9 October 2023

Attention: Alister Hartstone

Email: alister@setconsulting.co.nz

ref. 16782.blh

Dear Alister

RE: MERIDIAN ENERGY LIMITED – APP.045356.01.01 – LU2300093 – RFI RESPONSE No #1

Thank you for forwarding the s92 RFI dated 3 October 2023.

The following is an initial (interim) response to Item 1 of the RFI relating to the review of ecological effects by Rural Design Ltd (RDL). The purpose of this initial response is to narrow the issues to the extent possible.

There are some aspects of the RDL review which are not strictly ecological matters, are already covered in the AEE and/or other technical documents provided with the AEE, run contrary to the intended approach to managing effects, and are otherwise unfounded. These aspects are discussed as follows:

RDL Item 1

Under this item RDL expresses the view that the application does not pass the "functional need" test. With respect to RDL, the functional and operational need components of Regulation 45(6)(e) are not ecological matters. Functional need is dealt with in the AEE.[1] It is also a matter that has been traversed in the High Court and Court of Appeal,[2] where (in relation to the same definition of "functional need") a more practical and less draconian interpretation has been applied. For these reasons, it was not a matter covered in the Boffa Miskell (BML) report and is not a matter for RDL.

Noting that this is not an ecological matter, can you please confirm whether the NRC has any planning related concerns over the "functional need" of the solar farm.

RDL Item 9

Item 9 requests controls to ensure that the adverse effects of permanent wetland loss are minimised, including a suggestion that the offset wetland is constructed first – up to 5 years prior to the construction works.

The suggestion that the offset wetland be constructed before any construction works is unrealistic and impractical and will in effect stop the project. It is also unnecessary due to the alternative habitat available for fauna known to use the wetlands, and lag times for the establishing the new wetlands are incorporated in the wetland offset calculations in accordance with best practice.[3]

It is clear that this is a matter that has been adequately considered and assessed in the application AEE and its associated technical documents. Please confirm that you agree with this.

[1] Paragraph 1.2.3
[2] *Poutama Kaitiaki Charitable Trust and D & T Pascoe v Taranaki Regional Council* [2022] NZHC 629 [30 March 2022], *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2022] NZCA 598 (see **attached**).
[3] Appendix 6 of the NPS-FW

RDL Item 10

Under this item RDL requests an *"in-depth consideration of alternatives"* stating that "*there has been no consideration for establishing the solar farm operation over the entirety of Site 3",* and then going further to express a view on "feasibility".

With respect to RDL, while there may be ecological implications, the adequacy of the alternatives/optimisation assessment (relevant under clause 6(1)(a) of the Fourth Schedule of the RMA) is not an ecological matter.

The alternative/optimisation assessment is discussed in Section 2.2 of the AEE. Here the AEE states that:

"a range of options were assessed using multi-criteria analysis to evaluate the options against relevant criteria. This included consideration of the extent of wetland impact and associated effects (as identified in the BM ecological assessment), flood risk to assets and other properties, safety, maintainability, sustainability, cost, capacity, yield, and potential transmission routes".

In addition, Section 5.4.2 of the AEE states that:

"MEL commissioned an alternatives and optimisation report with the overall goal of maximising efficiency and minimising wetland loss to the greatest extent practicable".

Notwithstanding that this is not a matter relevant to RDL's field of expertise, the suggestion that MEL have not considered more solar on Site 3 in lieu of less solar on Site 1 is simply incorrect.

In light of the above, can you please confirm whether the NRC has any planning related concerns over the consideration of alternatives/optimisation assessment.

RDL Item 12

BML will provide a response to this item. However, the RDL statement that *"BML can only speculate that a wetland created within the pasture area would have higher ecological value"* is inappropriate. Effects assessments by their nature rely on expert opinion and judgement. To that end, BML, informed by the various Beca assessments and based on their experience and expertise, have concluded that the proposed wetland on Site 3 will provide higher ecological value than the existing mosaic of predominantly degraded and exotic wetlands on Site 1.

In addition to the above, it is not correct for RDL to say that *"the wetland offset area will require continued intervention to service the power pylons"*. It is clear from the plans provided in the application AEE that the pylons and their associated access are provided for in the design, and no access is required through the proposed wetland.

RDL Item 15

The RDL comments under this item read more as a statement than a request. In any event, potential saltwater influence has already been considered by BML, and will influence the Wetland Restoration and Management Plan required under conditions 20-22.

Regarding the reference to electricity lines, RDL should note that the low voltage (Northpower) lines are being relocated, and the transmission line support towers will be specifically provided for in the final wetland design, as indicated on the various plans provided with the application AEE.

RDL Item 16

The request under this item is RDL speculating that (a) there are wetlands on neighbouring sites; and (b) that the site works will somehow drain these features. Beca and BML will comment further in a subsequent response, but there is no indication in any of the technical assessments provided in the application that site works are going to alter hydrology to the extent that "potential" wetlands on neighbouring sites are affected. In short, this information request relates to effects that simply haven't been identified, and in all likelihood don't exist.

RDL Item 19

Rule C.1.5.6 provides for the clearing of material from artificial watercourses[4] as a permitted activity, subject to compliance with specified criteria. Similarly, Rule C.2.1.3 of the PRP provides for the maintenance of the free flow of water in rivers[5] as a permitted activity, subject to compliance with specified criteria. The RDL request for an assessment of effects relating to the maintenance of watercourses is therefore inappropriate as this activity is already provided for as a permitted activity under the PRP.

RDL refer specifically to the "Crown Drainage Easement" on Site 3 (note this is not a crown drainage easement and is more correctly an easement in gross in favour of the WDC). This drain is already being maintained by the WDC in accordance with the terms of the easement, and the permitted activity requirements of the PRP.

Re-routing the drain through the wetland will require the approval of the Council Drainage Team, and it will need to be (and can be) incorporated as part of the detailed design phase and included the Wetland Restoration Plan (conditions 20-22).

In summary, either the drain is going to remain as-is with periodic maintenance continuing as occurs now (i.e. the existing environment will remain unchanged), or it will be re-routed through the wetland (which would have positive effects on the wetland and water quality in general).

In light of the above, please confirm that this permitted activity (drain and river maintenance) is no longer a matter requiring further comment.

RDL – Item 20

Under this item RDL refers to *"numerous waterbodies (including permanent streams and open water wetland habitats)"* being *"reclaimed"* within Site 1, when in fact no permanent streams are being reclaimed. Furthermore, all watercourses on the site (including the main Bercich Drain) can be maintained now as a permitted activity (as discussed under the previous item 19).

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[4] **Artificial watercourse** - A man-made channel constructed in or over land for carrying water and includes an irrigation canal, roadside drains and water tables, water supply race, canal for the supply of water for electricity power generation and farm drainage canals. It does not include a channel constructed in or along the path of any historical or existing river, stream or natural wetland.

[5] ***river*** means a continually or intermittently flowing body of fresh water; and includes a stream and modified watercourse; but does not include any artificial watercourse (including an irrigation canal, water supply race, canal for the supply of water for electricity power generation, and farm drainage canal)

As RDL have identified, the drains on site 1 have been previously surveyed for fish (including black mudfish).[6] Recommended methods for surveying mudfish were used. 50 fish traps were deployed in wetlands and drains within Site 1 for three consecutive nights and checked daily in August 2020. No black mudfish were present. However, RDL now appear to be second guessing the veracity of the assessment. Given that an assessment has previously been carried out, and the fact that all watercourses can be periodically maintained as a permitted activity, no further information should be required in respect to this matter. Please confirm that you agree with this.

RDL Item 24

Inanga are specifically addressed in the BML report, and there are associated recommendations.[7] The information requested under Item 24 has already been provided in the BML report. Furthermore, the AEE states that:

While the drains on Site 1 (excluding Bercich Drain) are unlikely to be a habitat for native freshwater fish, the drains on Site 3 are slightly larger and have a better hydrological connection with the Ruakākā River. Therefore, it has been assessed that the habitat suitability of the drains on site 3, as well as the Bercich Drain, may be inhabited by low numbers of native freshwater fish. To mitigate this, a Native Fish Capture and Relocation Plan will be developed and implemented, which will restrict earthworks in drains to dry periods when there is less water, or relocation of native fish where drains provide native fish habitat. It will also set out best ecological practice for drain maintenance activities.[8]

Proposed Condition 16 reflects this.

In light of the above, please confirm that this matter has been satisfied.

RDL Items 23 and 25

The application proposes to manage potential adverse effects on avifauna (including seabirds) through a Native Avifauna Management Plan (NAMP) and Avifauna Collision Management Plan (ACMP) required as a condition of consent. The effects to be managed are those identified in the BML report and highlighted in the RDL review.

As stated in the AEE[9] the NAMP will require, at a minimum:

- Vegetation clearance of, and in the vicinity, of potential breeding and nesting habitat for cryptic wetland bird species be undertaken outside of the main breeding/nesting season for matuku-hūrepo and weweia, which is typically August to February inclusive.
- Clearance of other terrestrial vegetation be undertaken outside the main breeding/nesting seasons for native birds using the site, if possible. If not possible, nest

  checks will be done prior to vegetation clearance.
- No earthworks undertaken in the vicinity of prospective nesting sites that have not been cleared prior to breeding season.
- Monitoring and management throughout the earthworks stage to manage the risk of native wader species, such as Tūturiwhatu / NZ dotterel (*Charadrius obscurus*), establishing nests within or in the vicinity of the earthworks footprint.

[66] Wildlands Consultants, 2022

[7] BML report, Section 8.3, 9

[8] AEE, 5.4.4

[9] Section 5.4.5

- Management of mammalian predators across the three Sites, focusing on rodents and mustelids, to offset for the potential and actual effects on avifauna. This will help species re-establish within the Sites post-construction and improve survival rates.

The management plan approach to managing effects is common-place and is generally considered best practice. The BML ecological effects assessment appropriately identifies the effects, and based on this, specifies the measures required to minimise those effects. The further detail requested by RDL in item 25 will be provided with the management plans. In the meantime, the information provided in the BML EEA is more than sufficient to determine the level of effects and the ability to manage those effects through the subsequent management plans.

In light of the above, please confirm that no further information is required in respect to these items.

RDL Item 26

Item 26 requests additional information for effects that, according to the technical assessments provided with the application, do not exist. While it is easy to identify activities that "may have effects" there is no evidential basis for these. The request is extremely open ended and speculative. The suggestion that Ruakaka Beach or the Ruakaka estuary are in some way adversely affected by the proposal relative to the existing (farming) environment is baseless. Even if there were effects, they would surely be de minimis.

Furthermore, the request does not correspond to the nature of the proposed works, which is basic earthworks/levelling, and wetland development, with existing watercourses being maintained.

In light of the above, please confirm that no further information is required in respect to this item.

RDL Item 27

The comments under item 27 are unusual for an ecological peer review, and in any event they mis-construe the actual conclusion of the Patuharakeke Cultural Effects Assessment, which is:

Where an activity results in more than minor adverse effects on the environment, section 5 of the RMA requires that these be avoided, remedied or mitigated. For the most part, the proposed methodology for construction of the Ruakākā Energy Park Solar Farm and its outcomes will avoid or mitigate potential ecological, cultural, and socio-economic effects on Patuharakeke so that they will be no more than minor.[10]

It is assumed that no further information is required in respect to this item.

Summary

Having reviewed the various responses above, can you please confirm that no further information is required under items 1, 2, 9, 10, 15, 16, 19, 20, 23, 24, 25, 26 and 27 of the RDL review.

Assuming you agree with the above, the intention will be to provide the following information in respect to the other matters:

(1) Items 4, 5, 6, 7, 8, and 13 – wetland mapping accuracy, methodology, offset ratios/calculations.

[10] Section 6 'Recommendations', Page 32

(2) Items 11, 12, 13, 14 – offset wetland effects, likelihood of success.

(3) Item 17 – hydrological function of existing wetlands to be retained in Site 1.

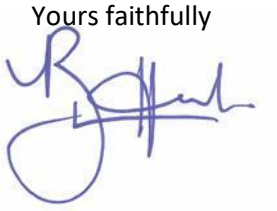
(4) Item 18 – status of watercourses.

(5) Items 21 and 22 – effects on bittern.

It is important that we agree on the scope of information required before the ecologists get together to discuss the outstanding matters.

I look forward to hearing from you.

Yours faithfully



Brett Hood
Director

Encl. *Poutama Kaitiaki Charitable Trust and D & T Pascoe v Taranaki Regional Council* [2022] NZHC 629 [30 March 2022], *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2022] NZCA 598.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA48/2021
[2022] NZCA 598

BETWEEN	TE RŪNANGA O NGĀTI AWA Appellant
AND	BAY OF PLENTY REGIONAL COUNCIL First Respondent
AND	CRESWELL NZ LIMITED Second Respondent

CA49/2021

BETWEEN	SUSTAINABLE OTAKIRI INCORPORATED Appellant
AND	WHAKATĀNE DISTRICT COUNCIL First Respondent
AND	CRESWELL NZ LIMITED Second Respondent

CA60/2021

BETWEEN	NGĀTI PIKIAO ENVIRONMENTAL SOCIETY INCORPORATED Appellant
AND	BAY OF PLENTY REGIONAL COUNCIL First Respondent
AND	CRESWELL NZ LIMITED Second Respondent

CA61/2021

BETWEEN	TE RŪNANGA O NGĀI TE RANGI IWI TRUST Appellant

	AND	BAY OF PLENTY REGIONAL COUNCIL First Respondent
	AND	CRESWELL NZ LIMITED Second Respondent

Hearing:	9-10 March 2022
Court:	Cooper, Goddard and Dobson JJ
Counsel:	H K Irwin-Easthope and K J Tarawhiti for Appellant in CA48/2021 D M Salmon KC for Appellant in CA49/2021 R B Enright and R G Haazen for Appellants in CA60/2021 and CA61/2021 M H Hill and R M Boyte for First Respondent in CA48/2021, CA60/2021 and CA61/2021 A M B Green and M S Jones for First Respondent in CA49/2021 J B M Smith KC, D G Randal and E L Bennett for Second Respondent in CA48/2021, CA49/2021, CA60/2021 and CA61/2021
Judgment:	2 December 2022 at 9.00 am

JUDGMENT OF THE COURT

A The questions of law are answered at [193] of this judgment.

B The appeals are dismissed.

C Te Rūnanga o Ngāti Awa must pay costs to the Bay of Plenty Regional Council for a standard appeal on a band A basis and usual disbursements.

D Sustainable Otakiri Inc must pay costs to the Whakatāne District Council for a standard appeal on a band A basis and usual disbursements.

E Te Rūnanga o Ngāti Awa and Sustainable Otakiri Inc must pay costs to Creswell NZ Ltd, on their respective appeals, for a standard appeal on a band A basis and usual disbursements. We certify for two counsel.

F We make no order for costs in respect of the appeals brought by Ngāti Pikiao Environmental Society Inc and Te Rūnanga o Ngāi Te Rangi Iwi Trust.

REASONS OF THE COURT

(Given by Cooper J)

Table of Contents

Introduction

[1] These four appeals on questions of law under s 308 of the Resource Management Act 1991 (RMA) arise out of a proposal made by Creswell NZ Ltd (Creswell) to expand an existing spring water extraction and bottling operation near Ōtākiri in the Bay of Plenty.

[2] Creswell's proposal required a range of resource consents from the Bay of Plenty Regional Council (Regional Council) and the Whakatāne District Council (District Council). The necessary consents were granted after a joint hearing before two independent Commissioners appointed by the Councils. Appeals were filed in the Environment Court, which by a majority upheld the grants of consent, subject to conditions.[1] Two appeals were then filed in the High Court under s 299 of the RMA, which were heard by Gault J in July 2020. He dismissed the appeals.[2] The present appeals are from the High Court judgment pursuant to leave granted by this Court under s 308 of the RMA.[3]

[3] An indication of the ambit of the appeals may be demonstrated by setting out the questions of law that we have to answer. They are:[4]

(a) Question 1: Did the High Court err in finding that the Environment Court was correct to conclude that the effects on the environment of end use (that is, export and use of plastic bottles) were beyond the scope of consideration in relation to Creswell's application for consents to take water, and those relating to land use activities?

(b) Question 2: Did the High Court err in finding that the Environment Court did not need to seek further evidence, or decline Creswell's application for consent, in circumstances where the Court had evidence as to the scale of the bottling operation but no evidence as to the scale of adverse effects of plastic bottles being discarded?

(c) Question 3: Did the High Court err in finding that the Environment Court did not need to have recourse to pt 2 of the RMA and, in particular:

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1 *Te Rūnanga O Ngāti Awa v Bay of Plenty Regional Council* [2019] NZEnvC 196, (2019) 21 ELRNZ 539 [Environment Court decision].

2 *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2020] NZHC 3388, [2021] NZRMA 76 [High Court judgment].

3 *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2021] NZCA 354 [Leave judgment].

4 The questions were set out in two judgments of this Court delivered on 29 July 2021 and 9 September 2021, respectively granting leave to appeal and amending the first of the questions: Leave judgment, above n 3, at [4]; and *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2021] NZCA 452 at [20].

(i) that the relevant planning instruments provided adequate coverage of the provisions of pt 2;[5] and

(ii) that an assessment of sustainability by itself was sufficient to address relevant cultural effects, so that no further reference to pt 2 was needed in that context?[6]

(d) Did the High Court err in finding that the Environment Court correctly determined that the activity status of Creswell's proposal was a discretionary "rural processing activity", rather than a non-complying "industrial activity" including "manufacturing", under the terms of the Whakatāne District Plan?

(e) Did the High Court err in finding that the Environment Court correctly classified Creswell's proposal as an expansion of an existing use of land, and therefore a discretionary activity under s 127 of the RMA, rather than as a new activity falling for consideration as a non-complying activity under s 88 of that Act?

[4] Leave had originally been sought in respect of 15 separate questions of law, but was granted only in respect of the five set out above. One question that was expressly rejected sought to raise an issue about the fact that the Environment Court, in an approach upheld by the High Court on appeal, preferred the evidence of an expert called by Creswell about issues of tikanga relevant to the proposal to the evidence on tikanga called by Te Rūnanga o Ngāti Awa. At the leave stage, this Court considered the issue was effectively foreclosed by what was said by Elias CJ in *Takamore v Clarke*, to the effect that what constitutes Māori custom or tikanga in a particular case is a question of fact for expert evidence, or for reference to the Māori Appellate Court in an appropriate case.[7] Consequently, this Court declined to grant leave "on the

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5 See High Court judgment, above n 2, at [178] and [188].
6 See Environment Court decision, above n 1, at [104]–[107].
7 Leave judgment, above n 3, at [5(2)], citing *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733 at [95].

challenges to the correctness of the preferred evidence as regards the tikanga effects of the proposal".[8]

[5] We note that a majority of the Supreme Court in *Ellis v R* has since endorsed a contextual approach to the appropriate method of ascertaining tikanga.[9] Glazebrook and Williams JJ both questioned the appropriateness of referring to proving tikanga as a question of fact or evidence: while in some cases it would be appropriate to call experts to give evidence about the relevant tikanga and how it should apply, in others, that would not be necessary.[10] In the present case, the Environment Court did hear evidence called by the parties concerning the relevant tikanga.

[6] In the following sections of this judgment, we:

(a) describe the proposal;

(b) describe the parties;

(c) explain the resource consents required to authorise the proposal;

(d) summarise the decisions of the Environment Court and the High Court;

(e) address the submissions of the parties; and

(f) resolve the questions of law presented.

The proposal

[7] The proposal is to expand an existing water bottling plant on land situated at 57 Johnson Road, Ōtākiri in the Whakatāne District of the Bay of Plenty.[11] The land

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8 At [5(2)].
9 *Ellis v R* [2022] NZSC 114.
10 At [123] and [125] per Glazebrook J, [181] per Winkelmann CJ and [273] per Williams J.
11 We base this description of the proposal on that given by the Environment Court and the High Court: see Environment Court decision, above n 1, at [14]–[24]; and High Court judgment, above n 2, at [8]–[15].

contains a kiwifruit orchard and an existing water bottling plant, which commenced operation in 1994 and is now owned and operated by Otakiri Springs Ltd.

[8] The existing activities on the land rely on a water right granted in 1979 to take water for kiwifruit irrigation from a 230 m-deep bore. The water right was modified in 1991, when the Regional Council allowed water to be taken for horticulture irrigation (158 m^3/day), frost protection (1,580 m^3/day) and commercial bottling (1,200 m^3/day). The current total allowable take of water is 327,000 m^3/year. The landowners at the time, James and Donald Robertson, also obtained land use consent from the District Council in 1991 to establish the water bottling plant on the land. The Robertsons are the directors and shareholders of Otakiri Springs Ltd.

[9] Creswell entered into an agreement in 2016 for the sale and purchase of the land and the water bottling and distribution business, subject to obtaining the consents it needs to implement the proposal and which are the subject of these appeals. It intends to establish a new purpose-built production plant alongside the existing plant. A new building, 16,800 m^2 in area, would be constructed. A truck unloading canopy and container loading area would be constructed next to the new building.

