

**IN THE ENVIRONMENT COURT OF NEW ZEALAND
I MUA I TE KŌTI TAIAO O AOTEAROA**

ENV-2020-WLG-00014

UNDER the Resource Management Act 1991

IN THE MATTER OF the proposed direct referral of an application for resource consents for activities associated with Te Ahu a Turanga: Manawatū Tararua Highway Project

BETWEEN **WAKA KOTAHI NZ TRANSPORT AGENCY**
Applicant

AND **MANAWATŪ-WHANGANUI REGIONAL COUNCIL**
Regulatory Authority

MEMORANDUM OF COUNSEL FOR WAKA KOTAHI NZ TRANSPORT AGENCY

30 April 2020

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MAY IT PLEASE THE COURT:

Introduction

1. This memorandum is filed on behalf of Waka Kotahi NZ Transport Agency (the "**Transport Agency**") in response to a direction of the Court in its decision of 16 April 2020 (the "**Decision**"¹).
2. The Decision was on the Transport Agency's application for anticipatory waivers and directions, to apply to the proposed direct referral of the application for resource consents for activities associated with Te Ahu a Turanga: Manawatū Tararua Highway Project (respectively, the "**Application**" and "**Project**").
3. In the Decision the Court declined to confirm a number of milestone dates in the draft timetable proposed by the Transport Agency, until further information was available on the number of submitters wishing to be involved in the proceedings, the issues which the submitters wish the Court to consider, and their ability to receive adequate advice.²
4. The Court indicated, however, that it would consider making further timetabling directions following the close of the submission period for the Application and directed that the Transport Agency update the Court as soon as practicable thereafter. The Court also made some indicative comments regarding timetabling.³
5. The period for making public submissions closed on Friday, 24 April 2020.
6. In this memorandum, counsel:
 - (a) update the Court on the submissions made;
 - (b) request that the Court now formally schedule a pre-hearing conference no later than five working days after closure of the section 274 notice period (presently estimated to be 17 June 2020), with the purpose being for the Court to make directions towards a hearing of the Application to commence on 24 August 2020; and
 - (c) ask that the Court also make directions now to facilitate expert witness conferencing as an early step in the process.

¹ [2020] NZEnvC 44.

² The Court made other waivers and directions, recorded in Decision No. [2020] NZEnvC 46.

³ At paragraph 16 of the Decision.

The submissions received

The submissions and issues raised

7. 19 submissions have been made on the Application.
8. 8 submitters have indicated that they do not wish to be heard in respect of their submissions; those submitters are identified in **Appendix A** to this memorandum.
9. The 11 submitters wishing to be heard are:
 - (a) Kenneth Barnett;
 - (b) John Bent;
 - (c) the Director-General of Conservation ("**DOC**");
 - (d) Forest and Bird Protection Society of New Zealand Incorporated ("**Forest & Bird**");
 - (e) Heritage New Zealand Pouhere Taonga ("**Heritage NZ**");
 - (f) Meridian Energy Limited ("**Meridian**");
 - (g) Queen Elizabeth the Second National Trust ("**QEII**");
 - (h) Nick Shoebridge;
 - (i) Tararua District Council;
 - (j) The Trustees of the Te Āpiti Ahu Whenua Trust (the "**Te Āpiti Trustees**"); and
 - (k) Transpower New Zealand Limited ("**Transpower**").
10. In broad terms, the submissions raise the following issues for the Court's consideration:
 - (a) effects on water quality and ecological values;
 - (b) effects on natural character;
 - (c) effects on archaeology;
 - (d) effects on electricity generation and transmission infrastructure, raised by Meridian and Transpower;
 - (e) effects on Parahaki Island (at the western end of Manawatū Gorge), raised by the Te Āpiti Trustees;
 - (f) effects on Mr Shoebridge's dwelling; and

- (g) the benefits of the Project, highlighted by submissions in support from Tararua District Council and Kenneth Barnett.
11. This high-level summary of issues is not intended to be exhaustive. All submissions will of course be provided to the Court in due course; if it would assist the Court in its timetabling considerations to have them now, counsel can promptly arrange that.

