IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 1/2023
[2025] NZSC 158

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

SC 2/2023

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

Hearing:	22–24 November 2023 (Further submissions received 17 and 26 July 2024)
Court:	Winkelmann CJ, Glazebrook, Ellen France, Williams and Kós JJ
Counsel:	D M Salmon KC and D A C Bullock for Appellant in SC 1/2023 H K Irwin-Easthope, K J Tarawhiti and R K Douglas for Appellant in SC 2/2023 A M B Green, F B Drissner-Devine and M Hooper for First Respondent in SC 1/2023 M H Hill and R M Boyte for First Respondent in SC 2/2023 J B M Smith KC, D G Randal and E L Bennett for Second Respondent in SC 1/2023 and SC 2/2023
Judgment:	12 November 2025

JUDGMENT OF THE COURT

A **Sustainable Otakiri Inc's appeal is dismissed.**

B **Te Rūnanga o Ngāti Awa's appeal is dismissed.**

C **Costs are reserved.**

REASONS

ELLEN FRANCE, WILLIAMS AND KÓS JJ
(Given by Williams J)

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Introduction

[1] These appeals concern a proposed expansion to an existing spring water extraction and bottling operation run by Ōtākiri Springs Ltd (OSL) on a rural property near Whakatāne. Located at the property is an existing (consented) extraction and bottling plant, as well as a kiwifruit orchard which occupies most of the site. The bottling plant currently bottles around 1.9 million litres of mineral water per annum. All of the water is drawn from a bore on the property. Under the proposed expansion, the existing plant would be retained while the kiwifruit orchard would be replaced with a second, much larger plant. The new plant would increase capacity from 1.9 million litres of water bottled per annum to 580 million litres—a 300-fold increase.

[2] Resource consents for the proposal were originally sought by Creswell NZ Ltd (Creswell). Creswell's ultimate parent company is Nongfu Spring Co Ltd (Nongfu), a large water bottling and distribution business in the People's Republic of China. In 2016, Creswell entered into a conditional sale and purchase agreement with OSL, intending to bottle and sell water from the site, primarily for export. That agreement was cancelled before the hearing in this Court. Creswell has transferred its rights and interests in resource consents for the proposal to OSL.

[3] The proposal is opposed by Sustainable Ōtākiri Inc (SOI) and Te Rūnanga o Ngāti Awa (TRONA). SOI represents local residents. TRONA represents the local

iwi. Both brought appeals, unsuccessfully, in the Environment Court, High Court and Court of Appeal. They were granted leave to appeal to this Court.[1]

[4] In this Court, SOI's appeal focuses on two arguments: first, SOI says the Courts below wrongly excluded from consideration the environmental effects of plastic bottle disposal by end users of OSL's product; and second, SOI says the Courts below miscategorised the proposed new plant as a discretionary activity under the Whakatāne District Plan (WDP). TRONA's appeal to this Court focuses on the effects of the project on the mauri (life and well-being in tikanga terms) of the water within its rohe (territory), and on Ngāti Awa's kaitiakitanga or cultural obligation to care for that water. For their part, and as we come to, OSL, the Bay of Plenty Regional Council and the Whakatāne District Council support the decision of the Court of Appeal and the reasons for that decision.

The proposal in more detail

[5] In 2016, Creswell agreed to purchase OSL's land and associated business subject to obtaining the necessary resource consents for a proposed expansion. As we have noted, Creswell has since cancelled this agreement and OSL is now the successor to the expansion proposal. It is appropriate, therefore, to proceed on the basis of the evidence given for the original proposal.

[6] The proposed expansion is to take place on a 6.27 ha property in Ōtākiri, about 20 km west of Whakatāne. The original water right on the site was granted in 1979. It was for orchard irrigation purposes only and drew from a 230 m bore on the property. In 1991, a land use consent to operate a commercial water bottling plant was obtained. The 1979 water right was expanded to include bottling to a volume of 1,200 m^3 (1.2 million litres) per day alongside allowances for irrigation at 158 m^3 per day and frost protection at 1,580 m^3 per day. A second bore was drilled onsite in 2017 to 228 m and the pre-existing 230 m bore is now intended to be kept as a backup.

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1 *Sustainable Otakiri Inc v Whakatāne District Council* [2023] NZSC 35 (Glazebrook and O'Regan JJ) [SC leave judgment].

[7] The current maximum take is 2,938 m^3 (2.938 million litres) per day and 327,000 m^3 (327 million litres) per annum for all uses including the orchard.

[8] Under the proposal, the maximum daily take will increase to 5,000 m^3 and the maximum annual take will be 1.1 million m^3 with the former orchard-related allocations being repurposed to water bottling.

[9] The two bores on the property draw from the Ōtākiri aquifer in the Awaiti Canal groundwater catchment located within the Tarawera management area. It is common ground that the Awaiti Canal groundwater resource parameters are as follows:

Groundwater Flow	24,093,504 m^3 pa
Available Allocation	8,432,726 m^3 pa (35 per cent of total flow)
Allocated Groundwater	6,710,180 m^3 pa (79.6 per cent of allocation)
Allocation Remaining	1,722,546 m^3 pa

Without deducting the existing consented take of 327,000 m^3 (this entitlement would be wholly replaced by the new consent), the proposed annual take is 13 per cent of the total available allocation of 8.4 million m^3 and 64 per cent of the remaining allocation of 1.7 million m^3.

[10] To bottle that additional water, present production will increase from 8,000 bottles per hour (with the plant operating Monday–Friday, 7.00 am – 4.30 pm and "sometimes" on Saturdays) to 154,000 bottles per hour (operating 24 hours a day, seven days a week). The capacity of the existing plant will be increased to 10,000 bottles per hour and a much larger production plant will be built alongside the existing one. The new plant will be housed inside a new 12.9 m high building occupying 16,800 m^2, which is a little over a quarter of the site area. On the southern side of the new building will be an associated unloading canopy and container loading area, with much of the remainder of the site taken up with ancillary structures, container storage and roading.

[11] The new building will house two high-speed bottling lines each capable of producing 72,000 bottles per hour. According to the evidence, small polyethylene terephthalate (PET) test tube-like cylinders known as "pre-forms" are trucked to the plant to be turned into plastic bottles there. Built into each bottling line is a machine that moulds each pre-form into a finished bottle by blowing air under pressure into it. Each bottle is then filled, sealed, packed and stored awaiting removal to market.

[12] To establish the proposed operation, a new water right was sought from the Regional Council to draw the increased volume of water from the Ōtākiri aquifer,[2] alongside an amended consent from the District Council to build and operate the expanded bottling plant.[3] Both applications fell to be considered under s 104 of the Resource Management Act 1991 (RMA). In broad terms, this section requires the relevant consent authorities to take into account matters including pt 2 of the RMA, the effects of the proposed activity on the environment and any relevant provisions of a policy statement or plan. We will come back to the relevant provisions in more detail below.

Water right

[13] The TRONA appeal focuses on the water right. TRONA argues that the consent permits "too much water to be sold too far away". TRONA witnesses said that the proposed volume of water to be taken and its proposed offshore destination materially injured te mauri o te wai (the mauri of the water) and undermined the iwi's ability to exercise its obligation of kaitiakitanga in respect of it. Granting consent would therefore breach Ngāti Awa tikanga in contravention of the provisions of pt 2 of the RMA—in particular, s 6(e) which protects Ngāti Awa's relationship with its ancestral waters, s 7(a) which provides for Ngāti Awa's kaitiakitanga and s 8 which relates to Ngāti Awa's rights according to the principles of the Treaty of Waitangi.[4]

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2 See Resource Management Act 1991 [RMA], s 14.

3 See s 9(3)(a). See also below at [15]–[16] as to the applicability of s 127.

4 These provisions require, in achieving the purpose of the RMA, for all persons exercising functions and powers under the RMA (in relation to managing the use, development and protection of natural and physical resources) to "recognise and provide for … the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga" (s 6(e)); to "have particular regard to … kaitiakitanga" (s 7(a)); and to "take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi)" (s 8).

[14] Importantly, the expert evidence was that the biophysical effects of the proposed take on the aquifer would be negligible. That evidence was not contested by TRONA. Further, as we shall see, Creswell also called a kaumātua from Ngāti Awa to give evidence in relation to the tikanga effects of the take, challenging TRONA's position.

Land use consents

[15] Creswell had also to obtain approval from the District Council to build the new water bottling facility. However, it did not seek a land use consent in accordance with the usual procedure for resource consent applications,[5] as it considered that the overall proposal could be treated as a variation of the 1991 consent for the existing smaller bottling plant. This meant the proposal could be dealt with under s 127 which provides a separate procedure for varying the conditions of an existing consent. The potential advantage of this for OSL was that a variation is deemed to be a discretionary activity.[6] This avoided the possibility that the new plant would be classified as a non-complying "industrial activity" under the operative WDP. The Planning Commissioners who considered the matter at first instance, the Environment Court and the High Court agreed that s 127 set the activity status,[7] but the Court of Appeal disagreed and held that a fresh land use consent was required.[8]

[16] The applicability of s 127 need not detain us here as neither OSL nor the District Council challenges the Court of Appeal's finding that in that respect. This is undoubtedly because the Court of Appeal found the error was immaterial.[9] The Court found the proposal was in fact a "rural processing activity" which was also a discretionary activity under the WDP.[10]

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5 Section 9 (as to land use consents) and s 88 (as to the requirements for applications).

6 Section 127(3)(a).

7 *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2019] NZEnvC 196, (2019) 21 ELRNZ 539 (Judge Kirkpatrick, Commissioners Buchanan and Kernohan) [EnvC judgment] at [252] per Judge Kirkpatrick and Commissioner Buchanan; and *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2020] NZHC 3388, [2021] NZRMA 76 (Gault J) [HC judgment] at [261].

8 *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2022] NZCA 598, [2023] NZRMA 280 (Cooper, Goddard and Dobson JJ) [CA judgment] at [187] and [191]–[192].

9 At [192].

10 At [156].

[17] The SOI appeal addresses the land use consents. The argument is that OSL's proposal is a non-complying "industrial activity" under the WDP and so must also pass through one or the other of the two narrow gateways in s 104D. That is, OSL must establish that the effects of the proposal on the environment will be minor or that the proposal will not be contrary to the objectives and policies of the WDP.[11] SOI argues that, as the proposal was not assessed against those gateways as a non-complying industrial activity, it must be sent back for reconsideration.

[18] As noted above, SOI also advanced argument based on the environmental effects of plastic bottle production and disposal. These effects may (subject to specific evidence being obtained) be relevant to both the water right and land use consents. The essential argument is that the Courts below wrongly excluded these effects from consideration as a matter of jurisdiction (as the Environment Court held),[12] as a question of remoteness (as the High Court held)[13] or as a question of remoteness and appropriateness (as the Court of Appeal held).[14] TRONA supported SOI's position on this issue.

The Court of Appeal's decision in brief

[19] Although we address the Court of Appeal's judgment in more detail under each issue, a brief summary of the overall conclusions of that Court is provided here for context before setting out the issues in the appeal before us. The appeals to that Court were by way of questions of law.[15] Five questions were accepted, only four of which remain relevant in this Court.[16]

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11 Section 104D(1)(a) and (b)(i). See also Whakatāne District Plan [WDP]. Any references to planning documents in these reasons refer to the versions provided to us by the parties to the appeal.

12 EnvC judgment, above n 7, at [66] per Judge Kirkpatrick and Commissioner Buchanan.

13 HC judgment, above n 7, at [149] and [156]–[157].

14 CA judgment, above n 8, at [56]–[61].

15 See s 299 of the RMA, which limits appeals from the Environment Court to the High Court to questions of law only; and see s 308 as to appeals to the Court of Appeal.

16 The fifth question related to s 127 which, as noted above at [16], has fallen away: see CA judgment, above n 8, at [3(e)]; *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2021] NZCA 354 (Clifford and Courtney JJ) [CA leave judgment] at [4]–[5]; and see *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2021] NZCA 452 (Clifford and Courtney JJ) [CA amended leave judgment].

[20] The first question related to environmental effects of end use (that is, export of the water and eventual disposal of the plastic bottles containing it). The Court of Appeal found that these end uses are merely consequential to the primary activity for which consent is sought, and unlike the primary activity, able to be done lawfully.[17] Further, the Court found that there were important "conceptual difficulties" with bringing such effects within the ambit of the RMA.[18] We discuss these in detail below.[19]

[21] The second question raised a procedural issue. Plastics disposal was not the subject of appeal to the Environment Court, nor did the parties call evidence in relation to it in that Court. Rather, plastics disposal was raised by a member of the Court during the hearing. The question in the Court of Appeal was whether the Environment Court should therefore have called for evidence on plastics disposal before determining the effects issue. The Court of Appeal considered that its answer to the first question effectively compelled a negative answer to this question.[20] But in any case, as plastic waste was not a ground of any appeal in the Environment Court, it could not be the subject of inquiry by that Court (except in the clearest of cases) and there was no obligation to call for further evidence.[21]

[22] The third question raised two distinct but related issues. The first was whether the Environment Court ought to have had direct recourse to the Māori-related provisions in pt 2 of the RMA when addressing the cultural effects raised by TRONA. As to this issue, the Court of Appeal found that direct recourse to those provisions was not required as the applicable policy statements and plans adequately addressed their requirements.[22] The second issue concerned whether the Environment Court's reliance on evidence of the biophysical sustainability of the Ōtākiri aquifer in answer to cultural effects evidence was a permissible response to those pt 2 provisions. This raised other end use issues about te mauri o te wai in addition to plastic waste. The argument advanced was that by focusing only on the biophysical state of the

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17 CA judgment, above n 8, at [55]–[56].
18 At [56]–[61].
19 Below at [34].
20 CA judgment, above n 8, at [68].
21 At [75]–[78].
22 At [109]–[110].

source aquifer, the Environment Court ignored the distinct cultural effect of removing the water to another place (the end use).[23] The Court of Appeal rejected that argument, finding that the biophysical and cultural evidence were reconcilable in this case and that the Environment Court did not therefore ignore the cultural effects of the water's end use.[24]

[23] The fourth question related to a matter of interpretation of the WDP—that is, whether the proposed plant is a discretionary "rural processing activity" or a non-complying "industrial activity" which includes "manufacturing". The Court of Appeal found that the proposal was a discretionary rural processing activity in accordance with the relevant provisions of the WDP.[25] The Environment Court had therefore applied the correct planning status to the activity.

Issues

[24] The issues arising in the appeal before us largely track those outlined above. We did, however, grant leave to appeal to TRONA on an additional question not addressed in the Court of Appeal—which we refer to as te mauri o te wai effects issue.[26] The resulting five issues are as follows:

(a) *the scope of "effects" issue*: whether potential effects on the environment of end user disposal of plastic bottles (primarily offshore) is a relevant "effect" under the RMA;

(b) *the scope of appeal issue*: whether the plastics disposal issue was properly before the Environment Court and amenable to further appeal;

(c) *the activity status issue*: whether under the WDP, OSL's proposal is a discretionary "rural processing activity" or a non-complying "industrial activity";

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23 At [98].
24 At [109]–[111].
25 At [156].
26 SC leave judgment, above n 1, at [9].

(d) *te mauri o te wai effects issue*: whether the Environment Court failed properly to consider the tikanga evidence called by TRONA as to the end use aspect of its opposition to the proposal; and

(e) *the pt 2 issue*: whether Māori-focused objectives, policies and rules in the applicable policy statements and plans were relevantly deficient such that the Environment Court should have considered pt 2 of the RMA directly.

The scope of "effects" issue: is plastic bottle disposal a relevant effect?

[25] This issue concerns whether the environmental effects of plastic waste *disposal* are relevant to resource consent decisions relating to the *production* stage. This turns on the scope of the word "effects" in s 104(1)(a) of the RMA and how this broad language can be applied in a practical way to resource consent decision-making.

[26] By way of context, s 104 is the core RMA provision controlling resource consent decisions. It requires consent authorities (and, on appeal, the Environment Court) to "have regard to" factors including:

(a) actual or potential effects on the environment of allowing the proposed activity;[27]

(b) relevant provisions of any environmental standard, regulation, policy statement or plan prepared;[28] and

(c) any other matter considered relevant and reasonably necessary to determine the application.[29]

[27] This direction is subject to the overarching requirements of pt 2,[30] which require RMA functions and powers to be exercised so as to "achiev[e]" the RMA's purpose of "promot[ing] the sustainable management of natural and physical

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27 RMA, s 104(1)(a).
28 Section 104(1)(b).
29 Section 104(1)(c).
30 Section 104(1).

resources".[31] Part 2 also requires statutory decision-makers to "recognise and provide for" various "matters of national importance",[32] "have particular regard" to a list of "[o]ther matters",[33] and "take into account" the principles of the Treaty of Waitangi.[34]

[28] Three further matters are relevant in this case.[35] First, s 88 and sch 4 of the RMA set out the information required to accompany applications for resource consents. In doing so, these provisions assist in inferring the intended scope of the "effects" to which regard must be had under s 104(1)(a). The second relevant matter is the Waste Minimisation Act 2008 (WMA). The WMA contains its own distinct systems of planning and control in relation to waste generally. It overlaps with the RMA in the control of waste, giving rise to questions about whether one of the regimes should predominate in decision-making, including resource consents. Third, analogies might be drawn with this Court's decision in *West Coast ENT Inc v Buller Coal Ltd* (*Buller Coal*),[36] and that of the United Kingdom Supreme Court in *R (on the application of Finch) v Surrey County Council* (*Finch*).[37] Both cases concerned the relevance of the climate effects of scope 3 (indirect) emissions in the planning context; we will address these decisions in more detail in our analysis.[38] For present purposes, it is sufficient to note that in *Buller Coal*, the majority expressed a tentative view in obiter that scope 3 emissions' effects may be outside the scope of s 104(1)(a) "effects".[39] In *Finch*, however, the majority held that scope 3 emissions' effects were relevant to consideration of an application to extract oil and therefore had to be addressed in the applicant's Environmental Impact Assessment (EIA).[40]

[29] The question here is one of statutory interpretation in light of facts. In what follows we discuss how the Courts below and parties approached the question. We then discuss the RMA framework in more detail before setting out our view.

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31 Sections 5–8.
32 Section 6.
33 Section 7.
34 Section 8.
35 See s 104(1)(c).
36 *West Coast ENT Inc v Buller Coal Ltd* [2013] NZSC 87, [2014] 1 NZLR 32 [*Buller Coal*].
37 *R (on the application of Finch) v Surrey County Council* [2024] UKSC 20, [2024] 4 All ER 717 [*Finch*].
38 See, in particular, below at [64] and following.
39 *Buller Coal*, above n 36, at [115]–[127] per McGrath, William Young and Glazebrook JJ but see at [94] per Elias CJ dissenting.
40 *Finch*, above n 37, at [7], [101] and following and [174] per Lord Leggatt, Lord Kitchin and Lady Rose SCJJ.

The Courts below

Environment Court

[30] A majority in the Environment Court comprising Judge Kirkpatrick (as he then was) and Commissioner Buchanan found that s 104(1)(a) did not require the Court to take into account potential environmental effects of plastic bottle disposal by end consumers.[41] While "effect" and "environment" are very broadly defined, the majority considered an effect on the environment cannot be "anything at all".[42] A "causal relationship" was required between the activity for which consent is sought and its alleged effect.[43] That relationship was both legal (sufficiently proximate in law) and factual (able to meet an orthodox "but for" test).[44] The majority found there was insufficient proximity in law, because used bottles may be disposed of lawfully and if disposal occurs outside the region, it is not a regional matter which can be controlled under a regional plan.[45] Further, "but for" causation was not satisfied: prohibiting plastic bottle use in this case could not materially reduce the wider problem of plastic waste disposal.[46] The majority concluded that the control of plastic waste could only be achieved through bespoke national legislation.[47]

[31] Commissioner Kernohan dissented. He calculated that the proposal would produce 1.35 billion plastic bottles per annum for 25 years, giving rise to concerns in relation to sustainable management.[48] He concluded:

> [336] I accept that trillions of plastic bottles are manufactured world-wide on a daily basis. However, the purpose of the RMA is to promote the sustainable management of natural and physical resources. Allowing the creation of products that will clearly add to current pollution in the environment without any commitment to avoid, remedy or mitigate the pollution is against the purpose of the RMA.

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41 EnvC judgment, above n 7, at [66].
42 At [60].
43 At [60].
44 At [60]–[61].
45 At [64]; and RMA, s 30.
46 EnvC judgment, above n 7, at [64].
47 At [65].
48 At [327] and [331].

High Court

[32] On appeal, Gault J considered the Environment Court majority "went too far" in holding that the environmental effect of plastic bottle disposal is, "in the abstract", too remote to be relevant under s 104.[49] Remoteness was instead best approached as "an issue of fact and degree", as the wider problem of plastic waste disposal was connected to bottled water production at scale and so should not be excluded without inquiry.[50] That said, the Judge concluded that the effects here were "too indirect or remote", in fact and degree terms, to warrant further consideration in Creswell's application.[51] In this the Judge relied on the analysis of the majority in *Buller Coal*.

Court of Appeal

[33] Cooper J (as he then was), writing for the Court, noted no party suggested plastic waste is irrelevant in principle under s 104.[52] But, also relying on *Buller Coal*, it remained open to the Court to conclude that, as a matter of fact and degree, such end use effects were too remote from the activities for which consent was sought to fall within s 104(1)(a).[53] This was analogous to s 108(1) as to the permitted scope of consent conditions; a condition to control a step for which no consent is required could not be "fairly and reasonably related to the subject matter of the consent" such as to permit the imposition of a condition in respect of it.[54] It followed, the Court considered, that any effect of putting the extracted water into plastic bottles was a "consequential effect" outside the scope of s 104.[55]

[34] The Court also identified five "conceptual difficulties" with bringing plastic bottle disposal within the scope of s 104:

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49 HC judgment, above n 7, at [142].
50 At [142] and [153].
51 At [156].
52 CA judgment, above n 8, at [49].
53 At [50]–[51] citing *Buller Coal*, above n 36, at [117] where McGrath, William Young and Glazebrook JJ in turn applied the analysis adopted by the Environment Court in *Taranaki Energy Watch Inc v Taranaki Regional Council* [2003] ELHNZ 239 (EnvC) at [84]–[85].
54 CA judgment, above n 8, at [54]–[55] citing *Newbury District Council v Secretary of State for the Environment* [1981] AC 578 (HL) at 599 per Viscount Dilhorne, 608 per Lord Fraser, 618 per Lord Scarman and 627 per Lord Lane.
55 CA judgment, above n 8, at [55].

(a) No consent is required to put water into bottles (nor to export and eventually dispose of those bottles) and, in this country, manufacturing typically occurs in zones where it is a permitted activity requiring no consent. It is "inconceivable" that disposal would be relevant under the RMA whenever a product is placed in a plastic bottle or container.[56]

(b) Disposal is, in any event, an action undertaken by a third party (the consumer) for which the applicant ought not to be held responsible.[57]

(c) Disposal within New Zealand is typically lawful, by placement in consented landfills through consented refuse collection infrastructure operated by or on behalf of local authorities. Disposal into the environment would be in breach of the Litter Act 1979 and unlawful.[58]

(d) Disposal offshore, whether lawful or unlawful in those jurisdictions, is too remote to be considered by a New Zealand consent authority.[59]

(e) Further, even if offshore disposal were relevant it would be too difficult to assess its effects in fact—and any condition attempting to control disposal could not be fairly and reasonably related to the water consent.[60]

Submissions

[35] Before this Court, SOI carried the burden of the argument for the appellants on this issue. It argued that the Court of Appeal was wrong to focus purely on disposal and not the production step when disposal is "an inevitable and direct consequence" of creating bottles and filling them with water. SOI submitted that all plastics eventually end up in the environment whether by being burned, placed in landfills or otherwise disposed of. Recycling, it submitted, merely delayed that outcome as all plastic has a finite commercial life and must eventually find its way into the

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56 At [56].
57 At [57].
58 At [58].
59 At [59].
60 At [60].

environment as microplastics or in other forms. Relying on a 2019 report of the Royal Society | Te Apārangi,[61] SOI argued that plastics are now environmentally pervasive and have been acknowledged at the level of the United Nations as one of the most serious environmental problems on a global scale.[62]

[36] SOI therefore submitted that the problem to be addressed is one of production not disposal, and the ultimate effects of producing plastic bottles at scale are "actual [or] potential effects … of allowing the activity" of water bottling in terms of s 104(1)(a). Further, they are "adverse", "future" and "cumulative" effects in accordance with the definition in s 3, affecting "ecosystems and their constituent parts" in terms of the definition of the environment in s 2(1). SOI submitted that the five conceptual difficulties identified by the Court of Appeal should therefore not exclude proper consideration of those effects when consent is sought to produce plastic bottles on the scale proposed by OSL. Further, SOI submitted that the Court of Appeal applied *Buller Coal* incorrectly, since the controlling provisions in that case were materially different.

