

Before the Independent Hearings Panel

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*under:* the Resource Management Act 1991

*in the matter of:* Submissions and further submissions in relation to the  
proposed Otago Regional Policy Statement

*submitter:* **Fonterra Limited**  
*Submitter 233*

Legal submissions on behalf of Fonterra Limited

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Dated: 7 February 2023

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## LEGAL SUBMISSIONS ON BEHALF OF FONTERRA LIMITED

### INTRODUCTION

- 1 These submissions are provided on behalf of Fonterra Limited (*Fonterra*), who is a submitter and further submitter on the Proposed Otago Regional Policy Statement (*PORPS*).
- 2 Fonterra has submitted across a large number of the objectives and policies, along with associated issues, methods and explanations.
- 3 Fonterra recognises that most submitters are presenting on a chapter-by-chapter basis. Fonterra is presenting its whole case today, across a number of topics. This is because, in the main, Fonterra's key submission points are interrelated and overlap between the chapters.
- 4 Fonterra is happy to address any particular further questions/issues that may arise as the hearing progresses (and from its end, Fonterra will keep a watch on the hearing and potentially seek leave to appear again or provide memorandums in relation to further hearings should anything materially new develop).
- 5 These submissions do not address each submission point or each individual item of relief being sought by Fonterra (which has been comprehensively set out in Fonterra's original and further submissions and the evidence of **Ms Susannah Tait**). Instead, these submissions are largely 'introductory' in nature and will:
  - 5.1 briefly summarise the background to Fonterra's interests in the *PORPS*; and
  - 5.2 discuss the key relief sought by Fonterra, with its main interests revolving around:
    - (a) the need for a suite of provisions recognising and protecting regionally significant industry;
    - (b) the need for adequate provisions addressing reverse sensitivity effects; and
    - (c) specific concerns around discharge to air provisions.

## FONTERRA'S INTERESTS IN THE PORPS

- 6 The background to Fonterra and its interests in the PORPS has already been set out in evidence, but in terms of a brief summary and focusing on the specifics of the Otago Region:
- 6.1 Otago is home to key Fonterra infrastructure including:<sup>1</sup>
- (a) the Stirling Milk Processing Site near Balclutha; and
  - (b) the Mosgiel Distribution Centre.
- 6.2 The Stirling site processes up to 1.8 million litres of milk per day, and is the largest cheese producer in Australasia, producing over 200 tonnes of cheese at the site each day. The site does not operate in isolation, and is instead part of a large operations region which includes Fonterra's Edendale processing site in Southland. The site operates within the ambit of a number of resource consents, including to take and use water, and to discharge contaminants to air, water and land.
- 6.3 The Mosgiel Distribution Centre is Fonterra's lower South Island logistics hub. Finished product is supplied to it from both the Stirling and Edendale processing sites, and then subsequently moved primarily to the Port of Otago for export to Fonterra's international markets. Its functioning is reliant on a safe and efficient road and rail network, and its ability to undertake its operations (and expand) in a suitably zoned area (i.e. industrial) with appropriate protection from reverse sensitivity effects.
- 7 Overall, it is the case for Fonterra that the operation of the sites contributes significantly to the local, regional and national economy.
- 8 Fonterra's principal motivation in respect of the PORPS is to ensure that its operations in Otago are appropriately recognised and protected in the PORPS. The two key aspects of this recognition are the inclusion of a suite of provisions that recognise regionally significant industry, and the associated objectives and policies that seek to protect and enable regionally significant industry.
- 9 This relief sought is consistent with that which has been sought over more recent years by Fonterra elsewhere in New Zealand (the most relevant being the Waikato Regional Policy Statement which now includes effectively the same reference to "*Regionally significant industry*"), but also extending to, for example:

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<sup>1</sup> See generally Ms O'Rourke's evidence