[10] Implementing the proposal would increase the maximum bottling capacity of the existing plant from 8,000 to 10,000 bottles per hour. In addition, the new building would house two new high-speed bottling lines, each producing 72,000 bottles per hour. The new building would also contain a plastic bottle manufacturing plant. Bottle manufacture, water bottling and warehousing activities would take place onsite 24 hours per day, seven days a week.

[11] Consent was sought for a maximum daily water take of 5,000 m^3, reflecting the capacity of the bottling operation. The maximum annual volume of water sought to be extracted is 1.1 million m^3. Daily figures are expected to fluctuate between 1,000 m^3 and 5,000 m^3, with an average of 3,000 m^3. The water would be extracted from a new 228 m-deep bore, which was drilled in 2017. The existing bore would be retained to provide a back-up water supply for the plant. Both bores draw water from the Ōtākiri aquifer in the Awaiti Canal groundwater catchment, which is in the Tarawera water management area.

[12] Water would be placed in both plastic and glass bottles, ranging in capacity from 350 ml to 2,000 ml. The product would be marketed locally and overseas as premium New Zealand artesian bottled water, under the Otariki Springs brand.

The parties

[13] Creswell is a wholly owned subsidiary of Nongfu Spring Company Ltd, a company incorporated under the laws of the People's Republic of China.[12] It operates a large-scale water bottling and distribution business in that country.

[14] Te Rūnanga o Ngāti Awa is the post-settlement governance entity and the iwi authority for the purposes of the RMA for Ngāti Awa. It is comprised of 22 hapū representatives, who are elected by their hapū every three years. Ngāti Awa is an iwi of the Mataatua waka, whose rohe is in the Eastern Bay of Plenty.[13]

[15] Ngāti Pikiao Environmental Society Inc is an iwi authority of Ngāti Pikiao. The Environment Court granted it status under s 274 of the RMA to become a party to the proceedings. Te Rūnanga o Ngāi Te Rangi Iwi Trust is an iwi authority of Ngāi Te Rangi. Like Ngāti Awa, Ngāi Te Rangi is an iwi of the Mataatua waka. Ngāti Pikiao Environmental Society Inc and Te Rūnanga o Ngāi Te Rangi Iwi Trust are both appellants who were granted leave to appeal in respect of Question 3[14] and were both represented at the hearing in this Court by Mr Enright in support of Ngāti Awa's stance that the consents granted by the Regional Council should have been declined.

[16] Sustainable Otakiri Inc (Sustainable Otakiri) was formed in July 2018 by residents living near the Ōtākiri Springs water bottling plant following the release of the Commissioners' decision to grant consent to the expansion of the plant. Members of Sustainable Otakiri include submitters at the original council hearing who have continued their opposition under the umbrella of Sustainable Otakiri.

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12 We base this description of the parties on that given by the Environment Court and the High Court: see Environment Court decision, above n 1, at [2] and [7]–[8]; and High Court judgment, above n 2, at [6] and [18]–[22].

13 For convenience, from this point we will refer to Te Rūnanga o Ngāti Awa as Ngāti Awa.

14 Leave judgment, above n 3, at [5(1)(iii)].

Resource consents required

Regional Council consents

[17] The proposal required consent from the Regional Council to take water for the water bottling operation, to undertake earthworks, to discharge stormwater and treated process wastewater, and to discharge treated sanitary wastewater to land.[15] Although a challenge was mounted to the grant of all these consents, Ngāti Awa only pursued an appeal against the consent to take water.

[18] The consent applications made to the Regional Council had to be considered under s 104 of the RMA, which relevantly provides:

> **104 Consideration of applications**
>
> (1) When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2 and section 77M, have regard to—
>
> (a) any actual and potential effects on the environment of allowing the activity; and
>
> (ab) any measure proposed or agreed to by the applicant for the purpose of ensuring positive effects on the environment to offset or compensate for any adverse effects on the environment that will or may result from allowing the activity; and
>
> (b) any relevant provisions of—
>
> (i) a national environmental standard:
>
> (ii) other regulations:
>
> (iii) a national policy statement:
>
> (iv) a New Zealand coastal policy statement:
>
> (v) a regional policy statement or proposed regional policy statement:
>
> (vi) a plan or proposed plan; and
>
> (c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.

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15 We base this description of the consents required and the framework under which they fell to be assessed on that given by the Environment Court and the High Court: see Environment Court decision, above n 1, at [3]–[4] and [26]–[28]; and High Court judgment, above n 2, at [16].

…

[19] Pursuant to s 104(1)(b)(v) and (vi), the applications fell to be assessed under the Bay of Plenty Regional Policy Statement (RPS), which became operative in 2014, and the Bay of Plenty Regional Natural Resources Plan (RNRP) made in 2017. The RNRP was an amalgamation of regional plans including the Regional Water and Land Plan of 2008 and the Regional Plan for the Tarawera River Catchment 2004. Other relevant parts of the RNRP deal with Kaitiakitanga (ch 3) and Water Quality and Allocation (ch 7). Proposed Plan Change 9 (PPC9), another planning instrument, would amend ch 7 in what the Environment Court described as "the first step in a two-stage approach to give effect to" the National Water Policy Statement on Freshwater Management 2014 (amended in 2017) (NPSFM) in the Bay of Plenty.[16]

District Council consents

[20] Creswell also relevantly sought consent from the District Council under s 127 of the RMA to vary the conditions applying to the existing land use consent to allow the expansion of the water bottling plant and construction of the facilities proposed. It considered that the proposal could be authorised as a variation of the consent originally granted in 1991, and as such it was unnecessary to make an application for a new consent under s 88 of the RMA. Section 127 provides:

> **127 Change or cancellation of consent condition on application by consent holder**
>
> (1) The holder of a resource consent may apply to a consent authority for a change or cancellation of a condition of the consent, subject to the following:
>
> (a) the holder of a subdivision consent must apply under this section for a change or cancellation of the consent before the deposit of the survey plan (and must apply under section 221 for a variation or cancellation of a consent notice after the deposit of the survey plan); and
>
> (b) no holder of any consent may apply for a change or cancellation of a condition on the duration of the consent.
>
> …

[16] Environment Court decision, above n 1, at [28].

(3) Sections 88 to 121 apply, with all necessary modifications, as if—

(a) the application were an application for a resource consent for a discretionary activity; and

(b) the references to a resource consent and to the activity were references only to the change or cancellation of a condition and the effects of the change or cancellation respectively.

…

(4) For the purposes of determining who is adversely affected by the change or cancellation, the consent authority must consider, in particular, every person who—

(a) made a submission on the original application; and

(b) may be affected by the change or cancellation.

[21] The District Council accepted the application could be considered under s 127. The Environment Court agreed, concluding that the proposal was for the expansion of an existing activity, and the character of the adverse effects that would be generated would be the same as for the existing activity, although their intensity would increase.[17] The High Court agreed.[18] Whether it was right to do so is the subject of Question 5.

[22] We now turn to the decisions of the Courts below, and the submissions of the parties, structured by the questions we have to decide.

Question 1

[23] The first question is:[19]

> Did the High Court err in finding that the Environment Court was correct to conclude that the effects on the environment of end use (i.e. export and use of plastic bottles) were beyond the scope of consideration in relation to [Creswell's] application for consents to take water, and those relating to land use activities?

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17 At [252].
18 High Court judgment, above n 2, at [258]–[261].
19 *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council*, above n 4, at [20].

[24] This question raises the issue of whether the effects on the environment as a consequence of the export and use of plastic bottles should have been taken into account in the assessment of the Regional Council and District Council consents.

The Environment Court decision

[25] Before the Environment Court, Ngāti Awa argued the fact that the water to be taken was to be placed in plastic bottles and exported overseas was a relevant consideration in the assessment of the consent to take water. The Regional Council and Creswell submitted to the contrary.

[26] The Court began its analysis by acknowledging increasing concerns about the use of plastic in packaging and containers and the significant volumes of long-lasting plastic waste in the environment.[20] The Court dealt with the relevance of the end use of the water in a section of its judgment headed "Jurisdictional overview". It framed its discussion of relevance by reference to s 104(1)(a) of the RMA. After reviewing various decisions about the proper scope of considerations on applications for resource consent, the Court held it was obliged to have regard to the consequential effects of granting the consents sought within the ambit of the RMA and subject to limits of nexus and remoteness.[21] It concluded that:

> [66] … the end uses of putting the water in plastic bottles and exporting the bottled water are matters which go beyond the scope of consideration of an application for resource consent to take water from the aquifer under s 104(1)(a) of the RMA.

[27] The Court noted that the RNRP comprehensively addressed issues relevant to the taking of water from aquifers, and there was no assertion that the RNRP had been

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20 Environment Court decision, above n 1, at [40].

21 At [43]–[59], referring to *Gilmore v National Water and Soil Conservation Authority* (1982) 8 NZTPA 298 (HC); *Annan v National Water and Soil Conservation Authority* (1980) 7 NZTPA 417 (PT); *Metekingi pp Atihau-Whanganui Incorporation and Others v Rangitikei-Wanganui Regional Water Board and Another* [1975] 2 NZLR 150 (SC); *Keam v Minister of Works and Development* [1982] 1 NZLR 319 (CA); *Beadle v Minister of Corrections* EnvC Wellington A074/02, 8 April 2002; *Lee v Auckland City Council* [1995] NZRMA 241 (PT); *Ngāti Rauhoto Land Rights Committee v Waikato Regional Council* (1997) 3 ELRNZ 32 (EnvC); *Cayford v Waikato Regional Council* EnvC Auckland A127/98, 23 October 1998; *Aquamarine Ltd v Southland R C* (1996) 2 ELRNZ 361 (EnvC); *Royal Forest and Bird Protection Society of New Zealand Inc v Buller Coal Ltd* [2012] NZHC 2156, [2012] NZRMA 552; and *West Coast ENT Inc v Buller Coal Ltd* [2013] NZSC 87, [2014] 1 NZLR 32 [*Buller Coal*].

prepared other than competently in relation to that activity.[22] But the end uses of the water, putting it in plastic bottles and exporting it for consumption by people outside New Zealand, were "ancillary activities which are not controlled under the [RNRP]".[23] Further, there was no suggestion that control of those activities came within the ambit of the functions of regional councils under s 30 of the RMA. The Court continued:[24]

> We are not aware of any direct control of such activities by other legislation and accordingly proceed on the basis that such activities are lawful. While such end uses are foreseeable, and while the effects on the environment of using plastic bottles and exporting water may well be adverse, refusing consent to the taking of water in this case will have no effect on all other instances where plastic bottles are used in New Zealand or where water is exported, whether in its natural form or as a component of other exports.

[28] Finally, the Court considered that while in this case the water would not be taken if it could not be bottled, and the proposed volume of water to be taken reflected the fact that the water was to be exported, an appeal in relation to a particular application for resource consent to take water could not effectively prohibit either the use of plastic bottles or the export of bottled water. Such controls required direct legislative intervention at a national level.[25]

The High Court judgment

[29] In the High Court, the Judge considered there was a nexus between the water take and the export of bottled water.[26] He rejected the submission made on behalf of Creswell that the effects of exporting water were too remote from, or insufficiently connected to, the activity of extracting it from the ground "at least when those effects are cultural effects occurring in New Zealand".[27] He also said:

> [142] I do not favour a legal proposition of general application that the effects of exporting water are too remote or otherwise beyond the scope of consideration in any application for resource consent to take water.

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22 At [63].
23 At [64].
24 At [64].
25 At [65]. We note here that some doubt was entertained by the High Court as to whether the Environment Court's discussion of end use was related solely to the Regional Council consents or was intended to extend to the District Council consents. In the end, the High Court Judge considered that the Environment Court had in fact addressed the end use issue in relation to both the Regional Council and District Council consents: High Court judgment, above n 2, at [51]–[54]. Nothing turns on that issue now.
26 High Court judgment, above n 2, at [140].
27 At [141].

> Remoteness is an issue of fact and degree and I do not consider it is capable of such a statement of law in the abstract. …

[30] The Judge held the Environment Court's conclusion, that exporting bottled water was beyond the scope of consideration in an application for resource consent to take water, "went too far".[28]

[31] The Judge accepted that the use of plastic bottles was lawful and not the subject of specific regulatory control under the RMA or otherwise. The impacts of concern were the disposal of the bottles after use.[29] Insofar as the bottles were discarded having been used overseas, the effects would be too remote and outside the scope of the RMA.[30] In terms of domestic disposal, the Judge considered it was not inevitable that every plastic bottle would be discarded, and recycling might reduce the relevant consequential effects together with proper disposal at facilities in New Zealand. Moreover, it was significant that operating a landfill to accept plastic waste required a resource consent, as it meant those consequential effects could be taken into account separately under the RMA.[31]

[32] The Judge also considered that discarding plastic bottles would be unlawful and the responsibility of the person disposing of them under the Litter Act 1979. In this sense, discarding the bottles could be independent from the grant of the consent to take water. Notwithstanding that, the fact that an action was unlawful and primarily the responsibility of another person did not necessarily preclude "nexus" between the consent and the discarding of the bottles.[32]

[33] The Judge further considered that the adverse effects of discarding plastic bottles were not direct effects of allowing the activity of taking water. Instead, they were "downstream effects", which would normally only be considered if the relevant activity were not subject to regulation under the RMA.[33]

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28 At [142].
29 At [148].
30 At [149].
31 At [150].
32 At [151].
33 At [153].

[34] Drawing the various threads together, the Judge concluded it was reasonably foreseeable (if not inevitable) that some plastic bottles would be discarded. While the adverse effects of discarding plastic bottles were not necessarily intangible, littering was a downstream effect which was prohibited. Although there was evidence about the scale of the bottling operation, there was no evidence as to the scale of adverse effects of plastic bottles from the operation being discarded. This meant that, as a matter of fact and degree, the adverse effects of consumers discarding plastic bottles were too indirect or remote to require further consideration in Creswell's application.[34]

[35] Consequently, the Judge held the Environment Court did not err in concluding that the effects on the environment of using plastic bottles were beyond the scope of consideration in assessing the application.[35]

Submissions on appeal

The appellants

[36] Ms Irwin-Easthope, for Ngāti Awa, submitted that the consequential effects of the export and disposal of plastic bottles have a sufficient nexus with the application for resource consent to merit consideration under s 104(1)(a) of the RMA. She submitted that the end use effects of the proposal are appropriately assessed under the RMA, particularly because they are not otherwise regulated.

[37] Ms Irwin-Easthope addressed the Supreme Court's decision in *West Coast ENT Inc v Buller Coal Ltd* (*Buller Coal*), the leading decision on consequential effects.[36] She submitted the Supreme Court held that whether end uses or "consequential effects" of allowing an activity are relevant under s 104(1) is a matter of nexus and remoteness. In *Buller Coal*, it was held that the words "actual and potential effects on the environment" in s 104(1)(a) did not extend to the impact on climate change of the discharge into air of greenhouse gases resulting indirectly from that activity.[37] Ms Irwin-Easthope argued *Buller Coal* could be distinguished: that case engaged s 104E of the RMA, which provides that in considering an application for a

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34 At [156].
35 At [157].
36 *Buller Coal*, above n 21.
37 At [172] per McGrath, William Young and Glazebrook JJ.

discharge permit or coastal permit to do something that would otherwise contravene ss 15 or 15B of the RMA relating to the discharge into air of greenhouse gases, a consent authority must not have regard to the effects of such a discharge on climate change. She argued that the majority in *Buller Coal* had been much influenced by s 104E, and relied on observations in the dissenting judgment of Elias CJ.

[38] Ms Irwin-Easthope referred in particular to Elias CJ's observations that:[38]

> [74] Section 104(1)(a) is concerned with the "actual and potential effects on the environment of allowing the activity", including future and cumulative effects, regardless of their scale. The "environment" is defined to include "ecosystems". That includes the single ecosystem which makes the phenomenon of global climate change possible. Small contributions which accumulate with other contributions in such an ecosystem have been treated as "effects" within the scope of [ss] 104(1)(a) and 3 of the [RMA] in decisions of the Environment Court. …

[39] Ms Irwin-Easthope also referred to what Elias CJ said on the issue of "remoteness". The Chief Justice had described s 104E as allowing an exception where the use of renewable energy permitted a reduction in the discharge of greenhouse gases into air, either absolutely or relatively. The Chief Justice considered the exception indicated that such effects were not treated by the legislation as "too remote" to be of concern to decision makers. She said:[39]

> [88] The exception also confirms the approach taken under ss 5 and 104 of the [RMA] which recognises that the merits of a proposal must be assessed by taking into account matters that detract from the benefits claimed. The exercise in assessing "sustainable management" is otherwise one-sided.

[40] Ms Irwin-Easthope also relied on the Environment Court decision of *Protect Aotea v Auckland Council*, in which the Court decided whether the consideration of applications for resource consent to carry out dredging in the Waitematā Navigation Channel could properly include the effects of dumping dredged material outside the coastal marine area but within New Zealand's exclusive economic zone.[40] The Court concluded there was no real foundation on the evidence for an argument that the dredging and dumping activities did not have a "clear causal

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38 Footnotes omitted.
39 Footnote omitted.
40 *Protect Aotea v Auckland Council* [2021] NZEnvC 140.

relationship in terms of both nexus and remoteness".[41] This was on the basis that "without dredging, there would be no dumping; and without the ability to dump, dredging would not occur".[42] Therefore the consequential effects of allowing the dredging activity necessarily included the effects of disposal of the dredged material.

[41] In the present case, Ms Irwin-Easthope noted the Environment Court accepted that the water would not be taken if it could not be bottled, and the proposed volume of water would not be taken if it could not be exported. She said the Court had therefore accepted that there was a nexus between the water take and its end use. Yet the Court failed to consider the end use of the activity in its assessment of the environmental effects. On this basis Ms Irwin-Easthope submitted that both the Environment Court and the High Court were in error and had unnecessarily restricted consideration of the end use of plastic bottles.

[42] Ms Irwin-Easthope also argued that the High Court wrongly constrained its assessment of nexus and remoteness to the issue of the disposal or discarding of plastic bottles. She said the Court should have instead considered the production and use of plastic more broadly, and the impact that has on the environment. This was important because concerns raised by the case did not solely relate to issues concerning the disposal of plastic bottles after use; other concerns included the impact of that on Ngāti Awa's ability to be kaitiaki of the wai in the Ōtākiri aquifer.

The respondents

[43] Mr Smith KC, for Creswell, argued that the question raised was not really a question of law. He submitted that neither the Environment Court nor the High Court had misdirected themselves in law: they had stated and considered the appropriate principles, and Ngāti Awa's real complaint was as to the application of those principles. Mr Smith argued that did not amount to an error of law, relying on the judgments of the Supreme Court in *Bryson v Three Foot Six Ltd* and *Vodafone New Zealand Ltd v Telecom New Zealand Ltd*.[43]

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41 At [59].
42 At [59].
43 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721; and *Vodafone New Zealand Ltd v Telecom New Zealand Ltd* [2011] NZSC 138, [2012] 3 NZLR 153.

[44] Mr Smith submitted the Environment Court had correctly stated that there must be a causal relationship between allowing the activity (that is, carrying out the activity itself) and the effect complained of. He contended the only effects that can be considered are those which directly result from exercising the consent or follow inevitably from it. It cannot be the case that the independent activity of recycling plastic amounts to a relevant consequential effect. Neither can the independent activity of putting plastic waste in a landfill or other approved disposal facility. If any adverse effects could be demonstrated, the activities giving rise to those effects would either take place at authorised facilities in New Zealand, which would be subject to an independent assessment under the RMA, or overseas and so beyond the proper jurisdiction of the New Zealand courts.

[45] Mr Smith also submitted that concerns in respect of the inappropriate discarding of plastic bottles are too remote to be taken into account as that activity would occur at the "bottom end of the retail chain" as a consequence of the actions of "multitudes of individuals". Further, the fact that the random discarding of plastic bottles in New Zealand would breach the Litter Act should be seen as interrupting the causal connection between the creation of the product and the effect of its misuse. In fact, Mr Smith argued, whether the discarding of the bottles is unlawful or not, it is still a consequence of an action by a third party, and not by the creator of the product in question.

[46] Mr Smith further submitted that even if a consent authority attempted to control the type of packaging used by one producer of goods such as Creswell, there would be substantial questions about the "tangibility" of any reduction in adverse effects that might arise. He submitted that issues concerning packaging are complex, and not such as can be effectively regulated through consenting processes. If they are to be controlled, that would be done more appropriately through governmental regulations.

[47] For all these reasons, Mr Smith submitted that neither the Environment Court nor the High Court erred in law.

[48] Ms Hill, for the Regional Council, made similar arguments. She emphasised that although the Environment Court had reached a jurisdictional conclusion that there

was no scope to consider the export of the water, it had proceeded to consider the cultural effects of export, which it had resolved on the evidence as a matter of fact, as the High Court acknowledged. Ms Hill submitted the High Court had properly applied the relevant principles of nexus and remoteness, and its decision contained no error.