[37] TRONA supported SOI, submitting that the effects of plastics disposal cannot be said to be de minimis and its effects must be given consideration under s 104. TRONA added that export also has end use tikanga effects; this submission is addressed below in the context of TRONA's own appeal.

[38] OSL argued that the appeal is advanced on a false premise. OSL's operation will not add to the sum of plastic bottles in existence; rather, it will merely meet existing demand that would otherwise be met by another producer. According to OSL, its position is on all fours with *Buller Coal*. Moreover, OSL submitted that the applicant's case related merely to the application of settled principle and did not give rise to a true question of law. That is because all three Courts below identified and applied the accepted authorities on the scope of "effects" under the RMA. Although the framing varied in matters of detail, all Courts concluded that the "nexus and remoteness" test under the RMA was not met in this case. Further, OSL emphasised

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61 Royal Society | Te Apārangi *Plastics in the Environment: Te Ao Hurihuri – The Changing World* (July 2019).

62 See, for example, *End plastic pollution: towards an international legally binding instrument* EA Res 5/14 (2022), preamble.

that disposal is undertaken by third parties for whose disposal decisions OSL cannot be responsible. As OSL put it:[63]

> The central but not sole point is that set out in *Buller Coal* (particularly in the Supreme Court) that the only effects that may be considered are those which directly result from exercising the activity or which follow inevitably from it: not independent subsequent effects or ones that (in terms of *West Coast ENT*) are irrelevant to the applications to the extent they seek permission to take water.

[39] OSL submitted that the negative effects of plastic waste *production* can only be addressed through bespoke national legislation, such as the WMA, because adverse effect mitigation is beyond the institutional capacity of individual consent authorities. Attempting to address such a polycentric issue at the resource consent stage will lead to uneven, ad hoc decisions that will fail to address the problem. Further, and in line with the Court of Appeal's analysis, the effects of plastic waste *disposal* arise for assessment when applications are made to establish and operate waste disposal facilities, not at the product creation stage.

[40] OSL acknowledged that this analytical framework does not satisfactorily address two disposal pathways: illegal disposal and offshore disposal. As to illegal disposal, OSL submitted that is already controlled through bespoke littering laws; and as to offshore disposal, the consent authority has no jurisdiction to control or affect events beyond New Zealand's borders.

[41] The District Council took a similar position. In its view, widening the scope of "effects" (in the manner proposed by SOI) would have implications throughout the supply chain and beyond plastic bottle disposal. It would "dramatically change the system of consenting" and require councils to undertake inquiries they lacked the capacity to conduct, increasing both cost and time. The District Council referred to regulations promulgated under the WMA for the control of plastic shopping bags, and "plastic and related products".[64] Nationally applicable regulations of that kind would apply to all identified products and not just to those created in the context of activities

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63 Footnote omitted.

64 Waste Minimisation (Plastic Shopping Bags) Regulations 2018; and Waste Minimisation (Plastic and Related Products) Regulations 2022.

that happened to require a resource consent. It was submitted that this was, by far, the preferable approach.

[42] The Regional Council accepts that "unmitigated production of plastic bottles" is a matter of serious concern requiring a concerted response. But, it submitted, "seeking to address these issues through ad hoc resource consents under a policy framework which does not currently seek to address them is not sound planning". Instead, central government could directly regulate the production of plastic bottles using the WMA or national environmental standards under the RMA. Further, the Regional Council submitted:

> Straining the existing tests of nexus and remoteness to fill a perceived policy gap will have potentially significant implications for the future assessment of consent applications, placing an onerous burden on [consent] planners and, in turn, on compliance staff.

[43] In any event, the production of plastic bottles is a District Council matter under s 31, as it relates to land use rather than water extraction. So, contrary to SOI's submission, the Court of Appeal was right to treat the issue as one of waste disposal rather than waste production.

[44] For completeness, we note that the parties addressed the relevance of the United Kingdom Supreme Court's decision in *Finch* in further written submissions, as the decision was released following the hearing of this appeal. We will address those submissions and the decision's implications below.

The RMA framework

[45] As Professor Kenneth Palmer describes, the RMA is characterised by three key themes.[65] These are:

(a) sustainable management of natural and physical resources, the promotion of which is the RMA's purpose;

(b) integrated management of natural and physical resources; and

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[65] Kenneth Palmer "Resource Management Act 1991: Purpose and National Direction" in Derek Nolan (ed) *Environmental and Resource Management Law* (looseleaf ed, LexisNexis) at [2.10].

(c) control of the adverse effects on the environment of human activities.

[46] The second and third themes are the means by which sustainable management is to be promoted. All three themes are engaged by the scope of "effects" issue, the third directly and the other two indirectly.

Section 104(1)(a)

[47] We introduced s 104 earlier as the controlling provision in relation to resource consent applications generally. Importantly for our purposes, subs (1)(a) provides that consent authorities must have regard to "any actual and potential effects on the environment of allowing the activity".[66] This is a standalone requirement that does not depend on activation through policy statements or plans. This reflects its role as a primary lever for achieving the third of the RMA's three key themes: controlling adverse effects on the environment.

"Effects" on the "environment" defined

[48] "Effect" is defined in s 3 of the RMA:

> **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.

[66] Subject, of course, to pt 2: see s 104(1).

[49] This definition is obviously the most important guardrail in any question of scope—but, reflecting the difficulty of the drafter's task, there is no attempt to be exhaustive. It is difficult to conceive of a more open-textured definition.

[50] The effects to which RMA decision-makers must have regard are those on the environment. In s 2(1), "environment" is also defined broadly and inclusively:

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

[51] The focus of this definition is on the physical environment but not exclusively so. There is also acknowledgement that humans and their built communities are a part of the environment and that there is a mutual cause and effect relationship between the social, economic, aesthetic and cultural conditions of human communities and the physical environment in which they are situated. That is, those four conditions present in all human communities can affect the environment and, in turn, the environment can affect those conditions. Thus, s 2 provides that where those conditions have that effect or are so affected, they too will form part of the environment. A similar idea is captured by the definition of amenity values referred to in para (c) of the definition of environment.[67]

"Sustainable management" defined

[52] As foreshadowed, s 5(1) provides that the RMA's purpose is the promotion of sustainable management of natural and physical resources. It is in the pursuit of this outcome that, under s 104(1)(a), consent authorities must consider the actual and

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[67] Section 2(1) definition of "amenity values". The definition provides that "**amenity values** means those natural or physical qualities and characteristics of an area that contribute to people's appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes".

potential effects on the environment of allowing the proposed activity. "Sustainable management" is defined in s 5(2) in the following broad terms:

> (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.

[53] The core ideas are that natural and physical resources must be managed in a way that: provides for present human needs (without compromising the needs of future generations); safeguards the life-supporting capacity of the biosphere; and avoids, remedies or mitigates adverse environmental effects.

[54] As we will come to under the pt 2 issue, s 5 is supplemented by ss 6–8. They are of particular importance to TRONA's appeal. If fact and context warrant it, the additional matters in pt 2 will also be relevant considerations, calibrated according to their respective statutory weightings, to the extent that they will also advance sustainable management. Part 2 is not just relevant to consents. It also controls the preparation of national standards or policy statements, regional policy statements, and regional and district plans. In this way, pt 2 drives the content of the cascade of national, regional and district planning documents, becoming more specific as to subject, resource or place down the cascade.[68] And, to a significant extent, it is the cascade that controls what activities require consent (and where), as well as the breadth

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[68] To illustrate the carefully calibrated interrelationships between documents within the hierarchy, see, for example, s 45A(1) as to national policy statements; s 56 as to New Zealand coastal policy statements; s 58C(1) as to national planning standards; s 62(3) as to regional policy statements; s 67(3)–(4) as to regional plans; and s 75(3)–(4) as to district plans. See also, for example, *Royal Forest and Bird Protection Society of New Zealand Inc v New Zealand Transport Agency* [2024] NZSC 26, [2024] 1 NZLR 242 [*Royal Forest and Bird*] at [32] per Winkelmann CJ, Ellen France and Williams JJ; and *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 [*King Salmon*] at [30] per Elias CJ, McGrath, Glazebrook and Arnold JJ.

of the consent authority's inquiry. If the system operates according to statutory design, the result should be integrated management in accordance with ss 30, 31, 59, 64 and 80A, or, expressed fully: integrated promotion of sustainable management of natural and physical resources.

Application information

[55] As foreshadowed, s 88 and sch 4 are also potentially relevant to the scope of "effects" to be considered under s 104(1)(a). Section 88(2)(b) requires that resource consent applications include the information about the proposed activity that is prescribed by sch 4. Clause 2 of that schedule sets out the required information, including an assessment of the activity against relevant pt 2 considerations and relevant provisions of applicable policy statements and plans within the cascade.[69] This reflects both the requirements of s 104(1)(b) and, ultimately, the evidential needs of the consent authority. Separately, an assessment of environmental effects is required by cls 6 and 7 reflecting the needs of the consent authority under s 104(1)(a). Clause 6 identifies the required information categories. It relevantly provides:

> **6 Information required in assessment of environmental effects**
>
> (1) An assessment of the activity's effects on the environment must include the following information:
>
> (a) if it is likely that the activity will result in any significant adverse effect on the environment, a description of any possible alternative … methods for undertaking the activity:
>
> (b) an assessment of the actual or potential effect on the environment of the activity:
>
> …
>
> (d) if the activity includes the discharge of any contaminant, a description of—
>
> (i) the nature of the discharge and the sensitivity of the receiving environment to adverse effects; and
>
> (ii) any possible alternative methods of discharge, including discharge into any other receiving environment:
>
> …

[69] Schedule 4 cl 2(1)(f), (g) and (2).

(2) A requirement to include information in the assessment of environmental effects is subject to the provisions of any policy statement or plan.

…

[56] In addition, cl 7 sets out the matters that must be addressed in an assessment of environmental effects as required by cl 6(1)(b). It provides as follows:

> **7 Matters that must be addressed by assessment of environmental effects**
>
> (1) An assessment of the activity's effects on the environment must address the following matters:
>
> (a) any effect on those in the neighbourhood and, where relevant, the wider community, including any social, economic, or cultural effects:
>
> (b) any physical effect on the locality, including any landscape and visual effects:
>
> (c) any effect on ecosystems, including effects on plants or animals and any physical disturbance of habitats in the vicinity:
>
> (d) any effect on natural and physical resources having aesthetic, recreational, scientific, historical, spiritual, or cultural value, or other special value, for present or future generations:
>
> (e) any discharge of contaminants into the environment, including any unreasonable emission of noise, and options for the treatment and disposal of contaminants:
>
> (f) any risk to the neighbourhood, the wider community, or the environment through natural hazards or hazardous installations.
>
> (2) The requirement to address a matter in the assessment of environmental effects is subject to the provisions of any policy statement or plan.

[57] It may be seen that the relevant effects referred to in cl 7 range from neighbourhood effects at one extreme to effects at the scale of the environment at the other. That said, sub-cl (2) of both clauses acknowledges that policy statements and plans will also seek to control environmental effects of activities on particular resources or in particular contexts. Where they do, those documents will shape how

such effects are to be addressed in applications.[70] This is a part of the integrated management design of the RMA. This means that in most cases, evidence about the environmental effects of activities will enter the consent assessment through two interconnected routes: first, by way of the general directive in s 104(1)(a) to consider actual and potential effects on the environment; and second, under s 104(1)(b), through policies, objectives and rules whose purpose is to avoid, remedy or mitigate adverse environmental effects.

Our view

[58] Our review of the relevant statutory provisions makes clear that, on its face, s 104(1)(a) has a very broad scope. The key words in s 104(1)(a)—"environment" and "effect"—are defined inclusively and multi-dimensionally. They are plainly intended to have wide import.[71] That is unsurprising since they serve the extraordinarily complex and polycentric statutory purpose of promoting sustainable management.[72] The legislature clearly did not intend that a restrictive approach should be taken to the application of these words.

[59] That said, we accept that "effects" is not of limitless scope. Not every matter will require consideration under s 104(1)(a). Identifying the effects that are within s 104(1)(a)'s scope is an exercise of statutory interpretation in light of facts. Put another way, the meaning of "effects" must be determined by the words of the RMA construed in light of its purpose and context, and applied in the particular factual context.[73] The effects that will be relevant in any particular case will depend on the controlling objectives, policies and rules (if there are any) and on the facts as determined by the consent authority.

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70 This reflects the expectation that where policies, objectives and rules have been tested through public engagement and formal decision-making procedures, they may be taken to represent the requirements of pt 2 upon which they are based: *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, [2018] 3 NZLR 283; and *Royal Forest and Bird*, above n 68.

71 The definition of "effect" was described as "all embracing" by Joan Allin, Rob Fisher and Tony Randerson in the 1991 New Zealand Law Society seminar materials on the new Act: Joan Allin, Rob Fisher and Tony Randerson "Resource Management Act 1991" (New Zealand Law Society seminar, 1991) at 9.

72 RMA, s 5(1).

73 Legislation Act 2019, s 10(1). Relevant effects may differ depending on the type of consent (and therefore its controlling section) and the content of applicable planning documents: see above at [57].

[60] The prevailing approach to "effects" under s 104(1)(a) has been fact-sensitive. For example, in *Cayford v Waikato Regional Council*, the applicant challenged a proposal to take water from the Waikato River to supply Auckland, on the ground that it would deliver water of poor quality to Auckland consumers.[74] The Environment Court held the claimed effect would depend on the proposed level of treatment of the water and its intended end use. The claimed effect was therefore too contingent to be relevant.[75] On the other hand, *Aquamarine Ltd v Southland Regional Council* involved an application to take water from the surface of Deep Cove where it enters from the Lake Manapouri tailrace, to be exported by ship via Doubtful Sound.[76] There, the Court found that the effects on the Sound from ships accessing the Cove were within scope even though Aquamarine did not own the ships and would not be operating them.[77] In *Beadle v Minister of Corrections*, a 2002 decision, the Environment Court reviewed over two decades of jurisprudence on the meaning of "effects", saying:[78]

> [88] From reviewing all those cases, we discern a general thrust towards having regard to the consequential effects of granting resource consents, particularly if they are environmental effects for which there is no other forum, but with limits of nexus and remoteness. Of course the weight to be placed on them has to be case-specific.

[61] The approach developed over that time was relatively permissive, acknowledging that the RMA's efficacy relies partly on its participatory approach to standard setting and consenting. And, as can be seen, the cases have taken a practical approach: limits on the effects to be considered tended to be worked out as matters of fact, degree and, where appropriate, weight.

[62] This prevailing approach has proved workable in the ordinary run of appeals. However, there are cases that test the boundaries. These appeals are an example.

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74 *Cayford v Waikato Regional Council* [1998] ELHNZ 404 (EnvC).

75 At 12.

76 *Aquamarine Ltd v Southland Regional Council* (1996) 2 ELRNZ 361 (EnvC).

77 At 364 and 366–367.

78 *Beadle v Minister of Corrections* [2002] ELHNZ 144 (EnvC) citing *Metekingi v Rangitikei-Whanganui Regional Water Board* [1975] 2 NZLR 150 (SC), *Gilmore v National Water and Soil Conservation Authority* (1982) 8 NZTPA 298 (HC), *Annan v National Water and Soil Conservation Authority (No 2)* (1982) 8 NZTPA 369 (PT), *Application by Canterbury Regional Council* [1995] NZRMA 110 (PT), *Lee v Auckland City Council* [1995] NZRMA 241 (PT), *Royal Forest and Bird Protection Society of New Zealand Inc v Manawatū-Whanganui Regional Council* [1996] NZRMA 241 (PT), *Aquamarine*, above n 76, *Pokeno Farm Family Trust v Franklin District Council* [1997] ELHNZ 84 (EnvC), *Ngāti Rauhoto Land Rights Committee Inc v Waikato Regional Council* [1997] ELHNZ 163 (EnvC), and *Cayford*, above n 74.

While the word "effects" may be, in the abstract, broad enough to capture the environmental impact of plastic bottle disposal, the Courts below and respondents raised a range of overlapping justifications for excluding these effects from consideration. We address these now.

Too remote?

[63] The overarching argument advanced by the respondents and influential in the Courts below is that the alleged effects are too remote to be captured by s 104(1)(a). The argument draws heavily from the suggestion of the majority in *Buller Coal* that scope 3 emissions may be outside the scope of s 104(1)(a) "effects".[79]

[64] Some important background to *Buller Coal* is this. The case concerned the climate effects of offshore burning of coal mined here in New Zealand. The issue was whether the effects of greenhouse gases (GHGs) that would eventually be emitted by Buller Coal's offshore customers (scope 3 emissions) were relevant to Buller Coal's consent applications for roading and other infrastructure to support a proposed coal mine.[80] The majority found that scope 3 effects were irrelevant, but did so on the basis of 2004 amendments to the RMA which excluded scope 3 emissions from consideration in discharge to air applications.[81] The majority reasoned that if those effects were excluded in discharge applications, they could not be read back in at the prior mining stage.[82]

[65] Those amendments are not engaged here and, in any event, have since been repealed. Instead, the analogy we are invited to draw is based on additional comments

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79 *Buller Coal*, above n 36, at [115]–[127] per McGrath, William Young and Glazebrook JJ but see at [94] per Elias CJ dissenting.

80 The appeals did not relate to the mining itself as mining was a restricted discretionary activity and the District Plan did not include climate change effects as a relevant consideration for such activities; instead, only the consents for the ancillary aspects of the mine were challenged as these involved discretionary, controlled or non-complying activities under the District Plan: see *Buller Coal*, above n 36, at [104] per McGrath, William Young and Glazebrook JJ. Note another respondent, Solid Energy, also sought and obtained consents in relation to a separate site. Those consents were the subject of an appeal to the Environment Court by the Royal Forest and Bird Protection Society of New Zealand Inc. The parties to the appeal were joined as respondents in *Buller Coal*, but the Court found it unnecessary to address Solid Energy's case in any detail as the issues and agreed facts were not materially different.

81 See RMA, s 15(1)(c) as to discharge permits; and ss 70A and 104E as to the exclusion of climate change effects from consideration. The exclusions have since been repealed: Resource Management Amendment Act 2020, ss 19 and 35.

82 *Buller Coal*, above n 36, at [168]–[174].

by the majority. In obiter, the majority expressed a tentative view that, regardless of the 2004 amendments, the climate effects of scope 3 emissions might have been irrelevant as a matter of general principle. While the majority accepted that questions of fact and degree would arise, it considered that scope 3 emissions were probably too indirect (depending on subsequent actions of others), too remote (particularly if burned offshore) or insufficiently tangible (since the effects of burning the coal from the subject mine would likely be imperceptible on a global scale).[83] Further, the majority reasoned, world demand for coal was "presumably" such that if coal that could not be taken from the Buller Coal mine it would be substituted with coal won from mines elsewhere in the world.[84]

[66] In our view, *Buller Coal* is of limited assistance in this case. The cases are not on all fours: first, the 2004 amendments are irrelevant here and second, the consents in *Buller Coal* concerned only subsidiary aspects of the proposed mine whereas this case concerns consents for the whole activity (bottling spring water). Leaving those matters to one side, it is also significant that the *Buller Coal* appeals were set up as questions of pure statutory interpretation. They began in the Environment Court as applications for declarations that the consent authorities could not consider the climate effects of scope 3 emissions. In the usual way, the applications were accompanied by a brief statement of agreed facts, but the agreed facts did not engage with matters such as the variability of demand for coal or whether the climate effects on the environment of burning the subject coal would, in fact, be intangible.[85] There would, we infer, never have been agreement between the parties on the material facts in those respects.

[67] This procedural context is important because the majority's analysis in this respect relied on the correctness of certain factual assumptions, albeit assumptions made tentatively. Indeed, the majority accepted that questions of fact and degree

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83 At [117] and following.

84 At [122(a)].

85 This is set out in the High Court judgment: *Royal Forest and Bird Protection Society of New Zealand Inc v Buller Coal Ltd* [2012] NZHC 2156, [2012] NZRMA 552 at [6]. The statement included references to the expected yield from each of the two mines, an acknowledgment that the coal mined would probably be burned resulting in the emission of GHGs and, in the case of one of the mines, an estimate of the quantity of CO_2 likely to be omitted thereby. The Environment Court had issued an interim decision on the merits of the Buller Coal application before this Court's decision was issued, but for obvious reasons, scope 3 emissions were not considered: *Buller Coal*, above n 36, at [113]–[114].

would inevitably arise.[86] That is also the position in these appeals and, as will be seen, a shortage of relevant facts is also a feature of this case, albeit for different reasons.[87]

[68] For an alternative approach to a similar issue, SOI pointed to *Finch*. That case concerned the relevance of climate effects from scope 3 emissions that would be caused by the combustion of hydrocarbons extracted from wells for which planning consent was sought. The precise issue was whether the applicant was required to provide in its EIA information about these effects. The majority in *Finch* found for the appellant: the climate effects of scope 3 emissions were relevant such that they had to be included in the EIA.[88]

[69] The respondents submitted that *Finch* is of no assistance to the appellants because its statutory context was materially different to that in *Buller Coal* and the appeals before us. For example, the respondents pointed out that the required EIA had to address the project's likely "significant effects", both "direct and indirect", on listed environmental "factors" including "climate".[89]

[70] At one level these differences from the RMA's terminology appear significant. But the heart of the inquiry in *Finch* was (as it is here) what effects are factually relevant to understanding the project rather than the particular statutory language. Importantly in that respect, the majority's analysis was primarily driven by the fact that all petroleum products obtained by the project would be burned by someone, inevitably releasing a quantity of GHGs calculable by means of accepted methodologies.[90] That fact was "common ground, and indeed obvious".[91] The contribution of these GHGs to climate change could also be calculated. This meant, the majority found, that the fact the petroleum is eventually burned by

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86 *Buller Coal*, above n 36, at [119].

87 See above at [21].

88 *Finch*, above n 37, at [7], [101] and following and [174] per Lord Leggatt, Lord Kitchin and Lady Rose SCJJ.

89 Town and Country Planning (Environmental Impact Assessment) Regulations 2017 (UK), regs 3 and 4 giving domestic effect to Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment [2012] OJ L26/1 as amended by Directive 2014/52/EU amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment [2014] OJ L124/1.

90 *Finch*, above n 37, at [7], [79]–[82] per Lord Leggatt, Lord Kitchin and Lady Rose SCJJ. See also at [110], [118], [123], [135] and [162] per Lord Leggatt, Lord Kitchin and Lady Rose SCJJ and [193] per Lord Sales and Lord Richard SCJJ.

91 At [193] per Lord Sales and Lord Richard SCJJ.

independent parties over whom the applicant had no control, is not a factor relevant to the scope of EIAs. Indeed, even if there was nothing the applicant could do to affect end user emissions, that too was something the consent authority and the public should know.[92] Nor was it relevant that the petroleum will be burned far from the project site, including in other countries. There is, the majority said, "no correlation between where GHGs are released and where climate change is felt".[93]

[71] Stepping back, the words of the RMA make clear that in many cases—including this one—the question will not be whether a given effect on the environment is excluded as a matter of principle, but rather as a matter of fact and degree. This is reflected in some basic propositions that emerge from the interlinking definitions of "environment", "effect" and "sustainable management".

[72] One such proposition is that if allowing an activity would either adversely affect the ability of natural and physical resources to meet the reasonably foreseeable needs of future generations or compromise the life-supporting capacity of an ecosystem, those effects are very likely to be relevant under s 104.[94] Another is that where allowing the activity *may* have that effect, this may be a relevant potential effect.[95] Whether that is so in any particular case will depend on considerations of "fact and degree".[96] A third proposition is that the effect need not necessarily be likely, at least not if its potential impact will be high.[97] This means that the relevance and weight of less likely effects will also be application-specific matters of fact and degree. A fourth proposition is that where effects on the life-supporting capacity of an ecosystem or on natural resources or human communities may only arise over time or in combination with other effects, they may be relevant cumulative effects.[98] A fifth is that if the "scale, intensity, duration, or frequency" of the effect is relatively small, that will not necessarily rule it out of consideration; effects are potentially relevant

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92 At [102]–[105] per Lord Leggatt, Lord Kitchin and Lady Rose SCJJ.
93 At [97].
94 RMA, s 5(2)(a)–(b).
95 Sections 3(e)–(f) and 104(1)(a).
96 *Buller Coal*, above n 36, at [119].
97 RMA, s 3(f).
98 Sections 3(d) and 5(2)(b).

