

## MEMORANDUM

**Date:** 9 November 2023  
**To:** Lois Easton  
**From:** Lucy de Latour, Kate Dickson

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### TE TAI O POUTINI PLAN – SCOPE REGARDING STRATEGIC DIRECTIONS

1. You have asked us to provide some further explanation of the principles of scope in relation to plan-making, in particular in relation to the Strategic Directions hearing of the Te Tai o Poutini Plan (TTPP). We understand that the Hearing Panel has asked about the extent of scope for substantial change to the strategic objectives, including making some objectives policies and placing them elsewhere in the plan, or amalgamating objectives.

#### Summary of scope principles

2. As set out in our legal submissions dated 13 October 2023, clause 10 of Schedule 1 of the RMA provides for the making of decisions on provisions and matters raised in submissions. When undertaking this assessment, the Panel must be satisfied that there is scope to make any amendments to the TTPP, in terms of:
  - (a) Submissions received are “on” the TTPP; and, if so,
  - (b) Any amendments are within the scope of a submission such that the Panel has jurisdiction to recommend amendments.
3. In terms of whether an amendment proposed is within the scope of a submission, the orthodox test is as follows:<sup>1</sup>

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.

  - (a) This test has been refined over time through case law, and has been expressed as a sort of “continuum”, with any decision of the Council (or Panel in this case) needing to be fairly and reasonably within the general scope of:<sup>2</sup>
    - (i) An original submission; or
    - (ii) The proposed plan as notified; or
    - (iii) Somewhere in between.
4. Issues of scope should be approached in a realistic, workable fashion, rather than from a perspective of “legal nicety”.<sup>3</sup> This requires consideration of the whole relief package detailed in submissions in a holistic manner.
5. The consideration of scope requires the Panel to consider the relief sought in a realistic workable fashion, while seeking to ensure that amendments are not made to the TTPP that would not have been appreciated by persons that have not had the opportunity to participate further.
6. The potential relief that can be provided to a submitter (and therefore amendments that can be made to the TTPP) is not confined purely to the words used or suggested by a submitter –

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<sup>1</sup> *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC) at 41.

<sup>2</sup> *Re an application by Vivid Holdings Ltd* [1999] NZRMA 467 (EnvC) at [19].

<sup>3</sup> *Royal Forest and Bird Protection Society of New Zealand Inc v Southland District Council* [1997] NZRMA 408 (HC) at 10; *General Distributors Ltd v Waipa District Council* (2008) 15 ELRNZ 59 (HC) at [56] and [59].

the important consideration is the intent of the submission, and whether the proposed amendment is reasonably and fairly raised by the submission itself.

7. Changes that are considered to be incidental or consequential to other changes are also allowed. Consequential changes can flow downwards, for example if a submission requesting amendment is accepted on an objective or policy, but there is a subsequent method or rule that would then be incompatible with the amended objective or policy such that it also requires amendment.<sup>4</sup>

#### **Scope for amendments to the strategic directions provisions**

8. We understand that the Panel has requested further information regarding the scope in submissions to amend the Strategic Directions section of the TTPP, including by potentially including policies, additional objectives, or relocating provisions to other parts of the TTPP.
9. While we have not addressed scope as it may be provided in specific submissions or in relation to specific provisions, we have sought to provide some general information that may assist in applying the principles of scope to some of the particular submissions on the TTPP.

#### *Extent to which scope is provided in general submissions*

10. The TTPP is subject to a number of general submissions, from a range of submitters. Some of these submissions seek broad and general relief, with a number seeking withdrawal of the TTPP in its entirety.
11. Given the “continuum” type approach that has previously been adopted by the Courts in relation to scope, these submissions on their face provide a significant amount of scope for amendments. Feasibly, amendments could be made to a number of provisions that would be considered to be somewhere between the relief sought in these submissions (deleting the whole plan) and the provisions as notified.
12. However, when relying on these general submissions to provide scope for amendments, the Panel will also need to bear in mind that there is still a question of degree to consider in terms of whether the amendment proposed is reasonably and fairly raised in the submissions. If the Panel considers that a proposed amendment is not reasonably and fairly raised in a submission (and therefore would not have been an anticipated result of making that submission), this will tend to suggest that there is limited to no scope for that particular amendment.
13. This is consistent with the approach taken by the High Court in *Albany North Landowners v Auckland Council*, where the Court stated that:<sup>5</sup>

It is entirely consistent with this scheme [of the RMA] 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.

14. In this case, there was a difference between submissions that were too generic to reasonably signal changes at specific locations, but in reality the submissions squarely raised the issue of residential intensification. Submissions such as those seeking further intensification in coastal suburbs and close to town centres were relied on to intensify the zoning of properties in Howick. The Court determined that in combination, the submissions were sufficient to provide scope for this particular rezoning (even if the area in question was not mentioned in the submissions), as the submissions reasonably and fairly raised the issue of intensification. The Court was satisfied that other parties had also appreciated this impact of the submissions, as they had submitted in opposition to the general submissions.<sup>6</sup> The key consideration is whether the planning outcome is a reasonably foreseen and otherwise logical consequence of the submission, which the Court noted was an evaluative matter.<sup>7</sup>

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<sup>4</sup> *Campbell v Christchurch City Council* [2002] NZRMA 332 (EnvC) at [20].

<sup>5</sup> *Albany North Landowners v Auckland Council* [2017] NZHC 138 at [149].

<sup>6</sup> *Albany North Landowners v Auckland Council* [2017] NZHC 138 at [238] – [240].

<sup>7</sup> *Albany North Landowners v Auckland Council* [2017] NZHC 138 at [153].

*Where “scope” may not be necessary*

15. To the extent that the Panel is considering making changes that do not alter the effect or content of the TTPP (for example, possibly relocating provisions to other areas of the TTPP), this may be able to be achieved under clause 16 of Schedule 1 of the RMA, rather than relying on scope in submissions.
16. Clause 16(2) of Schedule 1 of the RMA allows for a local authority to make an amendment to a proposed plan to alter any information, where such an alteration is of minor effect, or may correct any minor errors.
17. In some cases, relocating provisions to other parts of the TTPP may be considered to be of minor effect. However, to do so, the Panel would need to be satisfied that such a change was of minor effect (and if it is not of minor effect, clause 16 would not be available).

*Previous examples of significant restructuring occurring through plan drafting*

18. We are aware of a number of situations where there has been a significant restructuring or redrafting of certain provisions throughout the plan-making process, including the addition of new provisions.
19. In one scenario, we are aware of a plan that was notified with a single objective. During the hearing process it was determined that this approach was not satisfactory, and therefore the Panel in that case established scope in the submissions to include a number of additional objectives.
20. While every plan is case-specific (and dependent on the particular submissions that have been lodged in relation to it), this demonstrates that scope is to be approached from a realistic perspective, rather than being considered unnecessarily restrictive.

**Wynn Williams**