

Before the Proposed Porirua District Plan Hearings Panel In Porirua

Under the Resource Management Act 1991 (the Act)

In the matter of the Proposed Porirua District Plan - Hearing Stream 4: Energy, Infrastructure and Transport, General District-Wide Matters

Between **Porirua City Council**
Local authority

And **Transpower New Zealand Limited**
Submitter 60 and Further Submitter FS04

Memorandum of counsel for Transpower New Zealand Limited - Hearing Stream 4

Dated 15 February 2022

大成 DENTONS KENSINGTON SWAN

89 The Terrace
PO Box 10246
Wellington 6143

P +64 4 472 7877
F +64 4 472 2291
DX SP26517

Solicitor: E J Hudspith/ L D Bullen
E ezekiel.hudspith@dentons.com/ liam.bullen@dentons.com

MAY IT PLEASE THE HEARINGS PANEL

- 1 Transpower New Zealand Limited (**'Transpower'**) is a submitter and further submitter on the Proposed Porirua District Plan (**'PDP'**). Transpower appeared in front of the Hearings Panel for Hearing Stream 4 on 14 February 2022.
- 2 During Transpower's appearance, the Chair asked Counsel about the extent to which section 6 Resource Management Act 1991 (**'RMA'**) includes 'bottom lines', and the nature of the relationship between section 6 and the National Policy Statement on Electricity Transmission 2008 (**'NPSET'**). The Chair's question was posed in the context of the *NZ King Salmon* Supreme Court decision¹ which dealt with the 'environmental bottom line' issue.
- 3 Counsel's preliminary view at the hearing was that the *NZ King Salmon* decision had identified certain provisions of the New Zealand Coastal Policy Statement 2010 (**'NZCPS'**) as containing bottom lines, rather than section 6 itself. Counsel undertook to confirm that position in writing in order to assist the Hearings Panel.

Commentary in *NZ King Salmon*

- 4 Since the hearing, Counsel has reviewed the relevant parts of the *NZ King Salmon* case. Counsel was unable to find any reference to sections 6 or 7 RMA as providing 'environmental bottom lines' in and of themselves.
- 5 Most of the discussion of 'environmental bottom lines' in *King Salmon* relates to the two competing approaches to section 5 itself, which was the subject of very early RMA jurisprudence. These approaches are discussed at paragraph [38] onwards. Earlier cases² favoured an 'environmental bottom line approach' (whereby subsections 5(2)(a), (b) and (c) are fundamental), which was later superseded by the 'overall broad judgment approach'. The latter is probably most famously articulated in *North Shore City Council* decision³, referring to *New Zealand Rail*⁴ (see para [41] of *King Salmon*).

¹ *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited* [2014] NZSC 38

² The Supreme Court refers to: *Shell Oil New Zealand Ltd v Auckland City Council* W8/94, 2 February 1994 (PT); *Foxley Engineering Ltd v Wellington City Council* W12/94, 16 March 1994 (PT); *Plastic and Leathergoods Co Ltd v The Horowhenua District Council* W26/94, 19 April 1994 (PT); and *Campbell v Southland District Council* W114/94, 14 December 1994 (PT).

³ *North Shore City Council v Auckland Regional Council* (1996) 2 ELRNZ 305 (EnvC) at 345–347.

⁴ *New Zealand Rail Ltd v Marlborough District Council* [1994] NZRMA 70 (HC) at 85-86.

- 6 It was not until later that these concepts were applied to the NZCPS. It had been argued by EDS that the language of policies 13(1)(a) and 15(a) creates a bottom line,⁵ and the Majority concluded that:⁶

[132] Policies 13(1)(a) and (b) and 15(a) and (b) do, in our view, provide something in the nature of a bottom line. We consider that this is consistent with the definition of sustainable management in s 5(2), which, as we have said, contemplates protection as well as use and development ...

