

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

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

CIV-2021-485-

Under The Judicial Review Procedure Act 2016

And Part 30 of the High Court Rules

Between **TE POU MATAKANA LIMITED** trading as
WHĀNAU ORA COMMISSIONING AGENCY
an incorporated company at Auckland, Whānau Ora
provider

First Applicant

And **WHĀNAU TAHI LIMITED** an incorporated
company at Auckland, IT and information systems
provider

Second Applicant

And **ATTORNEY-GENERAL** sued in respect of the
MINISTRY OF HEALTH

Respondent

STATEMENT OF CLAIM – APPLICATION FOR JUDICIAL REVIEW

11 November 2021

Solicitor Acting:
T J G Allan
Grove Darlow & Partners
PO Box 2882
Auckland
T: 09 309 9875
E: tima@grovedarlow.co.nz

Counsel Acting:
J B Orpin-Dowell / M R G van Alphen Fyfe
Stout Street Chambers
PO Box 117
Wellington
T: 04 915 9275 / 04 260 5043
E: jonathan.orpin-dowell@stoutstreet.co.nz /
monique.vanalphenfyfe@stoutstreet.co.nz

The applicants by their solicitors say:

Parties

1. The applicants are:
 - 1.1 First applicant: Te Pou Matakana Limited, trading as the Whānau Ora Commissioning Agency (**WOCA**); and
 - 1.2 Second applicant: Whānau Tahī Limited.
2. The respondent is the Attorney-General, who is sued in respect of the Ministry of Health (**Ministry**), a department of the public service.

The applicants and Whānau Ora

3. Whānau Ora is a whānau-centred approach to the delivery of support and services that assist whānau Māori (and non-Māori) to achieve better outcomes for themselves.
4. Whānau Ora was created in response to a recognition by successive Governments that standard ways of delivering social and health services were not working and outcomes, particularly for Māori whānau, were not improving. It reflects the government's response to a 2009 taskforce that recommended unlocking "the latent potential in the relationships between Government, providers, whānau, and iwi to accelerate Māori social and economic development", with relationships that reflect the spirit and intent of the Treaty partnership.

Particulars

- 4.1 Source: [Te Puni Kōkiri](#) website.
- 4.2 Source: [Whānau Ora: Report of the Taskforce on Whānau-Centred Initiatives](#) (report to the Hon Tariana Turia, Minister for the Community and Voluntary Sector) at [5.3.3].
5. Te Puni Kōkiri is primarily responsible for administering Whānau Ora appropriations. It contracts with three Whānau Ora commissioning

agencies to direct investment and carry out commissioning initiatives with Whānau Ora partners.

6. The first applicant, Te Pou Matakana, is the commissioning agency contracted by Te Puni Kōkiri for Te Ika-a-Māui | the North Island.
7. In turn, Te Pou Matakana contracts with Whānau Ora partners to provide services and support directly to whānau and families. It has 96 partners throughout Te Ika-a-Māui providing health, education and social services to whānau. Of those partners:
 - 7.1 73 are iwi owned or iwi affiliated (76 per cent); and
 - 7.2 23 are owned or affiliated to urban Māori organisations (24 per cent).
8. The second applicant, Whānau Tahi, is Te Pou Matakana's information systems provider.

COVID-19 pandemic and risks to Māori

9. In early 2000, a new coronavirus (SARS-CoV-2) spread quickly around the world. It causes a serious disease called COVID-19. Globally, as at 9 November 2021 there have been 250.2 million confirmed cases of COVID-19 and 5.1 million deaths reported to the World Health Organization.

Particulars

- 9.1 [World Health Organization](#) website.
10. After eliminating COVID-19 in the community in 2020, New Zealand is currently experiencing a community outbreak of the Delta variant of COVID-19. As at 10 November 2021, there are known active cases of COVID-19 in:
 - 10.1 Tāmaki Makaurau | Auckland;
 - 10.2 Te Tai Tokerau | Northland;

10.3 Waikato; and

10.4 Waitaha | Canterbury.

11. As at 10 November 2021 at 9 am, there were 2,967 active cases of COVID-19 in New Zealand, 1,289 (43%) of which are Māori. By contrast, Māori make up only 16.5% of the population.

Particulars

- 11.1 Source: [Ministry of Health](#) website (see extract below).

