

Before the Freshwater Hearings Panel convened by the Chief Freshwater
Commissioner

In the matter of Freshwater parts of the Proposed Otago Regional
Policy Statement 2021

**Rebuttal Evidence of Ben Farrell on behalf of on behalf of Otago and Central
South Island Fish and Game Councils, Realnz Limited, and NZSki Limited**

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Introduction

- 1 My full name is Ben Farrell. I prepared a statement of evidence on the Freshwater Parts of the Proposed Otago Regional Policy Statement 2021 (pORPS) dated 28 June 2023 (EiC). My qualifications and experience are set out in my EiC.

Scope of evidence

- 2 In preparing this rebuttal evidence and following on from my EiC, I have viewed evidence from the following on behalf of various parties: James Dicey, Boyd Brinsdon, Claire Hunter, Bruce McKinlay, Marine Richarson, Murray Brass, Nicholas Dunn, James Taylor, Zoe Moffat, Katherine McCusker, Morgan Watt, Susannah Tait, Suzanne O'Rourke, Tim Ensor, Earnscy Weaver, Kris Robb, Leanne Roberts, Simon Webb, Stuart Ford, Vance Hodgson, Brendan Flack, Edward Ellison, Evelyn Cook, Justin Tipa, Maria Bartlett, Sandra McIntyre, Nicola Foran, Stephanie Styles, Vaughan Keesing, Alison Paul, Debbie Clarke, Shamubeel Equb, Ami Coughlan, Jayde Couper, Nigel Paragreen, Lynette Baish, Tom Dyer, Benjamin Patterson, Mario Cadena, Jenny McGimpsey, Ian Lloyd, Brendan Sheehan, Miranda Hunter, Simon Glennie, Susan McKeague, Kate Scott, Mike Freeman, Claire Perkins, Tim O'Sullivan, Richard Plunket, Bruce Jolly, Jeff Winmill, Mike Lord, Emma Crutchley, Jo Hay, Jeremy Anderson, Kelly Heckler, Luke Kane, Logan Wallace, Randall Aspinall, Simon Mason, Carmen Taylor, John Kyle, Dr David Jordan, Richard Johnson, Gavin McCullagh, Ainsley McLeod, Julia Kennedy, Aileen Crow, Barbara Beattie, Michael Joy, Michael Salinger, Nathan Surendran, Stephen Knight-Lenihan, Hamish Rennie
- 3 My rebuttal evidence is focused on aspects of other expert planning evidence that I do not agree with, or that I generally support but didn't raise directly in my EiC. I also make some observations of non-planner evidence insofar as it relates to matters informing my opinion as an expert planner having regard to my experience involved in preparing freshwater matters under the RMA.
- 4 Throughout my evidence I refer to the above-mentioned evidence and the material referred to in my EiC. I also refer to evidence I provided the Environment Court in relation to the Otago Regional Water Plan PC7 (with an extract attached to this rebuttal evidence).

Executive summary

- 5 I have viewed the party evidence tabled by Monday 3 July. This rebuttal evidence primarily responds to planning evidence on the following matters:

TMOTW hierarchy of obligations/priorities

- (a) I maintain many practitioners appear not to really understand the concepts of Te mana o Te Wai ('**TMOTW**') and Ki uta ki tai ('**KUKT**'). TMOTW puts the wai first, not human benefits derived from water. Similarly, I do not see how human health benefits derived from indirect uses with water can or should be afforded tier 2 status under the TMOTW priorities.
- (b) So long as the RPS visions are 'ambitious but reasonable', there is no statutory direction or requirement to place human needs above the freshwater environment and there can be no restoration of the balance between humans and the freshwater environment if we put the needs of humans above the freshwater environment.
- (c) Under the direction of the NPSFM I consider the costs and fairness associated with allocation of water rights are subservient to the health and well-being of water bodies and freshwater ecosystems; the health needs of people (such as drinking water); and equal with the ability of people and communities to provide for their social, economic, and cultural well-being, now and in the future.

Providing for REG

- (d) The RPS needs to 'provide for' REG, not 'enable' REG. In respect of water allocation and use, the RPS does not need to 'protect' existing hydro schemes or necessarily provide for additional water take. Historically REG has created significant adverse effects on the environment (including people) and enabling existing water take rights to remain ongoing into future generations may not be appropriate unless there is due consideration of current legislative requirements (including post treaty settlement requirements) and freshwater policy directions (including the fundamental concepts of TMOTW and KUKT).

Providing for Community Water Supplies

- (e) Community Water Supplies should not be afforded a tier 2 priority status under TMOTW, unless they are providing only drinking water. I acknowledge it is practically difficult for DCC and some other community water suppliers to distinguish drinking water from other end uses. However, I agree with the s42A findings that it is not appropriate to elevate the other uses into the same priority category as drinking water.

Primary production interests and need for a transitional and non-regulatory policy approach

- (f) I acknowledge the evidence associated with the various primary production parties, including the expert recommendations for preferring non-regulatory approaches to managing land uses affecting freshwater. I appreciate the benefits of non-regulatory approaches but think it is premature to determine now that non-regulatory approaches will be more appropriate compared to regulatory approaches.

