BEFORE THE OTAGO REGIONAL COUNCIL AND
BEFORE THE FRESHWATER HEARING PANEL

AT DUNEDIN
KI ŌTEPOTI

IN THE MATTER	of the Resource Management Act 1991
AND	
IN THE MATTER	of the proposed Otago Regional Policy Statement 2021 (including those parts determined to be a Freshwater Planning Instrument)

Legal Submissions for the Director-General of Conservation *Tumuaki Ahurei*
Re *Port Otago Limited v Environmental Defence Society Inc* [2023] NZSC 112
dated 15 September 2023

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MAY IT PLEASE THE HEARING PANEL FOR THE OTAGO REGIONAL COUNCIL AND THE FRESHWATER HEARING PANEL

The Director-General of Conservation Tumuaki Ahurei (Director-General) makes the following submissions for both the non-freshwater parts of the proposed Otago Regional Policy Statement (non-FPI, pORPS) and the freshwater parts of the proposed Otago Regional Policy Statement (FPI):

Introduction

1. This memorandum responds to the Minutes[1] issued by the Chair of both the non-FPI Hearing Panel and the FPI Panel following the release of the Supreme Court decision in *Port Otago Limited v Environmental Defence Society Inc. (Port Otago)*.[2] The Minutes offered the opportunity for submitters on both the non-FPI and FPI parts of the pORPS to make submissions on the implications of the *Port Otago* decision.

2. These legal submissions cover the following:

   (a) an analysis of the *Port Otago* decision, focussing on:

      i. the Supreme Court's discussion on the NZCPS avoidance policies

      ii. the ports policy

      iii. when a policy is directive, and

      iv. how to resolve conflicts between directive policies

   (b) consideration of what this means for the FPI part of the pORPS,

   (c) a discussion of what this means for the non-FPI parts of the pORPS,

   (d) some final comments.

Analysis of the Port Otago decision

[1] Minute 9 of the FPI Panel dated 29 August 2023, and Minute 18 of the non-FPI Panel dated 29 August 2023.
[2] [2023] NZSC 112, dated 24 August 2023

– the Supreme Court confirmed the NZCPS avoidance policies – 11, 13, 15 and 16 are directive

3. The Supreme Court referred to the New Zealand Coastal Policy Statement 2010 (NZCPS), considering the "avoidance" policies[3], and noting policies 11, 13 and 15 have a similar structure:

> *"[10] … First, they define the circumstances in which adverse effects must be avoided. In the case of policy 13, this covers areas of the coastal environment with outstanding natural character. In policy 15, this is with regard to outstanding natural features and outstanding natural landscapes in the coastal environment. In policy 11, this relates to certain species and areas listed, for example indigenous ecosystems and vegetation types that are threatened in the coastal environment or are naturally rare, as well as areas containing nationally significant examples of indigenous community types. Moving one step down on the hierarchy of protection, the policies then provide that, in other cases, significant adverse effects must be avoided and other adverse effects avoided, remedied or mitigated."*

4. The Supreme Court noted for policies 13, 15 (and maybe also 16) the values protected by those policies "… *are subject to the protections in the NZCPS for their own sake …"* and not just related to human enjoyment.[4]

5. The Supreme Court followed its previous decision in *King Salmon* finding the NZCPS avoidance policies have a directive character.[5] The court noted the *King Salmon* case was in the context of policy 13 and in that context "*… prohibition of minor or transitory effects would not likely be necessary to preserve the natural character of coastal environments"*.[6]

6. I submit the court's consideration of the individual avoidance policies in context is significant, as it demonstrates the protected policy values at issue need to be carefully considered in each case.

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[3] The term "avoidance" policies as used by the Supreme Court refers to policies 11 Indigenous biological diversity, 13 Preservation of natural character, 15 Natural features and natural landscapes and 16 Surf breaks of national importance. It does not include policy 10 Reclamation and de-reclamation which is also a highly directive policy, see Legal Submissions for the Director-General of Conservation *Tumuaki Ahurei* Coastal Environment Chapter dated 2 March 2023 at 15

[4] *Port Otago* at [31]

[5] *Port Otago* at [64], referring to *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38 *(King Salmon)* at [129]

[6] *Port Otago* supra at [64], *King Salmon* at [145]

7. The Supreme Court refers to its decision in *Trans-Tasman*[7] and applies the standard of "protection from material harm" as applicable to the NZCPS.[8]

8. I submit it is worthwhile looking a little more closely at the *Trans-Tasman* discussion of 'material harm', which arose from the court's consideration in that case of marine discharge consents under different legislation to the Resource Management Act 1991 (RMA).[9] Glazebrook J introduced the concept as follows:[10]