Analysis

[49] No party sought to argue in favour of the Environment Court's proposition that it was not relevant to take the end use of the water into account in assessing the adverse effects of the proposal, notwithstanding the absence of relevant controls or assessment criteria in the RNRP or other planning instruments directed to that issue. For that reason, we proceed on the basis that end use is a permissible consideration. That is, for the purpose of having regard to the actual and potential effects of allowing the activity, as required by s 104(1)(a) of the RMA, it is relevant to consider the end use of putting the water taken into bottles, many of which would be made of plastic, many of which would be exported and all of which would be disposed of (whether in New Zealand or overseas) once the water is consumed.

[50] However, the end use is to be considered in accordance with the approach contemplated by the Supreme Court in *Buller Coal*.[44] That means that it is first necessary to define what can appropriately be said to be the relevant effects of granting consent to take water, and whether subjecting those effects to controls under the RMA would have a tangible effect.

[51] The first of those issues gives rise to questions of remoteness. In *Buller Coal*, where an application for resource consent to mine coal was opposed on the basis of the adverse environmental effects of coal burning, the Supreme Court observed that there would always have been scope for argument that the climate change effects relied on "were too remote from the activities for which consents were sought to fall within the scope of s 104(1)(a)".[45] The Court illustrated this approach by reference to the Environment Court decision of *Taranaki Energy Watch Inc v Taranaki Regional*

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44 *Buller Coal*, above n 21.
45 At [117].

Council, in which consents were sought for facilities needed to extract natural gas from under the seabed off Taranaki and the discharge of contaminants into the air.[46] The Environment Court held that the environmental effects of the end use of the energy potential of the gas produced were too remote to be taken into account in deciding the applications, since the end users' activities would either be within the permitted baseline or, if larger in scale, would require separate consents.[47]

[52] The Supreme Court also referred to another decision of the Environment Court, *Beadle v Minister of Corrections*, where resource consents were sought to authorise the construction of a new prison.[48] These included consents for earthworks and for works affecting a stream running through the site. The Environment Court held that in deciding the applications it could have regard to issues raised by submitters tending to establish adverse environmental effects of the prison that should be offset against the positive effects claimed by the Minister of Corrections.[49] It said:

> [91] … we hold that in deciding the resource consent applications we are able to have regard to the intended end-use of a corrections facility, and any consequential effects on the environment that might have, if not too uncertain or remote. But we will also need to bear in mind the nature of the consents sought, to avoid turning proceedings about earthworks and streamworks into appeals about use of land for the facility.

[53] The Environment Court had earlier in its decision surveyed relevant authorities to articulate a general approach to determining what should be regarded as relevant consequential effects. It held that regard should be had to consequential effects "if they are environmental effects for which there is no other forum, but with limits of nexus and remoteness".[50] Consequential effects might be "too slightly connected to the consent sought, and too remote", and the weight to be placed on them must be a matter for the decision maker.[51] The Supreme Court regarded *Beadle* as showing that the relevance of a consequential effect will be a matter of fact and degree.[52]

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46 At [117], citing *Taranaki Energy Watch Inc v Taranaki Regional Council* EnvC Auckland W039/03, 16 June 2003.
47 *Taranaki Energy Watch Inc v Taranaki Regional Council*, above n 46, at [84].
48 *Buller Coal*, above n 21, at [119], citing *Beadle v Minister of Corrections*, above n 21.
49 *Beadle v Minister of Corrections*, above n 21, at [90].
50 At [88].
51 At [88].
52 *Buller Coal*, above n 21, at [119].

[54] In addition to the kinds of considerations discussed in *Buller Coal* and *Beadle*, we think it is helpful to consider the issue of nexus and remoteness through the lens of the case law about the legitimate scope of conditions imposed on the grant of resource consents. The authority to impose conditions is s 108 of the RMA. The power is broadly stated in s 108(1), but has always been regarded as subject to limits, often stated by reference to the House of Lords decision of *Newbury District Council v Secretary of State for the Environment*.[53] In general terms sufficient for present purposes, the rule is that a condition must be fairly and reasonably related to the subject matter of the consent.[54]

[55] The starting point here is that the consent required from the Regional Council was a consent to take water. No consent was required to place the water into plastic bottles, but such placement was plainly intended. It follows that the placement of the water into plastic bottles was a consequential effect. It is also clear, as the Environment Court had found, that the volume of water sought to be taken meant that a substantial amount of the water would be exported overseas. Leaving aside for the time being the impact of the export of the water on the mauri of the wai and on Ngāti Awa as kaitiaki, the question then is whether the fact that the plastic bottles would be disposed of after use is a relevant consideration, or one that is too remote.

[56] There are five main conceptual difficulties with bringing plastic bottle disposal into the range of relevant consequential effects. The first is that the disposal is not something that would be authorised by the resource consent or for which any permission is needed under the RMA. The placing of water into plastic bottles of itself requires no consent, neither does the export of the bottles. The activity of water bottling takes place in a societal context where plastic bottles are pervasively used to contain a great variety of liquids with a multitude of uses, whether for consumption or in various commercial and domestic applications. They are available in the wholesale and retail market. They are manufactured in New Zealand or imported from overseas. In New Zealand, manufacture typically occurs in a zone where manufacturing is a permitted activity. Sales typically occur at premises where

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53 *Newbury District Council v Secretary of State for the Environment* [1981] AC 578 (HL), considered in *Housing New Zealand Ltd v Waitākere City Council* [2001] 1 NZLR 340 (HC).

54 At 599 per Viscount Dilhorne, 608 per Lord Fraser, 618 per Lord Scarman and 627 per Lord Lane.

wholesale and/or retail activity is permitted. It is inconceivable that the RMA can properly be applied to require consideration of the disposal of plastic bottles in respect of every product placed and sold in a plastic bottle or other plastic container. To take a different approach in this case would be to use the occasion of a resource consent application to impose obligations in respect of a single proposal that would not be applied to numerous other commercial and industrial activities using plastic bottles.

[57] Second, disposal is not the action of the holder of the resource consent, but of persons who have purchased the bottled water. Obviously, the holder of the consent cannot control the actions of those persons. And it would not be right to suggest that the holder of a consent for bottling water should nominally be regarded as responsible for the unlawful or problematic disposal of plastic bottles by third parties. We mention here an argument advanced by Sustainable Otakiri. Mr Salmon submitted that the "unlawful" disposal of plastic bottles cannot be ignored, since it is inevitable. He drew a comparison with the inevitability of some drivers speeding on roads, suggesting it would be foolish to ignore that fact and set aside the risks to life of drivers exceeding the speed limit. Such a non-contextual analogy is not helpful. Nor does it advance the appellant's argument. An application for resource consent to manufacture motor vehicles would not obviously lend itself to assessment on the basis of the number of persons who might die as a result of the unlawful use of the cars. That would be too remote to be considered as an effect of granting the application.

[58] Third, insofar as disposal occurs in New Zealand, it will typically occur lawfully either in accordance with a roadside recycling scheme or at an authorised collection point and ultimately be received by those involved (typically local authorities or their agents) in the management of established facilities such as refuse stations and landfills. Those facilities would be operating in accordance with any necessary consents under the RMA or other relevant regulatory controls. Alternatively, if the disposal is by discarding the plastic bottles into the environment, that would be a breach of the Litter Act. But in that situation, the fact of legislative control in another statute tends against the suggestion that the issue should be controlled under the RMA.

[59] Fourth, where disposal occurs overseas, it might or might not be by means of recycling schemes or other lawful collection and disposal methods. But we consider that disposal of plastic bottles in foreign jurisdictions, whether lawful or unlawful, is too remote to be taken into account by a consent authority acting under the RMA in New Zealand.

[60] Fifth, and relatedly, even if the fact of export could be taken into account, it would be impossible to quantify its effects, or assess the impact of lawful and unlawful disposal of plastic bottles in foreign jurisdictions. And a condition that attempts to control the disposal of plastic overseas could not be justified as fairly and reasonably related to a consent to take water.

[61] The above combination of difficulties satisfies us that issues concerning the disposal of plastic bottles are too remote for consideration in the context of the application to take water in this case.

[62] Issues of "tangibility" also support that conclusion. That issue was referred to in *Buller Coal*.[55] The Supreme Court considered it would be difficult, and probably impossible, to show that the proposed burning of the coal would have any perceptible effect on climate change.[56]

[63] As the appellants submit, there is increasing concern about the harmful effects of plastic in the environment. The definition of "effect" in s 3 of the RMA includes, in para (d), "any cumulative effect which arises over time or in combination with other effects", and that is "regardless of the scale" of the effect. So, an effect which is small in scale can properly be considered under s 104(1)(a) of the RMA where it arises in combination with other effects. But to be relevant, the effect must still be an effect of allowing the activity.[57] Here, it would need to be said that the plastic bottles produced by the proposed activities that are discarded in the environment would produce a deleterious effect in combination with the discarding of plastic that already occurs in New Zealand and elsewhere arising from other activities.

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55 *Buller Coal*, above n 21, at [121]–[127].
56 At [122(b)].
57 *Queenstown Lakes District Council v Hawthorn Estate Ltd* [2006] NZRMA 424 (CA) at [83].

[64] By parity of reasoning with *Buller Coal*, the widespread and worldwide use of plastic means that any attempt to control its use in the setting of an individual application for resource consent needs to be justified by evidence tending to establish that there would be a tangible impact of doing so. That impact cannot be inferred in its absence. The parties now wishing to advance the argument that this impact should have been considered in the present case called no such evidence.[58] This is a further reason for affirming the reasoning of the Courts below.

[65] The focus of Ngāti Awa's argument on this question was on the Regional Council consents, and in particular the consent to take water. Sustainable Otakiri adopted Ngāti Awa's argument, adding that the effects of plastic in the environment would have an even more direct connection to the District Council consents because of the proposed production of the plastic bottles onsite. However, that does not overcome the issues we have already addressed in relation to the argument advanced for Ngāti Awa. The same reasoning applies in relation to the District Council consents.

[66] For all these reasons, Question 1 must be answered no.

Question 2

[67] The second question is:[59]

> Did the High Court err in finding that the Environment Court did not need to seek further evidence, or decline [Creswell's] application for consent, in circumstances where the Court had evidence as to the scale of the bottling operation but no evidence as to the scale o[f] adverse effects of plastic bottles being discarded?

[68] This question is premised on the idea that evidence about the extent of plastic bottles being discarded was relevant to the decision to grant consent. The conclusion to Question 1 effectively compels a negative answer for Question 2: if the High Court did not err in concluding that the export and end use of plastic bottles were not relevant considerations in relation to the application for resource consent

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58 They argue in fact that the Environment Court should itself have called the evidence, an argument we address in relation to Question 2.

59 Leave judgment, above n 3, at [4].

to take water, it cannot have been an error not to seek further evidence as to the scale of adverse effects of plastic bottles being discarded, or decline the application in its absence.

[69] Consistently with this, Ms Irwin-Easthope submitted that if the effects of land use were relevant to the consideration of the application, then the Environment Court had erred in not seeking further evidence as to the effects of the end use of export and use of plastic bottles, or by not declining the application due to inadequate information.

[70] It should be noted that, as Mr Smith pointed out for Creswell, no party before the Environment Court suggested that evidence should have been called about the scale of adverse effects of plastic bottles being discarded. Plastic waste was not in fact raised as a relevant consideration at any stage prior to the Environment Court hearing.

[71] Mr Smith also pointed out that the argument presented in the High Court was based on the fact that one of the Environment Court members, Commissioner Kernohan, raised the issue of his own motion. Ngāti Awa's focus in the Environment Court was on the cultural effects of the export of the water, as opposed to the adverse effects of plastic on the environment. No party called evidence on the adverse effects of discarding plastic, and none sought that the hearing be adjourned for such evidence to be obtained.

[72] In the High Court, Gault J was prepared to accept that as a matter of law the effects of disposal of plastic bottles would not always be too remote to warrant consideration, but noted that issue was not raised by those opposing the application at the Environment Court hearing. He considered that, in those circumstances, the Environment Court was not obliged to seek further evidence or dismiss the application on the basis of inadequate information.[60]

[73] Ms Irwin-Easthope argued in this Court that the Environment Court had a duty to seek evidence on the issue once it had been raised by one of its members, basing that submission on the fact that the Environment Court has an inquisitorial role.

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60 High Court judgment, above n 2, at [157].

She supported this proposition by reference to *Universal College of Learning v Whanganui District Council,* in which the Environment Court observed:[61]

> Although many proceedings before the Court take the form of a contest, the fact is that the Environment Court process is an amalgamation of both inquisitorial and adversarial processes driven by the imperative of sustainable management contained in [s 5 of the] RMA …

[74] Ms Irwin-Easthope noted that the Environment Court also referred to ss 269(1) and 276(1)(a) of the RMA, which enable the Court to regulate its own process and receive anything in evidence that it considers appropriate to receive.

[75] We accept that if the Environment Court considers that an issue of significance to the disposition of a case before it should be the subject of further evidence, it could ask the parties before it to call evidence on the issue or, if it thought it appropriate, make arrangements itself in an exceptional case for such evidence to be obtained.

[76] In the present case, one member of the Court considered that the end use of the plastic bottles was relevant to the assessment of the application, and that is clear from the dissenting judgment he delivered.[62] But the fact that an issue was raised by one member of the Court cannot be said to give rise to a duty on the part of other members to require the issue to be the subject of evidence. As is apparent from the Environment Court decision, it was not a view the majority shared. Given that they had a contrary view, they were entitled to act on it.

[77] Except in cases where it is clear that an issue should have been the subject of evidence, we do not consider the Environment Court is obliged to procure evidence on it. Where evidence of this type has not been called, often the most appropriate course for the Court to follow would be to decide the case on the basis that the evidence was not available, with appropriate consequences for the disposition of the proceeding before it.

[78] Although the Court is able to adopt an inquisitorial approach, we consider that its primary duty in an appeal concerning whether a resource consent should have been

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61 *Universal College of Learning v Whanganui District Council* EnvC Wellington W065/09, 17 August 2009 at [27].

62 See Environment Court decision, above n 1, at [322]–[347] per Commissioner Kernohan.

granted or declined is to consider the issues raised by the parties and the evidence they have called, and apply the relevant statutory provisions in the RMA. Any other approach would be likely to lead to increased uncertainty, cost and delays. We add that although the nature of the Environment Court's jurisdiction and obligations under pt 2 of the RMA will often require a more flexible approach than that which would be followed in civil litigation in the District Court or High Court, a party to proceedings before the Environment Court should ensure it calls relevant evidence to support the issues it wishes to raise. An approach that relies on the Court itself to seek the evidence is not to be encouraged and is unlikely to succeed.

[79] It will be apparent from the discussion of Question 1 that we do not regard this case as one where the Environment Court was obliged to obtain further evidence. Question 2 is answered no.

Question 3

[80] The third question is:[63]

> Did the High Court err in finding that the Environment Court did not need to have recourse to pt 2 of the [RMA] and, in particular (i) that the relevant planning instruments provided adequate coverage of the provisions of pt 2, and (ii) that an assessment of sustainability by itself was sufficient to address relevant cultural effects, so that no further reference to pt 2 was needed in that context[?]

[81] The phrasing of the third question reflects what was said about the role of pt 2 of the RMA in *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* (*King Salmon*),[64] which this Court applied in the context of applications for resource consent in *RJ Davidson Family Trust v Marlborough District Council* (*RJ Davidson*).[65] The argument for Ngāti Awa is that the relevant planning instruments did not adequately reflect the provisions of pt 2 and consequently the Environment Court should not have concluded that resort to pt 2 was unnecessary.

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63 Leave judgment, above n 3, at [4] (footnotes omitted).

64 *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 [*King Salmon*].

65 *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, [2018] 3 NZLR 283 [*RJ Davidson*].

It is also said that an assessment of "sustainability" was insufficient to address relevant cultural effects, so that further reference to pt 2 was needed in that context.

The Environment Court decision

[82] These arguments need to be addressed in the context the Environment Court had found, on the basis of expert evidence before it, that the proposed water take and the volumes and rates applied for would have negligible adverse effects on the source of the water.[66] The Court noted that Ngāti Awa had not contested the conclusions of water experts regarding the biophysical effects of the water take, nor had it called evidence describing the adverse metaphysical effects, such as those on the mauri of the aquifer.[67] The evidence it called from Dr Hōhepa Mason and Te Kei Wilson Merito had focused on the irrevocable loss of the mauri of the water resulting from its bottling and export overseas: Ngāti Awa's case was that the bottling and export of the water would adversely affect the mauri of the water and its role as kaitiaki of it.[68]

[83] However, the Court found against Ngāti Awa on this aspect. It preferred the evidence that was called by Creswell from Hemana Eruera Manuera (himself a Ngāti Awa kaumātua and tikanga advisor) who had, as the Court noted, expressed no concerns about the potential for adverse effects on te mauri o te wai, on the basis of his understanding that the water resource would not be depleted by the water take.[69] The Court explained his view that:[70]

> … when water is extracted it carries mauri with it, but as it is replenished by rainfall the mauri is restored as it returns to its original source. For water that moves away from its source, in this case through bottling and export, the mauri of the water moves within it. Where the water is consumed by a living person the mauri of that person is enriched by te mauri o te wai, irrespective of whether that consumption is local, outside the region or anywhere overseas. Mauri wai and mauri tangata (mankind) are linked and when all things return to Papatūānuku the cycle of mauri continues. It is from this understanding of tikanga that Mr [Manuera] advised that there will be no adverse effects on te mauri o te wai from the Creswell proposal, either from the extraction from the aquifer or from the subsequent bottling and export of that water.

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66 Environment Court decision, above n 1, at [319].
67 At [134].
68 At [71] and [134]. Dr Mason and Mr Merito were both members of Ngāti Awa's Tikanga Advisory Group, Te Kāhui Kaumātua o Ngāti Awa rōpū.
69 At [74] and [103].
70 At [74].

[84] The Court concluded there was no evidence of a coherent, widely held belief within Ngāti Awa as to the adverse metaphysical effects of taking water for bottling and export.[71] With specific reference to the export of the water, the Court saw no reason why, if the taking of the water was sustainable, its export would not be.[72]

[85] The Court noted that Ngāti Awa had framed the appeal as being about te mauri o te wai. It quoted the explanation of "mauri" in the RPS:[73]

> The essential life force, energy or principle that tangata whenua believe exists in all things in the natural world, including people. Tangata whenua believe it is the vital essence or life force by which all things cohere in nature. When Mauri is absent there is no life. When Mauri is degraded or absent, tangata whenua believe this can mean that they have been remiss in their kaitiakitanga responsibilities and this affects their relationship with the atua (Māori gods). Mauri can also be imbued within manmade or physical objects.

[86] The Court recorded its understanding that mana and mauri were closely linked, and adopted the approach that if the mauri of a resource were adversely affected, its mana must also be adversely affected.[74]

[87] The relevant regional planning framework was provided by the RPS, RNRP and NPSFM.[75] The Court concluded that issues relating to the taking of water were comprehensively addressed in the RNRP, and it had heard no argument that the RNRP had been prepared other than competently on that aspect.[76] The Court also concluded that issues concerning the efficient use and development of natural and physical resources (one of the matters that consent authorities must have particular regard to under s 7(b) of the RMA) were fully provided for in the regional planning instruments.[77]

[88] The Court also noted that at a conference of experts prior to the hearing it had been agreed that the regional plans provided adequate coverage of ss 6(e), 7(a) and 8

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71 At [100].

72 At [107]. As we noted at [4] above, this Court rejected at an interlocutory stage the raising of what was held to be a factual determination on this issue, for the purposes of a second appeal on a question of law: Leave judgment, above n 3, at [5(2)].

73 At [115]. The Court also referred to a definition of "mauri" in the RNRP: at [116].

74 At [117].

75 We referred to the documents represented by these abbreviations at [19] above.

76 Environment Court decision, above n 1, at [63].

77 At [167].

of the RMA.[78] These key provisions in pt 2 of the RMA provide respectively that the relationship of Māori with water (among other things) is a matter of national importance; that consent authorities must have particular regard to kaitiakitanga; and that the principles of the Treaty of Waitangi/Te Tiriti o Waitangi must be taken into account. The Court concluded:

> [169] Again, we have considered the matter of adequacy of the regional plans in providing for tangata whenua values and tikanga to be assessed, finding that such consideration is fully provided for. There is no need for recourse to pt 2 matters to address tikanga concerns.
>
> [170] We find that any recourse to assessing this application directly under pt 2 of the RMA would not add any value to our decision-making in these proceedings. This is consistent with the approach taken by the Court of Appeal in *RJ Davidson*.[79]

The High Court judgment

[89] These conclusions were challenged in the High Court on the basis that the Environment Court had failed to consider the effects of end use. The Judge recorded a submission by counsel for Ngāti Awa that the second stage of giving effect to the NPSFM was to set limits for water quantity and quality, and involve tangata whenua and the community in a consultation process. Counsel had submitted that it was a "risky precedent" to consider that a process only halfway through was complete so as to avoid the need to refer to pt 2.[80] The Judge also noted that it was common ground that PPC9 had been withdrawn by the time of the hearing in the High Court, but held that the withdrawal was irrelevant to the Environment Court's prior assessment.[81]

[90] The Judge quoted the relevant provisions of the NPSFM:[82]

> **Preamble**
>
> …

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78 At [168].
79 *RJ Davidson*, above n 65.
80 High Court judgment, above n 2, at [166].
81 At [167].
82 At [170]. The Environment Court had quoted more extensively from this provision including statements that upholding te mana o te wai would acknowledge and protect te mauri o te wai, and that recognition of te mana o te wai was intended to place the health and well-being of freshwater bodies at the forefront of discussions and decisions about freshwater: Environment Court decision, above n 1, at [114]–[117].

