BEFORE THE Waikato District Council Hearing Commissioners

UNDER the Resource Management Act 1991

IN THE MATTER of the Proposed Waikato District Plan

LEGAL SUBMISSIONS ON BEHALF OF WAIKATO-TAINUI – HEARING 21B: LANDSCAPES

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INTRODUCTION AND POSITION

1. These legal submissions are made on behalf of Waikato-Tainui.

2. They are supported by evidence from the following persons:

   (a) Donna Flavell – Waikato-Tainui;
   (b) Rukumoana Schaafhausen – Waikato-Tainui;
   (c) Antoine Coffin – Cultural Landscapes; and
   (d) Gavin Donald – Planning.

3. The central issue for Waikato-Tainui in respect of this topic is landscape recognition for the entirety of Te Awa o Waikato, including its catchment, befitting its significance to Waikato-Tainui and iconic national status.

4. Presently the Te Awa o Waikato is:

   (a) Operative District Plan:

      (i) Schedule 5A of the Franklin Section - Recognised as an outstanding natural feature with outstanding wildlife values in (and shown on the planning maps as such); and

      (ii) Waikato Section – recognised as an outstanding natural feature and landscape

(with some if its margins shown as a 'Landscape Policy Area' on the planning maps).

(b) Proposed to be recognised in the Proposed Waikato District Plan (**PWDP**), as an outstanding natural feature from the river delta to inside the river mouth, inclusive of some river margins and the river islands within this locale. Upstream, some of its margins are recognised as a Significant Amenity Landscape.[1]

5. In both instances, Te Awa o Waikato has been dissected, rather than viewed holistically. The original Waikato-Tainui submission requested that the entirety of Te Awa o Waikato be recognised as an Outstanding Natural Feature and/or Landscape (**ONF/L**).[2]

6. The evidence of Mr Coffin and Mr Donald provided alternate methods for landscape recognition by way of a Māori site of Significance or Cultural Landscape. These options were intended to reflect the unique history and resultant legislative context to Te Awa o Waikato, where contemporary landscape assessment has failed to keep pace with the statutory imperatives now applicable to the Waikato Region.[3] Responding to the recognised limitation of contemporary landscape assessment, these alternate options were intended to achieve the same end as would arise in respect of the ONF/L requested Waikato-Tainui's original submission.[4] As noted in the evidence of Ms Flavell:[5]

> "… as with our other settlement mechanisms, those arrangements must be equivalent to or exceed the existing recognition afforded outstanding landscapes and features in the planning context."

7. Since then, Mr Donald has filed further detail in respect of Waikato-Tainui's proposal in response to Council's S42A Rebuttal Evidence that asked to better understand the proposed objective, policy and rule framework supporting a

[1] The extent of SAL for the River generally corresponds with the extent Landscape Policy Area identification.
[2] Waikato-Tainui Submission to the Proposed Waikato District Plan, at [38].
[3] By virtue of the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010.
[4] They are not options for which an alternative landscape status less than an ONF/L is supported.
[5] Donna Flavell Landscape Evidence, 21 August 2020, at [6.2].

bespoke overlay within the identified landscape area.[6] Mr Donald's further detail has proposed to label the Waikato River as an "Outstanding Cultural Landscape".

OUTLINE OF SUBMISSIONS

8. These submissions:

   (a) address the law in respect of the landscape issues that present themselves;

   (b) deal with the question of scope; and

   (c) respond to some residual matters arising in the S42A Rebuttal Evidence.

THE LAW

9. It appears agreed by the parties that the orthodox approach to contemporary landscape *assessment* is not fit to achieve the relief sought by Waikato-Tainui.

10. In counsel's submission, the statutory framework in fact provides two avenues to provide for the relief sought by Waikato-Tainui:

   (a) in the context of contemporary landscape law and assessment as it relates to the RMA alone there is evolving recognition of "cultural landscapes"; and

   (b) in the Waikato Catchment, inclusive of the Waikato District, contemporary landscape assessment is coloured by statutory imperatives arising from the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 (the **Waikato River Act**).

