IN THE SUPREME COURT OF NEW ZEALAND

SC75/2012
[2013] NZSC 87

BETWEEN	WEST COAST ENT INCORPORATED Appellant
AND	BULLER COAL LIMITED First Respondent
	SOLID ENERGY NEW ZEALAND LIMITED Second Respondent
	ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED Third Respondent
AND	WEST COAST REGIONAL COUNCIL AND BULLER DISTRICT COUNCIL Interveners

Hearing:	12 and 13 March 2013
Court:	Elias CJ, McGrath, William Young, Chambers* and Glazebrook JJ
Counsel:	D M Salmon and D E J Currie for Appellant J E Hodder QC and B G Williams for First Respondent A C Limmer for Second Respondent P D Anderson for Third Respondent J M van der Wal for Interveners
Judgment:	19 September 2013

JUDGMENT OF THE COURT

A The appeal is dismissed.

B Costs are reserved. If sought, memoranda may be filed within 10 working days of the date of this judgment.

---

* Chambers J died before this judgment was delivered. The remaining Judges have decided under s 30(1) of the Supreme Court Act 2003 to continue the proceeding to judgment.

REASONS

ELIAS CJ

[1] On application for land use consents and other associated consents required in connection with a proposed open-cast coal mine, does s 104(1)(a) of the Resource Management Act 1991 permit consideration of the acknowledged fact that the end use of the coal to be obtained will probably release greenhouse gases into the atmosphere, contributing to climate change? A declaration that the end use of the coal to be mined was irrelevant to the resource consents required in relation to the proposed mine was made under s 310 of the Resource Management Act by the Environment Court.[1] The declaration was upheld on appeal to the High Court.[2] Following leave of this Court to permit appeal directly from the High Court,[3] that determination is now challenged in the present appeal.

[2] Section 104(1)(a) of the Resource Management Act requires a consent authority, "subject to Part 2" (which contains "the purpose and principles" of the Act), to have regard to "any actual and potential effects on the environment of allowing the activity" for which consent is required. "Effect" is defined to include "any positive or adverse effect" and "any cumulative effect which arises over time or in combination with other effects".[4] That is "regardless of the scale, intensity, duration, or frequency of the effect". It also includes potential effects, both of "high probability" and those which, while of low probability, have "a high potential impact".[5]

---

1 *Re Buller Coal Ltd* [2012] NZEnvC 80, [2012] NZRMA 401.
2 *Royal Forest and Bird Protection Society of New Zealand Inc v Buller Coal Ltd* [2012] NZHC 2156, [2012] NZRMA 552.
3 *West Coast ENT Inc v Buller Coal Ltd* [2012] NZSC 107.
4 Resource Management Act 1991, s 3.
5 Section 3.

[3] In the High Court, Whata J accepted that nothing on the face of the legislation limited the range of effects to be considered under s 104(1)(a).[6] He concluded however, in agreement with the view adopted in the Environment Court, that the scheme of the Act as a whole, especially as amended by the Resource Management (Energy and Climate Change) Amendment Act 2004 (2004 Amendment Act), excluded any consideration of the effects on climate change of the end use of the coal to be obtained.[7]

[4] For the reasons that follow I am unable to agree. I consider that the targeted and partial exclusion of effects on climate change adopted by the 2004 Amendment Act is limited to local authority regulation of and consents to the discharges of greenhouse gases into the atmosphere. No such regulation or consent was in issue here. The activities for which consent was required did not include the discharge of greenhouse gases into the atmosphere. Nor do I accept that the scheme of the Act by necessary implication imposes a wider exclusion of the considerations under s 104(1)(a) than is provided in the text of the statute. As s 104(2) makes clear, assessment of any "adverse effect of the activity for which consent is sought" is part of the s 104(1)(a) consideration. Such an adverse effect may be excluded if a national environmental standard "permits an activity with that effect". No national environmental standard has been made which authorises the adverse effect relied on by the appellants.

[5] I would allow the appeal and set aside the declarations made. I would want to hear further from the parties before making the declaration to the opposite effect in the terms proposed by West Coast ENT. Since mine is a minority position, that course is unnecessary.

Background

[6] Buller Coal Ltd applied to the West Coast Regional Council and the Buller District Council for resource consents for the Escarpment Mine, a proposed open-cast mine on the Denniston Plateau, a remote and largely unmodified part of the

---

6 At [17].
7 At [56]–[57].

West Coast. The proposals[8] required resource consents by reason of ss 9, 13, 14, and 15 of the Resource Management Act. Those in respect of which consents were sought from the Regional Council (principally for disturbance of waterways and discharges of contaminants) are uses which are prohibited without consent. Those in respect of which consents were sought from the Buller District Council also require consent but under various classifications. Coal mining itself is a restricted discretionary activity under the Buller District Plan so that the Council's discretion in granting consents or imposing conditions is limited to the matters to which the discretion has been limited.[9] With respect to other necessary consents, the range of considerations to be taken into account is not restricted by the District Plan.

[7] Because the consents required were connected, they were heard together by Commissioners appointed by both the West Coast Regional Council and the Buller District Council. The consents sought were treated in this process as subject to the most restrictive classification provided. "Bundling" in this way appears to be a practice based on a line of authority derived from the decision in *Locke v Avon Motor Lodge*[10] and adopted by the Environment Court in *Southpark Corporation Ltd v Auckland City Council*[11] and may be supported by the terms of s 104(5) of the Act. No point was taken of this procedure which it is unnecessary therefore to consider further.[12]

[8] Although the separate resource consents relating to water and land were part of the overall mining proposal, it would be misleading to characterise them as "ancillary" or "collateral", as if of subsidiary importance to the consents required for the restricted discretionary activity of mining. They required direct stand-alone consents and themselves entailed significant actual and potential effects. The range of considerations required to be taken into account in considering these other

---

8 Which entailed permits to mine coal and to allow associated disturbance of soil and vegetation and disturbance of waterways through modification, use and discharge of contaminants. Consents were also sought for construction of a pump station and freshwater pipeline, a coal processing plant, roads, a coal slurry pipeline, a facility for dewatering and treating discharge of water, power lines and substations, storage of hazardous substances, and for the discharge of contaminants (dust) into air.

9 Buller District Plan 2000, r 5.3.2.4.3.

10 *Locke v Avon Motor Lodge* (1973) 5 NZPTA 17 (SC) at 22.

11 *Southpark Corporation Ltd v Auckland City Council* [2001] NZRMA 350 (EnvC) at [8].

12 The Environment Court seems subsequently to have proceeded on this basis: see *West Coast Environmental Network Inc v West Coast Regional Council* [2013] NZEnvC 47 at [29].

consents was unrestricted and fell to be considered in application of the matters identified in Part 2 of the Act. Moreover, although the mining of coal is a restricted discretionary activity under the Buller District Plan, the restrictions to which the District Plan limited consideration in granting consents for mining under r 5.3.2.4.3 are wide-ranging. The discretion to be exercised by the consent authority is over:

> (1) Location of access points, tracks and mine roads.
>
> (2) Distance and gradient of mined land to boundaries.
>
> (3) Effects on waterbodies, wetlands and riparian margins.
>
> (4) Total area of disturbance and effects of bulk and location of stockpiling and buildings.
>
> (5) Hours of operation.
>
> (6) Protection of areas of significant indigenous vegetation or significant habitats of indigenous fauna identified using the criteria in Policy 4.8.7.4 as a guideline.
>
> (7) Effects on indigenous flora and fauna and the life supporting capacity and functioning of indigenous ecosystems.
>
> (8) Effects on outstanding natural features and landscapes.
>
> (9) Effects on cultural, archaeological and historic sites.
>
> (10) Site restoration, rehabilitation or revegetation.
>
> (11) Noise control, including vibrations.
>
> (12) Use, storage and transportation of hazardous substances.
>
> (13) Financial contributions relating to landscaping, land restoration and roading.
>
> (14) Impacts on public access, including recreation.

These identified considerations were themselves required to be assessed in accordance with the sustainable management purpose of the Act and in application of Part 2 of the Act.[13]

[9] The activities were New Zealand activities for which consents are required under the Resource Management Act. No question of extra-territorial application of

---

[13] See *Auckland City Council v John Woolley Trust* [2008] NZRMA 260 (HC) at [45] and [47]; and *Ayrburn Farms Estates Ltd v Queenstown Lakes District Council* [2012] NZHC 735, [2013] NZRMA 126 at 141.

the Act arises. The effects relied on are moreover effects in New Zealand by reason of the phenomenon of global climate change.

[10] The consents sought by Buller Coal were granted by the Commissioners.[14] West Coast ENT and Royal Forest and Bird Protection Society appealed to the Environment Court against the decision. They sought to argue that the Commissioners had erred in refusing to have regard to the effects on climate change of the end use of the coal to be extracted, which was destined to be exported.

[11] The relevance of the climate change effects of the end use of the coal to be mined was also in issue in relation to a separate pending application by Solid Energy New Zealand Ltd for land and water use and other consents required in respect of a proposal to undertake mining for coal at Mt William North. West Coast ENT and Royal Forest and Bird Protection Society had given notice of their intention to oppose the necessary consents for this mine partly also on the basis of the impact on climate change of the coal to be obtained.

[12] In order to settle the scope of what was in issue both on the appeal concerning the Escarpment Mine and in the application concerning the Mt William North Mine, Buller Coal and Solid Energy applied under ss 310 and 311 of the Resource Management Act (which permit declarations to be applied for as to the existence of duties under the Act) for a declaration that, in considering the applications for resource consents, "the decision maker cannot have regard to the effects on climate change of discharges into the air of greenhouse gases arising from the subsequent combustion of the coal extracted in reliance on those consents".[15] This was both where "any discharge of greenhouse gases associated with the end use of the coal occurs outside New Zealand territorial boundaries" and where "any discharge of greenhouse gases associated with the end use of coal occurs in New Zealand".

---

14 *Re an application by Buller Coal Ltd for resource consents for the Denniston Plateau Escarpment Mine Project* Decision of Commissioners appointed by West Coast Regional Council and Buller District Council, 26 August 2011, at [523].

15 *Re Buller Coal Ltd*, above n 1, at [4].

[13] The declaration was opposed by West Coast ENT and Royal Forest and Bird Protection Society. West Coast ENT itself applied for a declaration that a decision-maker considering resource consents for mining must, under s 104(1) of the Act, consider the contribution that the subsequent discharges into air from combustion of the coal will have towards climate change and must, under s 7(i), have particular regard to the contribution the subsequent discharges will have towards climate change.[16]

[14] The applications were determined in the Environment Court on the basis of an agreed statement of facts. It was accepted that Buller Coal is to remove up to 6.1 million tonnes of coal from the Escarpment Mine in a period of 5 to 12 years. The coal is intended to be exported to India and China for use in the steel manufacturing industry. Solid Energy intends to remove 4.1 million tonnes of coal over a period of approximately 12 years for export to India, China, Japan, Brazil and South Africa for use in steel manufacturing, where it is expected to produce approximately 11.5Mt of CO_2. The parties agreed that the Environment Court could "assume, for the purpose of these proceedings":

a. Climate change is a serious global issue.

b. The coal mined at the sites will probably result in the subsequent discharge of carbon dioxide from the combustion of that coal.

c. Carbon dioxide is a known greenhouse gas.

[15] The agreed facts also explain the position in respect of greenhouse gas emissions under the Emissions Trading Scheme. The Scheme was instituted in 2008 by amendment to the Climate Change Response Act 2002,[17] enacted as New Zealand's response to the United Nations Framework Convention on Climate Change[18] of 1992 and the Kyoto Protocol[19] of 1997, both of which are contained in

---

16 *Re Buller Coal Ltd*, above n 1, at [5].

17 Climate Change Response (Emissions Trading) Amendment Act 2008. The Emissions Trading Scheme was subsequently amended by the Climate Change Response (Moderated Emissions Trading) Amendment Act 2009.

18 United Nations Framework Convention on Climate Change 1771 UNTS 107 (opened for signature 4 June 1992, entered into force 21 March 1994).

19 Kyoto Protocol to the United Nations Framework Convention on Climate Change 2303 UNTS 148 (opened for signature 16 March 1998, entered into force 16 February 2005).

schedules to the Act.[20] Under the Framework Convention, the parties express concern that:[21]

> human activities have been substantially increasing the atmospheric concentrations of greenhouse gases, that these increases enhance the natural greenhouse effect, and that this will result on average in an additional warming of the Earth's surface and atmosphere and may adversely affect natural ecosystems and humankind.

The Emissions Trading Scheme is the principal vehicle used by New Zealand to date to fulfil the obligations under the Framework Convention and the Kyoto Protocol.

[16] Neither Buller Coal nor Solid Energy is required to apply for a discharge permit for the discharge into air of "fugitive" greenhouse gases (discharged in the mining). Each will however surrender units under the Emissions Trading Scheme for such greenhouse gases as escape during mining and for coal sold for consumption in New Zealand by domestic rather than commercial users.[22] Emission units do not, however, have to be surrendered for coal which is exported.[23] Since, apart from fugitive gases released in the course of mining, neither Buller Coal nor Solid Energy proposes to discharge greenhouse gases, they do not require discharge permits for that purpose.

[17] The Environment Court granted the declaration sought by Buller Coal and declined that sought by West Coast ENT.[24] In his judgment, Judge Newhook held that the 2004 amendments, especially s 3 (the purpose provision, which he considered to have "become part of the principal Act"), took "regulatory activity on the important topic of climate change … firmly away from regional government" and made it "the subject of appropriate attention from time to time by central government by way of activity at a national level":[25]

---

20 Schedules 1 and 2 respectively.

21 United Nations Framework Convention on Climate Change, above n 18, preamble.

22 Those mining coal are obliged to surrender emission units for coal sold to domestic customers if those customers are not themselves participants in the Emissions Trading Scheme: Climate Change Response Act 2002, s 212.

23 Under the Climate Change Response Act, s 207(a), a person who mines more than 2,000 tonnes of coal a year is not required to surrender units in respect of the carbon dioxide emissions from coal that is exported.

24 *Re Buller Coal Ltd*, above n 1, at [55].

25 At [53]–[54].

> … it is not correct to contend that ss 7(i) and 104(1)(a) of the Resource Management Act can be interpreted to cut down the clear underlying policy of the 2004 Amendment so as to permit or even require local authorities or the Environment Court on appeal to determine applications concerning extraction of coal (with or without associated applications for permits to discharge greenhouse gases) by reference to effects on climate change.

[18] An appeal by West Coast ENT and Royal Forest and Bird Protection Society to the High Court was dismissed by Whata J.[26] Whata J concluded that the assessment of effects under s 104(1)(a) did not include consideration of the effect on climate change of the discharge of greenhouse gases from the end use of the coal to be mined. This conclusion he reached for a number of reasons:

(a) He considered that the 2004 Amendment Act had removed the ability of regional councils to consider such effects when making rules and "at the evaluative resource consenting stage pending the promulgation of a relevant [national] standard".[27] In this Whata J was influenced in particular by the purpose provision of the 2004 Amendment Act, s 3.