The Treaty of Waitangi/Te Tiriti o Waitangi is the underlying foundation of the Crown–iwi/hapū relationship with regard to freshwater resources. Addressing tangata whenua values and interests across all of the well-beings, and including the involvement of iwi and hapū in the overall management of fresh water, are key to giving effect to the Treaty of Waitangi.

…

This national policy statement recognises Te Mana o te Wai and sets out objectives and policies that direct local government to manage water in an integrated and sustainable way, while providing for economic growth within set water quantity and quality limits. The national policy statement is a first step to improve freshwater management at a national level.

…

Iwi and hapū have a kinship relationship with the natural environment, including fresh water, through shared whakapapa …

…

This preamble may assist the interpretation of the national policy statement.

…

National significance of fresh water and Te Mana o te Wai

The matter of national significance to which this national policy statement applies is the management of fresh water through a framework that considers and recognises Te Mana o te Wai as an integral part of freshwater [management].

The health and well-being of our freshwater bodies is vital for the health and well-being of our land, our resources (including fisheries, flora and fauna) and our communities.

Te Mana o te Wai is the integrated and holistic well-being of a freshwater body.

…

AA. Te Mana o te Wai

Objective AA1

To consider and recognise Te Mana o te Wai in the management of fresh water.

Policy AA1

By every regional council making or changing regional policy statements and plans to consider and recognise Te Mana o te Wai, noting that:

a) te Mana o te Wai recognises the connection between water and the broader environment — Te Hauora o te Taiao (the health of the environment), Te Hauora o te Wai (the health of the waterbody) and Te Hauora o te Tangata (the health of the people); and

b) values identified through engagement and discussion with the community, including tangata whenua, must inform the setting of freshwater objectives and limits.

[91] The Judge next referred to relevant provisions in pt 2 (Issues and objectives) of the RPS, concerning Te Tiriti o Waitangi/Treaty of Waitangi principles, recognition of tino rangatiratanga and the degradation of mauri.[83] Relevantly, para 2.6.7 provides:

> There needs to be better interpretation by resource management decision makers of the effects activities and development have on mauri. Mauri in relation to water means life and the living. It has the capacity to generate, regenerate and uphold creation. Because of this, all living things in the water and its environs, are dependent on its mauri for their well-being and sustenance. Hence, each water type is seen as a taonga and is sacred due to the potential prosperity it can give to Māori associated with it. The mauri of each waterway is a separate entity and cannot be mixed with the mauri of another. There are clearly effects on mauri caused by water pollution, agricultural spray, fertilizer run-off and effluent discharges.

[92] The Judge then referred to pt 3 (Policies and methods) of the RPS, concerning iwi resource management, and quoted:[84]

> **Policy IW 3B: Recognising the Treaty in the exercise of functions and powers under the Act**
>
> Exercise the functions and powers of local authorities in a manner that:
>
> (a) Takes into account the principles of the Treaty of Waitangi;
>
> (b) Recognises that the principles of the Treaty will continue to evolve and be defined;
>
> (c) Promotes awareness and understanding of councils' obligations under the Act regarding the principles of the Treaty, tikanga Māori and kaupapa Māori, among council decision makers, staff and the community;
>
> (d) Recognises that tangata whenua, as indigenous peoples, have rights protected by the Treaty and that consequently the Act accords iwi a status distinct from that of interest groups and members of the public; and
>
> (e) Recognises the right of each iwi to define their own preferences for the sustainable management of natural and physical resources, where this is not inconsistent with the Act.

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83 High Court judgment, above n 2, at [171].
84 At [172].

Explanation

The Act requires all persons exercising functions and powers under it in relation to managing the use, development, and protection of natural and physical resources, to take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi). The Treaty is a living instrument and its principles continue to be defined — by the Courts, including the Environment Court, and the Waitangi Tribunal. Policy statements and plans should arise out of and be sensitive to the partnership principle of the Treaty. The objectives to be achieved should be such that both partners identify with them. Policy statements and plans can be a way of expressing what we hold in common.

The Treaty of Waitangi (Te Tiriti o Waitangi) established the special relationship between the Māori people and the Crown. The Treaty provided for the exchange of kāwanatanga (governance or government) for the protection of rangatiratanga.

…

[93] The Judge also set out a relevant extract from the Mataatua Declaration on Water, which counsel for Ngāti Awa had relied on and submitted reflected Ngāti Awa's kaitiaki role:[85]

WE THE TRIBES OF MATAATUA WAKA … recognise that:

I Water … is of vital importance in sustaining the life principle of all human beings in the past, for the present and in the future.

…

III It is the sacred duty of present generations to ensure that water quality and quantity is available to sustain the lives of future generations of the peoples of Aotearoa.

IV … the indigenous peoples of the land have rights based on the Treaty of Waitangi and on aboriginal title to the use of their waters in their tribal regions.

V … the people of Mātaatua recognise the need to share our water and to so manage it for the long term benefit of all peoples.

…

WE THE TRIBES OF MATAATUA WAKA also recognise that as good citizens of the land and in exercising our rights under the common law and the doctrine of aboriginal title, through the Treaty of Waitangi and under the Declaration on the Rights of Indigenous Peoples we have a responsibility to share our water and to so manage rights of access, use and conservation for the long term benefit of all peoples residing in these our islands.

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85 At [173]–[174].

[94] The Judge held that the Environment Court had clearly been aware of the key need in the NPSFM to consider and recognise te mana o te wai. He noted also the Environment Court's conclusion that the regional planning instruments required the Regional Council to recognise, have regard to and take into account kaitiakitanga and the principles of Te Tiriti o Waitangi/the Treaty of Waitangi.[86]

[95] The Judge agreed with the Environment Court that the RNRP addressed issues concerning water take comprehensively. He held the Environment Court had correctly concluded that the regional plans provided adequate coverage of the matters in ss 6(e), 7(a) and 8 of the RMA for kaitiakitanga, tangata whenua values and tikanga. The fact that PPC9 was the first part of a two-stage process did not mean there was any gap in the regional planning framework, since the planning documents themselves required consideration of the principles of the Treaty of Waitangi.[87] After discussing *King Salmon* and *RJ Davidson*, the Judge concluded that in the circumstances there had been no need for separate reference to pt 2 of the RMA, including s 8.[88]

Submissions on appeal

The appellants

[96] Ngāti Awa challenges the High Court's conclusion that the relevant planning framework provided adequate coverage of the matters in ss 6(e), 7(a) and 8, including in particular recognising and providing for the relationship of Māori with water. Ms Irwin-Easthope submitted that the High Court did not undertake its own assessment of the planning framework to assess whether it provided adequate coverage of pt 2 and had instead placed emphasis on the evidence of the planning witnesses.

[97] Ms Irwin-Easthope emphasised what she saw as unique aspects of the case, which she submitted meant reversion to pt 2 was necessary: that the planning framework is subject to change, that water bottling activities do not regularly come before the courts, and that Creswell's proposal is for an activity not contemplated by

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86 At [175].
87 At [178].
88 At [188].

the planning framework and will have serious effects on the environment and Ngāti Awa's ability to exercise their tikanga and kawa, including their role as kaitiaki. Partly because it is in a state of flux, Ms Irwin-Easthope submitted the planning framework was deficient in its coverage of the matters provided for in ss 6(e), 7(a) and 8, particularly when considering the principles expressed in the Mataatua Declaration, tino rangatiratanga (a principle encompassed by s 8) and the importance of te wai, the taonga at issue to Māori. Ms Irwin-Easthope said these deficiencies gave rise to the need to refer to and apply pt 2, in accordance with the statement in *McGuire v Hastings District Council* that ss 6(e), 7(a) and 8 contain "strong directions, to be borne in mind at every stage of the planning process".[89]

[98] Ms Irwin-Easthope also submitted that in the circumstances of this case an assessment of sustainability was not sufficient for the purposes of addressing cultural effects, particularly in relation to s 8. She contended the Environment Court and the High Court had wrongly conflated sustainability with biophysical matters and had failed to consider metaphysical effects in determining whether reversion to pt 2 was necessary. She suggested this was an error similar to that made by the decision-making committee of the Environmental Protection Authority in *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board*.[90] In that case, William Young and Ellen France JJ held that the committee had not effectively grappled with the true effect of the proposal for the iwi parties and their concern that they would be unable to exercise their kaitiakitanga to protect the mauri of the marine environment.[91] It was said that the committee needed to "indicate an understanding of the nature and extent of the relevant interests, both physical and spiritual, and to identify the relevant principles of kaitiakitanga said to apply".[92]

[99] Similar submissions were made by Mr Enright on behalf of Ngāti Pikiao Environmental Society Inc and Te Rūnanga o Ngāi Te Rangi Iwi Trust. In relation to the first part of Question 3, Mr Enright emphasised that PPC9, one of the regional planning instruments the Environment Court had considered, had been subject to

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89 *McGuire v Hastings District Council* [2000] UKPC 43, [2002] 2 NZLR 577 at [21].
90 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801.
91 At [160].
92 At [161].

appeals and has since been withdrawn. Mr Enright submitted the fact that a relevant planning instrument is undergoing the statutory procedures required to make it operative under the RMA and might therefore be subject to change means that direct resort to pt 2 was necessary. He made the general point that it cannot be assumed that a plan change will promote sustainable management and the various component parts of ss 6, 7 and 8 when its provisions might be changed in further processes.

[100] As to the second part of Question 3, Mr Enright emphasised the statements in *King Salmon* and *McGuire* about the mandatory nature of Treaty of Waitangi considerations for decision making under the RMA.[93] He submitted that pt 2 was a mandatory consideration for the proposal and the Environment Court had erred in finding there was no need to consider it directly.

The respondents

[101] For Creswell, Mr Smith submitted that, based on the Environment Court's factual findings that the Ōtākiri aquifer is an abundant, renewable source of water, Creswell's proposed water take will have no adverse effects on the aquifer in a physical or metaphysical sense. In terms of the latter, Ngāti Awa's case that the export of the water would adversely affect its mauri and ability to exercise its kaitiaki role was rejected by the Environment Court, which had preferred the evidence of Mr Manuera and found that the export would not, as a matter of the tikanga of Ngāti Awa, have adverse effects justifying the refusal of consent.

[102] Mr Smith also submitted that there was no basis in the relevant regional planning instruments for Creswell's application to be refused. There is no regional policy or rule that purports to regulate the export of water. There is no suggestion that the relevant plans had been prepared incompetently and the planning witnesses before the Environment Court agreed that the plans had provided adequate coverage of ss 6(e), 7(a) and 8. This was reflected in the joint witness statement of the experts, including Bridget Robson, whom Ngāti Awa had called. Ms Robson had also agreed that the regional planning framework provided comprehensive provisions regarding

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[93] Referring to *King Salmon*, above n 64, at [88]; and *McGuire v Hastings District Council*, above n 89, at [21].

kaitiakitanga. Mr Smith submitted there is no basis to question the conclusions reached by the Environment Court and the High Court that these issues were adequately dealt with in the planning instruments. He pointed out that Ngāti Awa had also not identified what would have been achieved if direct recourse to pt 2 were had.

[103] Mr Smith further submitted that it was wrong to suggest the High Court had found that an assessment of sustainability was by itself sufficient to address relevant cultural effects. He submitted that the High Court had not in fact made such a finding. Rather, the Environment Court had determined that Creswell's proposed water take would not compromise the sustainability or mauri of the aquifer, a finding that was not in issue in the High Court. But the Environment Court had not failed to deal with the actual issue raised before it, about the effect of bottling and export on Ngāti Awa's tikanga. As to that it had made a factual finding on the evidence before it. So, the factual premise of the second part of Question 3 was wrong.

[104] For the Regional Council, Ms Hill noted that the relevant provisions of the RNRP, which provide guidance on addressing the matters in ss 6(e), 7(a) and 8, were not affected by PPC9. The subsequent withdrawal of PPC9 should not have affected the comprehensive provisions of the RNRP that had been referred to and applied by the Environment Court and the High Court. Contrary to Ngāti Awa's submissions, while the High Court noted that all the planning witnesses agreed that the regional planning instruments dealt comprehensively with relevant pt 2 matters including kaitiakitanga, the High Court undertook its own assessment. In doing so, it had identified the relevant provisions which directly referred to te mana o te wai and Te Tiriti o Waitangi principles, including recognition of tino rangatiratanga and the degradation of mauri. The Court was entitled to rely on the provisions that were referred to it by counsel and in the evidence, and to review and apply those provisions. After doing so, the High Court properly concluded that the regional planning framework provided adequate coverage of the matters referred to.

[105] Ms Hill also submitted that neither Ms Irwin-Easthope nor Mr Enright had clearly explained how making direct reference to pt 2 would have resulted in a different outcome or explained what additional guidance or direction pt 2 would have provided in relation to cultural effects beyond the matters covered by the planning

framework. Ms Hill contended the High Court was alert to the fact that an additional assessment carried out under pt 2 would not have materially affected the outcome of this case. And, as with Mr Smith, Ms Hill rejected the suggestion that the Environment Court had carried out an assessment limited to sustainability.

Analysis

[106] *King Salmon* involved an application for changes to the Marlborough Sounds Resource Management Plan.[94] The Supreme Court held that the comprehensive nature of the New Zealand Coastal Policy Statement (NZCPS) meant there was no need for the decision makers to make reference to and apply the provisions of pt 2 of the RMA: in principle, by giving effect to the NZCPS, the decision makers were necessarily acting "in accordance with" pt 2 in any event.[95]

[107] In *RJ Davidson,* this Court explained that the consideration of applications for resource consent under s 104 of the RMA required a different approach.[96] Discussing s 104(1), we said:

> [47] … we are satisfied that the position of the words "subject to Part 2" near the outset and preceding the list of matters to which the consent authority is required to have regard, clearly show that a consent authority must have regard to the provisions of pt 2 when it is appropriate to do so.

[108] This Court also acknowledged that there will be cases where reference to pt 2 will not add anything of value. We said:

> [74] It may be, of course, that a fair appraisal of the policies means the appropriate response to an application is obvious, it effectively presents itself. Other cases will be more difficult. If it is clear that a plan has been prepared having regard to pt 2 and with a coherent set of policies designed to achieve clear environmental outcomes, the result of a genuine process that has regard to those policies in accordance with s 104(1) should be to implement those policies in evaluating a resource consent application. Reference to pt 2 in such a case would likely not add anything. It could not justify an outcome contrary to the thrust of the policies. Equally, if it appears the plan has not been prepared in a manner that appropriately reflects the provisions of pt 2, that will be a case where the consent authority will be required to give emphasis to pt 2.
>
> [75] If a plan … has been competently prepared under the Act it may be that in many cases the consent authority will feel assured in taking the view

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94 *King Salmon*, above n 64.
95 At [85].
96 *RJ Davidson*, above n 65, at [47].

> that there is no need to refer to pt 2 because doing so would not add anything to the evaluative exercise. Absent such assurance, or if in doubt, it will be appropriate and necessary to do so. That is the implication of the words "subject to Part 2" in s 104(1), the statement of the Act's purpose in s 5, and the mandatory, albeit general, language of ss 6, 7 and 8.

[109] We have already set out many of the relevant extracts from the planning documents to which the High Court referred, at [90]–[92] above, and we do not repeat them here. We observe that they reflect an apparently comprehensive set of provisions dealing with issues relevant to the relationship of Māori with water, te mana o te wai and relevant Te Tiriti o Waitangi/Treaty of Waitangi principles. The latter include provisions recognising tino rangatiratanga and the degradation of mauri. The planning documents refer extensively to both the biophysical and metaphysical dimensions of activities relating to water. The appellants assert an error as a result of the Courts not referring in addition to pt 2, but we are left unclear as to what that might have added to the analysis carried out by reference to the planning documents. This was a case in which, in accordance with what was said in *RJ Davidson*, the Environment Court could properly conclude that nothing would be added by direct reference to pt 2. And in this respect, it is not a significant point to say that the planning framework might later change if what remained and was referred to dealt comprehensively with the issues affecting the wai from both a biophysical and a metaphysical perspective.

[110] We consider in the circumstances that this was a case in which the Environment Court was entitled to feel "assured in taking the view that there is no need to refer to pt 2 because doing so would not add anything to the evaluative exercise".[97] We acknowledge that in cases involving issues of concern to Māori about the commercial exploitation of water for bottling and sale there may well be risks in adopting that approach in some contexts. However the combination of circumstances that allowed the approach to be adopted here was the comprehensive nature of the provisions in the RNRP, and the arguments and evidence presented to the Environment Court for and against the proposal which framed the issues the Court had to decide. No party identified any relevant consideration addressed in the submissions or evidence that did not come within the RNRP, but would come within pt 2. Against that backdrop, it was not the responsibility of the Environment Court

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[97] At [75].

to embark on a free-wheeling examination of pt 2 to see if something had possibly been omitted from consideration in the RNRP.

[111] We think it is clear that the Environment Court had dealt directly with the case that was presented to it and the same is true of the High Court in considering the matters which were the subject of argument there. Ms Irwin-Easthope referred to the possibility that the planning framework might later change to reflect the concerns now expressed about the use of water for bottling and export. While that might be true, it cannot be a significant point when the case presented in opposition to Creswell's proposal was answered on the evidence that the bottling and export of the water would not affect the aquifer, or the mauri of the wai. The Environment Court was entitled to accept this evidence and it has not been explained how reference to pt 2 might have resulted in a different outcome. We do not consider the Environment Court's approach in relation to this question is open to legal challenge on the grounds argued.

[112] For these reasons, we answer Question 3 no.

Question 4

[113] The fourth question is:[98]

> Did the High Court err in finding that the Environment Court correctly determined that the activity status of [Creswell's] proposal was a discretionary "rural processing activity", rather than a non-complying "industrial activity" including "manufacturing", under the terms of the Whakat[ā]ne District Plan?

[114] This question raises the issue of the status of the proposal under the Whakatāne District Plan. The issue arose because of an argument that the proposal was for an activity class referred to in the District Plan as "[i]ndustrial including manufacturing activities" and accordingly required a new resource consent as such activities are non-complying in the Rural Plains Zone, where the subject land is situated. The Environment Court rejected that argument. It concluded the proposal was a "rural processing activity", a discretionary activity in the Zone.[99]

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98 Leave judgment, above n 3, at [4].
99 Environment Court decision, above n 1, at [228].

[115] The District Plan defines a "rural processing activity" as "an operation that processes, assembles, packs and stores products from primary productive use". The expression "primary productive use" is also defined:

> … rural land use activities that rely on the productive capacity of land or have a functional need for a rural location such as agriculture, pastoral **farming**, dairying, poultry **farming**, pig **farming**, horticulture, forestry, quarrying and mining.

The expression "rural land use activity" is not itself defined.

[116] There is a definition of "industrial activity" in the District Plan, on which Mr Salmon relied, as noted at [131] below:

> **Industrial activity** means;
>
> a. the production of goods by manufacturing, processing (including the milling or processing of timber), assembling or packaging;
>
> b. dismantling, servicing, testing, repairing, cleaning, painting, storage, and/or warehousing of any materials, goods or products (whether natural or man-made), vehicles or equipment, and
>
> c. **depots** (excluding rural processing activities and rural contractor **depots**), engineering workshops, panel beaters, spray painters.

The Environment Court decision

[117] The Environment Court framed the issue as whether the proposal was for an "industrial activity" or a "rural processing activity".[100] After discussing the definitions of those terms, the Court held the essential difference between them was that an "industrial activity" can involve any type of material, good or product but a "rural processing activity" must have as its starting point a product from a "primary productive use". Such a use must either rely on the productive capacity of land or have a functional need for a rural location.[101]

[118] The Court concluded there was a functional need for the proposal to be located on the site. It also considered that the extraction of water from an aquifer is a form of primary production akin to mining or quarrying. While it might be possible to take

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100 At [216].
101 At [219].

water from a number of locations, there could be no certainty that other suitable supplies of water could be located. It accepted evidence before it that there was a:[102]

> … demonstrated functional need for the activity applied for to occur at the Ōtākiri Springs site given the assurance of access to the resource in this area and the requirements for marketing that resource.