"regardless" of their magnitude.[99] So it is not the case that only big, intense, continuing or repetitive effects will be relevant.

[73] There can therefore be no hard and fast rule excluding indirect effects of allowing an activity—in other words, effects to which the applicant contributes but which occur only after some additional intervening act such as burning coal (*Buller Coal*) or oil (*Finch*). As the majority in *Buller Coal* accepted, there will be questions of fact and degree. The Court was careful not to express any concluded view on the question of whether scope 3 emissions engaged the general words of s 104(1)(a).[100] And as noted in *Finch*, exclusion on contingency grounds alone would be potentially illogical if it is clear on the facts that the independent action *will* inevitably be taken. In any event, as the appellants submitted, if positive effects involving contingent behaviour by third parties are in scope—for example, economic growth and job creation from proposed activities—then there is no good reason to exclude indirect or contingent adverse effects.

[74] Further, effects that when viewed in isolation appear very small cannot be automatically ruled out, particularly where they accumulate or combine with other effects over time.[101] It follows that what makes an effect tangible enough in *Buller Coal* terms to be cognisable for the purposes of s 104(1)(a) is also likely to be application-specific and require evidence.[102]

[75] Likewise, there cannot be a hard and fast rule excluding the effects of offshore disposal from consideration. "Environment" is defined by reference to ecosystems, communities, natural resources, amenity values, social and economic conditions, and so forth. The definition is capacious and does not naturally suggest that all extraterritorial effects are excluded just because they are extraterritorial. National borders are determined according to law rather than facts, and environmental effects

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99 Section 3.

100 *Buller Coal*, above n 36, at [115] per McGrath, William Young and Glazebrook JJ.

101 Compare *Dye v Auckland Regional Council* [2002] 1 NZLR 337 (CA) at [49] but note that the potential cumulative effect at issue in *Dye* was the precedent effect of a subdivision consent in a rural zone on the integrity of that zone; it did not relate to the sorts of physical effects at issue in this case.

102 The same applies when determining whether effects are minor for the purposes of satisfying the non-complying activity gateway in s 104D(1)(a).

of activities undertaken in New Zealand will sometimes be insensitive to those borders. *Finch* makes that point in respect of scope 3 effects. In addition, taking effects outside New Zealand into account does not involve the consent authority acting extraterritorially. That is because RMA consents are only ever for activities that will be located in New Zealand and subject to New Zealand law.[103] Activities and their effects are not necessarily the same thing in RMA terms.

[76] As this Court said in *Buller Coal*, remoteness in RMA terms is a matter of fact and degree for which evidence is required except in the plainest of cases. If inquiry into the offshore effects of an activity is appropriate, the extent of such inquiry will depend on the facts and the degree to which the consent authority is assisted by it. We were told that the science of global environmental effects of plastics disposal, whether lawful or not, is now relatively sophisticated. We of course cannot determine whether such evidence will be helpful to a consent authority, but without knowing more, we are unable to say it will not be.

[77] Similarly, the fact that third parties are responsible for disposing of the empty water bottles does not mean the effects of disposal are irrelevant to consenting for the production stage. That is particularly the case if disposal is inevitable—which it is. This is somewhat analogous to the circumstances in *Finch* and *Buller Coal* where the oil and coal would inevitably be burned by downstream purchasers—that was the point in buying it. Here, once the water has been consumed, the owner of the now empty bottle must get rid of it. It may not matter whether disposal is by indiscriminate littering or lawful placement in a landfill. That is because landfills are themselves a finite resource and create their own environmental burden; lawful disposal, too, has adverse effects.[104]

Substitution

[78] We address the substitutability argument separately because it is, as we apprehend it, different to arguments about remoteness. Just as the consent applicants

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103 Compare *Buller Coal*, above n 36, at [175] per McGrath, William Young and Glazebrook JJ.

104 Section 3(1) of the WMA makes this point by providing that waste must be minimised and waste disposal decreased to protect the environment from harm and to provide environmental and other benefits.

argued in *Buller Coal*, OSL submitted that controlling its production of plastic bottles serves no purpose. This is because if OSL did not produce the plastic bottles, another producer would (whether here or offshore). Put another way, the argument is essentially that, in a global market, the absence of global controls makes local controls pointless.

[79] This is not an attractive argument. First, the adverse effects of plastic production are still "effects" relevant under s 104(1)(a) even if these effects might otherwise be generated by a third party. That is, if the effects on the environment of *my* proposed activity are demonstrated by evidence to be adverse, it cannot be an answer to posit that *another* producer would cause the same harm if I do not. The substitutability argument focuses only on the potential for additional future harm; this all too conveniently ignores the producer's share of existing harm. Second, while there is a global market for bottled water, the plastics problem is at once global, national and local.[105] In that context, local regulatory initiatives may well have knock-on effects in other localities, at the national level or even globally. The management of environmental effects that have only in recent times become widely appreciated is likely to begin with incremental steps until a tipping point is reached.

"Integrated management" and the WMA

[80] A different issue identified by the respondent councils was this: if plastic bottle disposal can, depending on the facts, have relevant effects on the environment, what could the councils reasonably be expected to do about those effects in a single application for consent to extract and bottle water? The issue was aptly summed up by Ms Hill for the Regional Council. She accepted that "unmitigated production" of plastic bottles could harm the environment. But, she submitted, addressing that risk "through ad hoc resource consents under a policy framework which does not currently seek to address them is not sound planning". These are matters of system design and efficacy that must not be ignored even if s 104(1)(a) is broad enough to include the global effects of plastics disposal.

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[105] As to global developments, see, for example, below at [221] and following per Winkelmann CJ and Glazebrook J.

[81] As to that, the Court of Appeal made this point: bottle making and filling at scale does not generally require a resource consent because it is done in industrial zones where such activities are permitted.[106] It might be said in response that water bottling is a little different because, as we come to in relation to the activity status issue, OSL's case is premised on the proposition that its operation must be located in a rural zone as that is where access to the valued spring water is obtained. Nonetheless, and putting spring water to one side, plastic bottles are also produced and filled with a myriad of other consumable liquids for which the Court of Appeal's point holds true. Further, the plastic waste problem is far larger than plastic bottles. There may be no material gain for sustainable management and considerable unfairness for applicants in singling out this particular example of water bottling for special treatment when the effects generated by most other plastic bottle makers are unregulated by RMA.

[82] Determining whether plastic disposal effects can be avoided, remedied or mitigated, and if so how, is already a complex task. It will be made more complex by the fact that consent authorities lack the guidance of subject-specific objectives, policies, rules or standards, whether at national, regional or district level. We accept that proceeding in this fashion could not be held out as a model of integrated management of the natural and physical resources of a region or district.[107] There is, as the respondents submitted, a high risk of ad hoc decision-making that will not promote sustainable management.

[83] Related to the difficulties of integrated management in this case is the existence of the WMA. We have already noted that although waste creation and disposal is plainly a matter within the broad compass of the RMA, there are purposive and functional overlaps with the WMA. This was a matter of considerable focus in the respondents' submissions. Section 3(1) of the WMA demonstrates that overlap:

> **3 Purpose of this Act**
>
> (1) The purpose of this Act is to encourage waste minimisation and a decrease in waste disposal in order to—
>
> (a) protect the environment from harm; and

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106 CA judgment, above n 8, at [56].
107 RMA, ss 30(1)(a) and 31(1)(a).

(b) provide environmental, social, economic, and cultural benefits.

…

[84] The WMA deals with the subject of waste in specific ways that are relevant to the issues in this case. First, under pt 2 the Minister for the Environment can declare, by notice in the *New Zealand Gazette*, a product to be a "priority product" for which an accredited product stewardship scheme must be developed.[108] Second, regulations may be promulgated to control or prohibit either the disposal of specified products, or the manufacture or sale of products containing specified materials.[109] In relation to plastics, regulations prohibited the manufacture and sale of wash-off products containing microbeads and the sale of plastic shopping bags.[110] In 2022, regulations either prohibited or controlled the manufacture or sale of a long list of plastic products; the list included single-use plastic drinking straws, stirrers, cutlery, tableware and produce bags, plastic produce labels, cotton buds, PVC food trays and containers, certain polystyrene packaging, and any plastic product containing an additive to accelerate its disintegration.[111]

[85] Third, and in addition to these quite significant central government powers, the WMA also imposes duties on territorial authorities to "promote effective and efficient waste management and minimisation" for each district and to adopt plans to achieve that.[112] The current Whakatāne District Waste Management and Minimisation Plan articulates the District Council's obligations in the following terms:[113]

> **1.2 Why do we need a plan?**
> ***He aha tātou e hiahia ai he mahere?***
>
> Whakatāne District Council (the Council) has a statutory requirement under the Waste Minimisation Act 2008 (WMA) to promote effective and efficient waste management and minimisation within the district. We do this by adopting a Waste Management and Minimisation Plan (WMMP). We also have an obligation under the Health Act 1956 to ensure that our waste management systems protect public health.

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108 WMA, ss 9–10. Under s 22(1)(a), regulations may be promulgated prohibiting the sale of priority products otherwise than in accordance with an accredited scheme.

109 Section 23.

110 Waste Minimisation (Microbeads) Regulations 2017; and Waste Minimisation (Plastic Shopping Bags) Regulations.

111 Waste Minimisation (Plastic and Related Products) Regulations.

112 WMA, ss 42–43

113 Emphasis in original.

> Our WMMP sets the priorities and strategic framework for managing waste in our district. In line with the requirement of section 50 of the WMA, our WMMP needs to be reviewed at least every six years after its adoption. Councils may elect to review any or all aspects of the Plan at any time prior to this, if they consider circumstances justify such a review.
>
> The WMMP includes a number of actions the Council and our communities will take to manage and minimise our waste. All the actions listed in our 2015–2021 WMMP were completed or are ongoing projects, such as school waste education.

[86] There is substance to the argument that, because of the lack of scaffolding in the RMA cascade, treating plastics disposal as a relevant effect at the production stage would be contrary to integrated management. It must be accepted that promulgating national controls on plastic bottle production under the WMA would be a more effective way of reducing the effects on the environment of New Zealand-sourced plastic bottles. The essential argument for the respondents was that without the benefit of a multi-layered consideration of plastics production and disposal in the cascade, the RMA is not fit for purpose and should not be pressed into service.

[87] Nonetheless, both the WMA and RMA focus on environmental effects—s 3(1) of the WMA and s 5(2) of the RMA say that explicitly. And there is no avoiding the fact that plastics disposal can harm the environment (a proposition accepted in fact by all parties). What then should be done when the RMA's purpose and the terms of s 104(1)(a) are each wide enough to make plastic bottle disposal a relevant and potentially important effect in theory, but the supports designed to connect purpose to consent decisions—relevant objectives, policies, rules or standards in multi-level RMA instruments—have not been built? That gap inevitably makes any consent decision in which plastics production is raised both more difficult and, at the same time, less potent in terms of contribution to the statutory purpose. Nonetheless, the standalone directive of s 104(1)(a) is mandatory and underpinned by s 5(2)(c) which sits at the structural centre of the RMA. The fact that central and local government have not promulgated relevant RMA objectives, policies, rules or standards does not mean s 104(1)(a) can be ignored. That would see the tail wag the dog.

[88] As the Court of Appeal in *RJ Davidson Family Trust v Marlborough District Council* held when discussing the relationship between pt 2 and s 104(1):[114]

> … if it appears the plan has not been prepared in a manner that appropriately reflects the provisions of pt 2, that will be a case where the consent authority will be required to give emphasis to pt 2.

[89] And in the different circumstances of *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* (where the issue was the relationship between instruments in the RMA hierarchy rather than consents), this Court referred to the appropriateness of direct recourse to pt 2 where there was "incomplete coverage" of relevant matters in the superior document in the hierarchy.[115] Part 2 thus acts as a backstop in consent decision-making. It ensures that if there is a gap in the cascade such that integrated management has not been achieved in relation to a relevant effect, then consent authorities must rely on the promotion of sustainable management and the requirements of ss 6–8.

[90] What then of the WMA? In different circumstances, for example if a comprehensive regime covering all plastics disposal had been promulgated under that Act, it might have been possible to suggest that for the purposes of s 104(1)(a) relevant adverse effects are adequately addressed by that means. For example, in *Protect Aotea v Auckland Council*, the Environment Court needed to resolve potential tensions between different legislative regimes when applying broad statutory language.[116] The Court held that the dumping of dredging material *outside* the Coastal Marine Area (CMA) would have been a relevant (and inevitable) effect for the purposes of an application to undertake dredging *inside* the CMA, but as the dumping required separate consent under a different environmental regime (the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012) the effect of dumping was necessarily excluded from consideration under s 104.[117]

[91] The circumstances here are different. Unlike *Protect Aotea*, this is not a situation where the RMA must, as a matter of construction, give way to a separate

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114 *RJ Davidson*, above n 70, at [74].
115 *King Salmon*, above n 68, at [90].
116 *Protect Aotea v Auckland Council* [2021] NZEnvC 140, [2021] ELHNZ 229.
117 At [57], [68], and [74] and following.

regime which covers the same ground in fact.[118] On the contrary, in the present appeal, the respondents appropriately accepted that a national policy statement (NPS) could provide for the control of plastics production and disposal. A draft plastics NPS would trigger community and stakeholder engagement prior to finalisation and, once finalised, NPS-consistent regulatory responses at regional and district levels. The result would be integrated management of the effects of plastics waste.

[92] It may be seen, therefore, that the WMA regime complements the RMA rather than supplanting it. In the context of this case, that is reflected in the Whakatāne Waste Management and Minimisation Plan. This Plan notes that the Council has adopted the waste hierarchy model espoused by the Prime Minister's Chief Science Advisor in 2019.[119] As the Plan explains:[120]

> This model … places more emphasis on waste avoidance prior to diversion and disposal. However, avoidance behaviours will be influenced more by national policy and community behaviour (both of which the Council can influence) but Council operations and services have more direct control over diversion practices.
>
> …
>
> In general, actions further up the [waste] hierarchy can reduce the costs at a lower level, and environmental impact is generally reduced at higher levels. However, relative costs can vary significantly depending on factors such as disposal and transport.

In this way, the District Council acknowledges that production and disposal are connected and that the Council itself can play an important role in waste avoidance by influencing national policy and local community behaviour. Managing effects under the RMA complements this role.

[93] Lastly, integrated management under the RMA need not necessarily begin with directives or policies imposed from above (even if it often does). Airing novel issues at the consent stage can, in a manner more familiar to the common lawyer, create upward pressure for the issue to be addressed in the future in higher order instruments

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118 Compare *Smith v Fonterra Co-operative Group Ltd* [2024] NZSC 5, [2024] 1 NZLR 134 at [100].

119 Whakatāne Waste Management and Minimisation Plan at [1.5] citing Office of the Prime Minister's Chief Science Advisor | Kaitohutohu Mātanga Pūtaiao Matua ki te Pirimia *Rethinking Plastics in Aotearoa New Zealand* (December 2019).

120 At [1.5].

or (as with the WMA) in an adjacent system. This is, perhaps, an answer to the concern expressed by the Court of Appeal about unfairly singling out producers of plastic products seeking resource consent when most do not need consent because they tend to be located in industrial zones where such activities are permitted. That is true, but attaining permitted activity status can depend on whether an applicant is able to comply with performance criteria prescribed in district rules. These could be added to include, by way of example only, a requirement to prepare a plastic waste minimisation plan.

Other considerations

[94] For completeness, we note that we are unpersuaded by the reference to the Environment Court's reliance on s 30, which limits the scope of regional council functions to their regional boundaries.[121] The direction in that section to establish objectives, policies and methods to achieve integrated management of regional resources does not logically exclude extra-regional effects arising from the use of such resources. This is the same, flawed, extraterritoriality reasoning that we rejected in the context of remoteness.[122] The same applies to s 31 which controls district council functions. Indeed, given the waste minimisation role accorded to district councils under the WMA, the case for such effects being within institutional capacity is even stronger for district councils.

[95] Nor do we find the analogy with s 108(1) relied on by the Court of Appeal as to the required nexus between consent and consent conditions to be of real assistance.[123] Although the Court may have been right to suggest that controls on bottle production lacked the required linkage to the water right (we need express no concluded view on that),[124] that is not the case with respect to the land use consent which was the focus of SOI's appeal. Plastic bottle production was an aspect of the land use consent, not of the water permit.

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121 EnvC judgment, above n 7, at [64] per Judge Kirkpatrick and Commissioner Buchanan.
122 See above at [75].
123 CA judgment, above n 8, at [54].
124 At [55]–[61].

[96] Finally, we acknowledge the concerns expressed by the respondent councils in respect of the added burden to consenting processes of adopting a wider view of the scope of "effects" than preferred in the Courts below. However, we are not convinced that holding plastics disposal issues to be relevant on a fact and degree basis depending on the evidence will create an impossible burden for consent authorities, nor that it will change the consenting process itself. It may mean however that, in the absence of national controls, district and regional councils should, within their respective spheres, consider developing relevant objectives, policies and rules (as the case may be) to operate alongside district waste minimisation plans as required under the WMA.

Conclusion

[97] In light of the foregoing, the Court of Appeal's five conceptual difficulties[125] with taking into account the effects of plastic bottle disposal tend to fall away—at least, in the absence of further evidence. It was thus premature to exclude, as a matter of principle, these effects from consideration.

[98] In s 104(1)(a), effects are factual things constrained only by the express carve-outs in the RMA.[126] They are the actual or potential consequences of defined activities—consequences that are ascertainable (with varying degrees of confidence) through evidence.[127] And the environment—the thing that receives those effects—is a complex factual phenomenon, not a legal construct. If the definitions of effect and environment in the RMA convey anything, it is a striving to describe dynamic phenomena as comprehensively as their reduction into statutory language permits. In this case, there is nothing to suggest the environmental effects of plastic bottle disposal are irrelevant in *principle*; the real question is whether these effects are relevant in *fact*.

[99] The problem is that in what is a fact and degree case, the available facts about the effects of disposal are sparse and generalised. Because of the way the issue arose

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125 See above at [34].

126 See, for example, s 104(3)(a)(i).

127 This is so even in relation to effects on more subjective social, economic, aesthetic and cultural conditions of ecosystems, resources and amenities per the definition of environment in s 2(1). For example, an effect on the social or cultural well-being of a community may be ascertained through expert evidence or by objective assessment of the evidence of members of the affected community.

in the Environment Court, we have precise information about the volume of plastic produced by the operation but almost nothing about the effects of its disposal. We come to that problem in the next issue.

The scope of appeal issue: was plastics disposal properly before the Environment Court and so amenable to further appeal?

[100] Having concluded that plastic bottle disposal is, subject to questions of fact and degree, a relevant effect for the purposes of s 104(1)(a), the next question is whether that issue was properly before the Environment Court and so amenable to further appeal. As we noted above, the effect of plastic disposal was not raised by either appellant as a ground of appeal in the Environment Court. Nor was it identified by the parties in the agreed list of issues before that Court. Rather, it was a matter raised by Commissioner Kernohan during the course of the hearing. It became, as summarised above, the focus of his dissent. And as we noted above, no substantive evidence was called by any party in relation to that issue.

[101] The majority did not approach the end use issue as one about the scope of the appeals. Rather, as discussed, they focused on the scope of the RMA itself, this through their assessment of the meaning of "effects" and the functions of the Regional Council under s 30. And, as we have said, the Environment Court relied heavily on this Court's decision in *Buller Coal*.[128]

[102] In the High Court, Gault J dealt with the issue in the context of SOI's appeal against the District Council consent, this because SOI had, in the Environment Court, withdrawn its appeal against the grant of the water right, choosing to focus on its challenge to the land use consent.[129] The High Court Judge accepted that the Environment Court's findings as to jurisdiction related to both consents, meaning SOI could mount its arguments in relation to plastics. He also accepted that a party cannot ordinarily raise a new ground on appeal that was not pursued in the court below. But he considered that if in its reasons the court below addresses an argument that was not raised by any party, the party affected is not precluded from challenging that aspect of

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128 EnvC judgment, above n 7, at [32]–[66] per Judge Kirkpatrick and Commissioner Buchanan.
129 See at [6].

the decision. It would not, he considered, be appropriate to deny an affected party the right of appeal when the Court itself has strayed outside the case as put.[130]

[103] In the circumstances of this case, however, the High Court Judge considered it was not necessary for the Environment Court to seek further evidence on the question:[131]

> I am not saying that as a matter of law the effects of plastic bottle or other plastic disposal will always be too remote to warrant consideration (nor suggesting that councils cannot address such effects in their planning documents). The majority's Jurisdictional Overview no doubt reflected the unusual circumstances of this case, involving an end use issue that was not part of the appellants' case and was raised by the Court during the hearing. In those circumstances, it was not incumbent on the Court to seek further evidence or decline the application on the basis of inadequate information.

[104] In the Court of Appeal, the issue was articulated in the following question of law:[132]

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

[105] The Court's reasons in this respect were relatively brief and it is worth setting them out in full:[133]

> [75] We accept that if the Environment Court considers that an issue of significance to the disposition of a case before it should be the subject of further evidence, it could ask the parties before it to call evidence on the issue or, if it thought it appropriate, make arrangements itself in an exceptional case for such evidence to be obtained.
>
> [76] In the present case, one member of the Court considered that the end use of the plastic bottles was relevant to the assessment of the application, and that is clear from the dissenting judgment he delivered. But the fact that an issue was raised by one member of the Court cannot be said to give rise to a duty on the part of other members to require the issue to be the subject of evidence. As is apparent from the Environment Court decision, it was not a view the majority shared. Given that they had a contrary view, they were entitled to act on it.

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130 HC judgment, above n 7, at [50]–[51].
131 At [157].
132 CA judgment, above n 8, at [3(b)].
133 Footnote omitted.

> [77] Except in cases where it is clear that an issue should have been the subject of evidence, we do not consider the Environment Court is obliged to procure evidence on it. Where evidence of this type has not been called, often the most appropriate course for the Court to follow would be to decide the case on the basis that the evidence was not available, with appropriate consequences for the disposition of the proceeding before it.
>
> [78] Although the Court is able to adopt an inquisitorial approach, we consider that its primary duty in an appeal concerning whether a resource consent should have been granted or declined is to consider the issues raised by the parties and the evidence they have called, and apply the relevant statutory provisions in the RMA. Any other approach would be likely to lead to increased uncertainty, cost and delays. We add that although the nature of the Environment Court's jurisdiction and obligations under pt 2 of the RMA will often require a more flexible approach than that which would be followed in civil litigation in the District Court or High Court, a party to proceedings before the Environment Court should ensure it calls relevant evidence to support the issues it wishes to raise. An approach that relies on the Court itself to seek the evidence is not to be encouraged and is unlikely to succeed.
>
> [79] It will be apparent from the discussion of Question 1 that we do not regard this case as one where the Environment Court was obliged to obtain further evidence. Question 2 is answered no.

Submissions

[106] SOI took the high ground on this question, arguing that it is for the consent applicant to bring evidence forward to address all relevant effects of the proposal. While it is regrettable that there was little direct evidence on plastics disposal before the Commissioners at first instance or the Environment Court, "the mechanisms of plastic pollution and the effects of plastics in the environment are so well-known and notorious" that it is appropriate for this Court to have regard to them. In oral submissions, counsel submitted further that since the *Buller Coal* decision, the "prevailing understanding" was that downstream effects such as plastics pollution were by definition too remote and intangible to be considered under s 104. In light of that apparent orthodoxy, public interest objectors such as SOI faced, it was submitted, significant costs exposure in the Environment Court if unsuccessful on that point. Having said that, counsel submitted that it may have been better for the issue to have been considered as a preliminary question as was the course adopted in *Buller Coal*.

[107] For OSL, Mr Smith argued that the plastics disposal issue was taken up "opportunistic[ally]" by SOI, as it had not been raised before the Planning Commissioners. Nor had it been a ground of appeal to the Environment Court. It was

not mentioned in the joint memoranda of counsel on the remaining issues for argument in the Environment Court appeal. Further, Mr Smith submitted, once the matter was raised by a member of the bench, no party sought an adjournment to obtain the relevant evidence.

[108] Seen in this context, the Courts below were entitled as a matter of principle and practice, he submitted, to make a prior assessment of relevance (according to nexus, remoteness and causality) before calling for substantive evidence. Further, counsel submitted, since nexus, remoteness and causality were likely to be challenged by OSL, it ought not to have been OSL's responsibility to call evidence on it at the outset. Rather, the appropriate pathway for airing the issue would have been for SOI to adduce evidence on it. OSL could then have objected on relevance grounds, and the issue would have been excluded as irrelevant or, if SOI succeeded on the point, OSL could have called its own evidence.

