OFFICIAL

Before the Waitangi Tribunal
Te Roopu Whakamana
i Te Tiriti O Waitangi

WAI 2358

IN THE MATTER OF claims under the Treaty of Waitangi Act 1975 to the Waitangi Tribunal

AND

The National Fresh Water and Geothermal Resources Inquiry

Memorandum of Counsel for Te Rūnanga o Ngāi Tahu

in respect of Stage Two of Inquiry

Dated 13 September 2013

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Waitangi Tribunal
13 Sept 2013
Ministry of Justice
WELLINGTON

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MAY IT PLEASE THE TRIBUNAL:

1. This memorandum is filed on behalf of Te Rūnanga o Ngāi Tahu (Te Rūnanga) in response to the Memorandum-Directions of the Chairperson dated 2 August 2013 and subsequent extension of time for filing granted by way of the Memorandum of Directions dated 3 September.

2. Te Rūnanga wishes to reiterate the views expressed in previous submissions and memoranda filed on its behalf in this Inquiry. In particular, Te Rūnanga's position remains as stated in its most recent Memorandum (dated 5 April 2013), namely that Te Rūnanga continues to address the issues which are the subject of the Inquiry by way of direct dialogue with the Crown and does not seek any findings or recommendations from the Tribunal in relation to its rights and interests in fresh water within the Ngāi Tahu Takiwā or the manner in which those rights and interests are recognised by the Crown.

3. Te Rūnanga, and the Freshwater Iwi Leaders Group of which it is part, continue to rely on the undertakings as set out in the affidavit of the Deputy Prime Minister cited and relied upon by the Supreme Court in *New Zealand Māori Council v the Attorney-General* [2013] NZSC 6 (at paragraphs 144-145).

Issues for Stage Two of Inquiry

4. It is apparent that dialogue between Claimants and the Crown has resulted in the reformulated approach to Stage Two of the Inquiry proposed in the Joint Memorandum dated 19 July 2013. Te Rūnanga acknowledges that the reformulated approach represents a useful advance in thinking, though notes the concerns that have been raised in memorandum filed today on behalf of parties with particular interests in geothermal resources that such resources are not specifically referred to in that reformulated approach.

5. Te Rūnanga remains concerned, however, that there is a risk of blurring those matters that can meaningfully be addressed at a generic, or national, level with those that require consideration on a case-by-

case basis. The Joint Memorandum discusses the two types of recommendations the Claimants and the Crown believe it will be necessary for the Tribunal to make in order to address the single issue they have proposed for consideration at Stage Two. In essence, those two types of recommendations (as described in paragraphs 29 and 30 of the Joint Memorandum) are:

(a) Recommendations for measures that can be taken at a national level that will "generally reduce the degree of prejudice experienced by Māori in relation to proprietary rights to water resources"; and

(b) Recommendations on the resolution of issues in respect of specific water bodies, including both:

(i) "general principles that should be applied to specific water resources to assist with resolving the issues in relation to those water resources"; and

(ii) recommendations "on the establishment of a process for the resolution of these issues".

6. With respect, Te Runanga fears that the two types of issues may not be so simple to separate and there is a real risk of the Tribunal embarking on the task of making recommendations of the first type, based on the limited evidence available to it through the case studies presented at Stage One of the Inquiry. Notwithstanding the somewhat different context and scope of the issues considered by the Supreme Court in the decision in *New Zealand Maori Council v Attorney-General* delivered in February this year, a caution delivered by the Court could apply with equal force to the task of the Tribunal in the present Inquiry:

> *While asserting generally that privatisation would materially impair their rights to redress for Treaty breaches, the appellants were not very specific as to the particular respects in which this was said to be so…* ***It is not easy to identify such prejudice except by careful analysis of particular claims and the waters to which***

> ***they relate*** *and the case was not conducted at that level of specificity.* (at paragraph 132, emphasis added)

7. The Court made it clear that this finding should not be read as a criticism of the way in which the appellants had conducted their case, and nor does Te Rūnanga wish any such criticism to be construed from its reliance on this passage. The Court was merely making an observation as to the challenges inherent in the task of seeking to draw generic conclusions from situations that involve a wide range of very specific issues. Te Rūnanga believes that observation is entirely relevant to the present Inquiry.

8. By way of example, Te Rūnanga notes that Tribunal, at Stage One of the Inquiry, declined to make any findings in respect of the nature and extent of Māori rights and interests in aquifers and groundwater. Yet, clearly, these resources and Māori rights and interests in respect of them must be considered in any holistic reform of freshwater management.

9. Beyond this, Te Rūnanga reserves its position in respect of any other issues or approaches put before the Tribunal by other parties, if those matters would impact on Ngāi Tahu rights or interests.

Stage Two process

10. Te Rūnanga agrees with the Claimants and the Crown that the presentation by the Crown of a detailed report on its reform programme is an essential first step in the Stage Two Inquiry. That programme is on-going, however, so there will be a question to be determined as to when such a report could most usefully be presented.

11. Like all Iwi, Te Rūnanga is anxious to see reforms made in the management of freshwater resources in its Takiwā. However, it is recognised that the necessary reforms will not be achieved overnight, and it is not too trite to say that the Te Rūnanga would rather see the Crown implement *good* reforms than *quick* reforms. Similarly, having the Crown report to the Tribunal within a short timeframe, so that the Tribunal can commence the next stage of its Inquiry, may ultimately be

less productive than allowing the Crown to propose a timeline for reporting that allows it to develop its programme to a meaningful point.

12. In order to accommodate this, Te Rūnanga believes that there is merit in the approach proposed in paragraphs 4 and 5 of the Memorandum dated 4 September filed by Mr Naden on behalf of a number of parties, namely that the next step in the Inquiry should be for the Crown to file detailed information on its proposed reforms. Once claimants and interested parties have had an opportunity to consider that information will they be in a better position to advise the Tribunal as to the best approach to Stage Two of the Inquiry.

Status of Te Rūnanga

13. Given that the Ngāi Tahu Takiwā encompasses at least 50% of all the country's freshwater resources, Te Rūnanga wishes to retain its status as an interested party in respect of the Inquiry and proposes to maintain its 'watching brief' approach. Te Rūnanga may seek to file a brief affidavit outlining water management measures adopted at the local level within its Takiwā, if it appears that would be of assistance to the Tribunal.

14. Beyond this, Te Rūnanga would respectfully reserve the right to call reply evidence and/or make submissions in relation to any evidence affecting Ngāi Tahu rights and interests.

Dated this 13th day of September 2013

Justine Inns

Counsel for Te Rūnanga o Ngāi Tahu