This conclusion was apparently buttressed by the existence of other water bottling activities in the vicinity, including those of Antipodes and Oravida.[103] The Court also referred to the fact that a bore across the road from the subject site was being used for the purposes of municipal supply and noted there were no other water bottling plants in the Whakatāne District.[104]

[119] The Court also held that the primary resource was the water, which would be unchanged by any process or other form of manufacture. The water taken would be stored in containers, which would be removed from the site. The principal activity was the extraction of the water. Activities within the bottling plant, such as the blow-moulding of plastic bottles as containers for the water and the packaging of the bottles on pallets for transport, were industrial activities as defined in the District Plan, but were ancillary to the principal activity in the sense that without the extraction of the water, those activities would not occur.[105]

[120] The Court was also of the view that the subsequent packaging of the water into bottles and the transport of the bottles from the site was within the scope of a "rural processing activity". The Court considered that providing for a processing activity close to an identified resource served an operational need for that activity consistent with the nature of a "rural processing activity". Undertaking such an operation on the site was both "efficient and consistent" with other rural processing activities, both in terms of the nature of the activity and the scale of buildings associated with such facilities.[106]

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102 At [225].
103 At [225].
104 At [209].
105 At [226].
106 At [227].

[121] For these reasons, the Court concluded that if the proposal were to be assessed as a new activity, it should be assessed as a "rural processing activity" and consequently as a discretionary activity under the District Plan.[107]

The High Court judgment

[122] The High Court agreed that water extraction has a functional need for a rural location, so the proposal was for a "primary productive use".[108] The Judge rejected a submission made by counsel for Sustainable Otakiri that the bottling operation could occur offsite, rather than at source. This meant that the water bottling activity fell within the definition of a "rural processing activity". However, even if it occurred offsite, that would not preclude it from being "an operation that processes" water from the "primary productive use" because the extraction of water was itself a land use.[109]

[123] The Judge noted Sustainable Otakiri's argument that the new blow-moulding operation involved the manufacture of plastic bottles, bringing it within the definition of "industrial activity", with the consequence that a non-complying activity consent was required.[110] However, he agreed with the Environment Court's view that the essential difference between an "industrial activity" and a "rural processing activity" was that the former could involve any type of material, good or product whereas the latter must have as a starting point a product from a "primary productive use".[111] While blow-moulding of plastic bottles was a form of manufacturing, the Judge considered the Environment Court was right to regard it as "ancillary".[112] The primary resource was the water and the principal activity was the extraction of the water. The Judge continued:[113]

> The blow moulding is a small part of the primary activity serving a subordinate but supportive function — part of the packaging process. As it was explained, the blow moulding involves inflating (expanding) pre-made plastic bottle moulds. Even acknowledging the scale of bottling, I consider the ancillary blow moulding does not make the principal activity an

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107 At [228].
108 High Court judgment, above n 2, at [235].
109 At [236].
110 At [237].
111 At [238].
112 At [244].
113 At [244].

> industrial activity rather than a rural processing activity. Similarly, storage and transportation are ancillary activities. Acknowledging the overlap between the two activity definitions, I agree with the majority that the principal activity should be assessed as a rural processing activity. The ancillary activities do not take away from the single overall activity.

[124] The Judge also rejected an argument that blow-moulding required a separate industrial activity consent.[114] He was satisfied that the whole proposal involved a "rural processing activity". He accepted the Environment Court's conclusion that what was proposed was a single activity primarily involving the taking of water within an ancillary bottling and packaging operation.[115]

Submissions on appeal

Sustainable Otakiri

[125] The principal argument advanced by Sustainable Otakiri was that to be a "rural processing activity" there must be a product from a "primary productive use" that is processed, packed or stored. Mr Salmon submitted that a "primary productive use" can only arise from a rural land use activity. He submitted that although "rural land use" is not defined, the concept cannot be so wide as to mean any "land use" occurring in a rural zone. To avoid redundancy and to have meaning, "rural" must describe the "nature" of the land use, rather than its location or zoning.

[126] Mr Salmon submitted, on the basis that the land use activity is an industrial bottle manufacturing, filling, packing and distribution operation, there is nothing qualifying it as a "rural land use". He noted that if the use of the bore for the taking of water is a land use activity, there is nothing about the taking of water that is uniquely "rural" in nature. Bores can be placed and operated wherever water is needed and able to be found. Similarly, water bottling plants are found in both rural and industrial zones. The argument is that if there is no "rural land use" then the activity cannot be a "primary productive use", and there cannot be a "rural processing activity".

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114 At [245].
115 At [247].

[127] Mr Salmon also argued that for the bottling of water to be a "rural processing activity" the use of the bore to extract the water must be the "primary productive use", to provide the product of "water" to be processed or packed.

[128] Alternatively, if the use of the bore to extract water is the relevant activity, Mr Salmon argued that the use of water for bottling does not rely on the "productive capacity" of the land. While water can be applied to generate productivity, the bottling of water itself is not productive. On this basis, water bottling does not rely on the land's "productive capacity" and therefore cannot be a "primary productive use". Otherwise framed, the argument is that the productive capacity of the land relies on water extraction rather than the other way round.

[129] In terms of whether there is a functional need for a rural location, Mr Salmon argued that in order for the proposed activity to qualify it should be of the same or a similar nature to the specific examples of "primary productive use" given in the definition. Mr Salmon noted that all farming, horticultural and forestry activities, as well as mining activities, require water, often obtained through a bore. So far as mining is concerned, that activity is specifically addressed in the RNRP and should not be used as a "crutch" to resolve the activity status or activity categorisation of water bottling. The extraction of water enables all the listed primary productive uses, rather than being a "primary productive use" itself. Mr Salmon suggested the alternative approach would undermine the protection of the productive capacity of versatile land, a District Plan policy designed to give effect to the RPS.

[130] In summary, Mr Salmon submitted that an industrial bottle manufacturing, filling, packing and distribution operation requiring the use of a bore cannot be said to have a functional need for a rural location. Industrial bottle manufacturing can occur offsite. As for the bottling operation itself, while it is understandable that for marketing purposes the water must be bottled at source to qualify as "spring water", that is a commercial or operational constraint, rather than a functional one.

[131] Another strand of Sustainable Otakiri's argument was reliance on the definition of "industrial activity". Mr Salmon submitted that because the proposal fell readily

within the definition, and industrial activities are not provided for in the Rural Plains Zone, non-complying activity consent was required.

[132] Finally, and alternatively, even if the principal activity were "rural processing", Mr Salmon submitted a consent to a non-complying activity would still be required because of the inclusion of the industrial bottle manufacturing activity in the proposal. That could not be regarded as ancillary but, even if it were so regarded, a non-complying activity consent would still be required in accordance with the principles established in cases where several kinds of resource consent were necessary for proposals that have been "bundled". The concept of "bundling" was succinctly described by the Environment Court in *Protect Aotea*, in which Chief Environment Court Judge Kirkpatrick, sitting alone, said:[116]

> **Bundling**
>
> [17] Bundling, in the context of resource management in New Zealand, refers to applications for two or more resource consents being considered together. Beyond the procedural requirements to hear related matters together, it denotes a practice of how to assess the class or status of the bundled activities overall. Where the activities involved are of different classes in terms of s 87A of the [RMA] and any relevant regulation, national environmental standard or plan rule, the applicable class for the bundled application may be the most stringent class. For example, if a proposal involves some activities which are classed as discretionary and some as non-complying, the whole proposal may be assessed as non-complying.

The respondents

[133] For the District Council, Mr Green submitted that the proposal was for a "rural processing activity". The "product" was bottled mineral water, and the land use is the extraction of artesian water, involving the use of an existing structure or bore. The activity has a functional need for a rural location because of its dependence on the artesian water resource at the site, affording the activity its status as a "rural land use". The definition of "primary productive use" should not be read to sever the use from its functional location. Mr Green also contended that the bottling plant is an ancillary activity. While the blow-moulding equipment means that manufacturing would take place onsite, that is rudimentary in nature, and for the purpose of efficiency rather than the creation of new products.

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116 *Protect Aotea v Auckland Council*, above n 40 (footnote omitted).

[134] For Creswell, Mr Smith also submitted that both the Environment Court and the High Court had correctly concluded the proposal was for a "rural processing activity". He submitted that extracting water is a "primary productive use". The key distinction between "primary productive use" and "industrial activity" was that the former must rely on the productive capacity of land, or have a functional need for a rural location. Here, the proposal is for a "rural land use activity" because it is to use rural land on which the existing bore is located. Alternatively, if "rural land use activity" relates to land use activities that are "'rural' in nature", the extraction of water from an underground aquifer is no different conceptually from mining or quarrying mineral resources, which are expressly provided for in the District Plan as examples of a "primary productive use". Because the District Plan contemplates that quarrying and mining will be rural activities in cases where the resource quarried or mined is found in a rural location, there is no basis for taking a different approach to the extraction of water.

[135] Mr Smith also submitted that the High Court was correct to uphold the finding of the Environment Court that the processing of water extracted at the site was the result of land use activities. These included activities relating to operating the bores and conveying water to the bottling plant for processing. The proposal is to use land in the sense of operating a bore to extract water and conveying water to the plant for processing, followed by the associated activities of processing, assembly, packing, storage and freight. Mr Smith emphasised that the two deep bores at the site enabled access to an extremely productive aquifer containing high-quality mineral water. Water taken from the bores is the end product, rather than enabling the production of something else.

[136] Mr Smith also emphasised that there was no evidence before the Environment Court of any suitable alternative source of water that would allow the proposal to be located other than in a rural location or indeed at any site other than the subject site. He noted the concession of Sustainable Otakiri that the taking of the water was "logically dictated by where the water is located".

[137] Mr Smith was critical of Sustainable Otakiri's description of the blow-moulding part of the operation as involving "bottle manufacturing and filling".

He submitted that the proper characterisation of that part of the activity was "water bottling". Plastic "pre-forms" in the shape of test tubes are to be manufactured offsite and transported onsite: the proposal does not involve bringing to the site fully inflated plastic bottles. Rather, the pre-forms will be inflated by "blow-moulding" into the finished bottle shapes, and then filled. While inflating the plastic pre-forms might be seen as a very rudimentary form of manufacturing, the end product is not the bottles, but bottled water. Mr Smith drew a parallel with similar activity at a dairy factory, or the erection of flat-packed cardboard boxes or moulding cardboard casing for packing fruit. He submitted the blow-moulding activity is properly seen as part of the overall water bottling "operation", intrinsically linked with the "processing", "assembling" and "packing" of water as contemplated by the definition of "rural processing activity".

[138] Mr Smith further argued that the High Court correctly held that activities ancillary and forming part of the "rural processing activity" did not need to obtain a separate consent, because a "rural processing activity" could properly extend to every part of the operation involved in the primary activity of extracting water for bottling. The High Court had correctly concluded that blow-moulding did not require a separate industrial activity consent. As a consequence, no error of law was made by the High Court or the Environment Court.

Analysis

[139] Creswell applied to the District Council to change conditions attached to an existing consent granted in 1991 to establish a mineral water bottling plant on the land.[117] It was a condition of consent that the site be developed generally in accordance with the application and plans submitted to the District Council. There were restrictions on operating hours: the activities authorised could not take place after 10 pm. Another condition required that there be regular monitoring of

[117] The 1991 consent refers to a "mineral bottling plant", but it is clear from the consent document read as a whole that this is a typographical error and that consent was given "to establish a plant for bottling mineral water from a bore on site".

the activity, and that the District Council be informed when there was any "major expansion or updating of plant and machinery".[118]

[140] The application made under s 127 of the RMA and accompanying material did not expressly identify which of the conditions Creswell sought to change. Clearly, however, the condition requiring development to be generally in accordance with the application and plans would need to be altered. As to the limitation on operating hours, an Operational Summary submitted with the application stated that what was described as "manufacturing" and "warehousing" would take place 24 hours a day, seven days a week.

[141] We deal with the question of whether s 127 was appropriately used as the vehicle for what amounted to a substantial change and intensification of the activities taking place on the site in answering Question 5; we proceed to deal with the present question on the basis that s 127 was properly invoked.

[142] A second appeal on a question of law is not an appropriate vehicle to question conclusions that are essentially factual in nature. As this Court noted in *Centrepoint Community Growth Trust v Takapuna City Council* (*Centrepoint*), to decide whether an activity falls within a term defined in a district plan, it is necessary to consider the defined term and its essential characteristics.[119] The second step is to find the facts, the third to decide whether they fall within the defined term. The first step is generally considered to be a question of law, although it may be a question of fact where the words used in the definition are ordinary words in everyday use. The second step obviously involves factual findings. The third is also a question of fact, although the conclusion can be attacked in law if it is unreasonable in the sense that no court "acquainted with the ordinary use of language

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118 It is not clear on the face of the 1991 consent why the District Council would be informed about a major expansion rather than noting that a further application for resource consent would be necessary. In any event, as Creswell obviously accepts, nothing in the 1991 consent could detract from obligations arising under the RMA.

119 *Centrepoint Community Growth Trust v Takapuna City Council* [1985] 1 NZLR 702 (CA) at 706 [*Centrepoint*].

could reasonably reach that conclusion", or if the court applied a wrong legal test in reaching its determination.[120]

[143] This accords with what was said more recently by the Supreme Court in the different context of appeals on questions of law arising under the Employment Relations Act 2000 in *Bryson v Three Foot Six Ltd*.[121] After noting that questions concerning whether a person is employed under a contract of employment involved questions of fact, the Supreme Court held that an appealable question of law could nevertheless arise if the court misinterpreted what the statute said about the legal concept of a contract of service.[122] The Court continued:[123]

> [25] An appeal cannot, however, be said to be on a question of law where the fact-finding Court has merely applied law which it has correctly understood to the facts of an individual case. It is for the Court to weigh the relevant facts in the light of the applicable law. Provided that the Court has not overlooked any relevant matter or taken account of some matter which is irrelevant to the proper application of the law, the conclusion is a matter for the fact-finding Court, unless it is clearly insupportable.
>
> [26] An ultimate conclusion of a fact-finding body can sometimes be so insupportable — so clearly untenable — as to amount to an error of law: proper application of the law requires a different answer. That will be the position only in the rare case in which there has been, in the well-known words of Lord Radcliffe in *Edwards v Bairstow*, a state of affairs "in which there is no evidence to support the determination" or "one in which the evidence is inconsistent with and contradictory of the determination" or "one in which the true and only reasonable conclusion contradicts the determination". …

[144] In these terms, the only possible error of law that could arise here is whether the interpretation of the definitions of "rural processing activity" and "primary productive use" adopted in the Courts below was incorrect. For the reasons that follow, we have not been persuaded that it was.

[145] We described the essential aspects of the proposal at [7]–[12] above. The question for present purposes is whether the Courts below were correct

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120 At 706. *Centrepoint* discussed the meaning of an ordinance in a district plan made under the Town and Country Planning Act 1977, which limited appeals from the then Planning Tribunal to questions of law. There is no reason to adopt a different approach to appeals under the RMA, which are similarly limited to questions of law: see Resource Management Act, s 308(1); and Criminal Procedure Act 2011, sub-pt 8.

121 *Bryson v Three Foot Six Ltd*, above n 43.

122 At [23]–[24].

123 Footnote omitted.

to determine that the proposal was for a "rural processing activity" falling to be assessed as a discretionary activity in terms of the District Plan.

[146] We set out the relevant definitions bearing on this question at [115]–[116] above. The starting point is the definition of "rural processing activity". That is "an operation that processes, assembles, packs and stores products from primary productive use". A preliminary observation that may be made is the definition contemplates an "operation" that embraces different activities, provided it involves "products from primary productive use". The products may be processed, assembled, packed and stored. It is clear that an "operation" may involve one or more of those activities. We also consider that the word "operation" is sufficiently broad to embrace activities other than those specifically listed in the definition, as part of the overall activity, provided they are carried out in relation to the "product".

[147] Sometimes where a land use consists of a number of separate elements there may be difficulties in assessing whether it falls within a category defined by the district plan. But this is not such a case. As observed by this Court in *Centrepoint*, the proper characterisation of an activity consisting of a number of different elements is a question of fact and degree.[124] The Court referred to two possible approaches. First, it may be possible to identify a single main purpose of the use of land, to which other activities are incidental or ancillary. Alternatively, the use may consist of a variety of activities in respect of which it is not possible to say that any one is incidental or ancillary to the other.[125] We consider it is possible in the present case to identify an overall proposed activity of which all the individual elements form part: in our view the single main purpose of the land use is the extraction and bottling of water. It does not matter that both extraction and bottling are involved, and it would be artificial to separate them. The use of the word "operation" is apt to cover an activity that embraces a number of elements. It does so explicitly in the definition itself by instancing processing, assembly, packing and storing.

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124 *Centrepoint*, above n 119, at 708.

125 At 708, citing *Burdle v Secretary of State for the Environment* [1972] 1 WLR 1207 (QB) at 1212.

[148] In the present case, water would be extracted pursuant to the consent to take water. The land use activities that are necessary for the extraction can properly be seen as part of the overall "operation" and covered by the District Plan.

[149] Alternatively, the land use activities that are necessary for the extraction may properly be regarded as ancillary to the operation. The District Plan defines "ancillary" as:

> … small and minor in scale in relation to, and incidental to, the primary activity and serving a subordinate but supportive function to the primary activity. An activity that is of a scale, character or intensity that is considered independent of the princip[al] activity is not ancillary.

[150] We consider the High Court was correct to consider the blow-moulding of plastic bottles was "ancillary" in terms of the above definition. In this context too, the fact that ancillary activities are not specifically referred to in the definition of "rural processing activity" is of no moment, because of the breadth of the definition and in particular the word "operation". We think that must cover everything that is involved in processing, assembling, packing and storing products, including forming up the packaging used to contain the product. This is all part of the "operation".

[151] It is possible to harbour some doubt about whether the word "product" can be appropriately applied to water if the definition of a "rural processing activity" was considered on its own. In this respect, as noted at [127] above, one of Sustainable Otakiri's arguments was that the water itself must be produced from a "primary productive use". However, we think that approach breaks down when reference is made to the definition of "primary productive use", set out at [115] above. An activity will be within the definition if it is a "rural land use activity" that relies on the productive capacity of land or has a functional need for a rural location. The definition has to be construed having regard to the use of the words "such as" and the examples which follow. Two implications of this are that:

(a) The examples given are not intended to state exhaustively which rural land use activities may be said to rely on the productive capacity of the land or have a functional need for a rural location.

(b) The category of such rural activities extends to those which are extractive in nature, *such as* quarrying and mining.

There is no obvious reason for treating the extraction of water from a rural location by the use of bores as an activity of a different kind. In all three cases (quarrying, mining and extracting water) something occurring naturally in, on or under the land is extracted. The Environment Court had found that the extraction of water from an aquifer is a form of primary production akin to mining or quarrying.[126] The High Court agreed.[127] We have not been persuaded this conclusion is incorrect as a matter of law.

[152] The activity in this case relies both on the productive capacity of the land and has a functional need for a rural location because that is where the water is found. The Environment Court had found, on the evidence before it, that the requirement of "functional need" was established. This was essentially a determination of fact. We do not see the District Plan as requiring that the particular rural location be the *only* place where the resource is found, and there is no need in our view for that to be addressed or established for the purposes of Creswell's application.

[153] Sustainable Otakiri contended that the extraction of water is not in itself a land use. That may be so if the taking of water is considered in the narrowest possible way. However, "use" is relevantly defined in s 2(1)(a)(i) of the RMA as including, for the purposes of s 9, using "a structure or part of a structure in, on, under, or over land". This definition of use would extend to all the activities taking place on the land that are necessary for the purposes of the extraction of the water (including the operation of the bores) and the placement of it in bottles. All this requires human agency, and that agency will be a land use activity.

[154] Because we have concluded the proposal falls within the definition of "rural processing activity", it does not matter that some aspects of it might also fall within the definition of "industrial activity" (but for the requirement that a "rural processing activity" must involve a product from a "primary productive use").

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126 Environment Court decision, above n 1, at [225].
127 High Court judgment, above n 2, at [235].

We think it clear that the District Plan does not intend to exclude activities in the nature of industrial activities from the ambit of rural processing activities, provided they take place as part of an operation that qualifies as a "rural processing activity". Both industrial and rural processing activities (through the definition of "primary productive use") can include, for example, processing, assembling and packaging.

[155] Our analysis means that no issues arise about the "bundling" of activities. The expression is used to refer to cases where a proposal involves activities which require a number of different consents that have a different status under the relevant district plan. In such cases the overall activity may be classified in the most "stringent" category, to borrow Judge Kirkpatrick's term in *Protect Aotea*.[128] However, on our approach the proposal as a whole falls within the discretionary activity category of a "rural processing activity".

[156] Consequently, we think a "rural processing activity" extends to the processing and storage of water, that being a product derived from a "primary productive use". We conclude that the activities proposed by Creswell are all within the defined discretionary activity of a "rural processing activity".

[157] Accordingly, Question 4 must be answered no.

