

UNDER the Local Government Act 2002  
AND Section 22AB of the Land Transport Act 1998  
IN THE MATTER of a proposed Bylaw using a Special Consultative  
Procedure

**PROCEDURAL MINUTE 7 (TANGATA WHENUA ISSUES)  
ISSUED BY COMMISSIONERS  
Dated 14 April 2022**

- 1 This minute is issued for the purposes of case management. We have not formed a final view of the merits of the proposed Bylaw, pending the reconvened hearing on 3 May (and, if required, 4 May) 2022. We acknowledge receipt of all information lodged by submitters from the date of our first hearing (23-25 November 2021). That information has been posted to the Council website and is available for review by all submitters. **Minute 6** addresses other procedural issues.
- 2 This minute addresses issues raised by:
  - (a) Te Rūnanga o Ngāi Tahu and Te Rūnanga o Kaikōura by letter dated 3 December 2021;
  - (b) Te Rūnanga a Rangitāne o Wairau in their response dated 4 February 2022.
- 3 Response to information provided by Te Rūnanga o Ngāi Tahu and Te Rūnanga o Kaikōura (TRONT)**
  - 3.1 We confirm receipt of TRONT's correspondence under s83(3) Local Government Act 2022.
  - 3.2 For reasons discussed below, we agree that whakapapa links alone do not create a conflict of interest (actual or perceived) for Commissioner Clayton, noting the cited authority in *NZ Māori Council v Foulkes*.<sup>1</sup> We consider that there are sound

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<sup>1</sup> Citing then Kós J in [2014] NZHC 1777 as follows:

policy reasons to have independent Commissioners with whakapapa relevant to the issues and area in dispute, and an understanding of the relevant tikanga for that rohe. We agree that Commissioner Clayton's culture and descent is no more relevant than any Pākehā Commissioner. Further grounds are discussed below.

- 3.3 TRONT identifies (in their correspondence) that issues regarding rangatiratanga and the status of Te Rūnanga o Ngāi Tahu as the iwi authority within the takiwā are of paramount importance. Council, as an agent of the Crown, cannot opt out of these issues.
- 3.4 TRONT then refers to Council's Technical Report (dated July 2021). The Technical Report identifies that the Bylaw area is within the statutorily recognized takiwā of Ngāi Tahu Whānui, which is one of the 18 Papatipu Rūnanga of Ngāi Tahu. The Report identifies Ngāti Kurī as the tangata whenua who have mana whenua and mana moana in the area covered by the proposed Bylaw.

### **Initial response**

- 3.5 Importantly, information on these values was provided by Te Rūnanga o Kaikōura. The Report is not definitive. It goes on to state that:

"It is acknowledged that there are Te Tau Ihu iwi who may consider the area of the draft Bylaw within their rohe as tangata whenua. These discussions are ongoing."

- 3.6 The Report is careful to identify that it is quoting from Te Rūnanga o Kaikōura, not stating the author's viewpoint; and to identify that other Iwi may take a different perspective on the same question (depending on their tikanga).
- 3.7 The Technical Report was therefore not definitive (and did not state a concluded view) on mana whenua and mana moana. The Report did not (and could not) usurp Council's role and function in managing their relationship with Te Tau Ihu Iwi.

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"[199]..a connection based purely on whakapapa is not of itself a conflict. Simply belonging to an iwi or having a genealogical connection. Does not necessarily mean a conflict exists. At most it may prefigure a potential conflict. Whether it is a conflict in fact will depend on further evaluation..."

Such a role could be better achieved through, for example, agreements reached under the Resource Management Act 1991, such as Mana Whakahone a Rohe;<sup>2</sup> and not by a Technical Report that evaluates pros and cons of the proposed Bylaw. That would be overreach. As Commissioners, we wish to avoid the same risk.

- 3.8 While this could have been more clearly and carefully expressed, the Technical Report did not critically (or conclusively) assess the question of which Iwi and Hapū had the strongest relationship to the Bylaws area, when competing beliefs are compared. In any event, although the Report was published by Council, we are not obliged to accept it on every (or any) point expressed.
- 3.9 Commissioners have recommendatory powers only. We have no power to override statutory instruments and statutory recognition given to Te Rūnanga o Ngāi Tahu and their hapū, including the takiwā of Ngāi Tahu Whānui. Commissioners agree that they cannot recommend a Bylaw framework inconsistent with pre-existing statutory recognition.
- 3.10 The Statement of Proposal identifies that Council has engaged with Iwi to understand their concerns and issues about the east coast environment. It identifies that Te Rūnanga o Kaikoura support in principle a draft Bylaw for reasons identified. By contrast, it identified that Te Rūnanga o Rangitanē o Wairau disagreed with the approach of a full ban, giving reasons.
- 3.11 There is no question that Council (and Commissioners) must have regard to the important issue of tangata whenua perspectives on the proposed Bylaw. This is required by the Local Government Act 2002, and relevant Treaty principles.
- 3.12 But the as-notified Bylaw does not identify a particular Iwi or Hapū as having paramount interest in the area that is the subject of the Bylaw. We retain our preliminary view that the function of the Bylaw (if confirmed) is to manage vehicle access to the area in response to an increased risk of damage to high and outstanding biodiversity, cultural, natural