Cases of COVID-19 by ethnicity

Ethnicity	Active (confirmed and probable)	Recovered	Deceased	Total cases since first case	Percentage of all cases
Māori	1289	725	8	2022	25.5%
Pacific peoples	591	1149	2	1742	22%
Asian	180	990	1	1171	14.8%
Middle Eastern, Latin American and African (MELAA)	59	172	2	233	2.9%
European or Other	791	1858	19	2668	33.7%
Unknown	57	29	0	86	1.1%
Total	2967	4923	32	7922	100%

12. One large British study has reported that one in three diagnosed COVID-19 cases are still suffering at least on long symptom three to six months after recovery. In another British study, more than half admitted to hospital had long COVID symptoms three months after discharge, with worse symptoms for those aged under 50, women, and those with higher pre-COVID fitness levels.

Particulars

- 12.1 Ministry of Health “Sharing of data to support COVID-19 vaccination uptake in individuals who are unvaccinated” (19 October 2021) at [5].

13. Māori are more at risk of adverse outcomes from COVID-19 due to a higher rate of poorer health, including respiratory disease.

Particulars

- 13.1 Ministry of Health “Sharing of data to support COVID-19 vaccination uptake in individuals who are unvaccinated” (19 October 2021) at [9].
14. The percentage of the Māori population who are enrolled with primary healthcare providers is materially lower than the percentage of the general population.

Particulars

- 14.1 As at July 2021, the estimated percentage of the Māori population enrolled with a primary health provider was 84 per cent, compared with 94 per cent for the total population.
- 14.2 Source: [Ministry of Health: Access to primary care](#).

Health rights

15. Everyone has the right to the highest attainable standard of health.

Particulars

- 15.1 Preamble to the World Health Organization’s constitution (ratified by New Zealand on 10 December 1946).
- 15.2 Article 12 of the United Nations International Covenant on Economic, Social and Cultural Rights (ratified by New Zealand on 28 December 1978).

COVID-19 immunisation programme

16. As part of its response to the COVID-19 pandemic, the New Zealand government is currently rolling out a COVID-19 immunisation programme using the Comirnaty vaccine manufactured by Pfizer-BioNTech.
17. Vaccination has been offered in stages. After first being offered to high-risk groups, vaccination was incrementally offered to the general population based on age as follows:

- 17.1 60 years old and over, from about 28 July;
 - 17.2 55 years old and over, from about 11 August;
 - 17.3 50 years old and over, from about 13 August;
 - 17.4 40 years old and over, from about 18 August;
 - 17.5 30 years old and over, from about 25 August; and
 - 17.6 12 years old and over, from about 1 September.
18. Two doses of the vaccine are offered, which the Ministry presently recommends be spaced apart by six weeks (although, given the current spread of COVID-19 in the community, it now also recommends individuals consider a shorter gap of three weeks).

Commitments to Māori relating to COVID-19 immunisation programme

19. The overarching principles for the immunisation programme are equity and Te Tiriti o Waitangi.

Particulars

- 19.1 Source: [Ministry of Health](#) website (see extract below).

Equity and Te Tiriti o Waitangi are the overarching principles for the COVID-19 Vaccine and Immunisation programme. To achieve equity for our priority groups (Māori, Pacific, and people with disabilities) and actively protect Te Tiriti rights of Māori, requires specific responses, resources, and activities to be developed and implemented.

20. The Government has committed to upholding and honouring Te Tiriti o Waitangi in the immunisation programme and acknowledged its obligations that flow from the Treaty partnership, including the principle of partnership, tino rangatiratanga, equity, options and the duty of active protection.

Particulars

- 20.1 Source: [Ministry of Health](#) website (see extract below).

Ensuring equal access

Ensuring equal access to free COVID-19 vaccines is a priority for New Zealand.

The Government is committed to upholding and honouring Te Tiriti o Waitangi, including obligations towards Māori that flow from the Treaty partnership. We have a strong focus on:

- partnership
- tino rangatiratanga
- options
- equity
- active protection.

Working with our partners

We're working closely with higher risk communities, Māori and our Pacific neighbours to ensure we're providing equal and fair access to the COVID-19 vaccine.

21. The Government has:

- 21.1 acknowledged that partnerships with iwi and Māori are critical to the successful implementation of the immunisation programme to maximise uptake and achieve equitable coverage; and
- 21.2 committed to working with Māori providers to empower them to deliver COVID-19 immunisation, including to deliver tailored and targeted approaches.

Particulars

21.3 Source: [Ministry of Health](#) website (see extracts below).

Partnering with Māori and Pacific

Māori and Te Tiriti

Iwi and Māori partnerships will be critical to the immunisation programme's successful implementation. We're committed to working with Māori providers and empowering them to deliver COVID-19 immunisation to their communities.