Protection of wetlands

- (g) I tend to agree that LF-FW-O9 should be amended so that it is not trying to prevent actual loss of the extent of every single natural wetland or wetland in Otago.

6 I also observe the evidence before us (including but not limited to economic, electricity generation, and primary production) does not appear to analyse or comment on:

- (a) The historical and ongoing benefits associated with taking, using, and adversely affecting the mauri and health and wellbeing of water.
- (b) The historical and ongoing costs associated with taking, using, and adversely affecting the mauri and health and wellbeing of water.
- (c) The economic contribution of angling to the Otago region and New Zealand, except for the evidence of Mr Paragreen.

TMOTW & freshwater priorities

7 Numerous planners discuss the hierarchy of three freshwater priorities set out in the NPSFM2020. I understand there is no dispute about what is and is not a tier 1 priority but there are varying opinions amongst the planners as to whether some activities should be afforded tier 2 or tier 3 priority status.

8 Without wanting to repeat my earlier evidence on this point, I maintain that it appears some practitioners do not really comprehend what TMOTW is fundamentally about. Whilst acknowledging that regional policy statements are to respectively express the concept at a regional level, the basic and fundamental principle of putting the mauri and health of a waterbody ahead of human health and then associated well-beings should always be front and centre of plan making and decision-making. This is easier said than done given the majority of our society (inclusive of practitioners and

decision-makers) have a European 'western' paradigm and are yet to have their paradigm disrupted by shifting towards an indigenous/Maori ('eastern') paradigm about the importance of freshwater.

- 9 I have attached a copy of part of my evidence presented to Environment Court as part of the Otago Regional Water Plan Change 7 (call in) process¹. This evidence was based on an affidavit I presented to the Environment Court in respect of the Proposed Southland Water and Land Plan in relation to the topic of the Treaty of Waitangi and the concept of TMOTW.
- 10 The findings of the Waitangi Tribunal Report coupled with the Environment Courts² three key understandings in relation to KUKT and TMOTW (as I understand them as set out below) remain relevant in helping to understand these two concepts as they might apply to the Otago RPS:
 - (a) *That all provisions of the plan are to be interpreted and applied in a manner that gives effect to Te Mana o te Wai and implemented in accordance with ki uta ki tai.*
 - (b) *As a matter of national significance, the health and wellbeing of water are to be placed at the forefront of discussion and decision-making. Only then can we provide for hauora by managing natural resources in accordance with ki uta ki tai.*
 - (c) *The NPS-FM makes clear that providing for the health and wellbeing of waterbodies is at the forefront of all discussions and decisions about fresh water.*
- 11 Whilst the Environment Court's findings pre-dated the NPSFM 2020, the fundamental concept of prioritising the mauri and health of the wai above that of the health and [socioeconomic] wellbeing of humans remains constant (and has not faulted or been amended since the concept was first introduced prior to and as part of the NPS2014).
- 12 With the backdrop of understanding the connection between the wai and the human, it is logical that human health associated with the wai is to be prioritised above socioeconomic well-being. As TMOTW is first and foremost about the needs of the waterbody, and then second about the

¹ This evidence will not be a surprise to some experts because I provided this evidence in the Southland Regional Plan process and also in the Otago Water Plan Change 7 hearing.

² NZEnvC 208 [2019] Aratiatia Livestock Limited v SRC@ pars 55-64

health needs from connecting with the waterbody, it is illogical (and I do not think correct) to conclude that social well-beings derived from a waterbody but realised after water has been taken away from the natural state of the waterbody should be afforded second tier priority status.

- 13 There are two aspects to well-being in respect of managing freshwater under the NPS and applying the concept of TMOTW:
 - (a) Human health well-being
 - (b) Social, economic, and cultural well-being
- 14 Human health well-being draws on direct contact with waterbodies and relates to the human relationship with the waterbody and should be afforded tier 2 priority status.
- 15 Social, economic, and cultural well-being draws on indirect use of and reliance on water and relates to individual and community benefits associated with indirectly using or affecting water and should be afforded tier 3 priority status.
- 16 Apart from supplying drinking water, I cannot think of any activity that takes water away from the waterbody and has a direct human health need. To be clear:
 - (a) I maintain that any activity that relies on direct contact with a waterbody for the benefits of human health should be afforded tier 2 priority status. This includes all forms of contact recreation and gathering food and resources from waterbodies.
 - (b) I maintain that the indirect health needs of people associated with food production and REG should not be afforded tier 2 priority status.
- 17 I acknowledge the inclusion of “including drinking water” in the NPSFM2020 creates some ambiguity, because it implies that all forms of drinking water supply should be afforded second tier priority status – even drinking water that has no direction connection with a waterbody. However, drinking freshwater has an obvious direct connection to human health requirements, so it is different to indirect well-being benefits associated from food production and REG that have indirect connections with water use, so I can understand why the NPSFM refers specifically to drinking water supply.
- 18 With all the above in mind and acknowledging that the concept of TMOTW captures human connections with water, not just whakapapa connections, I consider the relief sought by F&G throughout the freshwater provisions to provide for the well-being benefits of recreation, including amending LF-

WAI-O1 to recognise people's ability to connect meaningfully to waterbodies, appropriate.