(b) Although s 104(1)(a) was "not literally subject to an amending enactment", in the absence of a national environmental standard and given the prohibition of regional rule-making there was no "express method by which a local authority may require consent for … discharges".[28] This, Whata J thought, meant that "the jurisdiction to consider the effects of air discharges under s 104(1)(a) must be implied and collateral to the exercise of other local authority functions".[29] The Court must be slow to imply such "collateral jurisdiction", "given the unambiguous policy of the Amendment Act 2004".[30]

(c) The consents to allow the activity of coal extraction would not result in the discharge of greenhouse contaminants. Any consequential discharges were "presumptively irrelevant" to assessment of the

---

26 *Royal Forest and Bird Protection Society of New Zealand Inc v Buller Coal Ltd*, above n 2.
27 At [40].
28 At [41].
29 At [41].
30 At [41].

mining activities under s 104(1)(a),[31] despite the fact that the effects of downstream activities (if resulting in "diffuse or non-point pollution") are commonly taken into account by consent authorities as "not normally amenable to regulation by way of air discharge consenting".[32] Again, Whata J considered that "the normative basis for ongoing district level management of industrial discharges is weak" because the regional jurisdiction to control the effect had been removed by Parliament.[33] This was, he thought, "a strong factor against treating consequential industrial discharges as a justiciable effect of 'allowing the activity' of coal extraction in this case".[34]

(d) Although it was "intuitively attractive given the primacy afforded to sustainable management in the Act" to treat s 104(1)(a) as conferring a broad discretion on consenting authorities to consider the effects of land use activities, including the related use of coal, the Judge considered that "district level management of greenhouse gas effects", in the absence of a national environmental standard and regional rules, would clash with the method of the Act to provide for a framework of national and regional rules.[35]

(e) Given the global reach of climate change effects, "it cannot be said that the adverse effects of greenhouse gases on climate change are irrelevant to the exercise of functions under the RMA" and "an interpretation … that bests secures sustainable management would presumptively favour, in the unusual circumstances of this case [where exported coal, "unless regulated at the point of extraction", would result in discharges which "will not be subject to assessment under the rubric of sustainable management"], assessment under

---

31 At [42].
32 At [43].
33 At [43].
34 At [43].
35 At [44].

s 104(1)(a)".[36] Nevertheless, Whata J considered that this interpretation should be rejected because:

(i) the effects could be seen as "too remote";[37]

(ii) more fundamentally, the effects were not "subject to the jurisdiction of a local authority" because s 15 (which established the need to obtain consent for emissions,[38] as "the starting point") cannot apply to overseas discharges, outside New Zealand's territorial boundary:[39]

> Accordingly the discharge can only be amenable to oversight by way of collateral jurisdiction. But where there is no primary jurisdiction to regulate activities extra-territorially (and nothing in ss 30 or 31 confers such jurisdiction), there can be no collateral jurisdiction to do so. Any endeavour to regulate those activities by the side route of s 104(1)(a) could not have been within the contemplation of the legislators and, in my view, must be impermissible.

(f) Local authorities retained the jurisdiction "to mitigate the effects on climate change of greenhouse emissions via comprehensive urban planning and transportation strategies" because the 2004 Amendment Act "did not remove from consideration the effects of diffuse air pollution at a localised scale".[40]

(g) Section 7(i) was directed at the *consequences* of climate change.[41]

[19] "[To] the extent that there is a gap", Whata J concluded that "it is not to be filled by the s 104(1)(a) assessment".[42] While acknowledging that the interpretation he preferred was "arguably literal and narrow" and "might be said to be discordant

---

36 At [51].
37 At [52].
38 At [52].
39 At [52]. Whata J recorded at [54] that he was not suggesting that the effects of an activity, located within New Zealand, that extend beyond New Zealand's territorial boundary are not capable of assessment: "That is simply an issue of scale, not jurisdiction or justiciability."
40 At [46].
41 At [49].
42 At [55].

with the breadth of the sustainable management purpose", Whata J considered that his interpretation "runs in tandem with the implausibility of applying sustainable management principles to overseas jurisdictions".[43]

[20] West Coast ENT and Royal Forest and Bird Protection Society sought and obtained leave of this Court to appeal directly on the question of statutory interpretation on which the declaration sought by Buller Coal and Solid Energy had been granted and their own declaration refused. In the meantime, the Environment Court has dismissed the substantive appeal against the granting of the resource consents, but on a basis which is conditional upon the determination in this Court as to the relevance of the end use of the coal.[44]

Sections 104(1)(a) and 7(i) of the Resource Management Act

[21] The declaration sought by Buller Coal and Solid Energy turns principally on the proper meaning and application of s 104(1)(a) of the Resource Management Act. As is relevant, s 104 (which is contained in Part 6 of the Act which deals with "Resource Consents") 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, have regard to—
>
> (a) any actual and potential effects on the environment of 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

---

43 At [53].

44 *West Coast Environmental Network Inc v West Coast Regional Council*, above n 12, at [353].

(c) any other matter the consent authority considers relevant and reasonably necessary to determine the application.

(2) When forming an opinion for the purposes of subsection (1)(a), a consent authority may disregard an adverse effect of the activity on the environment if a national environmental standard or the plan permits an activity with that effect.

(2A) …

(2B) When considering a resource consent application for an activity in an area within the scope of a planning document, a consent authority must have regard to any resource management matters set out in that planning document.

(2C) …

(3) A consent authority must not,—

(a) …

(b) …

(c) grant a resource consent contrary to—

(i) section 107 [restricting grants of discharge permits for contaminants into water or on to land], 107A [repealed], or 217 [relating to water conservation orders]:

(ii) an Order in Council in force under section 152:

(iii) any regulations:

…

(5) A consent authority may grant a resource consent on the basis that the activity is a controlled activity, a restricted discretionary activity, a discretionary activity, or a non-complying activity, regardless of what type of activity the application was expressed to be for.

…

[22] In addition to s 104(1)(a), the declaration sought by West Coast ENT relied upon s 7(i), contained in Part 2 of the of the Resource Management Act, which states the "Purpose and principles" of the Act. Section 7(i) provides that all exercising functions and powers under the Act must "have particular regard to … the effects of climate change".

[23] The meanings of ss 104(1)(a) and 7(i) are to be understood from their context, as well as the text of the provisions themselves. The most important context

is that provided by the scheme and structure of the Resource Management Act within which they are located. Further context is provided by the legislative history of the enactment of the 2004 Amendment Act which inserted both s 7(i) and other provisions relied upon in the courts below to indicate a legislative scheme in excluding consideration of climate change effects in resource consents. Relevant, too, is the scheme indicated by the Climate Change Response Act, under which the Emissions Trading Scheme imposes charges on domestic discharges of greenhouse gases by those authorised to undertake such discharges and also on miners who produce coal for domestic use in New Zealand (an end use which discharges greenhouse gases into the atmosphere).[45]

[24] As already indicated, it is common ground that there is nothing in s 104(1)(a) which excludes consideration of the climate change effects of the end use of the coal to be extracted under the consents sought. Reading in an exclusion for the effects of the activity on climate change could only be justified if there is some absurdity suggesting error or an evident gap in the legislation it is necessary to fill to meet the purpose of the statute.[46] These conditions are not made out. The exclusion of climate change effects when considering land and water use consents is not necessary to meet the purpose of the 2004 Amendment Act in excluding such effect when considering permits to discharge greenhouse gases. The legislative history indicates that Parliament did not overlook the fact that consideration of climate change could be taken into account under s 104(1)(a): as is discussed below, the explanatory note to the Bill which became the 2004 Amendment Act explained the effect of the Bill as leaving "the ability to control land uses for climate change purposes [as] unchanged".[47] (A reference that cannot be to the effects "*of* climate change" because that amendment *was* necessary and was made by the 2004 Amendment Act, as is explained below.) The substantial gloss of the terms of the statute to exclude such consideration is said to be required by the scheme and effect of the legislation as a whole. Because I disagree with that conclusion, it is necessary

---

45 Persons who mine more than 2,000 tonnes of coal in a year are participants in the Scheme under s 54(1)(a) by virtue of being listed in Part 3 of Schedule 3 of the Climate Change Response Act.

46 The classic statement of when it is permissible by interpretation to read down the words of a statute is that of Lord Diplock in *Jones v Wrotham Park Settled Estates Ltd* [1980] AC 74 (HL) at 105–106.

47 Resource Management (Energy and Climate Change) Amendment Bill 2003 (48-1) (explanatory note) at 5.

to describe the relevant legislative scheme in some detail and to review the legislative history of the 2004 Amendment Act. Both were relied on by the Environment Court in making the declaration sought and by the High Court in upholding it.

The scheme and provisions of the Resource Management Act

[25] I first set out a general overview of the scheme of the Act, as applicable to the appeal. It is convenient to deal with the provisions inserted into the Act by the 2004 Amendment Act principally when referring to that Amendment Act because of the emphasis in the Courts below on the policy of the amendments and the significance of its purpose provision, which is not carried into the principal Act but which is said by the respondents to be "part" of it.

(a) Part 2

[26] Part 2 is headed "Purpose and principles". It is addressed to all who exercise functions and powers under the Act. Part 2 contains four provisions which constitute the "purpose and principles" for the Act as a whole and provide important context for the interpretation of ss 104(1)(a) and 7(i). They are: s 5 (dealing with the "purpose" of the Act, "to promote the sustainable management of natural and physical resources"); s 6 (dealing with "matters of national importance"); s 7 (dealing with "other matters" under the heading "purpose and principles"); and s 8 (dealing with the Treaty of Waitangi). Matters of "national importance" under s 6 require "all persons exercising functions and powers under [the Act]" to "recognise and provide for" the matters of national importance identified in the section. In respect of the "other matters" under s 7 (which include s 7(i) concerning "the effects of climate change", which is relied on by West Coast ENT), all exercising functions and powers under the Act are required to "have particular regard to" the factors identified. Under s 8, all exercising functions and powers under the Act are required to "take into account" the Treaty of Waitangi.

[27] Section 5(1) provides that the purpose of the Act is "to promote the sustainable management of natural and physical resources". "Sustainable management" is explained in subsection (2):

(2) In this Act, **sustainable management** means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural well-being and for their health and safety while—

(a) sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and

(b) safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and

(c) avoiding, remedying or mitigating any adverse effects of activities on the environment.

[28] As is relevant to the present case, the effect of this provision is that decision-makers required to assess the resource consents applied for against the requirement of promotion of "sustainable management" must consider the benefits advanced for the use (counsel at the hearing described those benefits as being principally the economic and social benefits expected for the region and the nation) "while" looking to the legislative objectives identified (most relevantly here, perhaps, "safeguarding the life-supporting capacity of air, water, soil and ecosystems" and "avoiding, remedying or mitigating any adverse effects of activities on the environment").

[29] All exercising functions and powers under the Act are required to "recognise and provide for" the "matters of national importance" identified under s 6. They include protecting from "inappropriate" use the natural character of wetlands, lakes and rivers and their margins, outstanding natural features and landscapes, and areas of significant indigenous vegetation and habitat. What is "inappropriate" use depends on contextual assessment which itself inevitably entails some comparison of benefits and detriments, as identified from the provisions of the Act and its purpose.

[30] Section 7 of the Act, which includes s 7(i) relied upon by the appellants, provides:

7 Other matters

In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to—

(a) kaitiakitanga:

(aa) the ethic of stewardship:

(b) the efficient use and development of natural and physical resources:

(ba) the efficiency of the end use of energy:

(c) the maintenance and enhancement of amenity values:

(d) intrinsic values of ecosystems:

(e) [*Repealed*]

(f) maintenance and enhancement of the quality of the environment:

(g) any finite characteristics of natural and physical resources:

(h) the protection of the habitat of trout and salmon:

(i) the effects of climate change:

(j) the benefits to be derived from the use and development of renewable energy.

[31] It may be noted that ss 7(ba), 7(i) and 7(j) were inserted into the Act by the 2004 Amendment Act. They are further considered below at paragraphs [64]–[65] in connection with that Amendment Act and its purpose. The meaning of s 7(i) is in issue on the appeal and is dealt with at paragraph [82]–[83] below. The meaning of s 7(j) is not in issue in the present case, but was considered in the decision of this Court in *Genesis Power Ltd v Greenpeace New Zealand Inc*.[48] The meaning of s 7(ba) has not yet been authoritatively considered. Different approaches have been taken in the Environment Court.[49] For present purposes it remains an open question, not raised in the submissions addressed to us, whether the burning of coal is an inefficient use of energy to which "particular regard" must be had.

[32] All those exercising functions and powers under the Act are required by s 7, in "managing the use, development and protection of the natural and physical resources" affected (here, land, waters, and minerals), to "have particular regard" to the considerations identified. Again, whether a consideration listed is engaged in the particular case depends on the context.

---

48 *Genesis Power Ltd v Greenpeace New Zealand Inc* [2008] NZSC 112, [2009] 1 NZLR 730.

49 Compare, for example, *Unison Networks Ltd v Hastings District Council* EnvC Wellington W101/06, 23 November 2006; *Lower Waitaki River Management Society Inc v Canterbury Regional Council* EnvC Christchurch C080/09, 21 September 2009; and *Crest Energy Kaipara Ltd v Northland Regional Council* EnvC Auckland A132/2009, 22 December 2009.

(b) Part 3

[33] Part 3 of the Act is concerned with "Duties and restrictions" identified and imposed by the primary legislation.

[34] Restrictions on use of land are contained in s 9. The general scheme is that national environmental standards must be observed in any land use and that regional and district rules must be observed unless the use is expressly allowed by the Act, a national standard or is permitted by a resource consent. In the present case, there is no national environmental standard applicable to the land uses proposed. Those activities which would contravene regional or district rules are the subject of the resource consent applications.

[35] Similarly, under ss 13 and 14 disturbance or other activities affecting beds of lakes and rivers and use of water, must observe national standards or regional rules unless expressly allowed by a resource consent. (District plans cannot authorise such disturbance or use.)

[36] Controls on the discharge of contaminants on to land, and into air and water build on s 15. It prohibits any such discharge which is not either expressly allowed by a national environmental standard or other regulations or by a rule in a regional plan, or which is not the subject of a resource consent.

[37] The resource consents sought in the present applications by Buller Coal and by Solid Energy are necessary to comply with the restrictions in Part 3 in relation to land use, disturbance of river beds, use of water, and discharge of contaminants on to land and into water and air. The discharge into air permit sought is in respect of dust. No application is necessary and none is made for the discharge into air of greenhouse gases.

(c) Part 5

[38] Part 5 of the Act deals with "Standards, policy statements and plans". They are described in a descending hierarchy from national standards (prescribed by regulations) and policy statements, through regional policy statements, plans, and

rules, to district plans and rules. So, broadly speaking, district plans and rules must observe regional plans, and regional plans and rules must observe national standards and policy statements.

[39] The functions of regional councils are described in s 30. They have the responsibility to set up methods to achieve "integrated management of the natural and physical resources of the region". Regional authorities have responsibility to control the use of land for the purpose of soil conservation and water quality. Importantly for the matters in issue in the present case, they have responsibility under s 30(f) for "the control of discharges of contaminants into or onto land, air, or water" as well as discharges of water into water.

[40] Regional councils are authorised under s 68 to make rules to carry out their functions. In making any such rule, the regional council is required by s 68(3) to "have regard to the actual or potential effect on the environment of activities, including, in particular, any adverse effect".