> *The standard used by the Court of Appeal, "material harm", seems sensible as a bottom line. If the environment is materially harmed, then it cannot be said to have been protected from pollution. On the other hand, it seems most unlikely that the purpose of s 10(1)(b) was to protect the environment against immaterial harm. What amounts to "material harm" and the period over which this is measured will be for the decision-maker to determine on the facts of each case. Of course, harm does not have to be permanent to be material. Temporary harm can be material.*

9. Winkelman CJ also discussed 'material harm' and says:[11]

> *The qualification added by the descriptor "material" is important in making sense of the statutory scheme and in terms of how it operates. Whilst s 10(1)(b) applies to every consent application for discharge of a harmful substance, not every discharge of a harmful substance will cause harm to the environment – material or otherwise. The continental shelf and exclusive economic zone cover a large and varied expanse of seabed. The exclusive economic zone contains a vast volume of ocean water and supports a wide variety of life. Whether harm is material in any one case will require assessment of a multiplicity of factors, such as the volume of the harmful substance discharged into the expanse of the sea, the flora, fauna and natural characteristics of the area of seabed affected, the size of seabed or volume of water affected, and the time for which the damage will last. There are therefore qualitative, temporal, quantitative and spatial aspects to materiality that have to be weighed.*

10. The Chief Justice's comments in *Trans-Tasman* clarify the importance of the relevant statutory scheme when assessing what harm may be 'material', and that there are qualitative, temporal, quantitative and spatial aspects to materiality that must be weighed in the circumstances of each case.

11. In *Port Otago* the Supreme Court concludes:[12]

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[7] *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127
[8] *Port Otago* at [65] – [66]
[9] The Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 applies in that case.
[10] *Trans-Tasman* at [252]
[11] Supra at [310]
[12] *Port Otago* at [68]

> *… the avoidance policies in the NZCPS must be interpreted in light of what is sought to be protected including the relevant values and areas and, when considering any development, whether measures can be put in place to avoid material harm to those values and areas.*

12. Applying these comments, I submit the correct way of looking at whether harm is 'material' is to consider whether the harm is relevant to the values which are protected. This does not create an effects threshold, and it would be a mistake to view the Supreme Court's discussion of 'material harm' in *Port Otago* as a reduction in the policy directive to avoid harm to the values protected by NZCPS policies 11(a), 13(1)(a), 15(a) and 16(b).

– the Supreme Court held the NZCPS policy 9 ports is also directive

13. The Supreme Court discussed Miller J's dissenting judgment in the Court of Appeal decision[13] considering the key word in the NZCPS ports policy to be "requires", and noting in *Port Otago* the Council has no choice in deciding whether to provide for the existing port. The court held on policy 9:[14]

> *… To recognise that something is required is to accept that it is mandatory. So, the directive nature of the ports policy arises from the two verbs taken together.*

14. The Supreme Court accepted, at [72], that where there are two sets of directive policies, then reconciliation between the NZCPS avoidance policies and the ports policy should be addressed in the regional policy statement and regional plan level as far as possible. This is to ensure decision-makers have guidance available to address any conflicts.

– whether a policy is directive depends on its wording

15. Whether other policies have wording to make them directive does require close attention to the text in light of its purpose and context.[15] As the Supreme Court said:[16]

> *… This means that close attention to the context within which the policies operate, or are intended to operate, and their purpose will be important in interpreting the policies. This includes the context of the instrument as a whole, including the objectives of the NZCPS, but*

[13] Supra at [39] referring to *Port Otago Ltd v Environmental Defence Society Inc*. [2021] NZCA 638, at [112]
[14] Supra at [69]
[15] Legislation Act 2019 section 10(1).
[16] *Port Otago* at [60] – [61]

also the wider context whereby the policies are considered against the background of the relevant circumstances in which they are intended to and will operate. …

The language in which the policies are expressed will nevertheless be significant, particularly in determining how directive they are intended to be and thus how much or how little flexibility a subordinate decision-maker might have. … These differences in expression matter.

16. I submit the Supreme Court has considered and found two categories of wording which make some NZCPS policies directive i.e., mandatory, in their context:

    (a) "avoid" as used in NZCPS policies 11(a), 13(1)(a), 15(a) and 16(b); and

    (b) "recognise" together with "requires" as used in NZCPS policy 9.

17. Other NZCPS policies may also be directive, e.g., policy 10 reclamation and de-reclamation which uses the formula "avoid … unless". I submit this policy wording clearly sets out a directive expectation the activity will be avoided unless the specified criteria are met.

18. Outside the NZCPS, the National Policy Statement for Freshwater Management 2020 (NPSFM) has policies which I submit might be considered directive, e.g., policy 11 re freshwater allocation:

    "*Freshwater is allocated and used efficiently, all existing over-allocation is phased out, and future over-allocation is avoided."*

19. Applying this wording, in light of its purpose and context, there is a very clear and directive expectation that over-allocation of freshwater will not occur in the future.

– how should conflicts between the NZCPS avoidance policies and ports policy be addressed?

