

Before the Hearings Panel  
Appointed by the Otago Regional Council

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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 2021  
(excluding parts determined to be a freshwater planning  
instrument)

*and:* **Christchurch International Airport Limited**  
*Submitter 0307*

Legal submissions on behalf of Christchurch International  
Airport Limited

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## **MAY IT PLEASE THE HEARINGS PANEL**

### **INTRODUCTION AND SUMMARY**

- 1 These legal submissions are presented on behalf of Christchurch International Airport Limited (*CIAL*).
- 2 *CIAL* is a submitter (#0307) and further submitter on the proposed Otago Regional Policy Statement (*pORPS*).
- 3 In summary, *CIAL* is generally supportive of the *pORPS*. *CIAL*'s key concern, as outlined in its submission and evidence, is to ensure that the *pORPS* is suitably forward-looking. As a planning document with a decade-long vision, the *pORPS* should anticipate the region's future needs and contain a framework that recognises development, in particular the development of infrastructure, to meet those needs.
- 4 The focus of *CIAL*'s evidence and hearing presentation is the "regionally significant infrastructure" definition (*the RSI Definition*). As notified, the *RSI Definition* refers only to the region's existing airport infrastructure assets. The *RSI Definition* needs to provide for the planning and development of new airport infrastructure in the lifetime of the *pORPS* to serve the region's air connectivity needs.
- 5 These submissions provide a high level overview of *CIAL*'s interests in the *pORPS*. They briefly address the statutory framework and then turn to several legal points in relation to the amendments *CIAL* seeks to the *RSI Definition*.
- 6 *CIAL* will call evidence from **Mr Rhys Boswell** (Project Lead Planning and Sustainability at *CIAL*) and **Mr Matthew Bonis** (Planner, Planz Consultants).

### **CIAL'S INTERESTS IN THE PORPS**

#### **Background to CIAL**

- 7 As set out in Mr Boswell's evidence:
  - 7.1 *CIAL* owns and operates Christchurch International Airport, the largest airport in the South Island and the second-largest in the country.
  - 7.2 *CIAL* has a strong, proven performance in planning, developing and operating long-term transport infrastructure assets that fulfil a significant role both regionally and nationally.

- 7.3 CIAL is actively championing a sustainable future within the aviation sector. This includes developing airport infrastructure that is resilient to climate change effects and that deploys low carbon aviation to assist with New Zealand's transition to a low emissions economy.
- 8 CIAL is currently assessing the feasibility of developing a new sustainable airport in Central Otago to serve the air capacity and connectivity demands of the fast growing Central Otago and Queenstown-Lakes areas.
- 9 Mr Boswell's evidence outlines the work CIAL is undertaking in detail. In particular, he addresses the demand for new airport infrastructure in the Otago region, specifically in Central Otago/Queenstown-Lakes, and the implications of a changed and changing climate for the ongoing functioning of existing airport infrastructure and the development of new airport infrastructure.
- 10 Mr Boswell's evidence illustrates that there will be a need to, at minimum, plan for, if not develop new airport infrastructure over the lifetime of the pORPS.

**CIAL's interests in the pORPS**

- 11 CIAL's submission and further submission are generally supportive of the provisions contained in the pORPS, including those that relate to infrastructure that are the subject of this hearing.
- 12 CIAL maintains its submission and further submission and seeks that the Hearings Panel consider all of its submission points in its decision-making. However, CIAL has focused for the purposes of this hearing on the changes it seeks to the RSI Definition.
- 13 CIAL's position is that it is critical that the pORPS, as the overarching planning document for the Otago region, is sufficiently forward-looking when it comes to anticipating and providing for the infrastructure needs of the region into the future.
- 14 As notified, the RSI Definition does not achieve these requirements. It is effectively backward-looking in respect of existing airport infrastructure only. The changes CIAL seeks to the RSI Definition to address this issue are set out in Mr Bonis' evidence and repeated for ease of reference below:

*Regionally Significant Infrastructure means:*

...

