I Te Kōti Mana Nui o Aotearoa
In the Supreme Court of New Zealand

SC 82/2022

between

CLOUD OCEAN WATER LIMITED
Appellant

and

AOTEAROA WATER ACTION INCORPORATED
First Respondent

and

CANTERBURY REGIONAL COUNCIL
Second Respondent

and

SOUTHRIDGE HOLDINGS LIIMITED
Third Respondent

and

TE NGĀI TŪĀHURIRI RŪNANGA INCORPORATED
Intervener

SUBMISSIONS FOR THE FIRST RESPONDENT

14 March 2023

Counsel certify that the first respondent's submissions are suitable for publication and do not contain any information that is suppressed.

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SUBMISSIONS FOR THE FIRST RESPONDENT

MAY IT PLEASE THE COURT

INTRODUCTION

1. This appeal concerns whether the Canterbury Land and Water Regional Plan (**LWRP**) requires consents for activities involving the take and use of groundwater to be assessed under r 5.128. The first respondent, Aotearoa Water Action Incorporated (**AWA**) submits that the Court of Appeal was correct to find that this is what the LWRP requires.[1] It is what the LWRP says, and its accords with the scheme and purpose of the LWRP and the Resource Management Act 1991 (**RMA**).

2. The appellant (and, separately, the third respondent (**Southridge**)[2]) seek to take and use water to fill plastic water bottles. The appellant had an existing take and use consent allowing it to take and use water to operate an industrial wool scour, but not water bottling.[3] The Council allowed the appellant to split off the "take" component of that existing consent and to "amalgamate" it with a new "use" consent for water bottling. The appellant submits that the Council was correct to process that new "use" consent under its residual discretionary power in r 5.6, rather than under r 5.128 which regulates the take and use of groundwater.

3. The Court of Appeal correctly held that the approach advanced by the appellant, and adopted by the Council, is inconsistent with the text of the LWRP, artificially elevates form over substance, and promotes a regulatory incoherence and fragmentation that cuts against what the LWRP and the RMA seek to achieve.

4. That is because Canterbury faces dire issues with water abstraction. Many catchments are considered overallocated or, like the catchment at issue, fully allocated. It was not realistic for the appellant to seek a new "take and use" consent under r 5.128 because the catchment is fully allocated and as a consequence r 5.130 would have classified the activity as prohibited. The approach taken by the Council, and advanced by the appellant, appears to

[1] *Aotearoa Water Action In v Canterbury Regional Council* [2022] NZCA 325 (Kós P, Cooper and Brown JJ) (**101.0193**).
[2] As only the appellant, and not Southridge or the Council, has appealed the decision of the Court of Appeal, the focus of these submissions is on the appellant's position.
[3] In *Aotearoa Water Action Inc v Canterbury Regional Council* [2018] NZHC 3240 (**101.0001**) Churchman J held that the scope of that consent was limited to that specific purpose and did not include water bottling. There was no appeal from that decision.

have been an attempt to create a workaround. AWA submits that there is no proper basis for that approach, and it undermines the important objectives of the LWRP relating to the protection and allocation of Canterbury's water resources and consequent environmental effects.

5. The appeal also concerns the question of whether, if this Court were to allow the appeal and find that the Council was correct to process the consent under r 5.6, the Council nevertheless erred by failing to take into account, under s 104(1)(a) of the RMA, all of the effects on the environment of allowing the activity (specifically, plastic pollution from the bottles being filled through the consent used of groundwater).

6. These submissions follow the following structure:

   (a) A brief overview of approach taken by the Court of Appeal on the r 5.128 issue (the factual background is summarised in detail in the Court of Appeal's judgment and is not repeated here; to the extent that additional factual issues arise they are addressed in the body of the submissions);

   (b) AWA's argument for why the Court of Appeal was correct;

   (c) AWA's response to the contrary argument raised by the appellant; and

   (d) AWA's alternative argument relating to s 104(1)(a) and plastic pollution.

7. In its notice to support the decision under appeal on other grounds AWA identified an argument about the meaning of "water" in the context of s 14 of the RMA. AWA has elected not to further advance that argument. The notice also identified issues relating to adverse effects on cultural values and tikanga Māori. Having conferred with the intervener, AWA respectfully adopts the submissions of the intervener on this ground and does not advance its own (save for a brief observation) to avoid duplication.

AWA'S POSITION ON THE APPLICATION OF R 5.128 OF THE LWRP AND ITS SUPPORT OF THE COURT OF APPEAL'S DECISION

8. AWA supports the reasons of the Court of Appeal (which it does not repeat here), which correctly found that the activity at issue is regulated by r 5.128 of the LWRP and that the application needed to be determined under that rule. The Court of Appeal correctly rejected the approach of the Council—and the approach now advocated for by the appellant—that the use aspect

of the activity could be dissected and considered under r 5.6, as if the activity did not involve a take.

9. The appellant's case creatively advances arguments that depend on a strained reframing of numerous issues in the case. So that the approach that AWA—and the Court of Appeal—says is correct does not become lost in unpicking the appellant's arguments, these submissions begin by presenting AWA's argument as to how the LWRP applies in this case.

