

We, Paul Majurey and Kuru Ketu certify that this submission is suitable for publication.

**I TE KŌTI MANA NUI O AOTEAROA
IN THE SUPREME COURT OF NEW ZEALAND**

SC 6/2022

UNDER the Resource Management Act 1991 (**RMA**)

IN THE MATTER of an application for leave to appeal under section 73 Senior Court Act 2016

BETWEEN **PORT OF OTAGO LIMITED**
Appellant

A N D **ENVIRONMENTAL DEFENCE SOCIETY INCORPORATED**
Frist Respondent

AND **OTAGO REGIONAL COUNCIL**
Second Respondent

AND **ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND INCORPORATED**
Third Respondent

AND **MALBOROUGH DISTRICT COUNCIL**
Fourth Respondent

**ORAL SUBMISSION FOR NGĀTI MARU RŪNANGA TRUST, TE ĀKITAI O WAIOHUA WAKA
TAUA INCORPORATED, NGĀI TAI KI TĀMAKI TRUST AND NGĀTI TAMAHOHO TRUST**

(12 May 2022)

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MAY IT PLEASE THE COURT

1. The Supreme Court will confirm the RMA resource consent regime post-*King Salmon* for the coastal environment across Aotearoa, and how policy statements are interpreted and weighed in their relevant RMA setting.
2. Section 104 (resource consent applications)¹ has a separate architecture – “subject to Part 2 ... have regard to ...”.² The NZCPS is one of the mandatory considerations.
3. The purpose of the NZCPS is to state objectives and policies to achieve the statutory purpose for the coastal environment (s56 RMA).
4. NZCPS structure:
 - a. Preamble – no “avoid” references.
 - b. Application of NZCPS - no “avoid” references (including 3rd bullet point).
 - c. Interpretation - no “avoid” references (including 1st bullet point).
 - d. Objectives 1 to 7 - no “avoid” references (including objectives 1 & 2).
 - e. Policies 1 to 29 – wide range of verbs used, including “avoid”.
5. There is no express internal hierarchy in the s 104(1) considerations.³
6. A general ‘avoid policy bottom line’ is not consonant with tikanga or the s104 regime. There will be a cultural and factual matrix in each case, likewise, a policy / plan context will also be present.
7. Where NZCPS objectives / policies pull in different directions, the resolution does not lie with preferring the strongest verb (and leaving the rest behind). Section s104 is to be assessed as a whole, with Part 2 as the touchstone.
8. Thus, in situations where mana whenua apply for consent to develop the coastal environment (aquaculture for taonga species / tauranga waka complex vs surf breaks), giving Policy 16 priority over Objective 3 and Policies 2 & 6 simply because of the comparative intensity of verbs would subvert s104. Yes, avoid means avoid, but, recognise equally means recognise. It is the operative verb, and not merely an intensifier for the place of the Treaty in coastal management. That is why Part 2 is so important in the s104 architecture, as are the strong directions in ss 6(e), 7(a) and 8 to be borne in mind at every stage of the planning process.⁴
9. Nor, does a general ‘avoid policy bottom line’ fit with the operation of ss104 (1)(ab) & (2A) (adverse effects can be offset / compensated, and recognition of investment value).
10. If the effects of an activity do not avoid adverse effects where a NZCPS avoid policy is in play, the s104 question is not whether a resource consent application can depart from the RPS / NZCPS. Rather, it is whether an evaluation of all the relevant s104 considerations permits the grant of consent where they are all engaged with on a rational basis.
11. Similarly, s104 does not prescribe that an applicant must reconcile the NZCPS policies in a way that gives effect to any avoidance policies (by test necessity or no practical alternatives) before finding the policies are in conflict.

¹ For controlled through discretionary activities.

² Compare with the “give effect” regime for policy statements/plans (ss 62(3), 67(3)(b) & 75(3)(b)).

³ Which list is non-exhaustive (s104 (1)(c)).

⁴ *McGuire v Hastings District Council* [2002] 2 NZLR 577 (PC), at [21].