi Waikato River Act 2010, and the WRA has additional functions under the Ngā Wai o Maniapoto (Waipā River) Act 2012.

31. The purpose of the WRA is to:[8]

(a) set the primary direction through Te Ture Whaimana to achieve the restoration and protection of the health and wellbeing of the Waikato and Waipaa Rivers for future generations;

(b) promote an integrated, holistic, and co-ordinated approach to the implementation of Te Ture Whaimana and the management of the Waikato and Waipaa Rivers; and

(c) fund rehabilitation initiatives for the Waikato and Waipaa Rivers in its role as trustee for the Waikato River Clean-Up Trust.

32. A central statutory responsibility for the WRA is Te Ture Whaimana, the 'primary direction setting document for the Waikato River'. The WRA reviews, prepares, approves and oversees the implementation of Te Ture Whaimana.

33. Mr Penter explains the various ways in which the WRA carries out its functions, to achieve its purpose, and the role it plays in resource

[6] Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, s 3.
[7] Statement of Evidence of D Flavell (18.06.2021) at [49].
[8] Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, s 22.

management policy, planning and consenting processes.[9] Over the past 11 years the WRA has:

(a) made submissions on at least 16 different policy statements, standards, and other policy/consultation documents;[10]

(b) appointed 25 accredited hearing commissioners to river related hearing panels, in consultation with River Iwi;[11]

(c) been heavily involved in the WRC's proposed plan change 1 to the Waikato Regional Plan (**WRP**);[12] and

(d) directly awarded $55.6 million of the Waikato River Clean-Up Trust fund to over 300 projects that support the restoration and protection of the Waikato River.[13]

34. Mr Penter also explains that the WRA works with resource consent applicants to ensure they engage with relevant mana whenua and provides assistance in terms of understanding Te Ture Whaimana.[14]

35. The WRA plays an integral part in ensuring that the vision of Te Ture Whaimana is realised. Mr Penter explains that the WRA works closely with Iwi and the community and has gained their confidence, trust and respect in undertaking this role.[15]

36. The WRA is also the trustee of the Waikato River Clean-Up Trust. That Trust was established through the Waikato River Treaty settlements as part of the negotiated outcomes achieved by Waikato-Tainui. Mr Penter explains the work of the WRA as the trustee of the Clean-Up trust.[16]

Te Ture Whaimana – Vison and Strategy

37. Section 5 of the Waikato-Tainui River Settlement Act sets out the 'guiding principles for interpretation':

[9] Statement of Evidence of R Penter (18.06.2021) at [21]-[55].
[10] Statement of Evidence of R Penter (18.06.2021) at [29].
[11] Statement of Evidence of R Penter (18.06.2021) at [38].
[12] Statement of Evidence of R Penter (18.06.2021) at [33]-[37].
[13] Statement of Evidence of R Penter (18.06.2021) at [46].
[14] Statement of Evidence of R Penter (18.06.2021) at [39].
[15] Statement of Evidence of R Penter (18.06.2021) at [55].
[16] Statement of Evidence of R Penter (18.06.2021) at [45]-[49].

5 Guiding principles of interpretation

(1) The vision and strategy is intended by Parliament to be the ***primary direction-setting document for the Waikato River*** *and activities within its catchment affecting the Waikato River.*

(2) This Act must be interpreted in a manner that best furthers—

(a) the overarching purpose of the settlement; and

(b) subsection (1); and

(c) the agreements expressed in the 2009 deed and the Kiingitanga Accord.

(emphasis added)

38. The 'vision' of Te Ture Whaimana is:[17]

Tooku awa koiora me oona pikonga he kura tangihia o te maataamuri.

The river of life, each curve more beautiful than the last.

Our vision is for a future where a healthy Waikato River sustains abundant life and prosperous communities who, in turn, are all responsible for restoring and protecting the health and wellbeing of the Waikato River, and all it embraces, for generations to come.

39. Te Ture Whaimana contains a set of objectives and strategies to achieve this vision. These are discussed in more detail below.

40. Through the Treaty settlement legislation, Te Ture Whaimana was given powerful legal effect. In fact, Te Ture Whaimana is more powerful than any other planning document under the RMA (it is the only planning document that overrides a national policy statement (**NPS**)). This legal effect is discussed in more detail below.

THE TREATY SETTLEMENT ARRANGEMENTS HAVE NOT BEEN REFLECTED OR RESPECTED

41. This application has not been advanced in a manner that reflects or respects the significant Treaty settlement arrangements. Examples of that approach are provided below.

[17] Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, sch 2.

Lack of engagement with the WRA

42. The applicant has not engaged in any meaningful way with the WRA, and the applicant's position is that it is not required to do so. That is a remarkable position for a public authority to adopt given the significant Treaty settlement context to the WRA as explained above.

43. Mr Penter explains that given the WRA's role and functions, particularly in setting the primary direction for the Waikato River through Te Ture Whaimana, the WRA would have expected genuine, robust and meaningful engagement from any resource consent applicant, particularly for a consent for a large water take from the Waikato River.[18] That has not occurred.

44. The WRA was established on 25 November 2010, and this application was first lodged in December 2013. Mr Waiwai identifies those consulted as part of the application process, and this did not include the WRA.[19] Similarly, prior to the amended application being lodged in December 2020, Mr Waiwai identifies those consulted. Again, that did not include the WRA.[20]

45. Mr Penter explains that there were some interactions with a range of parties including the applicant in relation to broader matters, and that there was one meeting with the applicant in May this year that did not address the WRA's concerns.[21]

46. The dismissive approach is reinforced in the applicant's evidence. Ms Mahuta states:[22]

> *I have read the evidence of Mr Fisher on behalf of Watercare. In that evidence Mr Fisher only refers to the WRA on two occasions:*
>
> *a) a reference to a seat that WRA may have on a proposed trust (a matter that has not been discussed in any detail or agreed with the WRA); and*
>
> *b) a reference to the Waikato River Clean Up Trust being the beneficiary of funds should agreement not be reached with Waikato-Tainui. Again, this has not been discussed in any detail or agreed with the WRA.*

[18] Statement of Evidence of R Penter (18.06.2021) at [20(a)].
[19] Statement of Evidence of R Waiwai (21.05.2021) at [2.1].
[20] Statement of Evidence of R Waiwai (21.05.2021) at Annexure A.
[21] Statement of Evidence of R Penter (18.06.2021) at [77].
[22] Statement of Evidence of T Mahuta (18.06.2021) at [47].

In my view Mr Fisher's evidence reflects and reinforces the disrespectful and presumptuous approach taken by Watercare to this application. That evidence does not respond to any of the concerns raised by the WRA in our submission.

47. Rather than seeking to respond to and address the concerns of the WRA raised through its submission and evidence, the applicant has further reinforced that dismissive approach towards both the WRA and the Treaty settlement context that led to the establishment of the WRA.

