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 **MW** – Mana Whenua, **RMIA** – Resource management issues of significance to iwi authorities in the region

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SUPPLEMENTARY LEGAL SUBMISSIONS ON BEHALF OF KĀI TAHU

Dated 9 February 2023

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LEGAL SUBMISSIONS ON BEHALF OF KĀI TAHU

May it please the Commissioners | Ki kā Kaikōmihana

Introduction | Whakatakika

1. These submissions are filed pursuant to a direction made at the hearing of the Kāi Tahu submissions on the MW and RMIA chapters of the PORPS, and repeated in Minute #5.

2. The direction requested further submissions on two points raised during the hearing of submissions on the MW and RMIA chapters:

   (a) the statements at paragraphs 5.5 and 5.6 of the summary statement of Paul Freeland on behalf of Dunedin City Council ("**DCC**") as to purported natural justice issues arising out of the proposed definitions of Māori land and papakāika, in the event of change of ownership of land; and

   (b) a similar challenge advanced in the evidence of Ainsley McLeod and legal submissions on behalf of Transpower.[1]

3. Counsel also takes the opportunity to respond to the point raised in discussions between the Chair and counsel for ORC (and, later, Kāi Tahu and the DCC) regarding the ORC's jurisdiction to require resourcing Kāi Tahu's participation in resource management decision-making, including funding, in MW-M4.

4. Attached to these submissions as Appendix "A" is a consolidated definition of Māori land, identifying changes recommended in the evidence of Ms McIntyre, and further changes following discussions at the MW/RMIA hearing. For the purpose of clarity, these submissions adopt the numbering in that appendix.

Evidence of Mr Freeland

5. At his paragraphs 5.5 and 5.6, Mr Freeland for DCC advanced the proposition that, unless Māori Land is mapped, then for natural justice reasons it will be difficult for neighbours, communities and the general public to participate in the planning process to consider the effects of activities that may be proposed on Māori land.

6. Mr Freeland also said that the proposed definition created uncertainty as to when land would be considered Māori land, and that it seemed to imply that plan rules linked to Māori land could change due to ownership changes, rather than through a Schedule 1 process. He also raised a concern regarding the need for frequent 'spot zoning

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[1] Counsels' notes from the hearing record that an opportunity to respond to the matters raised in counsel for Transpower's submissions was also directed orally, immediately following those submissions.

changes' in the event that land changes ownership, bringing it within the proposed definition.

7. At paragraph 5.8, Mr Freeland said that his preference was that Māori land should be mapped so that it is clearly identified for consideration through District Plan preparation processes, and for "natural justice reasons" enables public consultation and consideration of the effects of proposed activities proposed on Māori land.

Kāi Tahu response to Mr Freeland's propositions

8. Counsel notes that Mr Freeland did not particularise his concern regarding "natural justice" issues arising out of the proposed definition of Māori land. Counsel also notes that the issue was not addressed in the submissions of Mr Garbett for DCC.

9. However, notwithstanding that lack of detail, Kāi Tahu understand that Mr Freeland's concern is that by promoting a definition which is subject to changes in tenure, the rights of other people may be affected by "side wind" without an opportunity to be heard.[2]

10. As the Chair and Commissioner Cubitt noted during questioning of Mr Freeland, inclusion of the proposed definition of Māori land in a regional policy statement would not directly affect a person's "rights, obligations or interests".[3] A regional policy statement cannot contain rules, as defined by s 2(1) of the RMA.[4] While it is accepted that some policies may amount to a rule in the ordinary sense of the words, those "rules" are not directly binding on individuals, and derive their impact from the direction that a district plan must not be inconsistent with them.[5]

11. In that way, it is the district plan, promulgated through a Sch 1 process, that directly affects the rights, obligations or interests of the individual, not a regional policy statement.

