



Supreme Court of New Zealand | Te Kōti Mana Nui o Aotearoa

24 AUGUST 2023

## **MEDIA RELEASE**

**PORT OTAGO LIMITED v ENVIRONMENTAL DEFENCE SOCIETY  
INCORPORATED AND OTHERS**

(SC 6/2022) [2023] NZSC 112

### **PRESS SUMMARY**

This summary is provided to assist in the understanding of the Court's judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest: [www.courtsofnz.govt.nz](http://www.courtsofnz.govt.nz).

### **Background**

Port Otago Ltd operates two ports: at Port Chalmers | Kōpūtai and Dunedin | Ōtepoti. These are situated in the Otago | Ōtākou Harbour, which is the only significant natural port located between Timaru | Te Tihi-o-Maru and Bluff | Motupōhue. There are a range of important natural features in the harbour, including key habitats and areas of outstanding natural character.

This appeal concerns the validity of the proposed regional ports policy contained in a proposed Otago Regional Policy Statement prepared by the Otago Regional Council and publicly notified on 23 May 2015. The purpose of regional policy statements is to provide an overview of the resource management issues of the region and to set policies and methods to achieve integrated management of the natural and physical resources of the region. Regional policy statements must give effect to any national policy statements.

In this case, the relevant national policy statement is the New Zealand Coastal Policy Statement (NZCPS). The NZCPS recognises that a sustainable transport system requires an efficient national network of safe ports (NZCPS ports policy). It also has a number of policies (avoidance policies) which require adverse effects to be avoided on certain listed indigenous species or in certain areas, including areas of outstanding natural character. The appeal concerns the relationship between the NZCPS ports policy and the avoidance policies and if and how any potential conflicts among those policies should be reflected in the proposed Regional Policy Statement.

## **Procedural history**

The Environmental Defence Society Incorporated (EDS) and 24 others appealed the decision of the Council regarding the proposed regional ports policy to the Environment Court. The regional ports policy, as originally worded, provided that if the efficient and safe operation of port activities cannot be accommodated while avoiding harm to environmental values, the harms should be avoided, remedied or mitigated and otherwise managed. EDS and the other appellants said that the proposed regional ports policy failed to give effect to the avoidance policies in the NZCPS.

The Environment Court found that there was a potential conflict between the ports and the avoidance policies in the NZCPS and suggested several amendments to the proposed regional ports policy to address the resolution of the conflict.

EDS appealed to the High Court. Gendall J allowed the appeal, remitting the matter to the Environment Court for reconsideration. He held that the Environment Court erred in recommending wording that did not give effect to the prescriptive NZCPS avoidance policies.

The Court of Appeal unanimously dismissed the appeal against the High Court decision. By majority (Kós P and Gilbert J), the Court held that there was no conflict between the NZCPS ports policy and the avoidance policies: the ports policy was subordinate to the avoidance policies. Miller J dissented in part, on that point.

On 17 March 2022 this Court granted leave to Port Otago to appeal against the Court of Appeal's decision.

## **Result**

In a unanimous decision, the Supreme Court held that the Court of Appeal erred in holding that the NZCPS ports policy was subordinate to the avoidance policies. Rather, the avoidance policies and the ports policies are all directive. The ports at issue are part of an existing network necessarily operating in the coastal environment. Reconciliation of any potential conflict between the NZCPS avoidance policies and the ports policy should be addressed at the regional policy statement and plan level as far as possible.

The Supreme Court set out various considerations and a framework for analysis for how a decision-maker should address any potential conflict between the ports policy and the avoidance policies. Regarding work on ports, a decision maker would need to be satisfied that:

- (i) the work is required (and not merely desirable) for the safe and efficient operation of the ports;
- (ii) if the work is required, all options for dealing with these safety or efficiency needs have been evaluated and, where possible, the option chosen should not breach the avoidance policies;
- (iii) where a breach of the avoidance policies is unable to be averted, any breach is only to the extent required to provide for the safe and efficient operation of the ports.

Even where the option chosen encroaches on the avoidance policies only to the extent necessary for the safe and efficient operation of the ports, this does not mean that a resource consent would necessarily be granted. In deciding whether to grant a resource consent all

relevant factors would have to be considered in a structured analysis, designed to decide which of the directive policies should prevail, or the extent to which a policy should prevail, in the particular case.

The proposed regional ports policy, even as modified by the Environment Court, did not reflect these considerations. The Supreme Court suggested revised wording.

The appeal was allowed, the order remitting the matter to the Environment Court was set aside and the Otago Regional Council was directed to consult with the parties on the Supreme Court's suggested new wording or otherwise to give appropriate effect to the policies of the NZCPS and their inter relationships.

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