

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

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 IN SUPPORT OF NOTICE OF MOTION SEEKING WAIVERS AND DIRECTIONS

9 April 2020

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Introduction

1. This memorandum is filed on behalf of Waka Kotahi NZ Transport Agency ("**Transport Agency**") and accompanies a notice of motion seeking anticipatory waivers and directions under section 291¹ of the Resource Management Act 1991 ("**RMA**").²
2. The waivers and directions are sought in respect of the proposed direct referral of Transport Agency's application for resource consents for activities associated with Te Ahu a Turanga: Manawatū Tararua Highway Project (respectively, the "**Application**" and "**Project**"), which was lodged with Manawatū-Whanganui Regional Council ("**Horizons**") on 11 March 2020.
3. The purpose of this memorandum is to explain further the grounds for the waivers and directions sought in the notice of motion and to address matters raised in the Court's Minute of 24 March 2020 (the "**Minute**").
4. Broadly, the Transport Agency seeks:
 - (a) waivers and directions to enable the simplification of the section 274 interested party process;
 - (b) waivers and directions to facilitate the electronic case management of this proceeding generally (including via a dedicated website);
 - (c) confirmation of key early steps and dates ahead of hearing, and an indicative endorsement of an amended overall draft timetable, attached as **Appendix A**; and
 - (d) directions relating to communication of the proceedings with the public.

Background

Importance and urgency of the Project

5. The joint memorandum of counsel for the Transport Agency and Horizons dated 5 March 2020 set out the background to the Project, proposed a draft timetable for hearing and determination of the Application, and explained the urgency with which the Transport Agency seeks to progress construction.

¹ This is an originating application under section 291 of the RMA, rather than a standard waiver application under section 281, because there is not yet a proceeding before the Court in the context of which an application under section 281 can be made. In *Re Auckland Council* [2017] NZEnvC 207 at [11]-[13], the Environment Court confirmed that it was appropriate to seek anticipatory waivers and directions as an originating application under section 291.

² A supporting affidavit has not been filed with these documents, as the Court has indicated its awareness of the importance of the Project (being the key factual matter underpinning the relief sought). As the Court is aware, the Transport Agency has previously filed two affirmations of Lonnie Dalzell, project manager, which explain that point and give further background relating to the Project and its urgency, in the context of appeals against the notices of requirement (ENV-2019-WLG-069/070); the affirmations were dated 16 October 2019 and 11 February 2020.

6. Counsel are grateful for the Minute recording the Court's awareness of the importance attaching to a replacement road, and that it is reasonable to expect that the Application might fall into a list of priority matters being established by the Court (subject of course to the Court having regard to its statutory obligations and issues of fairness to all parties).
7. To confirm, the Transport Agency continues to seek inclusion of the direct referral proceedings within that priority list.
8. Further, the significance of the Project now extends to the important role that it (and other large-scale infrastructure developments) will likely play in providing stimulus to the local, regional, and national economy as New Zealand recovers from the impacts of the COVID-19 pandemic. That is, a core part of the Government's planning to reduce the economic impact of the COVID-19 pandemic is identifying and resourcing infrastructure projects that are 'shovel-ready' (or likely to be so within six months). The Project is intended to form a key part of that pipeline of infrastructure projects.
9. It is against that background that the Transport Agency now seeks waivers and directions to facilitate the expeditious determination of its Application.

Prior communications regarding the Application

10. Counsel for the Transport Agency and Horizons filed a joint memorandum with the Court on 5 March 2020, which foreshadowed the prospective direct referral of the Application and the waivers and directions that are now sought.
11. The purpose of that joint memorandum was to enable the Court, if so minded, to protect resources in its roster around the possibility of a hearing in late August 2020, and to provide an opportunity for early timetabling of the proceeding, as considered appropriate by the Court. An indicative proposed timetable was provided along with the memorandum.
12. Counsel have considered the feedback provided in the Minute regarding the process proposed by the Transport Agency and Horizons, including the indication that the Registry is likely to be able to assist in the manner proposed (subject to practicality). In particular, the Court:
 - (a) observed that a pre-hearing conference and mediation scheduled immediately following the close of the section 274 period "*potentially puts interested parties at something of a disadvantage in a situation*