Landscape law and assessment: the orthodox approach

11. It is well accepted that the objectives, policies and rules of district plans should provide for the values and landscape capacity of outstanding natural features and landscapes in order for a council to meet its obligations under sections 6(b) and 7(c) of the Resource Management Act 1991 (the **RMA**).[7]

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[6] Council's s42A Rebuttal Evidence at [157].
[7] Upper Clutha Environmental Society Inc v Queenstown Lakes District Council [2019] NZEnvC 205 at [139]–[140].

12. The phrase 'outstanding natural features and landscapes' arising from section 6(b) is not defined in the RMA. As a result, a substantial body of case law has developed regarding the definition and identification of outstanding natural features and landscapes.

13. In assessing whether a landscape is 'outstanding', the Court has held that the test as to what is outstanding should be reasonably rigorous:

    (a) The landscape is required to be "remarkable, exceptional, or notable".[8]

    (b) The most common approach employed by Councils and Courts is to stand back and ask, "does the landscape or feature stand out among the other landscapes and features of the district or region?"[9]

14. The Environment Court has previously defined 'natural' as "existing in or caused by nature; not artificial; uncultivated; wild".[10]

15. Importantly in this context, 'natural' does not mean pristine, instead:[11]

> The word "natural" is a word indicating a product of nature and can include such things as pasture, exotic tree species (pine), wildlife both wild and domestic and many other things of that ilk as opposed to man-made structures, roads, machinery, etc.

16. Other critical points that arise from the case law are:

    (a) <u>It is important that natural landscapes and features are viewed in their full context.</u> The Environment Court in *Carter Holt Harvey HBU Ltd v Tasman District Council* found that it was impossible to separate the

[8] *Man O'War Station v Auckland Council* [2015] NZHC 767 at [10]. Earlier Environment Court case law also identified outstanding to mean "conspicuous, eminent, especially because of excellence; remarkable": *Wakatipu Environmental Society Inc v Queenstown Lakes District Council* [2000] NZRMA 59 (EnvC) at 82.
[9] According to the Environment Court in *Western Bay of Plenty Council v Bay of Plenty Regional Council* [2017] NZEnvC 147, at [136].
[10] *Wakatipu Environmental Society Inc v Queenstown Lakes District Council* at 87.
[11] *Harrison v Tasman District Council* [1994] NZRMA 193 at 197. See also Environmental Law Online *Outstanding Natural Landscapes* at 4.

outstanding qualities of the Moutere Inlet (an outstanding natural feature) from those of the Kina Peninsula, which was one of the Inlet's defining features. The Court accepted that, considered in isolation, the Kina Peninsula might be no more than a typical coastal feature. However, "[a]s with anything", it was important to view the Peninsula in context and "the context [was] that the Peninsula is an integral part of an outstanding natural feature".[12]

(b) The identification of outstanding natural landscapes does not depend on the protection these areas will receive. The High Court has confirmed that "the identification of ONLs drives the policies. It is not the case that policies drive the identification of ONLs".[13]

17. In *Wakatipu Environmental Society* the Court considered that the question of feature versus landscape is a matter of fact and degree, and questions of scale need to be considered. Ultimately, the test is overall distinctness, having regard to the assessment criteria.[14]

18. With respect to landscape assessment, it is accepted by all parties that the orthodox approach to assessment of outstanding natural features and landscapes is based on the *WESI* criteria identified by the Environment Court in *Wakatipu Environmental Society Incorporated v Queenstown-Lakes District Council*,[15] as applied using three attribute categories by later decisions:[16]

(a) biophysical.

(b) sensory; and

(c) associative.