*(6) airports and aerodromes used for regular air transport services by aeroplanes capable of carrying more than 30 passengers, and includes the following airports: Dunedin, Queenstown, Wanaka, Alexandra, Balclutha, Cromwell, Oamaru, Taieri.*

- 15 In our submission, these changes are necessary for the pORPS to meet the relevant statutory requirements and to be a meaningful high-level planning document for the Otago region.
- 16 As notified, the RSI Definition is “stuck in time”, with no recognition that there may (and, in fact, will) be a need for additional airport infrastructure in the foreseeable future. This is not an appropriate position in the key strategic planning document for the region.

## STATUTORY AND LEGAL MATTERS

### Statutory framework

- 17 The Hearings Panel will be well aware of the relevant statutory framework. However, given the deficiencies alleged in the RSI Definition, we reiterate briefly that the purpose of a regional policy statement is to achieve the purpose of the Resource Management Act 1991 (*RMA*) by providing an overview of the resource management issues of the region and policies and methods to achieve integrated management of the natural and physical resources of the whole region.<sup>1</sup>
- 18 A regional council must prepare its regional policy statement in accordance with, *inter alia*:<sup>2</sup>
- 18.1 its functions under section 30;
- 18.2 the provisions of Part 2; and
- 18.3 its obligation (if any) to prepare and have regard to an evaluation report prepared in accordance with section 32.
- 19 Sections 5(2)(a),<sup>3</sup> 6(h),<sup>4</sup> 7(i),<sup>5</sup> 30(1)(a),<sup>6</sup> 30(1)(ba),<sup>7</sup> 30(1)(gb)<sup>8</sup> and 32 are of particular relevance in this decision-making context. The themes of these sections include meeting the reasonably foreseeable needs of future generations, integrated management of

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<sup>1</sup> Resource Management Act 1991, s 59.

<sup>2</sup> Resource Management Act 1991, s 61(1).

<sup>3</sup> “[S]ustaining the potential of natural and physical resources (excluding minerals) to meet the **reasonably foreseeable needs of future generations**;”

<sup>4</sup> “[T]he management of significant risks from **natural hazards**.”

<sup>5</sup> “[T]he effects of climate change.”

<sup>6</sup> “[T]he establishment, implementation, and review of objectives, policies, and methods to achieve **integrated management** of the natural and physical resources of the region:”

<sup>7</sup> “[T]he preparation of objectives and policies in relation to any actual or potential effects of the **use, development, or protection of land** which are of **regional significance**:”

<sup>8</sup> “[T]he **strategic integration of infrastructure with land use** through objectives, policies, and methods:”

land use and infrastructure, and managing climate change risks. All of these sections point to a future-looking planning regime.

- 20 Section 32 of course requires consideration of whether the objectives of the pORPS are the most appropriate way to achieve the purpose of the RMA, whether the provisions are the most appropriate way to achieve the objectives, and an assessment of the benefits and costs of the environmental, economic, social and cultural effects anticipated from the implementation of the provisions.

**Legal matters**

- 21 In the following paragraphs we address several legal matters in relation to the amendments CIAL seeks to the RSI Definition.

***Does the RSI Definition meet the relevant statutory requirements?***

- 22 The RSI Definition, as it relates to airport infrastructure, does not achieve the relevant statutory requirements outlined above because:
- 22.1 As notified, the RSI Definition lists in an exhaustive manner (by the use of the word "means") the existing airports in the Otago region. It does not contemplate new airport infrastructure and it is even unclear whether and to what extent it refers to upgrades or expansions to those existing airports.
- 22.2 It therefore has to be assumed that the drafters consider the existing airport infrastructure is sufficient to meet the region's air connectivity needs now and for the lifetime of the pORPS. However, this is inconsistent with the supporting section 32 assessment and Mr Boswell's evidence outlines that the opposite is true. That is, there will be demand for additional airport infrastructure in the region in the foreseeable future, which will need to be at least planned for, if not built, in the lifetime of the pORPS.
- 22.3 The fact that the exhaustive RSI Definition refers only to existing airports does not allow for strategic integrated management of the region's residential and commercial/industrial growth together with air infrastructure needs. Nor does it allow for the management of climate change risks and challenges through new airport infrastructure. As Mr Boswell's evidence explains, climate change factors are already influencing and will continue to impact our national infrastructure network.
- 22.4 The RSI Definition (a proposed provision) is not the most appropriate way to meet the objectives of the pORPS,

because the relevant objectives, particularly those in the Infrastructure and Transport sections, contain themes of effectiveness, efficiency, resilience,<sup>9</sup> supporting economic development and growth,<sup>10</sup> integration,<sup>11</sup> adaptability to changes in demand,<sup>12</sup> and reduction of greenhouse gas emissions/reliance on fossil fuels.<sup>13</sup> A definition that is “stuck in time” fails to achieve these objectives.