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<sup>2</sup> We appreciate, of course, that our role is under the LGA 2002, so this example is illustrative only.

character, and landscape. This risk has to be balanced against long standing values of free public access and public safety

- 3.13 The Bylaw does not identify a priority relationship, or comparative strength of relationship, between certain Iwi and/or their Hapū. It is not relevant to the Bylaw provisions to do so, and we consider it is not relevant to our recommendatory function. However, we have asked Council officers to provide a further report-back on the consultation and engagement processes followed with Iwi Authorities and hapū, as directed below.

#### **4 Response to information provided by Te Rūnanga o Rangitāne o Wairau**

- 4.1 Te Rūnanga a Rangitāne o Wairau (**Te Rūnanga o Rangitane**) has filed two separate responses, dated 3 February 2022 (**first response**) and 8 February 2022 (**second response**). The first response is a letter from Counsel for Te Rūnanga. It raises procedural matters, therefore we address those matters below. The second response provides suggested edits to the Bylaw. We will address this as part of our merits assessment, in conjunction with our assessment of all submitter information, including the pending hearing next month.
- 4.2 Key points made by Te Rūnanga o Rangitane in their response include:
- (a) Independent Commissioners appointed by Council are bound by previous decisions made by Council in relation to consultation and mana whenua and tangata whenua status of different Iwi and Hapū; and cannot “opt out” of those decisions. Commissioners are not wholly independent in light of this procedural history.
  - (b) Consultation processes in relation to the Bylaw were flawed. Te Rūnanga o Ngāi Tahu was treated as the Iwi Authority with sole status over the relevant rohe in which the Bylaw takes effect (mana whenua, mana moana).

- (c) Council, as agent of the Crown, cannot neatly opt out of these issues. Te Rūnanga o Ngāi Tahu has relied on the above determinations, and has not participated as a submitter.
- (d) Commissioner Clayton is not independent, due to her whakapapa to Ngāi Tahu, and her status as a nominated appointee to the Panel by Te Rūnanga o Ngāi Tahu. This is an issue of apparent bias. [We note that Te Rūnanga o Rangitāne does not comment on Commissioner Clayton's **full** whakapapa, which includes her whakapapa to Rangitāne o Wairau (and other Iwi and hapū). It is problematic to focus on one ancestral bloodline, but not others.]
- (e) The above issues taint the process. It is fundamentally flawed and will likely be set aside on judicial review **unless** there is meaningful engagement on these issues. Te Rūnanga o Rangitāne does not identify what "meaningful" engagement would involve.
- (f) The above is a summary, we have considered all points raised by Te Rūnanga o Rangitāne in their first response.
- (g) Te Rūnanga o Rangitāne refers to correspondence from Te Rūnanga o Ngāi Tahu dated 03 December 2021 (addressed above).

## **5 Initial response:**

- 5.1 We have given careful consideration to the issues raised. To a large extent the issues overlap with those raised by TRONT, and we therefore adopt similar reasoning.
- 5.2 We do not accept that the outcome for the Bylaw is predetermined, or that Commissioners are not independent of Council. Our role is to make recommendations to Council that are within scope of the Bylaw as notified, and the statutory framework, including submissions on the Bylaw that are within scope.

- 5.3 We have some difficulty with the proposition that the process is fundamentally flawed. We are required to have regard to all relevant matters, disregard irrelevant matters, avoid error of law, and act reasonably. We cannot (and will not) adopt a predetermined position on any relevant issue.
- 5.4 Te Rūnanga o Rangitāne does not identify what “meaningful engagement” would look like in context of the above. Presumably they anticipate that the consultation process would have to start anew and a different Commissioner than Commissioner Clayton be appointed. That would have material consequences in terms of further delays to this process, at the expense of the values that are the subject of the Bylaw.
- 5.5 Commissioner Clayton does not accept that she has actual or apparent bias. This issue was addressed by Minute 1, and at the very start of the hearing on 23 November 2021 (at which time Commissioner Clayton disclosed her whakapapa, which includes Kāi Tahu, Rangitāne o Wairau, Ngāti Rarua, Ngāti Kuia, Ngāti Toa Rangatira, Taranaki, Ngāti Porou).
- 5.6 We agree with Te Rūnanga o Ngāi Tahu that a whakapapa connection does not of itself create actual or apparent bias and Te Rūnanga o Rangitāne have not explained a specific conflict of Commissioner Clayton. Knowledge of Te Aō Māori and tikanga, grounded in whakapapa and mātauranga Māori, are expert skill-sets that assist Commissioners in their deliberations. If Te Rūnanga o Rangitāne infer that only Commissioners with (sole) whakapapa to Te Rūnanga o Rangitāne could be on the panel, they would face the same (or rather stronger) bias and conflict arguments they raise against Commissioner Clayton.
- 5.7 We also note that Commissioner Clayton was appointed by Council, not Te Rūnanga o Ngāi Tahu. We understand that the appointment of the Commissioners was determined by Council by exercising their judgement on the experience and skills required for the position. Whakapapa was one of several factors relevant for the appointment. It would indeed be retrograde (and lead to poor decision-making) if Māori Commissioners could not be recommended for appointment, or appointed to a Bylaw Panel, unless their ancestry and

