3 February 2020

Hon Tony Randerson QC  
Chair, Resource Management Review Panel  
Ministry for the Environment  
By email: rmreview@mfe.govt.nz

Dear Tony

Submission on Transforming the Resource Management System: Opportunities for Change – Issues and Options Paper

Port Otago Limited (Port Otago) welcomes the opportunity to comment on Transforming the Resource Management System: Opportunities for Change – Issues and Options Paper (“the Issues and Options Paper”).

Port Otago is wholly owned by the Otago Regional Council. It owns the land-based commercial port infrastructure in both the Dunedin area and Port Chalmers, and has occupancy rights to the coastal marine area at and adjacent to its berths and commercial port area. It also maintains the commercial shipping channels, berths and swinging area within Otago Harbour.

Otago Harbour is a sheltered natural harbour which provides deep water access to the port facilities. This combination of deep water and natural shelter has meant that the largest vessels serving the New Zealand coast call on Port Chalmers. Port Otago is a primary export port for the South Island region of New Zealand. Its continued operation and development to respond to changing shipping needs is essential to the economic performance of the South Island, and New Zealand.

Port Otago considers that it is vitally important that the review panel consider whether the Resource Management Act 1991 (RMA) adequately provides for the provision of nationally significant infrastructures such as ports.

Port Otago has significant experience with many of the issues with the RMA identified by the Panel, including uncertainty, complex and costly processes, and litigation to attempt to resolve resource management issues. As a consequence, this submission addresses many of the issues and options that are canvassed in the Issues and Options Paper.

Scope of the Reform of the Resource Management System

1. Port Otago is pleased to see acknowledgement in the Issues and Options Paper of the need to recognise the complex interactions between economic, social and environmental systems. It strongly supports this point, as it relates directly to the benefits derived from port activities. It considers that it is important that the review does not focus purely on improvements to environmental protection, but that it also reduces the negative impact that the RMA can have on the economic and social systems of New Zealand.

2. The aim of the review is to “improve environmental outcomes and enable better and timely urban and other development within environmental limits”. Port Otago suggests expanding the aim of the review to also include the need to enable significant infrastructure, such as ports, to develop and operate without costly processes, uncertainty and constant litigation.
3. Port Otago supports the review of entities that are best placed to perform resource management functions. Reform could lead to better integration of various aspects of the planning system that are currently disparate. For example, management of the coastal marine area interface with the terrestrial area; and management of heritage values with overlaps between local/regional/national entities and policies.

4. An issue that is not identified in the Issues and Options Paper is that significant infrastructure is struggling with the need to litigate in order to be able to continue to operate or expand. This submission addresses this matter in further detail in the comments on specific issues as identified in the Issues and Options Paper.

**Reasons Why the System has not responded effectively**

5. The Issues and Options Paper notes that there is a “perception that the RMA processes are overly cumbersome and provide insufficient certainty for major infrastructure”. This comment does not give sufficient recognition of the real costs of the RMA processes for major national infrastructure, such as ports. Rather, the focus on this commentary is on infrastructure to support urban development. Other nationally significant infrastructure that supports our national economy, including both rural and urban New Zealand, must also be considered in this reform of the RMA.

6. The Issues and Options Paper identifies that the RMA’s focus on environmental effects can mean that the positive benefits of development (e.g. ports) are under-emphasised despite such positive benefits being core aspects of “sustainable management” as used in section 5 of the RMA: “sustainable management means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while...”. Port Otago strongly supports the identification of this issue, since it strikes at the core of its operations, in that ports exist to support trading and the economy, which in turn provides for social and economic wellbeing for the community.

7. Port Otago supports the identification that there has been insufficient recognition of the importance of proactive and strategic planning in the system. This has been an issue for ports, as plans prepared under the RMA (regional plans, district plans) do not readily provide for the ongoing operation and expansion of major infrastructure such as ports.

8. Port Otago also supports the recognition that there is a lack of effective integration across the resource management system. This has particularly been the case with the integration of land use planning and planning for the coastal marine area, with Port Otago invariably requiring consents under multiple plans and National Environmental Standards from both the regional council and territorial authority for day-to-day operational matters.