Question 5

[158] The fifth question is:[129]

> Did the High Court err in finding that the Environment Court correctly classified [Creswell's] proposal as an expansion of an existing use of land, and therefore a discretionary activity under s 127 of the [RMA], rather than as a new activity falling for consideration as a non-complying activity under s 88 of that Act?

[159] Sustainable Otakiri seeks to challenge the fact that the proposal was advanced by Creswell and processed by the District Council as an application under s 127 of the RMA. Because of s 127(3)(a), dealing with the application in that way meant that it

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128 *Protect Aotea v Auckland Council*, above n 40, at [17].
129 Leave judgment, above n 3, at [4].

was to be treated as an application for a resource consent for a discretionary activity regardless of the proposal's activity status under the District Plan.

[160] Sustainable Otakiri submits that the application should have been considered as an application for resource consent for a new activity under s 88 of the RMA. If that approach had been followed, consent for a non-complying activity would have been required. Such applications must meet more stringent statutory tests than applications for discretionary activities.

[161] Because of the answer given to Question 4, this issue is of academic interest only, since if s 127 had been incorrectly invoked, the Environment Court had considered the proposal as a discretionary activity in any event, as required by s 127(3)(a).[130]

[162] The discussion that follows is best understood in the context of the wording of s 127, which we set out again for ease of reference:

> **127 Change or cancellation of consent condition on application by consent holder**
>
> (1) The holder of a resource consent may apply to a consent authority for a change or cancellation of a condition of the consent, subject to the following:
>
> (a) the holder of a subdivision consent must apply under this section for a change or cancellation of the consent before the deposit of the survey plan (and must apply under section 221 for a variation or cancellation of a consent notice after the deposit of the survey plan); and
>
> (b) no holder of any consent may apply for a change or cancellation of a condition on the duration of the consent.
>
> …
>
> (3) Sections 88 to 121 apply, with all necessary modifications, as if—
>
> (a) the application were an application for a resource consent for a discretionary activity; and

[130] There is no suggestion that the Environment Court's consideration of the matters relevant to the assessment of whether discretionary activity consent should have been granted were affected by legal error, other than in relation to the plastic issues addressed in Question 1.

(b) the references to a resource consent and to the activity were references only to the change or cancellation of a condition and the effects of the change or cancellation respectively.

…

(4) For the purposes of determining who is adversely affected by the change or cancellation, the consent authority must consider, in particular, every person who—

(a) made a submission on the original application; and

(b) may be affected by the change or cancellation.

The Environment Court decision

[163] The Environment Court was satisfied that the proposal was for the same type of activity, namely water bottling as authorised by the existing consent, and that the proposal would have the same types of effects on the environment. The substantial expansion of the activity would result in an increase in the scale of adverse effects, but the varied conditions of consent proffered by Creswell and imposed by the District Council would acceptably manage those adverse effects. In the circumstances, the Court was of the view that processing the application under s 127 was appropriate and consistent with its provisions.[131]

[164] The Court rejected arguments advanced by Sustainable Otakiri that dealing with the application under s 127 gave Creswell an advantage by providing a "head start" in how adverse effects would be considered, and because if a new application had been made, it would have had to be assessed as an industrial activity, a non-complying activity in the Rural Plains Zone.

[165] The Court rejected the first argument on the basis that under s 127(3)(b) the focus is on the change to the existing conditions and the effects of that change. The Court considered that would involve the same starting point for assessment under s 104(1)(a) of the RMA that would apply to any new applications for consent. The effects of the existing water bottling activity would be part of the existing environment within which any new proposal for expansion would be assessed. Consequently, no advantage had been gained by Creswell and a full assessment of the

131 Environment Court decision, above n 1, at [252].

adverse effects of the expansion had in fact been carried out in the assessment of the environmental effects accompanying the application.[132] In addition, as the information requirements for applications made under ss 104 and 127 were the same, and the relevant information necessary for assessment had been provided, no advantage had been gained by Creswell applying under s 127.[133]

[166] In terms of the second argument concerning the activity status of the proposal, the Court repeated its view that the proposal was for a "rural processing activity" under the District Plan. Consequently, even if a resource consent application had been made for a new activity, discretionary activity consent would have been required.[134]

[167] The Court concluded that Creswell's proposal had been appropriately processed as a variation to existing consent conditions under s 127.[135] It expressed its conclusion as follows:

> [252] The evidence before us confirms that the proposed project is for the same type of activity (water bottling) as authorised by the existing consent, with the same types of adverse effects. The substantial expansion of the activity proposed would result in a corresponding increase in the scale of adverse effects. The varied conditions of consent proffered by Creswell and imposed by the Council are designed to manage these adverse effects to acceptable levels. We consider that the application under s 127 was an appropriate pathway for Creswell to pursue, consistent with the provisions of that section and the criteria established by case law.

The High Court judgment

[168] The High Court endorsed the Environment Court's approach. The Judge considered the proposal involved the same activity for which consent had originally been granted in 1991. He repeated his conclusion that the proposal did not require a non-complying activity consent but rather consent as a discretionary activity.[136]

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132 At [253]–[254].
133 At [256].
134 At [255].
135 At [257].
136 High Court judgment, above n 2, at [258]–[259].

Submissions on appeal

Sustainable Otariki

[169] Sustainable Otakiri began its argument on this question by referring to this Court's decision in *Body Corporate 97010 v Auckland City Council*.[137] Although s 127 in the form it took when that case was decided has subsequently been amended, Mr Salmon submitted the obligation of the consent authority to direct its attention to the effects of the change or cancellation of the condition(s) remained. He emphasised that s 127 should not be available for a change in the activity, as opposed to a change in a condition to which the activity is subject.

[170] In the present case, the activity originally authorised was the establishment of a mineral water bottling plant. Mr Salmon contrasted that with the proposal for industrial blow-moulding facilities, two new high-speed bottling lines, a new two-storey building to house those activities, three new cooling towers, and a new container and transport depot allowing for storage and movement of containers: such activities had not previously taken place on the site. Mr Salmon particularly emphasised the new building, which would be 16,800 m^2 in area. He submitted that the new industrial blow-moulding activity, which would require steam boilers, cooling towers and a chimney stack, amounted to an entirely new activity on the site.

[171] Mr Salmon submitted that the High Court was wrong to endorse the Environment Court's approach. The substantial increase in the scale of the proposed activities meant there would be a change in the nature of the activity, with the result that s 127 was not available and a fresh application under s 88 was required.

[172] Mr Salmon illustrated this argument using parallels in the form of expansion of a corner dairy into a supermarket, a boutique retail shop into a shopping centre, a bed and breakfast into a hotel or indeed any number of small-scale activities changing into something which was beyond any contemplation at the time the original consent was granted. While s 127(1) allows an application for a change or cancellation of conditions of consent, here two conditions were proposed to be deleted and replaced

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137 *Body Corporate 97010 v Auckland City Council* [2000] 3 NZLR 513 (CA).

with 20 new conditions.[138] Mr Salmon submitted that the failure to separately identify and require consent for all the activities had resulted in errors of assessment, and a failure to properly assess the effects against the detailed provisions of the District Plan.

The respondents

[173] The respondents submitted that the approach of the Courts below was correct. Counsel submitted that the pre-existing land use consent enabled water bottling to take place on the site. The Environment Court had correctly held that there were no boundaries in s 127 on the "jurisdiction for its application". Whether s 127 can be relied on turns simply on whether there is an existing resource consent for what is in essence the same activity, namely water bottling, that is to continue into the future. Consequently s 127 was available and there was no need for Creswell to apply for resource consent to a new activity.

[174] The respondents also submitted that the proposal involves an activity which is essentially the same as the existing activity at the site, on a larger scale. There would be essentially the same production process involving the extraction of water, conveying it to the plant, bottling, packaging and loading containers onto trucks for removal from the site for export. There would be additional conditions reflecting the larger-scale operation. The new activities claimed by Sustainable Otakiri are all associated with water bottling and, in the case of the blow-moulding of plastic bottles, simply a reflection of advances in technology.

[175] For Creswell, Mr Smith emphasised the Environment Court concluded that the environmental effects associated with the change of conditions would be of the same nature as those of the current activity. Although they would be at a greater scale in some respects, they would remain "no more than minor". The fact that an approved variation of conditions might result in increased adverse effects is inherent in the statutory requirement to consider the effects of the change. There was no authority for

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[138] In fact, as finally consented to by the Environment Court, none of the original conditions remain and 69 new conditions have been imposed: see *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2020] NZEnvC 89.

Sustainable Otakiri's proposition that the consequences of a change of condition might result in a change of such significance that it cannot be said the activity is the same.

Analysis

[176] Section 127 as it currently reads is significantly different from the form it took prior to amendment in 2003. As enacted, s 127(1) provided that the holder of a resource consent could apply to vary its conditions (other than as to its duration) either:

(a) at any time specified for that purpose in the consent; or

(b) regardless of such specification, at any time provided that a "change in circumstances" had caused the condition "to become inappropriate or unnecessary".

[177] Section 127(3) of the RMA provided that certain provisions applicable to applications for resource consent would apply to applications under subs (1) as though the application were for a resource consent, but provided that s 93 (which related to when public notification of consent applications was required) would not apply if the consent authority was satisfied:

(a) that either—

(i) the adverse effect of the activity (other than on a person whose approval had been obtained under para (b)) would continue to be minor; or

(ii) the degree of the adverse effect (other than on a person whose approval had been obtained under para (b)) would likely be unchanged or would decrease; and

(b) that written approval had been obtained from every person (including submitters on the original application who might be affected) who might be adversely affected, unless it would be unreasonable to obtain every such approval.

[178] Subsection (4) provided that the exception in subs (3) as to public notification would apply regardless of whether notification was required by a plan or proposed plan and the type of activity regulated in the relevant resource consent.

[179] That position changed in 2003 following the enactment of the Resource Management Amendment Act 2003 (the 2003 Amendment). Section 53 of that Act replaced s 127(1) of the RMA, providing that the holder of a resource consent could apply to vary its conditions (other than as to its duration), omitting conditions (a) and (b) at [176] above.[139] It also replaced subs (3), providing that provisions applicable to applications for resource consent would apply to applications under subs (1) as though the application were for a discretionary activity.[140] Finally, the 2003 Amendment replaced subs (4), providing that the local authority must, when determining who is adversely affected by the change or cancellation, consider in particular every person who made a submission on the original application and who may be affected by the change or cancellation.[141]

[180] The explanatory note to the Bill that became the 2003 Amendment records that the amendments to s 127 were aimed at "allow[ing] consent holders greater flexibility to apply for a change of consent conditions".[142] Little else is immediately evident from the parliamentary materials.

[181] The 2003 Amendment appears to have been strongly influenced by the Resource Management Amendment Bill 1999, which had been introduced in an earlier parliamentary session (the 1999 Amendment Bill).[143] Referring to this, the explanatory note to the Bill which became the 2003 Amendment records that:[144]

> The Bill is virtually identical to the Report of the Local Government and Environment Committee on the Resource Management Amendment Bill (313–2).

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139 Resource Management Amendment Act 2003, s 53(1).

140 Section 53(2).

141 Section 53(2).

142 Resource Management Amendment Bill (No 2) 2003 (39–1) (explanatory note) [Explanatory note 2003] at 12.

143 Resource Management Amendment Bill (No 2) 1999 (313–1).

144 Explanatory note 2003, above n 142, at 1. The explanatory note also states that the Bill incorporated only two substantive changes to the 1999 Amendment Bill as reported on by the Select Committee, both of which were in the 1999 Amendment Bill as introduced: at 1–2. Neither is relevant for present purposes.

[182] The 1999 Amendment Bill was not progressed following the report of the Select Committee that considered it.[145] However, importantly for present purposes, cl 48 of the 1999 Amendment Bill substantially mirrored s 53 of the 2003 Amendment. Given the influence that the 1999 Amendment Bill clearly had on the 2003 Amendment, it is helpful to examine some of its explanatory materials to understand the intent behind those changes.

[183] In particular, the Select Committee noted:[146]

> Clause 48 amends section 127(1) of the [RMA] to remove the need for there to be a change in circumstances before a consent holder can apply for a change in consent conditions. The limitation on not being able to apply to change a condition relating to the duration of the consent is retained. The application is treated as an application for a discretionary activity for the purposes of processing the application.
>
> At present, if a resource consent does not explicitly allow conditions to be reviewed, the consent holder has to show that there has been a change in circumstances that has caused a consent condition to become inappropriate or unnecessary before the condition can be changed or cancelled. The test is considered unnecessary as practical experience may mean a condition is unsuitable. The process to be followed is the same as a new consent, although the only matter under review is the condition that is to be changed.
>
> We recommend that clause 48 be modified to clarify that only the change or cancellation of a consent condition is considered, not the whole consent. We also recommend the insertion of a new subsection (3A) in proposed new section 127, which reflects the current requirement for consent authorities, when determining who is adversely affected and should be consulted, to consider submitters on the original application. We support the provision for an application for a change or cancellation of a consent condition to be treated as a discretionary activity.

[184] Subsection (3A) referred to in the ultimate paragraph above is identical to what is now s 127(4) of the RMA, as introduced by the 2003 Amendment Act. Further changes to s 127 were made in Amendment Acts enacted in 2005,[147] 2009[148] and 2011[149], but these are not relevant for present purposes.

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145 Resource Management Amendment Bill (No 2) 2003 (39–2) (select committee report) at 1.

146 Resource Management Amendment Bill 1999 (313–2) (select committee report) [Select Committee report 1999] at 49.

147 Resource Management Amendment Act 2005, s 70.

148 Resource Management (Simplifying and Streamlining) Amendment Act 2009, s 150.

149 Resource Management Amendment Act (No 2) 2011, s 34.

[185] The Select Committee report indicates that the legislative intention was to enable conditions to be changed without the need to show that there had been a change in circumstances that caused a consent condition to become inappropriate or unnecessary. The report recognised that "practical experience" might mean that a condition originally imposed was unsuitable.[150] The focus shifted from assessing the effect of changed circumstances to assessing how suitable the condition was in relation to the activity the condition was intended to limit, as a result of the changed circumstances. Removal of the requirement to demonstrate the condition had become inappropriate or unnecessary was seen as enabling a fresh look at the suitability of the condition in the context of an application for discretionary activity consent.

[186] However, s 127 was not intended to authorise an application for resource consent to a new activity. Rather it was to authorise an application to change or cancel conditions attached to the activity for which consent was originally granted. So, if the condition were cancelled that activity could continue, no longer subject to that condition. And if the condition were changed, that activity could continue subject to a new condition or conditions. In the case of either change or cancellation, the activity that continued would need to be the same activity for which consent was originally granted.

[187] We do not consider that Parliament intended s 127 to be used to authorise a completely new activity under the guise of changing the conditions to which the original activity was subject. We think the "activity" that continues subject to a changed condition must be the same activity that was taking place subject to the cancelled condition. In our view, it is not appropriate to treat "activity" in this context as if it embraces an activity which might be described as the same "kind" of activity. We think in effect that is the approach the Environment Court took, and the High Court endorsed, and we do not think it is right.

[188] We consider our view accords with the genesis of the 2003 Amendment in the reform contemplated in 1999, although not proceeded with then. The legislative history does not sit comfortably with the use of the section to introduce a substantially

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150 Select Committee report 1999, above n 146, at 49.

modified activity with an entirely new suite of conditions, as has been found acceptable in the present case. It is of course correct in one sense to say the kind of activity is the same, but the increased intensity and scale of the activity compared with that for which consent was originally granted is discordant with the idea that all that is being changed are the conditions of consent.

[189] This conclusion is supported by the consideration that there is no need for such an expansive view of s 127, having regard to the structure and scheme of the RMA. Anyone wanting to apply for consent to a new activity may do so under s 88. There is no need for s 127 to function as a kind of alternative vehicle for obtaining resource consent for what is for all intents and purposes a different activity to that for which consent was originally granted.

[190] Activities are authorised by resource consents granted under s 104. They may be subject to conditions imposed under s 108. An activity is not the same concept as the conditions to which it is made subject. This was a distinction made by this Court in *Body Corporate 97010 v Auckland City Council*, observing that it is "preferable to define the activity which was permitted by a resource consent, distinguishing it from the conditions attaching to that activity".[151]

[191] We think the problem with the approach that found favour with the Environment Court and the High Court in this case lies with the nature of the principal condition that had to be changed — the condition requiring that the site be developed "generally in accordance with the application and plans submitted". Creswell used s 127 in effect to obtain consent for a new activity by seeking to change the "application and plans". We do not consider that is an approach contemplated by s 127. It is not just a question of scale and degree, although the very significant difference in scale and intensity underlines the fact that the activity is significantly different. On the view we take, it is the fact that the activity originally consented to will essentially be replaced. The conditions will be substantially changed, but they will control what is really a new activity.

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151 *Body Corporate 97010 v Auckland City Council*, above n 137, at [46].

[192] For these reasons, we conclude that Question 5 should be answered yes. But the consequence of that does not mean that Sustainable Otakiri's appeal should be allowed. That is because:

(a) The Environment Court, in accordance with s 127(3)(a), treated the proposal as one that required consent as a discretionary activity.

(b) Our conclusion that s 127 should not have been used means that discretionary activity consent was required for a "rural processing activity".

(c) The Environment Court assessed the proposal on that basis in any event.

Result

[193] The questions set out at [3] above are all answered no, with the exception of Question 5, which is answered yes.

[194] The appeals are dismissed.

[195] Ngāti Awa must pay costs to the Regional Council for a standard appeal on a band A basis and usual disbursements.

[196] Sustainable Otakiri must pay costs to the District Council for a standard appeal on a band A basis and usual disbursements.

[197] Ngāti Awa and Sustainable Otakiri must pay costs to Creswell, on their respective appeals, for a standard appeal on a band A basis and usual disbursements. We certify for two counsel.

[198] We make no order for costs in respect of the appeals brought by Ngāti Pikiao Environmental Society Inc and Te Rūnanga o Ngāi Te Rangi Iwi Trust, whose role at the hearing was very much limited to supporting Ngāti Awa and Sustainable Otakiri.

Solicitors:
Whāia Legal, Wellington for Appellant in CA48/2021
Linwood Law Ltd, Christchurch for Appellant in CA49/2021
Te Pono Legal Ltd, Rotorua for Appellants in CA60/2021 and CA61/2021
CooneyLeesMorgan, Tauranga for First Respondent in CA48/2021, CA60/2021 and CA61/2021
Brookfields Lawyers, Auckland for First Respondent in CA49/2021
Buddle Findlay, Wellington for Second Respondent in CA48/2021, CA49/2021, CA60/2021 and CA61/2021

IN THE HIGH COURT OF NEW ZEALAND
NEW PLYMOUTH REGISTRY

I TE KŌTI MATUA O AOTEAROA
NGĀMOTU ROHE

CIV-2021-443-15
[2022] NZHC 629

BETWEEN	POUTAMA KAITIAKI CHARITABLE TRUST AND D & T PASCOE Appellants
AND	TARANAKI REGIONAL COUNCIL First Respondent
	NEW PLYMOUTH DISTRICT COUNCIL Second Respondent
	WAKA KOTAHI NZ TRANSPORT AGENCY Third Respondent
	TE RŪNANGA O NGĀTI TAMA TRUST Section 301 Party

Hearing:	18-19 October 2021 [Further submissions received on 22 and 26 October and 8 November 2021]
Appearances:	M Gibbs and R Gibbs for Poutama Kaitiaki Charitable Trust (until withdrawal from the hearing on 18 October 2021) S J Grey for D and T Pascoe (granted leave to withdraw on 18 October 2021) D Allen, C A Easter and T Ryan for Third Respondent P F Majurey and V N Morrison-Shaw for Te Rūnanga o Ngāti Tama Trust
Judgment:	30 March 2022
Reissued:	8 April 2022

JUDGMENT OF ISAC J

Introduction

[1] This is an appeal on a point of law from decisions of the Environment Court granting approvals under the Resource Management Act 1991 for the construction of a new section of state highway.

[2] Te Ara o Te Ata is a proposed new six-kilometre stretch of State Highway 3 to the north of New Plymouth. On 8 December 2018, Taranaki Regional Council and New Plymouth District Council granted the New Zealand Transport Agency (Waka Kotahi) resource consents for the project and recommended the confirmation of Waka Kotahi's Notice of Requirement (NoR) altering the existing State Highway 3 designation.

[3] The proposed new road runs predominantly through Ngāti Tama land in the Mangapepeke and Mimi valleys. Te Rūnanga o Ngāti Tama, the iwi authority for the purpose of the Resource Management Act 1991, has been actively engaged in consultation with Waka Kotahi regarding the project since April 2016. An agreement has been reached regarding the acquisition of approximately 22 hectares of land for the project with a further 15.9 hectares to be leased for the duration of construction.

[4] The appellants oppose the project. Mr and Mrs Pascoe (the Pascoes) hold a large piece of privately owned farmland, some of which is needed for the project. Mr Pascoe has lived in the Mangapepeke Valley for over 65 years. The level of activity surrounding their home during the construction period will be disruptive.[1] A trust called Poutama Kaitiaki Charitable Trust (Poutama) also claims an interest in the land through which the project runs.

