

BEFORE THE HEARINGS COMMISSIONERS

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of the Proposed Otago Regional Policy Statement
2021 ("PORPS") (Non-Freshwater Parts)

**MEMORANDUM FOR THE OTAGO REGIONAL COUNCIL ON RESOURCING
KĀI TAHU**

Dated 21 July 2023

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MEMORANDUM OF COUNSEL FOR THE OTAGO REGIONAL COUNCIL

May it please the Commissioners:

Background

1. At the commencement of the hearing, the Panel questioned whether it was appropriate to include methods requiring territorial authorities to resource, including by funding, Kāi Tahu participation in resource management processes.
2. Particular attention focused on MW-M4 which, as notified, requires local authorities to facilitate Kāi Tahu involvement in resource management by resourcing Kāi Tahu participation, “*including [by] funding*”.
3. In oral submissions, counsel for Otago Regional Council (“ORC”) supported MW-M4 as notified.
4. Counsel for Dunedin City Council submitted that resourcing, including funding, should be left to Local Government Act processes.
5. Under the Local Government Act, councils are free to determine the activities they shall undertake, how much is spent on those activities, and how those activities are funded.
6. In closing submissions, counsel for ORC supported the MW-M4 as notified¹.
7. The submissions of counsel generally approached the issue on a “first principles” basis.
8. A line of relevant cases has now come to the attention of counsel for ORC.
9. In summary, those decisions support the position advanced by Dunedin City Council. The cases are contrary to the position set out in the notified Proposed Regional Policy Statement.
10. The submissions made for ORC cannot stand in the face of these authorities.

¹ Paragraphs 226-234, pages 33-35.

11. The line of cases is now summarised.

Te Whanau a Kai Trust litigation

12. This litigation concerned the proposed Gisborne Regional Freshwater Plan.
13. In its appeal to the Environment Court from the decisions on that plan, Te Whanau a Kai Trust sought the inclusion of objectives requiring the Gisborne District Council to provide technical and financial assistance to it. The Council opposed the amendments. The Environment Court refused to include the objectives.²
14. The essence of the Environment Court's reasoning was that it was not for the Court to direct a local authority how or to whom it should allocate resources.³
15. The Court held it was not appropriate to include in the plan an obligation to resource the Trust with technical and financial assistance.
16. It agreed with the Council that decisions on funding and allocation of resources are to be made through the long term and annual planning processes in the Local Government Act 2002.
17. In submissions dated 9 February 2023, counsel for Kāi Tahu cited the Environment Court's decision and tried to distinguish it.⁴
18. Te Whanau a Kai Trust appealed to the High Court. The appeal was unsuccessful.⁵
19. The High Court found there was no error of law. It acknowledged that the Regional Plan must contain methods. Nonetheless, it held that local government funding had to be dealt with under the Local Government Act.⁶
20. Te Whanau a Kai Trust sought leave to appeal to the Court of Appeal. Leave was refused.⁷

² [2022] NZRMA 372, paragraphs [116]-[129].

³ Op. Cit. [120].

⁴ Paragraphs 36-44.

⁵ Te Whanau a Kai Trust v Gisborne District Council [2022] NZHC 1462.

⁶ Op. Cit. [110].

⁷ [2023] NZCA 55, paragraphs [28]-[32].

21. The Court of Appeal held that the issue simply was not arguable. It was, in the Court's view, inappropriate to circumvent or cut across the Local Government Act's framework for decisions about funding and expenditure.
22. Leave was sought to appeal to the Supreme Court. The application for leave was dismissed.⁸
23. The Supreme Court Panel found that there was nothing to suggest that the Court of Appeal was wrong in its assessment.

Implications

Mandatory Funding

24. The implications of these decisions are that the following provisions can no longer stand:
 - 24.1. MW-M4(2);
 - 24.2. AIR-M5; and
 - 24.3. CE-M1A.
25. These methods purport to impose mandatory obligations on local authorities in a way that is inconsistent with the Te Whanau a Kai Trust decisions.

