

13 September 2021

**To**

Michael Savage  
Chair  
Expert Consenting Panel for the Stage 1B1 Papakura to Drury South application

**From**

Jennifer Caldwell

**By email**

C/- Environmental Protection Authority

Tēnā koe

1. We are the legal advisers to Waka Kotahi in respect of the above application (**Application**) under the COVID-19 (Fast-track Consenting) Act 2020 (**FTCA**).
2. Waka Kotahi has asked us to bring to your attention an issue that has arisen in relation to the cultural impact assessment (**CIA**) and cultural values assessments (**CVA**) that have been filed as part of the Application. On behalf of Waka Kotahi, we respectfully request that this matter be addressed by the Panel as a matter of urgency.
3. The CIA and CVAs filed were provided to Waka Kotahi by Ngāti Tamaoho, Ngaati Whanaunga and Ngaati Te Ata Waiohua (**Iwi**). Waka Kotahi had not appreciated that, while the Iwi were comfortable with the CIA and CVAs being provided to the Expert Consenting Panel (**Panel**), the Iwi did not intend that they would be placed on the EPA website and made publicly available. The presence of CIA and CVAs on the website is of significant concern to the Iwi as they contain culturally sensitive information that was not intended to be public information, and Iwi have not given permission for the information to be shared publicly. The Iwi have communicated their deep concern to Waka Kotahi and their need to have the CIA and CVAs removed from the EPA website as soon as possible.
4. Waka Kotahi has been in communication last Friday and today with the EPA administrator for this Application in relation to this issue. She has noted that under the FTCA, the EPA is required to publish information that is provided to it, which includes all documents provided as part of an application/notice of requirement.
5. We set out below a potential way forward to resolve this issue, but in the meantime, appreciating the extreme sensitivity of the information and the distress that its disclosure is causing Iwi, we respectfully request that as an interim step the CIA and CVAs be removed from the EPA website while the Panel is considering this matter.
6. As the Panel will be aware, there is a powerful Treaty provision in the FTCA:<sup>1</sup>

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<sup>1</sup> Section 6 of the FTCA.

***Treaty of Waitangi***

*In achieving the purpose of this Act, all persons performing functions and exercising powers under it must act in a manner that is consistent with—*

*(a) the principles of the Treaty of Waitangi; and*

*(b) Treaty settlements.*

7. The matters at hand clearly raise Treaty of Waitangi issues, including the principle of partnership and the principle of active protection. It is not consistent with either of these principles for information that is sensitive to Iwi to be made publicly available, in circumstances where Iwi have stated that they do not give permission for this information to be made available to parties other than the Panel.
8. The section clearly contemplates that this obligation applies to the EPA as well as to the Panel itself. While we acknowledge the requirements imposed on the EPA by clause 8(2) of Schedule 6 to the FTCA to publish information, we submit that those requirements need to be reconciled carefully with the clear directive in section 6.
9. We note that a Panel has the ability to regulate its own procedure under the FTCA without procedural formality and in a manner that best promotes the just and timely determination of an application.<sup>2</sup>
10. The Panel has other powers that support the request by Waka Kotahi, including the following provision that applies to any hearing the Panel may hold:<sup>3</sup>

*A panel may, in its discretion, make an order that prohibits or restricts the publication or other means of communication of information supplied to the panel or obtained by it in the course of a hearing.*

11. If the Panel has the power to prohibit the publication of information it obtains in the course of a hearing, it should also have the power to do so in the earlier stages of the application process.
12. We also note that the Panel's power to restrict publication applies where good reasons exist under section 6 or 7 of the Local Government Official Information and Meetings Act 1987 (**LGOIMA**).<sup>4</sup> Section 7 of LGOIMA provides good reasons exist for withholding information if it is necessary:

*in the case only of an application for a resource consent, or water conservation order, or a requirement for a designation or heritage order, under the Resource Management Act 1991, to avoid serious offence to tikanga Maori, or to avoid the disclosure of the location of waahi tapu.*

13. The Panel also has powers under section 4 of the Commissions of Inquiry Act 1908<sup>5</sup> and we note that, by clause 12(10) of Schedule 6 to the FTCA, a range of RMA powers also apply, including for

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<sup>2</sup> Clause 10(1) of Schedule 5 of the FTCA.

<sup>3</sup> Clause 21(10) of Schedule 6 of the FTCA.

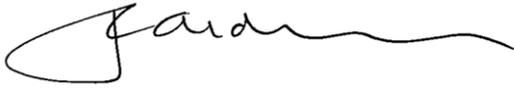
<sup>4</sup> Clause 21(11) of Schedule 6 of the FTCA.

<sup>5</sup> Clause 21(8) of Schedule 6 of the FTCA.

example section 42 relating to the protection of sensitive information. We would be happy to provide further commentary on the application of those powers if the Panel would find that helpful.

14. Given the urgency of the situation, we therefore request on behalf of Waka Kotahi:
  - (a) The immediate and interim removal of the CIA and CVAs from the EPA website;
  - (b) An opportunity to meet with the Panel at its earlier convenience by online meeting to discuss the matters we have raised;
  - (c) Ultimately, a ruling from the Panel directing the EPA to remove the CIA and CVAs from the public portal but to keep them available to the Panel to assist it in performing its duties and evaluating the Application on the basis that the Panel consider those documents in confidence.
  
15. We look forward to hearing from you.

Yours faithfully  
**Buddle Findlay**



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