- 22.5 The drafting related to airports is also strangely inconsistent with the remainder of the RSI Definition and it is unclear why it is drafted differently. Other subsections of the RSI Definition are not limited to existing infrastructure assets, for example in relation to renewable electricity generation.<sup>14</sup>
- 22.6 Failing to recognise and enable *new* regionally significant airport infrastructure in the context of a proposed regional policy statement is inconsistent with Part 2 of the RMA. In simple terms, it does not provide a clear and appropriate way for the pORPS to enable the social economic well-being of the region’s people and communities.
- 23 Ultimately, the impact of the RSI Definition as notified is that it will preclude proper and appropriate consideration of a proposal for any new airport infrastructure under the planning regime because the pathway for considering new infrastructure is tied to the RSI Definition.
- 24 Instead, such a proposal may need to meet different and more onerous thresholds, for example in relation to managing adverse effects.<sup>15</sup> This would be a perverse outcome for the region’s foreseeable future air connectivity needs.
- 25 The pORPS ought to enable consideration of new infrastructure projects that meet demands and that strive to increase resilience and deliver a low emissions economy. Such a proposal should be able to be put forward without failing at the first “definition” hurdle, then the merits be fully tested under the planning framework.
- 26 In addition, there are implications beyond the pORPS. The RSI Definition not only engages other provisions in the pORPS, it also

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<sup>9</sup> EIT-INF-04 and EIT-TRAN-07.

<sup>10</sup> EIT-INF-04.

<sup>11</sup> EIT-INF-05.

<sup>12</sup> EIT-TRAN-08.

<sup>13</sup> EIT-TRAN-09.

<sup>14</sup> For example, Subsection (3) is proposed as “*renewable electricity generation facilities that connect with the local distribution network...*”.

<sup>15</sup> See EIT-INF-P13.

engages with other key documents in the RMA planning framework. Most of the higher-order national policy statements and national environmental standards have outcomes that are tied to “specified infrastructure” (for example, the National Policy Statement for Highly Productive Land 2022 and the National Environmental Standards for Freshwater 2020). The lower-order regional and district plans for the Otago region must give effect to the pORPS.<sup>16</sup> It is important that the pORPS gets the definition right, so that there can be proper consideration of new proposals within the broader planning regime.

- 27 In our submission, the issues with the RSI Definition outlined above can be resolved through the amendments proposed by CIAL.

***Are the amendments sought by CIAL appropriate or necessary for the decade-long lifetime of the pORPS?***

- 28 The amendments CIAL seeks to the RSI Definition are to facilitate consideration of new airport infrastructure. To be clear, the amendments do not seek to enable new airport infrastructure, they simply seek an appropriate planning pathway for consideration of new airport infrastructure to meet the region’s air connectivity needs.
- 29 This necessarily requires consideration of timeframes and raises the questions of if and when new airport infrastructure might be required and whether this is in the lifetime of the pORPS.
- 30 Mr Boswell’s evidence outlines the levels of demand for air connectivity in the region, referring both to passenger and freight demand. His evidence illustrates that additional demand already exists and that it will increase substantially over the medium to long-term. Mr Boswell’s evidence addresses demand management but the short point is that there is demand that will need to be met and this will require additional capacity to be planned for, if not built, within the lifetime of the pORPS.
- 31 Infrastructure necessarily has long lead-times and infrastructure forecasting looks well into the future. The situation here is no different and the pORPS needs to provide for this.
- 32 It is important that the pORPS does not preclude opportunities for new infrastructure assets, such as the prospect of a new airport in Central Otago, before the merits of such a proposal can be properly considered and assessed.

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<sup>16</sup> Resource Management Act 1991, sections 67(3)(c) and 75(3)(c).