9. The review identifies that the resource management system is unnecessarily complex, creates uncertainty, and that processes are litigious and costly. Port Otago agrees this is an issue with the RMA. It experiences these issues on a regular basis, including for the major consent projects such as the Project Next Generation capital dredging consents and renewal of dredging disposal consents, as well for minor works such as new buildings, and earthworks.

10. Port Otago supports the identification of a problem with poor plan drafting and ineffective management of cumulative environmental effects. It recognises that in many cases this is due to a lack of resourcing of the work, and for this reason supports both institutional changes and legislation changes that will simplify the plan preparation process, reduce duplication of effort (e.g. in preparation of regional policy statements, regional plans and district plans) and thus reduce the work burden on regional councils and territorial authorities.
Issue 1: Legislative Architecture

11. Feedback is sought on whether the statutory frameworks for land use planning and environmental protection should remain integrated or be separated into two statutes. Port Otago considers that the current integrated approach is preferable to separate legislation for environmental management and planning for land use and development. To split the RMA would of necessity involve an extended period of uncertainty, costs and litigation. New plans and policies would have to be developed under the new statutes with consequential delays, costs and litigation. Splitting the RMA would not necessarily address the issue of how to both enable environmental protection while also enabling development. The integrated nature of the RMA significantly enhances Port Otago’s ability to respond to changing global shipping requirements. Separating environmental approvals from the RMA would diminish this benefit.

12. Port Otago has seen a degrading of the one-stop RMA integrated philosophy over the years and is concerned that separating environmental approvals from the RMA would lead to a further degradation of that ‘one-stop’ approach. It now needs to request more approvals and involve more entities. Examples include:
   - Heritage Act, district plan heritage and archaeology authority requirements – both Historic Places Trust and the territorial authority assess an application. In the case of the repurposing of a heritage building into a new administration building, multiple approvals for the different phases of the project are currently being sought from multiple agencies;
   - Wildlife approvals overlap with RMA ecology requirements; and
   - Marine and Coastal Area (Takutai Moana) Act 2011 overlaps with RMA iwi consultation, resulting in additional but duplicative consultation and engagement processes.

Issue 2: Purpose and principles of the RMA

13. The review asks what changes should be made to Part 2 of the RMA. In Port Otago’s view, the reform must address the conflicts created by the trade-offs/balance in a “broad overall judgement” approach vs the bottom lines approach to interpretation of the RMA. Part 2 of the RMA was written to require a trade-off, but suffers from a lack of clarity in the lawmaking. Subsequent disparate National Policy Statements (NPS), and the policies and plans that have been prepared under these NPS, have led to many years of uncertainty in meaning, confusion and conflict.

14. Port Otago would suggest a reframing of Part 2 of the RMA to more clearly provide for outcomes-based planning. Outcomes-based planning should recognise the needs of nationally and regionally significant infrastructure (e.g. ports). Ports make a major contribution to economic and social wellbeing: ninety-nine percent of imported and exported goods enter and exit New Zealand via a port; volumes are growing rapidly; and there is a need for ports to be able to upgrade to handle the increasing sizes of ships; and ports provide the necessary infrastructure to support the growing cruise ship tourism market.

15. There is disconnect between the matters contained within section 6 “matters of national significance” and the social and economic outcomes sought overall, as the benefits of infrastructure are not acknowledged. There is a disconnect between the current NPS’ and section 6, with only limited infrastructure acknowledged through NPS’ to date.

16. The “other matters” in section 7 of Part 2 are uncertain and in Port Otago’s experience typically distract from good planning outcomes, despite not being nationally significant matters. They can be used to derail good planning outcomes, as they offer protection of existing amenity and environmental quality over and above future outcomes.
**Issue 5: Climate Change**

17. Port Otago recognises the need for climate change adaptation and mitigation but is concerned that any changes to the RMA or other legislation recognise that some nationally and regionally significant infrastructure, such as ports, must be situated on the coast and must construct structures within the areas that may be identified as likely to be subject to sea level rise. Such structures include groynes and wharfs. Port Otago would be concerned to see any changes that might seek to prevent hard structures in the name of natural hazard management, as ports do not have the option to retreat in response to sea level rise.