48. In response to the concerns expressed by Ms Mahuta on behalf of the WRA, Mr Fisher states:[23]

> *6.2 The WRA is a statutory body whose functions are set out in section 23 of the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 (Settlement Act). Those functions do not include engaging with applicants for resource consent under the Resource Management Act 1991 (RMA), and more generally the RMA does not impose an obligation to consult with applicants for consent. One of the WRA's specific functions under section 23 of the Settlement Act is to appoint commissioners to sit on hearings committees or boards of inquiry when required to do so under section 28 or 29 (i.e. in resource consent hearings on applications to undertake activities affecting the River as described in section 26 of the Settlement Act). I see it as inconsistent with that appointment power for an applicant for resource consent such as Watercare to be consulting directly with the WRA in relation to a consent application.*
>
> *…*
>
> *6.4 Nor can the WRA in my view expect the same level of engagement as mana whenua in relation to Watercare's application. The WRA is not a mana whenua entity: as a statutory body it is more akin to the WRC (with which Watercare has not "consulted" either). Accordingly, the WRA cannot (and indeed it does not) claim to be affected by Watercare's application in the same way as mana whenua based on ancestral and spiritual connections to the River.*

49. The concerns of the WRA are not acknowledged in the applicant's opening legal submissions.

50. The applicant's approach and Mr Fisher's comments reflect a significant misunderstanding of and disrespect for the WRA and the Waikato River Treaty settlement arrangements. The applicant has essentially ignored the

[23] Rebuttal Statement of Evidence of R Fisher (09.07.2021) at [6.2] and [6.4].

independent statutory authority established through Treaty settlement legislation to set the primary direction for the Waikato-River. The WRA is a co-governance authority comprised of five River Iwi appointees and five Crown appointees.

51. The long and difficult road of Treaty breaches, grievances, negotiations and ultimately settlement is explained in the evidence for Waikato-Tainui and by Ms Mahuta. The WRA is a central Treaty settlement mechanism negotiated and secured by the Iwi to redress the historical breaches of the Treaty of Waitangi over the Waikato River. Consequently, one would expect any resource consent applicant (and particularly a public authority such as the applicant seeking to take a large volume of water from the Waikato River) to adopt a robust, respectful and genuine approach to engaging with the WRA. To the contrary, the applicant's approach is the antithesis of what would be expected in the post-Treaty settlement context of the Waikato River.

52. In response to Mr Fisher's specific comments:

(a) it is not necessary for the WRA to have an express statutory function for the applicant to engage with it. That is a far too narrow and constraining interpretation and would disqualify a wide range of entities from engagement. In any case, in addition to setting the primary direction for the Waikato River through Te Ture Whaimana, the WRA has a statutory function to:[24]

> *promote an integrated, holistic, and co-ordinated approach to the implementation of Te Ture Whaimana and the management of the Waikato and Waipaa Rivers.*

(b) the WRA 'nominated' a hearing commissioner to this Board under s 29(3) of the Waikato-Tainui Settlement Act.[25] This cannot be justified as an ex post facto reason (raised for the first time in rebuttal evidence) not to engage with the WRA. By way of comparison, hearing panels appointed under the RMA freshwater planning provisions must include a member nominated by tangata whenua,[26] while decision-making panels considering consent applications under the Covid-19 Recovery (Fast-track Consenting) Act 2020 must include a member nominated by

[24] Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, s 22(2)(b).
[25] Statement of Evidence of R Penter (18.06.2021) at [38].
[26] RMA cl 59, sch 1 and see s 80A(4)(d)(ii).

the relevant iwi authorities.[27] That of course does not mean that tangata whenua/the iwi authorities should not be consulted with through those processes;

(c) the WRA has and never would claim to be affected in the same way as mana whenua – again that reveals a significant misunderstanding of the different roles reflected in the Treaty settlement arrangements; and

(d) the WRA cannot be placed into the same category as the regional council as consent authority – that is another significant misunderstanding of the settlement and the legislation.

53. Mr Fisher also referred to the fact that the RMA does not require resource consent applicants to consult.[28] The applicant's legal submissions state:[29]

> *While section 36(1)(a) of the RMA expressly provides that there is no duty on applicants for resource consent to consult with any person, Watercare has consulted extensively with mana whenua and other stakeholders, consent holders, and river users.*

54. Despite that purported extensive consultation, the applicant clearly does not consider the WRA to be in the category of entities that should be consulted.

55. In *Watercare Services Ltd v Auckland Council*,[30] the Court noted that while there is no obligation to consult under s 36A of the RMA, "*consultation is best practice and it is foolish for a party not to consult with those with a known interest in a proposal. Consultation is actively encouraged (if not directed) by the Court*."[31]

56. By not engaging with the WRA, the applicant denied itself the ability to be well-informed of relevant matters (which itself is a relevant Treaty principle), including the implications of Te Ture Whaimana (the primary direction setting document for the Waikato River). Again, it is remarkable that the applicant would not inform itself by engaging with the statutory authority with responsibility for Te Ture Whaimana. That engagement, of course, should have been additional to (not in place of) the critical engagement with tāngata whenua.

---

[27] Covid-19 Recovery (Fast-track Consenting) Act 2020 clause 3(2)(b), schedule 5.
[28] Rebuttal Statement of Evidence of R Fisher (09.07.2021) at [6.2].
[29] Applicant's Opening Legal Submissions (31.09.2021) at [10.2].
[30] [2011] NZEnvC 155, (2011) 16 ELRNZ 521.
[31] At [33].

57. The applicant has still not taken any meaningful steps to engage with the WRA, in particular:

(a) Mr Waiwai, in his evidence in chief, noted that the applicant met with the WRA on 15 May 2021,[32] however Mr Penter in his evidence provides that no matters were resolved, and nothing further has happened;[33] and

(b) Mr Penter also confirmed that he received a phone call from Mr Fisher, on 14 June 2021 and encouraged him to use the time before the hearing to engage further with the WRA,[34] but there has been no further contact from the applicant since that call.