[41] Sections 70A and 70B are discussed at paragraphs [54] and [55] in relation to the 2004 Amendment Act by which they were inserted into the principal Act. Section 70A provides that, "despite section 68(3)", a regional council, when making rules under s 30(1) of the Act "to control the discharge into air of greenhouse gases" must not have regard to the effect of the discharge on climate change except where use of renewable energy permits a reduction in greenhouse gas emissions. Section 70B authorises a regional council to make rules to implement any national environmental standard made to control the effects on climate change of the discharge into air of greenhouse gases, provided the rules made are "no more or less restrictive than the standard".

[42] Because s 70A is expressed to be "despite s 68(3)", it prevents the adverse actual or potential effects of discharges of greenhouse gases on climate change being considered in setting a rule for controlling greenhouse gas discharges except to the extent that the use and development of renewable energy allows a reduction in the discharge into air of greenhouse gases. The effect appears to be (although the matter is not in issue and a concluded view is not warranted) that regional councils *can* set

rules to favour renewable energy if its use enables a reduction in the discharge into air of greenhouse gases, either absolutely or relatively.

[43] National environmental standards made under s 43 may prescribe qualitative or quantitative standards for any discharge, including into air, or set standards for air quality and prescribe methods or processes and provide exemptions.[50] Under s 43A, they may prohibit an activity, allow an activity, restrict rules or consents to matters specified in the national standard, and require certificates or review by local authorities of their existing permits.[51] As has already been mentioned in connection with s 104, subs 2 of that section makes it clear that "when forming an opinion for the purpose of subsection 1(a)" (considering an application for resource consent), "a consent authority may disregard an *adverse* effect of the activity on the environment if a national environmental standard … permits an activity with that effect".[52]

[44] The only national standard which has so far been made in relation to discharges of greenhouse gases into air concerns the discharge of methane gas from landfills.[53] Other greenhouse gas discharges are potentially managed in two ways under two different regimes. For the purposes of the Resource Management Act, they may be managed by rules (national and regional) and by consents by regional councils to discharges. In setting such rules and granting such consents only the effects of discharges on climate change are removed as a consideration by s 70A and s 104E. For the purposes of limiting emissions to fulfil New Zealand's international obligations, such discharges are also managed by the Emissions Trading Scheme introduced in 2008 under the Climate Change Response Act which has the effect of imposing costs on participants under the Scheme for the emission of greenhouse gases into the atmosphere.

(d) Part 6

[45] Part 6 of the Act, in which s 104 is located, is concerned with resource consents. They include, relevantly to the present appeal, land use consents, water

---

50 Section 43 (inserted by the Resource Management Amendment Act 2003, s 18).

51 Section 43A (inserted by the Resource Management Amendment Act 2003, s 18).

52 Emphasis added.

53 Resource Management (National Environmental Standards for Air Quality) Regulations 2004, regs 25–27.

permits and permits for the discharge of contaminants. Resource consents are not required for activities permitted by the Act, by regulations (including a national environmental standard), or by regional or district plans.

[46] If the activity is described in the Act, regulations or plan as a "controlled" activity, a resource consent is required if the activity complies with any requirements specified in the Act, regulations or plan but must be granted (except in identified circumstances), with the consent authority's power to impose conditions restricted to any matters over which control is reserved ("whether in its plan or proposed plan, a national environmental standard, or otherwise").[54] Where an activity is described in the Act, regulations or plan as "a restricted discretionary activity", the power to decline consent or impose conditions turns on the matters over which discretion is restricted. [55] If an activity is described as "discretionary", consent may be granted or declined and, if granted, may be subject to conditions.[56] Where an activity is described as non-complying, the consent authority may grant the consent with or without conditions but only if it is satisfied that the adverse effects of the activity will be minor or that it is not contrary to the Act, regulations and the relevant plan or proposed plan.[57]

[47] Section 104 has been set out at paragraph [21]. For the purposes of this appeal two points should be made.

[48] First, s 104(1) expressly provides that applications for resource consent are subject to Part 2 of the Act. The broad considerations to which the decision-maker must have regard under s 104(1)(a) ("any actual and potential effects on the environment of allowing the activity") are therefore explained by the considerations identified in Part 2 as well as by the expansive definition of "effects" in s 3 (set out in paragraph [52]).

[49] Secondly, any national environmental standard is not only a matter to which regard must be had under s 104(1)(b): s 104(2) also permits the decision-maker to

---

54 Section 87A(2).
55 Section 87A(3).
56 Section 87A(4).
57 Section 87A(5).

"disregard" any "adverse effect of the activity on the environment if a national environmental standard or the plan permits an activity with that effect". In the absence of such permission in a national standard or plan, any adverse effect on the environment falls to be assessed in the context of Part 2 and the principles of sustainable management. Section 104(2) is not expressed to be mandatory: despite a national standard, any adverse effect may remain relevant, depending on the circumstances. But s 104F makes it clear that where a national environmental standard is made to control the effect on climate change of discharges into air of greenhouse gases, a consent authority considering a discharge permit (to do something that would otherwise contravene ss 15 or 15B) must not decline the application or impose restrictions, except to give effect to the national standard. That is to say, any restriction imposed in the consent process for a discharge permit for greenhouse gases must fulfil the national standard and not be more restrictive than that set by the national standard.

[50] Sections 104E and 104F were inserted by the 2004 Amendment Act and are further considered at paragraphs [56] and [57]. Section 104E prevents a consent authority considering the grant of a permit relating to the discharge into air of greenhouse gases from having regard to the effects of such a discharge on climate change, except to the extent that the use of renewable energy permits a reduction in greenhouse gas discharges either absolutely or relatively. Section 104F requires consents and conditions to follow any national environmental standard made to control the effects on climate change of the discharge into air of greenhouse gases. In respect of adverse effects other than climate change effects the consent authority is not constrained. If there is a national environmental standard or regional rule permitting such other adverse effects it may disregard the adverse effect.[58]

(e) Definitions in ss 2 and 3

[51] There are a number of interpretation provisions in the Act which bear on the matters in issue on the appeal. They include: expansive description of "amenity values"; definition of "benefits and costs" to include "benefits and costs of any kind, whether monetary or non-monetary"; and definition of "contaminant" to include any

[58] Section 104(2).

substance which changes the physical, chemical or biological condition of land or air or water. The definition of "environment" includes: "ecosystems"; "all natural and physical resources"; "amenity values"; and the "social, economic, aesthetic, and cultural conditions which affect all these factors". "Intrinsic values", in relation to "ecosystems", include those aspects which have "value in their own right".

[52] Since both ss 7 and 104(1) require decision-makers to be concerned with "effects" of the activity for which consent is sought, it should be noted that the meaning of "effect" is defined very broadly in s 3 of the Act:

> **3 Meaning of effect**
>
> In this Act, unless the context otherwise requires, the term **effect** includes—
>
> (a) any positive or adverse effect; and
>
> (b) any temporary or permanent effect; and
>
> (c) any past, present, or future effect; and
>
> (d) any cumulative effect which arises over time or in combination with other effects—
>
> regardless of the scale, intensity, duration, or frequency of the effect, and also includes—
>
> (e) any potential effect of high probability; and
>
> (f) any potential effect of low probability which has a high potential impact.

The 2004 Amendment Act

[53] Subsections 7(i) and (j) were inserted into the legislation by the 2004 Amendment Act. The 2004 Amendment Act also inserted ss 70A and 70B into Part 5 of the principal Act.

[54] Section 70A limits rule-making by regional councils under s 30(1)(d)(iv) or (f) of the Act by preventing the regional council:

> [having] regard to the effects of [a discharge into air of greenhouse gases] on climate change, except to the extent that the use and development of renewable energy enables a reduction in the discharge into air of greenhouse gases, either—

(a) in absolute terms; or

(b) relative to the use and development of non-renewable energy.

[55] Section 70B prevents the rules adopted by regional councils to implement regulations prescribing national environmental standards made under s 43 "to control the effects on climate change of the discharge into air of greenhouse gases" being any more or less restrictive than the regulations.

[56] Section 104E (the provision in issue in *Genesis Power*[59]), also inserted into the principal Act by the 2004 Amendment Act, prevents a consent authority considering a discharge permit which would otherwise contravene s 15 or s 15B "relating to the discharge into air of greenhouse gases" from having regard to the effects of the discharge on climate change:

> except to the extent that the use and development of renewable energy enables a reduction in the discharge into air of greenhouse gases, either—
>
> (a) in absolute terms; or
>
> (b) relative to the use and development of non-renewable energy.

It is important for the purposes of the present case to note of this provision that it is confined to applications for the discharge into air of greenhouse gases. Nor does it prevent all effects on climate change being considered. As has already been indicated, if the application concerns renewable energy which "enables a reduction in the discharge into air of greenhouse gases" (either absolutely or relatively to the use of non-renewable energy), then climate change effects are explicitly not excluded from consideration.

[57] If a national environmental standard is made to control the effects on climate change of the discharge into air of greenhouse gases, s 104F (also inserted by the 2004 Amendment Act) prevents a consent authority being more restrictive than the standard in granting or declining consents or in imposing conditions (as is described in paragraph [50] above).

---

[59] *Genesis Power Ltd*, above n 48.

[58] Of particular importance in the decisions of the Environment Court and High Court and in the argument of the respondents on the appeal, is the purpose provision contained in s 3 of the 2004 Amendment Act. It was not carried through into the principal Act but explains the purpose of the provisions inserted into the Act:

> **3 Purpose**
>
> The purpose of this Act is to amend the principal Act—
>
> (a) to make explicit provision for all persons exercising functions and powers under the principal Act to have particular regard to—
>
> (i) the efficiency of the end use of energy; and
>
> (ii) the effects of climate change; and
>
> (iii) the benefits to be derived from the use and development of renewable energy; and
>
> (b) to require local authorities—
>
> (i) to plan for the effects of climate change; but
>
> (ii) not to consider the effects on climate change of discharges into air of greenhouse gases.

It may be noted that the purposes of the amendments described in s 3 of the 2004 Amendment Act are in two parts. Paragraph (a) identifies a purpose in expanding the considerations required to be taken into account by all persons exercising functions and powers under the Act and not until then explicitly provided for in the principal Act. Paragraph (b) indicates a purpose of requiring planning for "the effects of climate change" (also a provision which expands the considerations in the principal Act) while excluding from consideration "the effects on climate change of discharges into air of greenhouse gases".

[59] The scope of the 2004 Amendment Act is relevant in considering the effect of s 3. The 2004 Amendment Act contained nine sections only. After s 1 (title), s 2 (commencement) and s 3 (purpose), the provisions which amend the principal Act are:

(a) section 4, which amends s 2(1) of the principal Act by inserting definitions of "climate change", "greenhouse gas", and "renewable energy";

(b) section 5, which amends s 7 by inserting:

- "(ba) the efficiency of the end use of energy:";
- "(i) the effects of climate change:"
- "(j) the benefits to be derived from the use and development of renewable energy";

(c) section 6, which inserted new ss 70A and 70B (described at paragraphs [54] and [55] above), relating to the making of rules relating to discharge of greenhouse gases into air and the implementation of regulations made under s 43 to control discharges into air of greenhouse gases;

(d) section 7, which inserted the new ss 104E and 104F (described at paragraphs [56] and [57]), relating to applications to discharge greenhouse gases, preventing consent authorities taking into account the effects on climate change, except to the extent the use of renewable energy enabled a reduction of greenhouse gas emissions and providing that conditions are no more restrictive than regulations setting national standards made under s 43;

(e) section 8, which deals with transitional arrangements in relation to applications made before the commencement of the Act;

(f) section 9, which deals with transitional arrangements relating to rules made before commencement of the Act by revoking any existing rule in regional plans controlling the discharge into air of greenhouses gases "solely for its effects on climate change".

The legislative history of the 2004 Amendment Act

[60] The explanatory note that accompanied the Resource Management (Energy and Climate Change) Amendment Bill on its introduction described three objectives of the Bill:[60]

> - to give greater weight to the value of renewable energy, and clarify that energy efficiency should be a consideration, regardless of the energy source; and
>
> - to give greater weight to considering the effects of climate change, for example, addressing potential increase in flood risk, a rise in average sea level, and changes in typical rainfall patterns; and
>
> - despite the second objective, to remove climate change as a consideration when considering industrial discharges of greenhouse gases, as these emissions are best addressed using a national mechanism.

[61] The regulatory impact and compliance cost statement which accompanied the Bill described its purpose as being "to provide that climate change and related energy matters be relevant considerations for decision-makers"[61] and to ensure that the efficient use of energy (including "from minerals") was taken into account by decision-makers.[62] While "it would be contrary to the effects-based nature of the RMA to specify particular activities as being desirable", it was considered "appropriate to highlight particular matters that should be given consideration".[63] The statement noted, by way of background, that, "[t]o date, few [regional] councils have controlled greenhouse gases".[64] It explained that the Government's objectives "would be assisted by a stronger legal mandate to take into consideration energy and climate change matters".[65] Although "councils, applicants, and all those acting under the RMA have energy and climate change responsibilities", it was considered "most appropriate to specifically address industrial air discharges at the national level".[66] Despite this, "[t]he ability to control land uses for climate change purposes remains unchanged".[67]

---

60 Explanatory note, above n 47, at 1.
61 At 3.
62 At 4.
63 At 3.
64 At 3.
65 At 4.
66 At 5.
67 At 5.

[62] The Bill was reported back by the Local Government and Environment Committee with some amendments.[68] The commentary provided by the Committee in its report explained that the genesis of the Bill had been an assessment "to see whether amendments were necessary to give effect to the Government's energy and climate change objectives".

[63] The Select Committee report shows that the 2004 Amendment Act followed an audit of the Resource Management Act for its fitness to meet the Government's climate change policies. Four deficiencies only were identified and rectified by the amending legislation. The first three deficiencies concerned three perceived omissions in the principal Act as to the considerations able to be taken into account by local authorities in planning and in granting resource consents.

[64] First, it was thought that the existing legislation did not provide decision-makers with explicit authority to plan for and control resource use to take account of the consequences of climate change ("the effects of climate change").[69] Such consequences were illustrated in the Parliamentary materials by reference to rising sea levels which impacted on land use planning and consents.[70] This was the concern that led to the insertion of s 7(i).

[65] The second and third omissions addressed by the amending legislation related to the lack of explicit recognition of energy efficiency and the benefits of renewable energy over non-renewable energy in the principal Act.[71] Reference was made in the regulatory impact and compliance cost statement, when identifying the problem, to "recent decisions from the Environment Court" which had "noted that the efficient

---

68 Resource Management (Energy and Climate Change) Amendment Bill 2003 (48-2) (Select Committee report).

69 At 2–3.

70 Explanatory note, above n 47, at 1 and 3.

71 Select Committee report, above n 68, at 3–5.

use of energy from minerals is not a matter included in section 7(b)" ("the efficient use and development of natural and physical resources").[72] Of these decisions, the statement commented: "This omission needs to be corrected so that efficient use of energy is a matter that must be considered".[73] The omissions in relation to energy efficiency and the benefits of renewable energy over non-renewable energy were rectified by insertion of s 7(ba) (relating to "the efficiency of the end use of energy") and s 7(j) (requiring "particular regard to the benefits to be derived from the use and development of renewable energy").