Submitters' ability to receive advice on the application

12. The Court has noted the importance of parties being able to receive detailed legal and expert advice in order to participate effectively in the direct referral proceedings.
13. If the Court's preferred course remains to convene a pre-hearing conference prior to fixing a full timetable to hearing, these matters can be discussed by all parties at that conference. If the Court is instead minded to make further timetabling directions now, the following points are relevant:
- (a) All submitters wishing to be heard are well familiar with the Project; the Transport Agency has been engaging with all of them since 2018 (at the latest).
 - (b) All but the Te Āpiti Trustees and Mr Barnett were formally involved in the designation process, which included a Council-level hearing that took place in March and April 2019. The Transport Agency has been engaging with and supporting the Te Āpiti Trustees since summer 2018, including involving them in Project design workshops.
 - (c) Five such submitters – DOC, Forest & Bird, QEII, Meridian, and Tararua District Council – were involved in subsequent designation appeals to this Court. Counsel for the Transport Agency have kept counsel for those submitters advised of the proposed timetable for this direct referral process.
 - (d) All submitters wishing to be heard have long had the ability to take advice in respect of the Project and the Application, and most have taken that opportunity. In particular:
 - (i) Most have been advised by in-house and/or external lawyers, namely DOC, Forest & Bird, Heritage NZ, Meridian, QEII, Te Āpiti Trustees, Transpower and, in its regulatory capacity in respect of the designations, Tararua District Council.

- (ii) The Transport Agency's experts have been engaging with counterpart experts instructed by each of those submitters.
 - (iii) One submitter wishing to be heard who has not, to counsel's knowledge, engaged lawyers or experts in respect of the Project is Mr Bent, who is an experienced lay litigant in Environment Court proceedings.
 - (iv) Most of the submissions are very detailed, helpfully, indicating that they have been informed by expert advice.
- (e) During COVID-19 Alert Level 4, many lawyers and environmental consultancies were able to provide advice to their clients, albeit working from home, and during that period counsel and experts for the Transport Agency have been communicating without difficulty with counsel and experts for various submitters. In any case, restrictions on business activity have now been eased, with New Zealand moving to Alert Level 3.
- (f) There are approximately six weeks until the close of the section 274 period, meaning that any submitters who wish to receive legal and expert advice on their submissions and potential appearance at a hearing have ample time to do so.
14. As such, counsel are unaware of any barrier to those submitters who wish to be heard participating on a fully advised basis in the direct referral process.

Request to schedule pre-hearing conference

15. The Decision indicated that the Court would look to schedule a pre-hearing conference no later than five working days after closure of the section 274 notice period (presently estimated to be 17 June 2020), with the purpose being for the Court to make directions towards a hearing of the Application to commence on 24 August 2020.
16. In light of the relatively few submitters wishing to be heard and the points made above, counsel request that the Court now formally schedule a pre-hearing conference for that purpose.
17. As the Court indicated in its Decision, not less than two working days prior to the pre-hearing conference the Transport Agency will file for publication on the Court website a draft timetable for the exchange of evidence, mediation and expert witness conferencing.

18. In terms of timetabling, one matter to draw to the Court's attention is that the submission made by the Te Āpiti Trustees requests, on its face, that Manawatū-Whanganui Regional Council ("**Horizons**") delay determination of the Application pending the issuing and determination of separate legal proceedings before the Māori Land Court.
19. The submission of the Te Āpiti Trustees neither supports nor opposes the Application, but makes the following points:

"1. The trust owns the island in the middle of the river, Parahaki. The island with 229 owners has always been in maori ownership was never been sold to or confiscated by the crown. The island is an urupa with high cultural significance.

2. The main part of the island is adjacent to (and therefore just below) the area the road and bridge will pass.

3. One pylon that will be supporting the bridge/roadway will be next to and potentially on the trust's land (depending on whether the gravel area the pylon sits upon is considered accretion).