58. The High Court in the *Waikato Tainui Te Kauhanganui Inc v Hamilton City Council*[35] reinforced the significance of redress provided through Treaty settlements and the risks inherent in failing to engage appropriately (in that case with Waikato-Tainui):[36]

> *[88] … It is the jewel in the settlement crown for Tainui. Anything which tends to reduce the value of The Base and therefore the plaintiff's ability to care for tribal members from the income The Base produces, is of the gravest concern to the plaintiff. For these reasons, the interests of the plaintiff in its capacity as a significant landholder affected by Variation 21, and its iwi authority interests are closely related, and indeed are largely inseparable.*
>
> *[89] Because the plaintiff was not consulted prior to notification, it has lost the opportunity to lay before the Council all of these considerations. To minimise these issues, as Mr Lang's submission tend to do, is to overlook the important link between the plaintiff and The Base, which represents in its most tangible form the on-going importance to Tainui of the Raupatu settlement.*
>
> *[91] … An iwi authority has the right under the RMA to be consulted partly by way of recognition of the rights of Maori under the Treaty, and partly in order that the Council may obtain appropriate and accurate information on the effects and potential effects of a proposed plan, variation or change on affected Maori interests. The plaintiff has lost that opportunity in the present case. It cannot be contended that Tainui has suffered no (or minimal) loss.*

[32] Statement of Evidence of R Waiwai (21.05.2021) at [7.5].
[33] Statement of Evidence of R Penter (18.06.2021) at [80].
[34] Statement of Evidence of R Penter (18.06.2021) at [80].
[35] [2010] NZRMA 285.
[36] At [88]-[89] and [91].

59. The High Court in *Norman v Tūpuna Maunga o Tāmaki Makaurau Authority*[37] has recently commented on the changes that Treaty settlements can bring about in statutory decision-making processes:[38]

> *[67] The applicants' case was put forward on the basis that Ōwairaka is a recreation reserve "governed by the Reserves Act (as confirmed by Ngā Mana Whenua o Tāmaki Makaurau Collective Redress Act 2014…)." The submission for the applicants was that they "take no issue" with the underlying Treaty of Waitangi settlement that led to the vesting of the reserve in the Tūpuna Taonga Trust and to the creation of the Maunga Authority as the administering body of the reserve and other Maunga. They say that was a good thing. However, the effect of the applicants' interpretative approach to the Reserves Act is to give only lip service to the Collective Redress Act and what sits behind it. Applying that approach consistently would have the effect of thwarting the underlying settlement process and what it was designed to achieve.*
>
> *[68] In my view the applicants' analysis of the relevant statutory provisions fundamentally misconstrues the overall statutory framework. I accept the submission from the respondents that the Reserves Act must be read in the context of the Collective Redress Act, which itself gives effect to the settlement of and provision of redress for historical Treaty breaches in respect of Ngā Mana Whenua, including by establishing a clear regime for the Maunga Authority to govern the Tūpuna Maunga, including the exercise of mana whenua and kaitiakitanga by Ngā Mana Whenua.*

60. It is respectfully submitted that the applicant's approach reflects a similar fundamental misunderstanding of the Waikato River Treaty settlement arrangements and what sits behind them, as explained in the evidence of Waikato-Tainui and Ms Mahuta. Accepting that failure to engage with the WRA, including so as to ensure that the application is informed by the WRA's perspectives (including in relation to Te Ture Whaimana), would similarly have the effect of thwarting the underlying settlement process and what it was designed to achieve.

61. The applicant had a number of opportunities to engage with and address the concerns of the WRA in a respectful manner, but it chose to do the opposite. That is reflected in the evidence (both primary and rebuttal), legal submissions and general approach. Rather, the response of the applicant

[37] [2020] NZHC 3425.
[38] *Norman v Tūpuna Maunga o Tāmaki Makaurau Authority* [2020] NZHC 3425 at [67]-[68].

was that the WRA is an entity that does not merit consultation, let alone any stronger form of engagement or collaboration that one would expect in relation to the independent statutory authority for the Waikato River.

62. With respect, the application reflects a dated approach that falls well short of contemporary good practice, particularly in a post-settlement context such as this. The application and approach does not reflect what the Environment Court anticipated in *Puke Coal Ltd v Waikato Regional Council*[39] when it stated that as a result of the Treaty settlement there should be a "*stepwise change in the approach to consents affecting the catchment of the Waikato River*".[40]

63. The WRA's position is that consent should be declined. The WRA supports the position of Waikato-Tainui as explained by Ms Flavell:[41]

> *Waikato-Tainui seeks that the application be declined. As already shared, this is not a position that Waikato-Tainui has reached lightly, but it is our iwi's responsibility to be the voice and advocate for the rights of our ancestral river's health and well-being for current and future generations. Furthermore, the application and approach are so deficient that Waikato-Tainui considers that to be the only option.*

THE STATUTORY DECISION-MAKING FRAMEWORK

64. There is a specific statutory framework for the Board's decision on this application, as set out in the Waikato-Tainui River Settlement Act and the RMA. That framework reflects significant amendments to the standard RMA planning and consenting processes as they apply to the Waikato River. Te Ture Whaimana is central to that decision-making framework.

65. As noted, the Waikato-Tainui River Settlement Act states that Te Ture Whaimana is intended by Parliament to be the primary direction-setting document for the Waikato River. [42]

66. That clear Parliamentary intention is then given more detailed expression through the Waikato-Tainui River Settlement Act, and into the framework for decision-making under the RMA. In particular:

[39] [2014] NZ EnvC 223.
[40] At [86].
[41] Statement of Evidence of D Flavell (18.06.2021) at [86].
[42] Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, s 5(1).

(a) Te Ture Whaimana is set out in the Waikato-Tainui River Settlement Act, and is incorporated directly and without amendment into the Waikato Regional Policy Statement (**RPS**). The remainder of the RPS must be amended to ensure it is consistent with Te Ture Whaimana;[43]

(b) Te Ture Whaimana prevails over any inconsistent provision in an NPS or the New Zealand Coastal Policy Statement (**NZCPS**), and amendments cannot be made to RMA planning documents to give effect to an NPS/NZCPS, if that would make the document inconsistent with Te Ture Whaimana;[44]

(c) a regional plan must 'give effect to' Te Ture Whaimana;[45] and

(d) decision-makers are required to 'have particular regard' to Te Ture Whaimana when considering applications for resource consent (and in relation to a range of other statutory decisions).[46]

67. Together, these provisions mean Te Ture Whaimana has a unique and pre-eminent role in respect of the application of the RMA to the Waikato River. Te Ture Whaimana is the only planning document in Aotearoa that prevails over NPSs in the event of inconsistency.

'Have particular regard to'

68. The expression 'have particular regard to' has a meaning that involves a notably stronger obligation on the decision-maker than the requirement to 'have regard to' under s104:[47]

(a) In *New Zealand Transport Agency v Architectural Centre Inc*[48], the High Court recorded that a 'have particular regard to' requirement:[49]

(i) must, in accordance with the comments made by the Supreme Court in *Environmental Defence Society Incorporated v New Zealand King Salmon Co Ltd,*[50] "*convey… a stronger direction*" than "*have regard*"; and

[43] Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, s 11..
[44] Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, s 12(1).
[45] WRC is also specifically required by section 13(4) of the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act to ensure regional plans give effect to Te Ture Whaimana each time Te Ture Whaimana is reviewed.
[46] Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, s 17(3).
[47] See e.g. *Foodstuffs (South Island) v Christchurch City Council* [1999] NZRMA 481 (HC) at 484, and *Sanford Ltd v New Zealand Recreational Fishing Council Inc* [2008] NZCA 160.
[48] [2015] NZHC 1991.
[49] At [64]-[66].
[50] [2014] NZSC 38, [2014] 1 NZLR 595.