[66] The final deficiency identified in the Resource Management Act was that, under the existing legislation, regional councils had authority to set standards in plans and through consents for the discharge into air of contaminants.[74] As this was acknowledged to permit standards to be set in relation to the discharge into air of greenhouse gases or conditions to be placed on consents regarding the restriction or mitigation of emissions, it was inconsistent with government policy that such greenhouse gas emissions would be controlled by standards or other controls set nationally to achieve the international obligations to which New Zealand had committed. For that reason, in respect of "industrial greenhouse gas emissions", the objective was:[75]

> to clarify that, although councils, applicants, and all those acting under the RMA have energy and climate change responsibilities, it is most appropriate to specifically address industrial air discharges at the national level. The ability to control land uses for climate change purposes remains unchanged.

This objective was met by excluding consideration of climate change when setting standards or granting consents for discharge into air of greenhouse gases in the provisions that became ss 70A, 70B, 104E and 104F.

---

72 Explanatory note, above n 47, at 4. This seems to be a reference in particular to the decision of the Environment Court in *Winter v Taranaki Regional Council* [1999] NZRMA 1 (EnvC). There, the Court struck out an appeal on the basis that the efficient use of gas was not within the scope of s 7(b) ("the efficient use and development of natural and physical resources") or of s 7(g) ("any finite characteristics of natural and physical resources") because of the exclusion of "minerals" from s 5(2)(a) ("sustaining the potential of natural and physical resources (*excluding minerals*) to meet the reasonably foreseeable needs of future generations" (emphasis added)). The legislative response in the 2004 Amendment Act was to insert s 7(ba), making it necessary to have particular regard to "the efficiency of the end use of energy".

73 At 4.

74 Select Committee report, above n 68, at 5–7.

75 Explanatory note, above n 47, at 5.

[67] In all other respects, the Resource Management Act was considered to be consistent with the Government's climate change policies (adopted in response to New Zealand's obligations under the Kyoto Protocol). The 2004 Amendment Act did not affect the Resource Management Act except in ways targeted to meet the specific deficiencies identified.

[68] The report of the Select Committee explained that the Bill, as reported back, provided "a stronger legal mandate to take into consideration energy and climate change matters"[76] (something that councils and local government planners had "repeatedly requested", seeking "legal support to back up decisions, including those based on climate change predictions"[77]). The Bill as reported back was also said by the Select Committee to reflect "the Government's preference for national co-ordination of controls on greenhouse gas emissions", by removing "the power of regional councils to consider the effect of greenhouse emissions on climate change when making rules in regional plans or determining air discharge consents".[78] The effect of the Bill was described as requiring:[79]

> … that persons exercising functions and powers under the Resource Management Act have particular regard to the effects of climate change, the benefits of efficient energy use, and the benefits of renewable energy.

The consideration of the effect of the end use of the coal is not excluded

[69] The arguments that found favour in the lower Courts and are rehearsed again on the appeal by the respondents do not persuade me that the effect on climate change of the activities for which resource consents were sought by Buller Coal and Solid Energy is excluded by the terms of the Act. I reach that view because of the nature of the consents in issue, the text and scheme of the Resource Management Act, and the legislative purpose and history of the 2004 amendments.

(i) the consents in issue

[70] The declarations are not made in relation to an application to discharge greenhouse gases into air. Section 104E is therefore not directly relevant. Nor is it

---

76 Select Committee report, above n 68, at 1.
77 Explanatory note, above n 47, at 4.
78 Select Committee report, above n 68, at 2.
79 At 2.

undermined if the end use of the minerals obtained is treated as relevant to the consents relating to land and water use and discharge of other contaminants. Greenhouse gas emissions from New Zealand are controlled nationally (to date by costs imposed under the Emissions Trading Scheme rather than by setting national emission standards) to meet internationally-agreed obligations. That management does not neutralise any adverse effects on the environment which are a consequence of the activities for which land use and other permits are required under the Resource Management Act.

[71] These activities are not adequately described by referring to the restricted discretionary activity of mining. The status under the Buller District Plan of mining as "restricted discretionary" is not material to the question on the appeal. The resource uses that require consents entail significant modification of landscape, habitats and indigenous vegetation. Any adverse effect of the activities is to be weighed by the decision-maker when considering the benefits in favour of the consent. Without such assessment, the consent process is skewed, as is further described below.

(ii) the considerations relevant to s 104(1)(a) are not limited to exclude any adverse effect on the environment

[72] Regional councils since 2004 have been prevented by the legislation from regulating discharges of greenhouse gases by regional planning, and in consenting to discharges cannot "have regard to the effects of such a discharge on climate change" (except to the extent that renewable energy allows a reduction of greenhouse gas emissions). There is however no basis in the text of the legislation to exclude the acknowledged fact that the end use of the coal to be obtained is likely to contribute to climate change when considering the "actual and potential effects" of granting consents for the land use consents and other consents which authorise the activities by which the coal is obtained. In particular, there is nothing in the text of s 104(1) that would preclude consideration of the adverse effect on the environment from release of greenhouse gases in the burning of the coal, as Whata J acknowledged.[80]

---

[80] At [17].

[73] While s 104(2) would permit the consent authority to disregard an adverse effect if it is permitted by a national environmental standard, there is no such standard. Indeed, given the approach taken to the phenomenon of global climate change in New Zealand (as indicated by the international commitments entered into and the statements made in the enactment of the 2004 Amendment Act) provision of such carte blanche would seem unlikely even if it is within the power to set up a national environmental standard (a point of some doubt).

[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".[81] 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 Resource Management Act in decisions of the Environment Court.[82] It is not necessary in the present case to question that approach.

(iii) exclusion of consideration of the end use of coal would undermine s 5 and the statutory scheme

[75] The assessment of the benefits and detriments of proposed uses is the method of sustainable management under s 5. Section 5 is located in Part 2, to which the consent authority's consideration is expressly subject. To blinker the decision-maker by excluding adverse effects of the end use of the minerals to be obtained by the activities for which consent is sought is not necessary to achieve national coordination of the level of greenhouse gases emitted in New Zealand and distorts consideration of "the actual and potential effects on the environment" under s 104(1)(a).

[76] In *Beadle v Minister of Corrections*,[83] the Environment Court emphasised the need to assess consents on a basis that permits the benefits of the activities to be

---

81 Resource Management Act, s 2, definition of "environment".

82 *Environmental Defence Society Inc v Taranaki Regional Council* EnvC Auckland A184/2002, 6 September 2002 at [24]; and *Environmental Defence Society Inc v Auckland Regional Council* (2003) 9 ELRNZ 1 (EnvC) at [63]–[65].

83 *Beadle v Minister of Corrections* EnvC Auckland A074/02, 8 April 2002.

properly assessed. It took the view that those opposed to a prison facility for which public benefits were claimed by those supporting the development "must … be entitled to try and prove that the facility would have adverse effects on the environment that should be offset against its positive benefits, and indeed to prevail over them".[84]

> To preclude submissions and evidence along those lines would be to deprive the Court of the opportunity to make a judgment based on a more complete understanding of the proposal.

[77] Excluding consideration of the end use of the coal would undermine the assessment of the proposal on "sustainable management" principles. As explained by s 5, such principles require decision-makers to assess the benefits of use and development of natural and physical resources (social, economic, cultural, and those contributing to health and safety) "while … safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and avoiding, remedying, or mitigating any adverse effects of activities on the environment". That exercise cannot adequately be undertaken if the decision-maker is required to ignore the acknowledged fact that the end use of the coal to be obtained will release greenhouse gases into the atmosphere, probably contributing to global climate change. No doubt for this reason, Whata J acknowledged that the approach that "best secures sustainable management would presumptively favour, in the unusual circumstances of this case, assessment of those effects under s 104(1)(a)".[85]

[78] Similarly, if the applications impact upon matters of national importance under s 6 (perhaps because they affect "outstanding natural features and landscapes" or "significant indigenous vegetation and significant habitats of indigenous fauna"), the assessment of whether the development and use proposed is "inappropriate" or the decision-maker having regard to the protection of the nationally important features would be skewed if the decision-maker were prevented from challenging the claimed benefits by reference to the detriments which impact on them (here, the effect on climate change). The same distortion would deprive the decision-maker of the ability to properly discharge the responsibilities imposed by s 7 to have particular regard to considerations such as "the efficient use and development of natural and

---

84 At [90].
85 At [51].

physical resources", "the efficiency of the end use of energy", "the intrinsic values of ecosystems", "the maintenance and enhancement of the quality of the environment", and "any finite characteristics of natural and physical resources". It is possible too that, in a particular case, "the ethic of stewardship" might legitimately prompt consideration of deferral or adjustment of the rate of extraction of the mineral until more efficient methods of obtaining the stored energy, involving the emission of fewer greenhouse gases, are in prospect. But that argument is foreclosed by a blanket exclusion of the effects on climate change.

[79] The matters under Part 2 of the Act are mentioned here simply to identify possible relevance, the only question in issue on the appeal. Whether, if relevant, considerations such as these, including the consideration of the effects of an activity on climate change, might affect the determinations of resource consents is not a matter for this appeal and is something upon which it would be wrong to express any view.

(iv) the regulatory scheme of the Act

[80] It is evident that a consideration which weighed heavily with Whata J (and which he returned to several times in his reasons) was the absence of a regulatory framework for assessment under s 104(1)(a). In the absence of a national environmental standard for greenhouse gas emissions and given the prohibition on rule-making to control such emissions by the regional authority introduced by the 2004 Amendment Act, he considered that there is insufficient "normative basis" for local authority consideration of the effect on climate change of the release of greenhouse gases from the coal.[86]

[81] Two responses can I think be made to this approach. First, it treats the level of New Zealand greenhouse gas emissions (which are managed nationally to fulfil the purposes of the Climate Change Response Act and the international commitments) as exhaustive of the climate change effects of activities for which resource consents are required under the Resource Management Act. There is no basis in the Resource Management Act for such restriction of the scope of "effects on

[86] At [43].

the environment" under s 104(1)(a). Secondly, while national, regional, and district planning sets standards for many activities, much decision-making remains subject to wide discretion which is to be exercised in the context of the particular application and under the framework of the legislation. Part 2 of the Act means that there is no "normative" vacuum.

(v) the legislative history of the 2004 Amendment Act does not support a restrictive interpretation of s 104(1)(a)

[82] As described above in referring to the legislative history of the 2004 Amendment Act, the amendments were concerned to expand the Resource Management Act to make it clear that decision-makers could take into account the effects of global climate change. I consider that this legislative history makes it clear that s 7(i) was concerned with the *consequences* of climate change. I would therefore reject the argument advanced by the appellants that s 7(i) requires particular regard to be had to the effects of use of the coal on climate change. The argument was effectively abandoned in this Court although it featured strongly in the submissions made to the High Court where it was correctly dismissed by Whata J.[87]

[83] The purpose of the 2004 Amendment Act in inserting s 7(i) was to *expand* the considerations in the Act. Section 7(i) was required to permit decision-makers in managing uses and development to consider not simply the impacts ("effects") of the activity in issue but to reflect the consequences of the global phenomenon of climate change. No amendment such as was provided by s 7(i) for the effects of climate change was, however, required to make climate change a relevant consideration under s 104(1) where it is an effect of the use, development and protection of natural and physical resources for which consents are required. The Resource Management Act is explicitly concerned with all such effects, the scope of which is indicated by the breadth of s 3.

[84] The limited and partial restriction brought in by the amendments in 2004 was

---

87 At [49].

to remove consideration of the effects of greenhouse gases on climate change when controlling or consenting to discharge applications for greenhouse gases alone.[88] The removal was because the standards for such discharges were to be set nationally in order to facilitate a coordinated policy response to the government's commitments to reduce national emissions under the Kyoto Protocol. Retention of ad hoc regional control over those discharging greenhouse gases risked both double regulation and distorting the effect of national regulation.[89] In those circumstances, regional authorities were relieved of the obligations to plan for climate change effects from discharges of greenhouse gases into air in New Zealand except in relation to the use of renewable energy, and consent authorities considering consent applications for the discharge of greenhouse gases by emitters were relieved of having to consider the effects of the discharge proposed on climate change except in relation to renewable energy. The amendments had, however, no other impact. They did not relieve decision-makers from the obligation, in assessing resource consents on sustainable management principles and consistently with Part 2 of the Act, to take account of the effects on climate change where necessary to counter the advantages put forward for a proposal requiring a resource consent.

[85] The Parliamentary materials relating to the 2004 Amendment Act stress that land use and non-discharge planning and consent processes will continue, under the provisions of the Act, to allow climate change effects to be considered. Thus, it was explicitly acknowledged in relation to matters such as traffic emissions (non-point discharges which do not require a discharge consent) that local authorities in exercising planning and consent functions could continue to take into account any effects on the environment, including in respect of climate change.[90] The fact that climate change consideration was removed only in relation to consents for permits to discharge greenhouse gases into air (as the terms of the amendments made clear) left regional councils and consent authorities able to take into account climate change effects in all other resource management planning and consent processes.

---

88 So, for example, the transitional provision, s 9 of the Resource Management (Energy and Climate Change) Amendment Act, makes it clear that control of greenhouse gas emissions by a regional plan was not in itself objectionable except to the extent that it controlled the discharge to air of greenhouse gases "solely for its effects on climate change".

89 Explanatory note, above n 47, at 4.

90 Select Committee report, above n 68, at 5.

(vi) section 3 of the 2004 Amendment Act

[86] Section 3 of the 2004 Amendment Act, the purpose provision of that Act, was not carried through into the principal Act. It was argued however that it is properly to be treated as part of the Resource Management Act. Reliance was placed on s 23 of the Interpretation Act 1999 which provides that "[a]n amending enactment is part of the enactment that it amends". Although "enactment" is now interpreted to mean both an entire Act and a provision of it,[91] I doubt whether s 3 is properly to be treated as part of the Resource Management Act because it does not itself amend the Act. The provisions that amend are carried into the principal Act. And s 3 is relevant to their interpretation. To the extent that the amending provisions affect the scheme of the Act, s 3 is relevant also in understanding that change in scheme. But it is otherwise spent. Nor does s 3, properly construed in the light of the substantive amendments made by the 2004 Amendment Act, affect the meaning of s 104(1)(a) or the scheme of the Resource Management Act beyond those substantive changes.

(vii) the effects are not "too remote"

[87] It was suggested in the High Court that the effects on climate change through combustion of the coal were too remote.[92] Such argument is however impossible to reconcile with the terms of s 3, Part 2, and s 104 of the Resource Management Act. Nor is the effect on climate change treated as too remote in the legislative provisions that remove it from consideration. They allow an exception where the use of renewable energy permits a reduction in the discharge of greenhouse gases into air, either absolutely or relatively. Such exception (permitting reductions of greenhouse gases to be taken into account in favour of resource consents) indicates that such effects are not treated by the legislation as "too remote" to be of concern to decision-makers.

[88] The exception also confirms the approach taken under ss 5 and 104 of the Resource Management Act which recognises that the merits of a proposal must be

---

91 Interpretation Act 1999, s 29, definition of "enactment".

92 At [52].

assessed by taking into account matters that detract from the benefits claimed. The exercise in assessing "sustainable management" is otherwise one-sided.[93]

(viii) "tangibility"

[89] "Tangibility" is not a concept derived from the Resource Management Act. It is, perhaps, at most an aspect of the remoteness arguments. It is, however, treated by the majority as of significance in the reasons why they would exclude effects on climate change. It is therefore necessary to make some comment upon it.