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[12] *Carter Holt Harvey HBU Ltd v Tasman District Council* [2013] NZEnvC 25; [2013] NZRMA 143 at [75].
[13] *Man O'War Station v Auckland Council* [2015] NZHC 767 at [59]. This finding was upheld on appeal in *Man O'War Station v Auckland Council* [2017] NZCA 24.
[14] *Wakatipu Environmental Society Inc v Queenstown Lakes District Council* [2001] NZEnvC 259 at [39] - [42].
[15] *Wakatipu Environmental Society Inc v Queenstown Lakes District Council* [2000] NZRMA 59 at 7.
[16] *Upper Clutha Tracks Trust v Queenstown Lakes District Council* [2010] NZEnvC 432 at [50]; *Man O'War Station v Auckland Council* [2014] NZEnvC 167 at [59].

19. The evidence of Mr Coffin,[17] and Ms Macartney in rebuttal, acknowledge the weakness that exists in contemporary landscape assessments with respect to recognition of Maaori cultural values. In short, Maaori cultural values are a subset of the associative attributes only, not the biophysical or sensory attributes. Accordingly, they comprise less than a third of the total weighting framework in contemporary landscape assessment.[18]

Cultural landscape

20. The inadequacy of the orthodox approach to landscape assessment with respect to cultural values has been addressed in recent years by the emerging concept of a 'cultural landscape'. It recognises that, for iwi and hapū, what is important is the association of landscapes with people and the values that describe that relationship, rather than physical evidence. The record of these values is multi-layered, informed by written, oral and archaeological history, memories, ancestry, traditional activities, and, in part, captured by the form and spirit of the land itself.

21. The incorporation of cultural landscapes into resource management policy, planning and landscape design in New Zealand is evolving, with regional and district plans specifically recognising the concept, including:

    (a) the Te Waihora Cultural Landscape/Values Management Area;

    (b) Waipā District Plan Cultural Landscape Areas, identified as giving effect to requirements of the RMA and the requirements of the Vision and Strategy for the Waikato River that arises from the Waikato River Act and the Ngati Tuwharetoa, Raukawa and Te Arawa River Iwi Waikato River Act 2010;[19] and

    (c) the Auckland Unitary Plan (**AUP**).

22. In respect of the AUP, a recent example of a case under the RMA where the significance of the cultural landscape was relevant to determining the most appropriate rules to regulate

[17] Evidence of Antoine Coffin at [72] to [89].
[18] Macartney (Section 42A) Rebuttal Evidence at [152] to [154].
[19] Waipā District Plan, 25.1.3.

land use is *Self Family Trust v Auckland Council*.[20] The cultural values associated with certain land were found to be a reason not to bring that land within Auckland's Rural Urban Boundary, and therefore not to allow urban development on it. While a relevant feature of that decision was the relevance of the NZ Coastal Policy Statement, which makes express reference to "cultural landscape" at Policies 10, 14 and 15, counsel submits that the Waikato River Act creates a parallel in this regard.

The Waikato River Act

23. In the Waikato Region, orthodox landscape assessment takes place in a unique Treaty settlement context that finally acknowledges, and seeks to restore and protect, the relationship of Waikato-Tainui (and other iwi) with Te Awa o Waikato. Statutory imperatives arise from the Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 (**Waikato River Act**), fulfilling the aspirations of tuupuna (ancestors).

24. The antecedents of the Waikato River Act are found many generations ago in the Crown's confiscation of the Waikato River in 1865. The Crown has acknowledged that its past dealings in relation to the Waikato River breached the Crown's obligations under Te Tiriti o Waitangi (the Treaty of Waitangi). The Crown's express acknowledgements recognise, among other things:

    (a) That the historical Waikato River claims by Waikato-Tainui arise from the 1860s raupatu confiscation) and its consequences.

    (b) That the Crown's breach of the Treaty of Waitangi denied Waikato-Tainui their rights and interests in, and mana whakahaere over, the Waikato River;

    (c) The importance to Waikato-Tainui of the principle of te mana o te Awa: To Waikato-Tainui, the Waikato River is a tupuna (ancestor) which has mana (prestige) and in turn represents the mana and mauri (life force) of the tribe. Respect for te mana o te awa (the spiritual authority, protective power and prestige of the Waikato River) is

[20] [2018] NZEnvC 49.

at the heart of the relationship between the tribe and their ancestral river.