**Issue 6: National Direction**

18. The Issues and Options Paper questions the role of NPS and mandatory national direction in setting environmental standards. Port Otago seeks that reform of the RMA ensures that provisions be clearly made in NPS for the ongoing use and expansion of nationally and regionally significant infrastructure (such as ports). The High Court Decisions\(^1\) that the New Zealand Coastal Policy Statement (NZCPS) ‘avoidance policies’ prevail over policies in relation to regionally significant infrastructure and the Supreme Court decision on aquaculture\(^2\) illustrate that there have been significant problems in the way NPS’ are crafted and implemented. As a result of this, Port Otago is currently seeking leave to appeal the EDS v Otago RC decision\(^3\) to the Supreme Court in order that the matter can be revisited in the context of the nationally significant Ports at Dunedin and Port Chalmers.

19. The High Court decision of EDS v Otago RC held that the policies in the NZCPS that required avoidance of activities that would impinge on protected values would necessarily result in prohibited activities in rules in the plan and it rejected the proposition that minor breaches of the avoidance policies are permissible or that potential adverse effects could be avoided or managed. The Court said at [55]:

> Most significantly such a prohibition does not allow the use of adaptive management whereby predicted effects that carry an element of risk are avoided or managed by having monitoring and changing behaviour in accordance with that monitoring.\(^4\)

20. This decision creates potential problems for the efficiency and safety of the national port network because the High Court has made it clear that a port can only operate if its operation has no adverse effect on the values protected in the NZCPS. Potential future difficulties for Port Otago include:

a. Harbour channel beacons that are important for safe navigation of the harbour channel will not be able to be placed alongside the Aramoana Salt Flats, as that will likely become a protected area with no adverse effects permitted (not even the minor effects of construction of a beacon) through the upcoming review of the regional coastal plan;

b. The inability to use adaptive management to prevent adverse effects means it will be difficult (perhaps impossible) to renew disposal consents as coastal processes are dynamic and adaptive management is the practical means by which potential adverse effects on protected values, such as the nearby nationally significant surf breaks, can be avoided.

**Issue 7: Policy and planning framework**

21. Port Otago supports the identification in the Issues and Options Paper that there is potential to reform the hierarchy of policy statements and plans, and ways to improve plan drafting and

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\(^1\) Environmental Defence Society v Otago Regional Council [2019] NZHC 2278; Royal Forest And Bird Protection Society Of New Zealand Inc V Bay of Plenty Regional Council [2017] NZHC 3080

\(^2\) Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd [2014] NZSC 38

\(^3\) Environmental Defence Society v Otago Regional Council [2019] NZHC 2278

\(^4\) Ibid
processes for plan making. Port Otago also specifically supports the need to move from an ‘effects-based’ planning system to an ‘outcomes’ approach.

22. The Act provides for a hierarchy of planning documents providing direction on how the use, development and protection of resources can occur, going from the more general to more specific. Conflicts arise when the more general, high level planning documents do not adequately recognise the trade-offs that must be made to enable some development (e.g. regionally and/or nationally significant infrastructure) to take place. The hierarchy of documents means that even where aspects of higher order documents are considered inappropriate in the circumstances, there is no discretion or flexibility to fail to give effect to those higher order policies. Port Otago considers that this has happened when policies have been written using “avoid” language, without sufficient recognition of how this will then be interpreted in the lower order policies and plans. Requiring greater integration of plans may go some way to addressing this problem (e.g. unitary plans, combined plans, etc).

23. An outcomes-based approach to planning would achieve greater certainty for major infrastructure, and Port Otago therefore supports steps being taken towards developing this approach. The move from an ‘effects-based’ to an ‘outcome-based’ planning system should recognise that adaptive management is a method that can be used where the extent of potential adverse effects may not be well understood and can reflect the potential for change. Adaptive management can provide assurance that environmental ‘bottom lines’ will be met.

24. Port Otago has had significant involvement in plan development in Otago, with the regional policy statement and the second generation RMA district plan. Based on these experiences, there is a concern that the processes are long and costly, and that the plans frequently duplicate the policies of high level documents, or the wording of Part 2 of the RMA, without adding more specific policy content tailored to the local context.

25. ‘Reducing complexity’ is included as a guiding criterion for any changes to be made to the structure of institutions that operate in the resource management system. Port Otago supports this criterion, and considers that a simplified plan-making structure might be an overarching NPS, a national set of rules determining when consent is needed or not, with local policy statements below these if needed to deal with any local issues not covered by the NPS. An alternative might be more combined plans/unitary authorities. Port Otago’s projects that require consent often straddle MHWS and require approval from both the regional and the territorial authority. It is considered that there is unnecessary duplication of polices and plans, and, as a result, overly complex and duplicated resource consent applications and assessments.