*where they will not have seen the evidence to be advanced by the Agency in support of the applications”;*³

- (b) agreed to the Court Registry notifying section 274 parties of relevant procedural dates as soon as their notices were filed, subject to the advice of the Court Registry staff as to practicality; and
 - (c) agreed that a dedicated website for the Application could be established and operated by the Court, subject to the advice of the Court Registry staff as to practicality.
13. In light of the Court's observations (at paragraph 5 of the Minute) regarding scheduling of the pre-hearing conference and mediation shortly after close of the section 274 period, counsel have reflected on the proposed timetable and the need to ensure that parties are not put at any disadvantage. The Transport Agency's response is as follows:
- (a) Counsel confirm that the evidence-in-chief filed on behalf of the Transport Agency will be largely confirmatory of the technical assessments which form part of the Application documents. In addition to evidence from Transport Agency and expert witnesses as to the transport and other benefits of the Project and the nature of the proposed works, evidence will be adduced from:
 - (i) representatives of the four iwi groupings who are partners in the Project, whose involvement has extended to preparing Cultural Impact Assessments included among the Application documents;
 - (ii) the authors of nine technical assessments included with the Application; and
 - (iii) expert planners in respect of the statutory evaluation and proposed conditions.
- The statements of evidence-in-chief will (as relevant) explain any updates to the information contained within the Application and associated documents (including in response to any section 92 request of it by Horizons) and comment on issues raised by submitters and in Horizons' section 87F report.
- (b) To assist the other parties, the Transport Agency now proposes to file its evidence-in-chief on **Friday, 12 June 2020**, over a month earlier than initially proposed. This will give prospective interested parties an

³ Paragraph 5 of the Minute.

opportunity to review the Transport Agency's evidence ahead of the due date for filing section 274 notices, before the pre-hearing conference and mediation, and well before filing their own evidence (which is proposed to occur on 4 August 2020). The proposed timetable also retains the 20 July 2020 date for the Transport Agency to file any supplementary evidence necessary in light of the parties' section 274 notices, the agreed statement of issues, and the outcomes of mediation and expert conferencing.

- (c) More generally, the Transport Agency's intention in communicating with the Court and seeking early waivers and directions is to provide all prospective parties with advance notice of the likely timeframes associated with the direct referral, to enable them to plan accordingly. Counsel have socialised the proposed timetable with a number of potential submitters on the Application, including the Director-General of Conservation, Queen Elizabeth the Second National Trust, Royal Forest & Bird Protection Society of New Zealand Incorporated, and Meridian Energy Limited, and will continue to keep in close touch with those entities.
 - (d) The Transport Agency is also very mindful of the potential implications of the current health emergency for potential participants in the process, and is exploring various other measures to assist people to understand the Application and participate in the process, if they need any such assistance. This includes an offer to provide the Application on a USB key on request, which is advertised on Horizons' website.
14. The new proposed filing date for the Transport Agency's evidence-in-chief is provided in the updated draft timetable attached as **Appendix A** to this memorandum.
15. The draft timetable has also been updated to reflect that the following steps contained in the initial draft timetable have been achieved early:
- (a) Horizons' formal acceptance of the Application occurred on 17 March 2020 (initially proposed to occur on 23 March); and
 - (b) public notification of the Application occurred on 25 March 2020 (initially proposed on 27 March).
16. As a result, other steps in the timetable have been brought forward, including:

- (a) the time for making submissions will now close on 24 April 2020 (rather than 29 April);
- (b) Horizons' section 87F report will be completed by 25 May 2020 (rather than 27 May);
- (c) the Transport Agency intends to lodge a notice of motion seeking the Application be directly referred to the Environment Court on 26 May 2020 (rather than 28 May); and
- (d) on that basis, the interested party period will close on 17 June 2020 (rather than 18 June).