Planning Evidence of Mr Taylor for DCC

- 19 For the reasons set out above I agree with the s42 Report that *“Municipal takes include multiple uses, among them drinking water, but Councils also routinely take water for commercial use or irrigation. Priority 2 does not apply to these takes as a whole, although parts, e.g., those that relate to drinking water, will apply.”* My opinion differs to Mr Taylor (for example at pars 13-14) that the human health related uses of water from DCC's Community Water Supply (water for cleaning, heating and cooling households, institutions and workplaces, and firefighting), and water treated to drinking water standard, should be afforded tier 2 priority status.
- 20 Based on the evidence before us, I do not agree with Mr Taylor's recommended amendment to LF-FM-P7A(1) (in relation to allocation in the Taiari FMU) to prioritise 'first' Community Water Supply, including capacity for growth as provided for in the relevant District Plans over and above renewable electricity generation, and land-based primary production. This is primarily because:
 - (a) There is no need for his recommended change, as LF-WAI-P1 already prioritises in the second tier, the health needs of people including drinking water;
 - (b) There is no statutory policy direction or principled justification to prioritise community water supply over and above REG or land-based primary production (it would be different if Mr Taylor was recommending that 'human health needs such as drinking water' should be prioritised in accordance with LF-WAI-P1).
 - (c) There is no evidence that compares the costs and benefits of prioritising Community Water Supply over and above renewable electricity generation, and land-based primary production and other uses of water.
- 21 Rather than trying to prioritise uses of water that are within the same TMOTW tier (i.e. Community Water Supply, REG, food production), an option is to amend the RPS to provide more explicit criteria for helping parties/the community and decision-makers work through competing

interests. In my EiC I recommended amendments to IM-P2 so that priority shall be given in the following order³:

- (a) *the life-supporting capacity and mauri of the natural environment and the health needs of people, and then;*
- (b) *the ability of people and communities to provide for their social, economic, and cultural well-being, now and in the future;*
- (c) *if there are competing directives within the matters in priority (a) above then priority shall be given to the principles of sustainability, equity, and efficiency ensuring that the principles of the Treaty of Waitangi are given effect;*
- (d) *if there are competing directives within the matters in priority (b) above then priority shall be given to the principles of sustainability, equity, and efficiency ensuring that the principles of the Treaty of Waitangi are given effect.*

Planning Evidence of Ms Roberts and Mr Hodgson (Hortnz)

- 22 I have reviewed the evidence of Ms Roberts and do not agree with her logic or findings set out in pars 78-104 that it would be appropriate to recognise fruit and vegetables within the second priority obligation of Te Mana o te Wai, unless the reference to fruit and vegetables is intended to be narrowed to fruit and vegetables sourced from a waterbody (which I assume it is not).
- 23 I tend to agree with Mr Hodgson's evidence at pars 41-62 in respect of LF-FW-O1A and ORCs visioning exercise and I support inclusion of 'supporting food production' in the vision statement(s), provided that occurs alongside references to other important uses/sectors that submitters are seeking inclusion of (for example Fish and Game is seeking various inclusions to LF-FW-OA that I support).
- 24 Similarly, reflecting on Mr Hodgson's evidence at pars 63-67 in relation to LF-FW-O1A(6), I would also support inserting the term 'and well-being' after 'health of people'. Unlike the s42A Report I have no concerns with this vision statement recognising the fact that many members of the community

³ On reflection I would support further prioritisation within (a) above, in line with my evidence, so that the life-supporting capacity and mauri of the natural environment takes priority over the health needs of people.

rely on healthy water supporting their social, economic cultural well-being, as opposed to their human health wellbeing.

Planning Evidence of Ms Hunter

25 I understand Ms Hunter (at par 24) to effectively be saying that there is no hierarchy when considering the three separate TMOTW priorities. If this is effectively what Ms Hunter is opining, then I do not agree with her opinion. Achieving a balance between the different priorities is an outcome of TMOTW. That balance will not be achieved by prioritising or giving greater weight to a tier 3 priority over a tier 1 or 2 priority, nor a tier 2 priority over a tier 1 priority. To prioritise the indirect benefits from REG over and above tier 1 and 2 priorities, for example, undermines the fundamental concept of TMOTW. Rather, in my opinion, the balance referred to in the NPSFM will only be achieved when the priorities reflect the natural order of the fundamental concept of first providing for the health of the waterbody, second providing for human health, and third providing for indirect human wellbeing benefits.

26 For reasons set out in my previous evidence and concurring with the respective s42A evidence, I do not agree with Ms Hunter (at par 40) that the Clutha Mata-au FMU vision should seek to 'protect' the amount of water currently allocated to existing hydro, including the Clutha Scheme. I support the other amendments recommended by Ms Hunter to this vision, and support the vision being expressed as follows:

(6) the national significance of the ongoing operation, maintenance and upgrading of the Clutha hydro-electricity scheme, including its generation capacity, storage, and operational flexibility and its contribution to climate change mitigation, is recognised and provided for ~~and protected~~.