[109] For the District Council, Mr Green adopted the approach of the Court of Appeal. He argued that:

(a) the fact one member of the Court raised an issue does not create an obligation on the Court to explore it;

(b) the issues on appeal to the Environment Court were agreed between the parties and limited to planning matters and local effects—that is, effects on rural character and amenity; and

(c) in the Environment Court, counsel for SOI appeared to accept that plastics disposal was a matter for which national intervention was required.

[110] Counsel did accept, however, that if a relevant matter for the purposes of s 104 arose in an appeal but there was no evidence before the Environment Court on it, a court considering an appeal on a question of law could remit the matter for further consideration if there was no other appropriate way of addressing it.

[111] For the Regional Council, Ms Hill, in oral submissions, acknowledged that the Environment Court had an inquisitorial function and could have called for evidence on the plastics disposal issue if it chose to. There was, however, she submitted, no authority to suggest that the Court had a duty to do so.

Our view

[112] We have found that SOI was entitled to raise the issue of plastics disposal in the Environment Court and to call evidence to make out the case that plastics disposal has a material adverse effect on the environment. But SOI did not do that. On the contrary, as OSL pointed out, SOI expressly confined the ambit of its appeal in that Court to planning matters and local amenity effects. Plastics disposal was only raised as a point on appeal in the High Court.

[113] Early RMA authorities suggest that this eleventh hour procedural course "is to be deprecated",[134] although they were also concerned to avoid "the possibility that procedural omissions might otherwise trump merit".[135] A more recent case, *Gock v Auckland Council*, concerned zoning decisions.[136] One issue raised (of many) was whether an appellant could advance in the High Court an alternative zoning option that had not been advanced in the Environment Court. In a framing similar to that adopted by SOI in this appeal, the appellant argued that since the Council and (on appeal) the Environment Court had a statutory obligation to identify "other reasonably practicable options for achieving the [zoning] objectives",[137] it did not matter that the option now put forward by the appellants had not been raised until the High Court appeal. Muir J, after referring to the earlier authorities, found that the Environment Court was under no obligation to step outside the evidence and arguments advanced before it.[138] He considered that, had the Court done so, it could have opened itself to criticism on natural justice and evidential sufficiency grounds.

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134 See, for example, *Ngāti Maru Iwi Authority v Auckland City Council* [2002] ELHNZ 224 (HC) at [65].

135 *Wymondley Against the Motorway Action Group Inc v Transit New Zealand* [2004] NZRMA 162 (HC) at [14].

136 *Gock v Auckland Council* [2019] NZHC 276, (2019) 21 ELRNZ 1.

137 RMA, s 32(1)(b)(i).

138 *Gock*, above n 136, at [170].

[114] The appropriate response in these situations will depend on the context of the case, including its procedural history. The respondent councils accepted before us that the Environment Court could itself have called for evidence on plastics disposal (either from the parties or of its own motion). Although the Environment Court's jurisdiction is (for the most part) appellate, it hears appeals de novo and mostly unconstrained by what has gone before.[139] Submitters who bring appeals are not restricted to the matters raised in their original submissions to the consent authority.[140] The Court's work is often policy heavy and can involve a synthesis of judicial and legislative functions.[141] Further, apart from matters such as trade competition, the RMA has generous standing rules. Interested parties will regularly appear on their own behalf or through lay representatives, unassisted by counsel.[142] This combination of factors means that on occasion an inquisitorial approach may be required to ensure proper discharge of the Court's functions.[143]

[115] But there are limits to this flexibility. For example, considerable care is required when an applicant for consent, on appeal, seeks approval for something materially different to that applied for.[144] And, if a party raises a new question of law on appeal to the High Court, a clear case would need to be made for its remittal back to the Environment Court for consideration. As Gault J acknowledged in this case (rightly, in our view), it may be appropriate to allow an untested question of law to be advanced on appeal in the High Court if the Environment Court itself raised the issue for the first time in its judgment.[145] Indeed, for the reasons identified by Muir J in *Gock*, it would be contrary to fundamental principle to prevent adversely affected parties from challenging such a decision.

[116] That is not quite what happened here. The effects of plastic disposal were not treated as relevant by any party at the application stage. It seems none of the parties suggested, prior to the Environment Court hearing, that the assessment of

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139 See *Ross v Number Two Town and Country Planning Appeal Board* [1976] 2 NZLR 206 (CA); and *Beca v Auckland City Council* [1999] ELHNZ 378 (EnvC) at [19]–[22]. However, the Environment Court must have regard to the decision at first instance: RMA, s 290A.

140 RMA, s 120(1B).

141 See s 293.

142 See ss 274–275.

143 See CA judgment, above n 8, at [78].

144 *Waitākere City Council v Estate Homes Ltd* [2006] NZSC 112, [2007] 2 NZLR 149 at [35].

145 HC judgment, above n 7, at [50].

environmental effects was deficient, nor did anyone suggest further information on plastics should be sought under s 92 of the RMA. The point is an important one. The plastics production and disposal issue did not occur to the applicant, submitters or consent authorities, even though the application was to extract water and put it in 154,000 plastic bottles every hour.

[117] When the effects of plastic disposal were raised by a member of the Environment Court (who plainly considered them to be relevant), no party sought leave to call evidence—that is, to invoke the Court's inquisitorial power to step outside the evidence and argument before it, in order to discharge properly its function under s 104(1)(a). Had the Court rejected such application, that could have been taken up on further appeal.

[118] As discussed under the scope of "effects" issue, assessing the materiality of the plastic disposal effects would inevitably have required expert evidence about the biophysical effects of the proposed quantity of plastic waste and perhaps planning evidence about the efficacy (but not the legality) of controlling them in consent appeals un-scaffolded by relevant objectives, policies and rules. Contrary to findings in the Courts below, we are of the view that such effects (including remoteness) could not be accurately assessed at a conceptual level and in the absence of evidence.[146] Importantly, the potential effects in issue are not a problem of plastic waste generally, but the effects of *this* plastic waste.

[119] In the event, a majority of the Environment Court ultimately discounted plastic waste as irrelevant, so it had no effect on the outcome.[147] In those circumstances, we are not satisfied that the Environment Court should be required to reconsider the question. SOI was offered an opportunity to raise the issue but did not take it. It would be unfair to OSL and the other respondents to remit the matter when, even at this late stage, the evidence referred to by SOI does not allow this Court to make even a preliminary assessment of the potential effects of the activity in this respect.

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146 HC judgment, above n 7, at [148]–[157]; and CA judgment, above n 8, at [56]–[61].
147 EnvC judgment, above n 7, at [66].

[120] We cannot say whether such evidence, if given before the Environment Court, would have made a difference to the outcome. It may have. But it is too late, after a fourth appeal and still with no suggestion of a substantive evidential base from SOI, to require the applicant to go back and demonstrate that it would not have. In these particular circumstances, we agree with the Court of Appeal that "[a]ny other approach would be likely to lead to increased uncertainty, cost and delays."[148]

[121] As a general proposition, however, in circumstances where, depending on the evidence, an effect may or may not be too remote or too intangible to engage s 104(1)(a), it will be a matter for the consent authority to decide whether the applicant should provide that evidence. If no such requirement is imposed, it will be for submitters to bring forward their own evidence to demonstrate proximity and tangibility. In the alternative, submitters may choose to seek a declaration under s 310.

The activity status issue: is the proposal a discretionary "rural processing activity" or non-complying "industrial activity"?

[122] To construct and operate the proposed new plant, OSL had to obtain land use consents under s 9 of the RMA. The District Council is the consent authority in that respect, and the WDP is the controlling document. The application land is zoned rural plains in the WDP. By the time the matter progressed to this Court, the issue had evolved into the following: is the extraction and bottling of water a "rural processing activity" or an "industrial activity" in the rural plains zone? If the former, it is a discretionary activity subject only to the requirements of s 104; if the latter, it is non-complying, meaning that in addition to assessment under s 104, it must also pass through the more stringent s 104D gateway. Section 104D provides as follows:

> **104D Particular restrictions for non-complying activities**
>
> (1) Despite any decision made for the purpose of notification in relation to adverse effects, a consent authority may grant a resource consent for a non-complying activity only if it is satisfied that either—
>
> (a) the adverse effects of the activity on the environment (other than any effect to which section 104(3)(a)(ii) applies) will be minor; or

[148] CA judgment, above n 8, at [78].

(b) the application is for an activity that will not be contrary to the objectives and policies of—

(i) the relevant plan …

…

…

[123] In short, a non-complying activity can only be considered for consent if either its effects will be no more than minor or it will not be contrary to the objectives and policies of (in this case) the WDP. If one of these conditions is met, the application can then be considered under s 104 in the usual way.

[124] "Rural processing activity" is defined in the WDP in these terms:[149]

> … an operation that *processes, assembles, packs and stores* products from *primary productive use*. This includes wastewater treatment facilities associated with and within proximity of the Edgewater Dairy Manufacturing Site.

[125] In turn, "primary productive use" is defined to mean:[150]

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

[126] So primary productive uses either rely on the productive capacity of land (from which a product is grown such as by farming or horticulture) or have a functional need for a rural location (from which a product is extracted, such as roading metal from quarrying or minerals from mining).

[127] There is also an activity referred to in the WDP as a "rural *production* activity" (as opposed to rural *processing* activity):[151]

> Rural production activity means rural land use activities that *rely on the productive capacity of land* or have a *functional need for a rural location* such as agriculture, pastoral farming, dairying, poultry farming, pig farming, horticulture, forestry, quarrying and mining. *Also included* in this definition

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149 WDP, ch 21 definition of "rural processing activity" (emphasis added).
150 Chapter 21 definition of "primary productive use" (emphasis added and formatting omitted).
151 Chapter 21 definition of "rural production activity" (emphasis added and formatting omitted).

> are *processing and research facilities* that *directly service or support* those rural land use activities.

[128] Apart from its last sentence, the definition of rural *production* activity is identical to the definition of primary productive *use*. We will return to the significance of that below.

[129] As the name suggests, rural processing activities are derivative activities: they process the products of primary productive uses in preparation for market. They are permitted activities in light industrial and industrial zones, and discretionary activities in the rural plains zone.[152] The signal in the WDP is therefore that there will be circumstances where rural processing activities may be established in the rural plains zone, even though they are downstream from primary productive uses.

[130] "Industrial activity" is defined to mean:[153]

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

[131] It will be seen that industrial activity includes *manufacturing* as well as processing, assembling or packaging, while rural processing does not. In addition, forestry is expressly stated to be a primary productive use, but milling or processing timber is defined as an industrial activity when it might otherwise have met the definition of rural processing activity. This suggests there is a degree of factual overlap between industrial activities and rural processing activities.

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152 They are also discretionary in the rural foothills zone.

153 Chapter 21 definition of "industrial activity" (emphasis added and formatting omitted).

The Courts below

[132] The Courts below considered the application to be for a rural processing activity. The Environment Court's analysis of the difference between industrial and rural processing activities is worth setting out in full:[154]

> [219] The essential difference between the definitions of the two activities is that an industrial activity can involve any type of material, good or product but a rural processing activity must have as its starting point a product from a *primary productive use*. Such a use, again as defined, must either rely on the productive capacity of land or have a functional need for a rural location. The examples given in the definition indicate that farming and extractive activities are contemplated as being within it.
>
> [220] These definitions appear to be consistent with the conventional three-sector model in economics in which an economy is divided into primary (extraction of raw materials), secondary (manufacturing) and tertiary (services) sectors. The model is principally used in analyses of economic development, but to the extent that a plan under the RMA should generally reflect the world being planned, the approach may be helpful in dealing with the potential complexity of very broad terms such as "industry" and "primary production".
>
> [221] Statutory plans in New Zealand have typically identified separate rural and industrial areas, but the broad terms may obscure the overlap of the two and so be unhelpful to detailed analysis. In that context, we accept that the purpose of the plan's definitions is to provide a basis for analysis that is consistent with the relevant objectives and policies of the plan. Overall, the provisions do this to sustain the productive potential of rural land and to prevent the expansion of urban activities onto productive rural land while still enabling appropriate processing activities to occur where the resources to be processed are grown or found. The definitions serve to help achieve these objectives and determine what is appropriate by requiring rural processing activities to have a relationship with the land, either in terms of the land's productive capacity or to serve some other functional need. This approach in the plan is not contradicted or reversed by the fact that these processing activities may also be described as industrial activities: the connection with the productive activities on the land puts such processing in a different category of industry, more closely associated with farming and extractive industry than with urban activity.
>
> [222] In this context the planning approach to rural processing activities is based less on the segregation of activities due to their effects on amenity values and more on promoting the proximity of activities to promote the efficient use and development of resources. Both are matters to which particular regard must be had under s 7 of the RMA: the relative weight to be given to such regard will be matters of fact and degree.

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154 EnvC judgment, above n 7, per Judge Kirkpatrick and Commissioner Buchanan (emphasis in original and footnote omitted). Commissioner Kernohan dissented on this issue: at [324], [337]–[345] and [347].

[133] The majority of the Court had earlier found that, on the uncontradicted evidence, the geological conditions that make the Ōtākiri aquifer readily available by means of a bore were only known to exist at Ōtākiri and near Murupara.[155] The evidence was also that European Union regulations require spring water to be bottled at source.[156] The Court found that this established the necessary functional need to set up the proposed operation at the application site within the rural plains zone.[157] Further, while the blow-moulding process for making bottles on site may be considered industrial in nature, this aspect of the operation was considered within the overall scope of "rural processing activity" as it is ancillary to the process of extracting water, packaging it and transporting it. Providing for these steps to be undertaken at source was, the Court considered, an efficient use of resources and consistent with the nature and scale of other rural processing activities found in the zone.[158]

[134] In the High Court, Gault J accepted the Environment Court's analysis.[159]

[135] The Court of Appeal began by analysing the nature of the Court's function in a second appeal on a question of law in the land use planning context. Applying *Centrepoint Community Growth Trust v Takapuna City Council*, the leading decision on the correct approach to determining whether an activity is covered by a term in a plan, the Court identified the three required steps: identify the essential characteristics of the defined activity in the plan; determine the relevant facts in relation to the proposed activity; and compare the two.[160] The Court then noted that steps two and three involve factual inquiries and so are subject to the principle in *Bryson v Three Foot Six Ltd*.[161] That is, where the court below has correctly understood the law and applied it to the facts, no question of law arises unless the evidence to support its application in the particular case is entirely lacking or entirely contrary to the conclusion reached.

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155 At [212] and [215].
156 At [213].
157 At [215].
158 At [227].
159 HC judgment, above n 7, at [244].
160 CA judgment, above n 8, at [142] citing *Centrepoint Community Growth Trust v Takapuna City Council* [1985] 1 NZLR 702 (CA) at 706.
161 CA judgment, above n 8, at [142]–[143] citing *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721 at [25]–[26].

[136] This meant, effectively, that the issue was whether the Courts below had properly interpreted the definitions of "rural processing activity" and "primary productive use". The Court of Appeal considered that the use of the descriptor "operation" in the opening clause of the definition of "rural processing activity" suggested that it embraced a variety of activities. That is, the overall "operation" could include activities not within the ambit of the included list—"processes, assembles, packs and stores"—provided they also involved dealing with the products of primary productive use. That did not necessarily mean, however, that different elements require separate treatment under the plan. Rather, again applying *Centrepoint*, the proper characterisation of an activity consisting of multiple elements is a question of fact and degree in which it may be possible to identify a single main purpose to which other elements are ancillary or incidental.[162]

[137] In this case the Court considered that the single main purpose is the extraction and bottling of water in which all elements form a part. The use of the term "operation" is, the Court considered, "apt to cover an activity that embraces a number of elements".[163]

[138] In any event, the Court considered, it is equally appropriate to view the land use activities as ancillary. The Court expressed its view in this way:

> [149] Alternatively, the land use activities that are necessary for the extraction may properly be regarded as ancillary to the operation. The District Plan defines "ancillary" as:
>
> > … small and minor in scale in relation to, and incidental to, the primary activity and serving a subordinate but supportive function to the primary activity. An activity that is of a scale, character or intensity that is considered independent of the princip[al] activity is not ancillary.
>
> [150] We consider the High Court was correct to consider the blow-moulding of plastic bottles was "ancillary" in terms of the above definition. In this context too, the fact that ancillary activities are not specifically referred to in the definition of "rural processing activity" is of no moment, because of the breadth of the definition and in particular the word "operation". We think that must cover everything that is involved in processing, assembling, packing and storing products, including forming up the packaging used to contain the product. This is all part of the "operation".

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162 CA judgment, above n 8, at [147] citing *Centrepoint*, above n 160, at 708.
163 CA judgment, above n 8, at [147].

[139] Finally, the Court rejected SOI's submission that water cannot be a "product" for the purposes of the definition because it is not the product of a primary productive use as required. The Court referred to the definition of primary productive use, observing first that such uses may either rely on the productive capacity of land or have a functional need to be located rurally; and second, that identified uses included extractive activities "such as" quarrying and mining. There was, the Court concluded, no reason to treat water extraction differently from the analogous examples in the definition itself.[164]

Submissions

[140] For SOI, Mr Salmon KC argued that, in ordinary usage, blow-moulding plastic bottles at scale and on a production line amounts to manufacturing them. He submitted that a key distinction between the definitions of "rural processing activity" and "industrial activity" is that only the latter includes manufacturing. Further, he submitted, the activity status table contained in r 3.4.1 of the WDP provides for "industrial including manufacturing activities", making it clear that manufacturing is to be treated as a subset of industrial activity.

[141] SOI argued that the Court of Appeal's approach would nullify the direction in the definition of industrial activity that milling and processing timber is to be treated as industrial rather than rural processing. This would arise because forestry is a primary productive use and timber is its product. On the other hand, the fact that "quarrying and mining" are specifically included in the definition of "primary productive use" did not, it was submitted, assist the application. Rather, as those activities are subject to separate detailed controls including, where appropriate, their own activity status, the express inclusion of quarrying and mining should not be seen as indicating that the definition of primary productive use is intended to import a wider category of extractive activities into rural processing activities.

[142] These contextual indications were, SOI submitted, neatly sidestepped by the Court of Appeal when it described the overall activity as a unitary composite comprising both extracting and bottling water.

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[164] At [151].

[143] Further, SOI submitted, the Court was wrong to accept that bottle making would in any event be "ancillary" in accordance with the definition of that term in the WDP. This is because "ancillary" is deployed in the WDP in relation to certain specific activities (for example, in relation to retail activities,[165] public reserves[166] and rural contractor depots,[167] among others). It is not intended to have the general effect of bestowing the activity status of the parent activity upon any activity that is ancillary to it. SOI submitted that the correct approach to proposals that involve multiple activities in planning terms is to "bundle" those activities and apply the most stringent status according to the principle in *Protect Aotea*.[168] In this case, that would mean the application is for a non-complying activity.

[144] Finally, SOI submitted that water is not a "product" of a "primary productive use". The primary product cannot, on the Court of Appeal's reasoning, be bottled water because it is only the bottling aspect that amounts to a "rural processing activity". In short, water extraction cannot be a "rural land use activity" because water extraction is not inherently "rural". Therefore, water cannot be a product because it does not rely on the productive capacity of land and there is no functional need for a rural location. SOI submitted further:

> It so happens that the water sought to be extracted here is located rurally, but there is nothing intrinsic in the activity that means it needs to be done rurally (in contrast to the activities specified, which plainly can only occur in a rural location).

[145] For OSL, it was submitted that "rural processing activity" overlaps with "industrial activity", an approach which is consistent with "sustain[ing] the productive potential of rural land … while still enabling appropriate processing activities to occur where the resources to be processed are grown or found".[169] Rather than being a "core and *determinative* aspect" of the project (the view expressed by SOI),[170] bottle making is simply part of processing, assembling and packing water. In this sense, it is no different to putting milk into containers at a dairy factory. It was submitted that all

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165 Rule 3.1.12.1 in relation to the Light Industrial Zone.
166 Rule 3.1.15.1 in relation to the Active Reserve Zone.
167 Rule 3.4.1, item 37.b.
168 *Protect Aotea*, above n 116, at [17].
169 EnvC judgment, above n 7, at [221] per Judge Kirkpatrick and Commissioner Buchanan.
170 Emphasis in original.

rural processing activities involve some element of manufacture. The defining element of rural processing is the explicit link with the products of primary productive uses. This link brings with it a functional need for a rural location that general industrial activities lack.

[146] In the present case, OSL pointed to factual findings in the Environment Court. The majority of that Court found:

(a) that the application site was not suitable for horticulture but very suitable for the extraction of mineral water;[171] and

(b) that the geological structure of the area's subsurface meant that the Ōtākiri district was one of only two areas known to provide practicable access to the Ōtākiri aquifer and therefore that there was a sufficient functional need for the project to be established in the Ōtākiri area.[172]

[147] OSL further submitted that the land use activity issues in the appeal do not give rise to a genuine question of law. Rather, and in accordance with the view expressed by the Court of Appeal, whether blow-moulding can be subsumed within the overall operation or should be addressed separately involves questions of fact and degree.

[148] Finally, OSL pointed to the Environment Court's conclusion that the effects of the overall activity would be no more than minor.[173] This finding, it was submitted, renders the activity status issue moot since, even if the project should be treated as a non-complying activity, the gateway in s 104D(1)(a) could be satisfied on the evidence.

[149] For the District Council, Mr Green supported the decision of the Court of Appeal. He too submitted that the WDP treats rural processing activities as overlapping with industrial activities to clarify that rural processing activities having an industrial character are legitimate in rural zones. That rural processing activities are permitted in industrial zones is consistent with this. But rural locations are only

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171 EnvC judgment, above n 7, at [300]–[303] and [308].
172 At [212] and [215].
173 At [307] and [320] per Judge Kirkpatrick and Commissioner Buchanan.

acceptable if there is a functional need for the activity to be located near the source of the product it processes. Timber milling and processing are industrial rather than rural processing activities because there is no functional need to mill or process timber close to its source.

[150] The District Council accepts that protecting productive rural resources is very important and reflected in the applicable provisions of the Bay of Plenty Regional Policy Statement (RPS).[174] But the RPS accepts that there will be some loss of versatile soil due to servicing and other needs, and according to Policy UG 23B:

> Rural production activities often have particular locational and functional requirements in terms of access to resources, relationship to support facilities and the management of environmental effects. It is therefore important that resource use is managed in a manner which recognises and provides for those locational and functional requirements.

[151] Further, provision for rural productive land values in the WDP is not limited to the value of soil versatility. The District Council submitted that provision is also made for exploitation of other natural resource values including that related to groundwater.

[152] As to the blow-moulding of plastic bottles, the District Council submitted this is little different to flat-pack cardboard boxes for fruit and produce. These too are assembled by onsite machinery before being filled with the relevant product. On the other hand, the District Council submitted, manufacturing naturally denotes making a product, at scale, from raw material using machinery. Counsel submitted "[b]low-moulding is part of the packaging process and exists in the overlap between manufacturing and processing." In the definition of "rural processing activity", the employment of the term "operation" to describe the overall activity shows the activity is expected to comprise a series of steps, each of which is integral to that activity. Further, it was submitted, blow-moulding is ancillary to the extraction of water for sale in the way that carton making is ancillary to fruit packing for sale.

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174 See Policy UG 18B.

Analysis

[153] While our reasons differ, we agree with the concurrent findings of the Courts below: the multiple steps that combine to result in water being extracted from the Ōtākiri aquifer, filtered, bottled and transported from the application site, amount to a rural processing activity within the meaning of the WDP definition. This means the proposed project is a discretionary activity.

[154] It does not matter that the blow-moulding step has manufacturing characteristics—in the sense that it makes plastic bottles at scale from bottle pre-forms. There will be other rural processing activities that have similar characteristics. The District Council referred to cardboard flat packs that are formed into fruit cartons by machines on a production line as one obvious example. And there will be other rural processing activities the scale of which renders their character and effects industrial in the usual sense of that term. They might include large produce packing houses and wineries, for example. We agree with OSL and the District Council that "rural processing activity" overlaps with "industrial activity".

[155] Further, it must be remembered that the main concern of the residents represented by SOI is the offsite amenity effects of the new operation's increased scale and intensity. Those effects are not, however, produced by the blow-moulding step that is said to give the operation an industrial character. In fact, shifting from pre-made bottles to blow-moulding was said to reduce the operation's carbon footprint and adverse amenity effects by reducing the number of heavy vehicle movements necessary to maintain the required output.[175] It would be counterintuitive—and, indeed, contrary to the RMA's effects-focused purposes—to interpret "rural processing activity" in a way that prevented the introduction of a step that mitigated adverse effects.