- 9.1 Whangarei District where the operative plan includes “*Strategic Rural Industries*”, including “Fonterra Milk Processing site at Kauri and Ancillary Irrigation Farms”;
- 9.2 South Taranaki District where the operative plan includes “*Rural Industries Zone*” which includes Fonterra’s Kapuni and Whareroa Dairy Manufacturing sites; and
- 9.3 Selwyn District, where:
- (a) the operative Selwyn District Plan includes a dairy processing zone with specific plan provisions addressing site/activity related matters;
  - (b) the proposed Selwyn District Plan (in process) where the notified plan includes further provisions relating to “*Important Infrastructure*”, including “*Dairy processing plants located within the Special Purpose Dairy Processing Zone*”.
- 10 Over recent years, Fonterra has found that there has been an increasing need to seek (for example) specific recognition of ‘importance’ and specific zoning. This follows various initiatives around the country looking at, for example, improved waste water treatment and discharge, noise/attenuation issues, biomass and plant conversions and more careful water management.
- 11 All of these initiatives place further emphasis on consenting processes and accordingly ensuring the relevant planning regimes ‘enable’ change (rather than just bolstering the status quo) is taking on increasing importance.
- 12 With an increasing push to lower environmental footprints, ‘future proofing’ operations and more generally comply with, for example, emissions reduction goals, further examples (as explained by **Ms O’Rourke**) include:
- 12.1 Fonterra investing in transitioning the Stirling site from using a coal boiler to a biomass boiler such that it will use 100% wood biomass as renewable energy<sup>2</sup> (a change that will also contribute more than \$13.5 million to the local economy and support an estimated 10 jobs in the wood biomass industry);<sup>3</sup> and

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<sup>2</sup> Evidence of Ms O’Rourke at [32]

<sup>3</sup> Evidence of Ms O’Rourke at [32]

- 12.2 Fonterra investing heavily in ensuring that its sites are:
- (a) appropriately provided for in the resource management planning framework; and
  - (b) protected from reverse sensitivity effects (including a recent seven year appeal process in relation to a proposed Noise Control Area over the Mosgiel site to protect it from reverse sensitivity effects);<sup>4</sup> and
  - (c) achieving continual improvement in its operations and particularly discharges to land, water and air.
- 13 These issues are not unique to Fonterra, and are significant issues that could materially affect the social and economic wellbeing of the Otago Region.
- 14 Accordingly, Fonterra seeks amendments to the PORPS that will not only 'recognise and protect', but more directly provide for or enable:
- 14.1 regionally significant industry;
  - 14.2 a framework for addressing (in particular) reverse sensitivity effects; and
  - 14.3 the various takes and discharges (here most relevantly being discharges to air) that are required – and, importantly, the continuous improvement of these.

#### **FURTHER COMMENT ON RELIEF SOUGHT**

##### **The need to recognise and protect regionally significant industry**

- 15 The PORPS currently contains no provisions relating to regionally significant industry. In Fonterra's submission, it should.
- 16 In omitting to deal with regionally significant industry the PORPS:
- 16.1 neglects an important element of sustainable management of Otago's natural and physical resources. I.e. that regionally significant industry is a key driver for the social and economic well-being of the people and communities of Otago; and
  - 16.2 also, in Fonterra's submission does not properly align with the various statutory considerations (ultimately culminating in Part II) – which in simple terms provide a clear and appropriate way for a regional policy statement to enable the

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<sup>4</sup> Evidence of Ms O'Rourke at [70]

social and economic well-being of a region's people and communities.

- 17 Similarly, provisions dealing appropriately with regionally significant industry assist a regional policy statement to *best* achieve its purpose – the promotion of the sustainable management of Otago's natural and physical resources.<sup>5</sup>
- 18 In terms of wider importance to the Otago Region, Fonterra simply repeats **Mr Copeland's** evidence that:
- 18.1 Fonterra's Stirling and Mosgiel sites contribute significantly to the local, regional and national economy;
- 18.2 employment data for the Otago Region indicates that Clutha District is highly dependent on the agriculture sector, with dairy product manufacturing accounting for 530 jobs (6% of total employment) in the Clutha District;
- 18.3 the Stirling and Mosgiel sites together employ over 130 staff who mostly live within the Clutha District and Dunedin City, with the Stirling site also providing important diversity to the local Clutha District economy by providing off-farm employment and incomes;
- 18.4 the Stirling site is the largest dry salt cheese factory in Australasia, producing over 200 tonnes of cheese daily and 55,000 tonnes per year; and
- 18.5 the total direct plus indirect Otago regional impacts of the two sites are over 260 additional jobs, over \$23 million per year in additional wages and salaries and over \$101 million per year in additional expenditure.
- 19 Protection of Fonterra's operations therefore not only provides economic and social benefits to Fonterra and its shareholders, but also other business and residents within the Clutha District, Dunedin City and the wider Otago Region.
- 20 The reporting officer appears to be concerned that the suite of amendments Fonterra seeks in relation to regionally significant industry would elevate regionally significant industry to the same category as "regionally significant infrastructure" and rejects the policy package sought by Fonterra on that basis.<sup>6</sup> While Fonterra's primary position is that the reporting officers concern is misguided, in her evidence for Fonterra, **Ms Tait** has proposed revisions that ensure the provisions sought by Fonterra are contained in the

