
BEFORE THE WAITANGI TRIBUNAL

WAI 2358

IN THE MATTER OF

the Treaty of Waitangi Act 1975

AND

IN THE MATTER OF

the National Fresh Water and Geothermal
Resources Inquiry

**MEMORANDUM OF COUNSEL FOR THE CROWN IN RESPONSE TO
MEMORANDUM-DIRECTIONS DATED 22 NOVEMBER 2016**

25 November 2016

RECEIVED

Waitangi Tribunal

25 Nov 2016

Ministry of Justice
WELLINGTON

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MAY IT PLEASE THE TRIBUNAL:**Introduction**

1. In memorandum-directions dated 22 November 2016 (#2.6.3), the Presiding Officer directed the Crown to respond to a number of matters arising from hearing week 1 of Stage 2 of this inquiry.
2. This memorandum:
 - 2.1 Addresses directions to file certain documents and further information by midday today. Counsel apologises for the delay in filing and respectfully seeks leave to file this memorandum late.
 - 2.2 Updates the Tribunal on government intentions regarding legislation amending the Resource Management Act 1991 and advises that Crown counsel will file a further memorandum outlining the Crown's position as soon as further instructions are received.

Minister proposes to include proposal in Bill currently before Parliament

3. The *Next Steps for Fresh Water (Next Steps)* consultation document includes proposals for mana whakahono a rohe agreements (the mana whakahono proposals).¹
4. Counsel is instructed that the government wishes to include provisions for mana whakahono agreements in the Resource Legislation Amendment Bill (the Bill). The Bill is currently before the House.
5. Counsel is instructed that these provisions are not yet included within the Bill, but the government intends to propose their inclusion to the Select Committee. Counsel is instructed the provisions to be proposed for inclusion in the Bill may differ in some ways from the mana whakahono proposals in *Next Steps*.
6. The Ministry for the Environment has referred to the mana whakahono proposals in its recent departmental report to the Select Committee.² Counsel

¹ #3.1.255(a) at 29 – 30.

² The Bill, the departmental reports and other materials are available at: https://www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws/document/00DBHOH_BILL67856_1/resource-legislation-amendment-bill

is advised the Ministry considers the mana whakahono proposals are before the Select Committee for its consideration.

7. The Bill as introduced included proposals for iwi participation arrangements, which differ from the mana whakahono proposals, as outlined in the *Next Steps* document.³

Counsel is seeking instructions

8. Counsel are seeking instructions on a number of points, including (but not limited to) the government's intentions regarding the Bill.
9. The Select Committee's consideration of the mana whakahono proposals potentially raises jurisdictional issues under s 6(6) of the Treaty of Waitangi Act 1975 and under the Parliamentary Privileges Act 2014. It may also raise issues of comity between the judicial and legislative parts of New Zealand's government.
10. The Crown reserves its position pending further instructions.
11. Counsel will file a memorandum setting out the Crown's position in further detail as soon as instructions are received.

Information about the Freshwater Iwi Leaders Group

12. The Tribunal has requested further information about the Freshwater Iwi Leaders Group (ILG), in particular its members and who appoints them.⁴
13. The ILG has retained counsel to appear in this inquiry and has filed a joint brief of evidence of Sir Mark Solomon and Donna Flavell.⁵
14. Crown counsel has discussed the Tribunal's directions with counsel for the ILG.
15. Counsel understands the ILG intends to file a memorandum by 5pm, Wednesday, 30 November 2016 addressing issues raised by the Tribunal that are not already covered by the evidence of Sir Mark and Ms Flavell.

³ #3.1.255(a) at 30.

⁴ #2.6.3 at [10(a)].

⁵ #D85.

Crown's cross-examination bundle for Mr David Percy QC

16. The full decisions and documents for which extracts were used in the cross-examination of Mr Percy QC are being filed with the Tribunal separately.⁶

Position on Northern Gateway proposal

17. In regard to the Tribunal's request for an up-to-date position on the Northern Gateway Proposal,⁷ Crown Counsel understood this request to be directed to the witness, as it formed part of his evidence. The Crown is not familiar with the Proposal and not in a position to give an update.