4. Parahaki is the site of a number of buried koiwi and there may be further koiwi buried within the gravel area or accretion.

5. The trust have instructed legal counsel to make an application to the Maori Land Court to recognise the area of accretion as part of Parahaki. The sole purpose of that is to uphold the mana of the whenua and to protect the tranquil resting place of our deceased descendants.

6. The trust are involved in constructive discussions with NZTA to ensure the Trust's interests are protected. NZTA to date have been helpful, understanding and collaborative on most issues."

20. The decision the Te Āpiti Trustees wish Horizons to make on the Application is stated to be as follows:

"1. The application to the Maori Land Court will depend on constructive negotiations with NZTA to support our application to transfer ownership of the accretion to the Trust.

2. Given the high cultural significance of the situation we ask Horizons Regional Council to put the consent application on hold until the accretion ownership question has been resolved.

3. The Trust will notify Horizons Regional Council as soon as that has occurred to resume the process.

Ka whakapiki i te mana o te whenua - Kia mihi".

21. The Transport Agency will continue to work through these issues constructively with the Te Āpiti Trustees and, in particular, is supporting the Trustees to develop an application to the Māori Land Court to update the survey of the legal boundary of the island. To this end, the Transport Agency has procured an expert survey and provided it to the Trustees.
22. In the meantime, the Transport Agency seeks that the direct referral proceedings continue to progress towards a hearing from 24 August 2020, noting the pressing importance for the region and country of this Project.
23. The Transport Agency's understanding from discussions with the Te Āpiti Trustees is that they likewise do not wish to delay the Project, but rather seek the Transport Agency's commitment to supporting the Māori Land Court application. The Transport Agency is committed to that process; counsel will be communicating with counsel for the Te Āpiti Trustees to discuss the next steps, and can keep the Environment Court updated regarding that process (as necessary).
24. While counsel acknowledge the importance of determining the extent of Te Āpiti Trustees' property, the Court is able to undertake its functions under the Resource Management Act 1991 separately from processes under other legislation to identify property boundaries.

Updated indicative timetable to hearing

25. The Transport Agency's notice of motion of 9 April 2020 attached an indicative timetable and asked that the Court fix the dates of the following steps:
 - (a) the filing and service of the Transport Agency's evidence-in-chief (12 June 2020) and supplementary evidence (20 July 2020);
 - (b) Court-assisted mediation immediately following the pre-hearing conference;
 - (c) an agreed statement of issues, immediately following mediation;
 - (d) Court-assisted expert conferencing (between 26 June and 8 July 2020).
26. In the Decision the Court declined to do so, but rather indicated:

- (a) that the Transport Agency should file an updated draft timetable in advance of the pre-hearing conference; and
 - (b) its view that *"the exchange of evidence (other than the Transport Agency's rebuttal evidence) should precede mediation and expert witness conferencing"*.
27. The Court also noted, however, that it may make further timetabling directions following receipt of this update on submissions.
28. As noted above, counsel will file an updated draft timetable immediately prior to the pre-hearing conference. In the meantime, in case the Court is minded to make further timetabling directions now, an updated draft timetable is annexed to this memorandum as **Appendix B**, with certain steps reordered to reflect the Court's indicative comments in its Decision.
29. Notwithstanding those indicative comments, counsel wish to revisit the potential merits of convening expert conferencing early in the timetable. Given the relatively small number of submitters in this case, early conferencing may be effective in narrowing the issues required to be the subject of evidence from the section 274 parties and Horizons, rebuttal evidence by Transport Agency witnesses, and determination by the Court, and thus assist in streamlining the direct referral process.
30. To that end, counsel respectfully request that:
- (a) the next step following the pre-hearing conference be the filing of will-say statements by the section 274 parties (noting that Horizons' section 87F reports and the Transport Agency's evidence-in-chief will have been circulated in advance of the pre-hearing conference);
 - (b) the Court give a clear indication to submitters now that they should prepare for early expert conferencing, by directing that they file and serve will-say statements by **Friday, 3 July 2020**; and
 - (c) the Court take steps to secure the availability of an Environment Commissioner or Commissioners to facilitate expert conferencing during the period **Tuesday, 7 July to Friday, 17 July 2020**.
31. Counsel will provide this memorandum to submitters so they have ample time to prepare for possible early conferencing, irrespective of whether the Court is minded to make any further timetabling directions now.

