

**BEFORE THE HEARING PANEL**

**UNDER** the Resource Management Act 1991  
**IN THE MATTER** of the Proposed Otago Regional Policy Statement 2021

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**SUPPLEMENTARY EVIDENCE OF MICHAEL JOHN BATHGATE  
IN RESPONSE TO OTAGO REGIONAL COUNCIL EVIDENCE ON  
NATIONAL POLICY STATEMENT FOR INDIGENOUS BIODIVERSITY**

**ON BEHALF OF  
KĀI TAHU KI OTAGO, NGĀI TAHU KI MURIHIKU AND  
TE RŪNANGA O NGĀI TAHU**

**15 September 2023**

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## INTRODUCTION

1. My name is Michael John Bathgate. My qualifications and experience are set out in my evidence-in-chief for Kāi Tahu ki Otago, Ngāi Tahu ki Murihiku and Te Rūnanga O Ngāi Tahu, dated 23 November 2022.<sup>1</sup>
2. This supplementary evidence responds to the supplementary planning evidence of Andrew MacLennan in relation to the implications of the National Policy Statement for Indigenous Biodiversity (NPS-IB) for the non-freshwater provisions of the Proposed Otago Regional Policy Statement (PORPS).
3. The key documents that I have referred to in preparing this supplementary evidence include (in addition to the documents referred to in my evidence-in-chief):
  - (a) the supplementary evidence of Andrew MacLennan on implications of the NPS-IB, dated 8 September 2023; and
  - (b) the NPS-IB.
4. My evidence follows the structure of Mr MacLennan's in grouping topics of particular relevance to mana whenua into topic areas.<sup>2</sup> I have also looked at implementation of the NPS-IB specifically in relation to mahika kai activities. My evidence is structured as follows:
  - (a) Decision making.
  - (b) Partnership.
  - (c) Specified Māori land.
  - (d) Acknowledged and identified taoka.
  - (e) Sustainable customary use (mahika kai).
5. References in my supplementary evidence to PORPS provisions relate to the Reply Report Version updated on 30 May 2023.

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<sup>1</sup> Referred to collectively as 'Kāi Tahu' for the purposes of my evidence.

<sup>2</sup> Andrew MacLennan NPS-IB Evidence, para 40

6. I recommend several further amendments to Mr MacLennan's recommendations, which I provide in Appendix 1 to this supplementary evidence.

## **DECISION MAKING**

7. As set out by Mr MacLennan,<sup>3</sup> there are a number of NPS-IB requirements that recognise the mana whenua role as kaitiaki of indigenous biodiversity. Mr MacLennan discusses how these are given effect to in the MW and ECO provisions of the PORPS. I agree with Mr MacLennan's assessment that the Mana Whenua (MW) provisions do not need further amendment to give effect to the NPS-IB, particularly in relation to the rakatira and kaitiaki roles of mana whenua. They provide appropriate guidance for the decision-making role of Kāi Tahu as mana whenua under the principles of Te Tiriti o Waitangi.
8. In relation to the ECO provisions, I am in general agreement with Mr MacLennan's analysis in relation to NPS-IB Objective 2.1 and Policies 1 and 2. I note, however, that Policy 2(a) requires the exercise of kaitiakitaka through mana whenua managing indigenous biodiversity on their own land. I consider that my suggested amendments further in this evidence<sup>4</sup> relating to Māori land are required to fully endorse Mr MacLennan's analysis.
9. I note also that the language of NPS-IB Policy 2 is more directive than ECO-O3, seeking that 'Tangata whenua exercise kaitiakitanga for indigenous biodiversity in their rohe' as opposed to 'Mana whenua are able to exercise their role as kaitiaki of Otago's indigenous biodiversity'. I recommend an amendment to ECO-O3 to address this. I consider this is appropriate at the objective level, but do not consider a corresponding amendment to ECO-P1 necessary. ECO-P1 provides policy guidance for a range of parties, with the less direct 'enable Kāi Tahu to exercise their role as kaitiaki' language appropriate at this level.