(ii) requires the decision-maker to consider those matters specifically and separately from other relevant considerations.

(b) In *J & C Vaudrey Ltd v Canterbury Medical Officer of Health*[51] the Court of Appeal noted that 'have regard to' "*imposes a somewhat less onerous obligation than the strong formula 'have particular regard to'.*"[52]

69. Consequently, the elevated '*have particular regard to'* standard prescribed in s 17 (3) of the Waikato-Tainui River Settlement Act is not merely a "*gloss on section 104(1)(b)*" as contended in the applicant's opening submissions.[53] It reflects a deliberate Parliamentary intention to require a higher standard of consideration than for other s 104 matters (such as the WRP). Further, the subject of that 'have particular regard to' standard (Te Ture Whaimana) is intended by Parliament to be the primary direction setting document for the Waikato River, which further reinforces the significance of Te Ture Whaimana in the statutory decision-making scheme on this application.

Consideration must extend beyond the WRP

70. While accepting that the Board must have particular regard to Te Ture Whaimana, the applicant's primary focus is on the allocable flow limits set in the WRP as the basis for granting consent. The applicant contends that those allocable flow limits give effect to Te Ture Whaimana.[54]

71. By way of response:

(a) Under the WRP, the allocation sought by the applicant is a restricted discretionary activity. Under the bundling approach, as accepted by the applicant, that is elevated to a discretionary activity status. Te Ture Whaimana and all the s 104 matters remain very much in play, and must specifically be considered by the Board. The fact that the application would not fall foul of the restricted discretionary activity allocation limit does not mean that there is any presumption that consent should be granted.

(b) There is a difference in opinion between the planning experts as to whether the WRP fully gives effect to the RPS (and in particular Te

[51] 2016 NZCA 539, [2017] 2 NZLR 334.
[52] At [41]. See also *Taranaki-Whanganui Conservation Board v Environmental Protection Authority* [2018] NZHC 2217, [2019] NZRMA 64; and *Pukekohe East Community Society Inc v Auckland Council* [2017] NZEnvC 27 at [20(b)].
[53] Applicant's Opening Legal Submissions (31.09.2021) at [13.4].
[54] Applicant's Opening Legal Submissions (31.09.2021) at [11.20] and [13.3].

Ture Whaimana). The timing and circumstances surrounding the Environment Court's consideration of Proposed Variation 6 should, with respect, form part of the context for the Board when considering the application. As Mr Penter explains, the WRP does not necessarily give effect to Te Ture Whaimana given that the WRP process was largely completed before the WRA, Te Ture Whaimana and the new co-management approach to RMA planning with Iwi came into being.[55] Mr Brough, the expert planner for Te Whakakitenga o Waikato, states his position in the planning joint witness statement:[56]

I maintain the WRP has not fully given effect to Te Ture Whaimana. Of particular concern and material to this application, is whether the allocable and minimum flows in Section 3.3 gives effect to Te Ture Whaimana including, but not limited to, Objectives 3(b) and 3(c).

(c) Mr Brough considers that "…*the 'water allocation provisions' in Table 3-5 of the Regional Plan have <u>not</u> remained relevant, particularly in respect of the evolution of the NPS-FM from 2011-2020*."[57]

(d) Mr Brough also states that "*It is not surprising to me that Waikato-Tainui consider their cultural, customary and spiritual values, as described in Mr Papa's evidence, to be poorly reflected in planning instruments*".[58]

72. On that basis, the Board should be cautious of proceeding on the assumption that the WRP in fact gives effect to Te Ture Whaimana as is required under the legislation. The more recent WRC Plan Change 1 process reveals the nature and scale of what is required (including in terms of River Iwi and the WRA involvement) to properly reflect Te Ture Whaimana. Both Mr Penter and Mr Brough have provided evidence on this process as being significantly more reflective of the Treaty settlement arrangements as in comparison to the process adopted for Variation 6.

73. In any case, as Dr Mitchell confirms in the planners' joint witness statement, "*notwithstanding any provision in the WRP or whether it has or hasn't fully*

[55] Statement of Evidence of R Penter (18.06.2021) at [56]-[66].
[56] Joint Witness Statement: Statutory planning (17.08.2021) at [19].
[57] Statement of Evidence of G Brough (18.06.2021) at [63].
[58] Statement of Evidence of G Brough (18.06.2021) at [73].

given effect to the Vision and Strategy, particular regard must be had for the Vision and Strategy in any event".[59]

74. Te Ture Whaimana is unique: there is no external planning document anywhere in the country that is to be given greater weight and effect through RMA planning processes. The WRA's position is that the utmost respect and weight must be given to Te Ture Whaimana through this consent process, which requires analysis well beyond the restricted discretionary activity allocable flow limits in the WRP.

75. To date, this has not been the case. The applicant claims that the application is "*demonstrably consistent*" with Te Ture Whaimana.[60] As the evidence confirms, and as explained further below, the application is demonstrably inconsistent with Te Ture Whaimana.

Part 2 of the RMA

76. In addition to Te Ture Whaimana, Part 2 of the RMA is also relevant in the Board's decision-making process.

77. The Waikato River settlement arrangements (the history, context and settlement provisions such as Te Ture Whaimana) are directly relevant to the Board's decision-making, including:

    (a) directly, as a result of requirement for the Board to have particular regard to Te Ture Whaimana when making this decision; and

    (b) by virtue of Part 2 of the RMA, including:

        (i) s 5 (cultural wellbeing);

        (ii) s 6(e) (the relationship of Māori and their culture and traditions with their tupuna awa);

        (iii) s 7(a) (the ability for kaitiakitanga to be exercised);

        (iv) s 8 (the principles of the Treaty of Waitangi – in this context particularly the principle of redress which underpins the Treaty settlement arrangements); and

[59] Joint Witness Statement: Statutory planning (17.08.2021) at [20(xi)].
[60] Applicant's Opening Legal Submissions (31.09.2021) at [13.1].

(c) the references in the relevant planning instruments (including the direct incorporation of Te Ture Whaimana in the RPS); and

(d) if necessary, under s104(1)(c) as an other relevant matter.

78. The applicant's position is that applying *R J Davidson Family Trust v Marlborough District Council,*[61] the relevant statutory instruments have been prepared in a manner than appropriately reflects Part 2, and that therefore "*the Board's primary focus can be on the relevant planning documents [including Te Ture Whaimana] rather than directly on Part 2*."[62]

79. Te Ture Whaimana should certainly be a primary focus for the Board. That said, the reasoning of both the Court of Appeal in *Davidson* and the Supreme Court in *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd*[63] also support careful consideration of the Part 2 matters that relate directly to cultural matters.

