
**IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
ŌTEPOTI ROHE**

CIV-2021-412-000089

UNDER THE

Declaratory Judgements Act 1908

IN THE MATTER OF

An application for declaratory judgement

BETWEEN

OTAGO REGIONAL COUNCIL

Plaintiff

AND

**ROYAL FOREST AND BIRD
PROTECTION SOCIETY OF NEW
ZEALAND INCORPORATED**

First Defendant

AND

ERNSLAW ONE LIMITED

Defendant

STATEMENT OF DEFENCE

18 November 2021

Next event date:

Judicial officer:

Solicitor acting:
Solicitor: Philip Bellamy
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STATEMENT OF DEFENCE

Ernslaw One Ltd (Ernslaw) says in response to the statement of claim for declaratory judgement dated 3 September 2021:

Parties

1. Ernslaw is a production forestry company managing land holdings of up to 130,000ha throughout New Zealand. This includes 20,360ha of plantation forest in *Pinus radiata* and *Douglas fir* in the Otago region. Ernslaw submitted and further submitted on the proposed Otago Regional Policy Statement (pORPS)¹.
2. Ernslaw admits paragraphs 1 and 2.

Facts upon which the application is based

3. Ernslaw:
 - a. Admits paragraph 3a.
 - b. Admits paragraph 3b to the extent that the plaintiff is a regional council with responsibilities relating to the preparation of the pORPS under ss 59-62 of the Resource Management Act 1991 (RMA). It denies that s 63 RMA relates to responsibilities relating to the preparation of the pORPS; s 63 relates to the “purpose of regional plans”.
4. Ernslaw admits paragraphs 4 to 7.
5. Ernslaw:
 - a. Admits paragraph 8a.
 - b. Denies paragraph 8b to the extent it states that where a regional council is satisfied only part of a *freshwater planning instrument* relates to freshwater, only that part is prepared using Subpart 4 of Part 5 and Part 4 of Schedule 1 RMA. A freshwater planning instrument cannot, by definition, relate only *in part* to freshwater. As a result, reference to “the instrument” in s 80A(3) RMA must mean either a proposed regional policy statement or a

proposed regional plan as referred to in s 80A(2)(a) RMA, part of which may be a freshwater planning instrument and relate to freshwater, and part of which may not.

The proposed Otago Regional Policy Statement 2021

6. Ernslaw admits paragraphs 9 to 12.

Decision to subject whole of proposed Otago Regional Policy Statement 2021 to freshwater planning process

7. Ernslaw admits paragraph 13 in so far as it correctly records what is stated in the RPS notification report². It denies that the pORPS is a freshwater planning instrument in its entirety. Parts of the pORPS are not for the purpose of giving effect to the National Policy Statement for Freshwater Management 2020 (NPSFM), nor otherwise relate to freshwater. For example, provisions that relate to “coastal water” that are not necessary to give effect to the NPSFM cannot form part of a freshwater planning instrument, because “coastal water”³ cannot, by definition, be “freshwater”⁴.
8. Ernslaw admits paragraph 14 in so far as it correctly records what is stated in the RPS notification report⁵. Ernslaw denies that the reasons at paragraph 14a-d of the statement of claim (and in the RPS notification report more broadly) mean the whole pORPS is a freshwater planning instrument because:
- a. The reasons given would justify every proposed regional policy statement⁶ being considered a freshwater planning instrument in its entirety. This is contrary to the intention of s 80A RMA that only the parts of a proposed regional policy statement that relate to freshwater are considered through a separate, freshwater-specific process (the freshwater planning process).

¹ Submitter number 0412.

² Dawe Affidavit Exhibit 1 pg 393 at [15].

³ Defined in s 2 RMA as “coastal water means seawater within the outer limits of the territorial sea and includes—
 (a) seawater with a substantial fresh water component; and
 (b) seawater in estuaries, fiords, inlets, harbours, or embayment.”

⁴ Defined in s 2 RMA as “freshwater or fresh water means all water except coastal water and geothermal water.”

⁵ Ibid fn 1 pg 392 at [15], 394 at [24]-[25].

⁶ And proposed regional plan.

