

In the High Court of New Zealand  
Wellington Registry  
I Te Kōti Matua o Aotearoa  
Te Whanganui-ā-Tara Rohe

CIV 2021-485-735

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*under:* the Judicial Review Procedure Act 2016

*in the matter of:* an application for judicial review of decisions under  
sections 19A and 19B of the Land Transport  
Management Act 2003

*between:* **Movement**  
*Applicant*

*and:* **New Zealand Transport Agency**  
*Respondent*

## Joint Memorandum of counsel for Mentions Hearing

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Dated: 3 February 2022

Next Event Date: 8 February 2022 (Mentions Hearing)

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## **JOINT MEMORANDUM OF COUNSEL FOR MENTIONS HEARING**

May it please the Court:

- 1 This joint memorandum of counsel is filed in advance of the mentions hearing scheduled for 8 February 2022.
- 2 The parties have conferred, and respectfully seek:
  - 2.1 that the hearing is vacated; and
  - 2.2 directions in accordance with section 14 of the Judicial Review Procedure Act 2016 are made as set out at [19] below.

### **Background**

- 3 The statement of claim was filed on 26 November and served on 8 December. Initial disclosure has been provided by the applicant.
- 4 The respondent's statement of defence was filed on 2 February 2022.
- 5 The parties have reached a position on some of the matters set out in section 14 of the Judicial Review Procedure Act 2016 (and Schedule 10 of the High Court Rules), but:
  - 5.1 have not reached agreement on the appropriate costs categorisation; and
  - 5.2 consider that the issue of third party service and participation must first be resolved before the remaining matters such as duration and scheduling of hearing, and timetabling of exchange of evidence and submissions can be addressed.

### **Matters set out in Section 14 Judicial Review Procedure Act**

- 6 The parties:
  - 6.1 agree that the date for filing the statement of defence is 2 February 2022;
  - 6.2 agree that no orders are necessary relating to the production of the relevant records of the decision maker;
  - 6.3 disagree for the purposes of rule 14.3 on whether the proceeding should be classified as Category 2 or Category 3, but agree that this issue should be reserved at this stage of the proceeding (given that the scope of the proceeding will become clearer as it develops). The plaintiff considers that the proceeding should be categorised as Category 2. The respondent considers that the proceeding may be more appropriately categorised as Category 3. The parties

therefore propose to revisit categorisation after evidence is exchanged.

- 6.4 Do not anticipate making any applications for interim relief, or any interlocutory applications other than:
- (a) to address the position of third parties discussed below; and
  - (b) the applicant is likely to apply for an urgent fixture. The respondent anticipates opposing that application.

### **Informing third parties of the proceeding**

- 7 Without prejudice to their position on any subsequent application to join the proceeding, the parties agree that it is appropriate for a copy of the proceeding to be provided to “approved organisations” whose land transport activities have been approved for funding from the National Land Transport Fund.
- 8 The applicant seeks orders quashing the decision by the respondent, Waka Kotahi NZ Transport Agency (**Waka Kotahi**) to approve the National Land Transport Programme 2021-2024 (the **NLTP**). Under section 19A of the Land Transport Management Act 2003 (the **LTMA**), Waka Kotahi must, every three years, prepare and adopt an NLTP. What is required to be included in the NLTP is set out in section 19C.
- 9 Relevantly, the NLTP must include those land transport activities which either have been approved for funding from the National Land Transport Fund (the **NLTF**) or which may be approved for such funding during the term of the NLTP.
- 10 NLTF funding is available to “approved organisations” for activities delivered by approved organisations and to Waka Kotahi if the activity is one for which Waka Kotahi is responsible for delivery or managing delivery. “Approved organisations” is defined in the LTMA as regional councils, territorial authorities, approved public organisations.<sup>1</sup>
- 11 In the case of regional councils and Auckland Transport, the LTMA requires the preparation of regional land transport plans which set out the land transport activities for which NLTF funding is sought. Waka Kotahi is required to take these into account in preparing and adopting the NLTP.

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<sup>1</sup> Public organisations may be approved pursuant to s 23 of the LTMA. Section 23 deems that the Department of Conservation, Waitangi National Trust Board and Auckland Transport are approved public organisations. Kāinga Ora–Homes and Communities is also deemed to be an approved public organisation in relation to specified development projects.

- 12 The NLTP which is the subject of this application for review includes funding for approximately \$24.3 billion of investments (including non NLTF funding from central Government for specified projects). This includes approved funding for approximately 80 approved organisations.
- 13 Activities which are included in the NLTP and which are either previously or subsequently approved for funding from the NLTF by Waka Kotahi pursuant to s 20 of the LTMA are then delivered by the approved organisation that put the activity forward (or by Waka Kotahi where it is responsible for delivery). Activities must be included in the NLTP in order to be eligible for funding from the NLTF.<sup>2</sup>
- 14 The applicant seeks orders setting aside the decision to adopt the NLTP and directions that it be reconsidered. If the applicant is successful, then the question of the status and funding of activities included in the current NLTP arises.
- 15 It is therefore appropriate that the approved organisations are informed of this proceeding and given the opportunity to consider how and whether they wish to seek to join the proceeding (*Minister of Education v De Luxe Motor Service (1972) Ltd* [1990] 1 NZLR 27 (CA) at 34).
- 16 The parties have conferred and agree that the most efficient approach to bring this proceeding to the attention of approved organisation is for:
- 16.1 Waka Kotahi to contact each approved organisation and provide them with a copy of the pleadings in this proceeding, together with a copy of this memorandum and the Court's resulting minute;
- 16.2 approved organisations to have a four week period in which to file an application to be joined to the proceeding as intervenor or party.
- 17 The proceeding also potentially affects the interests of the Crown, as the interpretation and effect of the Government Policy Statement on Land Transport 2021 prepared by the Minister of Transport will be in issue in the proceeding. Accordingly, the parties also agree that the Minister of Transport and Ministry of Transport should be given an opportunity to decide whether to participate in the proceeding, on the same timeframe as approved organisations. A copy of the proceeding was sent to the Minister on 13 December 2021, and the

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<sup>2</sup> See LTMA, s 20. This is subject to limited exceptions for works that are in the urgent interests of public safety or are necessary to effect immediate or temporary repairs caused by a sudden and unexpected event.

applicant does not object to the Minister receiving the Statement of Defence and Court Minute in addition.

**Next steps in the proceeding**

- 18 The parties agree that the remaining matters set out in Section 14 be determined promptly once there is further clarity as to whether any parties will seek to participate in the proceeding (and on what terms).

**Orders sought**

- 19 The parties accordingly request that the Court make the following orders:
- 19.1 The position on cost categorisation of the proceeding be reserved, with the parties to revisit this once evidence is exchanged.
  - 19.2 Waka Kotahi is to provide a copy of the statement of claim, the statement on defence, this memorandum and the Court's resulting minute to the approved organisations, the Ministry of Transport and the Attorney-General by 14 February 2022. Waka Kotahi is to file a memorandum with the Court setting out which organisations have been provided with those documents by 15 February 2022.
  - 19.3 Approved organisations or any other person that wishes to join as a party or interested person in the proceeding are to apply by 14 March 2022 setting out the terms on which they wish to be joined.
  - 19.4 A further case management conference is to be scheduled for the first available date after 14 March 2022, regarding participation of approved organisations and the Crown, and next steps in the proceeding.

Dated: 3 February 2022



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Sally Gepp / Luke Acland  
Counsel for Movement



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Victoria Heine QC / Tim Smith / Anthony Wicks  
Counsel for Waka Kotahi