[5] The appellants have brought a series of previous challenges to the project, appealing the Environment Court's first interim decision on preliminary issues to the High Court, and unsuccessfully seeking leave for a direct appeal to the Supreme Court.

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1 *Poutama Kaitiaki Charitable Trust v Taranaki Regional Council* [2020] NZHC 3159 [High Court decision] at [7], citing the finding of the Environment Court that noise during the construction period would make it untenable for the Pascoes to continue to live in the house: *Director-General of Conservation v Taranaki Regional Council* [2018] NZEnvC 203 at [157].

The current appeal is against the second interim and final decisions of the Environment Court approving the resource consents and confirming Waka Kotahi's NoR.

[6] In a separate judgment issued today I have also provided my reasons for declining an application by Poutama for recusal and an application for an adjournment of the appeal hearing.[2]

Procedural background

[7] The background to the highway project is set out comprehensively in the earlier judgment of this Court.[3] The following is a summary.

First interim decision

[8] On 18 December 2020 the Environment Court issued an interim decision.[4] The Court found it was unable to determine that the effects of the project would be appropriately addressed at that time, as there was no certainty Waka Kotahi and Ngāti Tama would reach agreement as to the acquisition of the necessary land, or finalise an agreement for mitigation of cultural effects. However, the Environment Court did make final determinations that:

(a) Waka Kotahi undertook a detailed and extensive consultation process and gave adequate consideration to alternative sites, routes, or methods of undertaking the project;[5]

(b) Ngāti Tama are tangata whenua exercising mana whenua over the project area and accordingly are the only body to be referred to in conditions addressing cultural matters;[6]

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2 *Poutama Kaitiaki Charitable Trust v Taranaki Regional Council* [2022] NZHC 628.
3 High Court decision, above n 1, at [10]–[29].
4 *Director-General of Conservation v Taranaki Regional Council* [2018] NZEnvC 203 [first interim decision].
5 At [100]–[101] and [458].
6 At [333] and [462].

(c) Poutama are not tangata whenua exercising mana whenua over the project area and should not be recognised in any consent conditions addressing kaitiakitanga;[7]

(d) Mrs Pascoe and her family had not established they have and are able to maintain whanaungatanga relationships or exercise associated tikanga that would require recognition under Part 2 of the Act;[8]

(e) Mrs Pascoe is not kaitiaki in the sense the term kaitiakitanga is used in the Act;[9] and

(f) the significant adverse effects the project will have on the area may be appropriately addressed through proposed conditions.[10]

[9] The appellants appealed this interim decision to the High Court. The appeal challenged the ability of the Environment Court to issue an interim decision, the Court's assessment of customary and cultural rights, tikanga, mana whenua and kaitiaki, and other alleged adverse effects of the project. The High Court dismissed the appeal on all grounds.[11] A subsequent application for leave to bring a direct appeal to the Supreme Court was also declined.[12]

Second interim decision

[10] The Environment Court issued its second interim decision on 10 March 2021.[13] The Court noted that, as Ngāti Tama and Waka Kotahi had reached agreement regarding the acquisition of land and related mitigation, it could complete its assessment of effects. Of relevance to the current appeal, the Environment Court made findings that:

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7 At [339] and [467].
8 At [318]–[326] and [463].
9 At [327]–[330] and [464].
10 At [212]–[214] and [469].
11 High Court decision, above n 1.
12 *Poutama Kaitiaki Charitable Trust v Taranaki Regional Council* [2021] NZSC 87. There have also been the following recall applications: *Poutama Kaitiaki Charitable Trust v Taranaki Regional Council* [2021] NZHC 326; *Poutama Kaitiaki Charitable Trust v Taranaki Regional Council* [2021] NZSC 124; *Poutama Kaitiaki Charitable Trust v Taranaki Regional Council* [2021] NZSC 153.
13 *Director-General of Conservation v Taranaki Regional Council* [2021] NZEnvC 27 [second interim decision].

(a) given Ngāti Tama 's acceptance of the project and the acquisition of its land and the related agreements, the cultural effects of the NoR and the project would be properly addressed;[14]

(b) no aspect of the project will be inconsistent with any objective or policy contained in the National Policy Statement for Freshwater Management 2020;[15] and

(c) the conditions proposed appropriately address the adverse effects of the project on land-owners.[16]

[11] Accordingly, the Environment Court dismissed the appeals from Poutama and the Pascoes. The Court directed Waka Kotahi to make some minor amendments and lodge an amended complete set of NoR conditions, regional resource consent conditions and a full set of the latest plans with the Court.[17] Following receipt of these documents, the Court issued its final decision on 1 April 2021, issuing formal approval to the resource consents and confirming the NoR.[18]

[12] Shortly after the hearing of this appeal commenced on 18 October 2021, counsel for the Pascoes, Ms Grey, and Ms Gibbs on behalf of Poutama sought an adjournment. After I declined their application the appellants withdrew from the hearing and took no further part in it. Accordingly, I have addressed the grounds of appeal as they are identified in an amended notice of appeal dated 22 April 2021, and written submissions for the appellants dated 28 September 2021. My reasons for declining the late application for an adjournment are addressed in a separate judgment.[19]

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14 At [11]–[12].
15 At [29]–[48].
16 At [69].
17 At [76].
18 *Director-General of Conservation v Taranaki Regional Council* [2021] NZEnvC 40 [final decision].
19 *Poutama Kaitiaki Charitable Trust v Taranaki Regional Council*, above n 2.

Approach to appeal

[13] The appeal is brought pursuant to s 299 of the Resource Management Act 1999 (RMA). Appeals to this Court against a decision of the Environment Court are only available on a question of law.[20] The Supreme Court clarified the parameters of questions of law in *Bryson v Three Foot Six Ltd,*[21] which has since been applied in an RMA context.[22] This has helpfully been summarised in subsequent cases.[23] A court will have erred in law where it has:

(a) applied a wrong legal test. Misinterpretation of a statutory provision will obviously constitute an error of law;

(b) taken into account matters which it should not have taken into account;

(c) failed to take into account matters which it should have taken into account; or

(d) come to a conclusion without evidence or to one which, on the evidence, it could not reasonably have come.

[14] Any error of law must materially affect the result of the court's decision before it would be appropriate for the appellate court to grant relief.[24] Materiality is a matter of judgment for the appeal court rather than a question of proof to a particular standard.[25]

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20 Resource Management Act 1991, s 299(1).

21 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at [24]–[27].

22 *Estate Homes Ltd v Waitakere City Council* [2006] 2 NZLR 619 (CA) at [198].

23 *Tauranga Environmental Protection Society Inc v Tauranga City Council* [2021] NZHC 1201, [2021] NZRMA 492 at [60]; *Redmond Retail Ltd v Ashburton District Council* [2021] NZHC 2887 at [38]–[39].

24 *Countdown Properties (Northlands) Ltd v Dunedin City Council* [1994] NZRMA 145 (HC) at 153; *Transpower New Zealand Ltd v Auckland Council* [2017] NZHC 281 at [52]–[54].

25 *Manos v Waitakere City Council [1996] NZRMA 145* (CA) at 148, as cited in *Auckland Council v Cabra Rural Developments Ltd* [2019] NZHC 1892, (2019) 21 ELRNZ 185 at [75].

Grounds of appeal

[15] While the appellants set out a number of allegations in their amended notice of appeal and in written submissions, the appeal mostly reflects an effort to relitigate factual and other findings that have been finally determined.

[16] In particular, many of the arguments raised on appeal:

(a) were the subject of final and binding determinations of the Environment Court in its first interim decision, or the decision of this Court on appeal, and are res judicata;

(b) are matters of fact that cannot be challenged on an appeal under s 299 of the RMA;

(c) are legally irrelevant to the appeal, which concerns the Environment Court's decision to approve the NoR and resource consents; or

(d) were not developed at all, or were inadequately addressed in submissions, and therefore cannot be given further consideration.

[17] These allegations cannot be advanced on appeal because the Court lacks jurisdiction, or the ability, to consider them. They are addressed in a schedule to this judgment.

[18] Two grounds of appeal have the potential to constitute challengeable questions of law and require more detailed consideration. The first is whether the Environment Court was wrong in its application of the National Policy Statement for Freshwater Management 2020 (Policy Statement). The second is whether the Environment Court was wrong not to impose a lapse date on the amended designation.

First ground of appeal: error in the application of the Policy Statement?

The Policy Statement

[19] Under the RMA the Minister for the Environment may create national policy statements.[26] These are directional instruments by which central government can set policy and environmental benchmarks to be met by local authorities when making decisions.

[20] Decision-makers under the RMA must have particular regard to any relevant national policy statement when determining an application for a resource consent.[27]

[21] The Policy Statement came into force on 3 September 2020,[28] over a year after the Environment Court hearing. The Environment Court recognised this in its second interim decision:[29]

> Although [the Policy Statement and the Resource Management (National Environmental Standards for Freshwater) Regulations 2020] came into force well after the conclusion of the hearing, we are obliged to have particular regard to the [Policy Statement] in considering the NOR and the application for regional resource consents under the relevant provisions of ss 104 and 171 of the Act.

[22] The appellants advance two challenges to the second interim decision under this ground of appeal which could qualify as an appeal on a point of law. They submit the Environment Court wrongly applied the Policy Statement because it:

(a) failed to determine whether the Mangapepeke Wetland fell within the Policy Statement's definition of a "natural inland wetland"; and

(b) wrongly concluded that there is a "functional need" for the project in terms of cl 3.22(1)(b)(iii) of the Policy Statement.

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26 Resource Management Act 1991, ss 45–55.
27 Resource Management Act 1991, ss 104(1)(b)(iii) and 171(1)(a)(i).
28 National Policy Statement for Freshwater Management 2020 [Policy Statement], cl 1.2.
29 Second interim decision, above n 13, at [25].

Natural inland wetland

[23] The appellants argue that the Environment Court was required to determine whether an area of the lower Mangapepeke Valley was a natural inland wetland under the Policy Statement.

[24] The Policy Statement applies to all freshwater (including groundwater) and, to the extent they are affected by freshwater, to receiving environments.[30] Part 2 of the Statement sets out its objective and policies. Its objective is:

> **2.1 Objective**
>
> (1) The objective of this National Policy Statement is to ensure that natural and physical resources are managed in a way that prioritises:
>
> (a) first, the health and well-being of water bodies and freshwater ecosystems
>
> (b) second, the health needs of people (such as drinking water)
>
> (c) third, the ability of people and communities to provide for their social, economic, and cultural well-being, now and in the future.

[25] Clause 2.2 of the Policy Statement then identifies 15 policies which local authorities are required to give effect to. Policy six requires that:

> There is no further loss of extent of natural inland wetlands, their values are protected, and their restoration is promoted.

[26] This policy is then implemented by cl 3.22, which provides:

> **3.22 Natural inland wetlands**
>
> (1) Every regional council must include the following policy (or words to the same effect) in its regional plan(s):
>
> "*The loss of extent of natural inland wetlands is avoided*, their values are protected, and their restoration is promoted, *except where*:
>
> …
>
> (b) the regional council is satisfied that:
>
> (i) the activity is necessary for the construction or upgrade of specified infrastructure; and

[30] Policy Statement, above n 28, cl 1.5.

(ii) the specified infrastructure will provide significant or regional benefits; and

(iii) there is a *functional need* for the specified infrastructure in that location; and

(iv) the effects of the activity are managed through applying the effects management hierarchy.

(emphasis added).

[27] A key issue for the Environment Court was whether part of the lower Mangapepeke Valley, owned by the Pascoes and through which part of the proposed new section of highway would run, falls within the Policy Statement's definition of a "natural inland wetland". If it does, the roading project would need to comply with policy six and cl 3.22 of the Policy Statement.

[28] A "natural inland wetland" is defined as "a natural wetland that is not in the coastal marine area".[31] And a "natural wetland" means:

a wetland (as defined in the Act) *that is not*:

…

(c) any area of improved pasture that, at the commencement date, is dominated by (that is more than 50% of) exotic pasture species and is subject to temporary rain-derived water pooling.

(emphasis added).

[29] The Policy Statement then defines improved pasture in these terms:

improved pasture means an area of land where exotic pasture species have been deliberately sown or maintained for the purpose of pasture production, and species composition and growth has been modified and is being managed for livestock grazing.

[30] Both the appellants and Waka Kotahi have opposing views as to whether the lower Mangapepeke Valley constitutes a natural inland wetland and, as such, whether cl 3.22 is engaged. The appellants consider it is, and the project does not satisfy the specified infrastructure exception in cl 3.22(1)(b). Waka Kotahi's position is that it is

[31] Policy Statement, above n 28, cl 3.21(1).

not a natural inland wetland because the area falls within the improved pasture proviso contained in the definition of a wetland.

[31] The Environment Court struggled with the definition of "natural inland wetland", concluding:[32]

> In considering this matter we find the definition of "natural inland wetland" to be imprecise – it raises more questions than it answers, particularly in relation to the meaning of "improved pasture".

[32] In particular, the Court questioned whether management techniques beyond "grazing" are required for an area to be deemed "improved pasture", and whether "exotic pasture species" (not defined in the Policy Statement) include exotic herbaceous and rush species occurring in pasture, having significant implications when assessing whether "exotic pasture species" constitute over 50 per cent of the land in question.[33]

[33] The Court noted that, as the Policy Statement came into force after the hearing, it was unable to hear from ecological experts as to whether part or all of the Mangapepeke Valley is a natural inland wetland for the purposes of the Policy Statement. Accordingly, it was unable to reach a firm conclusion as to the status of the wetland.[34]

[34] However, the Court concluded that, in any case, it was able to rely on the specific infrastructure exception in cl 3.22 of the Policy Statement:[35]

> We agree with the submissions of counsel that the Project fits within sub-clause (1)(b) of the policy in clause 3.22. We consider it is both a lifeline utility, as defined in the Civil Defence Emergency Management Act 2002, and specified infrastructure providing significant national and regional benefits. There is a functional need for the Project to occur in the identified location, identified after consideration of options in the route designation process. Further, we are satisfied that the adverse effects of the Project can be managed through the effects management hierarchy as we had previously identified in our interim decision.

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32 Second interim decision, above n 13, at [36].
33 At [36].
34 At [39].
35 At [41].

[35] In short, the Environment Court took a view of the status of the area in issue most favourable to the appellants and its analysis proceeded on the assumption that the lower Mangapepeke Valley *could* constitute a natural inland wetland.

[36] There was no error of law in this approach. Whether the lower Mangapepeke Valley constitutes a natural inland wetland is immaterial if the specified infrastructure exception in cl 3.22(1)(b) would apply anyway. As the Court found that it did, there was no need to finally determine the status of the land.

[37] The appellant's first criticism of the second interim decision therefore falls away.

Was there a functional need?

[38] The relevant functional need exception is contained in cl 3.22(1)(b) of the Policy Statement, as noted at [26] above. For the exception to apply, the Environment Court had to be satisfied that the four limbs contained in cl 3.22(1)(b)(i)–(iv) were met. The appellants did not challenge the first two requirements at (i) and (ii). Their focus was on (iii) and (iv), relating to the functional need for the specified infrastructure "in that location", and management of the effects of the activity through the "effects management hierarchy".

[39] The appellants submit that the Environment Court failed to apply the definition, intent and purpose of the Policy Statement, including 'functional need' in relation to the Mangapepeke Wetland.

[40] Next they contend a functional road already exists in the form of the current Mt Messenger section of State Highway 3. They also claim there is an 'online' route option that would cost $150m and is "more convenient, cheaper and shorter, and reduces the environmental damages by 90%". They say this demonstrates there is no functional need for the project to traverse the lower Mangapepeke Valley.

[41] Waka Kotahi's submissions regarding the functional need for the project are set out in full in the second interim decision and were expressly adopted by the Court:[36]

> There is a functional need for the Project to occur in this location. "Functional need" is defined in the [Policy Statement] as meaning "*the need for a proposal or activity to traverse, locate or operate in a particular environment because the activity can only occur in that environment.*" This is the case for this Project, for the following reasons:
>
> (a) The Project comprises large-scale, linear infrastructure. There cannot be gaps in the road – the whole route must fit together safely and efficiently.
>
> (b) The constraints on the design of the Project included reducing cultural, ecological, and landscape (by keeping the road low in the landscape) effects while ensuring the road could be appropriately designed and constructed and its geometric design will deliver a safe fit for purpose modern section of state highway.
>
> (c) The Project route was the subject of a "*detailed*" alternatives process; Waka Kotahi carefully selected the route as explained in the evidence of Mr Roan. As the Court noted "*the Agency as the requiring authority undertook a thorough and detailed evaluation of the route options before deciding on the preferred route along the Mangapepeke valley*."
>
> (d) The route design was refined at several points to avoid impacts on the ecologically significant Mimi wetland. These refinements included the addition of a bridge to the route across a tributary valley to the Mimi Wetland area, and shifting the southern end of the route further west away from the Mimi Wetland.
>
> (e) As explained in the evidence of Mr Roan and Mr MacGibbon, and noted by the Court in its decision, the alignment though the Mangapepeke valley was shifted off the valley floor and moved to the eastern valley flanks, avoiding poorer soil conditions on the valley floor and an area that is a potential restoration target (for kahikatea swamp forest planting).

[42] In submissions, Waka Kotahi noted that an "online" option was considered and shortlisted, but ultimately rejected as it would have cost $180m *more* than the selected route option (due to significant engineering and geotechnical challenges) and pose significant traffic management challenges during construction. Further, Waka Kotahi notes that the lower Mangapepeke Valley floor has the lowest ecological values of any area within the project footprint.

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36 Second interim decision, above n 13, at [42].

[43] The Policy Statement defines "functional need" as:[37]

> …the need for a proposal or activity to traverse, locate or operate in a particular environment because the activity can only occur in that environment.

[44] This is the same definition as that appearing in the National Planning Standards.[38]

[45] The difficulty with the first of the appellants' challenges — that the Environment Court failed to apply the Policy Statement's definition of "functional need" — is that it did.[39] So this asserted error of law simply fails to reflect the decision under appeal.

[46] Beyond this, the criticisms of the Environment Court's decision based on the presence of the existing highway or the asserted merits of the online route are not errors of law but an impermissible challenge to the Court's factual assessment.

[47] I accept, as submitted by Waka Kotahi, that the test is whether the project (being the specific infrastructure) itself meets the "functional need" threshold — namely that the project needs to traverse, locate or operate in a particular environment because the activity can only occur in that environment. The functionality of the existing road is a question of fact that is not relevant to this assessment, and in any case the issue was the subject of a finding in the first interim decision that the existing portion of State Highway 3 is not fit for purpose.[40] This finding is not open to challenge.

[48] The strict language of "can only" employs a high threshold to satisfy the functional need definition. Waka Kotahi referred me to a report issued by the Ministry for the Environment on the draft first set of National Planning Standards in which the

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37 Policy Statement, above n 28, cl 3.21(1).

38 Ministry for the Environment | Manatū Mō Te Taiao *National Planning Standards* (Wellington, November 2019) at 58.

39 The Environment Court's consideration of the Policy Statement is at [25]–[48] of the second interim decision, above n 13. At [30], the Court found the project is consistent with the objective and policy framework of the Policy Statement. And at [41]–[43], the Court accepted Waka Kotahi's submissions, identifying the definition of "functional need", and considering that definition against the facts.

40 First interim decision, above n 4, at [4]–[5] and [427]–[436].

definition of "functional need" is discussed. The report identified a concern raised by submitters that the definition may be too restrictive:[41]

> Functional need is often a key consideration when an activity can only locate within the coastal marine area (such as a port) and we consider it appropriate to retain the stricter requirement that the activity can locate within that environment. However, we recognise that there can be good reasons why an activity should be enabled to occur in a location even when the activity can occur elsewhere, or the activity must locate there for technical reasons. For example, this is often applicable to linear infrastructure that often has to traverse identified earthquake fault lines or flood hazard areas or has a valid reason to locate in the coastal marine area as in the oil companies' example above.

[49] The Ministry appeared to endorse the strict definition of functional need and went on to propose the addition of a new term — "operational need" — to cover activities that need to traverse, locate, or operate in a particular environment because of technical, logistical or operational characteristics or constraints:

> We consider that the term 'operational need' can be used to cover situations where there are valid reasons why an activity should be enabled to occur in a particular location. We recommend including the term 'operational need' in the Definitions Standard for those provisions where this is the desired approach.

[50] This recommendation was ultimately implemented in the National Planning Standards in November 2019.[42] Despite the existence and implementation of the new term in the National Planning Standards, it was not carried into the Policy Statement, published nine months later.[43]

[51] Waka Kotahi also referred me to *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* as indicating that 'functional need' does not require the proposed location for a development to be the only possible location. The case concerned the variation of land use consent conditions relating to the taking of groundwater as part of the expansion of a water bottling operation. It was argued that water extraction did not fulfil the definition of "rural processing activity" under the relevant plan. To fulfil

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41 Ministry for the Environment | Manatū Mō Te Taiao *2I Definitions Standard – Recommendations on Submissions Report for the first set of National Planning Standards* (Wellington, April 2019) at [3.43].