Use of statutory acknowledgements in discretionary decision-making

18. The Tribunal has directed the Crown to provide information as to its general intention regarding statutory acknowledgements and their use in acts of discretion.⁸
19. Generally speaking, statutory acknowledgements in settlement legislation may be relevant considerations in discretionary decision-making. The Crown reserves its position on whether and how the particular statutory acknowledgements in the Tapuika Claims Settlement Act 2014 would apply in the particular circumstances set out in Ms Pia Callaghan's evidence. That is a matter of legal submission, which the Crown can only properly respond to once it has had the benefit of all the evidence and the claimants' submissions.

Macroinvertebrate Community Index

20. The Tribunal has requested information as to why the 'Next Steps for Freshwater' document does not explain why the Macroinvertebrate Community Index is not suitable for use at this time.⁹
21. Counsel is seeking further instructions on this issue. The Crown seeks leave to file a memorandum by 9 December 2016.

Timetable for written questions for Dr Sue Jackson

22. Crown Counsel notes the timetabling for written questions to be directed to Dr Jackson,¹⁰ in the event she cannot appear in hearing week 2, and seeks leave

⁶ See #2.6.3 at [10(b)].

⁷ #2.6.3 at [10(c)].

⁸ #2.6.3 at [10(d)].

⁹ #2.6.3 at [10(e)].

¹⁰ #2.6.3 at [17].

to vary that timetable slightly. As it stands, the Crown is required to file its questions on 9 December 2016, the same day that Dr Jackson is required to deliver her answers to the Crown's written questions of clarification,¹¹ which the Crown filed on 1 November 2016.

23. Counsel respectfully submits that the Crown should have the benefit of Dr Jackson's answers to the questions of clarification before filing its written cross-examination questions. Counsel therefore requests leave to file written cross-examination questions by 16 December 2016.

Questions in writing

24. The Crown **attaches** questions in writing for the following witnesses:

24.1 Dr Mike Joy (#D20);

24.2 Mr Bryan Jenkins (#D23); and

24.3 Ms Pia Callaghan (#D34).

25. The Crown has no questions in writing for Mr Hugh Sayers (#D36) or Mr Walter Rika (#A12).
26. Counsel is seeking further instructions in relation to written questions for Mr Marei Boston Apatu, and respectfully submits leave to file any questions for Mr Apatu by 9 December 2016.

Environmental Legal Assistance Fund Panel Document

27. The Tribunal has directed the Crown to file a memorandum setting out its view on whether the decision in document 1 of the Crown bundle for cross-examination of Meryl Carter (#D19(b)) is correct.¹²
28. The document in question is a copy of the Environmental Legal Assistance Fund Panel Meeting Minutes of 26 October 2012 recording the recommendations of the advisory panel and decision in relation to the funding application by the Whatitiri Maori Reserves Trust. A decision was made by the Director, Operations to decline the application for funding on 6 November 2012.

¹¹ #2.6.3 at [23].

¹² #2.6.3 at [15].

29. For the reasons set out below, the Crown sees no reason to doubt the reasonableness of that decision.

Background

30. In October 2012, the Whatitiri Māori Reserves Trust applied for funding in relation to appeal proceedings in the Environment Court against a decision to grant the Whangarei District Council and the Maungatapere Water Company Ltd rights to take water from the Waipao Stream. The Trust requested financial assistance from the Environmental Legal Assistance Fund for the costs of engaging a barrister and an expert witness, Dr George Habib.
31. The crux of the Trust's appeal was that the 32 year terms of the resource consents granted should be reduced to 10 years so as to enable legislative recognition of ownership/proprietary interests being pursued in claims before the Waitangi Tribunal. Dr Habib's proposed evidence was described in application as evidence in relation to the Māori ownership of the springs, Māori ownership/proprietary interests in water generally, and how the Resource Management Act 1991 should be interpreted in light of those ownership/proprietary interests.