80. In *Davidson*, the Court of Appeal emphasised that the default requirement on resource consent decision-makers is to consider Part 2. The Court stated:[64]

> *If a plan that has been competently prepared under the Act it may be that in many cases the consent authority will feel assured in taking the view that there is no need to refer to pt 2 because doing so would not add anything to the evaluative exercise. Absent such assurance, or if in doubt, it will be appropriate and necessary to do so. That is the implication of the words "subject to Part 2" in s 104(1), the statement of the Act's purpose in s 5, and the mandatory, albeit general, language of ss 6, 7 and 8.*

81. *Davidson* and *King Salmon* reinforce the importance of higher order planning documents in RMA decision-making. That was emphasised by the Environment Court in *Puke Coal*, specifically in respect of Te Ture Whaimana. The Court cited and applied the *King Salmon* decision as follows:[65]

> *[89] This Vision and Strategy Statement affects all decisions made which may affect the river or its catchment. As the Supreme Court noted in EDS v King Salmon at [149]:*

[61] [2018] NZCA 316, [2018] 3 NZLR 283.
[62] Applicant's Opening Legal Submissions (31.09.2021) at [6.25].
[63] [2014] NZSC 38, [2014] 1 NZLR 595.
[64] *R J Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, [2018] 3 NZLR 283 at [75].
[65] *Puke Coal Ltd v Waikato Regional Council* [2014] NZ EnvC 223 at [89] and [90] (footnotes omitted).

> *[149] Section 6 does not, we agree, give primacy to preservation or protection; it simply means that provision must be made for preservation and protection as part of the concept of sustainable management. The fact that s 6(a) and (b) do not give primacy to preservation or protection within the concept of sustainable management does not mean, however, that a particular planning document may not give primacy to preservation or protection in particular circumstances. This is what policies 13(1)(a) and 15(a) in the NZCPS do. Those policies are, as we have interpreted them, entirely consistent with the principle of sustainable management as expressed in s 5(2) and elaborated in s 6.*
>
> *[90] We have concluded that the Supreme Court has identified that instruments may give primacy to some aspects of the matters under Part 2. Further, it is clear that the Settlement Act was intended, and did take effect, as a statutory provision overriding national policy documents. The Supreme Court noted in EDS v King Salmon at [152]:*
>
> > *[152] The NZCPS is an instrument at the top of the hierarchy. It contains objectives and policies that, while necessarily generally worded, are intended to give substance to the principles in Part 2 in relation to the coastal environment. Those objectives and policies reflect considered choices that have been made on a variety of topics. As their wording indicates, particular policies leave those who must give effect to them greater or lesser flexibility or scope for choice. Given that environmental protection is an element of the concept of sustainable management, we consider that the Minister was fully entitled to require in the NZCPS that particular parts of the coastal environment be protected from the adverse effects of development. That is what she did in policies 13(1)(a) and 15(a), in relation to coastal areas with features designated as "outstanding". As we have said, no party challenged the validity of the NZCPS.*
>
> *This equally must be true for the Settlement Act to the extent that an application affects the Waikato River.*

82. In terms of decisions on resource consent applications under s 104, applying the reasoning in *Davidson*, Te Ture Whaimana gives primacy to certain aspects of the Part 2 matters, notably in this context cultural values and relationships between Waikato-Tainui and its tupuna awa.

83. In *Davidson*, the Court of Appeal reiterated the words of the Privy Council in *McGuire*, that sections 6, 7 and 8 of the RMA constitute "*strong directions, to*

be borne in mind at every stage of the planning process".[66] That finding was of course made specifically in reference to the 'cultural values' provisions in Part 2.

84. Consequently, it is submitted that:

(a) Te Ture Whaimana should be a central and pre-eminent consideration in the Board's decision-making;

(b) it remains appropriate for the Board to consider the provisions of Part 2 including sections 6(e), 7(a) and 8;

(c) some of those Part 2 provisions are given primacy through Te Ture Whaimana, particularly in relation to cultural matters; and

(d) the Board should not rely on the general 'enabling' elements of Part 2 in order to arrive at a finding that would run counter to Te Ture Whaimana.

85. The applicant's legal submissions state:

> *At paragraph [84] of her evidence Ms Flavell states that the application "undermines the very intent of our River Settlement and the Iwi's goals in achieving Te Mana o te Awa and Mana Whakahaere."* ***It is submitted the Board, as a judicial rather than executive or legislative body, can do no more than acknowledge these concerns****. Its task remains to determine Watercare's application within the decision-making framework of the RMA (modified as outlined above by the River Settlement Act), and guided by relevant case authority.*
>
> *(emphasis added)*

86. Those are not matters merely to be 'acknowledged' by the Board, but are central and fundamental to the Board's decision-making on the application. The concerns expressed by Ms Flavell and the Treaty settlement are clearly and directly relevant under the RMA, for the reasons explained above.

THE APPLICATION IS INCONSISTENT WITH TE TURE WHAIMANA

87. The application does not include or reflect a meaningful or robust assessment against Te Ture Whaimana. As noted, Te Ture Whaimana is the primary direction setting document for the Waikato River, and it requires and

[66] *McGuire v Hastings District Council* [2000] UKPC 43, [2002] 2 NZLR 577 at [21] in *R J Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, [2018] 3 NZLR 283 at [52].

deserves careful focus and attention in the context of an application of this scale.

88. Te Ture Whaimana should have been front and centre in the application given its status in the legislation and the Treaty settlement history and context. The applicant suggests that Te Ture Whaimana has been at the forefront of its decision-making.[67]

89. That has simply not been the case. The Assessment of Environmental Effects (**AEE**) provides a brief and high-level commentary on the objectives and strategies in Te Ture Whaimana. This assessment amounted to only three pages of comments that do not reflect the significant importance of Te Ture Whaimana and were not informed by the WRA, Waikato-Tainui, River Iwi or even a cultural impact assessment.[68]

90. The applicant, through the AEE, concluded that the application is "*demonstrably consistent*" with Te Ture Whaimana.[69] Mr Mitchell has also provided evidence to this effect[70] and the claim is repeated in the applicant's opening submissions.[71]

91. It is submitted that the application falls significantly short of being 'demonstrably consistent' with Te Ture Whaimana. This is revealed by the evidence of Waikato-Tainui, River Iwi and the WRA and is difficult to justify based on the minimal assessment of Te Ture Whaimana objectives and strategies undertaken by the applicant.

Objective A

The restoration and protection of the health and wellbeing of the Waikato River

92. The applicant claims that this objective is achieved because the effects on the flows, intrinsic values and ecological values have been assessed as minor or less than minor. However, the 'health and wellbeing' of the River, in the context of Te Ture Whaimana, is not based solely on environmental effects.