42 Ministry for the Environment, above n 38, at 62.

43 I note here that national planning standards fall lower on the planning documents hierarchy than a national policy statement, of which they are required to give effect: see Resource Management Act 1991, s 58C(1)(a).

this definition a rural land use activity was required to have a "functional need" for a rural location. Gault J agreed with the majority finding of the Environment Court that there was a functional need for the activity, notwithstanding that it might have been able to occur in other locations as "finding suitable supplies of water is not a certainty".[44]

[52] In both the Ministry for the Environment recommendations report and *Te Rūnanga o Ngāti Awa,* the focus was on the *location* of a particular activity. In the case of cl 3.22(1)(b)(iii) of the Policy Statement, it is of course correct that the functional need for the specified infrastructure can only be "in that location". But what is meant by "that location"?

[53] One answer might be to say that the "location" contemplated by cl 3.22(1)(b)(iii) is the "natural inland wetland", reflecting the opening words of cl 3.22(1). But this view overlooks the broader focus in the definition of "functional need". That focus is not on a particular location, but the need for an activity to locate in a "particular environment".

[54] The term "environment" is broadly defined in s 2 of the Resource Management Act. It includes:

> (a) ecosystems and their constituent parts, including people and communities; and
>
> (b) all natural and physical resources; and
>
> (c) amenity values; and
>
> (d) the social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) or which are affected by those matters.

[55] The RMA's definition of an "environment" is a much broader concept than a "location".

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[44] *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2020] NZHC 3388, [2021] NZRMA 76 at [223] and [235], citing *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2019] NZEnvC 196, (2019) 21 ELRNZ 539 at [225]–[226].

[56] In the present case, the project aims to improve existing linear infrastructure. It involves the creation of a new stretch of road approximately six kilometres in length which is required to join with two existing and fixed points on the highway.

[57] In order to connect these two points, it is necessary for the road to traverse the environment(s) between them. In this case, one of the environments is the lower Mangapepeke Valley. In theory, there could be an infinite number of route possibilities, or locations, connecting the relevant points of the highway. But these potential routes are constrained by practicalities, including distance, cost, terrain, and constructability, as well as environmental considerations. With any linear infrastructure, alternative locations or routes will always exist. And the existence of any conceivable alternative would make the specified infrastructure exception in cl 3.22(1)(b) otiose. Such redundancy could not have been intended.

[58] I consider the Environment Court was correct to find that the project *can only* occur in the relevant *environment*, namely the lower Mangapepeke Valley. This is a context and fact specific inquiry, in which the Environment Court considered the comparatively short distance the project traverses, the nature of linear infrastructure, the environment it is proposed to traverse, as well as the alternatives considered by Waka Kotahi. There was no error of law in its consideration of these issues.

[59] Finally, the current section of State Highway 3 to be replaced already traverses in and out of the lower Mangapepeke Valley. While the project would intrude further into the Valley, the presence of both the existing and planned sections in the same environment is indicative of the need for the proposal to traverse it.

[60] Overall, not only do I consider the appellants have failed to identify an error of law in the Environment Court's approach, I also consider the Court's assessment of functional need was correct.

Second ground of appeal: is the absence of a lapse date in the NoR an error of law?

[61] Section 184(1) of the RMA provides that a designation lapses on the expiry of five years after the date on which it is included in a district plan unless it is given effect to before the end of that period.

[62] The appellants consider the Environment Court erred in failing to impose a lapse period on land subject to the newly amended NoR. They urged a five year lapse period before the Environment Court, submitting that without it, the Pascoes will be subjected to unreasonable uncertainty for an indefinite period of time.[45]

[63] Waka Kotahi's position is that imposition of a lapse date on a NoR to alter a designation is not permitted under the RMA. It refers to s 181 of the Act:

> **181 Alteration of designation**
>
> (1) A requiring authority that is responsible for a designation may at any time give notice to the territorial authority of its requirement to alter the designation.
>
> (2) Subject to subsection (3), sections 168 to 179 and 198AA to 198AD shall, with all necessary modifications, apply to a requirement referred to in subsection (1) as if it were a requirement for a new designation.

[64] Waka Kotahi notes that the range of designation provisions explicitly set out in s 181(2) of the Act does not include the five year lapse period prescribed in s 184 for a designation. There is an obvious logic to this. The lapse period in s 184 is intended to operate as a sunset provision in relation to land affected by a designation but where no steps are taken to implement it within the five year period. Section 181(2) of the RMA, however, appears to contemplate that the original designation — as with the present case — has been implemented. In such circumstances, a lapse date on a variation makes no sense because the land affected is already subject to an implemented designation.

[65] When considering this question the Environment Court concluded:[46]

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45 Second interim decision, above n 13, at [64].
46 At [66].

> The Court did not hear full argument on the matter of the lapse of the designation and is therefore reluctant to determine the matter. We will not impose a lapse date on the amended designation but in so doing are not endorsing the position of either party. We note however that the project has a de facto lapse period given that a lapse date of 10 years has been imposed on the resource consents.

[66] I accept the submission of Waka Kotahi. Section 181(2) prescribes the sections of the Act relevant to an alteration of a designation. The lapse provision requirement is explicitly excluded. Accordingly, the Environment Court did not err in failing to impose a lapse date on the NoR.

[67] In any case, while there may be no lapse date imposed in the amendment to the NoR, as the Environment Court noted, the project has a de facto lapse period given the resource consents will expire after 10 years. It follows that the appellants' concern of unreasonable uncertainty for an indeterminate period is not warranted.

Remaining grounds of appeal

[68] Decisions of the Environment Court are final unless reheard under s 294 or appealed under s 299.[47] As counsel for Te Rūnanga o Ngāti Tama Trust submitted, this statutory bar recognises the significant public interest in finality of litigation and reflects the Environment Court's expertise as a specialist tribunal. The statutory bar fits well with the law of res judicata.[48]

[69] The bulk of the appellants' remaining challenges cannot succeed because they are either collateral attacks on final and binding judicial determinations in the Environment Court's first interim decision, or the decision of this Court on appeal, or the decision of the Supreme Court declining leave to appeal.

[70] Most of these challenges are, in effect, an attempt to relitigate factual findings made by the Environment Court.

[71] In addition, some bald allegations were made by the appellants in written submissions that essentially appear to be a repetition of grounds articulated in their

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47 Resource Management Act 1991, s 295.

48 *André v Auckland Regional Council* [2003] NZRMA 42 (EnvC) at [25].

amended notice of appeal, which are not further addressed or addressed with any clarity in the written submissions, and cannot be considered further.

[72] For the reasons noted in the schedule attached to this judgment, all of them must be dismissed. Their number, and in many instances complete lack of merit, added unnecessarily to the complexity of the appeal.

Conclusion and result

[73] The appeal is dismissed.

[74] Costs should follow the event. If the parties are unable to resolve the issue memoranda may be filed. The respondents should file their memoranda within 10 working days of the date of this judgment. Any memorandum in reply for the appellants must be filed 10 working days thereafter.

Isac J

Solicitors:
Buddle Findlay, Wellington for Waka Kotahi
Atkins Holm Majurey, Auckland for Te Rūnanga o Ngāti Tama Trust

Schedule – Reasons for dismissing the balance of the appellants' claims

GROUND A: The Environment Court failed to act in the interests of justice by relying on untruths and omissions from Waka Kotahi, including:	
Sub-ground of Appeal	**Answer**
Ground A(1)(i) Omissions regarding the withdrawal of the primary spoil offsite disposal site: appellants' submissions at [89]	The consent application as lodged identified the construction would generate 145,000m^3 of spoil disposal. This has been refined over the course of the project. The Environment Court heard evidence that the total volume of surplus fill would be 95,000m^3, to be accommodated in disposal sites within the designation. The Court in its first interim decision found these disposal sites and temporary stockpiling areas would be "contoured, landscaped and vegetated in accordance with the [ecology and landscape management plan]".[49] Therefore, this matter has been finally determined and is barred from being raised on appeal (res judicata).
Ground A(1)(ii) Accepting untrue statements from Waka Kotahi, notwithstanding countervailing sworn evidence that Waka Kotahi contractors carried out unconsented draining in the Mangapepeke wetland prior to the ecological assessments: appellants' submissions at [51]–[58] and [90]	The Environment Court in its second interim decision accepted the respondent's explanation that neither Waka Kotahi nor its contractors created the drains present on the Valley floor but, more importantly, noted that the matter is in any event irrelevant to the Court's assessment of the NoR and application for regional resource consents.[50] A matter of fact. The allegation has been dealt with and dismissed as irrelevant. There is no error of law in relation to this matter.
Ground A(1)(iii) Waka Kotahi's omission that it was colluding with Heritage New Zealand to not comply with statutory conditions in regard to Poutama: appellants' submissions at [91]	There is no evidence which can support this allegation. Waka Kotahi obtained a project-wide archaeological authority under s 44(a) of the Heritage New Zealand Pouhere Taonga Act 2014, on a precautionary basis, to address impacts on any as-yet unknown archaeological sites. It followed the normal statutory process in seeking and obtaining the authority. The Environment Court in its first interim decision recorded the authority as an "approval required under other legislation".[51]
Ground A(1)(iv) Omissions regarding the treatment of kiwis and their eggs and chicks monitored by the project: appellants' submissions at [92]	Questions regarding kiwi relocation were put to a witness for Waka Kotahi, Mr MacGibbon, by Ms Gibbs for the appellants, addressed by Mr MacGibbon and referred to in the first interim decision.[52]

49 First interim decision, above n 4, at [135].
50 Second interim decision, above n 13, at [60]–[61].
51 First interim decision, above n 4, at [64].
52 At [188]–[190].

	The Environment Court concluded that, on the basis that the project is constructed and operated in accordance with Waka Kotahi's proposed conditions of consent for ecology, the immediate and long-term ecological effects of the project will be appropriately addressed.[53] Therefore, this issue was the subject of a final factual determination by the Environment Court and is not amenable to appeal.

GROUND B: Errors of law	
Sub-ground of Appeal	**Answer**
Ground B(1) The Court failed to limit the designation area to the land required for the project: appellants' submissions at [68]–[72]	Pursuant to ss 168 and 171 of the RMA, the designation includes all land required directly for the construction and operation of the highway, and includes additional land intended to be used for construction related activities or ecological, mitigation, offset, or compensation activities, subject to agreement being reached with the Pascoes. The Environment Court was aware the designation included some land that Waka Kotahi hoped to acquire on a willing buyer/seller basis. This matter was addressed in the hearing and closing submissions and in the first interim decision:[54] > The area of Pascoes' land which the Agency proposes to be permanently acquired for the new highway is a little over 11 ha with a further 13.5 ha required for temporary occupation during its construction. > In addition to these areas, on a willing buyer/willing seller basis the Agency would like to acquire: > - The Pascoes' dwelling and outbuildings so that the underlying land can be used for construction storage and related activities; > - A number of tongues of land extending up the side valleys off the new alignment to provide for core ecological mitigation/ offset compensation activities, the [pest management area] and restoration and mitigation planting; > - The largest of these tongues which would be used for temporary storage during construction. It was open to the Court, and not an error of law, to accept the position on the area that should be confirmed as subject to the designation. The issue was resolved by the Environment Court as a matter of fact and is not amenable to appeal.

53 At [214].
54 At [447]–[448].

Ground B(2) The Court failed to impose a lapse date or lapse period on the land subject to the newly amended designation: appellants' submissions at [73]–[77]	This point is addressed in this judgment at [61]–[67].
Ground B(3) The Court failed to provide any resource consent conditions to address effects of the proposed project, including stewardship, on Poutama and the Pascoes: appellants' submissions at [78]–[81]	The Environment Court in its first interim decision determined there were no Māori cultural effects on the appellants that needed to be addressed via conditions.[55] It found they were not kaitiaki of the land but that their relationship with the land was better characterised as stewardship. The Court also found that the effects on the Pascoes would be significant but would be addressed by proposed consent conditions, including designation Condition 5A.[56] It noted that condition 5A is an "extensive package" which addresses effects on the Pascoes during pre-construction engagement, construction and operation of the project. It outlined the considerable obligations imposed on Waka Kotahi, including an explicit requirement to have regard to the Pascoes' stewardship over their land. The High Court did not disturb the conditions on appeal, noting that the proposed conditions explicitly recognised the Pascoes' stewardship over the land.[57] This issue has been finally determined and is not open to appeal. See also the discussion at Ground E (iii)–(v) below.

GROUND C: Irrationality	
Sub-ground of Appeal	**Answer**
Ground C The Court made findings so irrational that no reasonable authority could have come to them (or came to a conclusion without evidence)	The appellant's submissions did not develop this ground. There is no basis on which to consider that the Environment Court's findings were so irrational that no rational decision-maker could have made them. The appellant has failed to establish the very high hurdle that "the true and only reasonable conclusion contradicts the determination".[58]

55 First interim decision, above n 4, at [318]–[320], [326], [330], [339], [463]–[464] and [467].
56 At [117]–[119], [157]–[160] and [468].
57 At [207]–[217].
58 *Bryson v Three Foot Six Ltd*, above n 21, at [27].

GROUND D: Irrelevant matters	
Sub-ground of Appeal	**Answer**
Ground D The Court took into account irrelevant matters, namely that the Court erred in carrying out its own investigations, entered selected parts of those investigations into evidence, ignored requests to disclose those investigations to the parties, and failed to limit its consideration to the evidence from the parties in front of the Court	The appellant did not develop this ground and its nature is unclear. In the absence of further particulars, it is incapable of determination. Nevertheless, it is noted that the RMA grants the Environment Court wide discretion in how it regulates proceedings (s 269) and receives evidence (s 276). Further, the Court is a specialist court, comprising of experts in environmental issues who are entitled to apply their collective experience and relevant expertise in exercising their statutory power.[59]

GROUND E: The Court failed to have regard for relevant matters or failed to determine a materially contested matter.	
Sub-ground of Appeal	**Answer**
Ground E(1) The Court failed to address the issue that Waka Kotahi unlawfully obtained project information and evidence by way of unlawful entry onto land owned by the Pascoes, breached LINZ Licenses to Occupy, and failed to obtain permits to catch or kill protected wildlife: appellants' submissions at [82]–[86]	These allegations are not relevant matters to the Environment Court's assessment of the NoR and application for resource consents and, therefore, there cannot be any error of law in respect of them. In any event, the Environment Court was aware of the appellants' allegations of unlawful entry having received submissions and evidence on that issue. In relation to the wildlife permit allegation, the ecological effects of the project were addressed in detail, and finally, in the Environment Court's first interim decision[60] and by the High Court.[61] Those issues are not open on appeal.
Ground E(2) The Court failed to consider that flood modelling provided by Waka Kotahi was limited to post construction only: appellants' submissions at [87]	The Environment Court considered the potential for any flood risk to the Pascoes' property during construction. It concluded that in the event that the Pascoes elect to stay in their home during construction, the construction yard would need to be designed to forestall the increased flooding risk. The Court accepted that a Specific Construction Water Management Plan submitted to the Regional Council for certification would be a suitable mechanism

[59] *Friends of Pakiri Beach v Auckland Regional Council* [2009] NZRMA 285 (HC) at [28]; *Te Maru O Ngati Rangiwewehi v Bay of Plenty Regional Council* [2008] NZRMA 395 (EnvC) at [26].

[60] First interim decision, above n 4, at [212]–[214].

[61] High Court decision, above n 1, at [238]–[242].

	for ensuring that the construction yard is sited and designed to manage the risk of increased flooding around the home.[62] The High Court considered the Environment Court's assessment of the construction effects, noting its engagement with the conditions relating to forestalling increased flooding risks and Specific Construction Water Management Plan,[63] and concluded it made no errors of law in respect of those matters.[64]
Ground E(3) The Environment Court failed to give effect to the Policy Statement, including by:	
(i) Failing to reach a conclusion as to the status of the Mangapepeke Wetland pursuant to the Policy Statement definition of natural inland wetland: appellants' submissions at [7] and [64]–[65]	This point is addressed in this judgment at [23]–[37].
(ii) Failing to apply the definition, intent, and purpose of the Policy Statement, including "functional need" in relation to the Mangapepeke wetland: appellants' submissions at [9]–[18]	This point is addressed in this judgment at [39]–[59].
(iii) Failing to address the health and wellbeing of waterbodies in the Mangapepeke Valley: applicants' submissions at [38]–[42]	The Environment Court addressed these concerns in its first interim decision and found that the project's design would have negligible effects on the existing groundwater and springs regime in the Mangapepeke Valley.[65] Therefore, this issue has been finally determined and is not amenable to appeal.
(iv) Failing to address the health needs of Poutama, including drinking water, Mangapepeke puna waiora and mahinga kai: appellants' submissions at [33]–[45]	The Environment Court considered in detail the effects of the project on ecology, including stream and wetland ecology.[66] In making those findings, the Environment Court had submissions from Waka Kotahi and the appellants on the health and wellbeing of waterbodies in the Mangapepeke Valley, and on the health needs of Poutama, including Pascoe whānau drinking water, the Mangapepeke puna waiora and mahinga kai.

62 First interim decision, above n 4, at [129] and [157].
63 High Court decision, above n 1, at [203]–[204].
64 At [254]–[256].
65 First interim decision, above n 4, at [153]–[157].
66 At [168]–[214] and [469].

	The Court concluded that, on the basis that the project is constructed and operated in accordance with Waka Kotahi's proposed conditions of consent for ecology, the immediate and long-term ecological effects of the project will be appropriately addressed.[67] While there is no specific mention of the terms "puna waiora", or "drinking water" in the first interim decision, the Court does specifically refer to the protection and enhancement of mahinga kai within the region's waterbodies as a key policy element under the Regional Policy Statement.[68] In its second interim decision the Environment Court concluded that the proposed consent conditions to protect water quality and hydrology would enable a successful hydrological rehabilitation of the Valley floor.[69] The Environment Court's findings on ecological effects were upheld in the High Court and are not amenable to appeal.[70]
(v) Failing to address the ability of Poutama and the Pascoes to provide for their social, economic and cultural wellbeing: appellants' submissions at [28], [78]–[79]	Regarding cultural effects, the Environment Court concluded that neither Poutama nor the Pascoes are tangata whenua exercising mana whenua over the project area.[71] Regarding social effects, the Environment Court accepted that the project will have significantly adverse social effects on the Pascoes, who face losing their home and part of their land and their remaining land will be forever changed".[72] The Environment Court refers to an extensive package of measures to address the potential effects of the project on the Pascoes, including measures to address the social and economic effects on them.[73] The Court concluded that:[74] > There is no doubt that the Project will have significant adverse effects on the Pascoes and their lands. The adverse social impact of the Project on the Pascoes is severe. We consider, however, that proposed condition 5A will mitigate those effects to the extent possible if the Project is approved and proceeds and the Pascoes accept the Agency's offer to buy their house, the land on which it sits, and the other land that is required for the Project.

67 At [214].
68 At [408.
69 Second interim decision, above n 13, at [40].
70 High Court decision, above n 1, at [242].
71 First interim decision, above n 4, at [339], [463]–[464] and [467].
72 At [160] and [397].
73 At [449]–[454].
74 At [468].

	These findings were upheld by the High Court and are not open on appeal.[75]
(vi) Failing to address that Waka Kotahi degraded the Valley, including the wetland, prior to the Waka Kotahi environmental assessments, including vegetation and hydrology: appellants' submissions at [7(f)]	The appellant asserted in written submissions that "[t]he degradation included unconsented drainage, impact of stock disturbance by the project, and multiple conflicting work fronts", though did not provide further particulars. The concern relating to unconsented drainage is addressed above in relation to Ground A. In relation to the concerns around vegetation and hydrology, these ecological matters (and why they are not amenable to appeal) are addressed above at Ground E (iii) and (iv). The claims relating to stock disturbance and conflicting work fronts lack sufficient particulars and are accordingly incapable of determination. In any event, the points do not seem to raise any errors of law relevant to this appeal.
(vii) Failing to consider the implications on the proposed project if the Mangapepeke Valley is not used for restoration plantings and/or pest control: appellants' submissions at [7(g)]	One of the ways in which Waka Kotahi propose to mitigate, offset and compensate for ecological effects of the project is through a comprehensive restoration package. The package includes an intensive pest management over a 3,650 ha area surrounding the project area as well as extensive replanting of effected indigenous and significant species.[76] The Environment Court was satisfied that the restoration package was sufficient to provide for on-site/near-site ecological benefits in the short term and ecological benefits over the whole pest management area in the long term.[77] The High Court upheld the Environment Court's findings in relation to its consideration of ecological effects.[78] Those findings are not amenable to further appeal.

75 High Court decision, above n 1, at [243]–[245].
76 First interim decision, above n 4, at [170].
77 At [208].
78 High Court decision, above n 1, at [240]–[242].