BEFORE THE INDEPENDENT COMMISSIONERS
AT PALMERSTON NORTH

UNDER	*The Resource Management Act 1991 ("Act")*
AND	
IN THE MATTER	*of an application by KiwiRail Holdings Limited ("KiwiRail") under section 168 of the Act for a Notice of Requirements for the Palmerston North Regional Freight Hub*

PROCEDURAL MINUTE NO. 3 OF HEARING PANEL DATED 12 JULY 2021

To: Notice of Requirement Process Participants

[1] By memorandum dated 8 July 2021, Dr Whittle and Dr Fox invited the Panel to consider, as a preliminary question, the scope of KiwiRail's approval as a requiring authority to seek KiwiRail's Notice of Requirement. That request is based on the text of a Gazette notice issued to KiwiRail on 14 March 2013 setting out KiwiRail's requiring powers. KiwiRail opposes that application in a memorandum dated 12 July 2021. At [9] of that memorandum, KiwiRail notes that the Council has identified the issue in its s42A Report and that KiwiRail will address the matter in opening submissions at the start of the hearing.

[2] Dr Whittle and Dr Fox consider that the issue requires the Panel's determination as a preliminary matter because it will be unfair and wasteful to undertake a full hearing if there is a clear jurisdictional bar to the Notice of Requirement.

[3] The Panel accepts that the extent to which the proposed Notice of Requirement is for a purpose authorised by the Gazette notice is a question that the Panel will need to address. The issue is whether it should be dealt with as a preliminary question.

[4] Seldom are legal questions pure questions of law even if they are labelled as 'jurisdictional'. An issue of interpretation of this type inevitably involves the application of facts to legal categories.

[5] The danger of addressing a legal question as a preliminary point is at least the following:

(a) The question requires consideration of the facts, and so any efficiency is illusory.

(b) The issue is not straightforward and leads to a situation where appeals arise so that what seems like a shortcut becomes the opposite.

[6] There is high authority on this point both in New Zealand and England. For example, Lord Scarman in *Tilling v. Whiteman*[1] said:

> "*The Court is also mindful of the dictum that '[p]reliminary' points of law are too often treacherous shortcuts. Their price can be … delay, anxiety and expense*".[2]

[7] In *Amodu Tijani v. Secretary, Southern Nigeria*[3] at 404, Lord Haldane said:

> "*Abstract principles fashioned a priori, are but little assistance and more often than not misleading*".

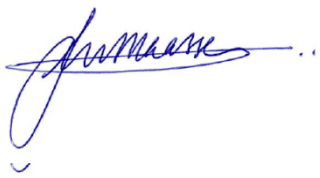
[8] Lord Haldane's observation was approved in another context in *Attorney-General v. Ngāti Apa*[4] by the New Zealand Court of Appeal.

[9] Considering the text of the Gazette notice quoted by Dr Whittle and Dr Fox, it is evident that the Minister used abstract nouns to capture the classes of things within the authorisation concerning KiwiRail's network utility operation. That points to the possibility that there is a penumbra of meaning, the limits of which will need to be considered by full argument, characterisation and application to the facts.

[10] Accordingly, the Panel considers that the scheduled hearing should proceed and full arguments heard on that disputed legal matter as part of the substantive hearing.

Kia Ora

Na



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[1] *Tilling v. Whiteman* [1979] UKHL 10; [1980] AC 1.
[2] Also cited by Judge Kirkpatrick in *Tauranga Environmental Protection Society v. TCC*, Decision No. [2019] NZEnvC 001, 8 january 2019.
[3] *Amodu Tijani v. Secretary, Southern Nigeria* [1921] 2 AC 399.
[4] A*ttorney-General v. Ngati Apa* [2003] 3 NZLR 641.

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