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<sup>5</sup> See sections 5 and 59 of the RMA

<sup>6</sup> Section 42A Report, Introduction and general themes, paragraph 120

appropriate chapter – largely in the chapter on Urban Form and Development.<sup>7</sup> This is because the thrust of Fonterra’s submissions on this matter are intended to protect it from urban intensification, urban expansion and rural lifestyle development.<sup>8</sup>

- 21 Locating the provisions in the Urban Form and Development chapter also reflects the reporting officers comment that the National Planning Standards are “*relatively ambivalent on where ‘rural’ matters would reside*” but ORC has determined such provisions are best located in a chapter alongside urban issues.<sup>9</sup> To the extent any question of scope might be raised, it is simply submitted that the amendments proposed by Ms Tait in response to the section 42A report is a matter of form rather than substance.<sup>10</sup> The important point is that the relief sought (the thrust of which is the recognition and protection of regionally significant industry) was fairly and reasonably raised in Fonterra’s submission.<sup>11</sup> Again, the core relief has been clear from the outset and interested parties are more than able to glean from the submission what relief Fonterra seeks. To this end, it is noted that the other submitters have made further submissions on the suite of amendments Fonterra sought in relation to regionally significant industry.<sup>12</sup>
- 22 In summary, the PORPS has a critical role to play in providing the framework for regional and district plans that will heavily influence decision-making under the RMA. In its current form, the PORPS does not recognise regionally significant industries and their importance in terms of enabling the economic and social well-being of the Otago region. As a consequence there are no express provisions that enable such activities, no provisions that seek to recognise and provide for the benefits that arise from their use of natural and physical resources and no express provisions that seek to manage potential adverse effects arising from them.

**The need for adequate provisions addressing reverse sensitivity effects**

- 23 The concept of reverse sensitivity will be well known to the Hearing Panel – i.e. the adverse effects of establishing sensitive/ incompatible activities in the vicinity of existing lawful uses, and the

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<sup>7</sup> Evidence of Ms Tait at [4.5]

<sup>8</sup> Evidence of Ms Tait at [4.6]

<sup>9</sup> Section 42A Report, Chapter 15: UFD – Urban form and development, paragraphs 149 – 151

<sup>10</sup> *Bennett v Thames-Coromandel District Council* [2017] NZEnvC 111 at [21]. See also [19] – [22]

<sup>11</sup> Resource Management Act 1991, Schedule 1, cl 6; *Countdown Properties Northland Limited v Dunedin City Council* HC Wellington AP214/93 at p9

<sup>12</sup> AgResearch (FS00208); Kai Tahu ki Otago (FS00226); Otago Water User Resource Group (FS00235); Silver Fern Farms (FS00221); Waka Kotahi NZ Transport Agency (FS00305)

potential for that establishment to lead to restraints on the carrying out of the existing uses.

24 Or, as the Court has stated:<sup>13</sup>

... it is the effect of the new use on existing uses that is the problem, not because of the direct effects of the new use but because of incompatibility which in turn may lead to pressure for change.

25 Reverse sensitivity effects have been particularly problematic for Fonterra elsewhere in the country. However, as planning regimes have evolved they have got better at managing reverse sensitivity effects.

26 Fonterra internalises its effects wherever reasonably possible. However, total internalisation of effects in all situations is not feasible, nor is it required under the RMA. The general principle, established in case law, is that activities should internalise effects wherever reasonably possible.<sup>14</sup> However, total internalisation of effects is not feasible in all cases and there is no requirement under the RMA that this must be achieved.<sup>15</sup>

27 To justify imposing any restrictions on the use of land adjoining an effects emitting site, the industry should be of some considerable economic or social significance local, regionally or nationally, as is the case for Fonterra's Mosgiel and Stirling sites.<sup>16</sup> In this regard it is well recognised that residential occupiers have the greatest potential to generate reverse sensitivity effects, and a greater degree of control outside of the site can be justified in some cases.<sup>17</sup>

28 As **Ms Tait** explains, regionally significant industry typically has specific operational and functional needs that cannot readily be replicated.<sup>18</sup> The operational needs of Fonterra's processing and distribution sites include:

