

**Before Commissioners**  
**Delegated by Otago Regional Council**

**Under** the Resource Management Act 1991  
**In the matter of** the proposed Otago Regional Policy  
Statement 2021 (non-freshwater parts)

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**LEGAL SUBMISSIONS FOR SUSTAINABLE TARRAS INC**

**17 March 2023**

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## **Introduction**

1. These submissions for Sustainable Tarras Inc (**Sustainable Tarras**) focus on some of the core propositions raised by Christchurch International Airport Ltd's (**CIAL**) request for amendments to the definition of Regionally Significant Infrastructure. As you have already heard, Sustainable Tarras is opposed to the changes to that definition that CIAL is seeking.

### **This is not the forum for assessing the merits of a possible future airport at Tarras**

2. Plainly, it is not the role of this panel to assess the merits of a possible future airport at Tarras. That—or indeed any other future airport proposal in Otago—is a matter for future processes under the RMA. To this extent, Sustainable Tarras and CIAL seem to be in agreement, along with other relevant submitters such as Queenstown Airport Corporation (**QAC**) and Dunedin International Airport Ltd (**DIAL**).
3. To be clear, though, you are being asked by CIAL to decide that a new airport is likely to be needed within the region within the life of this RPS. CIAL's contention is that this is so likely that it is inappropriate for the RPS to rely on existing airport infrastructure to meet demand.
4. CIAL's position regarding the need for a new airport is contested. Sustainable Tarras observes that the lower South Island has ~7% of the NZ population, and a new international airport would mean it has 50% of the international capable airports. There is significant spare capacity reported into the future for Queenstown, Dunedin, Invercargill and Christchurch airports. Sustainable Tarras asks that you think critically about CIAL's premise that the surplus of airports currently servicing the region is insufficient.

### **The RPS as notified does not prevent a new airport from gaining RMA approval**

5. If you conclude, contrary to the above submissions, that there is a need for the RPS to enable a new airport to be developed in the region within the life of this RPS, then you must focus on CIAL's next premise. CIAL contends that the RPS as notified somehow prevents a new airport from gaining RMA approval. CIAL says all it is doing is creating a potential pathway for a new airport to gain the requisite RMA approval. As Mr Bonis put it, CIAL is seeking to "open the door".

6. The implication is that the door is presently closed, which is not correct. In reality the door is already open, as I will outline below, and what CIAL is actually seeking is that it is opened further.
7. The RPS does not preclude an application for a new airport from being made (whether that takes the form of consenting or designation or some combination of the two). Approval for a new airport can be sought, and under the RPS as notified the application would be assessed on its merits against all usual RMA requirements.
8. This would include the policy directive in EIT-INF-P13 to avoid, as a first priority, locating the airport in any of the following areas:
  - 8.1 a significant natural area,
  - 8.2 an outstanding natural feature or landscape,
  - 8.3 a natural wetland,
  - 8.4 an outstanding water body,
  - 8.5 an area of high or outstanding natural character,
  - 8.6 an area or place of special or outstanding historic heritage,
  - 8.7 a wāhi tupuna or area with protected customary rights, or
  - 8.8 an area of high recreational and high amenity value.
9. As a second priority, if it were not possible to avoid such areas altogether, then the policy would require adverse effects on the values that contribute to the area's outstanding nature or significance to be avoided.
10. That provide any party with a pathway to seek approval for a new airport within the life of this RPS. It is a pathway that ensures the proponent prioritises avoiding areas with outstanding nature or significance, and if that is not possible, then the project is designed and managed to ensure adverse effects on the relevant values are avoided.
11. There is a more permissive pathway for RSI. A party proposing to develop RSI must still prioritise avoiding areas with outstanding nature or significance, but if that cannot be done, then it may revert to lesser standards under the effects management hierarchy (i.e. instead of

avoiding effects, the effects may be remedied, mitigated, offset or compensated) or otherwise minimise the relevant adverse effects.

12. What this discloses is that there are in fact two pathways for approval: one for infrastructure generally, and one for infrastructure that is regionally significant. A new airport that is not (yet) treated as regionally significant infrastructure can still gain approval under the first pathway.
13. So, the RSI definition as notified does not mean that the region is necessarily reliant on existing airports (or their growth) to meet demand. If a party like CIAL considers there is demand for a new airport, the RPS enables them to put forward an application, and ensures the merits of such a proposal will be fully and properly assessed.
14. I submit it is misleading for CIAL to contend that its proposal merely opens the door, or creates a pathway. The door is ajar, the pathway exists. What CIAL proposes is that a future project for a new airport should have an easier pathway than the RPS already provides.