Waivers / directions sought

- 17. The waivers and directions sought are set out in full in the Transport Agency's notice of motion which accompanies this memorandum. They fall into the following categories:
 - (a) waivers and directions relating to filing requirements; and
 - (b) waivers and directions relating to timetabling and case management.
- 18. The waivers and directions will enable the direct referral process to be progressed as efficiently as possible while minimising any inconvenience to interested parties.
- 19. Specifically, the waivers sought in relation to filing requirements are intended to ease the administrative burden on interested parties and the Court. The directions sought in relation to timetabling and case management will ensure that the Application is determined expeditiously, bearing in mind the importance and urgency of the Project, while ensuring that all parties are well informed about the process from the outset and have the ability to plan accordingly and participate effectively.

Waivers and directions relating to filing requirements

- 20. The Transport Agency seeks the following waivers and directions intended to facilitate the electronic case management of the direct referral proceeding and simplify the section 274 process:
 - (a) A waiver of the requirement that a party lodge a signed original and one copy of their section 274 notice with the Court, with the direction

instead that section 274 parties can file electronically (via email) a copy of their section 274 notice, which may be signed or unsigned.⁴

- (b) A waiver of the requirement under section 274(2B) that a section 274 party must serve a copy of their interested party notice on "*all other parties*". A prospective section 274 party should instead be required to serve their notice on the Transport Agency and Horizons only, with service on other parties to be achieved via uploading the notice to a website established for the proceeding.
- (c) Directions that:
 - (i) otherwise all section 274 notices must meet the requirements of form 33 of the Resource Management (Forms, Fees, and Procedure) Regulations 2003 and the RMA;
 - (ii) all documents related to the proceeding may be filed with the Court electronically, via email;
 - (iii) all documents may be served on the Transport Agency and Horizons electronically via email; and
 - (iv) service of all documents on any other party will be achieved by uploading them to the website established for the proceeding.

21. These waivers and directions would facilitate an efficient and user-friendly process, including because:

- (a) They facilitate electronic case management of the Application. Websites are effective tools for disseminating evidence and other documents relating to consenting processes under the RMA and are commonly used by the Court, the Environmental Protection Authority, and local authorities. Counsel understand from the Minute that the Court is prepared to establish a dedicated website for the Application, if considered practicable by the Registry staff. If this is not possible, Horizons' website (which currently hosts the Application and associated materials) can be used for this purpose.
- (b) In waiving the requirements to file and serve hard copies of section 274 notices and other documents, these documents will be circulated more easily and efficiently. This will in part relieve submitters from some of the administrative burden associated with participating in the direct

⁴ Counsel's intention is not to prohibit parties filing or serving documents by hard copy, if they so wish – rather, the proposed waiver is of the **requirement** to file and serve hard copies.

referral process. The use of electronic means of communication in the direct referral process is endorsed in the Environment Court Practice Note 2014 as a way of managing the process efficiently.

- (c) Due to current nationwide restrictions on travel, post, and other operations arising from the COVID-19 pandemic, the filing and service of hard copies of documents during this proceeding may not be achievable.
- (d) A direct referral process is likely to attract more parties than usual proceedings in the Environment Court. Waiving the requirement to serve documents on all parties will alleviate some of the issues that can arise for section 274 parties in the direct referral process.

Waivers and directions relating to timetabling and case management

22. The Transport Agency seeks the following waivers and directions relating to timetabling and case management of the Application:
- (a) a direction approving the draft timetable attached as **Appendix A** on an indicative basis (i.e. subject to confirmation by the Court in due course);
 - (b) a direction fixing in advance dates for early key steps in the timetable, namely:
 - (i) the Transport Agency to file (and serve on Horizons and any other parties) its evidence-in-chief by **Friday, 12 June 2020**, with any necessary supplementary evidence (in light of the parties' section 274 notices, the agreed statement of issues, and the outcomes of mediation and expert conferencing) to be filed by **Monday, 20 July 2020**;
 - (ii) a pre-hearing conference to be scheduled shortly after the close of the section 274 period, on **Friday, 19 June 2020**;
 - (iii) Court-assisted mediation to take place following the pre-hearing conference, on **Monday and Tuesday, 22 and 23 June 2020**;
 - (iv) in relation to expert conferencing:
 - (1) an agreed statement of issues to be filed by the parties two working days following mediation, on **25 June 2020**; and
 - (2) Court-assisted expert conferencing to take place between **26 June and 8 July 2020** (with the expert planners to

conference at the end of that period so as to be informed by the other technical experts' Joint Witness Statements);