27 Alternatively, and bearing in mind evidence that the RPS should attempt to reconcile policy conflicts, I would also support the vision being fleshed out to identify what the Clutha Scheme needs to be protected from, and assuming the reference to 'protection' is intended to prioritise water allocation to the scheme over other uses, then the vision should clarify what those priorities and other uses are – so that we all have an understanding heading into the preparation of the Otago Land and Water Plan (LWP) process.

28 Ms Hunter says (at par 43) “Quite clearly these schemes are critically important to overall health and wellbeing in social, economic and cultural terms”, in reference to NZs largest hydro schemes that have bespoke policy direction set out in s3.31 of the NPSFM. Ms Hunter does not acknowledge

however the substantial costs, including opportunity costs, of these schemes on the health and wellbeing in social, economic and cultural terms. While there is no dispute that the benefits of these existing hydro schemes need to be recognised and provided for, the NPSFM does not set out to protect any existing water allocations, including for these schemes. Protecting existing water allocation for the Clutha Scheme assumes that the water allocated to the Scheme is and will continue to be appropriate in the context of current legislation and environmental policy, including post treaty settlement legislation and various findings of the Waitangi Tribunal, without any consideration of potentially appropriate remedial actions such as cultural redress and environmental enhancement. I consider protecting the status quo for water allocation for hydro, as is implied by the relief recommended by Ms Hunter, will inappropriately frustrate the purpose of the Act and are in no way 'necessary'.

- 29 Notwithstanding the above and for reasons set out in my previous evidence in relation to REG, I am supportive of the RPS including the following new policy as recommended by Ms Hunter:

Existing hydroelectric generation is recognised as an essential use of freshwater in Otago, due to its:

- a. Contribution to reducing greenhouse gas emissions and assisting climate change mitigation;*
- b. Critical importance in supporting the health and wellbeing of communities;*
- c. Contribution to the region's economic resilience and efforts to decarbonise the economy.*

- 30 Ms Hunter (at pars 71-72) discusses Policy LF-FW-P10 in relation to restoring natural wetlands. I have no major concerns with Ms Hunters recommendation except to advise that the term "*where it is appropriate and can be practicably achieved*" also suffers from the ambiguity that Ms Hunter is concerned with in respect of "*to the greatest extent practicable*". I acknowledge "*can be practically be achieved*" is more achievable than "*to the greatest extent practicable*" but reference to "*where it is appropriate*" is very open to interpretation such that it is effectively meaningless.

Planning Evidence of Ms Styles

- 31 Ms Styles (at par 5.5) says that there is a need to increase renewable electricity generation generally (across all forms of renewable electricity generation) within the region to support national targets. I do not agree there is a 'need' for Otago to increase its supply of REG from existing hydroelectricity generation activities. While increasing supply from existing

hydro will have efficiency benefits for Otago and New Zealand the Otago region already contributes a very high proportion of hydro electricity generation to Otago and New Zealand. Otago (its people and its rivers) already carry a heavy burden in this respect. There is no statutory requirement or policy direction for Otago to produce more hydroelectricity. Just because Otago can produce more hydroelectricity does not mean it can do this without compromising natural and human well-beings, or that it should.

- 32 Ms Styles (at par 5.5) also says that the PORPS does not provide clear support for existing REG "*or provide a well-defined pathway that will enable development of new and expanded REG*". I note there is no statutory requirement or policy direction requiring the RPS (or any planning instrument) to "*provide a well-defined pathway that will enable development of new and expanded REG*". The strongest direction in the NPSET is to: "*provide for the development, operation, maintenance, and upgrading of new and existing hydro-electricity generation activities to the extent applicable to the region or district*". I am not aware of any policy directives that require REG to provide a "*well-defined pathway that will enable development*". Obviously there will be benefits to REG providers and people if the RPS does provide a "*well-defined pathway that will enable development*", but there is likely to be significant costs associated with REG development that would be precluded from consideration if REG is 'enabled'. Such costs might include for example ongoing environmental effects (including mauri of waterbodies, ecosystem health, recreation values, opportunity costs of allocation) and preventing or restricting opportunities to enhance or remedy these matters if they are in a degraded or effectively overallocated state.
- 33 I agree with Ms Styles discussion (at 5.8-5.9), but I do not agree with Ms Styles finding (at par 5.10) that the RPS "*policy approach is unreasonably directed at prioritising freshwater remaining in waterways to the detriment of giving effect to national direction as a whole*". My interpretation of applying all the NPS is that restoring the mauri and health and wellbeing of freshwater and human health are to take priority over and above the need to provide for the benefits of hydro.
- 34 For reasons set out above I do not agree with Ms Styles (in s.8 of her evidence and finding at par 8.4) that REG is a tier 2 priority status, and I do not agree with her finding (at par 8.7) that recognising REG as necessary for the health needs of people would not undermine the priority afforded to the wellbeing of waterbodies and ecosystems, or the exercise of mana whenua to uphold these.