This includes upholding Te Tiriti o Waitangi principles and working in partnership with Māori. This is fundamental to the programme's success and protecting the unique whakapapa of New Zealand Aotearoa.

Māori and Pacific providers

All health providers are responsible for the immunisation of the Māori and Pacific people in their communities, but we know that Māori and Pacific providers hold trusted relationships with the whānau they serve. These providers will play a crucial role in helping to maximise uptake and achieve equitable coverage for Māori and Pacific people.

The COVID-19 Immunisation Programme will partner with Māori and Pacific providers so they can deliver tailored and targeted approaches to their communities as part of the wider COVID-19 vaccination programme rollout.

The Government has committed dedicated funding and resources for Māori and Pacific providers and communities to prepare for this.

COVID-19 immunisation programme has not achieved equitable coverage

22. The percentage of the eligible Māori population who have received COVID-19 vaccinations is materially lower than the percentage of other eligible populations.

Particulars

- 22.1 As at 9 November 2021 at 11.59 pm, the percentage of the eligible population vaccinated, by ethnicity, was as follows:

	First dose	Second dose
Asian	>95.0%	94.6%
European / other	89.4%	80.4%
Pacific Peoples	87.1%	73.5%
Māori	74.9%	58.1%
TOTAL	89.5%	79.2%

- 22.2 Source: [Ministry of Health](#).

23. Significant barriers prevent Māori accessing primary healthcare services. Barriers to them doing so include:

23.1 **Cost** – including loss of income due to having to take time off work to seek services.

23.2 **Access to services** – such as service locations and the distance to travel for services, suitable appointment times, long waiting times, lack of transport, and childcare availability and cost.

23.3 **Poor service delivery** – including whānau feeling unwelcome or disrespected.

23.4 **Cultural barriers** – including service providers misunderstanding te Ao Māori and consequently misunderstanding whānau caution and whānau reluctance to approach health services that is often

related to cost and bad prior experience and a preference for Māori clinicians or Māori providers.

23.5 **Poor communication by health providers** – including whānau feeling whakamā because they do not understand the questions asked or the information shared by service providers that are not appropriately communicated.

23.6 **A clash between western and Māori models** – such as Māori models of wellbeing and the medical, disease-oriented model, which can result in whānau and non-Māori clinicians talking past each other.

Particulars

23.7 [More than just a jab: evaluation of the Māori influenza vaccination programme as part of the COVID-19 Māori health response](#) (report prepared for the Ministry of Health, December 2020) at [6]).

24. The Government has accepted publicly that the reasons why the Māori vaccination rate is lower than other New Zealanders include a lack of trust in government institutions.

Particulars

24.1 [Interview with Hon Peeni Henare, Associate Minister of Health by Mike Yardley on Newstalk ZB](#) (5 October 2021).

24.2 [Hon Chris Hipkins, Minister of COVID-19 Response at 1 pm press conference](#) on 6 October 2021.

Urgency of reaching unvaccinated Māori

25. Given the efficacy of the Comirnaty vaccine, COVID-19 is becoming a disease of the unvaccinated.

Particulars

- 25.1 Source: [Caroline McElnay \(Director of Public Health, Ministry of Health\) at 1 pm press conference](#) on 5 October 2021.
26. On 4 October 2021, the Prime Minister announced that New Zealand was transitioning away from its current strategy of eliminating COVID-19 using lockdowns to a new strategy reliant on vaccination and public health measures.

Particulars

- 26.1 Source: [Prime Minister's post-Cabinet press conference](#) on 4 October 2021.
27. On 22 October 2021, the Prime Minister announced that:
- 27.1 New Zealand will move from the current alert level system to the COVID-19 Protection Framework:
- (a) in Tāmaki Makaurau when 90 per cent of the eligible population in each of the three local district health boards are double vaccinated; and
 - (b) in the rest of the country when 90 per cent of the eligible population in all of the other district health boards are double vaccinated; and
- 27.2 Cabinet would review progress on 29 November 2021 to see if anything needs to change.

Particulars

- 27.3 Source: Jacinda Ardern “[Introducing the COVID-19 Protection Framework](#)” (22 October 2021, Unite Against COVID-19 <www.covid19.govt.nz>).

28. On 6 November 2021, the Prime Minister committed as a bottom line that Aucklanders would be able to move out of the city for summer and Christmas.

Particulars

28.1 Source: [Interview with Jacinda Ardern, Prime Minister](#) (Tova O'Brien, Newshub Nation, 6 November 2021).

29. On 7 November 2021, the Government announced that 90 per cent of the eligible population in all three district health boards in Tāmaki Makaurau had received a first dose of the vaccine.