(d) That to Waikato-Tainui, the Waikato River is a single indivisible being.

(e) That for Waikato-Tainui, their relationship with, and respect for, the Waikato River gives rise to their responsibilities to protect the mana and mauri of the River and exercise their mana whakahaere in accordance with their long established tikanga.

(f) That for Waikato-Tainui, their relationship with, and respect for, the Waikato River lies at the heart of their spiritual and physical wellbeing, their tribal identity and culture.

(g) That the Crown seeks a settlement that will recognise and sustain the special relationship of Waikato-Tainui with the Waikato River.

(h) That Waikato-Tainui wish to promote the concept of a korowai to bring the River tribes together as an affirmation of their common purpose to protect te mana o te awa.

25. The overall purpose of the settlement between Waikato-Tainui and the Crown is to restore and protect the health and wellbeing of the Waikato River for future generations.[21] The purposes of the Waikato River Act relevantly include, to:[22]

(a) give effect to the settlement of raupatu claims under the 2009 deed:

(b) recognise the significance of the Waikato River to Waikato-Tainui; and

(c) recognise Te Ture Whaimana (the Vision and Strategy) for the Waikato River.

(d) That Waikato-Tainui wish to promote the concept of a korowai to bring the River tribes together as an

[21] Waikato River Settlement Act, section 3.
[22] Waikato River Settlement Act, section 4.

affirmation of their common purpose to protect te mana o te awa.

26. This background, and the associated legislation, is important for a number of reasons:

(a) It is beyond question that Waikato-Tainui has significant and culturally important associations with the Rivers. Those associations are acknowledged by the Crown and included in legislation. The associations are reconfirmed by way of evidence before the Panel.[11]

(b) Te Ture Whaimana is a product of the process of agreement between the Crown and Waikato-Tainui.

(c) Te Ture Whaimana, therefore, is a fundamental element of the arrangements agreed to between the Crown and the River Iwi.

27. Te Ture Whaimana is:

(a) a statutory instrument, given legislative effect through the Waikato and Waipā River Settlement Legislation, including the foundational Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010 (**Waikato River Act**);[23] and

(b) "…intended by Parliament to be the primary direction setting document for the Waikato River and activities within its catchment affecting the Waikato River."[24]

28. Te Ture Whaimana holds a unique place in the RMA planning hierarchy:

(a) The Environment Court in *Puke Coal Ltd v Waikato Regional Council* confirmed that it has led to a fundamental change in the interpretation of the provisions of Part 2 for the purposes of the Waikato

[23] The other Waikato and Waipā River Settlement Legislation is the Ngāti Tūwharetoa, Raukawa, and Te Arawa River Iwi Waikato River Act 2010 and the Ngā Wai o Maniapoto (Waipā River) Act 2012.
[24] Waikato River Act, section 5(1).

Region.[25] Those provisions include section 6(b) and 7(c).

(b) It prevails over any inconsistent provision in a national policy statement, the NZ Coastal Policy Statement and a national planning standard. It also prevails over a national environmental standard if more stringent than the standard.[26]

(c) Te Ture Whaimana, in its entirety, is deemed part of the Regional Policy Statement (**RPS**).[27]

(d) In addition to the statutory direction to "give effect to" Te Ture Whaimana,[28] a district plan must "give effect to" any regional policy statement.[29]

29. Case law provides guidance on what "give effect to" means. The Supreme Court in *EDS v King Salmon* found that it:

> "...means 'implement'. On the face of it, it is a strong directive, creating a firm obligation on the part of those subject to it."[30]

30. The Court's approach affirmed that local authorities are required to develop express provisions to give effect to higher order documents:

> [79] The requirement to "give effect to" the NZCPS "gives the Minister a measure of control over what regional authorities do: the Minister sets objectives and policies in the NZPCS **and relevant authorities are obliged to implement those objectives and policies in their regional coastal plans, developing methods and rules to give effect to them. To that extent, the authorities fill in the details in their particular localities.**"
>
> [Emphasis added]

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[25] [2014] NZEnvC 223 at [133] and [143] – [146] (***Puke Coal***), reflecting on the implication of the Supreme Court's decision of *Environmental Defence Society v NZ King Salmon* [2014] NZSC 38 (***EDS v King Salmon***) with respect to Te Ture Whaimana. This position was unanimous.
[26] Waikato River Act, s 12.
[27] Waikato River Act, s 11(1).
[28] Waikato River Act, s 13.
[29] RMA, s 75(3)(c).
[30] *EDS v King Salmon* at [77].

31. Accordingly, the long-negotiated settlement that was finally given effect through the enactment of the Waikato River Act[31] forced a new legal framework to achieve what the Waitangi Tribunal has recognised in *Ko Aotearoa Tenei* "the RMA was supposed to deliver in any case."[32]

32. Against this historical and statutory context, Waikato-Tainui submit that "giving effect to" Te Ture Whaimana requires a revised approach to landscape assessment.

33. As identified by the evidence of Waikato-Tainui:

    (a) Te Awa o Waikato is a taonga and ancestral icon to Waikato-Tainui. It is an inseparable part of their whakapapa, whenua and identity. It is a fundamental part of what defines their very existence.

    (b) Te Ture Whaimana commences with the tongikura that Kiingi Taawhiao, the second Maaori King, left for Waikato-Tainui - *"Tooku awa koiora me oona pikonga he kura tangihia o te maataamuri. The river of life, each curve more beautiful than the last."* It is a vision that described Kiingi Taawhiao's admiration and respect for Te Awa o Waikato as he looked upon it; it is the description of the landscape in which Te Awa o Waikato lies, and to which it is inextricably linked.

    (c) The health and well-being of the Waikato River therefore extends beyond biophysical measures of health and includes other matters such as cultural landscape values; these values are not secondary or subsidiary to improving water quality.

    (d) A holistic and aggregate approach to considering the outstanding nature of the cultural values associated with Te Awa o Waikato is required, consistent with section 8(3) of the Waikato River Act.

    (e) The values that Waikato-Tainui attribute to Te Awa o Waikato – as identified by the evidence of Mr Coffin -

[31] Which received its Royal Assent on 7 May 2010.
[32] Waitangi Tribunal (2011) *Ko Aotearoa tēnei: a report into claims concerning New Zealand law and policy affecting Maaori culture and identit*y. Te taumata tuarua, Volume 1, page 273.

are relevant and to be given the highest regard, particularly in light of Te Ture Whaimana.

(f) The recognition of Te Awa o Waikato as a 'cultural landscape' is an important matter to Waikato-Tainui, and their iwi management plan articulates this at 15.3.2, 15.3.2.1 (a) & (g) and 26.3.2.1 (a).

(g) A new outstanding 'cultural landscape' category, of equal weighting, should be added to the ONF/L categories that already include Outstanding Natural Landscapes, Outstanding Natural Features, and Amenity Landscapes. This would reflect the 'very high' cultural values of Waikato-Tainui, and the expression of RMA sections 6(e) and 6(f).

SCOPE

34. Counsel acknowledges the opening legal submissions of the Council at [105] to [131], which deal extensively with the case law principles as to scope. Those submissions also acknowledge that the section 42A reporting officer for each topic will identify any submissions that they consider may be out of scope, and that the Hearing Panel will need to carefully consider those submissions through the hearings as they arise, on a case-by-case basis.

35. These submissions first address the legal principles, before turning to the scope issues raised by the S42A Rebuttal Evidence.