***Does a cross-reference to "nationally significant infrastructure" in the RSI Definition address CIAL's concerns?***

33 The Section 42A Report for Chapter 11 recommends the following insertion into the RSI Definition:

*(13) Any infrastructure identified as nationally significant infrastructure.*

34 CIAL supports this amendment because the definition of "nationally significant infrastructure" includes airports used for regular air transport services by aeroplanes capable of carrying more than 30 passengers.

35 However, the amendment does not fully address CIAL's concerns. CIAL continues to seek its proposed amendments to the RSI Definition because airports constitute both nationally and regionally significant infrastructure and are recognised as such for different purposes. While there will be overlap, different aspects and functions of an airport (existing and new) contribute to its national and regional significance.

36 Further, the two definitions must necessarily stand alone. It should be clear in applying the RSI Definition under the relevant pORPS provisions that it encompasses new airport infrastructure. It would be impractical and could become unworkable or contradictory to have to refer back to the definition of "nationally significant infrastructure" in respect of airports. There is no need to follow such a tortuous drafting path.

37 For the above reasons, CIAL's amendments to the RSI Definition remain necessary despite the Section 42A Report recommendations.

***Is it appropriate to refer to "airports and aerodromes" in the RSI Definition?***

38 As set out above, CIAL seeks that the RSI Definition refers to "airports and aerodromes".

39 The evidence of Mr Bonis outlines legislative documents which use "airport" and/or "aerodrome".<sup>17</sup> While effectively synonymous, they are not always treated with clear consistency. Therefore, for the purposes of clarity, in our submission, both of these terms should be included in the RSI Definition.

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<sup>17</sup> Statement of Evidence of Mr Bonis dated 23 November 2022 at [40].



- 40 The interpretation of "airport" and "aerodrome" was at the heart of *McElroy v Auckland International Airport Limited*.<sup>18</sup> The High Court and Court of Appeal considered the range of activities which fall within the word "airport" and, conversely, whether commercial activities not directly linked to core aviation activities carried out on land owned by Auckland Airport fell within the definition of the word "aerodrome".
- 41 The High Court decision contains the following useful summary of relevant statutes using the phrase "aerodrome" and "airport":

[31] *The Civil Aviation Act 1964 – ... – defined "aerodrome" as:*

*"Aerodrome" means any defined area of land or water intended or designed to be used either wholly or partly for the landing, departure, movement, and servicing of aircraft; and includes any buildings, installations, and equipment on or adjacent to any such area used in connection with the aerodrome or its administration:*

[32] *Interestingly, the Authorities Act – passed only two years later - contains no definition of "aerodrome" but defines "airport" as:*

*"Airport" means any defined area of land or water intended or designed to be used either wholly or partly for the landing, departure, movement, or servicing of aircraft; and includes any other area declared by the Minister to be part of the airport; and also includes any buildings, installations, and equipment on or adjacent to any such area used in connection with the airport or its administration.*

[33] *The 1981 Act contains no definition of "airport" but repeats the definition of "aerodrome" from the Civil Aviation Act 1964 and adds:*

*And also includes any defined air space required for the safe operation of aircraft using the aerodrome; and also includes a military airfield.*

[34] *The Civil Aviation Act 1990 contains no definition of "airport" and repeats the 1964 definition of "aerodrome", though dividing it at the semi-colon into subparagraphs.*

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<sup>18</sup> *McElroy v Auckland International Airport* [2009] NZCA 621; and *McElroy v Auckland International Airport Ltd* CIV 2006 404 005980 27 June 2009 Williams J HC.

[35] Section 3 of the Authorities Act empowers airport authorities to establish and carry on airports. That was amended by the Airport Authorities Amendment Act 1986 to define an "airport company" and, of relevance to this claim, with effect from 18 December 1986 enacted s 3D of the Authorities Act which, in the form current from 1991, reads:

3D. An airport operated or managed by an airport authority which is not a local authority shall - ...

(b) For the purposes of the Public Works Act 1981, be deemed to be a Government work.