Particulars

29.1 Source: Chris Hipkins “[90 percent first dose target reached in Auckland](#)” (press release, 7 November 2021).

30. On 8 November 2021, the Prime Minister announced that there was a strong expectation that Tāmaki Makaurau would move into the COVID-19 Protection Framework following Cabinet meeting on 29 November 2021.

30.1 Source: [Prime Minister’s post-Cabinet press conference](#) on 8 November 2021.

31. With the transition away from eliminating COVID-19 and the transition to the COVID-19 Protection Framework, the imperative to deliver vaccines to the unvaccinated is urgent.

Particulars

31.1 Hon Chris Hipkins “[Big vaccination drive leading to a National Day of Action on October 16](#)” (press release, 6 October 2021): “The next week and a half is critical. We need to pull out all the stops to increase our vaccination rates. It has never been more urgent.”

32. It is critical to reach all eligible people so that they can receive two doses, appropriately spaced, as soon as possible.

Particulars

- 32.1 Ministry of Health “Sharing of data to support COVID-19 vaccination uptake in individuals who are unvaccinated” (19 October 2021) at [6].

The applicants’ work in delivering vaccines to Māori

33. Whānau Ora partners are working to increase the low Māori vaccination rate across Te Ika-a-Maui. Whānau Ora partners have:
- 33.1 established 200 vaccination sites (either fixed, mobile or community sites) across Te Ika-a-Māui;
- 33.2 (as at 18 October 2021) delivered almost 496,000 COVID-19 vaccinations across the network (to people of all ethnicities).
34. Whānau Ora partners have provided vaccination services via:
- 34.1 the establishment of semi-permanent vaccination centres to carry out large scale vaccination;
- 34.2 clinic based appointments for vaccinations at existing healthcare services; and
- 34.3 mobile vaccination clinics.
35. These services have been designed to overcome the barriers Māori traditionally face in accessing healthcare services. In particular, the mobile vaccination clinics:
- 35.1 are a by Māori for Māori programme;
- 35.2 allow whānau to be vaccinated close to their homes at a time that suits them;
- 35.3 allow for a range of other COVID-19 related services to be offered in conjunction with vaccination, including COVID-19 saliva testing, hygiene packs and kai packs; and

35.4 come to whānau and the daily location of the mobile clinics is widely publicised in the local community using mail drops, social media, radio and announcements from cars driving around the location of the campervans.

Provision of individual level Māori data

36. As part of its efforts to reach unvaccinated Māori, the Ministry has provided individual level data about unvaccinated Māori to:

36.1 the operator of the COVID Vaccination Healthline (**Healthline**) (a non-Māori telehealth company), for the purpose of outbound vaccination information campaigns to encourage and support them to be vaccinated; and

36.2 non-Maori primary healthcare organisations, for the purpose of them encouraging and supporting them to be vaccinated.

37. As part of the Outreach Immunisation Service, the Crown shares individual level data about Māori with Outreach Immunisation Service providers.

The Ministry declines to provide the applicants with data

38. The applicants are working to support Whānau Ora providers to provide vaccine outreach services, particularly to those Māori who:

38.1 have not received any dose of the vaccine; and

38.2 have received only one dose of the vaccine

(together “**Unvaccinated**”).

39. On 27 August 2021, John Tamihere (on behalf of the applicants) asked the Ministry of Health to enter into data sharing arrangements with the applicants and to provide them with relevant details of Unvaccinated Māori.

40. Following discussions between the parties, on 27 September 2021 the applicants and the Ministry of Health entered into an agreement to share

health data for the purpose of Whānau Ora partners inviting their existing Unvaccinated clients to be vaccinated (**Data Sharing Agreement**). The Data Sharing Agreement:

- 40.1 Records the parties' agreement that "COVID-19 is considered a serious threat to the health and safety of New Zealanders" (clause 1.1).
 - 40.2 Records that the applicants' responsibilities include "outreach to populations they are engaged with to promote and facilitate delivery of vaccinations" (clause 1.3).
 - 40.3 Records the Ministry's agreement that vaccination outreach "work cannot practically be done without identifiable information because WOCA commissioned providers must be able to identify which of their clients are not vaccinated or booked, nor have opted-off the CIR" (clause 2.4).
 - 40.4 Puts in place a range of privacy protection mechanisms including that the data may "only be used ... to identify and engage unvaccinated or unbooked individuals to encourage them to access vaccinations" (clause 4.4) and that the data supplied will be securely destroyed no later than 31 January 2022 (clause 5.1).
 - 40.5 Sets out the information that the Ministry of Health will provide to the applicants in clause 6.3. By way of summary, this is the individual's NHI number, details of doses received to date, whether they have opted out of being vaccinated, and contact details.
41. By letter dated 1 October 2021, the Ministry of Health:
- 41.1 confirmed its agreement to share with the applicants information regarding the vaccination and booking status data of individuals who had previously been provided services by a Whānau Ora partner; and

