

Before the Independent Hearings Commissioners

Mai I Kā Kaikōmihana Motuhake

**Under the** Resource Management Act 1991 (RMA)

**In the matter** of the hearing of the submissions and further submissions on the Proposed Te Tai o Poutini Plan:

Topic 12: Sites and Areas of Significance to Māori - Ngā Wāhi  
Tāpua ki te Māori

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**MEMORANDUM OF COUNSEL ON BEHALF OF TE RŪNANGA O NGĀTI WAEWAE,  
TE RŪNANGA O MAKAAWHIO, AND TE RŪNANGA O NGĀI TAHU IN RELATION TO  
'SILENT FILES'**

**(Submitter 620 and Further Submitter 41)**

**Topic 12: Sites and Areas of Significance to Māori**

**29 April 2024**

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## **May it please the Panel**

1. This memorandum is filed on behalf of Te Rūnanga o Ngāti Waewae, Te Rūnanga o Makaawhio, and Te Rūnanga o Ngāi Tahu (together **Ngāi Tahu**), in relation to the Sites and Areas of Significance to Māori (**SASM**) topic in the Proposed Te Tai o Poutini Plan (**TTPP**). Ngāi Tahu filed a submission (number 620) and further submission (number FS 41) on the TTPP.
  
2. This memorandum responds to Minute 24 of the Panel dated 28 April 2024 (**Minute**). In summary, the Minute responds to submissions that seek public disclosure of information pertaining to ‘silent files’ in the TTPP, and requests that<sup>1</sup>:
  - 2.1 At the hearing, Mr Paul Madgwick (cultural expert for Ngāi Tahu) and / or legal counsel explain, while respecting the relevant sensitivities, the process of ‘silent files’, why a ‘silent file’ approach is needed and/or justified, and why are they important and generically what they might cover; or
  
  - 2.2 If Mr Madgwick or legal counsel consider that the requested explanations at 2.1 are not appropriate in an open forum, then legal counsel file an application for an order under section 42 of the RMA (regarding protection of sensitive information) by 5pm on 29 April 2024.

### ***Process for silent files***

3. Silent files are areas identified by Ngāi Tahu as requiring special protection due to the presence of significant wāhi tapu (sacred places) or wāhi taonga (treasured possessions) in the area. They may, for example, affect urupā (burial grounds), or wāhi tupuna (ancestral sites) that are documented and/or known only to Māori.
  
4. These have been identified in the proposed TTPP in the same way as other identified SASM, with that process explained in Mr Madgwick’s evidence from paragraph 65 – 69 and more specifically in 76 – 83. In short, the process of

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1 At paragraphs 16 and 17.

identification, notification, and submission was the same. The area of each of the five SASM that are silent files and have been submitted on, are shown on the TTPP maps (so their location is not silent', as is sometimes the case).

5. Section 41 of the RMA anticipates that the disclosure of certain waahi tapu, or due to the need to avoid serious offence to tikanga Maori, that a part of a hearing be heard with the public excluded. The terminology that has colloquially been given to such sites is 'silent file'.

***Why a 'silent file' approach is needed and/or justified, and why are they important and generically what they might cover***

6. All of the silent file sites are identified as wāhi tapu sites. As also set out in section 5 of Ngāi Tahu's legal submissions, the term 'silent file' is used to describe sites of significance to Māori where there are particular sensitivities regarding either the location or cultural value of the site that iwi are not comfortable sharing in the public arena. The relevant 'silent file' SASMs that have been submitted on are **SASM 41, 42, 122, 135 and 199**.
7. Attachment 1 to the evidence of Mr Madgwick<sup>2</sup> provides reasons why these five SASMs are significant to Ngāi Tahu. Mr Madgwick's evidence sets out the information Ngāi Tahu is comfortable providing in an open forum. While Mr Madgwick may be able to answer questions about 'silent files' generally in an open forum, it is difficult to know whether he would be able to provide meaningful responses to assist the Panel without knowing what those questions are in advance.
8. While Ngāi Tahu appreciates the Panel's intention is not to ask specific questions about each site, and intends to only ask more generic questions, without knowing the questions it is difficult to know whether Mr Madgwick will be able to answer them in a way that does not cause offence to tikanga. Ngāi Tahu is concerned that having this discussion in an open forum would limit the ability for Mr Madgwick to provide responses that will best assist the Panel in its decision making.

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2 Dated 5 April 2024.

9. Therefore this memorandum requests an order under section 42 of the RMA. The proposed solution to this is for the Panel to ask its questions of Mr Madgwick in a public excluded session. After questions have been asked, Mr Madgwick will be able to advise which questions (if any) he is comfortable to answer back in a public forum. If there are questions he is comfortable to answer that do not cause serious offence to tikanga, then he will do so.