- 35 I do not agree with Ms Styles (at par 8.5) that the generation of electricity and the use of that electricity to keep people safe and well is very different from the generality of uses of water. Mr Taylor, for example, has identified how water should be considered a tier 2 priority because of various indirect uses including cleaning and firefighting, and primary production witnesses have opined how water used for primary production is essential to human health. While REG has national significance under the NPSREG and reference in s7, most other uses of water will have significance under s5 of the act (as human well-beings).
- 36 I acknowledge Ms Styles point (at par 8.7) in respect of REG being fundamentally different to other water uses in that the water is [typically]⁴ returned to the natural system. This aspect of water use and allocation is something that could be more explicitly factored into any RPS freshwater priority settings.
- 37 Whilst I support greater direction around prioritisation in the RPS (as set out in my EiC) I tend to agree with Ms Styles' comment (at par 8.8) that there should be clearer differentiation within clause (3) for priority 3 activities. However, for reasons I set out above in response to Mr Taylor's EiC above I do not agree with Ms Styles' recommendation (at par 8.8) that REG should always be afforded greater priority than Community Water Supply or primary production (which, aside from drinking water supply, is what I understand her to be saying).
- 38 I agree with Ms Styles (at 5.11) that the RPS should try to 'better recognise opportunities to enable REG', but only where it can be demonstrated that enabling REG will not create or continue to have significant adverse effects on the natural environment or on people's health and well-being and give effect to the principles of Te Tiriti o Waitangi.
- 39 I also tend to agree with the principle of Ms Styles' opinion that LF-FW-P7A could be amended to articulate the prioritisation in respect of water allocation and use. Based on the statutory direction I've referred to previously and all the written evidence before us, I would support a slightly amended version, as follows:

LF-FW-P7A – Water allocation and use

Within limits and in accordance with any relevant environmental flows and levels, the benefits of using

⁴ I note not all hydro schemes return water to the natural system

fresh water are recognised and over-allocation is either phased out or avoided by:

(1) allocating fresh water efficiently to support the social, economic, and cultural well-being of people and communities to the extent possible within limits, including prioritising allocation of available fresh water for:

(a) community drinking water supplies, and then

(bi) Community Water Supply and

(bii) land-based food production and

(biii) existing output capacity and future generation from renewable electricity generation schemes, and then

(c) ~~land-based primary production, and then (d)~~ other commercial and industrial uses, including primary production...

Planning Evidence of Ms Perkins

- 40 I do not agree with Ms Perkins that a transition policy should be included in the RPS, primarily because it overly simplifies the important and inherently complicated and difficult management matters that need to be taken into account during transition. I consider the entire RPS, founded on its new direction to generally prioritise the health and well-being of the natural environment (to restore the balance between the natural environment and extractive human uses), a transitional policy.
- 41 If a new specific transition policy is to be introduced in the RPS then I raise the following issues with the policy currently recommended by Ms Perkins:
- (a) The policy is focused on future costs with no consideration of future benefit, or the costs associated with historical use of and effects on water. This raises equity issues, i.e., that the transition policy focuses too much on the costs on the land user and not on the environment or other parties that have dis-benefited from historical land uses affecting water.
 - (b) The policy signals that the timeframes for achieving the visions can be amended in the Land and Water Plan process. This undermines the role of the RPS and intent of the NPSFM to require the RPS to include both visions and associated timeframes. This approach reinforces 'kicking the can down the road'. Also, I do not understand

why it would necessarily be 'a costly and inefficient use of resources' if the RPS has to be amended in the future.

42 I recommend the following amendments (if a new policy is to be introduced):

Recognise that achieving the freshwater visions is likely to result in significant changes in land use activities and/or infrastructure by:

a. At the time of setting of environmental outcomes, attribute states, environmental flows and levels identify or demonstrate an understanding as far as reasonably practicable:

i. Historical costs and benefits derived from using water or adversely affecting water

i. Changes required by resource users;

ii. How those changes can be implemented;

iii. Future Costs and benefits of implementing those changes;

~~iv. The timeframe required to manage the costs of those changes in a way that can be sustained by the community that is ambitious but reasonable, and whether the dates in the visions need to be extended or brought forward in the Land and Water Plan.~~

43 I appreciate the role of non-regulatory approaches to supporting land use change and I acknowledge the farming evidence table by the Otago Water Resource Users Group, and I am supportive of a new policy to ensure decision-makers consider the benefits and appropriateness of non-regulatory roles.

44 However, in my experience relying primarily on voluntary approaches to changing land use does not work and will not work to the extent that is required to achieve significant environmental improvement. Relying on voluntary approaches will, in my experience, only make responding to the significant issues facing Otago water uses harder and more expensive in the future.

45 I anticipate that, post the FMU process, the level of degradation of Otago's waterbodies will likely be worse than what many of the Otago Water Users Group appreciate, including for example in relation to any Ngāi Tahu Indicators of Health.