- 41.2 declined at that time to share the same information about Māori who have not previously been provided services by a Whānau Ora partner.
42. On 7 October 2021, the applicants commenced proceedings against the respondent seeking judicial review of the Ministry of Health’s decision, to that date, not to share with the applicants information about Māori who have not previously been provided services by a Whānau Ora partner (**First Judicial Review Proceeding**).
43. Discussions continued between the applicants and the Ministry following filing of the First Judicial Review Proceeding.
44. As a result of those discussions, on 18 October 2021 the applicants confirmed to the Ministry that their request was limited to the personal details, contact details, vaccination status and vaccination booking status of Unvaccinated Māori within Te Ika-a-Māui.
45. On 20 October 2021, the Ministry made a decision on that request (**First Decision**). It decided to:
- 45.1 agree to authorise the sharing with WOCA of anonymised (to street level) mapping representations that show areas with unvaccinated communities, subject to the resolution of technical issues, and the execution of a data sharing agreement that meets the Ministry’s due diligence requirements; and
- 45.2 decline to authorise the sharing of individual identifiable data for individuals who are not vaccinated.
46. The First Judicial Review Proceeding relating to the First Decision was heard on 26 October 2021.
47. On 1 November 2021, this Court gave judgment in the First Judicial Review Proceeding (**First Judgment**). It granted the following relief:
- 47.1 The Ministry’s decision of 20 October 2021 is set aside.

- 47.2 It declared that the Ministry had erred in its interpretation and application of r 11(2)(d) of the Health Information Privacy Code 2020 (**HIP Code**).
- 47.3 It declared that the Ministry's power to disclose information under r 11(2)(d) of the HIP Code in the context of the COVID-19 vaccination programme must be exercised in accordance with Te Tiriti o Waitangi | Treaty of Waitangi and its principles.
- 47.4 It directed the Ministry to urgently retake the decision, within three working days, in accordance with the law and having regard to the findings in this judgment, reserving leave to the Ministry to apply to the Court if it was not able to retake the decision within three working days.
48. On 4 November 2021, the Ministry sought an additional working day in which to remake its decision. The applicants consented to that request. This Court extended the time for reconsideration by one working day.
49. In the early evening on 5 November 2021, the applicants were advised that the Ministry had completed its reconsideration and was declining to provide the applicants with the individual level data for unvaccinated Māori (**Second Decision**).
50. At 9.21 pm on 5 November 2021, the applicants were provided with a copy of the decision paper underlying the decision but not the attachments referred to in the paper.
51. Following their request, the attachments referred to in the paper were provided to the applicants in tranches on 5 and 6 November.
52. The reasons for the second decision are recorded in a decision paper, dated 5 November 2021, from Jo Gibbs (National Director, COVID-19 Vaccine and Immunisation Programme) to Ashley Bloomfield (Director General of Health).
53. The Director-General accepted Ms Gibbs recommendations that the Ministry:

- 53.1 invite WOCA and Whānau Tahī urgently to work in partnership with the Ministry, relevant iwi, and local service delivery providers to identify those rohe where vaccination outreach to Māori is most needed, and to identify the necessary and appropriate scope of data sharing in each case; and
 - 53.2 decline the request for access to all North Island individual level Māori health information sought by the applicants.
54. In relation to the provision of further data to the applicants, the decision paper suggested prioritising discussions in relation to Tāmaki Makaurau and Kirikiriroa | Hamilton given the current Delta outbreaks in those areas.

Events following reconsideration

55. On 7 November 2021, the applicants' solicitors wrote to the Ministry (without prejudice to their right to challenge the Second Decision) taking up the suggestion of prioritising discussions in relation to providing further data in Tāmaki Makaurau and Kirikiriroa. They requested provision of individual level information of unvaccinated Māori (personal details, contact details, vaccination status and vaccination booking status) in:
- 55.1 Tāmaki Makaurau (Auckland, Counties Manukau and Waitematā DHBs); and
 - 55.2 Kirikiriroa (Waikato DHB).
56. On 8 November 2021, the Ministry put forward a proposal under which it would consider sharing individual level information about unvaccinated Māori in 15 SA2 areas in Tāmaki Makaurau.
57. Using census data, the applicants were able to ascertain that:
- 57.1 four of SA2 areas identified by the Ministry had no Māori residents;
 - 57.2 the total unvaccinated Māori population for the 15 SA2 areas was 180;