12. For the rights of an individual to be affected in relation to their use of land, a change in zoning or rules in the relevant district plan would be required. That offers an opportunity for the individual concerned to make a submission on the proposed change and seek measures to protect their own interests, and to be heard on that submission. No issue of natural justice arises from the proposed definition of Māori land in the regional policy statement.

13. Given the potentially dynamic nature of the definition, the appropriate time for identification of Māori land in a district plan process is during the plan development phase, rather than requiring that land to be mapped in a regional policy statement.

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2 Or in the original Latin, *audi alteram partem* (the duty to hear both sides).
3 Adopting the language used in s 27 of the New Zealand Bill of Rights Act 1990.
4 *Auckland Regional Council v North Shore City Council* [1995] 3 NZLR 18 (CA).
5 Ibid.

14. As to the concern regarding "frequent spot zoning changes":

    (a) The purpose of the proposed definition is to enable those holding mana whenua[6] to exercise their rakatirataka and kaitiakitaka over their own land. A zoning change to better provide for that is consistent with the directions in ss 6(e), 7, and 8. Consistent zoning patterns are aimed at managing the interface between activities, not the rights and interests of Māori which are protected under art 2 of Te Tiriti, and ought to yield to those rights and interests where appropriate.

    (b) Arguably, the same could be said for leasehold interests acquired in favour of Transpower (for the purpose of National Grid infrastructure); or land acquired for the purpose of a hospital, school, or other civic infrastructure that might require a zoning change.

    (c) The type of rule or zone change that might be introduced into a district plan would be expected to be developed in collaboration between mana whenua and the territorial authority and would be subject to the usual section 32 analysis. The benefits and costs of different types of zoning approach, which might include "spot" zones, would be assessed as part of that process, in the context of the specific district plan framework.

Jurisdictional issues raised by Transpower

15. In her submissions, Ms Scott for Transpower raised concerns regarding the Panel's jurisdiction to:

    (a) add the new sub-clause (8) proposed in the evidence of Mr Adams, relating to land owned by a person with a Kāi Tahu whakapapa connection;

    (b) apply the new definition of Māori land to other provisions in the PORPS (for example, in amending the EIT provisions so that they give effect to the NPSET);

    (c) incorporate sub-clauses (7) and (8) in the absence of certainty as to the extent of land covered under the definition, and a corresponding analysis of the scale and significance of the changes pursuant to s 32AA(1)(c).

Scope provided by Kāi Tahu submissions for sub-clause (8)

16. The PORPS as notified did not include a definition of Māori land. It did, however, include a definition of Native Reserves, as well as a definition of Te Ture Whenua Māori land. Other policies in the notified

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6 To use the term preferred by Commissioner Kirikiri.

PORPS referred to the role of Kāi Tahu as kaitiaki over wāhi tupuna, Māori reserves and freehold land.[7]

17. Paragraph 3.6 of the Kāi Tahu ki Otago submission, which is repeated in full below, stated:

> [3.6] Policies enabling Kāi Tahu to use land in native reserves and Te Ture Whenua Māori (TTWM) land for a variety of purposes are supported – whether papakāika, marae or associated activities. Kā Rūnaka consider this is appropriate recognition of Te Tiriti principles and responds to a long history of mana whenua being alienated from whenua and resources. **This management approach should recognise that there is other whenua with ancestral connection, outside native reserves/TTWM land, for which mana whenua hold aspirations for cultural use.**
>
> (emphasis added)

18. Specific changes were also sought to particular policies to include, alongside Native Reserves and Te Ture Whenua Māori land, "**land with a particular ancestral connection**" (emphasis added).[8] Other amendments sought by Kāi Tahu seek to recognise the "enduring ancestral relationship of mana whenua with the coast",[9] and "all whenua, wai maori and coastal waters within their takiwā".[10]

19. As a response to concerns expressed prior to the exchange of evidence regarding the meaning of "land with a particular ancestral connection", Kāi Tahu proposed a definition of Māori land which was subsequently adopted by Mr Adams for ORC in his supplementary evidence in substitution for the existing definition of Te Ture Whenua Māori land.

