BEFORE THE ENVIRONMENT COURT
I MUA I TE KOOTI TAIAO O AOTEAROA

UNDER	the Resource Management Act 1991
IN THE MATTER	of appeals under Clause 14 of the First Schedule of the Act
BETWEEN	**TRANSPOWER NEW ZEALAND LIMITED** (ENV-2018-CHC-26)
	FONTERRA CO-OPERATIVE GROUP (ENV-2018-CHC-27)
	HORTICULTURE NEW ZEALAND (ENV-2018-CHC-28)

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LEGAL SUBMISSIONS OF COUNSEL FOR SOUTHLAND REGIONAL COUNCIL

TRANCHE 1 - DISPUTED HEARING

SCOPE

12 July 2022

Judicial Officer: Judge Borthwick

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ARATIATIA LIVESTOCK LIMITED
(ENV-2018-CHC-29)

WILKINS FARMING CO
(ENV-2018-CHC-30)

GORE DISTRICT COUNCIL, SOUTHLAND DISTRICT COUNCIL & INVERCARGILL CITY COUNCIL
(ENV-2018-CHC-31)

DAIRYNZ LIMITED
(ENV-2018-CHC-32)

H W RICHARDSON GROUP
(ENV-2018-CHC-33)

BEEF + LAMB NEW ZEALAND
(ENV-2018-CHC-34 & 35)

DIRECTOR-GENERAL OF CONSERVATION
(ENV-2018-CHC-36)

SOUTHLAND FISH AND GAME COUNCIL
(ENV-2018-CHC-37)

MERIDIAN ENERGY LIMITED
(ENV-2018-CHC-38)

ALLIANCE GROUP LIMITED
(ENV-2018-CHC-39)

FEDERATED FARMERS OF NEW ZEALAND
(ENV-2018-CHC-40)

HERITAGE NEW ZEALAND POUHERE TAONGA
(ENV-2018-CHC-41)

STONEY CREEK STATION LIMITED
(ENV-2018-CHC-42)

THE TERRACES LIMITED
(ENV-2018-CHC-43)

CAMPBELL'S BLOCK LIMITED
(ENV-2018-CHC-44)

ROBERT GRANT
(ENV-2018-CHC-45)

SOUTHWOOD EXPORT LIMITED, KODANSHA TREEFARM NEW ZEALAND LIMITED, SOUTHLAND PLANTATION FOREST COMPANY OF NEW ZEALAND
(ENV-2018-CHC-46)

TE RUNANGA O NGAI TAHU, HOKONUI RUNAKA, WAIHOPAI RUNAKA, TE RUNANGA O AWARUA & TE RUNANGA O ORAKA APARIMA
(ENV-2018-CHC-47)

PETER CHARTRES
(ENV-2018-CHC-48)

RAYONIER NEW ZEALAND LIMITED
(ENV-2018-CHC-49)

ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND
(ENV-2018-CHC-50)

Appellants

AND **SOUTHLAND REGIONAL COUNCIL**

Respondent

MAY IT PLEASE THE COURT

1 These legal submissions are filed on behalf of the Southland Regional Council (**Council**) in respect of Topic B, Tranche 1 of the appeals against the Council's decision on the proposed Southland Water and Land Plan (**pSWLP** or **Plan**).

2 By Minute dated 16 June 2022, the Court directed the Council to confer with the parties and file supplementary submissions setting out the law in relation to the scope to pursue relief on appeal.

3 Counsel prepared a draft of these submissions and circulated that draft to parties, asking that counsel identify any parts of the submissions they do not agree with.

4 All parties confirmed to Counsel that they agree with the final submissions set out below.

General legal principles relating to scope

5 Through the appeals process, the Court can only make amendments to the pSWLP to the extent that the Court has jurisdiction (or scope) to do so. The Environment Court's jurisdiction on appeal is not unlimited, as the Court is not a planning authority with executive functions.[1]

6 The principles relating to the Court's jurisdiction to amend a proposed plan on appeal are generally well understood.

7 Clause 14 of Schedule 1 of the RMA empowers people to appeal against plan decisions:

> **14 Appeals to Environment Court**
>
> (1) A person who made a submission on a proposed policy statement or plan may appeal to the Environment Court in respect of—
>
> (a) a provision included in the proposed policy statement or plan; or
>
> (b) a provision that the decision on submissions proposes to include in the policy statement or plan; or
>
> (c) a matter excluded from the proposed policy statement or plan; or

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1 *Mawhinney v Auckland Council* (2011) 16 ELRNZ 608 (HC) at [111].