20. The Supreme Court helpfully summarised how to address conflicts between the NZCPS avoidance policies and ports policy as follows:[17]

[17] *Port Otago* at [83](c)

Where there is a potential conflict between the avoidance policies and the ports policy with regard to a particular project, the decision-maker would have to be satisfied that:

(i) the work is required (and not merely desirable) for the safe and efficient operation of the ports;

(ii) if the work is required, all options for dealing with these safety or efficiency needs have been evaluated and, where possible, the option chosen should not breach the avoidance policies;

(iii) where a breach of the avoidance policies is unable to be averted, any breach is only to the extent required to provide for the safe and efficient operation of the ports.

21. Looking at the first limb, I emphasise the work must be required for both the safe operation of the ports and the efficient operation of the ports, it is not enough to be required for safety or for more efficient operation. As the Supreme Court commented, safety issues may have greater weight than efficiency requirements.[18] However, I submit that does not mean safety concerns alone would be sufficient.

22. Applying the second limb, if the NZCPS protected values could be put at risk and there is a possible option available for the ports which does not breach the avoidance policies, that option should prevail.

23. The final limb applies where there a breach cannot be averted. The Supreme Court's framework requires the breach to be constrained to only that which is required, i.e., necessary for the safe and efficient operation of the ports. Further, this is not a guarantee a resource consent may be granted as all relevant factors would need to be assessed in the particular circumstances.[19]

What does this mean for the non-FPI parts of the pORPS?

24. The Supreme Court, considering the 2019 version of the pORPS, provided suggested wording for the ports policy 4.3.7 proposed therein.[20] The previous 2019 proposed ports policy wording is not carried over into the non-FPI pORPS.

[18] Supra at [79]
[19] Supra at [84]
[20] Supra at [87]

25. In the non-FPI parts of the pORPS, commercial port activities are provided for in the Energy, Infrastructure and Transport chapter (EIT) by Objective EIT-TRAN-O10 and Policy EIT-TRAN-P23, as recommended to be amended in the Section 42A reply report on the EIT chapter.[21] The report writer recommended changes based in part on the evidence of Mr Brass for the Director-General.[22]

26. Policy EIT-TRAN-P23(1) and (2) refer back to the Coastal Environment chapter (CE) policies CE-P3 to CE-P12. The Council Hearing Panel will need to assess the recommendations made in the EIT reply report against the Supreme Court's suggested wording for a ports policy, and more generally following the decision.

27. I submit it could be useful for the Council Report Writer to file supplementary evidence proposing any revisions to EIT-TRAN-P23 applying the *Port Otago* decision, and for submitters to then have an opportunity to file additional evidence in response.

28. Given the limited scope of evidence which would be required, a relatively short timetable for evidence is likely to be appropriate.

The Director-General agrees the Port Otago decision has no impact on the FPI parts

29. I refer to the Opening Submissions for the Otago Regional Council (ORC, Council) in the FPI hearing[23] discussing the *Port Otago* decision. I agree with the conclusion for the FPI parts of the pORPS the *Port Otago* decision does not have any impact.

30. I also agree the NPSFM expressly contemplates and provides a method to resolve potential conflicts with the National Policy Statement for Renewable Electricity Generation (NPSREG) should this be necessary for the FPI.[24]

[21] Reply Report 11. Energy, Infrastructure and Transport, Marcus Hayden Langman, dated 23 May 2023, at section 8, pp 27-29
[22] Evidence of Murray John Brass on behalf of the Director-General of Conservation Tumuaki Ahurei dated 23 November 2023 at paras 205 – 207.
[23] Dated 28 August 2023
[24] Supra, ORC Opening Submissions at 20 – 23

Other matters

31. I note the Memorandum of Counsel for Meridian Energy Limited (Meridian) on the question of giving effect to directive national policy.[25] That counsel suggests the NPSREG is "… *replete with directive objectives and principles*."[26]

32. With respect to counsel for Meridian, while the word "shall" is used frequently throughout the NPSREG[27] and I accept "shall" is a synonym for "must", meaning a mandatory requirement, I submit "shall" as used in the NPSREG differs when contrasted to the values protected by the NZCPS avoidance policies.

33. In light of the purpose and context of the NPSREG I submit "shall" is used therein to ensure decision makers "recognise" the national significance of renewable electricity generation activities and "provide for" these in planning documents by "including" appropriate provisions and "having particular regard" to them in making decisions. This is not equivalent to "recognise" together with "requires" as used in the NZCPS ports policy.

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[25] Memorandum of Meridian Energy Limited Responding to Hearing Panel's Minute (Freshwater) and Minute 18 (Non-Freshwater) concerning implications of decision of Supreme Court in *Port Otago Limited v EDS*, dated 4 September 2023.
[26] Supra at 1(b), and refer NPSREG at preamble, paragraph 5 on p3.
[27] See e.g., NPSREG Policies A, B, C1 and C2