20. The change to introduce sub-clause (8), which relates to land owned or leased by a person with evidence of Kāi Tahu whakapapa connection to that land,[11] is consistent with the desire to capture "land with a particular ancestral connection". As Edward Ellison and Evelyn Cook describe, whakapapa is central to the identity of Kāi Tahu and their links to Te Waipounamu.[12]

21. Counsel submit there is clear scope within the Kāi Tahu submissions for the inclusion of sub-clause (8).

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7 HAZ-NH-P11.

8 See, for example, 00226.048 (Kāi Tahu ki Otago) and 00234.009 (TRONT) re MW-P4; 0026.053 (Kāi Tahu ki Otago) re MW-M5; 00226.320 (Kāi Tahu ki Otago) re UFD-P9. Counsel for Transpower's submission at paragraph 5.6 does not refer to the wording sought by Kāi Tahu ki Otago.

9 00226.139 (Kāi Tahu ki Otago) re CE-P4, and 00226.141 re CE-P6 and NFL-P2 and NFL-P3.

10 00226.277 (Kāi Tahu ki Otago) re HCV-WT-P1 and 00226.281 re HCV-WT-M3.

11 As is proposed to be amended in Appendix A to require a direct whakapapa connection to a piece of land, which is (in part) directed at avoiding the potential interpretation identified at paragraph 5.9 of counsel for Transpower's submissions.

12 BoE of Edward Ellison at [7]-[9] and[15]. BoE of Evelyn Cook at [8]-[9], [20] and [23].

Applying the new definition to other areas of the PORPS

22. Counsel submit that the Panel can be confident that it has jurisdiction to apply the proposed definition to other areas of the PORPS.

23. The first reason for that submission is that, as noted above, similar changes were sought elsewhere in the PORPS, including in relation to the Coastal Environment, Urban Form and Development, Natural Features and Landscapes, and Historical and Cultural Values chapters.[13] At a minimum, the proposed definition falls within the scope of those requested changes.

24. Indeed, the only policies that use the terms "native reserves and Te Ture Whenua Māori land" in the notified PORPS are those which Kāi Tahu have submitted on, seeking that they also apply to "land with a particular ancestral connection". Secondly, applying the definition across the PORPS was a matter that was reasonably and fairly raised in the course of submissions.[14] The assessment of whether an amendment was reasonably or fairly raised should be approached in a realistic workable fashion rather than from the perspective of legal nicety.[15] The "workable approach" requires that the Panel take into account the entire relief package in each submission, when determining whether or not there is scope for a particular amendment.[16]

25. Paragraph 3.6 of the Kāi Tahu ki Otago submission, referenced above, refers to their support for policies (plural) that enable Kāi Tahu to use their land for a variety of purposes, including land outside the categories of Native Reserves and Te Ture Whenua Māori land. Approaching that submission in a realistic, workable fashion (along with the other specific amendments sought in the Kāi Tahu submissions) provides clear scope for a more inclusive definition of Māori land[17] than what was in the notified PORPS.

26. Thirdly, and finally, and as the High Court has held, it is sufficient if the changes made can be fairly said to be foreseeable consequences of any changes directly proposed (or consequential relief, for short).[18] In our submission, it would be reasonably foreseeable to a participant in the plan-making process that if changes were made to expand through submission the categories of land that the enabling policies and methods in MW-P4 and MW-M5 apply to, there might be a need to make consequential amendments to other policies and methods to ensure that the provisions work together. That avoids the perverse

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13 See fns 8, 9 and 10 above.

14 *Albany North Landowners v Auckland Council* [2016] NZHC 138 at [115], applying *Countdown Properties (Northlands) LTd v Dunedin City Council* (1994) 1B ELRNZ 150 (HC).

15 Ibid, applying *Royal Forest and Bird Protection Society of New Zealand v Buller Coal* [2012] NZHC 2156, [2012] NZRMA 552.