- 57.3 the total number of unvaccinated Māori in the three Auckland DHBs is 26,979;
- 57.4 the Ministry's proposal therefore involved exploring whether it would provide the applicants with the individual level data for 0.67% of the unvaccinated Māori population in the three Auckland DHBs.
58. The same day the applicants rejected this proposal as an inefficient solution to the problem.
59. On 9 November 2021, the Ministry held a hui to consider the applicants' request for data about Unvaccinated Māori in Tāmaki Makaurau. At the time of filing this proceeding, no decision has been made on that request.

FIRST CAUSE OF ACTION: JUDICIAL REVIEW

60. The applicants seek judicial review of, and/or an extraordinary remedy in relation to, the Second Decision.

Second Decision

61. The Ministry's power to release the information requested is found in r 11(2)(d) of the HIP Code. This allows the Ministry to disclose the information if it believes on reasonable grounds that:
- 61.1 it is either not desirable or not practicable to obtain authorisation for the disclosure from the individual concerned (**Condition 1**);
- 61.2 there is a serious threat to public health or public safety, or to the life or health of the individual concerned or another individual (**Condition 2**); and
- 61.3 disclosure of the information is necessary to prevent or lessen that threat (**Condition 3**).
62. In the Second Decision the Ministry accepted that Condition 1 and Condition 2 were satisfied. It found that the key issues for decision were:

- 62.1 whether Condition 3 was satisfied; and
 - 62.2 if Condition 3 was satisfied, whether, in the Ministry's discretion it should, in all the circumstances, disclose the information.
63. In the First Judgment, this Court held at [63] that in the context of the acknowledged serious risks to individuals and public health posed by COVID-19, the Ministry's assessment of Condition 3 required an objective, evidence-based assessment of:
- 63.1 The anticipated effectiveness of disclosure and use of the requested information (**Question 1**).
 - 63.2 The anticipated adverse consequences, in terms of the protection of life and health, or other material and relevant harms, of that same disclosure and use (**Question 2**).
 - 63.3 Whether there are other options to address the health risk that lessen the privacy intrusion and resulting harms, but are nonetheless effective to address the risk (including in light of the urgency of that risk), and so whether it is possible to await the outcome of lesser measures (**Question 3**).
64. In relation to Question 2, the decision paper:
- 64.1 noted at paragraph 37 that it had heard a range of views about potential health-related disadvantages of the disclosure; but
 - 64.2 recommended at paragraph 38 not placing too much weight on these concerns in the current context; and
 - 64.3 concluded at paragraph 38 that these risks should be seen as neutral factors.
65. The decision to decline the applicants' request therefore turned on the Ministry's assessment of Question 1 and Question 3.
66. The Second Decision was unlawful because:

- 66.1 the Ministry's assessment of Condition 3 involved material errors of fact and law in relation to both Question 1 and Question 3 (grounds 1 and 2 below);
- 66.2 the decision was taken in breach of the applicants right to natural justice (ground 3 below);
- 66.3 the Ministry made an error of law in its consideration of iwi feedback (ground 4 below); and
- 66.4 the Ministry has exercised its power inconsistently with Te Tiriti o Waitangi and its principles (ground 5 below).

67. The applicants seek review on those grounds as follows.

Ground 1: Errors of fact and law in relation to Question 1 (anticipated effectiveness of disclosure and use of the requested information)

68. In relation to Question 1, the Ministry concluded that:

- 68.1 The reach of Whānau Ora providers was not spread evenly across Te Ika-a-Māui and their coverage was patchy (paragraphs 31 and 33).
- 68.2 Healthline had attempted outreach from call centres with progressively diminishing returns (paragraph 31). It was not clear that phone-based outreach from Whānau Ora providers was likely to be materially more effective for Māori (paragraph 32).
- 68.3 Māori vaccination rates are improving quickly (paragraph 33).
- 68.4 There are regions (Tairāwhiti and Wairarapa) where Whānau Ora partners have limited coverage but positive progress was being made (paragraph 36).
- 68.5 In some urban areas where the current Delta outbreak is occurring in parts of Auckland and Hamilton, there was a real need for targeted resource to support further progress (paragraph 36).

