

## MEMORANDUM

**Date:** 31 May 2024  
**To:** TTPP Hearings Panel  
**From:** Lucy de Latour | Kate Dickson

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### TTPP Deliberations – Panel’s ability to give effect to higher order documents

1. On 12 May 2024, the TTPP Hearings Panel (**Panel**) issued Minute 28, requesting advice in relation to its deliberations on topics already heard.
2. This memorandum addresses the following specific questions set out in Minute 28:
  - (a) Where there is no submission providing scope where we consider the TTPP does not give effect to a Higher Order document, can the Panel recommend amendments to the TTPP utilising sections 74 and or 75 of the RMA?
  - (b) If not, does the Panel have other options to ensure the TTPP gives effect to Higher Order documents, and if so, what are they?
  - (c) If the operative date of an NPS precedes the date of notification of the TTPP does that affect the legal position in any way, including utilising sections 74 & 75 of the RMA?
3. Minute 28 also provides some background context raising questions about how the Panel should give effect to higher order direction, including some specific questions in relation to the National Policy Statement on Highly Productive Land (**NPS-HPL**).
4. We have addressed each of these questions below.

### Executive summary

5. While sections 74 and 75 of the RMA require a district plan to give effect to Higher Order documents, the Panel is limited to making recommendations on submissions, within the scope of the submissions on the TTPP in accordance with Schedule 1 of the RMA. Whether an amendment sought is within the scope of submissions on the TTPP will depend on whether that amendment was “reasonably and fairly raised” as part of the submission, or a “reasonably foreseen logical consequence”. Case law tells us that this analysis should not be approached in an overly legalistic way.
6. Sections 74 and 75 of the RMA do not provide any further ability for the Panel to make recommendations beyond the scope of submissions, and we are unaware of any case law supporting this proposition, irrespective of whether those changes are needed to ensure that the TTPP gives effect to Higher Order documents.
7. In relation to Higher Order documents that have come into force since the TTPP was notified, the case law indicates that the Panel should strive to give effect to the recent Higher Order documents as far as practicable (within the scope of submissions).
8. However, many national policy statements include further implementation steps that are required to occur before provisions are amended. Both the NPS-HPL and NPS-IB require that they are given effect to “as soon as practicable” or “as soon as reasonably practicable”, and in the case of some issues before the Panel it may not yet be practicable if these implementation steps have not occurred.
9. In these cases, we consider the most appropriate question for the Panel to ask when it is determining whether the relief sought gives effect to the national policy statement, is whether the relief gives effect to the objectives and policies of the NPS, rather than the specific implementation clauses.

10. The legal position is unchanged where a document was in force prior to the notification of the TTPP (in that the Panel is still limited to recommendations within the scope of submissions).
11. Where the Panel finds that it does not have scope for an amendment, and that an amendment to a provision would be required to give effect to a Higher Order document, the remedy is either a variation, or a future plan change. This will be a matter for the TTPP Committee to determine, as such a decision is beyond the powers delegated to the Panel. The Panel will need to make a recommendation on submissions that best gives effect to the Higher Order documents.
12. If the Panel considers that a matter does not give effect to a Higher Order document, then it may make a comment to that extent in its recommendations report (which we expect will be required in instances where the Panel does not consider the section 74 and 75 tests are met). For example, the Panel may wish to indicate that the recommendation it has made is that which it considers best gives effect to the Higher Order documents within the scope of submissions.
13. The TTPP Committee will need to determine next steps where the Panel considers that a provision does not give effect to a Higher Order document, noting the potential risk of Environment Court declarations being brought, the Environment Court directing a change to the plan under section 293 of the RMA on appeal, or limited weight being given to the relevant provision in a consenting context on the basis that it does not address the requirements of sections 74 and 75 of the RMA. A possible further step to be taken by the TTPP Committee is the notification of a variation to the TTPP, which would go through a similar hearing process until it “caught up” to the TTPP.
14. Our detailed advice follows.

#### **Background and scope for Panel’s recommendations**

15. As set out in the Panel’s Minute, sections 74 and 75 of the RMA require that territorial authorities prepare and change their district plans in accordance with a national policy statement or planning standard, and that a district plan must give effect to any national policy statement, coastal policy statement, planning standard, or regional policy statement (referred to collectively for the purposes of this advice as Higher Order documents).
16. Case law has established that “give effect to” means implement. It is a strong directive, creating a firm obligation on the part of those who are subject to it.<sup>1</sup>
17. Any amendments made through the hearing process are required to be within the scope of submissions lodged. Difficulty arises where there is an inability to give effect to a national policy statement or regional policy statement within the scope of submissions. This often arises where a higher order document comes into force after notification of a planning instrument.
18. The question the Panel is ultimately left with is, where the Panel finds that the TTPP is not in accordance with, or does not give effect to the Higher Order document(s), but there is no submission seeking that relief, is any amendment to give effect to the Higher Order document therefore out of scope and unavailable to the Panel?
19. However, before we address that question, we have outlined for completeness the Panel’s powers in terms of making changes to provisions in light of the submissions made.