16 Ibid, applying *Shaw v Selwyn District Council* [2001] 2 NZLR 277 (HC) at [31].

17 Noting that term is used elsewhere in the PORPS (eg ECO-P4) but not defined.

18 Ibid, applying *Westfield (New Zealand) Ltd v Hamilton City Council* [2004] NZRMA 556 (HC) at [73]-[74].

situation where enabling policies are cast more broadly than their counterparts that seek to constrain or limit land use.

Section 32AA analysis in the absence of certainty as to the extent of land

27. As for the alleged lack of detail regarding the area of land that the proposed new definition would apply to, it is important not to lose sight of the task at hand. The purpose of an RPS is to provide an overview of the resource management issues of the region, and to provide policies and methods to achieve integrated management of the region's resources.[19] Counsel submit that what is needed for a section 32 analysis (or, for that matter, a 32AA analysis) is informed by the nature of the plan-making task.

28. Counsel submit that, for reasons similar to the response to Mr Freeland above,[20] information requirements are likely to differ, as between a higher-order (and, therefore, more overarching) RPS, and a lower-order, more fine-grained and ultimately consequential district or regional plan.

29. The Panel can rely on the evidence already before it as to the nature and extent of Kāi Tahu landholdings,[21] to find that the changes, while momentous to Kāi Tahu as those most likely to benefit from them, are unlikely to be all that significant to the public at large.

30. That is consistent with s 32(1)(c), which requires a level of detail that corresponds to the scale and significance of effects that are anticipated from the implementation of the proposal – here, in our submission, few to none. Unlike in Tāmaki Makau-rau,[22] where the Independent Hearings Panel there had insufficient evidence regarding potential sites of value to Māori to understand the scale and significance of the issues and the numbers of private landowners who may face constraints, here the principal aim is to ***enable*** Kāi Tahu to develop their landholdings and take the lead in the management of any adverse effects. That is unlikely to pose many, if any, problems for other private landowners.

31. It is also consistent with s 32(2)(c), which requires an assessment of the risk of acting or not acting where there is uncertainty about the subject matter of any provisions. In this case, failing to act on the proposed definition due to a lack of information as to its location would exclude from future consideration land that is subsequently acquired by Kāi Tahu, whether to substitute or supplement other landholdings, which might also benefit from the same enabling approach that applies to land in categories (2) to (6). Doing so would create a real risk of perverse outcomes and arbitrary barriers to the expression of rakatirataka, kaitiakitaka, and mana whenua.

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19 RMA, s 59.
20 See paras [10]-[13] in particular.
21 Especially, the evidence of the Kāi Tahu cultural witnesses.
22 *Independent Māori Statutory Board v Auckalnd Council* [2017] NZHC 356, [2017] NZRMA 195.

ORC's jurisdiction to require resourcing of Kāi Tahu participation, including funding

32. Counsel submitted at the hearing that a proper approach to s 8 of the RMA provided the Panel with sufficient jurisdiction to confirm the drafting of MW-M4 as notified, as it related to resourcing and funding.

Submissions for DCC

33. Mr Garbett for DCC later opined that an RPS does not, nor can it extend to allocating funding that is subject to other obligations under the Local Government Act 2002, the Local Government Borrowing Act 2022, and other legislation; and that while an RPS cannot direct a local authority to provide funding, it can certainly encourage it.

34. Counsel continue to hold the view that a proper approach to s 8 provides the simplest answer to the question posed by the Panel. Without resourcing, the requirements of active protection and partnership that arise from the principles of Te Tiriti are no more than words on a page.

35. In response to Mr Garbett's submission, the inclusion of MW-M4 does not transform the RPS into a de-facto annual or long-term plan, which specify *how* activities are to be funded (eg from rates, from borrowing, from user charges, or a combination of the same). It does not, and cannot supplant the role of those documents. What it does, like any other contractual commitment ORC may enter into,[23] is to say to Kāi Tahu that it will pay for the services that they provide as part of any resource management decision-making, so that they are not having to fund their involvement in a partnership approach from resources received from, and grown out of settlement redress for past failures.