93. As Ms Mahuta provides in her evidence, the objectives and strategies in Te Ture Whaimana are to achieve the 'vision', which provides for restoring and

[67] Assessment of Environmental Effects at [2].
[68] Assessment of Environmental Effects at [12.3.6].
[69] Assessment of Environmental Effects at [12.3.6].
[70] Statement of Evidence of P Mitchell (21.05.2021) at [3.13(d)], [7.17(d)] and [12.6(d)].
[71] Applicant's Opening Legal Submissions (31.09.2021) at [13.1].

protecting the Waikato River "…*for generations to come*".[72] Mr Papa, in his evidence on behalf of Waikato-Tainui, provides that:[73]

> *…A lengthy period of harm, such [sic] an extended take or discharge can be draining to the Awa in a holistic sense. Thirty-five years is close to a generation. A consent term of that length, in my view, doesn't prioritise the protection or restoration of the Awa and is inconsistent with Te Ture Whaimana.*

94. In addition, the applicant relies on the establishment of a trust to address this objective, but there is no certainty that the trust and the associated payment are appropriate in the context of the proposed water take or Te Ture Whaimana. The trust and the proposed payment are set in an arbitrary manner and it is not clear how they have been designed to achieve this objective.

Objective B

The restoration and protection of the relationships of Waikato-Tainui with the Waikato River, including their economic, social, cultural, and spiritual relationships

95. The application is clearly inconsistent with this critical objective. Again, the WRA defers to the evidence of Waikato-Tainui and River Iwi in respect to cultural matters.

96. There is a significant level of opposition to the application from Waikato-Tainui. That creates a real question as to how the application could be said to 'restore and protect' the relationships of Waikato-Tainui with the Waikato River as a tupuna awa.

97. The Board has before it strong and uncontested cultural evidence from Waikato-Tainui to confirm that the application is directly contrary to Objective B and the restoration and protection of those relationships.

98. By way of example:

    (a) Ms Flavell states that the application undermines the very intent of the Waikato River Settlement and Waikato-Tainui's goals in achieving Te Mana o te Awa and Mana Whakahaere;[74]

[72] Statement of Evidence of T Mahuta (18.06.2021) at [31]- [32].
[73] Statement of Evidence of S Papa (22.06.2021) at [41].
[74] Statement of Evidence of D Flavell (18.06.2021) at [84].

(b) Mr Papa states that any activity that discharges into or takes water from the Awa should be consistent with Waikato-Tainui values by tangibly advancing the objectives set out in Te Ture Whaimana. The entire approach to the regional plan, with particular emphasis on consents related to the Awa, would change with that view in mind;[75]

(c) Mr Morgan states that it is the relationship between Waikato-Tainui and the Waikato River that is relevant, not the allocable mechanisms in a regional plan; [76] and

(d) Mr Solomon states that the application does not give due consideration to Te Ture Whaimana and it undermines the Waikato River Treaty Settlement.[77]

99. Mr Brough and Mr Donald confirm in their planning evidence (supported by the Stantec report), there is very little assessment of the cultural effects of this application.[78] In respect to objectives (b) and (c) there is simply no way of assessing whether those relationships have been restored and protected, for example in respect to objective (c) "*according to their tikanga and kawa*", without understanding the cultural effects of the application. Mr Papa provides evidence on the cultural effects of the application, particularly for Waikato-Tainui.[79] As Mr Brough summarises:[80]

> *It is evident to me, and consistent with the evidence of Mr Papa, the application will impact the ability of Waikato-Tainui to protect their tūpuna awa, which appears to be additional and cumulative to the existing dislocation of values experienced by Waikato-Tainui over time. I note, this is diametrically opposed to achieving the desired future states that are set out in Objective 3(b) and 3(c), and arguably 3(g) of Te Ture Whaimana.*

100. There has been no cultural impact assessment provided by the applicant and there is no evidence before the Board to contest the position of the Waikato-Tainui witnesses. Rather, the applicant seeks to undermine that evidence through rebuttal evidence and opening submissions, including by focussing on the concept that cultural rights are not a 'veto' under the RMA.[81] That proposition is not disputed, but does not go to the heart of the issues before

[75] Statement of Evidence of S Papa (22.06.2021) at [42].
[76] Statement of Evidence of T Morgan (15.06.2021) at 19
[77] Statement of Evidence of S Solomon (11.06.2021) at [2]-3].
[78] Statement of Evidence of G Brough (18.06.2021) at [27]-[30]; Statement of Evidence of G Donald (22.06.2021) at [5.3.8].
[79] Statement of Evidence of S Papa (22.06.2021) at [22]-[29].
[80] Statement of Evidence of G Brough (18.06.2021) at [31].
[81] Applicant's Opening Legal Submissions (31.09.2021) at [11.9].

the Board. Rather, the Board must consider the views expressed by the Waikato-Tainui and WRA witnesses, and how those views impact on the Board's decision (that is a matter of evidence and weight, not a veto).

101. In the face of that evidence from Waikato-Tainui, it is difficult to envisage how the conclusion could be reached that the application is consistent with Objective B of Te Ture Whaimana (or Te Ture Whaimana generally).

Objective C

The restoration and protection of the relationships of Waikato River iwi according to their tikanga and kawa with the Waikato River, including their economic, social, cultural, and spiritual relationships

102. The WRA respects the views of all River Iwi. In relation to this particular application, Objective B is the primary consideration given the location of the activity in the rohe of Waikato-Tainui.

Objective D

The restoration and protection of the relationships of the Waikato Region's communities with the Waikato River, including their economic, social, cultural, and spiritual relationships

103. The application is not consistent with this objective. The dominant focus of the application is on the water supply needs for Auckland, rather than the interests of the Waikato communities. The application seeks to take a significant portion of the allocable flow from the River, and transfer that away from the Waikato Region's communities.

104. Ms Mahuta for the WRA states:[82]

> *52. The application does not deal with Te Ture Whaimana respectfully or appropriately, and it does not explain in any meaningful way how the vision or objectives of Te Ture Whaimana will be achieved. The focus of the application is on the needs of Auckland, not the needs of the Waikato River and its communities. The WRA does not consider that the application provides genuine focus and attention to the restoration and protection of the health and wellbeing of the Waikato River (objective (a) of Te Ture Whaimana).*
>
> *…*

[82] Statement of Evidence of T Mahuta (18.06.2021) at [52] and [59].