26. Port Otago would also recommend that the different activity classifications be reduced – too often infrastructure projects end up in an overly onerous non-complying activity status since a lot of approvals are invariably needed. Often, a minor matter is the trigger for non-complying consent approval. This then creates a large hurdle for the whole development – one that is not appropriate for essential infrastructure.

27. Options identified in the review include either expanding or restricting the ability to apply for a private plan change. Port Otago considers that the private plan change process provides important flexibility for developers and infrastructure providers to seek changes to policies and plan provisions without the need to wait for the local government to carry out the plan preparation work.

28. Port Otago opposes the removal of any appeal rights in relation to plan making. It has found it necessary to appeal regional council and territorial authority documents as the unique issues facing the port are invariably not given sufficient attention during the first stage hearing, despite our involvement in these.
Issue 8: Consents / approvals
29. Port Otago supports simplification of all aspects of the resource consent application process, including simplifying the categories of consent, simplifying notification requirements, and reducing the complexity of minor consent processes by only requiring certain applications to conduct a full assessment of environmental effects. Specifically in relation to notification, Port Otago understands and accepts the need for publicly notified consents for major development, however, it is becoming increasingly concerned about the ability to deal with simple operational matters (e.g. earthworks and buildings on the port’s land-based facilities) without lengthy consent processes being required before that work can take place.

30. Port Otago opposes the idea of notifying all applications and considers that there is a need to have the option for non-notified consents. Port Otago is a long term operator and it seeks to engage fully with the local community. It regularly relies on non-notified processes and the ability to supply affected party approvals as a result of its engagement effort. It considers that consent processes should be better tailored to the scale of investment for a particular project.

31. Regarding the consideration of the process for designations, Port Otago submits that the scope of entities able to apply for requiring authority status should be broadened to include ports, or ‘nationally or regionally significant’ ports. Port Otago supports the existing processes for designations, including the decision making role of requiring authorities in relation to notices of requirement.

32. Port Otago opposes the removal of any appeal rights in relation to resource consent applications. It has found it necessary to object to or appeal unworkable consent conditions, and to appeal to third party applications (e.g. marine farming) proposed within its operational areas, and so needs to be able to retain appeal rights.

Issue 10: Allocation
33. The Issues and Options Paper recognises that the RMA plays an important role in the allocation of access to resources, and notes that the review will address whether changes should be made to the way that resources are allocated by the RMA (e.g. permissions to occupy coastal marine space). It is noted that allocation under the RMA has generally been on a ‘first in first served’ basis. One option identified is to consider the role of specific tools in resource allocation such as spatial planning, transferable rights, tendering or auctioning. Any changes to the way that access and use of the coastal marine area is allocated needs to ensure that the allocation process avoids high costs, uncertainty and protracted litigation.

34. Port Otago considers that the RMA review could usefully provide legislation granting approval for the rollover of operational area occupation consents for ports under s.384A of the RMA. Port Otago’s occupation consent5 is due to expire in 2026 and it understands this is similar for all ports in New Zealand. Collectively, the renewal of these coastal permits through normal consenting processes is an unnecessary cost as the consents are necessary for the safe operation of all ports.

Issue 11: System monitoring and oversight
35. In relation to compliance monitoring, Port Otago sees a significant disjoint between the monitoring and scientific research that it (and other applicants) undertake to obtain and monitor consents, and that collated by councils. Like many infrastructure providers, it uses the CS Vue database to monitor its consents, but this is not linked to council systems. It is considered that the Government could usefully invest in a tool that would integrate applicant and council RMA monitoring so this could be rolled out nationally in a consistent manner.

5 Otago Regional Council reference 2010.011.V1
Conclusion
Port Otago thanks the review panel for the comprehensive Issues and Options Paper, and for the opportunity to make comment. It would welcome the opportunity to discuss this submission with the review panel and looks forward to continuing to engage with you on this important reform. If you have any questions or would like to discuss the detail of our submissions, please contact Environment Manager, using the contact details below.

Yours sincerely

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