

Joint Minute 21 of the Non-Freshwater Panel and Minute 11 of the Freshwater Panel
as to closing of hearings

1. The hearings of submissions in relation to the non-freshwater parts of the PORPS were formally orally adjourned without fixed date on 30 May, 2023. That was done particularly to enable opportunity for consideration of any relevant issues that might arise out of the Supreme Court decision on the Port Otago Limited appeal if, as was anticipated, it was to issue during the freshwater hearings; but also so that the final issue of integration of the two processes could be considered further if required.
2. As matters have transpired since 30 May, 2023 other significant developments in RMA terms have occurred with the issue of the NPS for Indigenous Biodiversity 2023 and the National Policy Statement for Greenhouse Gas Emissions from Industrial Process Heat 2023.
3. Those led to the issue of Minutes 15 & 17 in the non-freshwater process setting timetables for submitters & ORC to be able to make any submissions as to their effect on that process. The dates set were for an initial ORC position to be stated by 8 September, 2023, submitters' responses by 15 September, 2023, and for ORC in reply by 22 September, 2023. (In respect of the NPSIB a similar Minute 7 was issued in the Freshwater Hearings process, but provided for that submission process to be contained within those hearings.)
4. Then on 24 August, 2023 the Supreme Court issued its decision in Port Otago Limited v. EDS 2023 NZSC 112.
5. By Minute 18 in the non-freshwater process a timetable was set to enable submitters to make any submissions they wished to make as to the impacts of the Supreme Court's decision on the PORPS process by 15 September, 2023, with ORC's response to be lodged by 29 September, 2023. With the unfortunate passing of Counsel for Port Otago Limited Mr. L Anderson KC Minute 20 extended the time for that submitter only to respond on the Supreme Court decision until 6 October, 2023. ORC's reply to Port Otago Limited was required by 11 October 2023 as it appeared likely ORC was still intending to reply to other submitters by the original date of 29 September, 2023.
6. On 10 October, 2023, by email from its counsel Thea Sefton, ORC advised the Hearings Administrator:

“With respect to Minutes 18 and 20, ORC confirms it does not intend to respond to Port Otago’s memorandum of Counsel dated 6 October, 2023”.

*“With respect to EIT-TRAN-O10 and EIT-TRAN-P23, the wording adopted is the joint position of the Port Otago Limited and ORC experts per the Joint Witness Statement filed Friday 6 October 2023 (copy **attached**). From our legal perspective, this accords with the SC Judgment.”*

7. Therefore, all parties have abided by the timetables set in those Minutes as described. (The final joint ORC & Port Otago Limited response on the Supreme Court decision impact suggested amendments that have no greater weight in our consideration than any other submissions by other parties made on the Supreme Court decision. We are satisfied all submitters have had full opportunity of input to address the impacts of that decision.)
8. The freshwater hearings process was concluded by ORC complying with a Minute 10 requiring some further clarification responses from ORC by 26 September, 2023.

Integration of hearing processes

9. Every regional council is required by the Resource Management Act 1991 (RMA) to prepare and adopt one regional policy statement. s. 60(1) provides:

60 Preparation and change of regional policy statements

(1) There shall at all times be for each region 1 regional policy statement prepared by the regional council in the manner set out in Schedule 1.

10. Section 59 provides that the sole purpose of the single regional policy statement is for it to provide an integrated overview of the issues for a region:

59 Purpose of regional policy statements

The purpose of a regional policy statement is to achieve the purpose of the Act by providing an overview of the resource management issues of the region and policies and methods to achieve integrated management of the natural and physical resources of the whole region.

11. Throughout both sets of hearings we have welcomed and sought input as to how that integration is best achieved in a legislative setting where no specific procedural method is laid down as to how the integrated sole regional policy statement is to be achieved using two different processes.
12. In closing submissions on the freshwater hearings ORC's counsel Mr. S. Anderson suggested a timetable for which would have involved the Panel making recommendations on the freshwater planning instrument first to end the freshwater part of the hearing.
13. Then ORC's counsel proposed a timetable should be set by the Panel for the non-freshwater Panel to consider input from all parties as to how to integrate those freshwater recommendations with the non-freshwater recommendations to achieve an integrated RPS. Those suggestions were made because the RMA itself does not expressly provide any method of linking the two different processes to achieve integration.
14. We have decided that neither process has priority over the other in the RMA. Each process is just that – a procedure, which in each case at the end has to meet the RMA requirement of one integrated regional policy statement as ss 59 and 60 of the RMA require. The Panels in both processes for the Otago RPS comprise the same personnel.

15. Since a 2017 amendment the provisions of the RMA now include some overall procedural principles in s.18A. We interpret those principles as being of particular relevance to a situation such as this where a clear procedural lacuna exists. We are required to achieve one integrated planning document, but are required to do that using two entirely different processes, which have different appeal rights. The lacuna lies in the fact that there is no statutory procedural guidance as to how we are to integrate the recommendations we make in two separate reports to achieve that one planning document.

16. We consider that section 18A of the RMA provides some helpful practical guidance:

18A Procedural principles

Every person exercising powers and performing functions under this Act must take all practicable steps to—

(a) use timely, efficient, consistent, and cost-effective processes that are proportionate to the functions or powers being performed or exercised; and

(b) ensure that policy statements and plans—

(i) include only those matters relevant to the purpose of this Act; and

(ii) are worded in a way that is clear and concise; and

(c)

17. The provisions of s.18A must also be read and applied in conjunction with the hearings procedure provision s.39 (1) of the RMA relating to non-freshwater hearing processes. It concludes that a hearing panel in a non-freshwater process “*shall establish a procedure that is appropriate and fair in the circumstances.*” In Schedule 1 Part 4 of the RMA a similar direction is found in clause 48 (1) which provides that a freshwater hearings panel must “*regulate its own proceedings in a manner that is appropriate and fair in the circumstances;...;*”

18. Bearing those various directives in mind we intend to exercise our recommendatory powers to achieve an efficient and cost-effective process, which ensures the purpose of the Act is met. We will do that in both processes by ensuring sustainable management of Otago’s resources is provided for in one regional policy statement that provides for the integrated management of Otago’s resources - which is what ss. 59 and 60 of the RMA require.

19. Accordingly, we have decided to make each set of separate reasoning and recommendations by way of two separate appendices to a report that will have attached to it one final recommended regional policy statement.

20. A third appendix will contain the recommended final form of the one PORPS expressly specified by s.60 of the RMA. That recommended regional policy statement will have the same blue shading as was required for the separate hearing processes to mark out the freshwater instrument provisions from the non-freshwater provisions.

21. A fourth Appendix will be a tracked change version of the original notified version of the PORPS. It will be intended to explain how submitters can determine the reasoning and source of any recommended changes in the separate processes.

Procedural outcome

22. As a result the Panel in both processes does not feel it requires any further information from submitters than the mountain of material we are working on at present to make final recommendations. As stated in some closing remarks by the Panel we remain grateful for the very full measure of participation and constructive information we have been provided with both by submitters and ORC.
23. The purpose then of this Joint Minute is to formally advise that the hearings in each process are now closed.

Dated 17 October, 2023

R.D.Crosby
Chair

Non Freshwater Hearing Panel and Freshwater Hearing Panel