[90] In *Environmental Defence Society Inc v Taranaki Regional Council*, the Environment Court held that, although the contribution of the plant, there proposed, to global climate change could not be measured "scientifically", it could not be ignored as de minimus "[b]ecause of the stable nature of carbon dioxide and the fact that each small contribution is spread around the globe to combine and create the greenhouse effect".[94] It expressed the view that:[95]

> It is just this very situation that section 3(d), which relates to cumulative effects, is intended to cover.

[91] I, too, would have thought that contribution to the greenhouse effect is precisely the sort of cumulative effect that the definition in s 3 permits to be taken into account under s 104(1)(a) in requiring the consent authority to "have regard to any actual and potential effects on the environment of allowing the activity". It is suggested by the majority, however that this interpretation has been excluded by the decision of the Court of Appeal in *Dye v Auckland Regional Council*.[96] The majority consider that *Dye* "would have been seen as reflecting the then current legal status quo" in 2004, when the 2004 Amendment Act was enacted.[97]

[92] *Dye* was not referred to by counsel in the argument addressed to us. As the majority acknowledges, it arises in a very different context. It concerned an argument that the precedential effect of a resource consent to a subdivision meant

---

93 *Beadle v Minister of Corrections*, above n 83, at [90] as discussed at [76] above.
94 *Environmental Defence Society Inc v Taranaki Regional Council*, above n 82, at [24].
95 At [24].
96 *Dye v Auckland Regional Council* [2002] 1 NZLR 337 (CA).
97 See [126] below.

that further resource consents following the precedent were themselves "cumulative" effects or "other effects" which should be combined with the effect of the first consent. Not surprisingly, such argument led to a decision which is not entirely easy to follow. I think it most unlikely that it would have been at the forefront of the minds of those responsible for the enactment of the 2004 Amendment Act, which was concerned not with precedent in resource consents but with equipping decision-makers to respond to climate change and energy efficiency.

[93] Without further argument, I would be reluctant to extract propositions of general application from *Dye* about when effects are cumulative or may be combined with other effects for the purposes of s 104(1)(a).

Conclusion

[94] A conclusion that climate change is a matter to be weighed in the sustainable management required by s 5 of the Resource Management Act where it is an effect of the activities for which consents are sought is a decision only about relevance under the provisions of the Act. It should not be necessary to say that questions of weight are contextual and a matter for the consent authority. For the reasons given however I consider that the legislation, properly construed in accordance with its terms, purpose, scheme, and legislative history does not justify an interpretation s 104(1)(a) which excludes the consideration of the effects on climate change of the activities for which consents are required under the Resource Management Act. I would allow the appeal.

McGRATH, WILLIAM YOUNG AND GLAZEBROOK JJ

(Given by William Young J)

Table of contents

The issue

[95] Buller Coal Ltd (BCL) and Solid Energy New Zealand Ltd (Solid Energy) applied for resource consents to permit the mining of coal. The coal which is to be extracted will be exported and burnt overseas. The applications were opposed by the appellant, West Coast ENT Inc (West Coast ENT), and the Royal Forest and Bird Protection Society of New Zealand Inc (Forest and Bird). They wished to argue that climate change effects associated with the burning of the coal are material to the assessment of, and tell against, these applications. In issue in this appeal is whether they are entitled to maintain this argument.

[96] The case falls to be determined within the statutory framework of the Resource Management Act 1991 (the RMA), as amended with specific reference to climate change by the Resource Management (Energy and Climate Change)

Amendment Act 2004 (the 2004 Amendment Act). Section 3 of that Act expressed its purposes in the following way:

> **3 Purpose**
>
> The purpose of this Act is to amend the principal Act—
>
> …
>
> (b) to require local authorities—
>
> (i) to plan for the effects of climate change; but
>
> (ii) not to consider the effects on climate change of discharges into air of greenhouse gases.

[97] If the purpose expressed in s 3 had been explicitly carried through to the operative provisions of the 2004 Amendment Act this would have disposed of the appellant's argument. But what has given rise to the present litigation is that the operative provisions of that Act apply only to (a) the making of rules by regional councils in relation to the discharge into air of greenhouse gases and (b) the consideration by regional councils of applications for resource consents associated with the discharge into air of such gases. Since the present applications do not seek consent to discharge contaminants into air, West Coast ENT and Forest and Bird say that the consent authorities dealing with the applications are required to address the climate change consequences of burning the coal under s 104(1)(a) of the RMA which provides:

> When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2, have regard to–
>
> (a) any actual and potential effects on the environment of allowing the activity; …

International efforts to limit climate change and the Climate Change Response Act 2002

[98] Although the case turns on the meaning and effect of the RMA as amended in 2004, it is appropriate to refer briefly to the wider context provided by international efforts to address and mitigate climate change and New Zealand's response to those efforts.

[99] The United Nations Framework Convention on Climate Change (UNFCCC)[98] was opened for signature in June 1992 and there are 194 states and one regional economic integration organisation which are currently parties to it. Its objective is to stabilise greenhouse gas concentrations in the atmosphere at a level which will prevent dangerous anthropogenic interference with the climate system.[99] It envisages that developed countries will take the lead in combating climate change and its effects.[100] Developed, or Annex I, countries, including New Zealand, committed to take mitigation measures with the aim of returning emissions of CO_2 and other climate change gases to 1990 levels.[101]

[100] The Kyoto Protocol to the UNFCCC was adopted in 1997 and came into force in 2005.[102] New Zealand ratified the Protocol in 2002 following the enactment of the Climate Change Response Act 2002. Under the Protocol, Annex I countries, including New Zealand, committed to binding emissions reductions for 2008–2012. New Zealand's obligation was to maintain its annual average emissions during this period (referred to as "the first commitment period") by at least 5 per cent below its 1990 emissions.[103] As we understand it, the New Zealand Government's position is that New Zealand will meet its obligations in relation to the first commitment period.[104] New Zealand has, however, declined to give any further commitment under the Protocol beyond the expiry of that period. Instead it has offered a voluntary pledge that 2020 emissions will be between 10 and 20 per cent less than 1990 levels. Countries which have renewed and extended their Kyoto commitments account for approximately 15 per cent of worldwide greenhouse gas emissions.

[101] The Climate Change Response Act established the machinery which was necessary to ensure that New Zealand was able to comply directly with its obligations under the UNFCCC and the Kyoto Protocol. As amended in 2008, it

---

98 United Nations Framework Convention on Climate Change 1771 UNTS 107 (opened for signature 4 June 1992, entered into force 21 March 1994).

99 Article 2.

100 Article 3(1).

101 Article 4(2)(b).

102 Kyoto Protocol to the United Nations Framework Convention on Climate Change 2303 UNTS 148 (opened for signature 16 March 1998, entered into force 16 February 2005).

103 Article 3(1).

104 Greenhouse gas emissions have increased since 1990 but this was off-set by increases in forestry and associated carbon sequestration. See Ministry for the Environment *New Zealand's Greenhouse Gas Inventory 1990–2011* (April 2013).

now provides for the emissions trading scheme, the purpose of which is to support and encourage global efforts to reduce greenhouse gas emissions by (a) assisting New Zealand to meet its obligations under the UNFCCC and the Kyoto Protocol and (b) reducing New Zealand's net emissions below what are referred to as "business-as-usual levels".[105] This latter objective is of continuing significance despite New Zealand refusing to give any further commitments under the Protocol. The scheme covers all the greenhouse gases covered by the Protocol and is intended, over time, to cover the vast bulk of greenhouse gas emissions. It applies on a sector by sector basis. The sectors of relevance for present purposes are stationary energy and industrial processes. What is important to note is that because of the structure of the Act (which focuses on greenhouse gas emissions from New Zealand), the coal which the respondents win will not be subject to the scheme providing it is exported from New Zealand.[106]

Background

[102] BCL's resource consent applications are in respect of an open-cast mining proposal on the Denniston Plateau on the West Coast of the South Island. BCL intends to export coal to China and India for use in the steel manufacturing industry. The burning of this coal will result in the emission of the greenhouse gas, CO_2. Consents are required from both the West Coast Regional Council and the Buller District Council. In August 2011, Commissioners appointed by the two councils granted the necessary consents.[107] West Coast ENT and Forest and Bird appealed to the Environment Court. Amongst the grounds of appeal was a complaint that the Commissioners had not taken into account the climate change effects of the burning of the coal. They say that for the purposes of s 104(1)(a) of the RMA, these climate change effects are "actual and potential effects on the environment of allowing the activity".

---

105 See s 3(1)(c)(ii). Under s 3(3), "business-as-usual levels" is defined as meaning "the levels of New Zealand's greenhouse gas emissions, estimated by the Minister or the Environmental Protection Agency at any particular point in time, as if the greenhouse gas emissions trading scheme provided for under this Act had not been implemented".

106 The Climate Change Response Act 2002, s 207(a).

107 *Re an application by Buller Coal Ltd for resource consents for the Denniston Plateau Escarpment Mine Project* Decision of Commissioners appointed by West Coast Regional Council and Buller District Council, 26 August 2011, at [523].

[103] In December 2011, Solid Energy applied to the same two councils for resource consents to carry out mining at the Mt William North mining area. It intends to export coal to India, China, Japan, Brazil and South Africa for use in the steel manufacturing industry. Consents have subsequently been granted and appeals by both Solid Energy and Forest and Bird are awaiting hearing in the Environment Court. Forest and Bird wishes to rely on the same climate change argument as has been advanced in respect of BCL's application.

[104] Under the Buller District Plan, coal mining is a restricted discretionary activity.[108] When a consent authority is deciding whether to grant a resource consent for a restricted discretionary activity, it must consider only those matters over which "a discretion is restricted in national environmental standards or other regulations" or "it has restricted the exercise of its discretion in its plan or proposed plan".[109] The matters in respect of which the District Plan restricts discretion in relation to coal mining do not include climate change consequences of the burning of coal which is to be mined. Climate change arguments are therefore irrelevant to whether consent should be granted to allow the mining of coal. There are, however, ancillary elements of the coal mining proposals which involve activities which are discretionary, controlled, or non-complying under the District Plan.[110] In the case of BCL, these include roading, pipe works, the proposed processing plant and coal handling facility, the construction of an electrical substation and the use, storage and transportation of hazardous substances. Consents for these activities must be obtained from the District Council. BCL requires resource consents from the regional council because its mining (and associated) activities will involve disturbance of land, vegetation, and the beds of water bodies, the taking, diversion and use of water, and the discharge of contaminants onto land, into water, and to air. Coal mining, as a land use activity, is not addressed as such in the regional planning documents. Solid Energy's position as to consents is broadly similar to that of BCL and does not warrant separate discussion.

---

108 Buller District Plan (operative 28 January 2000, amended 21 September 2011), r 5.3.2.4.3.
109 See s 104C.
110 See s 87A of the Resource Management Act 1991.

[105] In the hope of avoiding what they saw as a potentially lengthy and expensive debate about the climate change effects of the burning of coal, BCL and Solid Energy applied to the Environment Court for declarations to the effect that the consent authority in relation to their applications:

> cannot have regard to the effects on climate change of discharges into the air of greenhouse gases arising from the subsequent combustion of the coal extracted … either where:
>
> (a) any discharge of the coal occurs outside New Zealand territorial boundaries; or
>
> (b) any discharge of greenhouse gases associated with the end ... use of coal occurs in New Zealand.

[106] West Coast ENT responded with its own application for a declaration[111] that the decision maker must:

> consider the contribution that [the] subsequent discharges into air from the combustion of coal will have towards climate change.

The Environment Court judgment

[107] In a judgment delivered on 30 April 2012, Judge Newhook granted the declarations sought by BCL and Solid Energy and dismissed the application by West Coast ENT.[112] He relied very heavily on the 2004 Amendment Act and, in particular, the statement of purpose set out in s 3 of the Act. He noted what was said about that statute in *Genesis Power Ltd v Greenpeace New Zealand Inc*[113] – a case which is discussed later in these reasons[114] – where this Court observed that:[115]

> The underlying policy of the [2004] Amendment Act was to require the negative effects of greenhouse gases causing climate change to be addressed not on a local but on a national basis … .

He concluded that:[116]

---

111 West Coast ENT also sought another declaration as to the effect of s 7(i) of the Resource Management Act 1991. This is no longer pursued. We will mention the point when we come to s 7(i) below at [130].

112 *Re Buller Coal Ltd* [2012] NZEnvC 80, [2012] 16 NZRMA 401.

113 *Genesis Power Ltd v Greenpeace New Zealand Inc* [2008] NZSC 112, [2009] 1 NZLR 730 [*Genesis Power* (SC)].

114 See below at [148]–[150].

115 At [55].

116 *Re Buller Coal Ltd*, above n 112, at [53].

> [T]he whole of the [2004] Amendment Act, but particularly s 3, point strongly to a finding that regulatory activity on the important topic of climate change is taken firmly away from regional government, and made the subject of appropriate attention from time to time by central government by way of activity at a national level.

The High Court judgment

[108] West Coast ENT and Forest and Bird both appealed to the High Court. Central to their argument on appeal was the contention that Judge Newhook had focused unduly on the purpose provision of the 2004 Amendment Act and had not sought to reconcile his conclusion as to its effect with the relevant and operative provisions of the RMA.

[109] This appeal was dismissed by Whata J in a judgment delivered on 24 August 2012.[117]

[110] The Judge first addressed the position in relation to coal to be burnt in New Zealand and concluded that the effects on climate change of the burning of such coal were not to be taken into account. He gave five reasons for this conclusion:

(i) The policy underlying the 2004 Amendment Act and its purpose provision.[118]

(ii) Although s 104(1)(a) is not expressed to be subject to the 2004 Amendment Act, it is "subject to the scheme of the RMA, as amended by the Amendment Act 2004". Under that Act, it is not open to local authorities to control the discharge to air of greenhouse gases by reference to the effects of such discharge on climate change. Accordingly, a jurisdiction to consider such effects under s 104(1)(a) "must be implied and collateral to the exercise of other local authority functions". But given the policy of the 2004 Amendment Act, the court "must be slow to imply such collateral jurisdiction".[119]

---

117 *Royal Forest and Bird Protection Society of New Zealand Inc v Buller Coal Ltd* [2012] NZHC 2156, [2012] NZRMA 552.

118 At [40].

119 At [41].

(iii) CO_2 which is discharged as a result of burning in New Zealand, is "presumptively irrelevant" to whether consent should be granted for coal extraction.[120] This is so for two reasons. First, the burning of the coal is not itself the "activity" for which consent is sought and thus the relevant "activity" for the application of s 104(1)(a). Secondly, such burning will need to be allowed by a national environmental standard, a regional plan rule or a discharge to air resource consent. Although "it is common for consent authorities to take into account the effects of downstream activities", this is usually in relation to activities which are not subject to regulation under the RMA.[121] He gave examples of increased traffic movements and associated "diffuse or non-point pollution" arising out of a proposed development.[122]

(iv) Use of land consent processes to control the discharge to air of greenhouse gases would:[123]

> jar heavily against the carefully constructed framework of the Act dealing with air discharges and undermine the methods overtly preferred by Parliament for achieving sustainable management of resources in relation to air discharges and related effects on climate change.

He fleshed this point out in this way:[124]

> … the RMA envisages achieving sustainable control of discharges of contaminants to air via regional policy statements and regional plans and now, in respect of the effects on climate change of discharges of greenhouse gases, only in accordance with a national environment standard. Ongoing or residual district level control of greenhouse gases emissions via consenting processes, without national and then regional policy guidance, is not reconcilable with this detailed framework.