- (c) in relation to expert conferencing, a direction that 'will-say' statements will not be required, as conferencing discussions can be framed by the evidence-in-chief filed by the Transport Agency and the parties' agreed statement of issues; and
 - (d) directions that the Transport Agency and Horizons be required to communicate key steps and dates with submitters in advance, as follows:
 - (i) Horizons must provide a copy of the Court's Minute containing waivers and directions, including the indicative timetable and any fixed dates, when it serves its section 87F report on submitters in accordance with section 87F(5)(b) of the RMA;
 - (ii) the Transport Agency must provide a copy of the Court's Minute containing waivers and directions, including the indicative timetable and any fixed dates, when it serves notice of its direct referral application on submitters in accordance with section 87G(2)(b)(ii) of the RMA; and
 - (iii) Horizons must publish the Court's Minute containing waivers and directions, including the indicative timetable and any fixed dates, on its website.
23. These directions will facilitate an efficient process in the public interest because:
- (a) The Project is an important one, with a high degree of public interest given it replaces the section of SH3 indefinitely closed since April 2017 (and will improve safety and travel times), and its significance has been elevated further in light of the COVID-19 pandemic.
 - (b) As such, the Transport Agency is highly motivated to implement the Project as quickly as possible. The Transport Agency aims to complete the Project in the summer of 2024/2025. In order to achieve this completion date (subject to the Court), the Transport Agency seeks to obtain regional resource consents as early as possible this year, in order to finalise additional management plans and associated documents prior to starting the Project's main works in the summer 2020/2021 earthworks season.

- (c) Early confirmation by the Court of the timetable for the direct referral process will enable the Transport Agency and Horizons to communicate with submitters regarding the process and allow prospective parties to plan for their effective participation as early as possible. Horizons has already foreshadowed the potential direct referral of the Application through its public notice, and in correspondence to potentially affected parties. Information was provided on steps involved with direct referral of the Application, with advice to expect further information regarding indicative timetabling.

Jurisdiction

- 24. It has previously been confirmed that the Environment Court has jurisdiction to grant waivers and make directions in respect of proceedings on an anticipatory basis, including in the context of the proposed direct referral of resource consent applications.
- 25. In *Minister of Education v Auckland Council* [2018] NZEnvC 177, the Court approved the Minister of Education's application for waivers and directions relating to the proposed direct referral of a notice of requirement for a school in Papatoetoe. Similar to the current application, the Minister of Education in that case sought waivers of requirements under section 274 (and in fact sought that submitters be deemed to be section 274 parties), and directions to facilitate the electronic management of the proceedings. The Court granted the requests, and found that it had jurisdiction to do so for the reasons given in another direct referral case, *Panuku Developments Ltd v Auckland Council* [2018] NZEnvC 64.
- 26. In *Panuku Developments Ltd v Auckland Council*, the Court granted waivers and directions sought by Auckland Council in relation to the proposed direct referral of the application for resource consents necessary for the development of Auckland Harbour to host the America's Cup. These waivers and directions related to:
 - (a) filing and service requirements under section 274;
 - (b) facilitating the electronic case management of the proceedings;
 - (c) confirming dates for certain key steps in the proceeding ahead of the direct referral application being lodged; and
 - (d) requiring the Council and the Applicant to communicate key dates to potential submitters and section 274 parties early.

27. The Court accepted that it had the jurisdiction to grant the waivers and directions on an anticipatory basis in full, through following provisions of the RMA:

(a) Section 269, which provides:

*"(1) Except as expressly provided in this Act, **the Environment Court may regulate its own proceedings in such manner as it thinks fit.***

(1A) However, the Environment Court must regulate its proceedings in a manner that best promotes their timely and cost-effective resolution.

(2) Environment Court proceedings may be conducted without procedural formality where this is consistent with fairness and efficiency. ..."

(emphasis added).

(b) Section 267(1), relating to the convening of conferences, provides that an Environment Court Judge:

"must, as soon as practicable after the lodging of proceedings, consider whether to convene a conference presided over by a member of the court".