## **PARTNERSHIP**

10. Mr MacLennan undertakes an analysis of the extent to which the PORPS gives effect to recognition within the NPS-IB of the role of mana whenua as partners in the management of indigenous biodiversity. Mr MacLennan recommends amendment to ECO-P1 and ECO-M7A to better achieve the direction of clause 3.2. I support these changes, with a minor amendment to ECO-M7A(1A) to include Kāi Tahu dialect.

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<sup>3</sup> Ibid, para 39

<sup>4</sup> Refer paras 20-24 below

## **SPECIFIED MĀORI LAND**

### **Definition of Māori land**

11. Mr MacLennan has recommended no change to the PORPS definition of Māori Land in response to the NPS-IB definition of 'specified Māori land'.<sup>5</sup> Although this definition was addressed in the primary evidence for Kāi Tahu of Sandra McIntyre rather than my own, I note that Kāi Tahu support Mr MacLennan's recommendation for no subsequent change, with this matter also addressed in legal submissions.

### **Implementation of NPS clause 3.18**

12. Mr MacLennan's supplementary evidence undertakes an analysis of the PORPS in relation to the requirements of NPS-IB cl 3.18 for specified Māori land.<sup>6</sup> In summary, Mr MacLennan highlights that:
- (a) Outside the coastal environment, under ECO-P4 the effects management hierarchy must be followed for certain activities affecting significant natural areas (SNAs) or identified taoka, which include:
    - (i) the development of papakāika, marae and ancillary facilities on Native reserves and Māori land;
    - (ii) the sustainable use of mahika kai and kaimoana by mana whenua; and
    - (iii) the use of Native reserves and Māori land to enable mana whenua to maintain their connection to the whenua and enhance their social, cultural or economic well-being.
  - (b) Outside the coastal environment, under ECO-P6, for indigenous biodiversity that is not an SNA or taoka the effects management hierarchy must be followed.
  - (c) ECO-P8 promotes restoration and enhancement of indigenous biodiversity generally, including taoka and mahika kai species.

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<sup>5</sup> Andrew MacLennan NPS-IB Evidence, paras 65-67

<sup>6</sup> Ibid, paras 71-79

- (d) MW-P4 states that Kāi Tahu are able to develop and use land within native reserves and Māori land to provide for their economic, cultural and social aspirations.
13. In addition to those provisions referred to above, it is also worth highlighting MW-M5(2),<sup>7</sup> requiring regional and district plans to enable Kāi Tahu mana whenua to lead approaches to managing adverse environmental effects on native reserves and Māori land.
14. Mr MacLennan's analysis does not extend to Māori land within the coastal environment, which is subject to CE-P5 (now recommended to be located in the ECO chapter). This policy requires either:
- (a) the avoidance of all adverse effects for certain ecosystems, areas or vegetation types corresponding to those listed in New Zealand Coastal Policy Statement (NZCPS) Policy 11(a), or
- (b) the avoidance of significant adverse effects and avoiding, remedying or mitigating other adverse effects for those ecosystems, areas, habitats and species corresponding to NZCPS Policy 11(b) – with the addition of SNAs or taoka that do not meet the first part of the policy (i.e. NZCPS Policy 11(a)).
15. Mr MacLennan considers that ECO-P3 and ECO-P4 generally give effect to cls 3.18(1) and 3.18(2)(c)-(d) – with the exception of the 'to the extent practicable' qualifier in the chapeau of cl 3.18(1). He also considers that there is no equivalent PORPS provisions to cls 3.18(2)(e)-(h). To rectify these two discrepancies, Mr MacLennan recommends the addition of a new method ECO-M4D, which is in essence a restatement of cls 3.18(1) and (2).
16. Mr MacLennan also recommends an amendment to ECO-P8 (cl (4)(e)), prioritising restoration of areas of indigenous biodiversity on native reserves and Māori land where restoration is advanced by Māori landowners. I support the addition of this clause.
17. Mr MacLennan's solution to include 'to the extent practicable' in new method ECO-M4D is a pragmatic one – from a drafting perspective, I understand his reluctance to redraft ECO-P3, P4 or P6 to accommodate alternate policy approaches for Māori land as required under cl 3.18. However, a lack of resolution at policy level raises the question of

