Taranaki Regional Council and New Plymouth District Council
Mt Messenger Bypass Project

UNDER	the Resource Management Act 1991 (**RMA**)
IN THE MATTER	of application for resource consent and notice of requirement by the New Zealand Transport Agency (**NZTA**) for alteration to the State Highway 3 designation in the New Plymouth District Plan, to carry out the Mt Messenger Bypass Project

OUTLINE OF LEGAL SUBMISSIONS FOR TE KOROWAI TIAKI O TE HAUĀURU INC (TE KOROWAI)

Dated 16th August 2018

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SUMMARY

1 It is common ground that the adverse cultural effects of this project are significant, with all relevant alternatives receiving negative cultural ratings. What is not agreed is whether sign-off by one iwi authority (Te Runanga o Ngāti Tama) is sufficient for you to conclude that the cultural effects are adequately avoided, remedied, mitigated or offset.

2 s6(e) RMA refers to the relationship of **all** Māori to their ancestral lands, wāhi tapu and taonga:

> (e) the relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga:

3 Because of the significance of the cultural effects involved, and that the preferred route does not avoid these effects, NZTA is reliant on a combination of mitigation and offsetting. Offsetting reflects the terms of an agreement between NZTA and Te Runanga that is not finalised and has not been disclosed to you.

4 s6(e) RMA is not limited to consideration of the effects on Te Runanga. You are also required to consider impacts on other tangata whenua and their ancestral and contemporary relationships with the lands, waters and taonga affected by the NOR.

5 In consequence, it is submitted that you cannot rely on the side agreement between NZTA and Te Runanga as sufficient to address the relevant cultural effects of this project. An undisclosed side agreement that may[1] address the concerns of the land-owning iwi is a material consideration, but it is not sufficient. It provides no clarity or transparency as to the nature of mitigation or offsetting, or whether it is adequate to address matters of significant public importance.

6 Te Runanga may say that it is satisfied, but your role as independent decision-maker is to ensure the agreement is adequate, in much the same way that the Environment Court often looks beyond a settlement reached by parties, to ensure that it meets the relevant statutory framework. There is a public policy interest in ensuring that matters of national importance are properly assessed and protected. Priority status is not necessarily given to the Iwi Authority over other representative groups that whakapapa to Ngāti Tama or hapu of Ngāti Tama.[2]

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[1] "may" because as far as we know, it hasn't been signed or ratified yet.
[2] Refer Solicitor's letter dated 12 July 2018 to NZTA, **attached**.

7 But the evidence and tone of NZTA's case suggests otherwise, with NZTA's legal submissions noting:

> "[296] This provision [s6(e) RMA] is covered in detail in the cultural effects section above. Significant engagement has occurred with Ngāti Tama. Through that engagement and its CIA the relationships with section 6(e) matters are well understood.."

8 The same conflation is apparent with NZTA's legal submissions on s7(a) and s8 RMA (where reliance is placed solely on the position reached with Te Runanga, without consideration of the impacts to other tangata whenua submitters).[3]

9 NZTA met once with Te Korowai, just prior to the start of the hearing.[4] This followed repeated requests by Te Korowai for engagement separately from Te Runanga's process. Consultation is not mandatory, but failure to consult with relevant tangata whenua stakeholders has resulted in inadequate information on s6(e) matters of national importance.

10 NZTA in submissions and evidence repeatedly refers to the Trustees of Te Runanga that are members of Te Korowai as the "suspended Trustees". Words matter here. Allegedly suspended is the correct phrasing, because the legality of the suspension is the subject of separate High Court proceedings. Also contested is the level of information disclosure provided by Te Runanga to these Trustees, and to beneficiaries generally of Te Runanga, in relation to the proposed agreement with NZTA. The dispute between Trustees is not relevant to your RMA deliberations, but perjorative labels should be avoided, pending outcome of the High Court proceedings.

11 NZTA notes that mandate is not usually resolved in the RMA context, although it can be where required by the evidence. This is not a mandate case. Instead the evidence of all relevant tangata whenua on s6(e), s7(a) and s8 RMA should be considered. Having disclaimed mandate as not relevant, NZTA still contends that sign-off by Te Runanga is all that is required:

> [133] Again, the fact that Ngāti Tama must agree before the Project can proceed should provide significant comfort to the Commissioner. In mechanical terms that decision will be made by Te Runanga, which is the properly mandated entity, and the legal owner of the land. Te Runanga of course has its own clear framework in terms of how it represents Ngāti Tama members. All Ngāti Tama members have had the opportunity to

[3] NZTA legal submissions at e.g. [300], [310]
[4] 24 July 2018

> influence Te Runanga's position to date on the Project (noting at least six hui-a-iwi have been held to canvass the views of Ngāti Tama members, including members of Te Korowai)..."