59. The other concerns of the WRA include:

(a) the application represents a wealth transfer from the Waikato region to the Auckland region, and this is at the expense of the future communities of the Waikato region;

(b) that water will be permanently lost from the Waikato River catchment if the application is approved, which undermines the definition of the Waikato River to Waikato-Tainui and River Iwi, being an indivisible entity [Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010, s 8(3)]:

> *…The Waikato River is a single indivisible being that flows from Te Taheke Hukahuka to Te Puuaha o Waikato (the mouth) and includes its waters, banks and beds (and all minerals under them) and its streams, waterways, tributaries, lakes, aquatic fisheries, vegetation, flood plains, wetlands, islands, springs, water column, airspace, and substratum as well as its metaphysical being…*

(c) it is not clear that this is the only viable option to meet Auckland's water needs and that alternatives have been appropriately or robustly considered, to the extent they should in light of the objectives of Te Ture Whaimana.

105. Similarly, Mr Penter for the WRA states:[83]

89. The application does not address or provide confidence that this vision (from the primary direction setting document for the Waikato River) will be realised, including how the activity would sustain prosperous Waikato communities or the health and wellbeing of the river for future generations. The focus of the application is on Auckland (including the costs to Auckland of not providing this water), not the Waikato region (including the costs and loss of value to the Waikato communities of losing this water from the catchment permanently).

Objective E

The integrated, holistic, and co-ordinated approach to management of the natural, physical, cultural, and historic resources of the Waikato River

106. In the AEE, the applicant provides that:[84]

In respect of Objective E, the approach taken to assessing and managing the effects of the proposed activities has included consideration of both the

[83] Statement of Evidence of R Penter (18.06.2021) at [89].
[84] Assessment of Environmental Effects at [12.3.6].

physical and cultural values of the Waikato River. It has also considered effects, and the management of those effects, on a whole of catchment scale.

107. As discussed above, the evidence is that the applicant has not assessed the cultural effects of the application.

108. Ms Mahuta states that it is not clear how restoration or betterment will be achieved, in particular through an integrated and coordinated approach with all parties, including the WRA, Waikato-Tainui and River Iwi.[85]

109. Mr Penter states that one of the functions of the WRA is to promote an integrated, holistic and co-ordinated approach to the implementation of Te Ture Whaimana and the management of the Waikato River, and provides evidence on the practical ways in which the WRA carries out this function.[86] Mr Penter's evidence is that, due to the absence of meaningful engagement, the application has not been informed by the views or experience of the WRA.[87]

110. The application is clearly not consistent with this objective.

BETTERMENT: THE PROPOSED TRUST AND THE ANNUAL PAYMENT

111. A central element in the applicant's proposal is the establishment of a trust and an annual payment. That was originally to be a trust with Waikato-Tainui, but if that did not eventuate the applicant considered that payment could simply be made to the Clean-Up Trust administered by the WRA (although that was not discussed in any detail with the WRA). It appears that if those options fail, the applicant will establish its own trust.[88]

112. The Environment Court in *Puke Coal* found that protecting and restoring the health and wellbeing of the Waikato River goes further than avoiding effects, and in particular some element of 'betterment' is intended by Te Ture Whaimana.[89]

113. In *Puke Coal* the Court held:[90]

[85] Statement of Evidence of T Mahuta (18.06.2021) at [58].
[86] Statement of Evidence of R Penter (18.06.2021) at [24], [34] and [48].
[87] Statement of Evidence of R Penter (18.06.2021) at [81]-[84].
[88] Applicant's Opening Legal Submissions (31.09.2021) at Appendix A (proposed consent conditions), Schedule 1, Common Conditions, Condition C; and Rebuttal Statement of Evidence of M Bourne (09.07.2021) at [5.3].
[89] At [92].
[90] At [134].

[134] Accordingly, it is our view that every application affecting the river catchment will need to demonstrate ways in which it protects and restores the river in proportion to:

[a] The activity to be undertaken;

[b] Any historical adverse effects; and

[c] The state of degradation of the environment. Section 8.2.1 of the Iwi Management Plan assists us in an approach to achieve protection and restoration.

114. The Court continued:[91]

[137] It is our view that the Vision and Strategy recognises that on an application for a resource consent, affecting the Waikato waterways, there is an important opportunity to provide for the protection and restoration of the river in a more direct fashion. In such a case, the applicant would need to show that, in proportion to the impact of the proposal, there was real benefit to the river catchment.

[138] We use the words in proportion as qualifying because it is clear from a reading of the whole Vision and Strategy that it does not intend that the first applicant is responsible for the entire upgrade of the river catchment, nor could such an approach be in accordance with the Act. But nevertheless, the generational impacts upon the river should be recognised and addressed.

[139] The scale of that is clearly a matter for the discretion of the Council relevant to each case, but we would expect that it would be interpreted as there being an opportunity wherever possible within the catchment to improve any streams or waterways and the water quality within it…

115. The Court in *Puke Coal* anticipated a "*stepwise change in the approach to consents affecting the catchment of the Waikato River*".[92]

116. The applicant's assessment of the proportionality principle is essentially that a proposal with significant adverse effects will need significant restoration measures, whereas a proposal with less adverse effects will need less restoration measures.[93] The applicant then relies on the assessment of environmental effects (absent cultural effects) of the proposal being low or very low, and as such concludes that less is required by way of restoration.[94]

[91] At [137]-[139].
[92] At [86].
[93] Applicant's Opening Legal Submissions (31.09.2021) at [13.11].
[94] Applicant's Opening Legal Submissions (31.09.2021) at [13.12].

That is clearly not appropriate under Te Ture Whaimana or the RMA, particularly given the importance of cultural effects.

117. This is a large-scale application which will have significant impacts. The applicant has provided, through the evidence of Mr Bassett, a graph identifying the relevant allocable flow limits and the allocation of water across the year (both with existing and proposed consents).[95]

118. This graph reflects the stark reality that a significant amount of water is already allocated and, in the months November through to April, the allocable flows are close to being reached (provided this consent and other applications are also granted). During those months, the applicant through this consent seeks to take nearly the full remaining allocable flow.

119. In addition, taking into account the applicant's existing water take consents (and the consents that will be surrendered if the application is successful) and the proposed water take consent, the total combined water take by the applicant would amount to approximately 18.47% of the allocable flow.[96] It is not realistic to suggest that a proposed water take of this magnitude from the country's largest river is anything other than significant, requiring a significant level of betterment to be provided.

120. It is also quite possible that if the WRP had been prepared in a manner consistent with the Treaty settlement arrangements and Te Ture Whaimana, the proposed take would not fall within the limits in the plan. Further, Mr Penter discusses the impending review of Te Ture Whaimana which could have a significant bearing on the water quality and water allocation parameters for the Waikato River.[97]

121. As noted above in relation to the evidence from Waikato-Tainui, the impact of the proposal is significant from a cultural perspective and in the context of the 'restore and protect' objectives in Te Ture Whaimana.