Discretionary Funding

26. There are some methods which require local authorities to consider funding specific actions:
 - 26.1. CE-M5;
 - 26.2. ECO-M5; and
 - 26.3. NFL-M4.
27. These provisions are distinguishable. They do not impose mandatory obligations on local authorities. Local authorities retain the ability to decline to take the actions suggested. That is not inconsistent with the Local

⁸ Te Whanau a Kai Trust v Gisborne District Council [2023] NZSC 77.

Government Act's framework for decision-making about activities, expenditure and funding. These methods can remain.

Timeframes

28. There are some methods which set timeframes within which local authorities are to undertake specified actions. Those methods might could be seen as pre-empting funding and expenditure decisions under the Local Government Act.
29. In its reply version of the Regional Policy Statement ("RPS"), the ORC proposed removing timeframes from some provisions:
 - 29.1. IM-M3;
 - 29.2. IM-M4;
 - 29.3. IM-M5;
 - 29.4. AIR-M3;
 - 29.5. CE-M1;
 - 29.6. LF-LS-M12.⁹
30. There are instances where the reply version of the RPS retains dates for actions to be taken:
 - 30.1. AIR-M1; the notified method required airshed boundaries to be reviewed by 31 December 2022. As that date had passed, the reply recommendation is to include in its place "*within 12 months of the AIR chapter being made operative*".
 - 30.2. AIR-M2; the date of 30 June 2025 is proposed to be substituted for the notified date of 31 December 2024 for a new or amended Air Plan.
 - 30.3. CE-M3; the date of 31 December 2028 for new or amended regional plan(s) is retained.

⁹ The relevant reply report at paragraphs 141-142 recommended deleting the date, but this was not shown in the accompanying tracked change version of the proposed RPS. The reply report is correct.

- 30.4. LF-LS-M11; the date of 30 June 2024 is given for public notification of the proposed Land and Water Regional Plan. This date was agreed between ORC and the Minister for the Environment¹⁰.
31. In each of these cases, ORC has committed to those dates and made financial provision in its Long-Term Plan (2021-2031).¹¹
32. Accordingly, these methods are distinguishable from the objectives proposed in the Te Whanau a Kai Trust line of decisions and may be retained.
33. There is a method, LF-LS-M11A which provides that ORC must include maps of highly productive land in its Regional Policy Statement by 17 October 2025. That method reflects the legal obligation imposed on ORC by clause 3.5(1) of the National Policy Statement for Highly Productive Land. ORC must give effect to that direction. It has no choice. This method can remain, without conflict with the Te Whanau a Kai Trust decisions.
34. ORC recommended that ECO-M2(2) be amended to set a date no later than 31 December 2030. This amendment responds to submissions from the Dunedin City Council and Waitaki District Council requesting a date.¹² This amendment was introduced in the section 42A report version of the RPS dated 31 October 2022. It was not contested at the hearing. It is submitted that that date might remain at least in respect to the Dunedin and Waitaki Districts. The relevant councils sought the date and have accepted it for their districts.
35. As notified, ECO-M2(5) contained the words “*no later than 31 December 2025 for identification of specified types of SNA in the Otago region*”. In the reply version of the proposed RPS dated 23 May 2023, that date is shown

¹⁰ Section 42A report paragraph 1779.

¹¹ Pages 23 and 28.

¹² Section 42A report 10, paragraph 394.

as struck out.¹³ In light of the Te Whanau a Kai Trust decisions, the text in the proposed RPS dated 23 May 2023 is preferred.

36. The reply version of the proposed RPS amended HAZ-NH-M2 to include a requirement that, within 5 years of the HAZ-NH being made operative, areas of significant risk be identified. This method applies to all local authorities in the region. While the timeframe reflects ORC's current work programme¹⁴, it does not necessarily correspond to the work programmes of territorial authorities in the region. The timeframe should be removed.



A J Logan
Counsel for Otago Regional Council
Dated 21 July 2023

¹³ Note that the accompanying reply report did recommend substituting “*within 5 years of the RPS being made operative*”: reply report 1, paragraph 137.

¹⁴ Reply report 12, paragraphs 140-141.