46 I recommend the following changes to Ms Perkins' recommended new Policy LF-FW-P7C:

LF-FW-P7C Recognise existing regulatory and non-regulatory measures when managing land and freshwater

When determining what methods to use to manage land and freshwater, recognise the benefits of give preference to the methods requiring the least additional regulatory intervention in the land and water plan, where this will enable progress towards achieving the visions, by:

a. Staging the implementation of any new regulatory requirements in recognition of the existing costs associated with addressing regulations that are already in force so that the implementation of new regulation can be managed by resource users;

b. Recognising the benefits of Relying on implementation of Freshwater Farm Plan Regulations;

c. Avoiding duplication of where possible new rules for matters already managed by:

i. National Environmental Standards; and

ii. Regulations made under the Resource Management Act

acknowledging that the regional plan may set more stringent rules and standards than the national standard or regulation.

~~d. Leveraging existing catchment groups or community collectives;~~

e. Not imposing new regulatory requirements where water quality is already meets all applicable ~~at the~~ target attribute states;

f. Establishing trigger points where additional regulatory intervention is required to prevent degradation

47 I support Ms Perkins' recommended new LF-VM-P7C in relation to the RPS directing local community involvement in the development and implementation of the RPS.

48 I have reviewed the benefits and costs analysis set out in Ms Perkins' evidence. I do not agree that there is 'very little risk of acting' through including all the provisions she is recommending, because I do think they will materially change what is included in the PRPS. In this regard the PRPS, as I understand it, seeks to prioritise the mauri and health and well-

being of waterbodies over and above the costs on our current and next generation. Some of the changes recommended by Ms Perkins could swing the priority settings back to the status quo where costs on people become the primary focus and key priority, which in my opinion would not be appropriate because it will not actually result in effective or efficient responses to addressing the freshwater issues facing Otago.

- 49 Whilst I appreciate the concerns around regulatory burdens' (and at the same time acknowledge the benefits of non-regulatory approaches), and I acknowledge Ms Perkins' comment that *"This approach will not create any new environmental risks because they can be managed through 'backstop' regulatory regimes in the event that non-regulatory tools are assessed as inadequate"*, I consider it would be more appropriate for all potential regulatory and non-regulatory regimes to be considered during the preparation of the LWP, and assessed on their merits at that time. It is premature to determine now that non-regulatory methods will be more appropriate compared to regulatory methods, particularly as the target attribute states (and associated indicators of health) have yet to all been identified or confirmed through the FMU process.

Planning Evidence of Mr Ensor

- 50 I agree in principle with Mr Ensor (at pars 10-16), in respect of LF-WAI-P1 that the RPS should deal with prioritisation as much as it can in the RPS now, rather than leaving this to future plan development processes. This evidence generally accords with my earlier evidence about the benefit of the RPS to try and reconcile rather than defer the need to reconcile policy conflicts.

Planning Evidence of Mr Richard Johnson

- 51 For reasons I've outlined above I tend to agree with the principle concern raised by Mr Johnson, effectively summed in his par 51, about the need for LF-FW-P7A to provide greater granularity for competing land uses. I tend to support inclusion of matters like that set out in par 49 of Mr Johnson's evidence as a means of 'fleshing out' or 'elaborating on' matters that should be taken into account or used as criteria to determine what uses should be prioritised over other.
- 52 To clarify I would support these matters, and other matters like these, being included to assist elaboration prioritisation of water allocation and use within the tier 3 priority, not to be used to compare or prioritise tier 3 over the first two tiers, or tier 2 over tier 1.

Planning evidence of Mr Kyle, Mr Ensor, Ms McLeod (LF-FW-O9, LF-FW P9)

- 53 I tend to agree with Mr Kyle and Mr Ensor respectively about their evidence on LF-FW-O9 – Natural Wetlands, i.e. that it is not appropriate for the RPS to create an expectation or seek an outcome that is an absolute avoidance of the loss of extent of individual wetlands and associated values.
- 54 I tend to agree with the intent of the amendment being recommended by Ms McLeod, to including: "*only activities that are identified and assessed appropriate may be undertaken in a natural wetland*".
- 55 To clarify I maintain LF-FW P9 should be amended as recommended in my EiC (or amended with like effect).

Planning evidence of Ms McLeod

- 56 For reasons set out in my EiC in respect of the difficulties and appropriateness of protecting subjective environmental values, and for the reasons set out by Ms McLeod (at pars 8.46-8.50), I support Ms McLeod's evidence and recommended further amendment and to Method LF-FW-M7:

"Territorial authorities must prepare or amend and maintain their district plans ~~no later than 31 December 2026~~ to:

...

(2) include provisions to ~~avoid the adverse effects of activities on~~ protect the significant and outstanding values of outstanding water bodies while enabling community to provide for their social, economic, and cultural well-being.

Planning Evidence of Mr Freeman

- 57 Mr Freeman has recommended 'plan drafting' improvements to numerous provisions. I am generally supportive of amending provisions to improve plan drafting as recommended by Mr Freeman (to clarify I do not support all his amendments where they result in substantive changes).