Whether Waikato-Tainui's submission is "on" the proposed plan

36. In terms of the relevant case law principles, counsel agrees that for the purposes of determining scope issues on the Proposed Plan, it is appropriate to treat the Proposed Plan akin to a full plan review, rather than a narrower plan change, to avoid any prejudice to submitters if a more strict approach to issues of scope were adopted:[33]

(a) While this may be considered a partial review given the staged nature of the process, the Council's forthcoming Stage 2 is limited to two topics. Stage 1

[33] Opening Legal Submissions by Counsel for Waikato District Council, 23 September 2019 at [128].

contains by far the majority of the provisions and applies to the entire district. It is akin to a full plan review.[34]

(b) The public notice referred to the Stage 1 as a "full review of the current Operative Waikato District Plan", noting "As the Proposed Plan (Stage 1) is a full review of the Operative Plan and or sets the framework for the use, development and management of resources throughout the district, Council considers that every resident and ratepayer is likely to be directly affected by some aspects of the provisions contained in the Proposed Plan (Stage 1)."[35]

37. To that end, counsel submits that the Panel should prefer the legal principles that emanate from the High Court decision of Whata J in *Albany North Landowners v Auckland Council*[36] *(**Albany North Landowners**)*, which deals with a full district plan review, to the *Clearwater*[37] and *Motor Machinists*[38] tests that relate to discrete variations or plan changes.[39] The following principles can be construed from the statements of Whata J in that decision:

(a) Where the notified proposed plan encompasses an entire district and purports to set the frame for resource management of the district (where presumptively, every aspect of the status quo in planning terms is addressed by the proposed plan), the scope for a coherent submission being "on" the proposed plan is therefore very wide.[40]

(b) A submission on a proposed plan is not likely to be out of scope simply because the relief raised in the submission was not specifically addressed in the original s 32 report in the context of a full district plan review. In that context, a s 32 report is simply a

[34] Ibid at [125].
[35] Public Notice issued 17 July 2018 and acknowledged in Council's Opening Submissions at [126].
[36] [2017] NZHC 138.
[37] *Clearwater Resort Limited v Christchurch City Council* AP 34/02, 14 March 2013, Young J.
[38] *Palmerston North City Council v Motor Machinists Limited* [2013] NZHC 1290.
[39] Those tests are set out in full in the Council's Opening Submissions.
[40] *Albany North Landowners* at [129].

relevant consideration among many in weighing whether a submission is first "on" the proposed plan and whether the proposed change requested in a submission is reasonably and fairly raised by the submission.[41]

(c) Indeed, the section 32 report is amenable to submissional challenge, and there is no presumption that the provisions of the proposed plan are correct or appropriate on notification. On the contrary, the scheme of the RMA clearly envisages that the proposed plan will be subject to change over the full course of the hearings process.[42] Counsel here interposes that, otherwise a local authority might artificially limit consideration of alternatives and extensions in the First Schedule process by producing an inadequate section 32 evaluation.

(d) The important matter of protecting affected persons from "submissional sidewinds" raised by Kós J must be considered alongside the equally important consideration of enabling people and communities to provide for their wellbeing, in the context of a long-term district-wide plan, via the submission process.[43]

The scope of Waikato-Tainui's submission

38. Counsel considers that the material issue here is whether the Outstanding Cultural Landscape as proposed was "reasonably and fairly raised" in Waikato-Tainui's submission made on the plan change, such that all are sufficiently informed about what is proposed. In that regard, the following legal principles are relevant:

(a) The Council must consider whether any amendment made to a plan change as publicly notified goes beyond what is "reasonably and fairly raised" in submissions made on the plan change. That will usually be a question of degree, to be judged by the terms of the proposed change and of the content of the submissions.[44]

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[41] *Albany North Landowners* at [130] to [131].
[42] *Albany North Landowners* at [132].
[43] *Albany North Landowners* at [133].
[44] *Countdown Properties (Northlands) Ltd v Dunedin City Council* (1994) 1B ELRNZ 150 (HC) at 171 - 172.