The Environmental Legal Assistance Fund

32. The Environmental Legal Assistance Fund (the ELA fund) is a particular government appropriation which provides not-for-profit groups (such as iwi/hapū) with financial assistance to advocate for environmental issues of high public interest at resource management cases at the Environment Court and certain boards of inquiry. The current annual appropriation for the fund is \$600,000 (exclusive of GST). The fund is administered by the Ministry for the Environment.
33. There is no guarantee that any or all requested funding will be awarded, in some cases only part funding is awarded. Applications are assessed by an independent advisory panel. The panel makes recommendations to the Minister for the Environment, and the Minister makes the final decision on whether to fund an application.
34. The independent advisory panel comprises seven members appointed by the Minister for the Environment to represent a range of areas of expertise and

areas of competency, including environmental law, resource management issues, and of Māori/iwi perspectives.

35. In 2012 the appointed panel members were:
- 35.1 Dr Royden Somerville QC (legal);
 - 35.2 John Frew (local government);
 - 35.3 Alan Dormer (legal);
 - 35.4 Alan Titchener (landscape architecture);
 - 35.5 Dr Huhana Smith (Māori/iwi);
 - 35.6 Sylvia Allan (Planning); and
 - 35.7 Nigel McFadden (legal).
36. The Panel Meeting Minutes of 26 October 2012 note that Dr Huhana Smith had a conflict of interest in relation to the funding application of the Whatitiri Māori Reserve Trust and therefore was not present during the panel's evaluation of the Trust's application.

The Decision in Question

37. The independent advisory panel must assess all applications against a fixed set of criteria which are publically available on the Ministry for the Environment's website. In 2012, applications were assessed against Primary Criteria and Secondary Criteria. The Primary Criteria included:
- 37.1 The focus of the case is the protection or enhancement of nationally or regionally important environmental qualities. (Relevant considerations include: Resource Management Act Part II considerations, and the potential for useful case law);
 - 37.2 The case affects the wider community or general public. (Relevant considerations include: may improve the administration of the Resource Management Act, the status of the activity in the statutory plans, maintaining the integrity of a statutory plan, impacts on the

wider community or general public, public/private interest balance, and the significance of the environmental issues); and

- 37.3 The group has shown that financial assistance is required, including whether there is likely to be an imbalance between the level or quality of evidence and case management due to a lack of financial resources.
38. After applying the evaluation criteria to the Trust's application the independent advisory panel noted that the central reason for the group's appeal was that the term of the resource consent should be reduced because a Treaty of Waitangi claim by the group, if successful, could result in a change to the Trust's role and legal status in respect of the Poroti Springs. The proprietary interests in the Poroti Springs are not an issue which comes within the criteria of the ELA fund.
39. On its face, this decision was reasonable. The panel and the Decision Maker¹³ took into account all mandatory considerations and did not take into account irrelevant considerations. Furthermore, this decision has not been judicially reviewed and is not the subject of this inquiry.

Relevance to this Proceeding

40. In her evidence, Meryl Carter (#D19) alleged that the Trust had particular concerns about the Whangarei District Council's scientific evidence, and that funding was needed to engage independent scientific advice to question this evidence. Document 4 of Crown bundle #D19(b) is a copy of the scientific brief of evidence Mark Poynter filed in the Environment Court for the Whangarei District Council. Mr Poynter's evidence covers the following:
- 40.1 The level of environmental sensitivity of the Waipao Stream as a function of its physical, biological and water quality setting;
- 40.2 Dissolved oxygen monitoring data and ecological studies, and the lack of any evidence for significant adverse effects on the ecology or water quality of the stream arising from the abstraction; and

¹³ In 2012, the Director, Operations held a delegation from the Minister to make ELA fund decisions.

- 40.3 The initiative set in place in the existing consent to improve the environmental quality of the stream and its riparian margins over time and the rationale behind that initiative.
41. Document 1 of Crown bundle #D19(b) tends to show that the Trust did not, in fact, apply for funding to engage independent scientific advice to question this evidence.

25 November 2016



J R Gough / D A Ward
Counsel for the Crown

TO: The Registrar, Waitangi Tribunal
AND TO: Claimant Counsel