



## **May it please the Hearing Panel**

The following additional matters are submitted on behalf of the Director-General of Conservation *Tumuaki Ahurei* (Director-General):

### **Introduction**

1. Representatives for the Director-General appeared before the Selwyn District Council Hearing Panel for the Strategic Directions Topic on Tuesday 10 August 2021.
2. Two questions arose during the appearance for the Director-General as follows:
  - (a) Is there sufficient scope within the Director-General's submission for the relief sought, as refined by Ms Ching's evidence dated 26 July 2021 (and now further refined by her supplementary evidence)?
  - (b) Is there anything in the Strategic Directions Chapter of the proposed Selwyn District Plan (proposed Plan) which would negate other more specific provisions in the proposed Plan which deal with indigenous biodiversity – with particular reference to EIB-O1?

### **Is there scope in his submission for the relief sought by the Director-General?**

3. The starting point for scope is whether the submission – and in this case the relief sought – is “on” the proposed Plan?
4. The test for scope remains the two limb test initially stated by the High Court in *Clearwater Resort Ltd v Christchurch City Council*<sup>1</sup> and reaffirmed by the High Court in *Palmerston North City Council v Motor Machinists Ltd*<sup>2</sup>. As stated by Kós J in *Motor Machinists* in relation to the first limb:

*[80] For a submission to be on a plan change, therefore, it must address the proposed plan change itself. ...*

*[81] ... the submission must reasonably be said to fall within the ambit of the plan change. ...*

5. Justice Kós described the second limb as follows:

*[82] ... whether there is a real risk that persons directly or potentially directly affected by the additional changes proposed in the submission have been*

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<sup>1</sup> 14/03/03, HC Christchurch AP34/02

<sup>2</sup> [2013] NZHC 1290, Kós J, now Kós P

*denied an effective response to those additional changes in the plan change process.*

6. Returning to the Director-General's submission<sup>3</sup> on the Strategic Directions Chapter, the submission was (in summary):
  - On all Strategic Directions provisions<sup>4</sup>, oppose and sought relief to *"Amend the strategic directions objectives to give effect to the RMA, NZCPS and CRPS. ..."*
  - SD-DI-O2 – District Wellbeing and Prosperity<sup>5</sup>, oppose and sought relief to delete the notified objective and replace with: *"Selwyn's residents and communities are able to provide for their social, cultural and economic wellbeing and their health and safety."*
  - SD-DI-O4 – Our Environment<sup>6</sup>, oppose in part as the objective does not highlight the importance of indigenous biodiversity. As relief sought to retain notified objective and add new objective to address this gap.
  - New SD-DI-Ox – indigenous biodiversity objective to fulfil the requirements of s6(c) and s31(1)(b)(iii) RMA, with wording proposed in the relief sought as follows:  
  
*"Selwyn's significant indigenous biodiversity is protected or enhanced, and restored; and other indigenous biodiversity is maintained or enhanced, and restored; with all indigenous biodiversity having improved connections and improved resilience."*
7. There were further submissions (in support) from Royal Forest & Bird Society (RF&B)<sup>7</sup> and Upper Waimakariri/ Rakaia Group<sup>8</sup>, on the Director-General's submission points on the Strategic Directions.
8. I submit the Director-General's submission and the relief sought are clearly "on" and can reasonably be expected to come within the ambit of the proposed Plan. Further submissions were made on the Director-General's submission and

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<sup>3</sup> Submission of Director-General of Conservation *Tumuaki Ahurei* on proposed District Plan dated 11 December 2020, Submitter DPR-0427

<sup>4</sup> Supra, DPR-0427, point 021

<sup>5</sup> Supra, DPR-0427, point 022

<sup>6</sup> Supra, DPR-0427, point 023

<sup>7</sup> Submitter DPR-407, FS points FS187, FS188 and FS189

<sup>8</sup> Submitter DPR-0301, FS points FS163, FS164 and FS165

interested persons have been able to respond to the changes sought by the Director-General.

9. For the Strategic Directions hearing, the Director-General refined his relief sought in evidence from Ms Ching<sup>9</sup> in part in response to the section 42A report. That evidence and refined relief was then relied upon by RF&B when that submitter filed its legal submissions<sup>10</sup>.
10. I submit this shows the Director-General's submission and refined relief sought can fairly be considered to be "on" the proposed Plan; and other interested persons have had the opportunity to respond and further submit on the original submission and, then take account of the evidence filed for the Director-General in the Strategic Directions Topic hearing.
11. I submit the Director-General's submission and relief comes within the scope of the proposed Plan, meeting the *Clearwater* test as reaffirmed in *Motor Machinists*.

**Does the Strategic Directions Chapter as notified "negate" other parts of the proposed Plan dealing with indigenous biodiversity/ natural environment?**

12. Questions from the hearing panel focused on the Natural Environment Matters Chapter and the Ecosystems and Indigenous Biodiversity Section, referring to Objective EIB-O1 as addressing both section 6(c) and section 31(1)(b)(iii) RMA. As notified<sup>11</sup> EIB-O1 states:

*EIB-O1 Indigenous biodiversity within the district is managed through the exercise of kaitiakitanga and stewardship, in order that:*

1. *Areas of significant indigenous vegetation and significant habitats of indigenous fauna are protected to ensure no net loss of indigenous biodiversity, and*
2. *Other indigenous biodiversity values are maintained and enhanced, and*
3. *The restoration and enhancement of areas of indigenous biodiversity is encouraged and supported.*

<sup>9</sup> Evidence of Amelia Grace Ching dated 26 July 2021, paragraphs 60-61, 69 and Appendix 1 - Recommendations

<sup>10</sup> Legal Submission on behalf of the Royal Forest and Bird Protection Society of New Zealand Inc, dated 2 August 2021 at paragraph 2.