#### **How should the Panel think about airports' ancillary commercial activities?**

15. In its legal submissions and evidence CIAL articulated a position regarding activities that are "ancillary" to an airport's core air transport functions. I submit there are two notable aspects of that position.
16. First, is CIAL's reliance on the *McElroy v Auckland International Airport Ltd* decisions. The proposition that Ms Appleyard advanced in oral submissions was that the Court's definition is "certainly quite different from Mr Langmans". You will recall this arose in response to the clarification Mr Langman gave that if NSI is included in the definition of RSI (as he recommends) then this also imports the part of the NSI definition that explicitly excludes an airport's "ancillary commercial activity".
17. In my submission, what is notable about this exchange is CIAL's reliance on Court decisions entirely unrelated to the scheme of the RMA or the meaning of RSI.
18. The *McElroy* decisions concerned a claim against Auckland Airport in relation to land it had acquired from Craigie Trust under the Public Works Act. Craigie Trust argued the Airport no longer required the land, and therefore was obliged under the Public Works Act to offer the land back to the Craigie Trust. It was in this context that the Courts examined what an "airport" (and an "aerodrome") is. The Courts clearly concluded that a

modern day “airport” or “aerodrome” encompasses a variety of facilities that has changed over time. But the Courts were not tasked with assessing whether Auckland Airport was regionally significant infrastructure, or what the appropriate meaning of that phrase might be.

19. It is not surprising, therefore, that the Courts' definition differed from Mr Langmans as *they were not attempting to define the same thing*. The Courts in *McElroy* were concerned with 'What is an airport?' in the policy context of Public Works acquisition and disposition. In contrast, Mr Langman is concerned with 'What is regionally significant infrastructure?' in the policy context of sustainable management of natural and physical resources.
20. In my submission, you need to be cautious about drawing from *McElroy* any conclusions of the sort that CIAL seems to be inviting. I understand Ms Appleyard intends to provide further interpretive guidance to you along with copies of the *McElroy* decisions, and Sustainable Tarras wishes to reserve the right to file any further submissions in response to that interpretive guidance if it addresses new matters.
21. The second noteworthy aspect of this topic is the view Mr Bonis expressed orally (for CIAL) that the time for working out what activities are 'in' or 'out' (of the RSI definition relevant to airports) is when a Notice of Requirement or plan change for a new airport is put forward.
22. Questions about what's included and what's excluded can of course be inherently difficult to resolve in the abstract. A concrete proposal enables the analysis to be undertaken in a more definitive way. However, that is missing the point. The task in front of this panel is to establish the RSI definition for the purposes of the RPS. The consequences of the RSI definition are significant: as covered above, an activity that is RSI is not required to avoid adverse effects on significant or outstanding values.
23. The conundrum this creates for airports, is that the significant or outstanding values in question might be compromised for the sake of enabling commercial activities such as banks, food courts, retail outlets, offices and hotels—none of which, in the absence of an airport, could conceivably be called infrastructure, let alone regionally significant. In this respect, airports are distinct from all other forms of infrastructure covered in the RSI definition. None of those other forms of infrastructure incorporate ancillary commercial activities in the same way. This, in my submission, is the logical reason behind the explicit exclusion of commercial activity

from the definition of NSI. The same reasoning suggests the definition of RSI should not be approached any differently.

### **Conclusion**

24. In conclusion, there is no question that the RPS, like all RMA planning instruments, must be forward-looking.
25. However, that does not mean this Panel needs to determine how the future airport infrastructure needs of the region might be met. Nor does it mean that the Panel must assume there will be a need that cannot be met by the existing infrastructure, or that there needs to be an easier approval path for a possible new airport based on such an assumption. Rather, I submit:
- 25.1 The Panel should assess critically what evidence it has that there is likely to be any need within the life of this RPS for air transport infrastructure that cannot be met by the region's existing airports (including growth or development of those airports). On this matter I note in particular that CIAL's position is contested by QAC.
- 25.2 The Panel should be cautious about conflating the type of assessment made by the Courts in *McElroy* with the type of assessment required to determine what is and what is not regionally significant infrastructure in an RMA setting.
- 25.3 The Panel should be mindful that 'modern' airports involve a host of ancillary commercial activities that ought not to displace values of an outstanding nature or significance under RMA s 6 or other national directives (as might be found in the NPS-FM or NPS-HPL).
- 25.4 Contrary to CIAL's evidence and submissions, there is a pathway for CIAL (or any other party) to seek RMA approval for a new airport in the region under the RPS as notified.



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