- 42 The definition of "airport" in the RMA is similar to the statutes discussed above, therefore the *McElroy* case can be taken as authoritative on the interpretation of the word "airport":

*Airport means any defined area of land or water intended or designed to be used, whether wholly or partly, for the landing, departure, movement, or servicing of aircraft:*

- 43 The *McElroy* case usefully outlines the history of New Zealand airports.<sup>19</sup> Relevantly, it states:

3. ... Both the aeronautical user and the airport management should have a common interest in the development of non-flight airport revenue sources...

...

6. It must be recognised that airport "operations" (the movement of air traffic) have a corollary in airport "commerce", demanding prompt appraisal and decision on local business opportunities and promotion. This broad division of the airport into two major components materially assisted the development of airport policy within the concept now accepted in New Zealand.

- 44 The experts for both sides in *McElroy* were agreed on what the term "airport" means. However, there was some debate over the phrase "aerodrome" and whether it was synonymous with "airport".

- 45 The Court adopted the "ambulatory approach" to interpretation and found:

*"[200] That approach can properly be adopted in this case. The evidence clearly showed that, for almost all users, interpretation of the word "aerodrome" and what was expected at such a facility changed significantly over time. By 1981 most persons asked to*

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<sup>19</sup> At [37].

define "aerodrome" would have described the facilities then found at airports such as Auckland International. By 1987 their views may have changed to accommodate any increased facilities then expected to be available at airports. If required to define "aerodrome" now, such a person is likely again to revert to the present facilities at airports, particularly Auckland International. An ambulatory interpretation of the word "aerodrome" can therefore properly be held to encompass the facilities commonly found at airports – Auckland International in particular - and changing over time to what was and is now available.

...

[202] Examples include the provision of banking facilities for the millions of travellers and thousands of staff at Auckland Airport and the rental car and campervan parking and the supermarket servicing airport users and inbound tourists. Food outlets can be similarly regarded. Even Butterfly Creek, though primarily recreational, offers convention facilities, now an important facility at airports.

[203] Additional points supporting the interpretation adopted but with specific reference to AIAL is the strong commercial and developmental thrust of the Airport Act. Further, the Vesting Order vested the airport's land in the company together with rights and licences "relating to it or to the operations and activities of the airport". That formula indicates that defining an area "wholly or partly ... used in connection with the aerodrome or its administration" should encompass land uses relating to the "operations and activities of the airport". That meshes with the corporatization and privatization adopted for New Zealand airports from the mid- 1980s and fortifies the view that Mr Smith's evidence is to be preferred in deciding what comes within the definition of "aerodrome" (or "airport") and facilities "wholly or partly ... used in connection with the aerodrome or its administration".

...

[205] For all those reasons the conclusion on this part of the case is accordingly that the Craigie Trust land was and is held for the public work of a modern day "aerodrome" or a modern day "airport". Alternatively, if it was no longer required for the public work of "aerodrome", it is required for another public work, namely an "airport".

- 46 On this basis, the phrases "aerodrome" and "airport" have been, and continue to be, used synonymously and it is therefore appropriate and necessary for the RSI Definition to refer to both.

## CONCLUSION

- 47 CIAL's principal concern is to ensure that the RSI Definition, as it relates to airport infrastructure, is not drafted in an exhaustive manner such that it precludes consideration of new airport infrastructure to meet the region's needs under the pORPS and broader planning regime.
- 48 The amendments CIAL seeks to the RSI Definition do not require the Hearings Panel to make a merits assessment of a new airport in the Otago region. The amendments simply ensure that if such a proposal is put forward, by CIAL or others, the planning regime appropriately allows fulsome assessment of the proposal, rather than foreclosing that opportunity from the outset.
- 49 In our submission, it is vital that the overarching planning framework for the Otago region be forward-looking, future-proof and able to anticipate and allow consideration of new infrastructure assets that serve current and future community needs.
- 50 The exhaustive drafting of the RSI Definition as notified, as it relates to airports, does not future-proof the pORPS. It does not account for future upgrading or development of new types of infrastructure that may emerge over the lifetime of the pORPS.
- 51 In our submission, the Hearings Panel should accordingly accept the relief sought by CIAL and amend the RSI Definition as per the evidence of **Mr Bonis** and as set out at paragraph 14 above.

Dated: 14 March 2023



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