(b) The assessment of whether any amendment was reasonably and fairly raised in the course of submissions should be approached in a realistic workable fashion rather than from the perspective of legal nicety. The "workable" approach requires the local authority to take into account the whole relief package detailed in each submission when considering whether the relief sought had been reasonably and fairly raised in the submissions. It is sufficient if the changes made can fairly be said to be foreseeable consequences of any changes directly proposed in the reference.[45]

(c) The underlying purpose of the notification and submission process is to ensure that all are sufficiently informed about what is proposed, otherwise "the plan could end up in a form which could not reasonably have been anticipated resulting in potential unfairness".[46]

39. The Waikato-Tainui submission made the following comments:

> 38. … Waikato-Tainui do not support the assessment of, and the non-inclusion of the Waikato River as an Outstanding Natural Features and / or Landscape in its entirety. It is also of concern that no natural character assessment has been undertaken for the Waikato River. Waikato-Tainui beyond the discussion below, fundamentally do not believe that parts of the Waikato River can be cut into sections and not viewed holistically.
>
> …
>
> 45. Waikato-Tainui understand that cultural and heritage values do not neatly fit into the specific feature or landscape assessment criteria, however engagement with iwi and understanding the districts identity should have seen the Waikato River included as an Outstanding Natural Feature or Landscape or both. The lines that are blurred on

[45] *Albany North Landowners* at [115], citing *Royal Forest and Bird Protection Society of New Zealand v Buller Coal* [2012] NZHC 2156; *Shaw v Selwyn District Council [2001] 2 NZLR 277* at [31]; *Westfield (New Zealand) Ltd v Hamilton City Council* [2004] NZRMA 556 (HC) at [73]-[74]
[46] *General Distributors Limited v Waipa District Council* (2008) 15 ELRNZ 59 (HC) at [55].

the margins of the Waikato River, by wetlands, tributaries, islands and river use in general only add to the rivers [sic] significance. It should be considered that because the Waikato River does not sit neatly as a Outstanding Natural Feature or an Outstanding Natural Landscape that it should be considered both and afforded the highest protection rather than defaulting to a partial categorisation that undermines its significance.

46. Furthermore, the assessment criteria used, would appear to isolate features or places rather than taking a more holistic approach. If this had been the case Waikato-Tainui assume that the Waikato River would have been deemed Outstanding; both as a landscape and a feature.

Relief Sought:

1. The proposed district plan and maps be amended to include the Waikato River in its entirety as both an Outstanding Natural Feature and an Outstanding Natural Landscape.

2. Undertake a natural character assessment for the Waikato River to determine if there are any areas of high or outstanding natural character.[47]

Section 42A Rebuttal Evidence issues as to scope

40. The S42A Rebuttal Evidence considers that there is a scope issue if the alternate methods for landscape recognition, by way of a Māori site of Significance or Cultural Landscape, proposed in evidence by Waikato-Tainui are advanced:[48]

(a) There are difficulties in now proposing that the Waikato River and its margins be scheduled as a Maaori Area of Significance (MAoS) because Hearing 20 for that particular topic has already occurred.

(b) No submitter on this landscape topic, or any other topic, has requested that the Waikato River be scheduled as a MAoS or MSoS.

(c) I do not consider the scheduling of the Waikato River as a MAoS was reasonably and fairly raised in Waikato-

[47] The landscape assessment attached to the proposed plan also referred to "The developing awareness of complexity of the 'indigenous cultural landscape' of tangata whenua. See reference in Waikato-Tainui Submission at p.12.
[48] S42A Rebuttal Evidence at [160].

Tainui's submission which requested that the Waikato River be identified as an ONF/ONL. I consider that a person reading that submission would have reasonably contemplated the relief sought to range between:

(i) The Waikato River being identified as both an ONF/ONL
(ii) The Waikato River being identified as either an ONF or ONL
(iii) An alternative landscape status that is less than an ONF/ONL, such as a High NCA or SAL

(d) Waikato-Tainui appears to seek a new objective, policy and rule framework for a MAoS, rather than relying on the MAoS framework as notified in the PWDP. This was not contemplated in the submission.