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<sup>7</sup> Mr MacLennan references this method earlier in his evidence, at para 49 relating to decision-making.

whether any use or development of Māori land is subject to the effects management approach set out either by the effects management hierarchy or under ECO-P6.

18. In my opinion, cl 3.18 clearly promotes alternative approaches to effects management relating to indigenous biodiversity on Māori land. As well as the 'to the extent practicable' wording, subclauses (e)-(h) clarify that there may be situations where outcomes for indigenous biodiversity are subsidiary to providing for mana whenua use of their whenua. This allowance for alternate approaches is reiterated elsewhere in the NPS-IB – including in the implementation clauses relating to SNAs (cl 3.10(1)(b)) and clauses applying to indigenous biodiversity outside SNAs (cl 3.16(1)-(2)).
19. I have considered a range of options to address this policy misalignment, including:
  - (a) amendments to ECO-P3, ECO-P4 and ECO-P6 to provide for alternate approaches for Māori land;
  - (b) a new policy specific to indigenous biodiversity effects management on Māori land; or
  - (c) amendments to new method MW-M4D to provide better alignment to MW-P4 and MW-M5, including signalling alternate approaches to effects management.
20. I consider options (a) and (b) relating to policy drafting would potentially be the most effective.<sup>8</sup> However, the ECO policies are already complex and trying to include a 'carve-out' for Māori land to the existing policies may detract from plan clarity and efficiency. While a new policy specific to indigenous biodiversity management on Māori land would appear an effective option, there is already a clear policy (MW-P4) and method (MW-M5(2)) in the Mana Whenua chapter relating broadly to effects management approaches for Māori land. On reflection, I consider it may not be efficient or effective to start replicating these at policy level elsewhere in other PORPS chapters.
21. I have proposed amendments to Mr Maclennan's new ECO-M4D in Appendix One below. These align the method with MW-M5 to recognise Kāi Tahu rakatirataka and allow mana whenua to take the lead in managing indigenous biodiversity on Māori land. The amendments clarify that alternate policy approaches to ECO-P3-P6 will be available for Māori land, but retains the overall outcomes sought by 3.18(1). I recommend retaining

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<sup>8</sup> I recommended the development of alternative management approaches for native reserves and Māori land in my evidence-in-chief at paragraphs 107-109, Appendix One p18.

the second clause which repeats 3.18(2), as I consider this provides useful context for the alternate policy approaches required for Māori land.

22. I note that this recommendation would be in slight conflict with method ECO-M7A(4) which encompasses local authorities working with mana whenua to determine appropriate management approaches for native reserves and Māori land. Accordingly I recommend deletion of ECO-M7A(4), if my amendments to ECO-M4D are accepted.
23. Another consideration is the application of alternative management approaches in the coastal environment. The NPS-IB applies in the terrestrial part of the coastal environment, namely land areas situated above mean high water springs to the landward boundary of the coastal environment. A separate policy approach to coastal indigenous biodiversity is provided by CE-P5, now located in the ECO chapter. Mr Maclennan's analysis of the application of NPS-IB clause 3.12 does not include CE-P5.
24. Across Otago, it is likely that significant areas of native reserves and Māori land fall within the coastal environment, as identified under NZCPS Policy 1. I consider that an alternative approach to managing indigenous biodiversity on native reserves and Māori land is also required in these coastal areas. As well as the requirements of the PORPS, this would give effect to NZCPS Policy 2 in relation to Te Tiriti and kaitiakitaka, particularly clauses (a)-(d) and (f)(ii), and ss 6(e) and 8 of the RMA. I consider the amendment I have proposed to ECO-M4D above provides such an alternative approach.