[156] It must be accepted that the contested definitions in this case are not the finest examples of legislative drafting, but their intention is plain and well supported by relevant RPS policies and provisions. The intention is best approached in two bites:

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[175] The rebuttal evidence of Mr Gleissner was that use of bottle pre-forms reduced the carbon footprint of production when compared with the existing glass bottle-based operation. In argument before us it was submitted that this reduction was achieved through reduced vehicle movements.

first, any activity that makes products by utilising the productive capacity of land or has a functional need to be rurally located is a "primary productive use"; and second, any activity whose purpose is to prepare those products for market (even where it comprises multiple steps undertaken at scale in a single overall operation) is a "rural processing activity" *provided* the processing operation "directly service[s] or support[s]" the primary productive use.[176] Here, the blow-moulding and bottling directly service or support the extraction of the water.

[157] In this, directness is read through from rural production activity to rural processing activity. Reference back to the definition of rural production activity (and, in turn, industrial activity) explains why this is the drafter's intention. It will be recalled that the definition of rural production activity is as follows:[177]

> … rural land use activities that rely on the productive capacity of land or have a functional need for a rural location such as agriculture, pastoral farming, dairying, poultry farming, pig farming, horticulture, forestry, quarrying and mining. *Also included in this definition are processing and research facilities that directly service or support those rural land use activities.*

[158] The italicised portion adds processing and research to the core production-focused definition. This WDP definition is taken from one in identical terms in the RPS.[178] But the RPS contains no definition of rural processing activities, nor is there separate provision for such activities in the RPS objectives and policies. Rather, Policy UG 23B refers only to rural production activities:[179]

> Rural production activities often have *particular locational and functional requirements* in terms of access to resources, *relationship to support facilities* and the management of environmental effects. It is therefore important that resource use is managed in a manner which recognises and *provides for those locational and functional requirements*.

[159] Coming back down the cascade to the WDP, rural production and processing are treated separately for the first time:[180]

> To enable rural activities such as farming, intensive farming, production forestry and mining to continue and prosper as part of the rural environment

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176 WDP, ch 21 definition of "rural production activity".
177 Emphasis added and formatting omitted.
178 Bay of Plenty Regional Policy Statement, Appendix A.
179 Emphasis added.
180 Objective Rur3 Policy 1 (emphasis added and formatting omitted).

> and *provide for directly related rural service activities and rural processing,* whilst avoiding significant adverse and/or cumulative effects on the surrounding environment.

[160] One can see how the treatment of this issue has evolved from the regional and generalised to the local and rural zone specific. But, remembering that "processing" is included in the definition of rural production activity in the RPS and WDP, there is a common thread across all definitions and policies. It is that the relationship between rural production and rural processing must be direct before the latter may be located in a rural zone, alongside the rural production activity it serves or supports.

[161] This also explains why processing is referred to in both the definition of rural processing activity and industrial activity: the difference is in the directness of the relationship between the processing and primary activities.

[162] Directness is not further defined. We consider it is used in the sense of co-location. Functional need for co-location would obviously suffice. A requirement in law for co-location would also suffice. Whether mere operational need or commercial preference will be enough is not a matter we need to resolve here, though we tend towards the view that they will not be. Nor is it necessary to resolve whether directness has a wider connotation—such as, simply, the step taken immediately following the "primary productive use" to prepare the product for market. But there is considerable reason to doubt that it does.

[163] Whether directness is made out is a question of fact—and, in this case, law. As outlined above at [133], the Environment Court made factual findings in favour of OSL in that regard:

> [212] It was Mr Goff's evidence that the special conditions needed to access the high-quality artesian water from the aquifer at Ōtākiri relate to fracturing of the Matahina ignimbrite and that this geological characteristic is not known to occur other than in the vicinity of the site and near Murupara.
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> [213] Mr Gleissner explained the marketing access reasons for bottling water at source and the investment that had gone into establishing the current plant and the two bores on the site. In his evidence he explained that in order to meet the regulations of the European Union for quality assurance, bottlers of water must identify the source and exact location of bottling operations and demonstrate full control of the bottling process. To be described as spring

> water, it must be bottled at source and the transport of water those authorised for distribution to the ultimate consumer is prohibited.
>
> [214] Counsel for Sustainable Ōtākiri submitted that these were operational rather than functional considerations and referred to passages in the statements of Mr Frentz and Mr Batchelor that he submitted supported that contention.
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> [215] It appears from our review of the evidence that the opinions of those witnesses are that not all cases of water bottling needed a rural location, but they both accept a functional need in this case, given the evidence of Mr Goff and Mr Gleissner. It appears from the evidence that not all water is the same, much as not all rocks are the same.

[164] The evidence of the occurrence and state of the Matahina ignimbrite at the site demonstrates that there is a functional need for abstraction to occur in Ōtākiri. And even if the processing plant could not piggyback on that functional need, the European Union regulations demonstrate that it is a legal requirement for abstraction and processing to be co-located. There can be no error of law in this respect for the reasons outlined by the Court of Appeal.[181]

[165] As to the alternative argument that water is not a "product" for the purposes of the definition of "rural processing activity", we also agree with the conclusion and reasons of the Court of Appeal in this respect.[182] The meaning of product must be construed from the associated definition of primary productive use, which returns the reader to the key requirements of productive capacity of land or functional necessity. Further, operating the physical plant associated with a bore (the bore itself, pump and piping) is a land use in its own right and must be a primary productive use because placing it in a rural location is a functional necessity.

[166] Finally in relation to activity status, we note that the Environment Court found that, even if individual adverse effects of the project, such as heavy traffic movements, would be "moderate", total adverse effects would be no more than minor when viewed holistically.[183] In this the Court took into account both proposed consent conditions and pre-existing effects generated from established activity on the site. SOI argued

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181 CA judgment, above n 8, [152].

182 At [151].

183 EnvC judgment, above n 7, at [307] and [320] per Judge Kirkpatrick and Commissioner Buchanan. The High Court, which agreed with the Environment Court, referred also to *SKP Inc v Auckland Council*: HC judgment, above n 7, at [265] citing *SKP Inc v Auckland Council* [2018] NZEnvC 81, [2018] ELHNZ 119 at [49].

that the Court's conclusion was driven by its finding that the project was a rural processing activity and so acceptable in a rural zone. While that may be so (it is unnecessary to come to a view on that), the Court's factual evaluation takes much of the materiality out of the issue.

Te mauri o te wai effects issue: did the Environment Court properly consider TRONA's tikanga evidence?

[167] The question here is whether the Environment Court failed properly to consider the effects in tikanga terms of exporting water from the Ōtākiri aquifer to offshore consumers. We have already addressed the treatment of plastics disposal and we do not intend to repeat that material here. Although before this Court TRONA supported SOI's plastic waste argument, this argument was not the focus of TRONA's case on end use effects.

[168] The most relevant background is this. The Environment Court found that the end use of exporting water in plastic bottles was irrelevant under s 104(1)(a). That, the Court considered, was because bottling and exporting are ancillary activities not able to be regulated by the Regional Council and are, in any event, too remote in terms of effects.[184] The High Court later found this "went too far".[185] The Environment Court did, however, go on to discuss and make findings based on the evidence concerning negative effects on te mauri o te wai of that end use.[186] For reasons we come to, the primary question for our purposes will be whether, in its discussion, the Environment Court considered that tikanga evidence and came to an available conclusion on it.

[169] Central to answering that question are the principles in *Bryson* as to the distinction between errors of law and errors of fact. Most relevantly:[187]

> [26] An ultimate conclusion of a fact-finding body can sometimes be so insupportable — so clearly untenable — as to amount to an error of law: proper application of the law requires a different answer. That will be the position only in the rare case in which there has been, in the well-known words of Lord Radcliffe in *Edwards v Bairstow*, a state of affairs "in which there is no evidence to support the determination" or "one in which the evidence is

184 EnvC judgment, above n 7, at [59]–[66] per Judge Kirkpatrick and Commissioner Buchanan.
185 HC judgment, above n 7, at [142].
186 EnvC judgment, above n 7, at [71] and following per Judge Kirkpatrick and Commissioner Buchanan.
187 *Bryson*, above n 161 (footnote omitted).

> inconsistent with and contradictory of the determination" or "one in which the true and only reasonable conclusion contradicts the determination". Lord Radcliffe preferred the last of these three phrases but he said that each propounded the same test.

[170] To assess whether the Environment Court's findings on te mauri o te wai were unsupportable on the evidence (as TRONA said) or available to the Court (as the respondents argued) requires consideration of both the evidence itself and how the Court assessed it. We begin by summarising the evidence before turning to the Environment Court's assessment of it and the reviews of that assessment in the High Court and Court of Appeal. We then set out the submissions of the parties in this Court and provide our own analysis of the issue.

The tikanga evidence in the Environment Court

[171] The complicating but very important context for this issue was that there were Ngāti Awa witnesses on both sides of the debate. For TRONA, joint evidence was given by two leading kaumātua of the tribe, Dr Hohepa Mason and Dr Te Kei Merito. Both were then members of Te Kāhui Kaumātua (TKK), a formal gathering of elders whose mandate is to protect the mauri of Ngāti Awa and to advise TRONA on matters relevant to its (TRONA's) business. They represented their respective hapū on TRONA. Both were in their 80s when they provided their evidence and they have since passed away, having lived lives in service of their hapū and iwi.

[172] For OSL, Mr Hemana Eruera gave evidence. He is a kaumātua of standing in his community (Te Teko) and his hapū (Te Pāhipoto), and he is the youngest son of the last ariki (paramount chief) of Ngāti Awa—the late Dr Eruera Manuera. Mr (Hemana) Eruera is also the vice chair of TKK, although in evidence he advised that he had stepped away from participation in TKK deliberations on the OSL application.

[173] All three kaumātua were impeccably credentialed both in terms of hapū leadership and the possession of tikanga knowledge. The record suggests that the disagreement between them over the OSL proposal was respectful, courteous and principled.

[174] In the Environment Court, Dr Mason gave the joint evidence of himself and Dr Merito as the latter was ill on the day of the hearing. Dr Mason began his evidence by giving the whakapapa of water according to the traditions of his people. He gave the names with which he was familiar for various ancestral manifestations of water as well as the names for its many forms and presentations. He gave two explanations for the name Ōtākiri, both related to the military prowess of Irāmoko, a principal ancestor of Ngāti Awa. He referred to Irāmoko's whakatauākī (proverb): "Ōtākiri te puna hei oranga mō ōku whakatipuranga" (the spring of Ōtākiri shall provide life for my future generations).

[175] Dr Mason acknowledged expert hydrogeological evidence to the effect that the proposal was "sustainable" in physical terms, but that did not change his view:

> We understand that the hydrogeologists have agreed that the take is "sustainable" mainly due to the amount of water in the [aquifer] and its regenerative nature. Despite this, our view remains to be that … the negative effects on te mauri o te wai are unacceptable and cannot be avoided.
>
> *E mārama ana māua kua whakaae ngā kaititiro wainuku he "toitū" tonu te tōwaitanga i te nui o te wai i te puna wai, me tana kaha tonu ki te whakaputa anō i te wai. Hāunga tēnei, ka pūmau tonu māua ki tā māua whakatau, ko te tūtohu a Creswell he tūkino i te mauri o te wai, kaua e whakaaetia, kāre hoki e taea te kaupare.*

[176] His starting and ending position was expressed in these terms:

> Creswell's Proposal will erode te mauri o te wai. The erosion is due to the amount of water being taken out of the system to then be bottled and sold. Not enough water has the opportunity to re-enter the system as a whole. The Proposal is therefore able to be distinguished from other activities such as irrigation. Creswell's Proposal is sucking the water out of the system to sell; and to sell a lot overseas. Given the nature of the Proposal, the effects on te mauri o te wai continue to remain and cannot be solved.
>
> *Ka tānoanoa te mauri o te wai i te tūtohu a Creswell. Ko te tānoanoatanga e pā ana ki te nui mārika o te wai e ngotea ana i ngā ara wai kia pātarahia, kātahi ka hokona. Otirā, kāre e nui rawa te wai e hoki tōtika tonu mai ana ki ngā ara wai. Nō reira, ka kitea tonuhia te tino pūtake o te tūtohu nei i ētahi atu mahinga pēnei i te whakamākūkū whenua pāmu. Ko te tūtohu a Creswell e ngote ana i te wai i ngā ara wai ki te hoko; ki te hoko i te nuinga ki tāwāhi. Ko te āhua tonu o te tūtohu nei, ko ngā tūkinotanga i te mauri o te wai e kore e taea te karo.*
>
> It seems this point is primarily where our evidence differs from that of our whanaunga Hemana Eruera who has provided evidence in support of the proposal.

I tēnei wā, ka rerekē ngā taunakitanga ki ērā o tō māua whanaunga a Hemana Eruera nāna nei ngā taunakitanga e tautoko ana i te tūtohu.

[177] Further, Dr Mason accepted that, as kaitiaki, Ngāti Awa must share the water within its rohe. He noted that this principle is confirmed in the Mataatua Declaration on Water 2012. But, he said, there were limits to sharing:

> However, to take away the amount of water Creswell want to outside of Aotearoa to then sell overseas, is not sharing the taonga. It is commodifying a huge amount of water and selling it which is a profit driven purpose. That is not our way and it is not supported by our tikanga.
>
> *Heoi anō, ki te tangohia e Creswell te wai nui nei ki ngā iwi kei waho o Aotearoa e noho mai ana, ka hokona ki whenua kē, ei, ehara tēnā i te mahi e whai pānga ai ki te taonga. He takahuri kē i te nui o te wai, kātahi ka hokona atu kia whai rawa rawa ai.*

[178] During cross-examination and in response to questions from the bench, Dr Mason made it clear that his primary complaint was with the export of so much water drawn from Ōtākiri rather than the drawing itself. He also made it clear that his focus was on the water within Ngāti Awa's rohe rather than water in the rohe of other tribes. He agreed that not all Ngāti Awa members supported his stance but he considered that his was the majority view. Finally, he said that Ngāti Awa's relationship of kaitiakitanga with water applied both to groundwater and water within the deeper aquifer—both were ancestral water.

[179] In support of OSL's application, Mr Eruera took a different view. He said that the concept of mauri does not just apply to water. He pointed out the potential employment benefits of the proposal to his hapū. He referred to the fact that the chairperson of Creswell's parent company, Nongfu, had visited his marae (Kōkōhinau) and expressed a wish to support Ngāti Awa through employment opportunities. Mr Eruera explained:

> I have also been asked whether it could affect the mauri of water to bottle it and sell it overseas. It does not make a difference. Bottling and selling water overseas is no different than if we were to drink the water ourselves; it is no different to the Whakatāne District Council's Braemar Water Scheme. It does not matter where the water is going because either way, the water will ultimately end up being returned to and enhancing Papatūānuku.
>
> When considering mauri it is important to look from a broader perspective. Part of the mauri of Ngāti Awa is the human aspect, the mauri of our people. For me, te mauri o te wai in this instance will have positive benefits as a result

of the Project, in terms of the impact the Project will have on our people and employment. That ability to provide for our living people and our future is a positive influence on the mauri. I am reminded of another saying of my father:

> *Kaua e tangi mō ngā mate, engari e tangi mō koutou katoa*
>
> *Kua haere kē rātou ki te ao maungārongo o tō tātou Matua i te rangi*
>
> *Kua mahue mai tātou ki tēnei ao hurihuri.*

In English:

> *Let us not grieve for the deceased, we need to grieve for ourselves.*
>
> *They are travelling on to the peaceful world of our Heavenly Father.*
>
> *We are left in this tumultuous world.*

In my view, provided Creswell respects the authority of the guardian of the mauri at all times, there will not be adverse effects on mauri.

[180] In cross-examination, Mr Eruera referred to the necessity for balance:

> I've always looked at it as there's two balancing things and that's the balance of negative and the balance of positivity, so I'm supporting the positive aspect of the mauri.

[181] While Mr Eruera appeared to accept that there may be some negative impact on te mauri o te wai, albeit outweighed by positive effects on te mauri o te iwi (the mauri of the people), he also preferred a less localised approach to understanding te mauri o te wai—an approach more in line with the views of the hydrogeologists:

> As water and other things are moved around, there is a perpetual transaction of mauri. As wai is extracted from a river or aquifer, it carries mauri with it, and so in that sense mauri leaves the river or aquifer. But as the wai is replenished through rainfall, the mauri is restored within the replacement wai as it returns to its original source — the water body. In this way, fresh water is a renewable resource with its renewable mauri. This is what my father meant when he said "*mā te taiao anō e manaaki te taiao*" — the environment will take care of itself.
>
> As the wai moves elsewhere, so too does the mauri within it. This is an important part of Creswell's proposal in this case. Where the wai from Ōtākiri goes locally, nationally or overseas and is consumed by a living person there, ka hāpaitia te mauri o te tangata — the life character of that person is enriched or uplifted by te mauri o te wai. Mauri wai (life essence of water) and mauri tangata (life character of mankind) are linked in this way.

> All things then return to Papatūānuku, and the cycle of mauri continues.

[182] In summary then, the OSL application is controversial among the hapū of Ngāti Awa. Despite this, there was no challenge to Dr Mason's evidence that most iwi members oppose the proposal—a point underscored by TRONA's stance, taken on behalf of the iwi. Nonetheless, Mr Eruera would place considerable weight on the advantages of the proposal to the mauri of his hapū through employment opportunities and the like, particularly in light of the facts that (a) on the scientific evidence, the scale of the take will not affect the physical health of the aquifer; and (b) te mauri o te wai can be understood on a global water cycle scale and from that perspective it will be unaffected.

[183] Drs Mason and Merito on the other hand insisted on a local focus as this, they considered, is the extent of Ngāti Awa's kaitiakitanga. They did not wish or presume to speak for other iwi or other wai. For their part, and whatever the scientific evidence, extraction and export of Ōtākiri water for profit and on the scale proposed is inconsistent with Ngāti Awa's kaitiakitanga obligations and injurious to te mauri o te wai. They accepted that these matters are sometimes a question of degree, but there was no doubt that this proposal crossed the line.

The Courts below

[184] In the Environment Court, the majority suggested that TRONA's stance was inconsistent with TRONA's own practices:[188]

> [97] No evidence was adduced to reconcile the asserted requirement for the return of the bottled water to Papatūānuku, at least within Aotearoa, in order for its mauri to be retained, with circumstances where other commodities heavily reliant on water from within the rohe, such as milk, meat and horticultural commodities are exported to all parts of the world. We understand that Ngāti Awa commercial enterprises hold consents for greater volumes and rates of take of water than that proposed by Creswell, taken from highly sensitive and culturally significant surface water resources such as the Tarawera and Rangitikei Rivers. We were not provided with any explanation as to the nature of any loss of mauri in these circumstances or how kaitiakitanga is exercised.

[188] EnvC judgment, above n 7.

[185] Further, "customary practice and traditional knowledge" had not had to deal with the export of bottled water, requiring a degree of adaptation of tradition:

> [100] Customary practices and traditional knowledge are not directly applicable to the export of bottled water. This is a modern-day question in which TKK has a role in applying traditional values and principles. It may have been useful for the Court to have had the benefit of the collective wisdom of TKK applying traditional values and knowledge to this modern issue. In the absence of this we have no evidence of a coherent widely held belief within Ngāti Awa regarding the adverse metaphysical effects of taking water for bottling and export.

[186] In light of this, the Court applied the so-called "rule of reason" test adopted in *Ngāti Hokopū ki Hokowhitu v Whakatāne District Council*, in which the Court identified indicators against which to test the strength of traditional evidence.[189] They were as follows:[190]

- whether the values correlate with physical features of the world (places, people);
- people's explanations of their values and their traditions;
- whether there is external evidence (e.g. Māori Land Court Minutes) or corroborating information (e.g. waiata, or whakataukī) about the values. By "external" we mean before they became important for a particular issue and (potentially) changed by the value-holders;
- the internal consistency of people's explanations (whether there are contradictions);
- the coherence of those values with others;
- how widely the beliefs are expressed and held.

[187] The Court preferred the broader approach to mauri of Mr Eruera as, it considered, this was consistent with the hydrogeological evidence.[191] The Court summed its view up in this way:

> [156] In assessing the evidence on the primary issue of the adverse metaphysical effects resulting from the asserted loss of mauri from the water that is bottled and exported, we have accepted Mr Eruera's evidence that there is no loss of mauri from the water as the water remains within the broad global

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189 *Ngāti Hokopū ki Hokowhitu v Whakatāne District Council* (2002) 9 ELRNZ 111 (EnvC).

190 EnvC judgment, above n 7, at [101] per Judge Kirkpatrick and Commissioner Buchanan citing *Ngāti Hokopū*, above n 189, at [53].

191 See EnvC judgment, above n 7, at [103]–[107] per Judge Kirkpatrick and Commissioner Buchanan.

> concept of the water cycle and is returned to Papatūānuku irrespective of where it is used. In doing so we respect the honestly-held beliefs of Dr Mason and Mr Merito that for some of the people of Ngāti Awa the export of water in bottle form results in loss of the mauri of the water and that this cannot be restored. There is inherent difficulty in assessing the extent of metaphysical beliefs. In our overall consideration of the evidence on this point, we find that any adverse effect that may be perceived by members of Ngāti Awa has not been shown to be of a nature and scale that warrants refusing consent on this basis alone.
>
> [157] The biophysical evidence supports a conclusion that the proposed take would have negligible effects on the aquifer resource or on any ground or surface water resources in the wider Tarawera Catchment.
>
> [158] No evidence was adduced as to the potential for any metaphysical effects on the aquifer resource itself. The establishment through conditions of consent of the Kaitiaki Liaison Group with direct linkage to monitoring of the resource will, on the evidence of Mr Eruera, ensure the ongoing ability of the hapū and the Rūnanga to exercise kaitiaki according to Ngāti Awa tikanga in the future management of the Ōtākiri aquifer. We accept this evidence of Mr Eruera. We find that the project will not unreasonably prevent the exercise of kaitiakitanga by Ngāti Awa in its rohe. As we have already found in relation to our jurisdiction, we cannot control the export of water from the rohe.

[188] In the High Court, in which the appeals were brought as questions of law, the debate over tikanga effects was a part of the broader end use effects issue which included plastic waste. It was argued by TRONA in that Court that the assessment of the tikanga evidence could not be separated from the Environment Court's prior finding that end use effects were already outside the scope of s 104(1)(a). This meant, TRONA argued, the tikanga basis for the opposition of Drs Mason and Merito to the proposed export at scale for profit had been effectively ignored.

[189] Gault J rejected the Environment Court's jurisdictional bar to consideration of end use effects. The Judge found that the relevance of end use effects will be a matter of fact and degree, relying in this regard on dicta in *Buller Coal*.[192] That said, the Judge acknowledged that the Environment Court had nonetheless made factual findings in relation to the tikanga evidence about end use effects. This meant, he concluded, the Environment Court's error in relation to jurisdiction was not material to its treatment of the tikanga issue.[193] He noted that those factual findings were not directly challenged (and could not be in an appeal on a point of law). He concluded

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192 HC judgment, above n 7, at [136] and [157] citing *Buller Coal*, above n 36, at [119] per McGrath, William Young and Glazebrook JJ.

193 At [119].

that, were it not for those factual findings, he would have remitted the tikanga issue for rehearing as it could not be said that reconsideration could not possibly produce a different result.[194]

[190] The Court of Appeal declined to grant leave on this point, considering it a factual rather than legal question and endorsing the High Court's findings.[195] As a result, TRONA's challenge to the Environment Court's treatment of tikanga was, in substance, folded into the question of whether the Court ought to have had recourse directly to pt 2—either because the relevant planning documents do not provide sufficient guidance on the question or because applying a sustainability lens, as the Environment Court had done, failed to address the gravamen of TRONA's tikanga evidence. We address those matters more directly under the next issue.

Submissions

[191] In this Court, as in the High Court, TRONA's argument was that the Environment Court's finding on jurisdiction was so central to its approach to the case that it prevented the Court from considering the effects of export on te mauri o te wai. Reference is also made in submissions to the effect of plastic bottle disposal, but we have already dealt with that question, and on our consideration of the evidence, it was not the core concern of the evidence of Drs Mason and Merito.

[192] In any event, TRONA submitted that its appeal was not a challenge to the Court's factual findings on physical effects, but to its failure to consider end use effects in tikanga terms. Contrary to the finding of the High Court, it was submitted this was a material error. The essence of Ms Irwin-Easthope's argument is captured in the following:[196]

> 57. Importantly, the High Court held that, had the Majority not made those subsequent factual findings on the tikanga effects of the take, the Court would have remitted the issue.[197] The specific factual findings cited by the High Court therefore require careful analysis.