#### *Recommendations within scope of submissions*

20. Schedule 1 of the RMA governs the TTPP hearing process, including clause 10 which provides the requirements in relation to decisions on submissions through this process. Clause 10 of Schedule 1 provides that a local authority must give a decision on the provisions and matters raised in submissions. In making recommendations on the provisions of the

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<sup>1</sup> *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [77].

TTPP and any matters raised in submissions, the Panel must be satisfied that there is scope to make any such amendments.

21. Previous case law has classified the possible amendments to be made to provisions in five groups:<sup>2</sup>
- (a) Amendments sought in written submissions;
  - (b) Amendments that respond to grounds of written submissions;
  - (c) Amendments that address cases presented at the hearing of submissions;
  - (d) Amendments to wording not altering meaning or effect; and
  - (e) Other amendments not in groups (a) to (d),
- with only the changes in group (e) being held to be unavailable.
22. This case law highlights that the Panel is not restricted to relief related to the exact wording sought by a submitter in considering whether an amendment is within the scope of submissions. For example:
- (a) In the particular circumstances of that case, group (b) as outlined above was addressing situations where a local authority wished to implement the intent of the submission, rather than the exact wording sought in the submission itself (as submitters would not always specify the exact relief they sought, or the relief sought may not be available).
  - (b) Group (c) was intended to address situations where relief sought in a submission might have been so broadly stated that any informed person who had read the original submission would have appreciated that the council might have accepted parts of the submission by making amendments to meet the criticisms.
23. The requirement to make recommendations only within the scope of submissions is an important characteristic to ensure procedural fairness, so as to ensure that persons potentially affected are not denied an effective opportunity to participate in the plan change process.<sup>3</sup>
24. The Courts have variously expressed the test for whether there is scope within a submission as being whether an amendment is “reasonably and fairly raised” by a submission,<sup>4</sup> or is a reasonably foreseen logical consequence.<sup>5</sup>
25. Whether an amendment is within the scope of a submission should be approached in a realistic workable fashion, rather than from a perspective of legal nicety. This has also been expressed on a continuum, identifying that decisions of councils (and panels) must be:<sup>6</sup>
- “fairly and reasonably within the general scope of:
- (i) An original submission; or
  - (ii) The proposed plan as notified; or
  - (iii) Somewhere in between.”
26. Through these authorities, it is apparent that while the Panel’s recommendations must be within the scope of submissions, the scope provided by those submissions should not be read

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<sup>2</sup> *Foodstuffs (Otago Southland) Properties Ltd v Dunedin City Council* (1993) 2 NZRMA 497 (PT), approved in *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC).

<sup>3</sup> *Palmerston North City Council v Motor Machinists Limited* [2013] NZHC 1290.

<sup>4</sup> *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC) at 41.

<sup>5</sup> *Albany North Landowners v Auckland Council* [2017] NZHC 138 at [115].

<sup>6</sup> *Re an application by Vivid Holdings Ltd* [1999] NZRMA 467 (EnvC) at [19], cited with approval in *Gock v Auckland Council* [2019] NZHC 276 at [43].

in an overly legalistic or restrictive way – provided that there is no prejudice or procedural unfairness by making the amendment.

### **Panel's decision-making framework**

27. In light of the above principles, it is important to acknowledge the role of the Panel in this case. The Panel is tasked with making a recommendation on submissions, that will form the basis of the TTPP Committee's decision on submissions under clause 10 of Schedule 1 of the RMA.
28. While the Panel is required to comply with sections 74 and 75 when undertaking its task (being the fundamental statutory tests for a district plan), these sections do not prevail over the Panel's obligation to make recommendations on submissions.
29. Once a plan is notified for submissions under Schedule 1 of the RMA, all of the decision-making requirements relate to decisions on submissions. We acknowledge that in some circumstances it will not be possible for a district plan to give effect to all Higher Order documents within the scope of submissions, for example where a new Higher Order document has been introduced mid-process. The RMA provides other avenues for challenging a district plan on the basis that it does not meet the tests in sections 74 and 75 (discussed further below).
30. Sections 74 and 75 of the RMA do not provide any powers over and above these requirements of Schedule 1 and established in case law to give effect to Higher Order documents. While it is a requirement of a district plan to give effect to Higher Order documents, for natural justice reasons, the Panel is not able to make recommendations or decisions that are outside the scope of submissions.
31. We are unaware of any case law that suggests the requirement to give effect to a Higher Order document provides the ability to recommend changes to a district plan beyond the scope of submissions. This can be contrasted with specific provisions in relation to both the freshwater planning and the intensification planning instrument processes which do explicitly provide hearing panels with the ability to recommend changes beyond the scope of submissions.<sup>7</sup>
32. With that in mind, in our opinion the Panel's obligation is to make recommendations on submissions that give effect to Higher Order documents, to the extent that it is able to do so within the scope of submissions (noting the principles of scope as outlined above).

