

**BEFORE INDEPENDENT HEARING COMMISSIONERS
AT DUNEDIN**

**MAI I KĀ KAIKŌMIHANA MOTUHAKE
KI ŌTEPOTI**

UNDER the Resource Management Act
1991 (“**RMA**”)

AND

IN THE MATTER OF the Proposed Otago Regional
Policy Statement 2021 (non-
freshwater parts) (“**PORPS**”)

AND the **IM** – Integrated Management
provisions of the PORPS

LEGAL SUBMISSIONS ON BEHALF OF KĀI TAHU

Dated 8 February 2023

Solicitor instructing:
Jessica Riddell



Te Rūnanga o **NGĀI TAHU**

15 Show Place
Christchurch 8024
PO Box 13 046,
Christchurch 8042
P: 021 226 9328
E: jessica.riddell@ngaitahu.iwi.nz

Counsel acting:
Aidan Cameron

BANKSIDE CHAMBERS

Level 22, 88 Shortland St
Auckland 1010
PO Box 1571, Shortland St
Auckland 1140
P: +64 9 307 9955
E: aidan@bankside.co.nz

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May it please the Commissioners | Ki kā Kaikōmihana

Introduction and summary | Whakatakika

1. Integrated management sits at the heart of a regional policy statement. It is core to the purpose of the PORPS, its function and its significance. From a Kāi Tahu perspective, integrated management is central to the concepts of “ki uta, ki tai”, and the interconnected nature of whenua, wai, and moana.¹
2. These submissions support the relief sought in the evidence of Ms McIntyre and Ms Bartlett on behalf of Kāi Tahu. Again, there is a high level of agreement between Kāi Tahu and the ORC.
3. These submissions address the following two issues that remain outstanding from the evidence filed:
 - (a) The appropriateness of a prioritisation approach in IM-P1, the place of mauri within the hierarchy of considerations in IM-P1 and IM-P2, and the proposed amendment to include the “health needs of people” within sub-clause (1).
 - (b) IM-P6 and the proper role of the precautionary approach.

The prioritisation approach – IM-P1 and IM-P2

4. IM-P1, as proposed in the s 42A report provided by Ms Felicity Boyd, requires decision-makers to consider all provisions that are relevant to an issue, and apply them according to the terms in which they are expressed. Where a conflict exists between provisions that cannot be resolved by the application of higher-order documents, IM-P1 requires the prioritisation of the life-supporting capacity and mauri of the natural environment and the health needs of peoples, *and then* the ability of people and communities to provide for their social, economic and cultural well-being, now and in the future.

The appropriateness of a prioritisation approach for life-supporting capacity and mauri

5. A number of parties have filed evidence in opposition to the proposed hierarchy of priorities in IM-P1.² In addition, Dr Freeman for OWRUG has sought the removal of mauri from IM-P1, on the basis that there is no rationale to include it at the same level as the “life-supporting capacity” of the natural environment.³

¹ BoE of David Higgins at [11]. See also BoE of Edward Ellison at [91].

² See, for example, the evidence of Susannah Tait for Fonterra; Claire Hunter for Oceana Gold; and Stephanie Styles for Manawa Energy.

³ Evidence of Dr Freeman for OWRUG, Federated Farmers and Dairy NZ at p 17.

6. The drafting of IM-P1 reflects, in our submission, the return to an environmental bottom lines approach, and the acknowledgement, post-*King Salmon*, that environmental protection is “a core element of sustainable management”.⁴ It is also consistent with the Supreme Court’s acknowledgement that “while”, in the context of sustainable management as defined in s 5, requires the life-supporting capacity of air, water, soil and ecosystems to be safeguarded “at the same time as” the more enabling aspects of the definition.⁵
7. It is also appropriate that, within the hierarchy in IM-P1, priority is given to the mauri of the natural environment. There are strong links between the Eurocentric concept of “life-supporting capacity” referenced in s 5(b) and the tikanga surrounding mauri, to the point where the concepts have been treated as two sides of the same coin.⁶ Those links to mauri, as well as its recognition in the concept of Te Mana o te Wai,⁷ provide a clear rationale for its inclusion within IM-P1.
8. The prioritisation of mauri within IM-P1 is also consistent with the ORC’s obligations under ss 6(e), 7(a) and 8 of the RMA; and the iwi management plans prepared by Kāi Tahu, which reflect the mātauraka that has been handed down through generations.⁸ It is important that the provisions of the PORPS reflect that mātauraka, in order to comply with the strong directions in those sections.⁹
9. If an application is unable to demonstrate the ways in which it safeguards the life-supporting capacity and mauri of the natural environment, then it is unlikely to find favour, whether by reference to the sustainable management purpose of the RMA in s 5, or to a lower-order instrument that is designed to implement it. In my submission, that is entirely appropriate.

Including the “health needs of people” in sub-cl (1) conflates the cumulative safeguards in s 5 (a) to (c) with the enabling aspects of s 5

10. Ms McIntyre broadly supports the proposed amendments to IM-P1.¹⁰ However, she differs from Ms Boyd in one respect, which is the incorporation of “the health needs of people” alongside the life-supporting capacity and mauri in the prioritisation approach.

⁴ *Environmental Defence Society Inc v The New Zealand King Salmon Company Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [24](d).

⁵ *King Salmon*, above n 2 at [24](c).

⁶ *Ellis v R* [2022] NZSC 114 at fn 114, where Glazebrook J synonymises the two concepts in relation to s 7(2) of the Hauraki Gulf Marine Park Act 2000. See also *Wakatu Inc v Tasman District Council* [2012] NZEnvC 75, [2012] NZRMA 363 at [63]; and *Gock v Auckland Council* [2019] NZHC 276 at [197], referring to Chapter B6.5.2(2) of the Auckland Unitary Plan (Operative in Part). See rebuttal evidence of Maria Bartlett at [5]-[9]; and of Sandra McIntyre at [44]-[45].
NPSFM 2020, cl 1.3.