<sup>11</sup> The Director-General has sought amendments to EIB-O1, and other submitters also submitted on this objective and this section of the proposed Plan.

13. This is not the place for an analysis of objective EIB-O1 or the policies intended to implement it. The question is whether the Strategic Directions Chapter could 'negate' EIB-O1 and similar provisions in the proposed Plan.
14. I submit the application of the Interpretation Directive in the SD-Overview could lead to objective EIB-O1 being negated. Ms Ching's evidence of 26 July 2021<sup>12</sup> refers to the "interpretation directive" which requires:  
  
*"For the purposes of preparing, changing, interpreting and implementing the District Plan, all other objectives and policies in all other chapters of this District Plan are to be read and achieved in a manner consistent with these Strategic Directions".*
15. The Strategic Directions Chapter has four sections setting out Strategic Directions Objectives for: District Identity; Infrastructure, Risk and Resilience; Mana Whenua Values; and Urban Form and Development. The only provisions of the Strategic Directions Chapter which could apply to natural environment matters are in the District Identity section.
16. As notified, there are five District Identity Objectives under headings as follows:
  - SD-DI-O1 – Sensational Selwyn
  - SD-DI-O2 – District Wellbeing and Prosperity
  - SD-DI-O3 – Integration and Land use, Ecosystems, and Water – Ki Uta Ki Tai
  - SD-DI-O4 – Our Environment
  - SD-DI-O5 – Vibrant and Viable Centres
17. The SD-DI-O1, SD-DI-O2 and SD-DI-O5 objectives cover Selwyn's amenity values, economy, and peoples' social activities in its centres. SD-DI-O3 supports the management of Selwyn's land and water resources and gives effect to the National Policy Statement for Freshwater Management 2020 and its fundamental concept – Te Mana o te Wai.
18. This leaves only SD-DI-O4 – Our Environment to cover any natural environment and indigenous biodiversity values for Selwyn. I refer to my previous legal submissions<sup>13</sup> where I discussed the effect the interpretation directive has in requiring all other objectives and policies in all other chapters to be read and achieved in a manner consistent with the Strategic Directions.

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<sup>12</sup> Paragraphs 41-43.

<sup>13</sup> Legal Submissions for the Director-General of Conservation *Tumuaki Ahurei* dated 2 August 2021, paragraphs 13-17.

19. When looking at objective EIB-O1 and focusing on indigenous biodiversity which is not significant, under SD-DI-O4 this requires the maintenance and enhancement of indigenous biodiversity values to be achieved where this is: “... *significant to Selwyn’s character, cultural heritage, or are of spiritual importance to Ngāi Tahu ...*”.
20. Reading objective EIB-O1 to be consistent with and achieve SD-DI-O4, could result in a future decision maker deciding some indigenous biodiversity which does not meet one of the listed significance criteria in SD-DI-O4 is insignificant and needs to only be maintained without enhancement, which may result in continuing gradual decline.
21. The decision-maker may go further and consider to achieve SD-DI-O2 to support Selwyn’s prosperous economy and the most efficient use of land, developments that have adverse effects on indigenous biodiversity which do not meet the listed significance criteria in SD-DI-O4 could be mitigated by replacement with other different types of indigenous biodiversity, or non-native amenity plantings which the decision-maker considers will make Selwyn an attractive and pleasant place to live taking into account the character of the individual community, and achieving SD-DI-O1.
22. These scenarios highlight the difficulty that in reading the notified wording of SD-DI-O4 (being the only objective which applies to natural environment values) in combination with the interpretation directive, there is a real and significant risk that achieving the Strategic Directions as a whole in the proposed Plan will negate other objectives and policies which are intended to address s6(c) and s31(1)(b)(iii) RMA, as well as other higher instruments including the Canterbury Regional Policy Statement.
23. This is also without looking in depth at the Infrastructure, Risk and Resilience objectives, which understandably prioritise needs of important infrastructure. I submit there is a real risk that needs of important infrastructure could negate the EIB-O1 objective as this applies to maintaining indigenous biodiversity.

### **Further supplementary evidence and Conclusion**

24. Ms Ching has now provided further supplementary evidence<sup>14</sup> which proposes amending SD-DI-O4 – Our Environment (and which no longer proposes a separate objective to cover Selwyn’s historic and cultural heritage values) to

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<sup>14</sup> Supplementary evidence of Amelia Grace Ching dated 16 August 2021

achieve the desired outcome that in reading and achieving the Strategic Directions, the proposed Plan is not contrary to Part 2 and section 31 of the RMA.

25. In conclusion, I submit the Strategic Directions objectives are unbalanced without the amendments sought by the Director-General (as further refined by Ms Ching's supplementary evidence). If the Council does make these amendments this would ensure the proposed Plan is in accordance with Part 2 of the RMA and the Council's functions under s31.<sup>15</sup>



Pene Williams

Counsel for the Director-General of Conservation *Tumuaki Ahurei*

17 August 2021

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<sup>15</sup> Section 74(1) RMA