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194 At [208].

195 CA leave judgment, above n 16, at [5(2)]; and CA amended leave judgment, above n 16, at [15]–[18]. See also CA judgment, above n 8, at [4]–[5].

196 One footnote omitted.

197 HC judgment, above n 7, at [208].

"…there is no loss of mauri from the water as the water remains within the broad global concept of the water cycle and is returned to Papatūānuku irrespective of where it is used"[198]

(a) Ngāti Awa submits that this conclusion of the Court is focused on the physical sustainability of the take premised on concepts of water cycles and the physical return of wai to the land. This frame is reinforced by the Majority's conclusion that Mr Eruera's evidence "is consistent with the biophysical western science understanding of all water as part of a constant replenishing global cycle".[199] However, this analysis becomes quickly circular as Mr Eruera himself premised his views here on the hydrogeologists evidence that the water supply will not be depleted through Creswell's extraction. We do not challenge the evidence of Mr Eruera as his view, however, it is relevant to determining whether or not the Environment Court Majority did in fact consider the effects on te mauri o te wai of the export, a matter Ngāti Awa submits the Majority did not do.

(b) The conflation of sustainability and cultural matters with biophysical effects was recently at issue before the Supreme Court in *Trans-Tasman Resources Limited v The Taranaki-Whanganui Conservation Board*.[200] Ultimately, the Supreme Court concurred with the Court of Appeal's analysis and held that what was required by the Environmental Protection Agency's Decision Making Committee was "to indicate an understanding of the nature and extent of the relevant interests, both physical and spiritual, and to identify the relevant principles of kaitiakitanga said to apply."[201] The Decision Making Committee did not do so and this was an error of law. Counsel submit that a similar conflation occurred in this case by the Environment Court Majority in assessing cultural effects through a biophysical sustainability lens. The Court did not grapple with the evidence of Drs Mason and Merito as they had said they could not and then they did not; rather, the Majority simply addressed Mr Eruera's evidence framed within a sustainability context.

…

"Considering the export of this water, we do not find any reason why, if the take is sustainable, the export would not be. Any use of the water, particularly a consumptive use, will have generally similar physical effects.... In terms of the evidential basis on which we might refuse consent to the increased take because of its intended purpose for export, we do not see any sufficient connection in this case, either in terms of physical or metaphysical effects of

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198 At [112] citing EnvC judgment, above n 7, at [156] per Judge Kirkpatrick and Commissioner Buchanan.

199 EnvC judgment, above n 7, at [102] per Judge Kirkpatrick and Commissioner Buchanan.

200 *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801.

201 At [161] per William Young and Ellen France JJ. See also Williams J at [297] endorsing the approach of William Young and Ellen France JJ.

export, for basically the same reasons as our assessment of the physical and metaphysical effects of the take"[202]

(e) When read in context, this conclusion was limited to the physical sustainability of the take on the aquifer, and not premised on the effects that the export itself will have on te mauri o te wai.

(f) The end use effects should have been properly considered and understood within the context of the evidence given by Ngāti Awa. This would have required the Court to work through all of the evidence on the end use effects which were framed holistically by Ngāti Awa's witnesses; and through the lens of the sustainability of the take by Mr Eruera. The Court must be clear about *why* it is disregarding particular evidence or preferring evidence. The Court did not undertake this exercise in relation to end-use effects.

[193] The burden of the respondents' argument on this issue was carried by Ms Hill for the Regional Council. She submitted that the issue was not whether the Environment Court considered itself jurisdictionally constrained, but whether the Court addressed tikanga effects and made factual findings. Since the Court did that, those findings cannot be disturbed except on the basis identified in *Bryson*. Ms Hill submitted that the judgment in the Environment Court demonstrated that Court was well aware of the evidence of tikanga related to metaphysical effects.

Analysis

[194] As foreshadowed, we agree that the principle in *Bryson* as to when findings of fact become errors of law is central here. Since the Environment Court did consider the tikanga evidence, the submission was essentially that the Environment Court so misunderstood, misapplied or ignored TRONA's evidence about end use effects on te mauri o te wai as to amount to an error of law in *Bryson* terms. The submission was put in three related but subtly different ways. First, that the Environment Court's exclusion of end use effects from consideration in its "jurisdictional overview" erroneously constrained all that followed, including its assessment of the tikanga evidence about end use effects. Second, that the Court determinedly focused on the aquifer to the exclusion of all else, leading it to ignore TRONA's evidence of the effects of export on mauri and kaitiakitanga. And third, that the Court conflated

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[202] HC judgment, above n 7, at [114] citing EnvC judgment, above n 7, at [107] per Judge Kirkpatrick and Commissioner Buchanan.

evidence about te mauri o te wai on the one hand and aquifer sustainability on the other, erroneously treating them as essentially the same thing. These slightly different formulations were, we consider, different ways of putting the same core proposition which is that in light of the evidence of the end use effects on the mauri of the aquifer and Ngāti Awa's kaitiakitanga, the Environment Court's conclusions in those respects were untenable. We do, however, respond to all three formulations.

[195] It is obvious that the Environment Court was correct when it suggested that bottling and exporting water for sale is not an activity that was well known or accounted for in tikanga experience. It is unsurprising, therefore, that eminent mātanga (experts) brought different perspectives to the problem. Like experts in any system of law, they were applying familiar and accepted principles to new facts and testing the appropriateness of that application through argumentation.

[196] One side emphasised local impact on the wai and the obligation of the iwi to care for its own resource for the benefit of all. The deep discomfort was with putting so much water beyond the influence of Ngāti Awa just to sell it. This, the mātanga considered, undermined Ngāti Awa's kaitiakitanga. "Too much water to be sold too far away", as Ms Irwin-Easthope put it.

[197] On the other side, Mr Eruera acknowledged that diverting water from its natural flow to another course entirely is wrong in tikanga terms but what weighed heavily with him was that the project presented a significant opportunity for his own community at Te Teko in terms of jobs and the building of whanaungatanga relationships with Nongfu. In those circumstances, he felt able to take a wider view of te mauri o te wai—beyond the local. He considered that the science of water cycles supported him in that approach. In this way, he could factor in the positive effects as he viewed them alongside the negative ones.

[198] The Environment Court applied its "rule of reason" approach to resolving tikanga conflicts, but unsurprisingly obtained little assistance there, other than finding that the Mason/Merito approach was not universally supported in Ngāti Awa.[203] It should not therefore, the Court found, be controlling of its approach to tikanga.

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[203] EnvC judgment, above n 7, at [101]–[105] and [156] per Judge Kirkpatrick and Commissioner

[199] It is easy to see why large-scale removal for sale of a taonga over which kaitiakitanga is both asserted and acknowledged may be seen as inconsistent with basic tikanga principles; and why the science of aquifer recharge may be seen to miss the point. On that traditional view as espoused by Drs Mason and Merito, the relationship of iwi and hapū with wai can only ever be local. Other wai is for other kaitiaki to protect and the mauri of one wai should not be mixed with another. Not only is this view honestly held, as the Environment Court accepted, it is very orthodox and has its own internal logic.[204]

[200] Mr Eruera's view, on the other hand, might be said to be less traditional, but it reflects a tension between tikanga of environmental management and tikanga of community well-being which acknowledges the mauri of the people and the importance of building lasting relationships with those who offer advantages to one's community. It also reflects a perhaps more contemporary view that mauri can, in the abstract, be framed in terms of a national, or even global, phenomenon and so inform, and be informed by, western science.

[201] It is clear that the Environment Court grappled with the substance of the debate about what kinds of end uses of water are acceptable in tikanga terms, and it came to its own view as to which approach could best be reconciled with the overall evidence in the case. The Court was invited to choose, and it did.

[202] Though the Court erred in relation to jurisdiction, it cannot be said that its conclusion in relation to the tikanga evidence was reached without due consideration of TRONA's evidence. We are not prepared to accept that the Court's wrong view on jurisdiction unduly influenced its finding on the tikanga evidence, or that its assessment of that evidence was a reverse-engineered make-weight that added nothing to the true reason for its conclusion. The Court understood that the application raised a somewhat novel situation and that there was room for debate. It, perhaps unsurprisingly, preferred the less traditional, wider view of mauri offered by Mr Eruera, as this was more consistent with the scientific and biophysical

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Buchanan.

[204] See, for example, Waitangi Tribunal *Manukau Report* (Wai 8, 1985) at 56; and *Ngāti Rangi Trust v Manawatū-Whanganui Regional Council* [2004] ELHNZ 186 (EnvC) at [331].

sustainability evidence it had heard. That was a conclusion it was entitled to reach. We see no error of law either in terms of the correct approach to the issue or in *Bryson* terms.

[203] In any event, it is clear that the Environment Court would decide this issue the same way even if, contrary to the view we have expressed here, we were to remit the matter for reconsideration. This is because, as we have said, the Environment Court genuinely grappled with the substance of the tikanga evidence. Its assessment was not superficial.

The pt 2 issue: should the Environment Court have applied pt 2 of the RMA directly?

[204] TRONA argued, in addition to the end use issue, that it was not possible to resolve the conflict with OSL over impacts on te mauri o te wai in the Ōtākiri aquifer without calling in aid the tikanga-related provisions of pt 2 of the RMA.

[205] By way of overview, in addition to s 5 on "sustainable management", pt 2 identifies eight matters of national importance to be "recognise[d] and provide[d] for".[205] Relevantly on this issue, these matters include "the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga".[206]

[206] Eleven other matters to which "particular regard" must be had are provided by s 7 including, relevantly, "kaitiakitanga"[207] which is defined in s 2 as:

> … the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Maori in relation to natural and physical resources; and includes the ethic of stewardship

[207] And, under s 8, "account" must be taken of the principles of the Treaty of Waitangi.

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205 Section 6.
206 Section 6(e).
207 Section 7(a).

[208] In this case, therefore, decision-makers must recognise and provide for the relationship of Ngāti Awa and its culture and traditions with its ancestral water; have particular regard to Ngāti Awa's kaitiakitanga in relation to wai; and take account of Treaty principles such as the guarantee of tino rangatiratanga in respect of Ngāti Awa's taonga and the duty to actively protect that taonga.

[209] Implicit in TRONA's argument is the suggestion that the cascade of RMA instruments designed to advance the purpose of the Act, and pt 2 generally, have failed to address properly the Māori-specific provisions listed here, causing the Environment Court to fall into error. In this respect, TRONA called in aid the Court of Appeal's decision in *RJ Davidson*, which, as we have noted, explains that where a plan does not properly reflect pt 2, "the consent authority will be required to give emphasis to pt 2".[208]

[210] The difficulty with this argument is that the Environment Court's decision did not turn on whether Ngāti Awa's relationship with the Ōtākiri aquifer had been recognised and provided for, nor whether particular regard had been had to Ngāti Awa's kaitiakitanga or its rangatiratanga in terms of art 2 of the Treaty of Waitangi. The Court considered these matters as they arose on the evidence. The fact is, there was a substantive debate among the experts as to what effects the proposal would have on these interests. Mr Eruera took the view that the proposal would not undermine Ngāti Awa's relationship with the wai and would provide benefits to his hapū, if not the iwi. Drs Mason and Merito considered the amount of the take and its end use unthinkable. As noted above, this left the Court with a choice, which it made. It is difficult to see how direct reference to ss 6(e), 7(a) and 8 could have made any difference in light of the Court's factual findings.

[211] It is unnecessary to repeat the full assessment made by the Court of Appeal of the provisions of the National Policy Statement for Freshwater Management 2014 (as amended in 2017), the RPS and the Bay of Plenty Regional Natural Resources Plan. We agree with that Court's conclusion that the tikanga and Treaty-based issues arising

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[208] *RJ Davidson*, above n 70, at [74].

in this case were amply covered by the provisions of those instruments. There was, as the Court of Appeal concluded, no point in resorting directly to pt 2.[209]

Result

[212] Sustainable Otakiri Inc's appeal is dismissed.

[213] Te Rūnanga o Ngāti Awa's appeal is dismissed.

[214] We reserve costs. If the parties cannot agree on costs in this Court, they must file submissions, not longer than five pages each, according to the following timetable:

(a) Respondents: 26 November 2025

(b) Appellants: 10 December 2025

WINKELMANN CJ AND GLAZEBROOK J
(Given by Glazebrook J)

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[209] CA judgment, above n 8, [109]–[110].

Introduction

[215] These appeals concern a proposed expansion of an existing water bottling business on a rural property near Whakatāne.

[216] The proposal involves the construction of a new production plant alongside the existing plant.[210] The existing bottling line is to be upgraded from its current maximum capacity of 8,000 bottles per hour to a maximum capacity of 10,000 bottles per hour. The new building will contain a plastic blow-moulding machine and two new high-speed bottling lines, each producing 72,000 bottles per hour, meaning that overall production will increase from 8,000 bottles per hour to 154,000 bottles per hour. It is proposed that the bottling operation will run 24 hours a day, seven days a week, increasing the current maximum water take from approximately 327,000 m^3 annually to 1.1 million m^3 annually. The water will be extracted from a new bore drilled in 2017, with an existing bore[211] as a backup.[212]

[217] Resource consents were sought from the Bay of Plenty Regional Council to take water and from the Whakatāne District Council to allow the expansion of the

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210 This would replace the kiwifruit orchard which is currently on the site.

211 The associated groundwater right had originally been granted in 1979 for kiwifruit irrigation but in 1991 had been modified to allow, among other things, for commercial water bottling: see *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2020] NZHC 3388, [2021] NZRMA 76 (Gault J) [HC judgment] at [4].

212 For more details, see *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2019] NZEnvC 196, (2019) 21 ELRNZ 539 (Judge Kirkpatrick, Commissioners Buchanan and Kernohan) [EnvC judgment] at [14]–[24] per Judge Kirkpatrick and Commissioner Buchanan; HC judgment, above n 211, at [3]–[15]; and *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2022] NZCA 598, [2023] NZRMA 280 (Cooper, Goddard and Dobson JJ) [CA judgment] at [7]–[12]. See also the reasons of Ellen France, Williams and Kós JJ (the majority) above at [5]–[12].

water bottling plant. The applications were granted by a panel of two independent commissioners acting on behalf of both Councils.[213] Various parties appealed to the Environment Court, including Te Rūnanga o Ngāti Awa (Ngāti Awa) and Sustainable Ōtākiri Inc (SOI).[214] By majority the Environment Court dismissed the appeal. The appeals to the High Court and the Court of Appeal were also dismissed.

Issues

[218] The issues we address are:

(a) whether the effect on the environment of plastic bottle production is a relevant effect under s 104(1)(a) of the Resource Management Act 1991 (RMA);

(b) whether under the Whakatāne District Plan the proposal is a "rural processing activity" or an "industrial activity";

(c) whether the tikanga evidence was properly considered (with the related issue of whether the Environment Court should have had recourse to pt 2 of the RMA directly); and

(d) whether the matter should be remitted to the Environment Court to consider whether it should have sought further evidence or declined the applications.

Summary of our conclusions

[219] Commissioner Kernohan, in the minority in the Environment Court, would have declined the applications.[215] His concern was with the "adverse effects on the environment of the end use of plastic bottles manufactured on site" and he was of the view that the "activity status for the resource consent application should have been considered as an industrial and therefore non-complying activity with wider public

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213 See EnvC judgment, above n 212, at [5] per Judge Kirkpatrick and Commissioner Buchanan.
214 HC judgment, above n 211, at [18].
215 EnvC judgment, above n 212, at [322].

notification".[216] We consider he was correct on both of these issues (identified at [218(a)–(b)] above) for the reasons he gave and for the reasons we give below. We also consider that the error in relation to the first issue meant that the majority of the Environment Court erred in law in its consideration of the tikanga evidence and Ngāti Awa's submissions before it. The matter should be remitted to the Environment Court for reconsideration.

Is plastic pollution a relevant environmental effect under the RMA?

[220] We first set out some relevant background on the effect of plastic pollution and then summarise the decisions of the Courts below before reaching a conclusion on this first question.[217]

Background

[221] United Nations Secretary-General António Guterres said in his 2025 message for World Environment Day that:[218]

> Plastic pollution is choking our planet — harming ecosystems, well-being, and the climate.
>
> Plastic waste clogs rivers, pollutes the ocean, and endangers wildlife.
>
> And as it breaks down into smaller and smaller parts, it infiltrates every corner of Earth: from the top of Mount Everest, to the depths of the ocean; from human brains; to human breastmilk.

[222] The May 2024 *Issues Brief* of the International Union for Conservation of Nature said that over 460 million metric tonnes of plastic are produced each year.[219] Further, it estimated that 20 million metric tonnes of plastic litter ends up in the environment every year, an amount expected to increase significantly by 2040. It said that:[220]

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216 At [324].

217 The submissions of the parties on this issue are summarised in the majority's reasons above at [35]–[44] and [68]–[69].

218 António Guterres "Secretary-General's message on World Environment Day" United Nations (5 June 2025) <www.un.org>.

219 International Union for Conservation of Nature "Issues Brief: Plastic Pollution" (May 2024) <www.iucn.org>.

220 Emphasis omitted.

> Discarded improperly, plastic waste pollutes and harms the environment, becoming a widespread driver of biodiversity loss and ecosystem degradation.[221] It threatens human health,[222] affects food and water safety, burdens economic activities, and contributes to climate change. …
>
> Much of the world's plastic pollution is generated by single-use products such as bottles, caps, cigarettes, shopping bags, cups, and straws.

[223] The United Nations Environment Assembly on 2 March 2022 adopted a resolution committing to the negotiation of an international legally binding instrument to end plastic pollution.[223] The preamble noted with concern:

> … that the high and rapidly increasing levels of plastic pollution represent a serious environmental problem at a global scale, negatively impacting the environmental, social and economic dimensions of sustainable development … [and] the specific impact of plastic pollution on the marine environment.

[224] In 2019, in its report on plastics, the Royal Society | Te Apārangi said that plastics can enter the environment at any stage of product manufacturing, use and disposal. The lightweight and durable properties of plastics mean that discarded plastics "are persistent, highly-mobile pollutants that are easily transported around the globe".[224] Many plastics ultimately enter the ocean, regardless of where they were discarded.[225] The report says that weathering eventually makes plastics brittle and

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221 It is said that "[a]ll land, freshwater, and marine ecosystems are affected by plastic pollution. Natural ecosystems provide a broad range of services that are not only fundamental for conservation, but also key for economies and human well-being" (emphasis omitted).

222 It is noted that "microplastics have been found in human blood and placentas and in food and drinks, including tap water, beer, and salt" (emphasis omitted). The publication points out that "[s]everal chemicals used in the production of plastic materials are known to be carcinogenic and can cause developmental, reproductive, neurological, and immune disorders."

223 *End plastic pollution: towards an international legally binding instrument* EA Res 5/14 (2022). The most recent negotiations for the binding international instrument on plastics adjourned on 15 August 2025 without a consensus on the text of the instrument. The Intergovernmental Negotiating Committee agreed to resume negotiations at a future date, which is yet to be announced: United Nations Environment Programme "Talks on global plastic pollution treaty adjourn without consensus" (press release, 15 August 2025). The negotiations failed to reach a resolution, not because of a disagreement over the effects of plastic, but because of issues over the scope of any proposed instrument: whether it should cover the whole plastic lifecycle or concentrate on plastic waste reduction: Andrea Willige "INC-5.2: The global plastics treaty talks – here's what just happened" (15 August 2025) World Economic Forum <www.weforum.org>.

224 Royal Society | Te Apārangi *Plastics in the Environment: Te Ao Hurihuri – The Changing World* (July 2019) [Royal Society report] at 19. This report was put before the Court of Appeal by Sustainable Ōtākiri Inc [SOI] in its application for leave to appeal to that Court.

225 At 22.

vulnerable to fragmentation, and this can release toxic chemicals into the environment. Eventually, most non-biodegradable plastics will form microplastics.[226]

[225] In many developed nations, the final destination for the majority of plastic waste is landfills, where many plastics will remain "for decades or even centuries, due to their resistance to microbial degradation and requirements for oxygen and ultraviolet light to aid degradation".[227] Plastic waste can be incinerated if burnt at extremely high temperatures but this releases toxic fumes known to cause cancer and birth defects.[228] Ash generated can likewise be hazardous to human health and the environment.[229]

[226] At the time of the report, only an estimated 14–18 per cent of plastic waste was recycled globally.[230] The report said that recycling can reduce the loss of plastics into the environment, but recycled plastics are typically "down-cycled" (made into items of lower value). Each time an item is recycled, the quality declines, meaning eventually "it is no longer useful as a source of raw material for new plastic products."[231] The majority of plastic products "are still in existence in some shape or form".[232]

[227] Plastic, once in the environment, has numerous adverse environmental effects.[233] These include harms to animals through entanglement[234] and providing a vehicle for invasive species or disease to travel around the world's oceans.[235]

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226 At 23. These are minute plastic particles usually less than 5 mm in size. In 2014, the ocean contained an estimated 15–51 trillion microplastic particles, not counting those that had sunk to the seabed or been deposited on shorelines around the world: at 24.

227 At 14.

228 From 1950–2015, 12 per cent of plastic waste was incinerated globally: at 12.

229 At 15.

230 At 16. Some plastics are uneconomical to recycle because of the volumes required for recycling and the costs of collecting and sorting: at 16. There are biodegradable and compostable plastics, but home compost systems are rarely suitable for these: at 18.

231 At 17. Contamination is also an issue.

232 At 28.

233 At 28–35.

234 At 28.

235 At 30.

Ingestion of plastic by animals can have devastating effects,[236] and various toxic chemicals can leach into the environment from plastics.[237]

[228] We accept SOI's submission that the mechanisms of plastic pollution and the effects of plastics in the environment described above are so well known that this Court can have regard to them.

Environment Court decision

Majority

[229] The Environment Court majority said that Ngāti Awa had urged the Court to consider the "total nature of the consents applied for, including the take from the aquifer, the bottling of the water and its export overseas".[238] It was noted that none of the other parties raised the end-use issue in their opening argument, but both the Bay of Plenty Regional Council and Creswell NZ Ltd (Creswell)[239] had submitted that end use was not an issue for the Court.[240] The majority said:

> [40] The Court is aware that there is growing public concern and increasing political debate about the issues relating to commercial interests, particularly foreign-owned companies, exporting high quality freshwater from New Zealand without having to pay royalties or other charges to do so. There is also increasing concern about the use of plastics in packaging and containers, especially where such plastic products are designed to be for a single use and not recyclable, or where opportunities for and the practice of recycling are limited, leading to significant volumes of long-lasting waste. There is also an ongoing public discussion about the rights and interests of Māori in water separate from or beyond the issues that arise from consideration of pt 2 of the RMA although, as noted, counsel for the Rūnanga did not advance such matters in presenting her client's case before us. These matters all raise important issues, but the undoubted importance of these issues does not, by itself, confer jurisdiction on the Court.

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236 At 31. Ingestion of microplastics can have a particularly adverse effect on smaller animals: at 31–32. Microplastics have been detected in many seafood species, table salt, tap water, up to 90 per cent of bottled water and in the air. At the time of the 2019 report it was not yet known what degree of harm this exposure may be causing to human health: at 34.

237 At 32–33.

238 EnvC judgment, above n 212, at [38].

239 Creswell NZ Ltd [Creswell] is a New Zealand company whose ultimate parent company is a large Chinese bottled water supplier. Creswell was the initial applicant for the resource consents, having agreed in 2016 to purchase Ōtākiri Springs Ltd's land and business, subject to the consent applications being granted. That sale and purchase agreement was cancelled before the hearing in this Court and Cresswell transferred its rights and interests in the resource consents to Ōtākiri Springs Ltd, which intends to continue with Creswell's initial proposal. See above at [2] and [5] per the majority.

240 EnvC judgment, above n 212, at [39].

[230] After reviewing the authorities, including this Court's decision in *West Coast ENT Inc v Buller Coal Ltd* (*Buller Coal*),[241] the majority held that the end uses of the water ("putting the water in plastic bottles, exporting the bottled water and consumption of it by people outside New Zealand") are "ancillary activities which are not controlled under the regional plan". Nor were they aware of any direct control of such activities under other legislation. They therefore proceeded on the assumption that such activities are lawful. The majority continued:[242]

> While such end uses are foreseeable, and while the effects on the environment of using plastic bottles and exporting water may well be adverse, refusing consent to the taking of water in this case will have no effect on all other instances where plastic bottles are used in New Zealand or where water is exported, whether in its natural form or as a component of other exports. We do not have specific evidence on the relative quantities involved, but as far as we understand the position, the scale of the proposed operation in this case would be a small component of the total bottling and export activities in New Zealand.