#### **ACKNOWLEDGED AND IDENTIFIED TAOKA**

25. Mr Maclennan's supplementary evidence undertakes an analysis of the PORPS in relation to the requirements of NPS-IB clause 3.19 for acknowledged and identified taoka.<sup>9</sup> Mr Maclennan considers that ECO-P2(2) and ECO-P3 achieve the requirements of clause 3.19 at a policy level, noting that these have been drafted and reviewed with mana whenua. Mr Maclennan also reviews the PORPS method ECO-M3 for taoka and concludes that subclauses (6)-(8) of NPS-IB 3.19 are not given effect to, and recommends appending these to ECO-M3.

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<sup>9</sup> Andrew Maclennan NPS-IB evidence, paras 80-87

26. In general, I support Mr MacLennan's conclusion that the ECO provisions largely give effect to clause 3.19 and generally support his amendments to ECO-M3.<sup>10</sup> However, there are several further matters that I draw attention to in the following paragraphs.
27. Mr MacLennan does not include CE-P5 in his analysis, yet this is relevant to taoka species and ecosystems in the terrestrial parts of the coastal environment. CE-P5 follows from the identification process set out under ECO-P2(2) but provides an alternative effects management approach for taoka in the coastal environment. I consider that this generally gives effect to the intent behind the NPS-IB, albeit in a directive way that may be at odds with the kaitiaki approach to the management of taoka required under NPS-IB Policy 2 and clause 3.19(4).
28. Subclause (4) of NPS-IB contains the phrase 'as far as practicable' in the clause requiring local authorities to work in partnership with mana whenua in the protection and management of taoka. While slightly unclear, the 'as far as practicable' seems to relate to the requirement to protect both acknowledged and identified taoka. This suggests a level of discretion in policy settings that may not be available in either ECO-P3 or CE-P5.
29. Inasmuch as the taoka provisions are to be developed by local authorities working with mana whenua, and there is discretion for mana whenua to either choose not to identify taoka or choose the level of detail used to describe taoka, I do not consider any further changes are required at the PORPS policy level to implement clause 3.19.
30. Mr MacLennan does not specifically discuss the approach to management of identified taoka on Māori land cl under 3.19(5). I consider that the amendments that I have suggested to method ECO-M4D<sup>11</sup> would give appropriate effect to cls 3.18 and 3.19(5) of the NPS-IB.
31. Finally, Mr MacLennan's amendments to ECO-M3, particularly new subclauses 4 and 5, add aspects of management to a method which, previously, was solely concerned with identification of taoka. While the title could be changed to include 'management', I consider this would be misleading as the management of taoka is more fully dealt with by other methods, such as ECO-M4 and ECO-M5. New clause 4 in ECO-M3 arguably relates both to the identification of adverse effects on taoka as well as potential management approaches. However, I consider clause 5 would be better located within

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<sup>10</sup> With the exception of new subclause (5) as discussed at para 31.

<sup>11</sup> Refer para 21 above



ECO-M7A, as customary use by mana whenua in accordance with tikaka is part of the expression of kaitiakitaka. I have recommended this amendment in Appendix 1 to my supplementary evidence.