⁷ And which must be taken into account pursuant to s 61(2A)(a) of the RMA.

⁸ *McGuire v Hastings District Council* [2002] 2 NZLR 577 (PC) at [21].

⁹ And the proposed amalgamation of IM-P2 within its terms: see BoE of Sandra McIntyre at [83].

11. In Ms McIntyre’s view, bracketing the health needs of people conflates between the enabling aspects of s 5, which include health and safety, and the other matters which give rise to environmental bottom lines through ss 5(a) to (c).¹¹ In her Appendix 1, she proposes to relocate health and safety to sub-clause (2).¹²
12. In my submission, that is an appropriate amendment. The reference in s 5 to health and safety relates to *enabling* people and communities to, inter alia, provide for their own health and safety. It does not, as the current drafting of IM-P1 might suggest, create an environmental bottom line in favour of the health needs of people.
13. In my submission, requiring prioritisation of the health needs of people is already adequately covered by the inclusion of life-supporting capacity and mauri in IM-P1.¹³ That formulation closely aligns with the framing of s 5. As such, the inclusion of the “health needs of people” is both potentially confusing and duplicative, and should be removed.

The requirements of a precautionary approach – IM-P6

14. In her s 42A report, Ms Boyd recommends the deletion of IM-P15, which required decision-makers to adopt a precautionary approach, where effects are uncertain, unknown, or little understood, but potentially significantly adverse, and incorporating it within IM-P6.
15. IM-P6, as notified, referred to the need to avoid unreasonable delays in decision-making processes, by using the best information available at the time.
16. Ms McIntyre opposes the deletion of IM-P15 and its incorporation into IM-P6, on the basis that it substantially alters its effect, especially as the requirement to adopt a precautionary approach may be interpreted as being subsidiary to the direction to avoid unreasonable delays in decision-making.¹⁴ Ms McIntyre says that management of uncertainty should be clearly expressed as the primary intent of the policy; and recommends further amendments to IM-P6 to ensure that is how the policy is interpreted.¹⁵

¹¹ On the basis that subsections (a) to (c) are not bottom lines themselves: *Muaūpoko Tribal Authority Inc v Minister for the Environment* [2022] NZHC 883, [2022] NZRMA 481 at [12] and [130]-[145].

¹² BoE of Sandra McIntyre, Appendix 1, p 15.

¹³ As Edward Ellison describes, mauri can be observed as a measure of environmental health and well-being, which, in counsel’s submission, must (by necessity) include the health and well-being of people, albeit viewed through a lens that is informed by mātauraka and tikanga: BoE of Edward Ellison at [20]. It is also expressed through the whakataukī referenced at paragraph 17 of Ms Cook’s evidence.

¹⁴ Or where the need to avoid unnecessary delay is viewed as a condition precedent to the application of a precautionary approach, when the latter’s ambit is much wider.

¹⁵ BoE of Sandra McIntyre at [80](c) and Appendix 1, pp 17-18.

Ensuring the precautionary approach remains front and centre in IM-P6

17. In my submission, the two policies (IM-P6 and IM-P15) were aimed at substantially different directives. The former, as notified, was aimed at the general duty of persons exercising functions, powers or duties under s 21 the RMA to avoid unreasonable delay, and to act as promptly as is reasonable in the circumstances by acting on the best information available.
18. IM-P15, by contrast, is aimed at the precautionary approach, which is mandated in s 32(2)(c),¹⁶ and which has been expressed in higher-order policy documents, including Policy 3 of the New Zealand Coastal Policy Statement 2010, and Policy 3 of the draft National Policy Statement on Indigenous Biodiversity.
19. The precautionary approach is not aimed at the need to avoid unreasonable delay, but instead the existence of scientific uncertainty or insufficient information about the potential effects of an activity (or a rule designed to regulate it).¹⁷ The adoption of a precautionary approach is broader than simply “acting on the best information available”. It may include, where there is too much uncertainty, prohibiting an activity until more is known.¹⁸
20. Encouraging a decision-maker to act on the “best information available” to avoid unreasonable delay may, in the absence of more refined wording, send a perverse signal. It could potentially encourage a decision-maker to overlook any deficiencies in the information and “go with what we have”, rather than apply a truly precautionary approach.
21. While the desire for brevity is to be encouraged, counsel submit that the proposed wording in Ms Boyd’s s 42A report fails to appropriately address the risk of acting or not acting, against the background of the precautionary approach in higher-order policy documents and international law. Counsel submit that the proposed drafting provided by Ms McIntyre, which puts the precautionary approach at the forefront, better gives effect to the requirements in s 32; those higher-order directions; and the principle of sustainable management.

Conclusion

22. Kāi Tahu seek the amendments to the IM chapter set out in Ms McIntyre’s Appendix 1 at pp 13-22.

¹⁶ *Coromandel Watchdog of Hauraki Inc v Ministry of Economic Development* [2007] NZCA 473, [2008] 1 NZLR 562 at [30].

¹⁷ *Sustain Our Sounds Inc v The New Zealand King Salmon Company Ltd* [2014] NZSC 40, [2014] NZSC, [2014] 1 NZLR 673 at [30] by reference to Policy 3 of the NZCPS.

¹⁸ *Coromandel Watchdog*, above n 11 at [34](a) and [36].

23. Ms McIntyre will appear to address you on those points. Ms Bartlett will not be appearing, as the matters raised in her rebuttal evidence were traversed during the General Themes hearing.

Dated 8 February 2023

A M Cameron
Counsel for Kāi Tahu