[231] The majority said that they did not consider that:[243]

> …on an appeal in relation to a particular proposal to take water we can, by our decision, effectively prohibit either using plastic bottles or exporting bottled water. Such controls would require direct legislative intervention at a national level.

[232] In conclusion, the majority considered that the end uses of putting the water in bottles and exporting it are matters outside the scope of consideration of an application for resource consent to take water.[244]

Minority

[233] Commissioner Kernohan noted that the current production of the existing water bottling plant was 8,000 bottles of water per hour. The new total was to be 154,000 bottles per hour, equating to 3.7 million bottles per day and 1.35 billion bottles per year for the next 25 years.[245] He said:

> [331] The adverse effects on the sustainable management purposes of the RMA of the manufacture, use, and specifically the disposal of plastic bottles

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241 *West Coast ENT Inc v Buller Coal Ltd* [2013] NZSC 87, [2014] 1 NZLR 32 [*Buller Coal*].
242 EnvC judgment, above n 212, at [64].
243 At [65].
244 At [66].
245 At [327].

> is pollution with widespread environmental damage to fauna and flora. Plastic bottles among other plastic products are almost entirely not bio-degradable and while on occasion they are suitable for re-cycling and re-use, ultimately do not break down beyond micro-plastics. They end up at best in various states in landfills and at worst in eco-systems where they have considerable ongoing adverse effects on those systems.

[234] Commissioner Kernohan said that there had been very little evidence from any of the parties about the environmental consequences of creating 1.35 billion new plastic bottles or of "any proposed actions to avoid, remedy or mitigate any of the pollution effects on the environment". He commented that "[t]here appeared to be a general view that as water bottling is a legal activity there was no more to be said about the environmental impact of such production."[246] He said:

> [333] Creswell expressed little concern for the life cycle of the new plastic bottles they are creating nor of the final destination of their disposal. When asked, Mr Gleissner made general remarks about re-cycling and the life-cycle of plastic bottles prior to going to landfill or wherever. No information was provided about responsibilities for re-cycling plastic bottles or the potential of bio-degradable or compostable water containers and any possible future development or use of such. No comment was passed on other methods of delivering water. Apparently Creswell accepts no responsibility for the disposal (or apparently even the re-cycling) of the plastic bottles manufactured by them, once used for carrying their water.
>
> [334] It was remarkable that such a major adverse environmental effect (the pollution caused by plastic bottles) was not considered in Mr Frentz's AEE[247] and was not addressed in any significant way by any one of the parties.

[235] Commissioner Kernohan did not accept the argument that concerns about the production of plastic bottles was beyond the scope of the Court in determining the application. He said that the "sustainable management purposes of the RMA especially under s 7 are under challenge from this proposal".[248] He accepted that trillions of plastic bottles are manufactured daily worldwide but said:[249]

> However, the purpose of the RMA is to promote the sustainable management of natural and physical resources. Allowing the creation of products that will clearly add to current pollution in the environment without any commitment to avoid, remedy or mitigate the pollution is against the purpose of the RMA.

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246 At [332].
247 Meaning an assessment of environmental effects: see below at [303].
248 EnvC judgment, above n 212, at [335].
249 At [336].

High Court decision

[236] The High Court dismissed the appeals against the Environment Court decision.[250]

[237] The High Court did not consider the Environment Court majority erred in law in concluding that the effects on the environment from the use and disposal of plastic bottles were beyond the scope of consideration in relation to the application for consent to take water. The Court recognised, however, that "issues of nexus and remoteness … often raise questions of fact and degree and so there is limited scope for jurisdictional threshold determinations".[251] The Court made it clear, therefore, that it was not holding that, as a matter of law, the effects of plastic disposal will always be too remote.[252]

[238] The High Court said that, even if it had decided that the majority had erred, it would have declined to grant relief because the effects of plastic bottles were not part of the appellants' case in the appeals before the Environment Court.[253]

[239] With regard to the land use consents sought from Whakatāne District Council, and for essentially the same reasons as with the regional appeals, the High Court considered that "as a matter of fact and degree, the adverse effects of consumers discarding plastic bottles were too indirect or remote to require further consideration in Creswell's application in relation to the land use activities".[254]

Court of Appeal decision

[240] The first question identified was whether the High Court erred in finding that the Environment Court was correct to conclude that the effects on the environment of end use (export and use of plastic bottles) were beyond the scope of consideration in relation to the water and land use consents.[255]

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250 HC judgment, above n 211, at [266].
251 At [157].
252 At [157].
253 At [209].
254 At [217].
255 CA judgment, above n 212, at [3(a)] and [23].

[241] The Court of Appeal considered that the starting point was that the consent was a consent to take water. It was plainly intended that the water would be placed in plastic bottles, but no consent was required for this. This meant the placement into plastic bottles was a consequential effect. The Court of Appeal considered that there were five main conceptual difficulties with bringing the disposal of those plastic bottles into the range of relevant consequential effects.[256] The combination of difficulties meant that the issue of disposal of plastic bottles was too remote for consideration in the context of the application to take water.[257] The Court of Appeal said:[258]

> [63] As the appellants submit, there is increasing concern about the harmful effects of plastic in the environment. The definition of "effect" in s 3 of the RMA includes, in para (d), "any cumulative effect which arises over time or in combination with other effects", and that is "regardless of the scale" of the effect. So, an effect which is small in scale can properly be considered under s 104(1)(a) of the RMA where it arises in combination with other effects. But to be relevant, the effect must still be an effect of allowing the activity. Here, it would need to be said that the plastic bottles produced by the proposed activities that are discarded in the environment would produce a deleterious effect in combination with the discarding of plastic that already occurs in New Zealand and elsewhere arising from other activities.
>
> [64] By parity of reasoning with *Buller Coal*, the widespread and worldwide use of plastic means that any attempt to control its use in the setting of an individual application for resource consent needs to be justified by evidence tending to establish that there would be a tangible impact of doing so. That impact cannot be inferred in its absence. The parties now wishing to advance the argument that this impact should have been considered in the present case called no such evidence. This is a further reason for affirming the reasoning of the Courts below.
>
> [65] The focus of Ngāti Awa's argument on this question was on the Regional Council consents, and in particular, the consent to take water. [SOI] adopted Ngāti Awa's argument, adding that the effects of plastic in the environment would have an even more direct connection to the District Council consents because of the proposed production of the plastic bottles onsite. However, that does not overcome the issues we have already addressed in relation to the argument advanced for Ngāti Awa. The same reasoning applies in relation to the District Council consents.

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256 At [55]–[60].
257 At [61].
258 Footnotes omitted.

Our assessment

[242] Section 104(1)(a) of the RMA provides that consent authorities must have regard to "any actual and potential effects on the environment of allowing the activity". Effects are defined inclusively and widely in s 3, as is the environment in s 2(1). Section 5(1) provides that the purpose of the RMA is to promote sustainable management of natural and physical resources, and "sustainable management" is also defined in s 5(2) in broad terms.

[243] In light of the broad nature of the definition of effects, and the clearly adverse effect on the environment of plastic pollution, it is difficult to understand how it could be thought that the production of the plastic bottles involved in Creswell's proposal was not a relevant effect under the RMA.[259]

[244] In this regard, we accept SOI's submission that the Court of Appeal adopted the wrong starting point. The issue arises from the creation of the plastic bottles because the disposal of plastic into the environment is an inevitable and direct consequence of creating plastic bottles and filling them with water.[260] While some plastic might be able to be recycled several times, all plastic has a finite commercial life before it becomes waste.[261] The ultimate disposal of the bottles is therefore a direct effect of allowing the Creswell proposal and is integral to it.

[245] Contrary to the submissions of the respondents, and the finding of the Court of Appeal,[262] the effects are not too remote to be considered. As the United Kingdom Supreme Court said in *R (on the application of Finch) v Surrey County Council* (*Finch*), "[a]n impact is not precluded from being an effect of a project by the fact that

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259 In this case, indirect beneficial effects, like employment and economic effects, were considered, but the adverse effects of plastic pollution were not. Both types of effect needed to be considered: see similar comments by the United Kingdom Supreme Court in *R (on the application of Finch) v Surrey County Council* [2024] UKSC 20, [2024] 4 All ER 717 [*Finch*] at [150] per Lord Leggatt, Lord Kitchin and Lady Rose SCJJ.

260 The majority reach the same conclusion above at [77].

261 See above at [226]. The recyclability of Creswell's bottles is not known because Creswell did not address that question and neither of the Councils nor the Environment Court sought that information.

262 CA judgment, above n 212, at [61].

its immediate source is another activity that occurs away from the project site."[263] Further, the Court said that:[264]

> If there is a clear and inexorable causal path from event X to event Y, then Y is an effect of X. The number of intermediate steps along the way, the nature of those steps and the fact that Y occurs far away from X does not alter or affect that conclusion.

[246] It is no answer that the production of plastic bottles is otherwise legal or that another producer would produce and fill the bottles if Creswell did not. The focus is on the effects of this proposal, which is to increase production from 8,000 bottles per hour to 154,000 bottles per hour. It does not lessen the effect of this increase in production that someone else or even many others are producing or will produce plastic bottles.[265] It is also no answer to say that, given the intent to export the bulk of the bottles produced,[266] the effects of disposal will be offshore. It is clear that the effects from plastic pollution are global.[267]

[247] The reliance of the Courts below and the respondents on this Court's decision in *Buller Coal* is misplaced. The ratio of the case depended on climate change being excluded from consideration at the local level by s 104E of the RMA (now repealed).[268] We note, however, that s 104E did not support an argument that climate change was irrelevant or too remote but just that it had to be considered at a national rather than a local level. Any of the other comments made by the majority in *Buller Coal* (and which were relied on by the Courts below and by the respondents) were obiter. Moreover, those obiter comments have to be read in context. At issue in *Buller Coal* was not the consent to extract coal but subsidiary consents related, for example, to roads.[269] We do not rule out that, in that context, arguments about remoteness of climate change effects may possibly have more legs. We also, however,

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263 *Finch*, above n 259, at [102] per Lord Leggatt, Lord Kitchin and Lady Rose SCJJ.

264 At [134] per Lord Leggatt, Lord Kitchin and Lady Rose SCJJ.

265 We do not in any event understand there to have been any evidence before the Court as to the likely future production of plastic bottles (in New Zealand or globally).

266 See EnvC judgment, above n 212, at [65] per Judge Kirkpatrick and Commissioner Buchanan.

267 See in particular above at [224] and [227]. The same can be said for the effects of climate change: see *Finch*, above n 259, at [97] per Lord Leggatt, Lord Kitchin and Lady Rose SCJJ. As the Court in *Finch* observed at [93], the fact effects will occur elsewhere is not a reason to exclude those effects: "There is no principle that, if environmental harm is exported, it may be ignored."

268 See *Buller Coal*, above n 241, at [169]–[175] per McGrath, William Young and Glazebrook JJ. Section 104E of the Resource Management Act 1991 [RMA] was repealed by s 35 of the Resource Management Amendment Act 2020.

269 See at [104] per McGrath, William Young and Glazebrook JJ.

accept SOI's submission that the science has changed since then and that many of the obiter comments made by the majority in *Buller Coal* in the context of climate change would not be supportable now.

[248] We note that neither appellant suggests that consideration of effects like plastic pollution will necessarily mean that a consent is not granted or that conditions will be set to address them. The point is rather that these effects should have been known and properly considered, both in deciding whether to grant the consent and upon what conditions.[270] We accept the appellants' submission that this goes to the heart of what the RMA does: sustainably manage natural and physical resources while "avoiding, remedying, or mitigating any adverse effects of activities on the environment".[271]

[249] As the United Kingdom Supreme Court said in *Finch*, consideration of such effects might involve "the identification of ways in which the design of the project can be modified without undue detriment to its aims so as to avoid or reduce what would otherwise have been a significant adverse environmental effect of the project".[272] The Court also recognised the general public importance in such effects being considered as part of the process, even if ultimately there was no way to control them. The decision should be made "with full knowledge of these consequences".[273]

Was the proposal a rural processing activity or an industrial activity?

[250] As indicated above, the proposal involved a new plant that will be housed in a new building occupying a little over a quarter of the site area.[274] Water will be extracted from the aquifer, before going through membrane filtration and ozonation treatment. Pre-forms (small polyethylene terephthalate (PET) test-tube like cylinders) will have air under pressure blown into them to create plastic bottles. The plastic

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270 The effects of plastic bottle disposal are relevant to whether limited or full public notification was appropriate: see RMA, ss 95A–95D and 104(3)(d). Prior to the Councils' decisions on the applications, there was public notification of the regional consent application, but only limited notification of the district consent application: see EnvC judgment, above n 212, at [235] per Judge Kirkpatrick and Commissioner Buchanan.

271 RMA, s 5(2)(c) definition of "sustainable management".

272 *Finch*, above n 259, at [104] per Lord Leggatt, Lord Kitchin and Lady Rose SCJJ.

273 At [152] per Lord Leggatt, Lord Kitchin and Lady Rose SCJJ.

274 See above at [216].

bottles will then be filled with the filtered water, sealed, packaged and stored on site until they go to market.[275]

[251] The Courts below classified the proposal as a discretionary "rural processing activity", as defined in the Whakatāne District Plan.[276] SOI submits that the Courts below erred in reaching this conclusion and that the appropriate activity status is a non-complying "industrial activity". This meant that, as well as being assessed under s 104,[277] the proposal had to fit through one of the two gateways in s 104D(1)[278] and may also have needed to be fully publicly notified.[279]

[252] As the Court of Appeal recognised, this ground of appeal turns on the correct interpretation of the Whakatāne District Plan and is therefore amenable to review by this Court as a question of law.[280]

Environment Court decision

Majority

[253] The majority said that the main issue in determining the activity status was whether the proposal was for an "industrial activity" or a "rural processing activity".[281] They said:[282]

> [217] *Industrial activity*, as defined in the district plan, includes the production of goods by manufacturing, processing, assembling or packaging. This implies taking resources and processing or using them to manufacture or otherwise to produce goods that are different from the resource. The principal element of this kind of industrial activity is the processing or manufacturing.
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> [218] *Rural processing activity*, as defined in the district plan, is the processing assembling, packaging and storing of products from primary

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275 The submissions of the parties on this point are set out in the majority's reasons above at [140]–[152].

276 EnvC judgment, above n 212, at [234] per Judge Kirkpatrick and Commissioner Buchanan; HC judgment, above n 211, at [235]–[247]; and CA judgment, above n 212, at [144]–[156].

277 The Court of Appeal overturned the conclusions of the High Court and the Environment Court that the application had been correctly dealt with according to the procedure under s 127 of the RMA for varying the conditions of an existing consent: CA judgment, above n 212, at [176]–[192]. It held, however, that the error was immaterial as, by virtue of s 127(3)(a), the Environment Court had in any event considered the proposal as a discretionary activity: at [161] and [192].

278 See above at [122]–[123] per the majority.

279 See RMA, ss 95A–95D and 104(3)(d).

280 See CA judgment, above n 212, at [144].

281 EnvC judgment, above n 212, at [216].

282 Emphasis in original.

> productive use. It can immediately be seen that the elements of processing, assembling, packaging and storage can occur in both industrial activities and rural processing activities. This implies that those elements are not determinative of the type of activity and therefore of the activity status.
>
> [219] The essential difference between the definitions of the two activities is that an industrial activity can involve any type of material, good or product but a rural processing activity must have as its starting point a product from a *primary productive use*. Such a use, again as defined, must either rely on the productive capacity of land or have a functional need for a rural location. The examples given in the definition indicate that farming and extractive activities are contemplated as being within it.

[254] The majority concluded that there was a:[283]

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

[255] The majority held that "the primary resource is the water which is unchanged by any process or other form of manufacture".[284] They held:[285]

> The principal activity is the extraction of the water. Activities within the bottling plant, such as the blow-moulding of plastic bottles as containers for the water and packaging the bottles on pallets for transport, are industrial activities within the range of the definition but they are ancillary to the principal activity: without the production of the water, they would not occur.

[256] In conclusion the majority considered that, if assessed as a new activity, it should be assessed as a "rural processing activity" and therefore as a discretionary activity.[286]

Minority

[257] Commissioner Kernohan considered that the proposal was not for a minor variation of an existing resource consent but "a substantial change and expansion of one part of the original consent well beyond the scope or reasons for that original consent".[287] He said that:[288]

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283 At [225].
284 At [226].
285 At [226]. Judge Kirkpatrick and Commissioner Buchanan also held that "the subsequent packaging of the water into bottles and the transport of it from the site [was] within the scope of a rural processing activity": at [227].
286 At [228].
287 At [343].
288 At [345].

> … water bottling is not a rural production activity or use per se, nor is mining, or any other extractive activity, rural production per se. The use of manufacturing equipment, pumps and production lines is all industrial. There are no rural productivity benefits from drawing water, bottling it directly and transferring it elsewhere. Water can be available from many locations (as can coal or gold). It is not exclusively a rural production activity.

[258] Commissioner Kernohan said that the application related to a non-complying activity. This meant that a new resource consent application had to be applied for and publicly notified.[289]

High Court decision

[259] The High Court held that, despite the taking of water requiring a regional rather than a district council consent, it could still be a land use for the purposes of the Whakatāne District Plan.[290] The Court also accepted that the water extraction has a functional need for a rural location and that it is therefore a "primary productive use". Water extraction fits within the definition of a rural processing activity.[291] The Court considered that water bottling also fits within the definition of a "rural processing activity".[292]

[260] The High Court accepted that blow moulding involved a form of manufacture.[293] The High Court, however, did not consider that the Environment Court majority erred when it held that this was ancillary to the extraction of water.[294] The High Court rejected the submission that a separate industrial activity consent was needed, holding that the Environment Court majority did not err when they held that:[295]

> … "the proposal is for a single planning unit which primarily involves the taking of water with an ancillary bottling and packaging operation" and "that the activity, overall, is a rural processing activity".

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289 At [347].
290 HC judgment, above n 211, at [233].
291 At [235].
292 At [236].
293 At [239].
294 At [244].
295 At [245] and [247] citing EnvC judgment, above n 212, at [234].

Court of Appeal decision

[261] The Court of Appeal was not persuaded that the interpretation of the definitions of "rural processing activity" and "primary productive use" adopted in the Courts below was incorrect.[296] The Court of Appeal said that the definition of rural processing activity contemplates an operation covering different activities (including processing, assembling, packing and storing) as long as it involved products from primary productive uses.[297] The Court considered that it was possible in the present case to identify an overall proposed activity with the main purpose being to extract and bottle water. It would be artificial to separate extraction from bottling.[298] It considered the High Court correct to identify the blow moulding as ancillary.[299]

[262] The Court considered that the extraction of water came within the definition of "primary productive use" as it was a "rural land use activity" and there was no need to distinguish between the examples given, of quarrying and mining, and water extraction.[300] The Court thought it clear that:[301]

> … the District Plan does not intend to exclude activities in the nature of industrial activities from the ambit of rural processing activities, provided they take place as part of an operation that qualifies as a "rural processing activity".

[263] The Court considered that no issues about the bundling of activities arise with the need to classify the overall activity in the most "stringent" category because the proposal as a whole fell within the definition of "rural processing activity".[302]

Our assessment

[264] We accept SOI's submission that the production of plastic bottles by blow-moulding plastic is the manufacture of those bottles.[303] This therefore comes within the definition of "industrial activity" in the Whakatāne District Plan which,

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296 CA judgment, above n 212, at [144].
297 At [146].
298 At [147].
299 At [150].
300 At [151].
301 At [154].
302 At [155].
303 This was accepted by the High Court: see above at [260]. The majority of the Environment Court likewise found the bottle production was an "industrial activity": EnvC judgment, above n 212, at [226]. See also CA judgment, above n 212, at [154].

unlike the definitions of "rural processing activity" and "rural production activity", includes manufacturing.[304]

[265] "Rural processing activities" relate to the processing, assembly, packing and storing of products from primary productive use. "Primary productive use" means "rural land use activities that rely on the productive capacity of land or have a functional need for a rural location".[305]

[266] There is some doubt about whether water extraction can be classified as a "primary productive use". The fact that water extraction must occur on land under which there is an aquifer does not mean that the activity "rel[ies] on the productive capacity of land". The land's productive capacity is not relied on at all (as opposed to the water underneath). This distinguishes water extraction from quarrying and mining, which involve extraction from the land itself and which, unlike water extraction, are explicitly included in the definition of "primary productive use". Nor does the activity of water extraction *generally* have a "functional need for a rural location", even if in this particular case the evidence before the Environment Court was that water extraction had to occur near the site at Ōtākiri or near Murupara.[306] In any event, this seems to be for marketing rather than functional purposes — in other words, the proposal is to extract water from this particular site so that it can be sold as bottled spring water. In addition, there may be merit in SOI's submission that a "product from primary productive use" is something derived from production associated with a use of rural land, such as growing crops or grazing livestock. Water cannot be a "product" as there is no primary production. Nor is there any "product" produced (until the water is bottled).

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304 Contrast the definition of "industrial activity" set out in the majority's reasons above at [130], with the definitions of "rural processing activity" and "rural production activity", above at [124] and [127].

305 See above at [125] per the majority.

306 See EnvC judgment, above n 212, at [212] per Judge Kirkpatrick and Commissioner Buchanan.

[267] We do, however, accept that it is possible that, had the project been limited to extracting the water and bottling it, it would have come within the definition of "rural processing activity". But it is not so limited. It includes the manufacture of bottles.[307]

[268] The Court of Appeal categorised the entire proposal as one "operation", concluding that it would be artificial to separate the extraction and the bottling of the water.[308] This overlooks the fact that the proposal also involves the "manufacturing" of "goods" — the bottles themselves. We accept SOI's submission that the Court of Appeal's approach to the interpretation of "operation" subsumed the specific categories of activities included in the definition of "rural processing activity", which notably do not include manufacturing.[309]

[269] Additionally, in our view the Court of Appeal was wrong to hold that the word "operation" contemplates the inclusion of activities "ancillary" to the rural processing activity.[310] As SOI submits, there is no general or freestanding concept of "ancillary activities" found in the Whakatāne District Plan. Where the word "ancillary" appears in the Whakatāne District Plan, it is used an adjective to qualify or expand specific terms or concepts. Its omission from the definition of "rural processing activity" is therefore material.

[270] In any event, we accept SOI's submission that the scale of the blow-moulding activity means that it could never have been considered "ancillary" as that term is defined in the Whakatāne District Plan.[311] We accept that it is a core aspect of the proposal and not, employing the language of the definition, "minor", "subordinate" or "incidental to" the water extraction. We also accept SOI's submission that, assuming that different parts of the proposal came within different definitions with different

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307 It was not argued before us that the proposal came within the definition of "rural production activity". Nor is that argument of any assistance as manufacturing is not included in that definition either. We thus do not agree with the majority's reliance on this in its interpretation above at [156]–[160].

308 CA judgment, above n 212, at [147].

309 The majority consider that the shift from pre-made bottles to blow-moulding will mitigate adverse amenity effects and reduce the operation's carbon footprint and that this supports their interpretation of the definitions: see above at [155]. That will not always be the case, and in our view this argument conflates the preliminary activity status question and the ultimate issue of whether consent for a particular activity should be granted.

310 CA judgment, above n 212, at [149]–[150].

311 See the definition of "ancillary" quoted in the CA judgment, above n 212, at [149] and reproduced in the majority's reasons above at [138].

activity status (discretionary and non-complying), the Courts below were wrong not to "bundle" the different activities involved in the project and then apply the most stringent status.[312]

[271] Finally, various statements in the Whakatāne District Plan and the Bay of Plenty Regional Policy Statement illustrate an intention to protect the use of rural land for rural production. This includes Objective 26 of the Bay of Plenty Regional Policy Statement, which is to ensure that "[t]he productive potential of the region's rural land resource is sustained and the growth and efficient operation of rural production activities are provided for".[313] The approach of the majority and the Courts below may lead to good rural land being taken up by manufacturing plants or other industrial activities where there is only a tenuous connection to primary production.

[272] Because the proposal was wrongly classified as a discretionary activity, remittal to the Environment Court for consideration on the correct basis is warranted.[314] This should involve consideration of s 104D(1) and of whether public notification was required,[315] especially in light of our conclusion that plastic pollution is a relevant effect.

Was the tikanga evidence properly considered?