### **SUSTAINABLE CUSTOMARY USE (MAHIKA KAI)**

32. Several NPS-IB clauses provide for sustainable customary use, as follows:
- (a) cl 3.3(2)(d) requires local authorities, when making or changing objectives, policies or methods to give effect to the NPS-IB, to allow for the sustainable customary use of indigenous biodiversity in accordance with tikanga;
  - (b) cl 3.10(6)(b) exempts sustainable customary use in accordance with tikanga from the management approach to adverse effects on an SNA set out more broadly under clause 3.10; and
  - (c) cl 3.19(7) requires local authorities in their policy statements and plans to provide for sustainable customary use of identified taoka in accordance with tikanga and in a manner consistent with the protection of the identified taoka.
33. Mr MacLennan does not comprehensively examine how these NPS-IB clauses are given effect to. I have examined this topic in greater detail, as set out in the following paragraphs.
34. There are a number of PORPS provisions that make allowance for mahika kai, which is defined as the 'gathering of food and natural materials by Kāi Tahu whānui in accordance with tikaka, the places where those resources are gathered, and the work, methods and cultural activities involved in obtaining them'. While the NPS-IB does not define 'sustainable customary harvest', I consider that there is a direct correlation between this concept and mahika kai, with Kāi Tahu tikaka dictating that the gathering of materials as part of mahika kai should be undertaken in a sustainable manner.<sup>12</sup>
35. The relevant PORPS provisions that provide for mahika kai are as follows:
- (a) MW-P3(1) around supporting Kāi Tahu hauora, although this refers to protecting 'customary uses'.

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<sup>12</sup> Cultural evidence of Edward Ellison: *Mana whenua*

- (b) ECO-P1(3), ECO-M5(3) and ECO-M7A(3) around facilitating access to and use of mahika kai by Kāi Tahu as part of kaitiakitaka.
  - (c) ECO-P4(2A) sets out that, outside the coastal environment, mahika kai and kaimoana use that affects SNAs or taoka is subject to the effects management hierarchy (rather than ECO-P3).
  - (d) ECO-P8(1) promotes mahika kai species for habitat restoration and enhancement.
  - (e) ECO-M3(5), a new clause recommended by Mr Maclennan, allows for the sustainable customary use of identified taoka by mana whenua.<sup>13</sup>
  - (f) ECO-M4(1A) and ECO-M5(2) require regional and district plans to manage the clearance or modification of indigenous vegetation, while allowing for mahika kai activities.
  - (g) ECO-M7(2) and ECO-M8(1),(7) include mahika kai species and ecosystems in the requirements for monitoring and use of other mechanisms or incentives.
36. The fundamental role of mahika kai as a cornerstone of what it means to be Kāi Tahu was described in the evidence of Kāi Tahu cultural witnesses.<sup>14</sup> In summarising this cultural evidence, my evidence-in-chief described the role of mahika kai in reinforcing and sustaining the Kāi Tahu connection to te taiao (the natural environment) and ancestral areas – in effect giving effect to the relationships provided for under RMA s6(e).<sup>15</sup>
37. In my opinion, there is reasonable recognition of the need to provide for mahika kai practices in the Reply Version of the ECO chapter. However, there is still potential for misunderstanding between the ECO policy effects tests and the exercise of mahika kai, which remains of some concern.<sup>16</sup>
38. As set out in para 35(c) above, mahika kai practices outside the coastal environment that interact with SNAs or taoka, while following an ‘easier’ effects pathway due to recognition in ECO-P4(2), remain subject to the effects management hierarchy.

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<sup>13</sup> Note that I am recommending shifting this clause to ECO-M7A(3), as set out at para 31 above.

<sup>14</sup> Refer evidence of Edward Ellison and Brendan Flack in particular, although all Kāi Tahu cultural witness statements of evidence made reference to mahika kai practices.

<sup>15</sup> Paras 86-87, 95-97 of my evidence-in-chief.

<sup>16</sup> For example, refer para 99 and Appendix 1, p19 of my evidence-in-chief in relation to ECO-P6.