(v) He dismissed concerns that his approach would inhibit the ability of district councils to use comprehensive urban planning and transportation strategies to mitigate the climate change effects of

---

120 At [42].
121 At [43].
122 At [43].
123 At [44].
124 At [45].

> greenhouse gas emissions. He noted that this could be provided for under the aegis of national environmental standards under which regional and then district councils might develop rules. He also pointed out that the 2004 Amendment Act did not limit the ability of local authorities to address effects of "diffuse air pollution at a localised scale".[125]

[111] Whata J then turned to address the issue of what he called "overseas discharges". This is what he said:[126]

> The issue with overseas discharges of greenhouse gases from the use of coal extracted in New Zealand is more complex. Such discharges cannot be subject to national environmental standards, with the result that unless regulated at the point of extraction, they will not be subject to assessment under the rubric of sustainable management. Given the global reach of climate change effects … it cannot be said that the adverse effects of greenhouse gases on climate change are irrelevant to the exercise of functions under the RMA. Nor are coal-mining participants required to surrender units for carbon dioxide emissions from burning of exported coal. The parties also agree the coal mined will probably result in subsequent discharge of carbon dioxide from the combustion of coal. An interpretation therefore that best secures sustainable management would presumptively favour, in the unusual circumstances of this case, assessment of those effects under s 104(1)(a).
>
> The short answer might be that such effects are simply too remote. But there is a more fundamental objection. The central question remains whether the discharges and their effects are subject to the jurisdiction of a local authority. The starting point must be s 15, as this section controls the need or otherwise to obtain consent. Given that s 15 cannot apply outside of New Zealand's territorial boundary, there is no remit to require consent for overseas discharges. Accordingly the discharge can only be amenable to oversight by way of collateral jurisdiction. But where there is no primary jurisdiction to regulate activities extra-territorially (and nothing in ss 30 or 31 confers such jurisdiction), there can be no collateral jurisdiction to do so. Any endeavour to regulate those activities by the side route of s 104(1)(a) could not have been within the contemplation of the legislators and, in my view, must be impermissible.
>
> This arguably literal and narrow interpretation of the reach of the RMA might be said to be discordant with the breath of the sustainable management purpose. But this jurisdictional objection runs in tandem with the implausibility of applying sustainable management principles to overseas jurisdictions. In short, in order to form an accurate view as to whether the overseas discharges are adverse and contrary to the sustainable management purpose, an authority would need to assess the management of those effects

---

125 At [46].
126 At [51]–[53].

> in those overseas jurisdictions … . The prospect of a district council assessing whether an end use of coal (or other greenhouse gas emitting resources) is subject to sustainable environmental policy, regulatory control, mitigation or compensation in Cambodia or a province in China, in Japan or Brazil, Zimbabwe or Kenya, or other foreign jurisdictions is palpably unattractive. I do not think it is a matter that is properly justiciable under the RMA in accordance with acceptable judicial method.

[112] The effect of the High Court judgment was to preclude the appellant from calling evidence at the Environment Court's hearing on the potential effects on climate change of discharge of greenhouse gases from the end use of coal to be mined. As that hearing was due to conclude in late December 2012, an early final determination as to whether the High Court's judgment was correct was desirable to avoid disruption to the Environment Court's determination of the substantive appeal. Given the exceptional nature of these proceedings, we granted leave directly to this Court against the High Court judgment.[127]

The current state of play in relation to the applications

[113] The Environment Court has recently delivered an interim judgment in relation to the appeal against the consents granted to BCL indicating that consents will be approved subject to conditions which have yet to finalised.[128] There have been High Court challenges to the approach taken by the Environment Court.[129] These events have occurred since the hearing before us and there is no need for us to review their implications save to say that it seems clear that the issue debated before us is not moot as it may have been if the Environment Court had held that resource consents should be refused for reasons other than the climate change argument which we must address.

[114] The appeals in relation to Solid Energy's Mt William North proposal are apparently on hold awaiting the outcome of the present case.

---

127 See *West Coast ENT Inc v Buller Coal Ltd* [2012] NZSC 107.

128 *West Coast Environmental Network Inc v West Coast Regional Council and Buller District Council* [2013] NZEnvC 47; and the appeal against it in *Royal Forest and Bird Protection Society of New Zealand Inc v Buller District Council* [2013] NZHC 1346, [2013] NZRMA 275.

129 On the meaning of "existing environment", see *West Coast Environmental Network Inc v West Coast Regional Council* [2013] NZEnvC 42; and *Royal Forest and Bird Protection Society of New Zealand Inc v Buller District Council* [2013] NZHC 1324, [2013] NZRMA 275; and see above n 128.

The position as it was prior to the 2004 Amendment Act

The appellant's submission

[115] In his submissions for the appellant, Mr Salmon treated it as a given that if the present issue had arisen prior to the enactment of the 2004 Amendment Act, the climate change effects associated with the overseas burning of coal would have been taken into account under s 104(1)(a). We will not attempt to answer the necessarily hypothetical question as to whether such climate change effects would have been taken into account at that time. But Mr Salmon's proposition nonetheless warrants some discussion and evaluation.

[116] If advanced prior to the 2004 Amendment Act, such an argument would have been assessed in light of the following considerations:

(a) The climate change effects relied on would not result directly from the activity for which consent was sought (the mining of coal) but rather from consequential but independent activities (the burning of coal);

(b) The coal is to be burnt overseas; and

(c) The probable impossibility of showing perceptible climate change effects resulting from the burning of coal from a single mine.

In this section of the judgment, we will evaluate Mr Salmon's contention by reference to the considerations just identified.

Indirectness

[117] As Whata J noted in his judgment, the effects on which West Coast ENT and Forest and Bird wish to rely are direct consequences of burning coal, rather than mining it.[130] So there would always have been scope for argument that the climate change effects relied on by the appellant were too remote from the activities for

[130] *Royal Forest and Bird Protection Society of New Zealand Inc*, above n 117, at [43].

which consents were sought to fall within the scope of s 104(1)(a). Indeed what was effectively this argument succeeded in one case in the Environment Court.[131]

[118] The indirectness argument can be taken a little further. For reasons already given,[132] the climate change effects of burning coal are irrelevant to the applications to the extent to which they seek permission to mine coal. The issue only arises because aspects of the projects which are ancillary to the proposed mining are discretionary, controlled or non-complying under the relevant plans. To put this in more specific terms – and to give an example – BCL requires consent to put in roading associated with its mining proposal. West Coast ENT's argument is that such consent should be refused because of, inter alia, the climate change effects of the burning of the coal, the mining and export of which will be facilitated by the roading in question. It might be thought a little odd if climate change consequences which are irrelevant to the application for consent to mine the coal are relevant to an ancillary element of the mining proposal. As well, the eventual burning of the coal overseas is not closely associated with the construction of roading on the West Coast. And finally on this point, allowing climate change arguments to be advanced in relation to roading might be thought to be antithetical to the concept of a restricted discretionary activity and the rules in the District Plan.

[119] We accept that effects on the environment of activities which are consequential on allowing the activity for which consent is sought have sometimes been taken into account by consent authorities. This is particularly so in respect of consequential activities which are not directly the subject of control under the RMA. But questions of fact and degree are likely to arise as is apparent from the judgment of the Environment Court in *Beadle v Minister of Corrections*.[133] In issue in that case was an application for consent for earthworks and streamworks associated with a proposed prison. Those objecting to the proposal wished to raise arguments directed to the detrimental effects on the environment likely to result from the development of the site for a prison facility. This attracted the following comment from the Court:

---

131 *Taranaki Energy Watch Inc v Taranaki Regional Council* EnvC Auckland W039/2003, 16 June 2003 at [84]–[85].

132 See above at [104].

133 *Beadle v Minister of Corrections* EnvC Wellington A074/2002, 8 April 2002.

> [90] … the Minister expects the Court, in deciding the resource consent applications, to have regard to the purpose of the earthworks and streamworks to create a site for what he urges is a necessary public facility and one that will provide public benefits in Northland. The submitters must be entitled to challenge those claims. But their rights are not limited to direct denial. They must also be entitled to try and prove that the facility would have adverse effects on the environment that should be offset against its positive benefits, and indeed to prevail over them. To preclude submissions and evidence along those lines would be to deprive the Court of the opportunity to make a judgement based on a more complete understanding of the proposal.
>
> [91] So, for what difference it may turn out to make, 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.

The burning of the coal overseas

[120] The fact that the coal will be burnt overseas raises an issue which in a sense is a subset of the point just discussed. As to this, we simply note the remarks made by Whata J to which we have already referred at [111] and which would have been applicable to the situation as it was before the 2004 Amendment Act.

Tangibility

[121] The considerations just discussed involve the particular situation of the mining of coal and its subsequent burning, in this case, overseas. The tangibility issue which we are now about to discuss was (and is) applicable to any climate argument, including those referable to activities which result directly in the discharge of climate change gases.

[122] Prior to the 2004 Amendment Act, there would have been considerable scope for argument whether the effect on climate change of burning coal which is to be mined by BCL and Solid Energy would be sufficiently tangible to engage s 104(1)(a). Relevant to this are two considerations:

(a) BCL and Solid Energy wish to produce coal to meet an existing market. Steel manufacturers who are unable to acquire coal from

New Zealand will presumably obtain coal from other suppliers. So there is scope for doubt at least as to whether restricting New Zealand's coal output would make any appreciable difference to the worldwide use of coal. To relate this consideration back to the text of the statute, it may be that since steel manufacturers will, whatever happens in New Zealand, burn whatever coal is required for their purposes, the emissions of CO_2 which result from their operations is not properly to be seen as a consequence or effect of the mining of coal in New Zealand; and

(b) In any event, it would be difficult, and probably impossible, to show that the burning of coal would have any perceptible effect on climate change.

[123] The arguments referred to in [122] have both received some acceptance in Australia[134] and the argument referred to in [122](b) was addressed in passing in *Genesis Power Ltd v Greenpeace New Zealand Inc* by the Court of Appeal in this way:[135]

> … given New Zealand's comparatively low contribution to worldwide GHG emissions and the infinitesimal contribution which any particular project could make, there could be no demonstrable linkage between GHG emissions associated with any particular project and climate change generally.

On the other hand, in overseas jurisdictions reasoning along the same lines has not always prevailed.[136] As will become apparent, the [122](b) argument is largely premised on the view that, under s 104(1)(a) of the RMA, "effects" are confined to those which would not occur but for the activity in question. We do not wish to express a conclusion as to whether this view is correct. Rather, what we are

---

134 See, for instance, the comment of Dowsett J in *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment and Heritage* [2006] FCA 736, (2006) 232 ALR 510 at [43], [55], [57] and [72]; and *Xstrata Coal Queensland Pty Ltd v Friends of the Earth* [2012] QLC 013 at [559]–[560].

135 *Genesis Power Ltd v Greenpeace New Zealand Inc* [2007] NZCA 569, [2008] 1 NZLR 803 [*Genesis Power* (CA)] at [17].

136 See, for instance, *Massachusetts v Environmental Protection Agency* 549 US 497 (2006) at 523-525; and *Gray v The Minister of Planning* [2006] NSWLEC 720 at [96]–[100].

interested in – for reasons which will become apparent shortly[137] – is (a) how such an issue would likely to have been resolved in New Zealand prior to 2004 and (b) the likely associated contemporary perceptions.

[124] Such resolution would have involved, inter alia, consideration of the s 3 definition of "effect" which includes:

> [a]ny cumulative effect which arises over time or in combination with other effects … .

Also material would have been the principle that a consent authority must disregard effects that already form part of the existing or future environment.[138]

[125] The concept of cumulative effects was addressed in *Environmental Defence Society Inc v Taranaki Regional Council*,[139] where the Environment Court dealt with a proposal for the generation of electricity by burning natural gas which was going to produce 2.6 million tonnes of carbon dioxide a year. This was assessed as being approximately one millionth of the total annual global emissions. It was conceded that it was not possible "to identify any definable effects attributable to [such discharge] from the application site, locally, regionally or globally".[140] The argument that they should be taken into account was that "since all greenhouse gas emissions all contribute cumulatively to the same global atmosphere, every small contribution makes a difference".[141] It was this latter argument which prevailed:

> [24] Because of the stable nature of carbon dioxide and the fact that each small contribution is spread around the globe to combine and create the greenhouse effect, we are satisfied that, while it cannot be measured scientifically, the effect of the proposed plant will nevertheless be more than "de minimis" or "vanishingly small". It is just this very situation that section 3(d), which relates to cumulative effects, is intended to cover.

---

137 At [168]–[172] below.

138 A principle discussed in *Queenstown Lakes District Council v Hawthorn Estate Ltd* (2006) 12 ELRNZ 299 (CA) at [65].

139 *Environmental Defence Society Inc v Taranaki Regional Council* EnvC Auckland A/184/2002, 6 September 2002.

140 At [19].

141 Evidence to this effect is set out at [22].

We note, however, that consent was granted for reasons which included a conclusion that the new plant would serve to displace less efficient generating capacity and the unreasonableness of the proposed mitigation conditions.[142]

[126] As is apparent, the Environment Court took the view that in assessing cumulative effects, it was entitled to have regard to the effects of the activity under consideration in conjunction with the effects of other activities around the world which also produced CO_2. In reaching this conclusion, it did not refer to the then recently-issued judgment of the Court of Appeal in *Dye v Auckland Regional Council* where that Court discussed the meaning of "effects" in s 104 in the following way:[143]

> [38] The present issue is the way the word "effects" should be construed in ss 104 … of the Act. … In s 104(1)(a) the focus is on "any actual and potential effects on the environment of allowing the activity". … The definition of "effect" includes "any cumulative effect which arises over time or in combination with other effects". The first thing which should be noted is that a cumulative effect is not the same as a potential effect. This is self-evident from the inclusion of potential effect separately within the definition. A cumulative effect is concerned with things that will occur rather than with something which may occur, that being the connotation of a potential effect. This meaning is reinforced by the use of the qualifying words "which arises over time or in combination with other effects". The concept of cumulative effect arising over time is one of a gradual build-up of consequences. *The concept of combination with other effects is one of effect A combining with effects B and C to create an overall composite effect D. All of these are effects which are going to happen as a result of the activity which is under consideration.* The same connotation derives from the words "regardless of the scale, intensity, duration, or frequency of the effect".

The emphasised remarks are based on a view of the meaning of "cumulative effects" which is very different from that adopted in the Environment Court. *Dye* was decided in a context distinctly different from the present and it would, in any event, be inappropriate for us to express a view as to whether the approach taken in that case was correct.[144] It is right to say, however, that in 2004, *Dye* would have been seen as reflecting the then current legal status quo.

---

142 To the same effect is *Environmental Defence Society (Inc) v Auckland Regional Council* (2002) 9 ELRNZ 1 (EnvC). Consent was granted and mitigation conditions were not imposed but a climate change argument was accepted as being available on the basis of cumulative effects.

143 *Dye v Auckland Regional Council* [2002] 1 NZLR 337 (CA) (emphasis added).

144 We note that it has not been adopted by the Environment Court in at least one case, see *The Outstanding Landscape Protection Society Inc v Hastings District Council* [2008] NZRMA 8 (EnvC) at [51]–[53].