Various amendments recommended by Ms McIntyre, Ms Bartlett, Mr Brass

- 58 Ms McIntyre (inclusive of recommendations from Ms Bartlett) and Mr Brass are recommending a range of specific amendments which I generally support for reasons provided in their evidence respectively, for example in relation to:

- (a) Vision Timeframes

- (b) LF-VM – General
- (c) LF-FW-P10 – Restoring natural wetlands
- (d) LF-FW-P15 – Stormwater and wastewater discharges
- (e) LF-FW-AER9
- (f) LF-FW-AER10
- (g) LF-LS-P21 – Land use and fresh water
- (h) LF-LS-M11 – Regional plans

59 Some of their recommended amendments are consistent, in principle, with amendments I've recommended in my EiC but I am yet to fully reflect on whose recommendations are more appropriate, whether the amendments I recommend are needed in light of other recommendations, or whether some refinement of either sets of recommendations might be an appropriate outcome.

Economic Evidence of Mr Patterson and Mr Cadena

60 I observe Mr Patterson has focused his analysis on the food and fibre sector and for example does not compare his findings with other sectors or appear to consider any overall region-wide economic matter – including for example the benefits of improving water quality or returning water to waterbodies.

61 I acknowledge there will be an economic cost of 'adjusting to new water regulations' as set out in Mr Patterson's evidence, but I observe from the economic evidence before this panel there appears to be no consideration of:

- (a) Financial benefits, including historical benefits, to people and sectors that have taken water or discharge contaminants to water (directly or indirectly)
- (b) Costs, including opportunity costs, of people and sectors from not being able to use water because of historical use rights, such as the impact of loss of people's ability overtime to harvest food and resources from waterbodies (an example is the gradual loss of people's ability to harvest freshwater fish including whitebait due to degraded habitats and populations).

62 I observe from the economic evidence before this panel there appears to be no identification of the specific contribution of angling. Based on the evidence of Mr Paragreen I consider angling is likely to provide a discernible economic benefit to Otago.

Conclusion

63 I have viewed the party evidence. This rebuttal focuses on key findings and recommendations of other planning experts. I also make some observations from other evidence, namely the economic and farming evidence.

64 I maintain the PRPS freshwater provisions should be amended. There, are numerous amendments that I recommend (as set out in my EIC) and that I support from others. This evidence identifies some but not all of the amendments I support. After reviewing parties' rebuttal evidence, I intend to reflect on my recommendations and consolidate the recommendations I support into a single updated document and present that to the panel in due course.

17 July 2023

Ben Farrell

Attachment – Extract from Environment Court evidence in relation to the Otago Regional Water Plan PC7

- 17 The Waitangi Tribunal Freshwater Report is a relevant background document that could be taken into account.
- 18 I consider the discussion and findings in the *Waitangi Tribunal Freshwater & Geothermal Resources Report 2019*⁸ relevant to the question of how the Treaty principles are properly taken into account in a freshwater context. For example:
- a. The report includes an analysis of whether the RMA has failed to deliver sustainable management of freshwater. Given the Tribunal's role was in assessing the NPS-FM as a mechanism for partnership and the exercise of tino rangatiratanga and kaitiakitanga in freshwater management⁹, those findings seem pertinent to the questions that the Court has asked. The report concludes¹⁰, among other things, that "*the decline of water quality has profoundly affected the relationship of Māori and their culture and traditions with their ancestral waters, a matter of national importance that should have been recognised and provided for under section 6(e) in part 2 of the Act.*"
 - b. The report has a section on development of the NPSFM 2014 including consideration of Te Mana o te Wai¹¹ and similarly the NPSFM 2017. The Crown's position was that the NPSFM 2017 "puts Te Mana o te Wai at the centre of freshwater planning"¹², and the report identifies that "*Officials also suggested that the strengthening of Te Mana o te Wai would address the Treaty principle of active protection 'by putting the river first'.*"¹³
 - c. In respect of the National Significance of Te Mana o te Wai, the report¹⁴ identifies that this "*reflected the Crown's view that Te Mana o te Wai was not intended to be 'Māori-centric' but 'water-centric'; in other words, Te Mana o te Wai was a vehicle for the whole community's value for healthy water*

⁸ Waitangi Tribunal Report 2019: The Stage 2 Report on the National Freshwater and Geothermal Resources Claims WAI 2358

⁹ [p338]

¹⁰ [p137]

¹¹ [p207]

¹² [p240]

¹³ [p325]

¹⁴ [p330]

bodies. It also underlined the Crown's view that Te Mana o te Wai had a crucial role to play in the setting of values, objectives, and limits in RMA plans; that was the core function of the NPS-FM.

- d. The report also includes various extracts and observations by Te Rūnanga o Ngai Tahu on freshwater management.