### **Recommendations to give effect to recent Higher Order documents outside the scope of submissions**

33. We have provided legal submissions to the Panel regarding how the Panel should approach giving effect to Higher Order documents that have come into force since the TTPP has been notified.<sup>8</sup> The two relevant Higher Order documents are the NPS-HPL and the NPS-IB. We do not repeat the content of those legal submissions for the purposes of this advice.
34. However, we reiterate the key points made in those legal submissions relevant to this question:
  - (a) To the extent that there is scope to do so, the Panel should strive to give effect to the Higher Order documents introduced after the TTPP was notified;
  - (b) However, the ability to give effect to the NPS-IB and the NPS-HPL is confined by the extent that there is scope within submissions, and scope within the TTPP itself.
35. The NPS-HPL and NPS-IB both have a timeframe by which they are required to be given effect to. For example, the NPS-HPL provides that local authorities must give effect to it from its commencement date, but that changes to objectives, policies and rules in district plans to

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<sup>7</sup> See RMA ss 49(2) and 99(2)(b) which both provide that recommendations "are not limited to being within the scope of submissions".

<sup>8</sup> Opening Legal Submissions on behalf of Te Tai o Poutini Plan Committee, dated 13 October 2023, at [35] – [49].

give effect to the NPS-HPL must be notified as soon as practicable, but not later than 2 years after the maps of highly productive land in the relevant RPS become operative.<sup>9</sup>

36. Correspondingly, the NPS-IB provides that every local authority must give effect to it as soon as reasonably practicable, but must notify changes to plans that are necessary to give effect to it within eight years after commencement (17 October 2030).<sup>10</sup>
37. Giving effect to a national policy statement “as soon as practicable” or “as soon as reasonably practicable” does not provide an ability to make recommendations outside the scope of submissions. For example, in a case where the policy statement has come into force after notification of the TTPP, then it may not be practicable to fully give effect to that Higher Order document through the TTPP process, as the TTPP was not notified with the intention of giving effect to that document.
38. In considering whether it is practicable to give effect to a Higher Order document the Panel will need to specifically consider whether there is scope to do so. If there is, it is likely to be practicable to give effect to a national policy statement that did come into force following notification of the TTPP as part of the current process, rather than requiring a future planning process for that aspect.
39. However, in making its recommendations on submissions, we acknowledge the Panel will also need to bear in mind that many of the implementation clauses of national policy statements for example will not be able to be given effect to at this point in time, as they require detailed further steps to occur. These implementation clauses will need to be given effect to through future planning processes further down the line, so in many cases the TTPP will not be able to fully give effect to national direction, regardless of the scope of submissions.
40. In these cases, we consider the most appropriate question for the Panel to ask when it is determining whether the relief sought gives effect to the national policy statement, is whether the relief gives effect to the objectives and policies of the NPS, rather than the specific implementation clauses. This is consistent recent findings of the High Court in *Southern Cross Healthcare Ltd v Eden Epsom Residential Protection Society Inc* that the obligation to complete other implementation steps does not limit the obligation to give effect to the objectives and policies of the NPS itself.<sup>11</sup>
41. If the Panel considers that a matter does not give effect to a Higher Order document, then it may make a comment to that extent in its recommendations report. For example, the Panel may wish to indicate that the recommendation it has made is that which it considers best gives effect to the Higher Order documents within the scope of submissions. The next step to be taken will be up to the TTPP Committee, as outlined further below.

#### *Specific example regarding NPS-HPL*

42. However, there may be circumstances where the scope to give effect to the relevant documents is broader than first anticipated, despite them coming into force after notification of the TTPP.
43. The Panel has used the specific example of giving effect to the NPS-HPL provisions that refer to “protect”, rather than “maintain” highly productive land, as was notified in the TTPP.
44. Given the principles of scope we have outlined above, a submission would not necessarily have to specifically seek the word “protect” be used in relation to highly productive land. It

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<sup>9</sup> NPS-HPL, cl 4.1.