whakapapa was unconnected to the rohe (area) in question. We would also consider such an approach to be contrary to the principles of the Treaty and Council's cultural obligations under the Local Government Act.

- 5.8 While we do not accept the proposition of a fundamental flaw, **we direct** that Council officers provide an updated timeline of the process of consultation and engagement with Iwi and Hapū that led to notification of the proposed Bylaw. We understand that this included providing Te Rūnanga o Rangitāne (and other Iwi Authorities) with opportunity to nominate a Commissioner for consideration by Council and, if approved, appointment to the Panel. That timeline should be provided for review by all submitters **by 22 April 2022**.
- 5.9 For Commissioners, a key issue is what are the relevant issues, in particular, whether it is relevant to the Bylaw to identify one or more Iwi or Hapū as having the strongest relationship with the area within which the Bylaw will take effect (if confirmed)?

### **Summary: Preliminary view**

- 6 In summary, our preliminary view (as set out in Minute 1 dated 18 November 2021) has not changed. We do not consider that we are required to make a determination on mana whenua and mana moana status for the purposes of making recommendations on the proposed Bylaw. We do not consider that it is relevant to the issues that apply, which include competing views on the merits of the proposed Bylaw. We will have regard to, but are not bound by, the Technical Report, which does not have the status of a binding Council resolution.
- 7 Te Rūnanga o Rangitāne o Wairau has not identified what further engagement with Iwi and Hapū would require, beyond opportunities provided to date. How could engagement be improved, given that the proposed Bylaw has not been confirmed at this point in time ?
- 8 A declaratory Bylaw that solely identifies that a particular group holds mana whenua, mana moana would (in our preliminary view) be unlawful and outside our powers.

- 9 The proposed Bylaw is subordinate to legislation enacted by Parliament. If approved, the Bylaw will not affect or override the statutory acknowledgements in place for Marlborough District. The Bylaw cannot affect any rights preserved to Māori under the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, and the corresponding Deed of Settlement. These have their own statutory force.
- 10 If the Bylaw is confirmed, then it will apply equally to all persons, regardless of their ancestry or whakapapa.
- 11 We are conscious that both Iwi Authorities have had opportunity to provide feedback. However, we wish to reserve the opportunity for further response. Te Rūnanga o Ngāi Tahu may provide additional written information (if it wishes) in reply to this Minute (and the associated information identified above), under s83(3) Local Government Act 2022 by **29 April 2022**.
- 12 As a submitter, Te Rūnanga o Rangitāne o Wairau is of course able to attend at the hearing on 3 May 2022, to speak to its written material, and to provide further information on the issues raised. Our particular interest is in the proposed wording for the Bylaw, including whether it should be approved, amended, or revoked. In that regard, we note the constructive feedback provided by Te Rūnanga o Rangitāne o Wairau in their second response dated 8 February 2022.
- 13 In summary, our Directions are as follows:
  - 13.1 Commissioner Clayton does not recuse herself from continuing in her role as an independent Commissioner;
  - 13.2 Council officers are requested to provide an updated timeline of the process of engagement with Iwi and Hapū that resulted in the notified Bylaw (and any subsequent engagement, post-notification, where relevant) by 27 April 2022;
  - 13.3 In light of the matters raised in this Minute, Te Rūnanga o Ngāi Tahu may provide additional written information (if it wishes) in reply under s83(3) Local Government Act 2022 by 29 April 2022;



- 13.4 Te Rūnanga o Rangitāne o Wairau may address the above matters, as well as providing substantive comments on the proposed Bylaw, at the hearing on 3 May 2022;
- 13.5 Other submitters may (if relevant) address matters identified above during the hearing on 3 & 4 May 2022;
- 13.6 Leave is reserved for any person to apply for a variation to the timetable set out above.
- 14 In making these directions, Commissioners have not come to any view on the merits of the proposed Bylaw. As noted in Minute 6, all submitters have the opportunity to attend our reconvened hearing, but they should limit their comments to new material received from 25 November 2021.

**Dated** 14<sup>th</sup> April 2022

A handwritten signature in black ink, appearing to be 'Rob Enright', written over a light grey rectangular background.

**Rob Enright**  
**Chair**