[273] The tikanga evidence, the decisions of the Courts below and the submissions before us have been summarised in the reasons of Ellen France, Williams and Kós JJ.[316] We add some more detail on the evidence of Dr Mason and Dr Merito and

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312 See *Protect Aotea v Auckland Council* [2021] NZEnvC 140, [2021] ELHNZ 229 at [17] for a description of the concept of bundling. Bundling was not deemed appropriate in that case because one of the activities was a controlled activity: see at [45].

313 SOI also refers us to Policy UG 18B and Method 52 of the Bay of Plenty Regional Policy Statement and Strategic Objective 4, Policies 1 and 2 and Objectives Rur1 and Rur2 of the Whakatāne District Plan. Any references to planning documents in these reasons refer to the versions provided to us by the parties to the appeal.

314 Contrast HC judgment, above n 211, at [265].

315 The Environment Court minority thought wider public notification was required: see EnvC judgment, above n 212, at [324] and [347].

316 See above at [167]–[193].

provide a fuller summary of the decision of the majority of the Environment Court as that was the focus of the submissions of Ngāti Awa before us.[317]

Evidence of Dr Mason and Dr Merito

[274] The evidence of Dr Mason and Dr Merito was:

> When the wai leaves our shores to be sold overseas its mauri for Ngāti Awa is lost. This effect is due to the amount of water being taken out of the system to then be bottled and sold (a lot of it overseas). Not enough water has the opportunity to re-enter the system as a whole. …
>
> *Mā te tūtohu a Creswell e tānoanoa ai te mauri o te wai. Ko te kino o tēnei e pā ana ki te nui o te wai e ngotea ana i te ara wai kātahi ka pātarahia, ka hokona (ko te nuinga ki tāwāhi kē). Otirā, kāre e nui rawa te wai e hoki tōtika tonu mai ana ki ngā ara wai.*

[275] With regard to the differences in their evidence from that of Mr Eruera:

> Our evidence is not focused on a challenge to our whanaunga Hemana Eruera's evidence. That is important to us; we are whanaunga and those links will withstand this matter. However, we do disagree on the effects of this Proposal on te mauri o te wai and the ability of Ngāti Awa to be kaitiaki.
>
> *… Kāre a māua taunakitanga i te wero i te taunakitanga a tō māua whanaunga a Hemana Eruera. He whai tikanga tērā ki a māua; he whanaunga mātou, ā, he kaha ake ērā tātai tērā i tēnei kaupapa. Otirā, e whakahē ana māua ki ngā tūkinotanga o tēnei tūtohu i te mauri o te wai me te kaha o Ngāti Awa ki te noho hei kaitiaki.*
>
> We have a responsibility to our mokopuna and to our wai. That, alongside our tikanga Ngāti Awa, is the foundation for our evidence.
>
> *Kei a tātou te rangatiratanga o ā tātou mokopuna me te wai hoki. Koinā, me ngā tikanga a Ngāti Awa, te tūāpapa mō ā māua taunakitanga.*

[276] They said also that mauri wai and mauri tangata are bonded together:

> It is the responsibility of the leaders of the hapū and iwi to maintain the bond. We are responsible for the present and future supplies of the life giving wai.
>
> *… Mā ngā rangatira o ngā hapū me te iwi tēnei hononga e hāpai. Kei a tātou te mahi nui ki te tiaki i te oranga o te wai ināianei me āpōpō hoki.*

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317 We have nothing to add to the majority's discussion of pt 2 of the RMA above at [204]–[209] and [211]. Although we disagree with them as to the sufficiency of the assessment of the tikanga evidence by the majority of the Environment Court, had the evidence been properly considered, we would agree with the majority's proposition above at [210] that direct reference to ss 6(e), 7(a) and 8 of the RMA would not have made any difference. This section therefore just addresses the issue of whether the Environment Court majority erred in its assessment of the tikanga evidence.

[277] As to Creswell's proposal they said:

> Creswell's Proposal will erode te mauri o te wai. The erosion is due to the amount of water being taken out of the system to then be bottled and sold. Not enough water has the opportunity to re-enter the system as a whole. The Proposal is therefore able to be distinguished from other activities such as irrigation. Creswell's Proposal is sucking the water out of the system to sell; and to sell a lot overseas. Given the nature of the Proposal, the effects on te mauri o te wai continue to remain and cannot be solved.
>
> *Ka tānoanoa te mauri o te wai i te tūtohu a Creswell. Ko te tānoanoatanga e pā ana ki te nui mārika o te wai e ngotea ana i ngā ara wai kia pātarahia, kātahi ka hokona. Otirā, kāre e nui rawa te wai e hoki tōtika tonu mai ana ki ngā ara wai. Nō reira, ka kitea tonuhia te tino pūtake o te tūtohu nei i ētahi atu mahinga pēnei i te whakamākūkū whenua pāmu. Ko te tūtohu a Creswell e ngote ana i te wai i ngā ara wai ki te hoko; ki te hoko i te nuinga ki tāwāhi. Ko te āhua tonu o te tūtohu nei, ko ngā tūkinotanga i te mauri o te wai e kore e taea te karo.*

[278] They said further:[318]

> Creswell's Proposal is like a blood transfusion to others outside of our eco-system. The wai is being taken out without an opportunity to re-enter our system. There is no reciprocity for the environment for the wai to be sucked out without giving enough an opportunity to re-enter the water cycle. If we allow the wai to go to whenua kē, the mauri o te wai departs. The mauri cannot be restored at this point through karakia (or any other methods to restore the mauri).
>
> *He rite te tūtohu a Creswell ki te whakawhiti toto ā-whare ki te rāwaho i waho i tō tātau ake pūnaha hauropi. Kei te tangohia te wai, ā, kāre tonu he huarahi e hoki mai anō ai te wai ki ō tātou ara wai. Kāre kē he tāruatanga o te wai ki te taiao e kaha hoki mai anō ai te wai ki te pūnaha hauropi.*

[279] They explained that the role of a kaitiaki is as guardian of the resource for benefit of the ecosystem as a whole:

> The guardianship is over all living things and is not just restricted to human sustenance. If all living things are sustained then the people are sustained.
>
> *… Ko te kaitiakitanga mō ngā mea katoa e ora ana, kauā ko te oranga tangata anake. Ki te ora ngā mea katoa, ka ora anō hoki ko te tangata.*

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[318] They recognised that amendments to the proposal, "particularly in relation to how much water is being taken and what happens to it", might make a difference, it often being a matter of degree. They also said that they did not have a problem sharing the taonga with anyone that may come to Aotearoa as that is part of the kaitiaki role and shows manaaki.

[280] The local hapū also have spiritual kaitiaki in te wai. Dr Mason and Dr Merito said:

> If the mauri is diminished, or gone, the kaitiaki are not fulfilling their responsibility. That is particularly difficult for the hapū when the hapū are not the ones undertaking the activity that is causing the negative effects.[319]
>
> *… Ki te kore te mauri kāre ngā kaitiaki i te mahi i ā rātou mahi kaitiakitanga.*

[281] In terms of economic benefits they said:

> There may well be economic benefits of the Proposal. However, the economic benefits do not negate the detrimental effects on te mauri o te wai. Therefore, potential positive economic benefits cannot and should not be used as a reason to offset the negative effects on te mauri o te wai. He rerekē te mauri o te wai ki te putea mō ngā tangata.

Environment Court decision

[282] In its "jurisdictional overview", the majority said:[320]

> The issue is whether, and if so to what extent, a consent authority or, on appeal, the Court, should or may consider matters beyond the particular activity for which consent is sought and take into consideration the end use of whatever may be produced by that activity or the effects of other activities for which consent is not required.

[283] The majority noted the argument for Ngāti Awa made in its opening submissions that the application is "for too much water to be sold too far away".[321] Ngāti Awa said that the focus was on the tikanga effects of the proposal in the context of the Mataatua Declaration on Water 2012.[322] The majority said that they were urged "to consider the total nature of the consents applied for, including the take from the aquifer, the bottling of the water and its export overseas".[323]

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319 The evidence did not include a reo Māori version of this second sentence.

320 EnvC judgment, above n 212, at [34].

321 At [35].

322 As set out at [37] of the EnvC judgment, above n 212, "the Mataatua Declaration is an iwi planning document agreed and approved by the tribes of Mataatua in the Bay of Plenty region. The Declaration guides Ngāti Awa's approach to policy development around a holistic view of freshwater. It affirms Ngāti Awa's rights and responsibilities within its own constitutional framework to advocate for mana over water in its rohe. Counsel for [Ngāti Awa] submitted that it is within the context of this declaration that the broad opposition to the Creswell proposal has developed."

323 EnvC judgment, above n 212, at [38].

[284] As outlined above, the majority considered that the end use of exporting water in plastic bottles was not a matter within its jurisdiction.[324]

[285] The majority advanced some criticisms of Dr Mason and Dr Merito's evidence.[325] The majority said that "[c]ustomary practices and traditional knowledge are not directly applicable to the export of bottled water. This is a modern-day question". They expressed concern that there was "no evidence of a coherent widely held belief within Ngāti Awa regarding the adverse metaphysical effects of taking water for bottling and export".[326]

[286] The majority said that:

> [101] Evidence on cultural topics of this kind can present challenges to the traditional approach of common law courts, of which this Court is one, to the assessment of such evidence. Nonetheless, the requirements of ss 6(e), 7(a) and 8 of the RMA require this Court to undertake such assessments in a way that is consistent with the interests of justice. In *Ngāti Hokop[ū] ki Hokowhitu v Whakatāne District Council*[327] the Court proceeded according to what was there described as a "rule of reason"[328] to test the evidence on issues raising beliefs about values and traditions by listening to, reading and examining:[329]
>
> - whether the values correlate with physical features of the world (places, people);
> - people's explanations of their values and their traditions;
> - whether there is external evidence (e.g. Māori Land Court Minutes) or corroborating information (e.g. waiata, or whakatauki) about the values. By "external" we mean before they became important for a particular issue and (potentially) changed by the value-holders;

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324 Above at [229]–[232].

325 EnvC judgment, above n 212, at [96]–[97]. Those criticisms included that no explanation had been provided for what was too much and what distinguished this take from other existing takes, including for other commodities heavily reliant on water and which were also exported, such as milk and meat. We do not comment apart from to point out the evidence above at n 318, and to note that the water-reliant commodities referred to by the Environment Court rely on irrigation and are therefore different to the direct use of water by bottling it for sale overseas: see Dr Mason and Dr Merito's comments on irrigation above at [277]. We also emphasise Ngāti Awa's right to advocate for mana over water in its rohe, as set out in the Mataatua Declaration on Water.

326 EnvC judgment, above n 212, at [100].

327 *Ngāti Hokopū ki Hokowhitu v Whakatāne District Council* (2002) 9 ELRNZ 111 (EnvC).

328 In the sense used generally in philosophy rather than the specialised sense used in competition and anti-trust law. In *TV3 Network Services Ltd v Waikato District Council* [1998] 1 NZLR 360 (HC), Hammond J used the term to distinguish an objective approach from a per se objection or veto which is unlawful under the RMA: see *Minhinnick v Watercare Services Ltd* [1998] 1 NZLR 63 (HC).

329 *Ngāti Hokopū ki Hokowhitu*, above n 327, at [53].

- the internal consistency of people's explanations (whether there are contradictions);
- the coherence of those values with others;
- how widely the beliefs are expressed and held.

[287] The majority articulated the differences between the evidence of Dr Mason and Dr Merito and that of Mr Eruera in the following manner, indicating that they preferred the evidence of Mr Eruera:[330]

> [102] Dr Mason and Mr Merito believe that in the absence of any opportunity for return to Papatūānuku in the narrow context of the original source of the water, the mauri of the water is lost. The view of Mr Eruera that the cycle of water and the mauri of that water operates at a much broader scale is consistent with the biophysical western science understanding of all water as part of a constant replenishing global cycle as described by Mr Goff.
>
> [103] The evidence of Dr Mason and Mr Merito on the nature and scale of the adverse metaphysical effects was that these effects are so great as to warrant declining consent. We accept these beliefs are honestly held and perhaps are shared by many members of the iwi, but we prefer the evidence of Mr Eruera that te mauri o te wai is retained as water passes through its many forms before returning to Papatūānuku to begin its journey again within the earth's water cycle.

[288] The majority expressed the view that "water should be considered in the context of the resource rather than simply as any volume of water". They accepted that "water is essential to life on earth", and that "[t]he health or hauora of the environment, the water and the people are connected and inter-dependent."[331] They said:

> [105] Using that approach, a taking of water would be too much if it threatened the sustainable management of its source, so that even local taking and use for domestic purposes and stock could be too much if the source of water were very limited. Both the protection of the water and enabling the use of the water are part of the sustainability of the water resource. We think that such an approach would demonstrate consistency between the purpose of the RMA and tikanga Māori.

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330 EnvC judgment, above n 212 (footnote omitted).
331 At [104].

[289] With regard to the export of water the majority said:

> [107] Considering the export of this water, we do not find any reason why, if the take is sustainable, the export would not be. Any use of the water, particularly a consumptive use, will have generally similar physical effects. For this aquifer, uses include a range of products, many of which are likely to be taken and consumed or otherwise used outside the district and the region. As noted in our jurisdictional overview, while there is public debate about export of water from New Zealand, there is no legal basis on which we can restrict that activity. In terms of the evidential basis on which we might refuse consent to the increased take because of its intended purpose for export, we do not see any sufficient connection in this case, either in terms of physical or metaphysical effects of export, for basically the same reasons as our assessment of the physical and metaphysical effects of the take.

[290] The summary given by the majority on this point is set out in the reasons of Ellen France, Williams and Kós JJ above at [187].

Our assessment

[291] Ngāti Awa's position, both before the Environment Court[332] and before us, is that the export of wai outside of Aotearoa negatively affects te mauri o te wai and that the production, use and export of plastic bottles impacts its ability to be kaitiaki. We accept the submission that the error made by the Environment Court majority (that there was no jurisdiction to consider end use and in particular plastic pollution) meant that the majority in the Environment Court did not consider the tikanga effects from an end-use perspective.

[292] This was made quite explicit by the majority in their jurisdictional overview,[333] and repeated in their discussion of the tikanga evidence where they said that they did not consider there was any "legal basis on which we can restrict that activity [the export of water]".[334] That was an error of law for the reasons set out above.[335]

[293] While the bottling of the water may not have been the primary focus of the tikanga evidence of Dr Mason and Dr Merito, it was made clear that they were talking

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332 See above at [274]–[281] and [283].
333 See EnvC judgment, above n 212, at [64]–[66].
334 See at [107], reproduced above at [289].
335 See above at [242]–[249]. The approaches of the High Court and the Court of Appeal, although not based on jurisdictional grounds, were also in error, as explained above at [242]–[249] and in the majority's reasons above at [63]–[77].

about the whole of the process of taking, bottling and exporting (both in respect of te mauri o te wai and Ngāti Awa's kaitiaki role).[336] The whole process was also discussed in Ngāti Awa's submissions before the Environment Court.[337]

[294] As a result of the jurisdictional error, the Environment Court majority concentrated on the water take only in its assessment of the tikanga evidence. They also characterised the concern as being the "adverse metaphysical effects",[338] preferring the evidence of Mr Eruera because it was consistent with "the biophysical western science understanding" of the water cycle.[339]

[295] What are termed "metaphysical effects" were certainly a focus of the tikanga evidence, but Dr Mason and Dr Merito also referred to the effect on the ecosystem generally,[340] the responsibility to future generations[341] and the relationship between mauri wai and mauri tangata.[342]

[296] The Royal Society | Te Apārangi, in its 2019 report, identified the very real effects of plastic pollution for Māori which were not considered by the majority of the Environment Court because of the jurisdictional limit they wrongly considered existed:[343]

> For Māori, understanding and connecting with the natural environment is integral to identity, whakapapa and culture. Plastic waste and debris can affect the mauri, or life force, of the environment, which can therefore affect cultural health and wellbeing.[344] Customary harvesting practices that may involve higher levels of consumption of raw fish, shellfish, and whole fish also give greater exposure to potential health risks. These factors, and the depth of cultural connection with the natural environment, mean that Māori will experience a disproportionate burden of risk from plastic waste in Aotearoa New Zealand.

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336 See above at [274], [277] and [280]–[281].
337 See above at [283].
338 EnvC judgment, above n 212, at [100], [103], [134] and [156].
339 At [102], and see at [103] and [107].
340 See above at [274] and [277]–[278]; and EnvC judgment, above n 212, at [79]. We note that the effects on the ecosystem of plastic pollution are global: see above at [223]–[224] and [226]–[227].
341 See above at [276].
342 See above at [276].
343 Royal Society report, above n 224, at 28. We note that this report was published in July 2019, which was after the Environment Court hearing in May 2019, but before the decision was issued on 10 December 2019.
344 Jim Williams "Resource management and Māori attitudes to water in southern New Zealand" (2006) 62 New Zealand Geographer 73.

[297] Further, the majority did not resolve the differences between Mr Eruera and Dr Mason and Dr Merito with regard to economic benefit,[345] which was in fact the significant difference between them.[346] And any alleged benefits must of course be weighed in light of plastic pollution.[347]

[298] Finally, Ngāti Awa submitted before us that the proper conception of its evidence should have been as holistic and inclusive of end-use effects capable of consideration under the RMA. *He Poutama* was referred to as providing a framework for the consideration of the tikanga effects and tikanga evidence.[348] We also accept that submission.[349]

Should the application have been declined or further evidence sought?

High Court decision

[299] As noted above, the High Court said that the Environment Court majority was wrong to hold that, as a matter of law, they were precluded from considering the effects of plastic pollution.[350] The Court went on to comment, however, that the majority's decision arose in the unusual circumstances of this case, where the issue had been raised by the Environment Court and was not part of the appellants' case. In such circumstances, the Environment Court was not required "to seek further evidence or decline the application on the basis of inadequate information".[351]

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345 We do note that extractive industries have not had a good track record of providing economic benefits for indigenous peoples globally, even where the extraction occurred on indigenous land: see generally Cathal M Doyle and Andrew Whitmore *Indigenous Peoples and the Extractive Sector: Towards a Rights-Respecting Engagement* (Tebtebba Foundation, Baguio City (Philippines), 2014); Emily Caruso and others *Extracting Promises: Indigenous Peoples, Extractive Industries and the World Bank* (Tebtebba Foundation, May 2003); and Lisanne Raderschall, Tamara Krawchenko and Lucas Leblanc *Leading practices for resource benefit sharing and development for and with Indigenous communities* (OECD, Regional Development Papers No. 01, 2020).

346 As explained by the majority above at [196]–[197] and [200].

347 See above n 259.

348 Te Aka Matua o te Ture | Law Commission *He Poutama* (NZLC SP24, 2023) at [3.10], [3.18] and 102. Courts have to guard against the natural tendency to accept a view of tikanga that accords with Western values and evidence.

349 We are not to be taken as commenting on the "rule of reason" approach referred to by the Environment Court majority: EnvC judgment, above n 212, at [101], reproduced above at [286]. As the majority say, it was of limited assistance in this case: see above at [198].

350 Above at [237].

351 HC judgment, above n 211, at [157].

Court of Appeal decision

[300] The second question identified by the Court of Appeal was whether the High Court erred in finding that the Environment Court did not need to seek further evidence or decline the application for consent, in circumstances where there was evidence as to the scale of the bottling operation but not as to the scale of the adverse effects of plastic bottles being discarded.[352] The Court of Appeal said that its conclusion on the first question "effectively compels a negative answer" to this second question.[353] The Court of Appeal noted that no party before the Environment Court had suggested that evidence should be called "about the scale of adverse effects of plastic bottles being discarded".[354] Nor had this issue been raised at any stage prior to the Environment Court hearing.[355]

[301] The Court of Appeal accepted that, if the Environment Court considered an issue of significance to the disposition of the case before it warranted further evidence, it could call for further evidence.[356] However, in this case, while one member of the Environment Court considered that the end use of the plastic bottles was relevant, the majority did not. "Given that they had a contrary view, they were entitled to act on it."[357] The Court of Appeal said:

> [77] Except in cases where it is clear that an issue should have been the subject of evidence, we do not consider the Environment Court is obliged to procure evidence on it. Where evidence of this type has not been called, often the most appropriate course for the Court to follow would be to decide the case on the basis that the evidence was not available, with appropriate consequences for the disposition of the proceeding before it.
>
> [78] Although the Court is able to adopt an inquisitorial approach, we consider that its primary duty in an appeal concerning whether a resource consent should have been granted or declined is to consider the issues raised by the parties and the evidence they have called, and apply the relevant statutory provisions in the RMA. Any other approach would be likely to lead to increased uncertainty, cost and delays. We add that although the nature of the Environment Court's jurisdiction and obligations under part 2 of the RMA will often require a more flexible approach than that which would be followed in civil litigation in the District Court or High Court, a party to proceedings before the Environment Court should ensure it calls relevant evidence to

352 CA judgment, above n 212, at [3(b)] and [67].
353 At [68].
354 At [70].
355 At [70].
356 At [75]
357 At [76].

> support the issues it wishes to raise. An approach that relies on the Court itself to seek the evidence is not to be encouraged and is unlikely to succeed.

Our assessment

[302] We accept SOI's submission that it was for Creswell to address in its proposal all the relevant effects, including plastics pollution. Ellen France, Williams and Kós JJ categorise this submission as taking the "high ground",[358] but it is in fact what the RMA requires.

[303] Section 88(2)(b) of the RMA provides that an application for a resource consent must "include the information relating to the activity, including an assessment of the activity's effects on the environment" required by sch 4. Under sch 4 cl 6(1)(b), an assessment of environmental effects (AEE) must include "an assessment of the actual or potential effect on the environment of the activity". It must also include, under cl 6(1)(e), "a description of the mitigation measures … to be undertaken to help prevent or reduce the actual or potential effect".[359]

[304] In this case, Creswell did not include plastic pollution as one of the effects of the project in its AEE.[360] That it did not do so may well have been because of a misunderstanding as to the law.[361] Were this the case, that misunderstanding, and the fact that it was shared by the majority of the Environment Court, the High Court and the Court of Appeal, does not mean that Creswell was excused from its obligations under s 88 and sch 4.[362]

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358 Above at [106].

359 For practical information on preparing applications, see Ministry for the Environment | Manatū Mō Te Taiao *A Guide to Preparing a Basic Assessment of Environmental Effects* (Wellington, 2006). This publication draws attention to the "very broad" definition of effects and says that all effects must be addressed: see at 9, 17 and 27.

360 See the comment of Commissioner Kernohan at [334] of the EnvC judgment, above n 212, reproduced above at [234].

361 It is possible that, at the application stage, this misunderstanding of the law was shared by the current appellants but that also is irrelevant in that, under the RMA, it was Creswell that should have included plastic pollution in its application as a relevant effect.

362 Given the High Court and the Court of Appeal did not consider plastic pollution to be a relevant effect it is not surprising that they did not consider the obligation of Creswell under s 88 and sch 4, nor that they came to the decision they did on the obligation of the Environment Court either to call for evidence on that issue from the parties or to decline the application as Commissioner Kernohan would have done.

[305] As a relevant effect was not included in the AEE, the Councils should have required that information to be included before considering the proposal and, as they did not, the Environment Court should either have declined the application (as Commissioner Kernohan would have done) or required Creswell to put the relevant evidence before it.[363]

[306] Even if it had not been Creswell's obligation to address all relevant effects, including plastic pollution, we would not have dismissed the appeal on what is essentially a pleadings point as to the scope of the appeal, given the devastating effects of plastic pollution on the environment globally.[364]

Result

[307] We would allow the appeals and remit the proposal for reconsideration by the Environment Court.

[308] We would make the usual costs awards in the appellants' favour and remit the question of costs in the Courts below to be determined by those Courts in light of this judgment.

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Brookfields Lawyers, Auckland for First Respondent in SC 1/2023
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Buddle Findlay, Wellington for Second Respondent in SC 1/2023 and SC 2/2023

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363 This would have required also giving SOI and Ngāti Awa the opportunity to put evidence before the Court, including additional tikanga evidence concentrating specifically on plastic pollution. We note the comment of the Court of Appeal that, where the evidence in support of the application is incomplete, although the Environment Court can adopt an inquisitorial approach, the better course may be to decide the case on the evidence before it: see CA judgment, above n 212, at [77]–[78], reproduced above at [301]. In this case that would have meant refusing the application, as Commissioner Kernohan would have done: see EnvC judgment, above n 212, at [322] and [346].

364 Contrary to the position taken by the High Court and by the majority: see above at [238]; and above at [112]–[121] per the majority. In any event, even if the issue of plastics pollution was raised primarily by Commissioner Kernohan, the end use of the bottles had been part of Ngāti Awa's argument in the Environment Court: see above at [229].