
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
REGARDING RELEASE OF *CLEAN WATER* DISCUSSION DOCUMENT
AND INQUIRY PLANNING MATTERS**

23 February 2017



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MAY IT PLEASE THE TRIBUNAL:**Summary**

1. This memorandum advises the Tribunal and claimants that the Crown:
 - 1.1 has announced proposed changes to the National Policy Statement for Freshwater Management (the NPS-FM). These proposals are contained in the Ministry for the Environment discussion document *Clean Water*, a copy of which is **filed** with this memorandum;
 - 1.2 is seeking public submissions on the *Clean Water* proposals by 28 April 2017; and
 - 1.3 anticipates Ministers will invite the House of Representatives to rise on 17 August 2016 and that Parliament will be dissolved on 22 August 2016. Counsel respectfully submit the likely timing of these events and the conventions surrounding the formation of a new government (outlined below) may be relevant to the scheduling of the Crown hearing week (hearing week three).

Proposed changes to the NPS-FM***Crown has released proposed changes to the NPS-FM for consultation***

2. The Crown has previously signalled to the Tribunal that it was engaged in an ongoing policy process that would include considering amendments to the NPS-FM and public consultation on specific proposed amendments.¹ This was originally scheduled to take place before the end of 2016.
3. Counsel are advised that the Minister for the Environment has today released a discussion document, *Clean Water*. The document contains proposals to amend the NPS-FM.
4. The Crown considers consultation on the proposals in the *Clean Water* discussion document is part of the statutory process for amending a National Policy Statement. The *Clean Water* proposals take into account public

¹ Wai 2358, #3.1.267 (14 April 2016) at [11.2] and [19].

submissions on the *Next Steps for Freshwater (Next Steps)* discussion document which was filed with the Tribunal on 23 February 2016.²

Submissions are sought by 28 April 2017

5. The Crown is seeking submissions on the proposed amendments in *Clean Water* by 28 April 2017. Submissions can be made by completing an online submission form or by writing, emailing or posting a submission to the Ministry for the Environment.
6. Counsel note that during the first hearing week of Stage Two in November 2016, some witnesses expressed concern they had not received a copy of the *Next Steps* document. The Crown notes that the *Next Steps* document was filed in the Tribunal and served on all parties.³

The proposals relate to fresh water quality and management

7. The *Clean Water* document contains a number of proposed amendments to the NPS-FM, including:
 - 7.1 requiring regional councils to improve the quality of fresh water bodies so they are suitable for swimming more often;
 - 7.2 specifying that obligations to “maintain or improve” fresh water quality apply within a freshwater management unit, and clarifying what is required to meet that obligation;
 - 7.3 requiring regional councils to monitor macroinvertebrates in appropriate rivers and streams as part of the assessment of the value of ecosystem health;
 - 7.4 clarifying that regional councils must establish numeric objectives for the concentrations of dissolved inorganic nitrogen and dissolved reactive phosphorous when managing for the periphyton attribute;
 - 7.5 clarifying the applicability of attributes to coastal lakes and lagoons; and

² Wai 2358, #3.1.255, #3.1.255(a).

³ Wai 2358, #3.1.255, #3.1.255(a).

- 7.6 clarifying the meaning of Te Mana o te Wai, adding a description of Te Mana o te Wai, and requiring regional councils to consider and recognise Te Mana o te Wai when giving effect to the NPS-FM.

Consultation need not affect the inquiry timetable

8. Counsel submit this consultation process need not affect the existing timetable for this inquiry and anticipates the Crown's supplementary evidence, due to be filed by 21 April 2017, will address certain matters concerning the *Clean Water* proposals.
9. Council is instructed no date has been set for the Minister's decision on amending the NPS-FM. Any decision is likely to require Cabinet discussion.

Election timetable may be relevant to timing of hearing week three

10. In memorandum-directions dated 1 February 2017, the Presiding Officer proposed hearing week three will be scheduled in the first quarter of the 2017/2018 financial year.⁴
11. As the Tribunal will be aware, the 2017 General Election will be held on 23 September 2017. The government's intention is that the House will rise on 17 August 2017⁵ and Parliament will be dissolved on 22 August 2017.⁶ It is intended that the Governor-General will issue a writ formally directing the Electoral Commission to hold the election on 23 August 2017.⁷
12. In the period immediately prior to the election, counsel's ability to obtain decisions from Ministers is likely to be reduced.
13. Following the election, the caretaker convention may apply until the government formation process is complete and the new administration is sworn in.⁸ Transition from one ministry to the next depends on a number of practical matters, including the allocation of portfolios. In practice there is usually a period of some days between the formation of a new government and

⁴ Wai 2358, #2.6.10, at [21].

⁵ New Zealand Government "General Election to be held on 23 Sept, 2017" (1 February 2017) <www.beehive.govt.nz>

⁶ Electoral Commission "2017 General Election Timetable" (21 February 2017) <www.elections.org.nz>.

⁷ Electoral Commission "2017 General Election Timetable" (21 February 2017) <www.elections.org.nz>.

⁸ Cabinet Office, *Cabinet Manual 2008* at [6.16] and [6.17].

the new ministry taking office. Current ministers continue in office, in a caretaker capacity, until new appointments are made.⁹

14. Previously, the caretaker period has lasted from two weeks to two months.¹⁰
15. While the normal business of government and day-to-day administration of departments continues during the caretaker period, special care is required¹¹ and decision making is constrained:
 - 15.1 Where it is not clear who will form the next government, the caretaker convention requires that decisions in relation to certain matters should be deferred, if possible, or handled by way of temporary arrangements. This includes matters involving significant or potentially controversial issues.¹² Decisions taken and specific policy determined before the start of the caretaker period may be implemented by a caretaker government.¹³
 - 15.2 Where it is clear who will form the next government, but Ministers have not yet been sworn in, the caretaker convention requires that the outgoing government undertakes no new policy initiatives, and acts on the advice of the incoming government on any matter of such constitutional, economic or other significance that it cannot be delayed until the new government formally takes office.¹⁴
16. Parliament must be convened by 24 November 2017. Counsel notes that, in practice, Parliament may well be convened before that date.¹⁵

⁹ Cabinet Office Circular “Constitutional Procedures after the Election” 28 July 2014 (CO (14) 5) at [20] and [21].

¹⁰ Department of Prime Minister and Cabinet “Elections” < www.dpmmc.govt.nz/cabinet/elections>.

¹¹ Cabinet Office, *Cabinet Manual 2008* at [6.26].

¹² Cabinet Office, *Cabinet Manual 2008* at [6.20].

¹³ Cabinet Office, *Cabinet Manual 2008* at [6.20].

¹⁴ Cabinet Office, *Cabinet Manual 2008* at [6.24].

¹⁵ The actual first meeting day will be decided following the formation of government. See the Constitution Act 1986, s 19: After any general election of members of the House of Representatives, Parliament shall meet not later than 6 weeks after the day fixed for the return of the writs for that election; and the Electoral Act 1993, s 139(4): The latest day for the return of the writ (other than a writ issued under section 153E(2)) shall be the 50th day after its issue. The day fixed for the return of the writ may be earlier.

17. Counsel respectfully submits that these factors may be relevant to the scheduling of the Crown hearing week (hearing week three).

23 February 2017



J R Gough / D A Ward
Counsel for the Crown

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