<sup>10</sup> NPS-IB, cl 4.1. We note that clause 4.2 of the NPS-IB provides that local authorities must publicly notify any plan or change necessary to give effect to subpart 2 of Part 3 (significant natural areas) and clause 3.24 (information requirements) within five years after the commencement date which is 17 October 2027, although this date is proposed to be extended to 31 December 2030 by the recently introduced Resource Management (Freshwater and Other Matters) Amendment Bill.

<sup>11</sup> *Southern Cross Healthcare Ltd v Eden Epsom Residential Protection Society Inc* [2023] NZHC 948, at [86].

may be sufficient to allow the Panel to change the wording to “protect” if there are submission points seeking the TTPP better give effect to the NPS-HPL, for example.

45. On that basis, given the NPS-HPL provides for the protection of highly productive land, a submission that seeks further consistency with the NPS-HPL has (in our opinion) reasonably and fairly raised the possibility that the wording of TTPP provisions might be changed to better align with that used in the NPS-HPL.
46. For example, we have undertaken a brief assessment of the summary of decisions requested and consider the Horticulture New Zealand (S486) submission seeking a new objective in the Rural Zone to give effect to the NPS-HPL, that “highly productive land is protected for primary production purposes” may be relevant.

#### **Operative Higher Order document before notification of TTPP – effect on legal position**

47. We do not consider that the legal position in terms of the Panel’s powers and obligations is altered where a Higher Order document was already in place before the TTPP was notified. The Panel is still required to make decisions on submissions, and sections 74 and 75 of the RMA do not provide any additional powers to make recommendations outside the scope of submissions, where that relief would give effect to a Higher Order document.
48. In our opinion, there is more likelihood that scope for potential amendments will be provided in submissions if the document was in existence before the TTPP was notified (because submitters will have had the opportunity to seek changes to ensure that the TTPP does give effect to it). Accordingly, the Panel may find that the change required is reasonably and fairly raised in a submission if the relevant document has been in place for some time.
49. However, the same options for the TTPP Committee as outlined below will apply if the Panel considers that the provisions do not give effect to a Higher Order document and that there is no scope in the submissions to amend the provisions accordingly.

#### **Options to ensure the TTPP gives effect to Higher Order documents**

50. While the Panel is able to identify possible provisions or parts of its recommendations that do not give effect to Higher Order documents, its delegation does not extend to providing direct control over options to remedy this.
51. The Panel’s delegation in this case is to make recommendations to the TTPP Committee on the submissions (consistent with the decision-making requirements under Schedule 1 of the RMA).
52. Where the Panel is clear that an amendment would be required to give effect to the Higher Order document, and that cannot be achieved in response to a submission on the TTPP, then it may make a comment to that extent in its recommendations report (which we expect will be required in instances where the Panel does not consider the section 74 and 75 tests are met).
53. The TTPP Committee will need to determine next steps where the Panel considers that a provision does not give effect to a Higher Order document. Any further action that the TTPP Committee takes in response to those recommendations is a matter for the Committee. Therefore, it is not within the Committee’s delegations to the Panel for the Panel to recommend that a variation occur.
54. However, the TTPP Committee may choose to address this through a variation to the TTPP. A variation to a proposed plan can be initiated at any time before the approval of the plan.<sup>12</sup>
55. Any variation would go through largely the same process as the TTPP has to date (for example, public notification, submissions and hearings), until it “catches up” to the remainder of the TTPP. This means that where notification of a variation is required to give effect to a Higher Order document, this may delay parts of the TTPP from being resolved or becoming operative.

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<sup>12</sup> RMA, Schedule 1, cl 16A.

56. The Panel does not have the ability to direct that a variation occur, but the TTPP Committee will need to give careful thought to its next steps (as a variation would likely be more efficient than a full additional planning process in future).
57. There is a risk that if the TTPP Committee does not pursue a variation, or otherwise seek to address plan provisions that it is aware do not necessarily give effect to Higher Order documents, Environment Court declaration proceedings may be brought.<sup>13</sup> Alternatively, if there are appeals on the TTPP then the Environment Court may also seek to initiate a change to the TTPP under section 293 of the RMA. There may also be limited weight placed on the provisions of the TTPP (compared to the corresponding provisions in the relevant Higher Order document) in the interim in a consenting context if it is not achieving the requirements of the RMA.

### **Conclusion**

58. We trust that our advice assists. Please let us know if you have any further questions, or would like clarification on any matters.

**Wynn Williams**

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<sup>13</sup> RMA, s 310(bb).