32. The Transport Agency will also be contacting the prospective parties to explore the potential for informal conferencing between experts to take place as soon as possible.

DATED this 30th day of April 2020



**D G Randal / T J Ryan / F R Wedde
Counsel for Waka Kotahi NZ Transport
Agency**

Appendix A – submitters who do not wish to be heard

Submitter name	Summary ⁴
Business Central	In support of the Project given its importance, and suggests that it be fast-tracked (as a 'shovel-ready' project) to provide economic stimulus
Samuel David Hill	Opposes the Project given its adverse effects on ecological and cultural values
Lou Klinkhamer	Opposes the Project in preference to retention of the SH3 route through the Manawatū Gorge, with bridge/viaduct structures used to bypass unstable areas
Manawatū District Council	In support of the Project because of the significant economic and social benefits it will deliver to the region
NZ Automobile Association Inc	In support of the Project given its importance, and supports 4-laning
Palmerston North City Council	In support of the Project because its construction and operation will result in significant social, economic, cultural and environmental benefits to the region, particularly in light of COVID-19
Graham David Speedy for DaSS Trust	In support of the Project given its positive effects on the environment
Carl Westwood	In support of the Project given the adverse effects of existing traffic passing through Ashhurst

⁴ The Court will of course be provided with all submissions in their entirety in due course.

Appendix B – updated proposed timetable

Transport Agency lodged application for Main Works Consent (and request direct referral to the Court under section 87D)	Wednesday, 11 March 2020 (done)
Formal acceptance by Horizons of application	Tuesday, 17 March 2020 (done)
Public notification of application	Wednesday, 25 March 2020 (done)
Submissions closed	Friday, 24 April 2020 (20 WD from public notification, excluding Good Friday and Easter Monday)
Preparation of Horizons' section 87F report	Monday, 25 May 2020 (20 WD from submission close excluding the Anzac Day holiday)
Notice of motion filed with the Environment Court	Tuesday, 26 May 2020 (next working day)
Applicant to file and serve on Horizons and any other parties its evidence-in-chief (soft copy only)	Friday, 12 June 2020
Close of interested party period	Wednesday, 17 June 2020 (15 WD from notice of motion, excluding Queen's Birthday)
Pre-hearing conference	Friday, 19 June 2020 (2 WD after close of section 274 period)
Section 274 parties to serve will-say statements on other parties	Friday, 3 July 2020 (10 WD after pre-hearing conference)
Expert conferencing (facilitated by the Court)	Tuesday, 7 July to Friday, 17 July 2020 (with planners on the last Thursday and Friday)
Section 274 parties and Horizons to serve evidence on other parties	Friday, 31 July 2020 (10 WD after end of conferencing)
Section 274 parties' and Horizons' evidence filed in Court (soft copy only)	Monday, 3 August 2020
Mediation	Wednesday and Thursday, 5 and 6 August 2020 (2 WD after service of section 274 party and Horizons evidence)
Agreed statement of issues	Monday, 10 August 2020 (2 WD after mediation)

Common bundle of documents filed in Court (soft copy only)	Wednesday, 12 August 2020
Applicant to serve rebuttal evidence on other parties	Friday, 14 August 2020
Rebuttal evidence filed in Court (soft copy only)	Monday, 17 August 2020
Hard copies of all evidence and common bundle of documents filed in Court	Tuesday, 18 August 2020
Hearing	Monday to Friday, 24 August to 4 September 2020 (two weeks) 5 WD from lodgement of rebuttal evidence