[127] The arguments against the relevance of climate change effects were strengthened by the enactment of the Climate Change Response Act. New Zealand had committed to reducing net emissions of climate change gases to 1990 levels and the mechanisms by which this was to be achieved were provided for in that Act. This commitment and the statutory and national mechanisms provided for in the 2002 Act left little – and arguably no – scope for useful involvement by local authorities.

The relevant statutory provisions

[128] Section 5 of the RMA provides:

> **5 Purpose**
>
> (1) The purpose of this Act is to promote the sustainable management of natural and physical resources.
>
> (2) In this Act, **sustainable management** means managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic, and cultural wellbeing and for their health and safety while—
>
> (a) Sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably foreseeable needs of future generations; and
>
> (b) Safeguarding the life-supporting capacity of air, water, soil, and ecosystems; and
>
> (c) *Avoiding, remedying, or mitigating any adverse effects of activities on the environment*.
>
> (emphasis added)

It will be observed that the language of s 5(2)(c) is similar to that used in s 104(1)(a). The same point can also be made in respect of ss 68(3) and 76(3) which we discuss later in these reasons.

[129] Section 7 is relevantly in these terms:

> **7 Other matters**
>
> In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to—

(a) kaitiakitanga:

(aa) the ethic of stewardship:

(b) the efficient use and development of natural and physical resources:

(ba) the efficiency of the end use of energy:

...

(d) intrinsic values of ecosystems:

...

(f) maintenance and enhancement of the quality of the environment:

(g) any finite characteristics of natural and physical resources:

…

(i) the effects of climate change:

(j) the benefits to be derived from the use and development of renewable energy.

Subsections 7(ba), (i) and (j) were inserted by the 2004 Amendment Act.

[130] A brief comment on s 7(i) is appropriate. In both the Environment Court and the High Court, the appellant (and Forest and Bird) relied on s 7(i) as supporting the argument that the discharge into the atmosphere of greenhouse gases from the burning of coal was required to be taken into account by the consent authority in considering the resource consent application. The same argument had been rejected by the Court of Appeal in *Genesis Power Ltd v Greenpeace New Zealand Inc*[145] and unsurprisingly therefore was also rejected in the present case by both the Environment Court[146] and the High Court.[147] The appellant did not advance it in this Court, in effect accepting that s 7(i) is a direction to plan for the anticipated effects *of* climate change, not a direction to seek to limit climate change. We note in passing that this interpretation is consistent with the text of art 1(1) of the UNFCCC.

[131] The RMA imposes some direct restrictions on particular activities and provides for other restrictions to be imposed nationally through national

---

145 See *Genesis Power* (CA), above n 135, at [37] .
146 *Re Buller Coal Ltd*, above n 112, at [54].
147 *Royal Forest and Bird Protection Society of New Zealand Inc*, above n 117, at [49]–[50].

environmental standards, regionally by regional councils, or at district level by territorial authorities. The general structure is relatively complex, but for present purposes it is sufficient to note that:

(a) National environmental standards under ss 43 and 43A can be promulgated by the Governor-General in Council.

(b) In exercising their functions under the RMA, regional councils and territorial authorities are entitled to make rules under ss 68 and 76, respectively.

(c) Under subss 30(1)(d)(iv), (f), and (fa)(iv) discharge of contaminants onto, or into land, water or air is generally subject to regulation and control by regional councils.

(d) Territorial authorities are responsible under s 31(1) for regulation and control of the "effects of the use, development, or protection of land and associated natural and physical resources of the district". Their functions do not extend to the regulation or control of discharges of contaminants to air.

[132] National environmental standards are promulgated by the Governor-General in Council.[148] They may prohibit or allow an activity.[149] The scheme of the Act is that such standards take priority over the rules made by regional or district councils.[150] It is common ground that regulation and control of activities with a view to limiting or mitigating the discharge into the atmosphere of climate change gases could be effected through the use of national environmental standards.

[133] The extent of this regulating power is material to the issue which we must determine and for this reason it is necessary to set out the relevant parts of ss 43 and 43A:

---

148 Resource Management Act 1991, s 43(1).
149 Section 43A(1)(a) and (b).
150 Section 43B.

43 Regulations prescribing national environmental standards

(1) The Governor-General may, by Order in Council, make regulations, to be known as national environmental standards, that prescribe any or all of the following technical standards, methods, or requirements:

(a) standards for the matters referred to in section 9, section 11, section 12, section 13, section 14, or section 15, including, but not limited to—

(i) contaminants:

(ii) water quality, level, or flow:

(iii) air quality:

…

(c) standards, methods, or requirements for monitoring.

(2) The regulations may include:

(a) qualitative or quantitative standards:

…

43A Contents of national environmental standards

(1) National environmental standards may—

(a) prohibit an activity:

(b) allow an activity:

(c) restrict the making of a rule or the granting of a resource consent to matters specified in a national environmental standard:

…

(2) A national environmental standard that prohibits an activity—

(a) may do 1 or both of the following:

(i) state that a resource consent may be granted for the activity, but only on the terms or conditions specified in the standard; and

(ii) require compliance with the rules in a plan or proposed plan as a term or condition; or

(b) may state that the activity is a prohibited activity.

…

Section 43(1) refers to a number of other sections of the Act which provide for restrictions on certain activities, most relevantly for present purposes, ss 9 (the use of land), 13 (the use of beds of lakes or rivers), 14 (the use of water) and 15 (the discharge of contaminants).

[134] The effect of s 15 is that contaminants from any industrial or trade premises into air are prohibited unless expressly allowed by national regulations (including a national standard) or a rule in a regional plan or proposed regional plan or by resource consent. Other discharges of contaminants to air are permitted unless regulated by a national environmental standard or a regional plan or require resource consent. Section 15A imposes some additional restrictions which apply to activities in the coastal marine area.

[135] As noted, regional councils and territorial authorities may make rules. This is directly provided for by s 68 (in relation to regional councils) and s 76 (in relation to territorial authorities). Sections 68(3) and 76(3) provide that in making rules, a regional council or territorial authority, respectively:

> shall have regard to the actual or potential effect on the environment of activities, including, in particular, any adverse effect …

[136] Sections 70A and 70B, inserted by the 2004 Amendment Act and, in the case of s 70B as amended in 2005, provide as follows:

> **70A Application to climate change of rules relating to discharge of greenhouse gases**
>
> Despite section 68(3), when making a rule to control the discharge into air of greenhouse gases under its functions under section 30(1)(d)(iv) or (f), a regional council must not have regard to the effects of such a discharge on climate change, except to the extent that the use and development of renewable energy enables a reduction in the discharge into air of greenhouse gases, either—
>
> (a) in absolute terms; or
>
> (b) relative to the use and development of non-renewable energy.
>
> **70B Implementation of national environmental standards**
>
> If a national environmental standard is made to control the effects on climate change of the discharge into air of greenhouse gases, a regional council may

make rules that are necessary to implement the standard, provided the rules are no more or less restrictive than the standard.

[137] Section 104 provides for the considerations which must be taken into account by a consent authority when dealing with a resource consent application. The most relevant provision is s 104(1)(a) which is reproduced earlier in these reasons.[151] It should be noted that there is considerable commonality between the language of s 104(1)(a) and of ss 5(2)(c), 68(3) and 76(3).

[138] Sections 104E and 104F (also inserted into the RMA by the 2004 Amendment Act and in the case of s 104F, as amended in 2005) address the relevance of climate change effects in relation to applications for consent to discharge contaminants:

> **104E Applications relating to discharge of greenhouse gases**
>
> When considering an application for a discharge permit or coastal permit to do something that would otherwise contravene section 15 or section 15B 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, except to the extent that the use and development of renewable energy enables a reduction in the discharge into air of greenhouse gases, either—
>
> (a) in absolute terms; or
>
> (b) relative to the use and development of non-renewable energy.
>
> **104F Implementation of national environmental standards**
>
> If a national environmental standard is made to control the effects on climate change of the discharge into air of greenhouse gases, a consent authority, when considering an application for a discharge permit or coastal permit to do something that would otherwise contravene section 15 or section 15B,—
>
> (a) may grant the application, with or without conditions, or decline it, as necessary to implement the standard; but
>
> (b) in making its determination, must be no more or less restrictive than is necessary to implement the standard.

[139] The new provisions inserted by the 2004 Amendment Act did not address expressly whether the effects of the discharge of greenhouse gases are to be addressed by:

---

151 Above at [97].

(a) regional councils in respect of their rule making functions under s 68 other than in respect of regulating the discharge of greenhouse gases into the air;

(b) territorial authorities in respect of their rule making functions under s 76;

(c) regional councils when acting as consent authorities when dealing with applications which do not encompass the discharge of contaminants into air; or

(d) territorial authorities when acting as consent authorities when dealing with applications for land use consents.

[140] We have set out already the relevant operative provisions of the 2004 Amendment Act and also the relevant part of s 3 of that Act. Section 3 is not declared to be part of the principal Act (being the RMA). The respondents, however, rely on s 23 of the Interpretation Act 1999 which provides:

> **23 Amending enactment part of enactment amended**
>
> An amending enactment is part of the enactment that it amends.

[141] For the sake of completeness we should also refer to s 9 of the 2004 Amendment Act which provides:

> **9 Transitional provision relating to rules made before commencement of Act**
>
> On the commencement of this Act, an existing rule or part of a rule in a regional plan that controls the discharge into air of greenhouse gases solely for its effects on climate change is revoked.

The history of the 2004 Amendment Act

[142] The legislative history was relied on by counsel on both sides of the case. We see some of the material to which we were taken (in particular cabinet papers) as irrelevant. The parliamentary history of the Bill which became the 2004 Amendment

Act is relevant but unfortunately for the simple resolution of the case, it gives some mixed signals.

[143] The "general policy statement" in the explanatory note to the Bill as introduced provided:[152]

> The Bill has 3 objectives, as follows:
>
> - to give greater weight to the value of renewable energy, and clarify that energy efficiency should be a consideration regardless of the energy source; and
>
> - to give greater weight to considering the effects *of* climate change, for example, addressing potential increase in flood risk, a rise in average sea level, and changes in typical rainfall patterns; and
>
> - despite the second objective, to remove climate change as a consideration when considering industrial discharges of greenhouse gases, as these emissions are best addressed using a national mechanism.

[144] The accompanying regulatory impact and compliance cost statement recorded:[153]

> The problem, in relation to industrial greenhouse gas emissions, is that there is a current lack of clarity regarding the role of regional councils under the RMA. This has led to the Environment Court hearing debates on whether regional councils should control greenhouse gas emissions, and by which means.
>
> Interested stakeholders have contested these controls at the Environment Court. However, as Environment Court decisions *do not create consistency across regions* and only High Court decisions provide binding precedent, there could be more expensive and time-consuming litigation. Emitters will also potentially face double controls on their emissions, through national climate change policies (including a carbon charge) and through local rules and consents.
>
> …
>
> *For industrial greenhouse gas emissions into air, the objective is to clarify that, although councils, applicants, and all those acting under the RMA have energy and climate change responsibilities, it is most appropriate to specifically address industrial air discharges at the national level. The ability to control land uses for climate change purposes remains unchanged.*

---

[152] Resource Management (Energy and Climate Change) Amendment Bill 2003 (48-1) (explanatory note) at 1 (emphasis added).

[153] At 4–5 and 7 (emphasis added).

…

> An amendment to the RMA to remove explicitly the ability of regional councils to control emissions of greenhouse gases for climate change reasons will mean that emitters only face controls on their emissions as a result of national instruments. This is the preferred policy option, primarily because it would provide greater certainty for councils and emitters across New Zealand.

[145] Unclear is what was meant by the statement that, "The ability to control land uses for climate change purposes remains unchanged".[154] This could be read as supportive of the appellant's case. Indeed, on the Bill's first reading, the co-leader of the Green Party, Jeanette Fitzsimons, said:[155]

> *The bill specifically provides that councils should still consider the effects on climate change of their other decisions.* Those decisions are legion. When a supermarket wants to locate a long way from town, the council has the right to consider how many more vehicle kilometres will have to be travelled for people to get to that supermarket if it is away from where people live and away from public transport routes. A council can take climate change into account in its responsibilities for providing for public transport and in its responsibilities to design more sensible urban form whereby land-use activities are located close to public transport corridors and public transport nodes in order to reduce the need for travel, and also in its provision of facilities for walking and cycling, in order to reduce greenhouse emissions from burning fossil fuels.

The passage we have italicised does not correlate with any specific provision in the Bill but was presumably based on the passage in the regulatory impact and compliance cost statement to which we have referred.[156]

[146] Public transport arrangements, sensible urban form limiting the need for travel, and the provision of facilities for walking and cycling are all considerations which may be material to land use consent applications independently of climate change concerns. As well, it is possible that what was primarily in mind was that local authorities would continue to plan for the effects *of* climate change rather than seek to limit its causes. Supporting this interpretation is the fact that we were not taken to anything which suggested that prior to 2004, territorial authorities did seek to limit climate change when controlling land use. Possibly relevant to this are some

---

154 At 5.
155 (5 August 2003) 610 NZPD 7596 (emphasis added).
156 See above at [144].

cryptic remarks made by the Local Government and Environment Select Committee in its report on the Bill:[157]

> The effects of greenhouse gas emissions from transport can still be considered in land use planning.
>
> It is important to ensure that there is ongoing potential for local management of domestic emissions. However, we consider that domestic emission management is more likely to be designed for the mitigation of human health effects, which is not affected by the bill.

[147] The Committee made a number of amendments to the Bill as introduced. But as it seems clear that no substantive change to the Bill was envisaged,[158] there is no point discussing them in any detail.

Genesis Power Ltd v Greenpeace New Zealand Inc

[148] We have already referred several times to this case. It is the only decision of this Court which has addressed the effect of the 2004 Amendment Act, and in particular s 104E of the RMA, and for this reason, we should say a little more about it.

[149] Although we have set out the text of s 104E earlier in these reasons, it is convenient to reproduce the text here:

> **104E Applications relating to discharge of greenhouse gases**
>
> When considering an application for a discharge permit or coastal permit to do something that would otherwise contravene section 15 or section 15B 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, *except to the extent that the use and development of renewable energy enables a reduction in the discharge into air of greenhouse gases, either-*
>
> *(a) in absolute terms; or*
>
> *(b) relative to the use and development of non-renewable energy.*
>
> (emphasis added)

---

157 Resource Management (Energy and Climate Change) Amendment Bill 2003 (48-2) (select committee report) at 5.

158 See the judgment of this Court in *Genesis Power* (SC), above n 113.

In issue was whether the exception – that is the words we have italicised – was relevant to an application in relation to a gas-fired electricity generating plant (which thus did not involve renewable energy).

[150] This Court concluded that the exception only applied to applications in respect of projects which would emit greenhouse gases and involved the use of renewable energy. The majority found support for that conclusion in the text of ss 104E and 70A. But the Court also concluded that the policy of the statute was as follows:[159]

> Local authorities are generally prohibited from having regard to the effects on climate change of the discharge of greenhouse gases, but may do so when making a rule which controls, or considering an application for consent to, an activity involving the use and development of renewable energy.