> (d) a provision that the decision on submissions proposes to exclude from the policy statement or plan.
>
> (2) However, a person may appeal under subclause (1) only if—
>
> (a) the person referred to the provision or the matter in the person's submission on the proposed policy statement or plan; and
>
> (b) the appeal does not seek the withdrawal of the proposed policy statement or plan as a whole.

8 There are two limbs to a determination of scope. Any amendments made through the appeals process must be both:

(a) within the scope of an appeal on the pSWLP; and

(b) within the scope of a submission on the pSWLP.

9 The key principles are further addressed below.

Within the scope of an appeal

10 The scope of an appeal to the Environment Court is determined from the document that initiated the proceedings, in this case the various notices of appeal filed by the appellants.[2]

11 A key consideration is procedural fairness, as "adequate notice must be given to those who might seek to take an active part in the hearing before the Environment Court if they know or ought to foresee what the Environment Court may do as a result of a reference."[3]

12 While an appeal can only be made on a "provision or matter" referred to in a person's submission, these words should be given a liberal interpretation. A broad reference to the provision or matter in the submission is sufficient to give the Court jurisdiction to consider the appeal.[4]

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2 *Scholes v Canterbury Regional Council* [2010] NZEnvC 29 at [13].

3 *Westfield (NZ) v Hamilton City Council* [2004] NZRMA 556 (HC) at [74].

4 *Option 5 Inc v Marlborough District Council* (2009) 16 ELRNZ 1 (HC) at [15].

13 It is sufficient if the changes can fairly be said to be foreseeable consequences of any changes directly proposed in the notice of appeal.[5] In *Westfield (NZ) Limited v Hamilton City Council*, the High Court held:[6]

> I agree that the Environment Court cannot make changes to a plan where the changes would fall outside the scope of a relevant reference and cannot fit within the criteria specified in ss 292 and 293 of the Act: see *Applefields*, *Williams and Purvis*, and *Vivid*, supra.
>
> On the other hand I think it implicit in the legislation that the jurisdiction to change a plan conferred by a reference is not limited to the express words of the reference. In my view it is sufficient if the changes directed by the Environment Court can fairly be said to be foreseeable consequences of any changes directly proposed in the reference.
>
> Ultimately, it is a question of procedural fairness. Procedural fairness extends to the public as well as to the submitter and the territorial authority. Adequate notice must be given to those who seek to take an active part in the hearing before the Environment Court if they know or ought to foresee what the Environment Court may do as a result of the reference. This is implicit in sections 292 and 293. The effect of those provisions is to provide an opportunity for others to join the hearing if proposed changes would not have been within the reasonable contemplation of those who saw the scope of the original reference.

Within the scope of a submission

14 Any amendments proposed before the Court must also be within the scope of a submission. The orthodox test for whether an appeal is within the scope of a submission was outlined by the High Court in *Countdown Properties (Northlands) Ltd v Dunedin City Council* as follows:[7]

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5 *Westfield (New Zealand) Limited v Hamilton City Council*, [2004] NZRMA 556 (HC), at [73]; *Albany North Landowners v Auckland Council* [2017] NZHC 138, at [115].

6 *Westfield (New Zealand) Limited v Hamilton City Council*, [2004] NZRMA 556 (HC), at [72]-[74].

7 *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC), at page 41.

> The local authority or Tribunal must consider whether any amendment made to the plan change as notified goes beyond what is reasonably and fairly raised in submissions on the plan change. … It will usually be a question of degree to be judged by the terms of the proposed change and of the content of the submissions.

15 The High Court in *Albany North Landowners v Auckland Council* confirmed that the reasonably foreseen logical consequence test applied in *Westfield (NZ) Limited v Hamilton City Council* conforms to the orthodox "reasonably and fairly raised" test laid down in *Countdown Properties (Northlands) Ltd v Dunedin City Council*.[8]

16 In *Re an application by Vivid Holdings Ltd*, the Environment Court refined the test in *Countdown Properties (Northlands) Ltd v Dunedin City Council* and identified that any decision of the Council, or requested of the Environment Court on appeal, must be:[9]

(a) fairly and reasonably within the general scope of:

(i) an original submission; or

(ii) the proposed plan as notified; or

(iii) somewhere in between.