12 There are several aspects of the proposal that are unorthodox in RMA terms and arguably *ultra vires* (unlawful):

13 No final agreement on cultural effects has actually been reached with Te Runanga. So you cannot validate the existence of the agreement; or assess whether the agreement will or may avoid, remedy or mitigate the adverse cultural effects. Instead you are being asked by NZTA to rely on the say-so evidence of NZTA and Te Runanga witnesses. Te Korowai is not of course the decision-maker, but it is placed in the same position. Te Korowai, as representative of more than 500 Māori that whakapapa to Ngāti Tama, and claim representative status as hapu, hasn't seen the terms of the full agreement; and cannot evaluate it's efficacy in RMA terms. It is however certain that it doesn't "avoid" significant adverse cultural effects.

14 NZTA says that members of Te Korowai that are members of Te Runanga have had opportunity to influence the negotiations process. That is simplistic in terms of the Trustee dynamics. More importantly, Te Korowai has been unable to assess the full terms of the agreement, take legal advice on it, and Te Korowai's independent planning expert has not been able to assess whether (and to what extent) the agreement mitigates or offsets adverse cultural effects.

15 NZTA has conferred a veto power on Te Runanga. According to NZTA, the designation will not proceed, absent Te Runanga's agreement:

> "[133] Again, the fact that Ngāti Tama must agree before the Project can proceed should provide significant comfort to the Commissioner.."

> "[310]..The evidence of Mr White is that retaining the ability to say no recognises and gives supremacy to this tikanga and on that basis Te Runanga resolved to support the RMA approvals being grantded."[5]

16 If Ngāti Tama vetos the project, then this RMA process will have been futile. Agreement should have been resolved, then made available to the submitters to evaluate whether it avoids, remedies or mitigates the relevant effects; alternatively whether the "remedy" generates its own suite of adverse effects. To the extent that the

[5] NZTA legal submissions

agreement includes commercially sensitive terms, these could have been the subject of directions by the Commissioner.

Invalidity or unlawful RMA purpose

17 Fettering the exercise of RMA powers, pending the agreement of Ngāti Tama (as 3rd party), is arguably *ultra vires* (unlawful) for several reasons:

(1) NZTA cannot fetter exercise of it's statutory powers to provide for and build the road. It would be a perverse outcome if NZTA, having identified the road as the most appropriate option in light of detailed evidence, and meeting the "public interest" criteria in s171 RMA, then prevented the public work proceeding through side agreement with Te Runanga;

(2) your RMA assessment cannot rely on exercise of third party of side agreement or powers (in this case, approval by Te Runanga of a pending agreement (or two agreements: one under the RMA, the other involving property sale and inferred land swap);

(3) RMA assessment of effects cannot be contingent on a veto power to be exercised through side agreement on property and ownership issues. As Commissioner, you have no way of knowing whether the designation will be exercised. It may be futile if Te Runanga exercises its veto.

18 Te Korowai opposes the deal done by Te Runanga as demonstrating bad faith, likely breach of Trust deed powers, including likely breach of process followed to notify beneficiaries and mandate the agreement. For now, that is a civil matter likely to result in judicial review proceedings or other remedies. It does not concern your RMA assessment.

19 What does concern your inquiry is that Te Runanga cannot and does not speak for the tangata whenua represented by Te Korowai. NZTA has used mandate as sword and shield. It says on the one hand that you cannot assess mana whenua and mandate, as between Te Runanga and other iwi entities; but on the other, asserts that Te Runanga speaks for Te Korowai members that identify as Ngāti Tama, or hapu of Ngāti Tama. Both positions cannot be right. The RMA (and Treaty principles) recognise the right of hapu to self-identify and represent themselves separately from iwi authorities.

S6(c) RMA: Biodiversity

20 Te Korowai raised s6(c) RMA effects on biodiversity as part of its submission.[6] Te Korowai does not have any ecological evidence so it relies upon DOC's evidence. The proper inference to be drawn from that evidence is to decline the proposal because of the significant adverse impacts to SNA values, indigenous biodiversity and taonga species.

S8 RMA Treaty principles

21 This must be one of the strongest s8 RMA cases in nearly 30 years of RMA jurisprudence. Land taken from Ngāti Tama as raupatu by the Crown is being taken again for public roading. Te Korowai says that is untenable, given the land was returned to Ngāti Tama under settlement legislation. NZTA's acquisition, even if by agreement, of Treaty settlement land is a breach of the duty of good faith.[7] Ownership of the land should remain with Ngāti Tama, to acknowledge the past and protect future generations, including the hapu represented by Te Korowai.

22 The "voluntary" agreement with Te Runanga relates to a public work in the context of NZTA's public work powers. It is a failure to actively protect taonga lands recovered by settlement legislation. The forced or negotiated taking of Ngāti Tama land by NZTA (acting as Crown agent) for roading purposes has not been "avoided". No clarity has been provided as to proposed cultural mitigation or offsetting.

23 NZTA's assurance that it will not use compulsory acquisition provisions under the Public Works Act to acquire Ngāti Tama land is inaccurate or arguably misleading. As a starting point, the designation is for a "public work".

24 By virtue of issuing a NOR, NZTA has immediate veto powers in relation to uses of Ngāti Tama's lands inconsistent with the designation and within the footprint of the designation (s178(2) RMA).[8] Any negotiations between Te Runanga and NZTA for acquisition of land take place in context of mandatory exercise of powers by NZTA under the Resource Management Act 1991, and the statutory framework of the Public Works Act. It seems unlikely that NZTA can waive its' statutory power to acquire land

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[6] Te Korowai's submission stated:
"Does not protect biodiversity including taonga species of native flora and fauna (s6(c) RMA)."