122. The applicant does not assess cultural effects. In the absence of that assessment, it is difficult to understand how the applicant can conclude what is required by way of a proportionate level of restoration. That raises real

[95] Statement of Evidence of T Bassett (21.05.2021) at [6.9].
[96] This percentage is to two decimal places. This was calculated based on the evidence that the allocation flow at the Waikato River at Coastal Marine Area is 1,624,320 m^3/day (see [6.3], Table 3 of the Statement of Evidence of Tom Bassett), and the total take by the applicant (if consent is granted as proposed) would amount to 300MLD.
[97] Statement of Evidence of R Penter (18.06.2021) at [67]-[70].

questions as to whether what the applicant proposes in fact provides for 'betterment' as anticipated in *Puke Coal.*

The Trust and annual payment

123. The applicant has provided for the establishment of a trust, to administer $2 million per year for the duration of the consent, for the purpose of restoring and protecting the health and wellbeing of the Waikato River. Mr Penter's evidence is that the proposed trust does not provide any certainty that it will provide 'betterment' proportionate to the activity.

124. It is submitted that the applicant has not actually provided evidence as to how, in practice, these measures will provide for 'betterment' for the Waikato River in a proportionate sense – even from a solely environmental (and not cultural) effects perspective. The trust does not provide 'betterment' proportionate to the other significant impacts of the proposal, in particular the significant cultural impacts.

125. The applicant states (and this is reflected in the condition) that this trust is for the purpose of restoring and protecting not only the health and well-being of the Waikato River but also the relationship of Waikato-Tainui and River Iwi with the Waikato River. However, Waikato-Tainui have not agreed to be a part of the trust and neither has the WRA. It is difficult to understand how a trust could achieve those purposes without that support.

126. Ms Mahuta notes in relation to the proposed trust:[98]

> *The application is unclear in terms of how the water take will contribute to the 'restoration' of the Waikato and similarly it does not address the issue of 'betterment' in any meaningful way. It is not clear how restoration or betterment will be achieved, in particular through an integrated and coordinated approach with all parties, including the WRA, Waikato-Tainui and River Iwi. A general commitment to a trust, with an arbitrary monetary payment, with no certainty that agreement will be reached, falls well short of what is required.*

127. The proposed consent conditions provide that the applicant must provide the first year's annual funding to the Waikato-River Clean-Up Trust. As discussed above, a core function of the WRA is to fund rehabilitation initiatives for the Waikato River in its role as trustee for the Waikato River

[98] Statement of Evidence of T Mahuta (18.06.2021) at [58].

Clean-Up Trust, but this proposal was not discussed with the WRA. Mr Penter states that although the WRA may accept other sources of funding, it is not required to do so and it would be unlikely to if that would be opposed by the River Iwi.[99] As such, there is no certainty that this condition will be achievable.

128. In terms of the payment, it is not clear how the annual payment was calculated against the scale of the proposed water take and the consequent (particularly cultural) effects. To the WRA that appears to be an arbitrary amount with no connection to Te Ture Whaimana or the settlement arrangements that sit behind it.

129. Mr Bourne, in his rebuttal evidence, confirms that "*there is no particular "science" or methodology that sits behind this figure of $2 million per year*" and relies, by way of comparison, on the quantum of other restoration funds.[100] That confirms the arbitrary nature of the proposed payment.

130. By way of analogy, an arbitrary monetary payment of this kind would in an ecology context be considered an absolute last resort form of 'compensation' for adverse effects, to be implemented only if all alternatives more clearly related to the nature and level of effect have been exhausted. The proposed payment should be treated with the same level of caution as it would be treated in the ecology context, especially given the central importance of cultural matters in the decision-making framework.

Other measures

131. The applicant has proposed a number of other measures relevant to 'betterment'. In summary:

    (a) **reduction in reliance**: Mr Penter's evidence is that, in the context of a significant water take from the Waikato River, reduction in reliance is essential to achieve betterment, particularly when looking at the 'vision' of Te Ture Whaimana requiring restoration and protection of the Waikato River "*…for generations to come*.".[101] Mr Fisher provides evidence that the Kawenata entered into between Te Whakakitenga and the applicant in December 2020 records key agreements relating

[99] Statement of Evidence of R Penter (18.06.2021) at [107].
[100] Rebuttal evidence of M Bourne (09.07.2021) at [3.2].
[101] Statement of Evidence of R Penter (18.06.2021) at [101].

to a reduction in reliance of the Waikato River over time.[102] However, as Mr Penter notes in his evidence, and what has since been confirmed in the rebuttal evidence of Mr Fisher, this reduction means a reduction in the percentage contribution of Waikato River water to Auckland's water supply and not a reduction in the absolute volume of water taken from the Waikato River.[103] Moreover, the applicant seeks to 'lock in' that level of take for the next 35 years. That is not a reasonable interpretation of the 'reduction in reliance' concept in the context of seeking improved outcomes for the River.

(b) **Other**: The applicant, through legal submissions, has listed a number of other measures, that appear to be related to cultural matters. For example, the establishment of a tāngata whenua liaison group, appointment of a kaitiaki advisor and the implementation of a cultural indicators monitoring plan. Again, it is difficult to see how these measures can be assessed as being appropriate and proportionate when the evidence before the Board is that the applicant has not adequately assessed or understood the cultural effects of the application, and the measures are unlikely to be supported by the River Iwi.[104]

132. The measures proposed by the applicant to achieve betterment are not supported, and were not meaningfully informed, by Waikato-Tainui, the WRA and a number of other submitters.

133. Section 8.2.1 of the Iwi Management Plan provided guidance to the Court in *Puke Coal*, and importantly states at 8.2.3:[105]

> *Only Waikato-Tainui can determine what, from a Waikato-Tainui perspective, constitutes a suitable way to avoid, remedy, minimise, mitigate or balance effects caused from a resource use or activity.*

EVIDENCE

134. The evidence on behalf of the WRA will be provided by:

[102] Statement of Evidence of R Fisher (21.05.2021) at [3.6] and Rebuttal Statement of Evidence of R Fisher (09.07.2021) at [2.3].
[103] Statement of Evidence of R Penter (18.06.2021) at [102]; and Rebuttal Statement of Evidence of R Fisher (09.07.2021) at [2.14]
[104] Statement of Evidence of G Brough (18.06.2021) at [27]-[31]. See also page 12, Section 3.0 of Review of Watercare Services Limited Resource Consent Applications for New Waikato River Take – Stantec February 2021.
[105] See DLAF-1, Annexure 1 to Statement of Evidence of D Flavell (18.06.2021) at at [8.2.3].

(a) Tipa Te Atawhai Mahuta: Co-Chair of the WRA; and

(b) Robert Ray Penter: Chief Executive of the WRA.

CONCLUSION

135. For the reasons set out in these submissions and the evidence provided on behalf of the WRA, the WRA seeks that the consents be declined.

Dated: 9 September 2021

P Beverley / C Bulow
Counsel for the Waikato River Authority