39. Non-coastal mahika kai practices not involving SNAs or taoka fall under ECO-P6, and are subject to the effects management hierarchy for significant adverse effects, or an 'avoid/remedy/mitigate' approach for other adverse effects on indigenous biodiversity. Mahika kai practices in the coastal environment are subject to CE-P5. I note there is no specific provision for mahika kai in either ECO-P6 or CE-P5.
40. In my opinion, these policies do not give full effect to the NPS-IB, particularly those clauses relating to sustainable customary harvest described in paragraph 32 above. I consider that these clauses anticipate that mahika kai (undertaken in a sustainable manner) need not be subject to the effects tests in these policies, or at least anticipate an alternative management approach for those species.
41. I note that methods ECO-M4(1A) and ECO-M5(2) already anticipate such an alternative approach, by making allowance for mahika kai in developing management approaches for indigenous vegetation clearance or modification.<sup>17</sup> Rather than recommending any further policy changes (due to the issues regarding policy complexity outlined in para 20 above), I recommend amendments to these methods in Appendix 1 below to provide for mana whenua-led approaches to the management of mahika kai as anticipated by the NPS-IB (and consistent with MW-P4 and MW-M5).



**Michael Bathgate**

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<sup>17</sup> Added in response to the Kāi Tahu ki Otago submission.

## APPENDIX 1. RECOMMENDED AMENDMENTS TO THE PORPS.

(Section 42A (Reply Report version) amendments in black, Andrew MacLennan supplementary evidence amendments in green, Michael Bathgate supplementary evidence amendments in red)

### ECO-03 – *Kaitiakitaka* and stewardship

*Mana whenua* ~~are able to~~ exercise their role ~~recognised~~ as kaitiaki of Otago's indigenous biodiversity, and Otago's communities are recognised as stewards, who are responsible for: ...

### ECO-M3 – Identification of taoka

... ~~(5) make or change their policy statements and plans as necessary to ensure that the sustainable customary use of identified taoka by mana whenua in accordance with tikaka and in a manner consistent with the protection of the identified taoka is provided for, and ...~~

### ECO-M4 – Regional plans

Otago Regional Council must prepare or amend and maintain its regional plans to: ...

(1A) manage the clearance or modification of indigenous vegetation, while allowing for mahika kai and kaimoana (seafood) activities (including through the development, in partnership with mana whenua, of provisions for mahika kai and kaimoana activities that may provide an alternative approach to effects management than those policies set out in this ECO chapter), ...

### ECO-M4D – Native reserves and Māori land

Local authorities must:

(1) ~~work in partnership (which includes acting in good faith) with mana whenua and owners of native reserves and Māori land to develop, provide for the use of native reserves and Māori land in accordance with MW-P4, and recognise Kāi Tahu raketirataka over this land by enabling mana whenua to lead approaches to managing any adverse effects of such use on indigenous biodiversity. This may involve the inclusion to and include in district plans and regional plans, of objectives, policies, and methods that provide an alternative approach to effects management for indigenous biodiversity than those policies set out in this ECO chapter. These objectives, policies and methods will seek that, to the extent practicable, to:~~

(a) maintain and restore indigenous biodiversity on native reserves and Māori land, and

(b) protect SNAs and identified taoka on native reserves and Māori land, and

(2) ensure that objectives, policies, and methods developed under (6 1): ...

## ECO-M5 – District plans

Territorial authorities must prepare or amend and maintain their *district plans* to: ...

- (2) ~~control~~ manage the clearance or modification of *indigenous vegetation*, while allowing for *mahika kai* activities (including through the development, in partnership with *mana whenua*, of provisions for *mahika kai* activities that may provide an alternative approach to effects management than those policies set out in this ECO chapter),

## ECO-M7A — Kāi Tahu kaitiakitaka

Local authorities must partner with Kāi Tahu in the management of *indigenous biodiversity* to the extent desired by *mana whenua*, including by:

(1A) ensuring that engagement with *mana whenua* is early, meaningful, and in accordance with *tikanga Māori*,

- (1) actively supporting the role of *mana whenua* as kaitiaki,
- (2) facilitating opportunities for *mana whenua* to be involved in resource management (including decision making),
- (3) enabling the *mahika kai* practices of *mana whenua* in accordance with *tikaka*, including the sustainable customary use of identified taoka,
- ~~(4) working with *mana whenua* to determine appropriate management approaches for *indigenous biodiversity* within native reserves and Māori land, ...~~