28.1 proximity to product source (i.e. milk catchment);

28.2 sufficient and suitable land availability for the discharge of process wastewater;

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<sup>13</sup> *Joyce Building Limited v North Shore City Council* [2004] NZRMA 535, para [22]

<sup>14</sup> *Winstone Aggregates v Matamata-Piako District Council* (2005) 11 ELRNZ 48, para [7-9]

<sup>15</sup> *Winstone Aggregates v Matamata-Piako District Council* (2005) 11 ELRNZ 48, para [7-9] and *Catchpole v Rangitikei District Council*, W35/03

<sup>16</sup> *Winstone Aggregates v Matamata-Piako District Council* (2005) 11 ELRNZ 48, para [18]

<sup>17</sup> *Ngatarawa Development Trust Ltd v Hastings District Council*, W017/08

<sup>18</sup> Evidence of Ms Tait at [4.17]



- 28.3 being sufficiently isolated from neighbouring dwellings to avoid issues associated with reverse sensitivity effects; and
- 28.4 good access to strategic freight networks, including rail.
- 29 Amendments to appropriately manage the interface between urban and rural environments, avoid reverse sensitivity effects and to provide for regionally significant industry such that it is not constrained by urban encroachment are obviously supported by Fonterra.
- 30 While important, growth and development should not be 'at all costs' and particularly not at the cost of constraining activities that are important for social and economic wellbeing. The evidence of **Mr Copeland** is that the amendments sought by Fonterra will better safeguard economic benefits from the ongoing operations and potential expansion of activities related to Fonterra's Otago sites, for Fonterra, Fonterra's farmer shareholders, and residents and business of the Clutha District, Dunedin City and wider Otago Region.
- 31 It is therefore submitted that the PORPS should look to manage and recognise reverse sensitivity effects, including protecting regionally significant industry from such effects. As notified, the PORPS does not do so.
- Fonterra's concern with the discharge to air provisions**
- 32 Fonterra is concerned that the discharge to air provisions are not justified on the evidence. Nor do they achieve the Act's purpose of sustainable management.
- 33 The air quality standards proposed by ORC are more stringent than the National Environment Standards for Air Quality 2004 (*NESAQ*).
- 34 Applying any standard involves opportunity cost and imposes a burden on those who are regulated. In this case, the burden of ORC's proposed air quality standards could be significant and, as discussed in the evidence of **Ms Tait**, effectively prohibit discharges to air that have *any* adverse effect.<sup>19</sup> This is not a scenario in which additional restriction has no real downside – poorly targeted and overly restrictive standards (which flow on from an objective that is too directive) can be actively detrimental in social or economic terms, for potentially no corresponding environmental or public health benefit. In other words, needless excessive protection would place Fonterra, and others in the Otago Region, at a significant disadvantage with no purpose served.

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<sup>19</sup> Evidence of Ms Tait at [9.3]

- 35 Standards have appropriately been set at a national level. The NESAQ is the national framework for determining acceptable air quality: "*it is informed by the World Health Organisation and New Zealand's own national studies.*"<sup>20</sup> The PORPS should align with the national policy direction to provide a suitable framework for the Regional Air Plan to achieve compliance with the national standards.
- 36 The section 42A writer appears to consider that, because air quality in Otago does not currently meet the standards set in the NESAQ or the operative Regional Air Plan during the winter, more stringent standards are required. It is submitted that this does not justify bespoke limits for the Otago Region. Existing breaches of ambient air quality need to be addressed by a planning regime that gives effect to and correctly reflects the appropriate 'yardstick'- being the NESAQ.

#### **EVIDENCE**

- 37 Fonterra is calling evidence from:
- 37.1 **Ms Susanne O'Rourke**, Fonterra's National Environmental Policy Manager, who provides an overview of Fonterra and its operations at the Stirling and Mosgiel Sites, Fonterra's broader strategic and legal considerations, and the changes Fonterra seeks to recognise the regional significance of its industrial activities;
- 37.2 **Mr Michael Copeland**, consulting economist, who outlines the background to Fonterra's existing and future use of its Stirling and Mosgiel Sites, and the economic costs and benefits of the Stirling and Mosgiel Sites; and
- 37.3 **Ms Susannah Tait**, in relation to planning matters.

Dated: 7 February 2022




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**B G Williams / K I G Jacomb**

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<sup>20</sup> Evidence of Ms Tait at [9.9]