Discussion

The appellant's case

[151] West Coast ENT's case rests on a literal approach to the relevant provisions of the RMA. The general language of s 104(1)(a) appears to be broad enough to at least permit West Coast ENT and Forest and Bird to lead evidence as to the effect on climate change of the burning of the coal which is to be won. Arguments based on indirectness and immateriality might be thought to involve questions of degree which are primarily factual and not legal in character. And although the approach taken by the Court of Appeal in *Dye* might provide BCL and Solid Energy with a discrete legal basis for resisting climate change arguments, their case has not been based on *Dye*. And although there was some mention in argument of the restricted discretionary status of coal mining in the Buller Plan, BCL and Solid Energy did not advance the argument referred to in [118] that allowing climate change arguments in relation to ancillary consents would undermine the statutory concept of restricted discretionary activity and the rules in the Buller Plan. So to the extent to which the climate change argument West Coast ENT wishes to raise is available on the language of s 104(1)(a), BCL and Solid Energy have not pointed to anything in the operative provisions of the 2004 Amendment Act which is explicitly to the contrary.

---

159 *Genesis Power* (SC), above n 113, at [62].

[152] The case for BCL and Solid Energy rests very much on a scheme and purpose approach to the RMA as amended in 2004. But West Coast ENT also has a scheme and purpose argument. The 2004 Amendment Act envisaged (via what became ss 70B and 104F of the RMA) that there would, or might be, national regulation:

> to control the effects on climate change of the discharge into air of greenhouse gases … .

To the extent that the statute envisaged national regulation in relation to discharges of greenhouse gases, the associated carve out in relation to the discharge of such gases (as effected by ss 70A and 104E) might be thought to be appropriately confined to the functions of regional councils directly associated with the discharge of contaminants into the air. If so, there is no incongruity in precluding climate change arguments in relation to applications to discharge contaminants but allowing them in other contexts (that is, where the discharges are incidental to the activity).

Our approach: a preliminary comment

[153] For reasons which follow in the next section we do not accept West Coast ENT's scheme and purpose argument discussed in [152] and thus do not see any overarching logic in the interpretation advanced by West Coast ENT. In subsequent sections we will test West Coast ENT's literal approach in particular situations – which we term "examples" – with a view to assessing its plausibility and workability and, as well, whether its adoption would subvert the operation of the 2004 Amendment Act. We will then express and explain our conclusion that, when the words of the statute are interpreted in a purposive fashion in the context of the statute as a whole, West Coast ENT's interpretation cannot be sustained.

The scope of national regulation

[154] West Coast ENT's scheme and purpose argument recorded in [152] proceeds on the basis that:

(a) The regulatory (including consenting) functions of territorial authorities, in respect of the use of land, and regional councils, in relation to the use of beds of rivers and lakes and water, must be

exercised having regard to climate change effects indirectly caused or facilitated by such uses; and

(b) The carve out from what would otherwise be the regulatory functions of regional councils in respect of the direct discharge of contaminants into the air is explicable on the basis that direct discharges can be subject to national regulation.

[155] We have already set out the relevant parts of ss 43 and 43A.[160] They undoubtedly provide power to regulate, at a national level, the discharge of greenhouse gases into the air. But their scope is not necessarily so confined. The regulatory powers conferred by s 43(1) are drafted by reference to the powers conferred on territorial authorities under s 9 and on regional councils under ss 11–15. West Coast ENT's argument is that the regulation of activities controlled under those sections must take into account their climate change effects and that this is so even where the activities do not themselves involve the direct discharge of climate change gases. It is part of West Coast ENT's argument that this was the position before the enactment of the 2004 Amendment Act. As we have explained, we see scope for a different view.[161] But if West Coast ENT is correct about the position as it was before 2004, it must also be the case that indirect climate change effects could have been regulated nationally at that time. If so, the power to do so must have survived the 2004 Amendment Act as any such regulation would be within what is contemplated by ss 70B and 104F of the RMA in their references to national regulation:

> to control the effects on climate change of the discharge into air of greenhouse gases …

[156] Since the corollary of West Coast ENT's argument must therefore be that indirect discharges can be subject to national regulation and that this was so in 2004, the susceptibility of direct discharges to such regulation does not explain the differential treatment of direct and indirect discharges contended for by West Coast ENT.

---

[160] See above at [133].
[161] See above at [115]–[127] above.

Concurrent applications to mine and burn coal ("example one")

[157] In the course of argument we were invited to consider how a consent authority might deal with concurrent applications for resource consents (a) to mine coal and (b) to discharge the products of its combustion into the air. The effects on climate change of discharges into the air of greenhouse gases would be irrelevant to the consideration of the discharge application. Given this, it might be thought anomalous if the consent authority was required to take into account those effects when dealing with the application to mine coal.

[158] This example was put to Mr Salmon, counsel for the appellant, in argument. His approach generally was that if there was any illogicality, it was simply a result of the legislative scheme as enacted and had to be accepted. Our preference, however, is to construe the legislation so as to avoid illogicalities.

Application to mine coal which is to be burnt subject to a separately obtained resource consent ("example two")

[159] Assume that (a) an electricity generator is seeking a resource consent to generate power using coal; (b) the electricity generator wishes to buy coal for the purpose of such generation; and (c) a coal miner seeks a resource consent to mine the coal which is to be burnt. On West Coast ENT's argument, the climate change effects of the burning of coal would be taken into account in relation to the mining of the coal even though they would be irrelevant to the consideration of the generator's application for consent to discharge contaminants into the air.[162]

[160] If not for the 2004 Amendment Act, a consent authority dealing with such a coal mining proposal would be entitled to assume that the adverse effects of the discharge into air of contaminants associated with the burning of the coal would have been (or would be) properly addressed on the application to discharge contaminants into the air. The scheme of the 2004 Amendment Act was that the effects on climate change of such discharges were (a) to be nationally regulated and (b) for this reason, to be excluded from regulatory functions of regional councils. It would be perverse to conclude this diminution of the regulatory functions of regional

---

[162] As confirmed by *Genesis Power* (SC), above n 113. See [107] and [150] above.

councils had the practical effect of enlarging the corresponding functions of territorial authorities so as to encompass, in this context, consideration of the discharge of climate change gases.

Application to mine coal which is to be burnt in New Zealand in circumstances which will not require a discharge consent ("example three")

[161] The burning of coal otherwise than in industrial or trade premises does not require a resource consent if the associated discharge to air of contaminants does not contravene a national environmental standard or regional rule. The discharge to air of contaminants is subject to regional council regulation. But the impact of s 70A of the Act is that in making rules, regional councils may not take into account the effects on climate change of the discharge of contaminants. Such effects are to be provided for, if at all, by national environmental standards.[163]

[162] In a situation where the coal to be mined is to be burnt in circumstances not requiring a resource consent, would it be open to a regional council dealing with say an application to divert natural water associated with the proposed coal mine to take into account the climate change effects of the burning of the coal? Alternatively would a regional council which sought to do so be taking into account irrelevant considerations? If the latter proposition is correct, as we think it is, it is difficult to see why climate change considerations should be relevant in relation to the present proposals.

Regional rules as to activities incidental to coal mining addressed to climate change effects ("example four")

[163] As we have noted, s 68(3) provides that:

> In making a rule, the regional council shall have regard to the actual or potential effect on the environment of activities, including, in particular, any adverse effect … .

Would it be possible for a regional council in making a rule which bears on activities which are incidental to coal mining (for instance as to the diversion of natural water) to take into account climate change effects of the burning of coal (for instance, by

---

163 See above at [132] and following.

prohibiting such diversions if associated with coal mining)? Such an exercise would not be directly precluded by s 70A of the RMA. It might, however, be thought to fall foul of an implied and more general limitation on its competence in relation to climate change underlying the 2004 Amendment Act. If so, such a rule would be ultra vires a regional council. The alternative – that regional councils must address climate change when making such rules – would be directly contrary to the legislative purpose that regulatory control of climate change associated with discharges is to be addressed at the national level.

Making district rules about activities which may result in the emission of greenhouse gases ("example five")

[164] The Auckland Council District Plan (Rodney Section) 2011 provides for a special thermal energy generation rural zone to accommodate the proposed Rodney power station,[164] which was in issue in *Genesis Power*.[165]

[165] As we have noted, s 76(3) of the RMA provides that:

> In making a rule, the territorial authority shall have regard to the actual or potential effect on the environment of activities including, in particular, any adverse effect … .

On the literal interpretation advanced by West Coast ENT, the change of zoning which was necessary to accommodate the Rodney power station could have been opposed on the basis of exactly the same arguments as were held by this Court to be unavailable in *Genesis Power*.[166]

Application to build and operate a coal-fired station ("example six")

[166] Assume an application for resource consents to build and operate a coal-fired power station is lodged with a consent authority. The impact on climate change of the discharge of greenhouse gases into the air would be irrelevant in relation to whether consent should be given to discharge contaminants into the air but would be relevant in relation to any other consents which might be necessary to enable the

---

164 Rule 12.8.27.
165 *Genesis Power* (SC), above n 113; and *Genesis Power* (CA), n 135.
166 See above at [107] and [150].

building of the power station. On the appellant's argument, climate change effects would be material in respect of the building of the power station.

[167] It will be appreciated that this example is based on the facts of *Genesis Power*, save that the postulated power station is coal-fired rather than gas-fired. In that case, Genesis required a number of resource consents. Assuming, as seems likely, that s 104(1)(a) was engaged by some of the other (non-discharge) consents,[167] that litigation was, on Greenpeace's current argument, pointless; this is because the climate change arguments which were held by this Court to be irrelevant in relation to the discharge consents were available in relation to all other resource consent applications to which s 104(1)(a) applied. But, because legislative policy required climate change effects to be ignored when considering the discharge consent application, it is not entirely easy to see why such climate change effects would be relevant in relation to ancillary elements of the scheme.

Our conclusions

[168] Given the examples we have provided, the most likely explanation for the form of the 2004 Amendment Act is that those responsible for its drafting assumed the climate change arguments could only be advanced in relation to rules and consents involving direct discharges. In other words, the drafters did not envision that those same arguments could be made in relation to rules and consents relating to activities which indirectly result in, or facilitate the discharge of greenhouse gases. For the reasons given, such an assumption would have been very reasonable.

[169] All the examples provided show that a literal interpretation of s 104(1)(a) would produce anomalous outcomes. In examples one, two and three, the literal approach would allow arguments which are off limits in relation to the issues to which they are most closely related (namely, discharges to air) to come in, by the backdoor, in respect of ancillary issues (such as land use, roading and the like). At

---

[167] Consents were eventually granted by the Auckland Regional Authority. A subsequent appeal to the Environment Court was resolved by a consent order, see *Genesis Power Ltd v Auckland Regional Council* EnvC Auckland ENV-2009-AKL-000009, 9 October 2009. Some of the consents which were granted were amended and are thus referred to in the order. It is difficult to believe that in respect of at least some of these (including, for instance, a consent to discharge effluent into the Kauapakapa River), s 104(1)(a) was not engaged.

least in relation to such circumstances, this would subvert the scheme of the legislation which leaves climate change effects to the national government and would thus deprive s 104E of practical effect.

[170] It might be suggested that the possibility of some anomalous outcomes should not control the interpretation of s 104(1)(a). But anomalies would not be confined to a few hypothetical situations. This is because if "effects" bears the meaning asserted by West Coast ENT, regional councils would be required generally to regulate and control for climate change by making rules in relation to activities which do not directly involve the discharge of contaminants, as example four shows. And the same would be true of territorial authorities as illustrated by example five. The legislative scheme under which climate change arguments are excluded in relation to the use of a power station would be subverted if the same arguments could be deployed in relation to its zoning. Such an outcome would be not only anomalous, it would also subvert the whole scheme and purpose of the RMA as amended in 2004 under which such regulation and control is to be provided for nationally.

[171] Example six illustrates the same absurdity as is illustrated by the other examples. But it also shows how the literal approach favoured by West Coast ENT would subvert the scheme and purpose of the RMA as amended. A major project which will involve the emission of greenhouse gases is likely to require resource consents in other respects, as was the case with the Rodney power station applications. There is no point in precluding climate change arguments in relation to discharge consents if exactly the same arguments can be deployed in relation to ancillary consents which are almost inevitably going to be required.

[172] In light of the examples just discussed and our discussion of the scheme and purpose of the relevant provisions of the RMA and their legislative history, we are satisfied that in s 104(1)(a), the words "actual or potential effects on the environment" in relation to an activity which is under consideration by a local authority do not extend to the impact on climate change of the discharge into air of greenhouse gases that result indirectly from that activity.

[173] Such limitation seems to us to be justified as a matter of necessary implication, essentially on the basis that, when the amended RMA is looked at as a whole, the limitation is so obvious that it goes without saying.[168] We also see this limitation as consistent with the clear legislative policy that addressing effects of activities on climate change lie outside the functions of regional councils and, *a fortiori*, territorial authorities.

[174] Legislatures sometimes enact legislation on the basis of an understanding of existing law. If the understanding is incorrect, such an enactment does not usually retrospectively alter the effect of the law as it was at the time of enactment.[169] But where, as here, an amendment Act is based on a particular understanding as to the effect of the principal Act it may sometimes be necessary to give effect to that understanding to avoid the overall legislative scheme being subverted.[170] As is apparent, we see such an interpretation as necessary to avoid a subversion of the scheme and purpose of the RMA as amended.

[175] The various examples which we have discussed have all involved the discharge into air from New Zealand of climate change gases. For the reasons which we have given, we are satisfied that it is not open to territorial authorities and regional councils to regulate activities by reference to the effect on climate change of discharges of greenhouse gases which result indirectly from such activities. In the present case, there is the added factor that the discharges will occur overseas. As Whata J explained,[171] this poses further practical and legal problems, for instance, in assessing the regulatory context in which the discharges will occur and the extent to which they will be balanced by mitigation or compensation measures. While the principle that statutes do not have extraterritorial effect is not strictly engaged, given that the effects of climate change are global, the issues with assessing effects

---

168 An approach usually deployed in relation to contractual interpretation issues but also applicable to statutory interpretation, see Jim Evans "Reading Down Statutes" in Rick Bigwood (ed) *The Statute: Making and Meaning* (LexisNexis, Wellington, 2004) 123 at 128.

169 See, for instance, Daniel Greenberg (ed) *Craies on Legislation: a practitioner's guide to the nature, process, effect and interpretation of legislation* (10th ed, Sweet and Maxwell, London, 2012) at [1.8.4].

170 *Birmingham Corp v West Midland Baptist (Trust) Association (Inc)* [1970] AC 874 (HL) at 898 per Lord Reid; and Francis Bennion *Bennion on Statutory Interpretation: A Code* (5th ed, LexisNexis, London, 2008) at 709.

171 See above at [111].

offshore are an added reason why we reject the interpretation contended for by West Coast ENT.

[176] Although the reasons we have given differ in structure and form from those given by Whata J, it is right to acknowledge that our approach is in substance very similar to his in that both are grounded in an overall scheme and purpose approach to the RMA as amended in 2004.

Disposition

[177] For those reasons, we are satisfied that the climate change arguments which West Coast ENT and Forest and Bird wish to advance are not available to them. Accordingly, the appeal is dismissed.

[178] Costs are reserved. If sought, memoranda may be filed within 10 working days of the date of this judgment.

Solicitors:
Lee Salmon Long, Auckland for Appellant
Chapman Tripp, Christchurch for First Respondent
Anderson Lloyd, Christchurch for Second Respondent
P D Anderson, Christchurch for Third Respondent
Duncan Cotterill, Christchurch for Interveners