As noted by the Court and counsel in *Panuku Developments Ltd v Auckland Council*, although this provision refers to considering the need for a conference after proceedings are lodged, it does not preclude the Court from considering or making a direction about conducting a conference on an anticipatory basis.⁵ Indeed, the provision appears to be to ensure the Court considers the necessity to convene a conference at the earliest opportunity.

(c) Section 281(1), which relates to waivers and directions, including of the nature the Transport Agency now seeks.

28. Section 281(2) provides that the waivers and directions granted must not unduly prejudice any of the parties to the proceeding. Additionally, the Court must be satisfied that the appellant or applicant and respondent consent to the waiver sought.⁶

⁵ Paragraph 10 of the Court's decision, citing legal submissions for Auckland Council.

⁶ Section 281(3) of the RMA: *Without limiting subsection (2), the Environment Court shall not grant an application under this section to waive a requirement as to the time within which anything shall be lodged with the court (to which subsection (1)(a)(ii) applies) unless it is satisfied that—*

29. The waivers and directions sought do not unduly prejudice any potential parties; indeed, many are sought for the benefit of prospective parties and are intended to alleviate some of the administrative burden on submitters wishing to become involved in a direct referral proceeding.
30. In relation to the request that certain procedural steps be scheduled now, this is intended to assist prospective parties to plan for the process ahead. Any potential prejudice will be addressed by Horizons and the Transport Agency being required to advise prospective parties of these dates at an early stage.
31. Further, the Transport Agency proposes to bring forward the proposed date for the filing and service of its evidence-in-chief by over five weeks, to Friday, 12 June, giving prospective parties ample opportunity to consider the Transport Agency's case and their position ahead of filing their section 274 notices, participating in the pre-hearing conference and mediation, and filing their own evidence.
32. If any prejudice were to arise to a section 274 party in regard to the early scheduling of certain steps, it would be outweighed by the significant public interest in the Project, and the need to progress the Application urgently.
33. Horizons has confirmed that it supports the waivers and directions now sought, for the reasons set out above.

Application made on *ex parte* basis

34. This memorandum and the corresponding notice of motion have been filed on an *ex parte* basis, given the anticipatory nature of the waivers and directions sought.
35. This will not cause any undue prejudice to the parties for the reasons set out above. To reiterate:
 - (a) the waivers and directions sought in relation to the section 274 process and electronic case management will make the direct referral process more user-friendly for potential section 274 parties; in particular, section 274 parties will be relieved of the potentially onerous task of serving their notice on all other parties; and

*(a)the appellant or applicant and the respondent consent to that waiver; or
(b)any of those parties who have not so consented will not be unduly prejudiced.*

- (b) any early scheduling of key procedural dates will be actively communicated with prospective parties at an early stage, such that they will not be prejudiced.

DATED this 9th day of April 2020



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

Appendix A – updated draft 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 (note: Horizons notified the Application two working days earlier than foreshadowed in counsel's joint memorandum of 5 March 2020)
Submissions close	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)
Mediation	Monday and Tuesday 22 and 23 June 2020 (Next WD after PHC)
Agreed statement of issues	Thursday, 25 June 2020 (2 WD after mediation)
Expert conferencing (facilitated by the Court)	Friday 26 June 2020 to Wednesday 8 July (with planners on the Wednesday)
Applicant to serve any supplementary evidence on other parties	Monday, 20 July 2020 (8 WD after conferencing)
Applicant's supplementary evidence filed in Court, together with joint witness statements (soft copy only)	Tuesday, 21 July 2020
Section 274 parties and Horizons to serve evidence on other parties	Monday, 3 August 2020 (10 WD after applicant's supplementary evidence)

Section 274 parties' and Horizons' evidence filed in Court (soft copy only)	Tuesday, 4 August 2020
Common bundle of documents filed in Court (soft copy only)	Friday, 7 August 2020
Applicant to serve rebuttal evidence on other parties	Monday, 17 August 2020 (10 WD after section 274 parties' and Horizons' evidence)
Rebuttal evidence filed in Court (soft copy only)	Tuesday, 18 August 2020
Hard copies of all evidence and common bundle of documents filed in Court	Wednesday, 19 August 2020
Hearing	Monday to Friday, 24 August to 4 September 2020 (two weeks) 4 WD from lodgement of rebuttal evidence