Te Whānau a Kai

36. In giving further consideration to the point, counsel identified the recent decision of the Environment Court in *Te Whānau a Kai Trust v Gisborne District Council*.[24] In *Te Whānau a Kai*, the Court refused a request by the Trust to amend the decisions version of the Gisborne Freshwater Plan to include two new objectives requiring that the Council adequately resource the Trust both financially and with technical assistance.[25]

37. Counsel brings this decision to the Panel's attention. However, it is submitted that the argument before the Court in *Te Whānau a Kai* focussed on the *absence* in the RMA and its associated framework of provisions that prohibit the Court from requiring a local authority to provide financial assistance to iwi. The Kāi Tahu submission is founded on a proper construction of s 8 and underlying constitutional

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23 Which does not have to find a home in an annual or long-term plan.

24 *Te Whānau a Kai Trust v Gisborne District Council* [2021] NZEnvC 115, [2022] NZRMA 372.

25 Ibid at [116]-[129].

principles, to provide a *positive* basis for the inclusion of a direction to provide resourcing and funding in MW-M4.

38. The decision in *Te Whānau a Kai* is somewhat difficult to reconcile with the earlier decision of the Court in *Aratiatia*.[26] While that decision related to a consent order made in respect of the proposed Southland Land and Water Plan, it provides a useful summary of the practical implications of s 8 of the RMA. They include the requirements to provide for:[27]

    (a) the active participation by tangata whenua in resource management decision-making; and

    (b) positive action to (actively) protect tangata whenua interests.

39. In a number of other spheres, the Waitangi Tribunal has held that "the principle of active protection includes an obligation on the Crown to focus specific attention on inequities experienced by Māori, **and if need be, to provide additional resources to address the causes of those inequities"** (our emphasis).[28] Where adverse disparities are persistent and marked, active protection may "compel the Crown to target more resources according to need in order to reduce structural or historical disadvantage".[29]

40. The Stage 2 Report on the National Freshwater and Geothermal Claims[30] identified that "under resourcing has historically contributed to a lack of capacity and capability for many Māori entities in freshwater management" which "has crippled their ability to participate effectively in RMA processes".[31] The Tribunal recommended that the Crown "urgently take such action or actions as are necessary to ensure that under-resourcing no longer prevents iwi and hapū from participating effectively in RMA processes, including freshwater management and freshwater decision-making".

MW-M4 and its consistency with, and need to give effect to the NPSFM

41. The amendments to the National Policy Statement for Freshwater Management, promulgated after the Tribunal's report, now require local authorities to "actively involve tangata whenua" in freshwater management, including decision-making processes.[32] In particular, they require regional councils "to work collaboratively with, **and enable**, tangata whenua" to, inter alia, be actively involved in decision-

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26 *Aratiatia Livestock Ltd v Southland Regional Council* [2020] NZEnvc 191.
27 For the full list, see counsels' earlier submissions at [83].
28 Waitangi Tribunal *Hauora: Report on Stage One of the Health Services and Outcomes Kaupapa Inquiry* (Wai 2575, 2019)
29 Ibid, citing Waitangi Tribunal *The Napier Hospital and Health Services Report* (Wa 692, 2001) at 53-54, and Waitangi Tribunal *Tū Mai te Rangi!* (Wai 2540, 2017) at 27 and 54.
30 Which the Chair will be familiar with from his role as a Member of that Tribunal.
31 Waitangi Tribunal *The Stage 2 Report on the National Freshwater and Geothermal Claims* (Wai 2538, 2019) at 528.
32 NPSFM 2020, cl 3.4(1).

making processes relating to Māori freshwater values at each step of the NOF process (our emphasis).[33]

42. These are much stronger directives than the previous wording, which merely required that local authorities take reasonable steps to involve iwi and hapū in freshwater management, and reflect tangata whenua values and interests in decision-making regarding freshwater.[34]

43. The ordinary meaning of "enable", relevantly, is to:[35]

(a) give power to, strength; make adequate or competent;

(b) make able, give the means to be or to do something.