[7] Ngāti Tama Claims Settlement Act 2003

[8] S186 RMA:
"(2) In the period that starts as described in subsection (3) and ends as described in subsection (4), no person may do anything that would prevent or hinder the public work, project, or work to which the designation relates unless the person has the prior written consent of the requiring authority."

required for a public work, when NZTA will be financially responsible under the relevant statutory framework for that work.

25 Te Korowai's evidence is that NZTA engagement with adversely affected hapu of Ngāti Tama, including members of Te Korowai, has been flawed, inadequate, does not adhere to best practice, and has breached Treaty principles of engagement. Consultation processes have not identified or assessed the degree of opposition to NZTA's confiscation or taking of Ngāti Tama land for state highway purposes.

Code of Conduct

26 Greg Carlyon is an experienced planning consultant and his evidence confirms compliance with the Expert Code. NZTA's criticism of Mr Carlyon was unjustified and should have been raised with Counsel prior to the hearing, for clarification. Mr Carlyon's brief explicitly limits itself to cultural effects and an assessment of cultural effects under related planning provisions. It is not intended as an overall planning assessment. It is a "limited brief" because his focus was on the cultural effects. Mr Carlyon will confirm that he accepts the positive effects arising from the proposal, as identified by NZTA experts. Mr Carlyon acknowledges that he has not addressed other issues (such as the impact of the proposal on taonga species and biodiversity under s6(c) RMA) relevant to a wider planning assessment.

Witnesses

27 Te Korowai calls the following witnesses for evidence:

- Amos White
- Bill White
- William Simpson
- Greg Carlyon
- Several other kaumatua may give evidence, depending on availability

Dated this 16th day of August 2018

Rob Enright
Counsel for Te Korowai

SIMPSON LEGAL

12 July 2018

New Zealand Transport Agency
By its solicitors Buddle Findlay
By email to David Allen, Paul Beverley
David.allen@buddlefindlay.com paul.beverley@buddlefindlay.com

Copy to:
Te Runanga o Ngāti Tama
By its solicitors Atkins Holm Majurey
By email to Tama Hovell
tama.hovell@ahmlaw.nz

RE: NZTA MT MESSENGER BYPASS

1 There has been no substantive response from NZTA to Counsel for Te Korowai's letter of 27 May (other than short notice emails inviting Te Korowai members to attend a hui on 2 June 2018).

2 Instead our client learned through the media that negotiations between NZTA and Te Runanga O Ngāti Tama are close to conclusion.

3 Te Korowai has previously raised process and substance flaws in NZTA's decision to reach settlement with Te Runanga O Ngāti Tama:
   a. Te Korowai's RMA submission dated 27th February 2018;
   b. Counsel's correspondence of 12 April and 27 May 2018;
   c. Te Korowai members that attended the short notice hui between NZTA and Te Runanga on 2 June 2018;
   d. Our client has put NZTA on notice that Te Runanga has failed to provide sufficient notice to beneficiaries in relation to endorsement of a major transaction that involves the Crown taking ancestral lands returned to the Runanga under settlement legislation.

4 Our client's position is that NZTA's failure to engage with Te Korowai, with more than 500 members, all of whom whakapapa to Te Runanga O Ngāti Tama, means that the RMA effects of the Mt Messenger proposal, have not been adequately assessed. The cultural offsetting agreement (terms of which have not been disclosed) does not avoid, remedy and mitigate significant adverse effects to Ngāti Tama and its hapu, as represented by Te Korowai.

5 Priority status is not necessarily given to the Iwi Authority over other representative mana whenua groups within the RMA process, and NZTA is therefore at risk of signing off a multi-million dollar deal with the Runanga that does not satisfy the relevant RMA tests for approval.

6 NZTA has resourced engagement with Te Runanga. In contrast, no offer of resourcing has been made to Te Korowai. This creates unfair process, and an obvious resourcing and power imbalance.

7 NZTA has continuously failed to respond to requests for direct "on the record" engagement with Te Korowai. NZTA's process is contrary to its own best practice policies regarding consultation, mana whenua engagement, and contrary to the principles of the Treaty of Waitangi. Te Korowai instructs that it represents a large proportion of the beneficiaries of Te Runanga O Ngāti Tama. NZTA has refused to engage with Te Korowai, it appears to have "deal fever", wanting to complete settlement with the Runanga, before engaging with Te Korowai.

8 This letter is notice that:

a. NZTA may face judicial review or other proceedings in relation to unlawful process followed for negotiation of agreement with the Runanga.

b. NZTA knowingly has continued in these negotiations and ignored requests of Te Korowai acting on behalf of beneficiaries of Ngāti Tama, who are mana whenua.

9 Te Korowai urgently seeks an "on the record" meeting with NZTA to discuss these matters prior to any final settlement with the Runanga; and seeks NZTA's response to the urgent Official Information requests made.

Yours faithfully
SIMPSON LEGAL

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Principal
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cc. Rob Enright
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