- b. Integrated management ki uta ki tai can still be achieved if different parts of the pORPS are considered through different planning processes because all parts of the pORPS must meet the statutory requirements in ss 59-62 RMA irrespective of the planning process through which they are prepared.
 - c. Parts of the pORPS are not for the purpose of giving effect to the NPSFM, nor otherwise relate to freshwater.
 - d. Preparation of the whole pORPS as a freshwater planning instrument risks providing for overreach in its ability to provide direction about whether lower order planning documents should have more stringent rules applying to plantation forestry than those in the Resource Management (National Environmental Standards for Plantation Forestry) Regulations 2017, because all of the pORP's objectives could be considered to give effect to the NPSFM⁷.
9. Ernslaw admits paragraph 15 in so far as it correctly records what is stated in the RPS notification report⁸. For the reasons given at paragraph 8 above, it denies that the ability to make “links” between freshwater parts of the pORPS and parts of the pORPS addressing other matters/resources means the pORPS in its entirety is a freshwater planning instrument.
10. Ernslaw admits paragraphs 16 and 17.
11. Ernslaw admits paragraph 18 to the extent that it correctly records that public notice of the pORPS was released on 26 June 2021 and what that public notice said. Ernslaw denies that that the whole of the pORPS is a freshwater planning instrument that should be subject to the freshwater planning process for the reasons given at paragraphs 7 to 9 above.
12. Ernslaw admits paragraph 19 in so far as it correctly states the date on which submissions closed under the plaintiff's current planning process. If the pORPS or part of the pORPS is re-notified, then further opportunity for public submissions will need to be provided.

⁷ Regulation 6(1)(a) of the NESPF.

⁸ Ibid fn 1 pg 396 at [35]-[40].

13. Ernslaw admits paragraph 20 in so far as it refers to both that the plaintiff is required to prepare a summary of decisions requested by submitters under Part 4 Schedule 1 RMA on the freshwater planning instrument parts of the pORPS, and under Part 1 Schedule 1 RMA in relation to other aspects of the pORPS.
14. Ernslaw admits paragraph 21 in so far as it states that opportunity for further submissions is provided under Part 4 Schedule 1 RMA in relation to the freshwater planning instrument parts of the pORPS, and under Part 1 Schedule 1 RMA in relation to other aspects of the pORPS.
15. Ernslaw admits paragraph 22 in so far as it states what s 80A(4) RMA and cl 37(1) Part 4 Schedule 1 RMA require. Ernslaw denies that the plaintiff is required to submit the whole pORPS to the Chief Freshwater Commissioner, because the whole pORPS is not a freshwater planning instrument. The plaintiff is only required to submit to the Chief Freshwater Commissioner those parts of the pORPS that are for the purpose of giving effect to the NPSFM or are otherwise relate to freshwater, as a freshwater planning instrument. Similarly, the plaintiff is only required to submit to the Chief Freshwater Commissioner those documents, or parts of documents, referred to in cl 37(1) Schedule 1 RMA that relate to the parts of the pORPS that qualify as a freshwater planning instrument. If the parts of the pORPS that qualify as a freshwater planning instrument are re-notified, then the plaintiff will instead have to provide that instrument and related documents to the Chief Freshwater Commissioner.
16. Ernslaw admits paragraph 23 in so far as it correctly records the outline of the freshwater planning processes in s 80A(5) RMA. It denies that the freshwater planning process applies to the pORPS as a whole because the whole pORPS is not a freshwater planning instrument.

Declarations sought

17. Ernslaw denies the declarations sought in paragraph 24 reflect correct statements of either fact or law and says:

- a. The entire pORPS is not a freshwater planning instrument under s 80A RMA because parts of the pORPS are not for the purpose of giving effect to the NPSFM, nor otherwise relate to freshwater.
- b. Consequently, there is no jurisdiction for the plaintiff to continue to prepare the entire pORPS under the freshwater planning process in Subpart 4 Part 4 and Part 4 Schedule 1 RMA.
- c. The plaintiff must determine which parts of the pORPS are for the purpose of giving effect to the NPSFM or otherwise relate to freshwater, and which parts do not. The plaintiff must prepare the former as a freshwater planning instrument in accordance with the freshwater planning process Subpart 4 Part 4 and Part 4 Schedule 1 RMA, and the latter in accordance with standard planning process in Part 1 Schedule 1 (or the process in Part 5 Schedule 1 if applicable⁹).
- d. If no changes are made to the parts of the pORPS that are determined to be for the purpose of giving effect to the NPSFM or otherwise relate to freshwater and thus qualify as a freshwater planning instrument, then the freshwater planning instrument has been publicly notified and does not need to be re-notified. If changes are made, then public notification is required in accordance with s 80A(4)(a) RMA.
- e. If no changes are made to the parts of the pORPS that are determined not to be a freshwater planning instrument, then those parts of the pORPS have been publicly notified and do not need to be re-notified. If changes are made, then public notification is required in accordance with cl 6 Schedule 1 RMA.

This statement of defence is filed by **PHILIP J BELLAMY**, solicitor for the abovenamed defendant. The address for service of the abovenamed defendant is counsel's chambers at Level 1 189 Hardy Street Nelson.

Documents for service on the abovenamed defendant may be left at that address for service or may be –

⁹ Being the stream-lined planning process described in Subpart 5 Part 4 RMA.

- (a) Posted to Level 1, 189 Hardy Street Nelson; or
- (b) Emailed to sally@sallygepp.co.nz or madeleine@sallygepp.co.nz