19 Part of the Tribunal's conclusion on the next steps for freshwater management is repeated below¹⁵:

In our view, there is a particular strength in the way that the Crown and ILG have defined Te Mana o te Wai as a vehicle that can provide for both Māori and wider community values. The 2017 version has integrated it in the main body of the NPS-FM. Even though it is not mentioned explicitly in section D, Te Mana o te Wai clearly provides a platform for Māori values to be identified and reflected in freshwater planning. At the same time, it is – as officials noted – water-centric. At its most fundamental, it puts the health of the water first. As is stated in the 'National significance' statement, it relates to the 'integrated and holistic well-being of a freshwater body'. It will require 'the health and well-being of freshwater bodies' to be at the 'forefront of all discussions and decisions about fresh water', mainly in the policy and planning stage. This shows the particular value of co-design by the Crown and Māori, which has provided for the values of both peoples in the NPS-FM while allowing for them to act together to achieve those values. Te Mana o te Wai was clearly intended by both parties to provide the vehicle for partnership in the essential task of deciding objectives and setting limits for freshwater bodies. There are, however, some weaknesses in the tools for giving effect to Te Mana o te Wai in the way in which the 'National significance' statement had envisaged (the 2017 version). The first is the relative weakness of section D. This section ought to have required a co-governance and co-management approach to identifying Māori values and setting freshwater objectives, as we set out in chapter 3. It ought also to have required councils to promote and explore opportunities to enter into section 33 transfers and Joint Management Agreements. Such an approach would have required from councils a level of dialogue and cooperation in the application of Te Mana o te Wai, which was more consistent with the Treaty partnership. The second is the relative weakness of section AA. We agree with the claimants that greater legal weighting was needed for this section,

¹⁵ [@ pp337-338]

and that the requirement should have been for Te Mana o te Wai to be 'recognised and provided for' in regional policy statements and plans. It was also necessary to clarify that councils must recognise and provide for Te Mana o te Wai in the consenting as well as the planning process. The policies under objective AA1 only referred to the setting of objectives and limits in policy statements and plans, whereas the objective itself referred to 'the management of fresh water'. Additional policies were clearly required. We also agree that the objective and policies in section AA would have been more effective if councils were required to explicitly record how they had provided for Te Mana o te Wai in their policies and plans. The third weakness comes from the successful attempt to sever Te Mana o te Wai in the main body of the NPS-FM from the national values of the NOF in appendix 1. We do not agree with the idea that the specific links included in the Clean Water proposals (and the 2014 version of the NPS-FM) created a hierarchy in the national values. Instead, those links provided a means for more integrated freshwater planning and a tool for tāngata whenua values to be better reflected in the setting of objectives and limits, which was one of the purposes of the NPS-FM. The removal of those links does weaken the effectiveness of the Te Mana o te Wai provisions in the NPS-FM, although we think that the revised text of some values in appendix 1 provides greater clarity and implicit connections between the national values and Te Mana o te Wai. The fourth weakness relates to the lack of tools provided in the NPS-FM for: ... using mātauranga Māori to monitor progress towards achieving the freshwater objectives set by plans (CB1); and cultural indicators for the national values in the NOF

...

In our view, the amendments have created an opportunity for greater partnership in freshwater plan-making and for Māori values, especially the mauri and health of water bodies, to be better reflected in freshwater plan making. This is an important and necessary opportunity, which demonstrates the value of codesigning such important instruments with high Treaty implications. But the 2017 amendments fall short of complying fully with the principles of the Treaty, for the following reasons: The relative weakness of section AA is a serious matter. The requirement to 'consider and recognise' is not strong enough, and Policy AA1 restricts the application of Te Mana o te Wai to freshwater plan making. This is not sufficient to provide for tino rangatiratanga and kaitiakitanga in freshwater management. The severing of Te Mana o te Wai from appendix 1 reduces its utility as an over-arching principle in freshwater plan making. The failure to include tools for cultural monitoring

(CB1) or cultural indicators for the NOF is significant in Treaty terms, and again reduces the effectiveness of Te Mana o te Wai in freshwater plan making and freshwater management more generally.

...

On balance, the 2017 amendments have improved the NPS-FM in Treaty terms but the amendments have some significant weaknesses. We find that the NPS-FM is not compliant with Treaty principles, and Māori continue to be prejudiced by the weakness of mechanisms for the inclusion of their values and interests in freshwater management.

- 20 In my opinion the above statements from the Waitangi Tribunal help explain why the NPSFM20, in comparison with the NPSFM14 and NPSFM17, is now much more directive and explicit about the prioritisation of the health and wellbeing of water when applying TMOTW.

~~State of freshwater in Otago~~

~~21 Many rivers in Otago are effectively in a degraded or overallocated state in respect of water quantity and flow:~~

~~(a) Mr Trotter¹⁶ observes that “many streams in Central Otago experience high levels of abstraction and do not have effective environmental flows (a minimum or residual flow and associated allocation limit) to protect habitat and ecological values. This is often due to historic allocation under deemed permits”.~~

~~(b) Mr Trotter discusses degradation in respect of the impacts of flow reduction on fish habitat¹⁷, impacts of multiple stressor impacts¹⁸, and consequences of the high levels of abstraction restricting effective environmental flows of many streams¹⁹.~~

¹⁶ EIC par 21 & 62

¹⁷ EIC pars 21-25

¹⁸ EIC par 50

¹⁹ EIC pars 51-56