#### **Application for section 42 order**

10. As summarised in section 5 of the legal submissions for Ngāi Tahu dated 16 April 2024, section 42 of the RMA enables a local authority (which includes the TTPP hearing panel)<sup>3</sup> to protect sensitive information where it is satisfied that it is necessary to avoid serious offence to tikanga Māori or to avoid the disclosure of the location of wāhi tapu, and the importance of this outweighs the public interest in making the information available. In accordance with section 42(2) the Panel may make an order for the purposes of excluding the public from part of a hearing, or restricting the communication or publication of related information.
11. For completeness, relevant parts of section 42 are as follows:

#### **42 Protection of sensitive information**

- (1) A local authority may, on its own motion or on the application of any party to any proceedings or class of proceedings, make an order described in subsection (2) where it is satisfied that the order is necessary—
- (a) to avoid serious offence to tikanga Maori or to avoid the disclosure of the location of waahi tapu; or
- [...]
- and, in the circumstances of the particular case, the importance of avoiding such offence, disclosure, or prejudice outweighs the public interest in making that information available.
- (2) A local authority may make an order for the purpose of subsection (1)—
- (a) that the whole or part of any hearing or class of hearing at which the information is likely to be referred to, shall be held with the public

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3 Local authority is defined in section 42 as including a person given authority to conduct hearings under section 34A of the RMA.

excluded (which order shall, for the purposes of subsections (3) to (5) of section 48 of the Local Government Official Information and Meetings Act 1987, be deemed to be a resolution passed under that section):

- (b) prohibiting or restricting the publication or communication of any information supplied to it, or obtained by it, in the course of any proceedings, whether or not the information may be material to any proposal, application, or requirement.
- (3) An order made under subsection (2)(b) in relation to—
- (a) any matter described in subsection (1)(a) may be expressed to have effect from the commencement of any proceedings to which it relates and for an indefinite period or until such date as the local authority considers appropriate in the circumstances:
  - (b) any matter described in subsection (1)(b) may be expressed to have effect from the commencement of any proceedings to which it relates but shall cease to have any effect at the conclusion of those proceedings—  
and upon the date that such order ceases to have effect, the provisions of the Local Government Official Information and Meetings Act 1987 shall apply accordingly in respect of any information that was the subject of any such order.

**12.** Counsel additionally emphasises, but does not repeat, the matters in Part 2 of the RMA, particularly section 6(e) in that decision makers shall recognise and provide for the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga.

**13.** The Panel highlights *Te Ruunanga A Iwi O Ngati Tamatera (Inc) v Thames-Coromandel District Council* EnvC (2000) 7 ELRNZ 27 in its Minute as an example of where serious offence to tikanga has been established. As the Panel will be aware, this case found that:

[13] In this case it is our judgment that the public interest in publicity of the proceedings is indeed outweighed by the risk that publication of evidence about the location of wahi tapu may lead to spiritual and physical effects. The spiritual effects would be loss of tapu. The physical effects would be the risk of disturbance and loss of artefacts and other remains. The evidence is not sufficient to support making a similar judgment in respect of evidence of tikanga and whakapapa. To the extent

that they are already in the public domain, further publication would not have such weighty effect as to outweigh public interest in publicity of the Court's proceedings

[14] For those reasons, the application is granted in part, and it is ordered that publication of any evidence that may be adduced on behalf of Ngati Tamatera, Ngati Maru or Ngati Whanaunga in these proceedings about the location of wahi tapu of those Iwi is prohibited, except to the extent necessary for those parties to the proceedings to conduct their cases and to obtain advice for that purpose.

- 14.** Similar concerns to those set out in *Te Rununga A Iwi* exist in this case.

*Outweighs the public interest in making that information available*

- 15.** Ngāi Tahu acknowledges the importance of promoting public participation and transparency in the Panel's decision making, however, Ngāi Tahu considers that in these limited cases, this importance is outweighed.

- 16.** Ngāi Tahu only seek orders for the minimum extent required to avoid serious offence or disclosure of location and therefore does not seek to restrict providing information to an unnecessary extent or unnecessarily impede public interest. Once the questions that are to be asked are known, and if Mr Madwick is giving answers in public, then we can revert to a public forum.

**Order sought**

- 17.** Counsel respectfully requests that if, pursuant to RMA section 42, the Panel is satisfied that the order is necessary to avoid serious offence to tikanga Māori or to avoid the disclosure of the location of wāhi tapu, and in the circumstances of the particular case, the importance of avoiding such offence, disclosure, or prejudice outweighs the public interest in making that information available, then the Panel makes orders to the following effect:

- 17.1** Pursuant to s42(2)(a), the part of the TTPP hearing(s) at which 'silent files' (i.e. SASM 41, 42, 122, 135 and 199) are to be discussed is to be held with the public excluded;

- 17.2** Pursuant to s42(2)(b), the publication of any information pertaining to 'silent file' SASMs in the TTPP be prohibited. And that the information supplied to the Panel or obtained by the Panel, be restricted to Hearing Commissioners Dean Chrystal, Paul Rogers, Anton Becker, Sharon McGarry and Maria Bartlett;
- 17.3** Pursuant to s42(3)(a), the order will have effect for an indefinite period; and
- 17.4** Ngāi Tahu otherwise have discretion to disclose information as it sees fit, including generally at hearing to the level of detail considered appropriate (included agreeing to revert to a public forum if comfortable with the questions being put to Ngāi Tahu).

**DATED** this 29<sup>th</sup> day of April 2024



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Sarah Scott / Katherine Viskovic  
Counsel for Ngāi Tahu