44. It is the latter of these two definitions that Kāi Tahu rely on. Merely offering for Kāi Tahu to participate in decision-making is not "enabling" it. That is already covered by the requirement to actively involve them. In order to meet its obligations under cl 3.4(2) of the NPSFM, a regional council must give tangata whenua the means to be actively involved, which must (by necessity) include resourcing, including funding. On that basis, MW-M4 as drafted is both consistent with, and necessary to give effect to, the NPSFM.

Conclusion

45. In summary, it is our submission that:

(a) Contrary to the evidence of Mr Freeland, there are no natural justice concerns raised by the proposed definitions of "Māori land" and "papakāika".

(b) There is clear scope for the proposed definition, whether pursuant to primary relief sought in the Kāi Tahu submissions, or as consequential relief flowing out of suggested amendments.

(c) There is jurisdiction to require local authorities to provide resourcing, including funding, for Kāi Tahu involvement in decision-making in MW-M4; and that wording is required in order to give effect to the NPSFM.

Dated 9 February 2023

A M Cameron | J A Riddell
Counsel for Kāi Tahu

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33 NPSFM 2020, cl 3.4(2).
34 NPSFM 2017, Objective D1 and Policy D1.
35 *Dandelion (in liq) v Morrison & Ors* HC Napier, CIV-2009-441-000522, 5 September 2011 at [14], in the context of s 292(2)(b) of the Companies Act 1993.

APPENDIX A

Māori Land Definition

Black text with underlining – Amendments recommended in Supplementary Evidence 04 of James Adams at [41]

Green text with underlining or ~~strikethrough~~ – Amendments recommended in Evidence in Chief of Ms McIntyre at [31] – [33] (and Appendix 1 page 8)

Red text with underlining or ~~strikethrough~~ - Additional amendments to address concerns raised during MW Hearing

For the purposes of the Otago RPS, means land within the region that is:

1. Owned by Te Rūnanga o Ngāi Tahu or its constituent papatipu rūnaka;

2~~1~~. Māori communal land gazetted as Māori reservation under s338 Te Ture Whenua Māori Act 1993;

3~~2~~. Māori customary land and Māori freehold land as defined in s4 and s129 Te Ture Whenua Māori Act 1993;

4~~3~~. Former Māori land or general land owned by Māori (as those terms are defined in Te Ture Whenua Māori Act 1993) that has at any time been acquired by the Crown or any local or public body for a public work or other public purpose, and has been subsequently returned to its former Kāi Tahu owners or their successors and remains in their ownership;

5~~4~~. General land owned by Māori (as defined in Te Ture Whenua Māori Act 1993) that was previously Māori freehold land, has ceased to have that status under an order of the Māori Land Court made on or after 1 July 1993 or under Part 1 of the Māori Affairs Amendment Act 1967 on or after 1 April 1968, that is in the ownership of Kāi Tahu whānui;

6~~5~~. Vested in a Trust or Māori incorporation under Te Ture Whenua Māori Act 1993;

7~~6~~. Held or claimed by Te Rūnanga o Ngāi Tahu and/or related entities including by a person or persons with a Kāi Tahu whakapapa connection to ~~Kāi Tahu~~ that land, where the land was transferred or vested, is an entitlement, or is part of an ancillary claim:

(a) as part of redress for the settlement of Treaty of Waitangi claims; or

(b) by the exercise of rights under a Treaty settlement Act or Treaty settlement deed (as those terms are defined under the Urban Development Act 2020);

8~~7~~. Owned or leased by a person or persons with evidence of Kāi Tahu whakapapa connection to that ~~the~~ land (where documentary evidence of whakapapa connection is provided from either the Māori Land Court or the Te Rūnanga o Ngāi Tahu Whakapapa Unit).