17 Issues of scope should be approached in a realistic workable fashion rather than from a perspective of legal nicety.[10] It is not fatal that a submission does not identify the provision that is sought to be amended. In *Albany North Landowners v Auckland Council*, the High Court stated:[11]

> [149] First, as noted at [114] and [135], there can be nothing wrong with approaching the resolution of issues raised by submissions in a holistic way — that is the essence of integrated management demanded by ss 30(1)(a) and 31(1)(b) and the requirement to give effect to higher order objectives

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8 *Albany North Landowners v Auckland Council* [2017] NZHC 138, at [115].

9 *Re an application by Vivid Holdings Ltd* [1999] NZRMA 467 (EnvC), at [19]. See also *Church of Jesus Christ of Latter Day Saints Trust Board v Hamilton City Council* [2015] NZEnvC 166 at [19].

10 *Royal Forest and Bird Protection Society of New Zealand Inc v Southland District Council* [1997] NZRMA 408 (HC) at page 10; *General Distributors Ltd v Waipa District Council* (2008) 15 ELRNZ 59 (HC) at [56] and[59].

11 *Albany North Landowners v Auckland Council* [2017] NZHC 138 at [149].

> and policies pursuant to ss 67 and 75 of the RMA. It is entirely consistent with this scheme to draw on specific submissions to resolve issues raised by generic submissions on the higher order objectives and policies and/or the other way around in terms of framing the solutions (in the form of methods) to accord with the resolution of issues raised by generic submissions.

18 The recent case law confirms that consequential relief may be granted as a matter of law subject to considerations of fairness and the application of *Motor Machinists*.[12] However, this does not mean to say that submissions on lower order provisions in a plan can drive consequential changes further up the hierarchy of provisions in the same document, precisely because they are not usually reasonably foreseeable.[13] Policies and rules should be driven from the top down according to what the High Court described as the orthodox approach.[14]

19 However, there is no jurisdiction for the Court to make amendments to such an extent where those who are potentially affected have not had the opportunity to participate.[15] This would not achieve procedural fairness. The purpose of notifying a plan, along with the submissions and further submissions process, is to inform everyone about what is proposed "otherwise the plan could end up in a form which could not reasonably have been anticipated resulting in potential unfairness".[16]

Legal principles relating to scope of section 274 party relief

20 The leading decision on a s 274 party's capacity to seek relief in proceedings it has joined is *Transit New Zealand v Pearson*.[17] In this case, the Court held that the scope of appeal is the range between what was in the decision being appealed and the relief sought in the appeal.

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12 *Arthurs Point Outstanding Natural Landscape Society Inc v Queenstown Lakes District Council* [2019] NZEnvC 150 at [69].

13 *Arthurs Point Outstanding Natural Landscape Society Inc v Queenstown Lakes District Council* [2019] NZEnvC 150 at [69].

14 *Federated Farmers of New Zealand (Inc) v Mackenzie District Council* [2017] NZEnvC 53 at [177].

15 *Clearwater Resort Ltd v Christchurch City Council* HC Christchurch AP 34/02, 14 March 2003 at [66].

16 *General Distributors Ltd v Waipa District Council* (2008) 15 ELRNZ 59 (HC) at [55].

17 *Transit New Zealand v Pearson* [2002] NZRMA 318 (HC).

21 *Calveley v Kaipara District Council* confirmed that despite amendments to section 274, *Pearson* remains authoritative on the essential point.[18] This is that the scope of the appeal defines the limits of what a section 274 party can pursue by way of relief. The available limits to relief are between what was in the decision being appealed and the relief sought in the appeal.

22 The Court in *Gertrude's Saddlery Ltd v Queenstown Lakes District Council*[19] cited *Meridian Energy Ltd v Wellington Regional Council* as authority for the principle that an incoming section 274 party is not free to define and argue for its own desired outcome but is confined to supporting or opposing what is raised by the scope of the appeal documents.[20]

23 The Court of Appeal confirmed the High Court's decision in *Gertrude's Saddlery*, stating that the appellant in that case had expressly limited the scope of its appeal, and a section 274 party is not able to widen the ambit of that appeal.[21]

DATED this 12th day of July 2022

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P A C Maw / A M Langford
Counsel for the Southland Regional Council

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18 *Calveley v Kaipara District Council* [2015] NZEnvC 69 at [12].

19 *Gertrude's Saddlery Ltd v Queenstown Lakes District Council* [2020] NZHC 3387 at [25].

20 *Meridian Energy Ltd v Wellington Regional Council* [2012] EnvC 148 at [6]-[7].

21 *Gertrude's Saddlery Ltd v Arthurs Point Outstanding Natural Landscape Society Inc* [2021] NZCA 398 at [26].