(e) I consider that most, if not all, owners of properties abutting the Waikato River would not have reasonably contemplated a new framework of objectives, policies and rules now proposed as part of either of the suggested approaches. I am therefore concerned that landowners may now be prejudiced as they are denied an opportunity to be involved in the development of provisions without having lodged submissions.

41. Most of the issues as to scope relate to the option to propose that the Waikato River and its margins be scheduled as a Maaori Area of Significance (**MAoS**). While that is not pursued by Waikato-Tainui, the following comments are relevant:

(a) Waikato-Tainui do not consider that Hearing 20 having already occurred precludes introduction of the concept. The deliberations in respect of that topic remain ongoing.

(b) While there has been a decision to distinguish the MAoS topic from the landscape topic in this Plan review, that distinction does not preclude recognition of a MAoS as part of a cascade of alternative statuses less than an ONF/ONL, when viewed with respect to the broader cultural landscape of which MAoS form.

42. In relation to the Outstanding Cultural Landscape proposal, counsel submits that this is properly within the scope of

Waikato-Tainui's submission, taking into account the whole relief package detailed in the submission, inclusive of:

(a) the reference to afford Te Awa o Waikato "the highest protection"; and

(b) the criticism of the proposed plan's assessment criteria for ONF/Ls.

43. In counsel's submission, there was no need to refer specifically to a "cultural landscape" in the submission for the reasons identified by the s42A Rebuttal Evidence where the author notes that "a person reading that submission would have reasonably contemplated the relief sought to include an alternative landscape status that is less than an ONF/ONL." In this case, the critical reference is to an alternate landscape status – which is what a cultural landscape is – as the proposal seeks equivalent recognition to an ONF/ONL.

RESIDUAL MATTERS

44. In relation to further matters raised by the Council Rebuttal Evidence, counsel submits, on behalf of Waikato-Tainui:

(a) Whole of catchment approach - The proposal put forward in Mr Donald's original evidence, and the further detail provided, does apply to the whole of the Waikato River catchment.

(b) Plan Change 5 - The Proposed Plan is deficient in its recognition of Te Ture Whaimana, particularly in a landscape context. Plan Change 5 to the Operative Plan, which was initiated by WDC in 2013 in order to give effect to the Te Ture Whaimana, was from Waikato Tainui's perspective about the early application of Te Ture Whaimana in response to the River Settlement. It brought through the Te Ture Whaimana objectives and strategies into the Operative Plan, and included information requirements regarding early engagement and for activities within the catchment to turn their mind to the Waikato-Tainui Environmental Plan. These matters cannot be considered to be the full extent of the realisation of Te Ture Whaimana. What is more, the information requirements regarding early engagement and requirement for activities within the

catchment to turn their mind to the Environmental Plan have disappeared out of the proposed plan as a result of its new structure.

(c) Values of Te Awa o Waikato – Waikato-Tainui does not agree with the evidence of Ms Ryder that applying Mr Coffin's framework of values of Te Awa o Waikato to the Waikato River would also require application of that same approach across the remainder of the District's landscapes. The values are bespoke to the relationship with the awa and its catchment, and can be read as such in the context of the statutory imperatives of the Waikato River Act.

HE KUPU WHAKAKAPI

45. It has been over 10 years since the Deed of Settlement in respect of the Waikato River was entered into between Waikato-Tainui and the Crown. That Te Awa o Waikato is not yet recognised as outstanding in landscape terms within the Waikato District Plan is a stark reminder that much is yet to be done to reflect the Settlement Legislation in district planning.

46. Waikato-Tainui seek landscape recognition for the entirety of Te Awa o Waikato, including its catchment, befitting its significance to Waikato-Tainui and iconic national status. In doing so, they welcome the opportunity for the Waikato District Plan to reflect the Waikato-Tainui way of seeing and interacting with their Awa Tupuna.

DATED at Wellington this 28th day of October 2020

Maia Wikaira
Counsel for Waikato-Tainui