- 68.6 Overall, there was evidence to suggest that WOCA’s proposed use of the information, given its breadth, may be effective to address the risks associated with COVID-19 in relation to some areas, but the evidence was not so clear it would have an impact in all others.
69. In reaching these conclusions, the Ministry made the following errors of fact and law:
- 69.1 **Error of law:** The Ministry has asked itself the wrong question. It has asked itself about the reach of Whānau Ora providers in the absence of the information requested, rather than whether disclosure of the information requested would increase the effectiveness of their vaccine outreach.
- 69.2 **Error of law:** The Ministry has failed to have regard to the urgency of the situation and its identified critical need to reach all of the eligible population as soon as possible. The Second Decision suffers from the same mismatch identified in the First Judgment at [69].
- 69.3 **Error of fact:** The Ministry’s conclusion that Whānau Ora has limited provider coverage is wrong. Whānau Ora has providers in the only two areas of limited coverage identified by the Ministry (Tairāwhiti and Wairarapa). In fact, the two allegedly non-Whānau Ora providers identified as making progress in Wairarapa — Te Whaiora and Te Hauora Runanga o Wairarapa Inc — are Whānau Ora providers and collectively make up the Wairarapa Whānau Ora Collective.
- 69.4 **Error of law:** Even if (which is not accepted) the request was overbroad because in some areas of Te Ika-a-Māui Whānau Ora provider coverage is more limited, given the Ministry’s acceptance that it should share individual level data with the applicants (paragraph 47), it ought to have shared data except in relation to those areas where it had concerns about provider coverage.

- 69.5 **Inconsistency:** In relation to mainstream vaccine outreach services, the Ministry has recognised that provision of individual level data of unvaccinated individuals to Healthline was necessary to effectively target all unvaccinated individuals.
- 69.6 **Error of fact:** The vaccine outreach offered by Whānau Ora providers is materially different to that offered by Healthline. Whānau Ora providers offer a kaupapa Māori service that is not limited to phone calls; Healthline does not.
- 69.7 **Error of fact:** Although Māori vaccination rates are increasing, the disparity between Māori and non-Māori vaccination rates remains and those who remain unvaccinated are increasingly hard to reach.

Ground 2: Errors of fact and law in relation to Question 3 (whether there are other less privacy-intrusive options that are still effective)

70. In relation to Question 3, the Ministry concluded that:
- 70.1 A weakness in Whānau Tahī's process was that it had a lack of iwi oversight in governance terms (paragraph 39).
- 70.2 A less privacy intrusive alternative was to share smaller sets of personal information with trusted locally-based organisations (paragraph 40).
- 70.3 The provision of mapping level data to the applicants would go a long way to supporting the applicants to target their response (paragraph 45).
71. In reaching these conclusions, the Ministry made the following errors of fact and law:
- 71.1 **Error of law:** The Ministry has asked itself the wrong question. It asked whether there was a less privacy intrusive alternative but it did not assess whether its identified alternative (sharing some unidentified smaller sets of data with unidentified locally-based organisations) was equally as effective at addressing the risk. In the

First Judgment, this Court held at [72] that it is only where there was a lesser privacy invasive approach that is equally effective that the necessary test in Question 3 is not satisfied.

- 71.2 **Error of law:** In assessing other options, the Ministry failed to have regard to the urgency of the situation and its identified critical need to reach all of the eligible population as soon as possible. In the First Judgment, this Court held at [63(c)] that the effectiveness of other options must be assessed in light of the urgency of the risk.
- 71.3 **Error of law:** The Ministry has had regard to an irrelevant consideration. Whether Whānau Tahi is subject to iwi oversight is irrelevant to whether there are other options to address the health risk and which lessen the privacy intrusion and resulting harms.
- 71.4 **Error of fact:** Sharing smaller sets of personal information with locally-based organisations in some parts of the country is not an equally effective alternative for reaching all Unvaccinated Māori as soon as possible. In addition, locally-based organisations do not have the same technical capability to analyse and use the data as Whānau Tahi.
- 71.5 **Error of fact:** Sharing data with locally-based organisations is not an option that lessens privacy intrusion and the risk of resulting harms. This is the same level of privacy intrusion and increases the risk of a breach of privacy because smaller local providers do not have the same data security processes in place as Whānau Tahi.
- 71.6 **Error of fact and law:** Provision of mapping level data is not an equally effective alternative for reaching unvaccinated Māori, as this Court determined in the First Judgment at [72].

Ground 3: Breach of the right to natural justice

72. During the course of its reconsideration, the Ministry held a number of hui to consult with other Māori and iwi groups and individuals.
73. The applicants were not invited to attend those hui.