- 7 Based on Counsel's review, it seems clear that the comments in *NZ King Salmon* in relation to 'bottom lines' were made in the context of the NZCPS policies rather than section 6 RMA itself. The Court was focussing on the concept of sustainable management, and its components of 'use, development, and protection' as being broad enough to provide a basis for bottom lines to be set in subsidiary instruments.
- 8 On that point and in relation to section 6 RMA in particular, the Majority went on to say that:⁷

[149] **Section 6 does not, we agree, give primacy to preservation or protection;** it simply means that provision must be made for preservation and protection as part of the concept of sustainable management. **The fact that ss 6(a) and (b) do not give primacy to preservation or protection within the concept of sustainable management does not mean, however, that a particular planning document may not give primacy to preservation or protection in particular circumstances.** This is what policies 13(1)(a) and 15(a) in the NZCPS do. Those policies are, as we have interpreted them, entirely consistent with the principle of sustainable management as expressed in s 5(2) and elaborated in s 6.

Implications for section 6 and the NPSET

- 9 In light of this commentary in *King Salmon*, Counsel submits that:
- a These comments in *King Salmon* in relation to 'bottom lines' were made in the context of the specific NZCPS policies rather section 6 RMA itself.

⁵ *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited* [2014] NZSC 38 at [43].

⁶ *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited* [2014] NZSC 38 at [132].

⁷ *Environmental Defence Society Incorporated v The New Zealand King Salmon Company Limited* [2014] NZSC 38 at [149]. Emphasis added.

- b The statement that section 6 does not itself give primacy to preservation or protection (but that a particular planning document may nonetheless do so) is also notable.
 - c Logically, if a planning document can give primacy to preservation or 'protection' as a component of sustainable management, then a planning document could also give primacy to other aspects of sustainable management that correspond to 'use' and 'development'.
 - d While it would perhaps be going too far to say the NPSET gives 'primacy' to the use and development of the National Grid, it is clearly intended to at least *elevate* the 'use' and 'development' of the National Grid relative to other aspects of sustainable management, at least to some degree (and relative to other activities). This is in light of the identified national significance of the National Grid, and is consistent with the way in which the National Grid enables people to provide for their various wellbeing's (s 5(2)), as well as with the efficient use and development of natural and physical resources (s 7(b)).
- 9.2 Overall, Counsel submits that it is not necessary or appropriate for the Hearings Panel to attempt to second guess or 'read down' the NPSET in light of the directions in section 6. Section 6 considerations are already reflected in the NPSET itself.
- 9.3 For completeness, Counsel notes the following comments of the High Court (Wylie J) in considering the proposed Auckland Unitary Plan:⁸
- the NPSET is not as all embracing of the Resource Management Act's purpose set out in s 5 as is the New Zealand Coastal Policy Statement. In my judgment, a decision-maker can properly consider the Resource Management Act's statutory purpose, and other Part 2 matters, as well as the NPSET, when exercising functions and powers under the Resource Management Act. They are not however entitled to ignore the NPSET; rather they must consider it and give it such weight as they think necessary.
- 9.4 It should also be observed that after making these high level comments, the High Court went on to characterise Policy 10 of the NPSET as containing a strong

⁸ *Transpower New Zealand Ltd v Auckland Council* [2017] NZHC 281 at [84].

directive,⁹ and ultimately found a number of the proposed provisions amounted to an error of law because they failed to implement the NPSET.¹⁰

- 9.5 Counsel submits that other parts of the NPSET (including in relation to managing effects of the National Grid) are equally directive. While Counsel would be reluctant to suggest that section 6 is ever *irrelevant*, it is submitted that in this case sufficient guidance to the Hearings Panel is provided within the NPSET itself.



Ezekiel Hudspith/ Liam Bullen
Counsel for Transpower NZ Limited

⁹ *Transpower New Zealand Ltd v Auckland Council* [2017] NZHC 281 at [85] – as quoted at paragraph 7.3 of Counsel’s legal submissions.

¹⁰ For example, at [104]: “Permitting subdivision involving the creation of lots for new building platforms for non-sensitive activities (buildings) in urban zones does not give effect to the NPSET, the regional policy statement and objective D26.2(1). Again there is an error, or errors, of law.”