74. Prior to the Ministry completing its reconsideration, the applicants were not provided with a copy of whatever feedback was received at those hui or provided with an opportunity to respond to it. At the time of filing this statement of claim, the applicants have still not received a copy of the notes taken at those hui.
75. The Ministry has had regard to views of unspecified individuals, which views the individuals were not willing to commit to in writing, and which views are not particularised or attributed in the decision paper. As a result, the applicants have:
- 75.1 no way of knowing what information the Ministry has considered and relied on, or the extent of it;
 - 75.2 no ability to respond to or address any relevant matters raised; and
 - 75.3 no ability to assess whether the conclusions the Ministry has drawn are supported by the information it received.
76. The conduct of the Ministry's consultation process was in breach of the applicants' right to natural justice.

Ground 4: Error of law in consideration of iwi feedback

77. The Ministry has treated the views of iwi as relevant, on a stand-alone basis, to assessing whether to grant the applicants' request. In doing so, the Ministry erred in law:
- 77.1 The applicant's request fell to be decided by applying the relevant criteria in r 11(2)(d) of the HIP Code.
 - 77.2 Feedback from iwi could be relevant information to inform the Ministry's assessment of each of those criteria. But iwi support or opposition to the request is not, by itself, determinative of whether those criteria are established.

Ground 5: Power exercised inconsistently with Te Tiriti o Waitangi and its principles

78. In the First Judgment, this Court held at [135(c)] that the Ministry's power under r 11(2)(d) had, in the context of the COVID-19 vaccination programme, to be exercised in accordance with Te Tiriti o Waitangi and its principles.

79. In the circumstances of the pandemic, no reasonable decision maker exercising the power consistently with Te Tiriti o Waitangi and its principles could have:

79.1 been satisfied that Condition 3 was not satisfied; and/or

79.2 declined the applicants' request, or declined to provide the applicants with any individual information at all on the basis that the Ministry might, in the future, provide the applicants with some information in relation to particular rohe on the basis of some unspecified criteria.

80. That decision and the process is inconsistent with the principles of:

80.1 equity and active protection;

80.2 partnership and tino rangatiratanga; and

80.3 options.

81. In relation to its assessment of equity and active protection, the Ministry made the following errors:

81.1 **Error of law:** The Ministry failed to have regard to the urgency of the situation, the extent of the threat, and its identified critical need to reach all of the eligible population as soon as possible.

81.2 **Error of law:** The Ministry failed to have regard to the fact that the duty of active protection is heightened in the context of the COVID-19 pandemic.

- 81.3 **Error of law:** The Ministry failed to have regard to the fact that health is a taonga.
- 81.4 **Inconsistency:** In relation to mainstream vaccine outreach services, the Ministry has recognised that provision of individual level data of unvaccinated individuals to Healthline was necessary to effectively target all unvaccinated individuals.
82. In relation to its assessment of partnership and tino rangatiratanga, the Ministry made the following errors:
- 82.1 **Error of law:** The Ministry wrongly concluded (at paragraph 23) that WOCA and Whānau Ora partners were not Māori organisations entitled to the benefit of the principles of partnership and tino rangatiratanga. Consequently, the Ministry has denied them the ability to design and deliver the most efficient Whānau Ora response to the current health crisis.
83. In relation to its assessment of the principle of options, the Ministry made the following errors:
- 83.1 **Error of law:** The Ministry failed to have regard to the fact that the principle of options requires Māori to be able to pursue a direction based on personal choice. The Ministry failed to consider whether that choice would be available to Māori who are not currently engaged with existing providers.

Relief

84. By way of relief, the applicants claim:
- 84.1 An order setting aside the Second Decision.
- 84.2 A declaration that, subject to the applicants entering into a data sharing agreement with the Ministry on terms containing privacy protection measures in line with the existing Data Sharing Agreement, the Ministry must urgently (within three days) share with the applicants the following individual level information for

Unvaccinated Māori within Te Ika-a-Māui: personal details; contact details; vaccination status; and vaccination booking status.

84.3 Such other relief as the Court thinks just.

84.4 Costs.

This statement of claim is filed by Tim Allan, solicitor for the abovenamed applicants of the firm Grove Darlow & Partners, Level 9, Rabobank Tower, 2 Commerce Street, Auckland.

Documents for service on the abovenamed applicants may be left at that address for service or may be:

- (a) Posted to the solicitor at PO Box 2882, Auckland 1140; or
- (b) Transmitted to the solicitor by email at tima@grovedarlow.co.nz, if they are also copied to counsel at jonathan.orpin-dowell@stoutstreet.co.nz and monique.vanalphenfyfe@stoutstreet.co.nz.