The correct approach in a nutshell

10. Cloud Ocean proposes to take ground water and use it to fill plastic water bottles. That is a single activity involving both taking water and using it: water is taken from an aquifer to be used for bottling. Cloud Ocean needs a new take and use consent for the purpose of water bottling because its existing take and use consent is for purposes of operating a wool scour, and in 2018 the High Court found that water bottling was not within the scope of that consent (and that judgment is not appealed here).[4]

11. The activity of taking and using groundwater is regulated by r 5.128 of the LWRP.[5] Taking and using ground water is regulated together as a single activity, subject to various conditions and considerations in r 5.128. Section 14 of the RMA allows councils to regulate take and use together or separately. Rule 5.129 provides that the activity is non-complying if the take is from outside a Groundwater Allocation Zone or bore interference effects are not acceptable. Rule 5.130 provides that the activity is prohibited if environmental flow and allocation limits, or ground water allocation limits, are exceeded. Otherwise, r 5.128 classifies the activity as restricted discretionary.

12. Because the applicant proposes to take and use groundwater for its bottling operation, its application is regulated by r 5.128 because that rule regulates the take and use of ground water. The applicant requires a permit for its proposed activity—taking groundwater to use for water bottling—being a single activity, requiring single permit, regulated by a single rule.

13. Ascertaining the meaning of the LWRP is governed by s 10 of the Legislation Act 2019: "from its text and in light of its purpose and context". The Court of Appeal took an orthodox and linguistically sound interpretative approach, beginning with the text of the LWRP. The Court of Appeal's approach reflects

[4] *Aotearoa Water Action Inc v Canterbury Regional Council* [2018] NZHC 3240 (**101.0001**).
[5] (**304.0158**).

and respects the words used by the drafters of the LWRP in r 5.128 and the adjoining heading ("take and use"), and the deliberate drafting decision to sometimes use a conjunctive ("and") framing, and at other times a disjunctive ("or") framing for different activities and in different contexts.[6] It also reflects obvious textual indicators in r 5.128 pointing to the regulation of take and use of groundwater as a single activity, including the use of the singular "is" when r 5.128 begins "the taking and use of ground water **is** a restricted discretionary activity…" (emphasis added).

14. The Court of Appeal's approach ensures that the LWRP maintains a conceptual and functional coherence because it means that the rule governing and classifying the take and use of groundwater—r 5.128—applies to an activity that involves the take and use of groundwater. The Court of Appeal's approach prevents consent applicants circumventing these specific rules through tactically framed consent applications. The alternative would be incoherence: any applicant wanting to take and use groundwater could create and exploit an artificial split to have its "take" and "use" applications each separately determined under r 5.6, meaning that the important and specific rules and conditions governing the "take and use" of water in r 5.128—and in rr 5.129 and 5.130—would be functionally otiose. For a discrete and separate "use" application, the consenting authority would have no power to reduce the rate of take and volume limits (because those matters are set by the "take" consent), including to enable reduction of overallocation or to reallocate fully allocated zones to better reflect values that might be associated with that water.

15. The Court of Appeal's approach accords with the context of the taking and use of groundwater. Unlike water in a lake, canal, or river, it is difficult to conceive of "in-stream" or non-extractive uses of groundwater. Put another way, to use groundwater, you must take it.

16. The Court of Appeal's approach accords with general practice, and that is best evidenced by the historic consents in this case. Despite the efforts of the appellant to convince this Court that it has an existing "take" consent, it in fact has an existing "take and use" consent.[7] The problem for the appellant is that its existing take and use consent is for a different activity

[6] It appears that this was a deliberate drafting change as the predecessor planning instrument to the LWRP appears to have adopted a wider variety approaches to regulating take and use with some rules separately regulating take and use, and other rules regulating take and use together in some circumstances: Burge affidavit at [34] (**201.0044**).
[7] CRC175895 being a consent "to take groundwater … for industrial use" and specifically to use to operate a wool scour (**301.0089**).

from the activity it proposes to carry out. There is nothing remarkable in the proposition that the appellant's proposal to carry out a new activity involving the take and use of groundwater requires it obtaining a new take and use consent for that new activity under r 5.128.

17. Finally, and importantly, the Court of Appeal's approach accords with the scheme, purpose, objectives and policies of the LWRP. These matters are addressed in detail below.

Purpose and intention of the LWRP

18. The purpose of the LWRP is best distilled from the comments its drafters have recorded in its extensive introduction.

19. The introduction emphasises the importance of water to numerous different, and often competing, activities.[8] It emphasises the complexity associated with managing water, and the challenges that past and current activities have created for ongoing management of water resources.[9] It confirms that fresh water is a "public" or "commons" resource, and that consents do not confer ownership.[10] It recognises the difficulties associated with ensuring certainty while responding to "changing conditions in catchments and values of and demand for water".[11] It recognises that there is no guarantee that new permits will be issued on the same or similar conditions as previously granted.[12] The plan calls for "integrated and consistent management" which balances a variety of "values and uses" which "create competing demands between maintaining in-stream natural and ecological values and the need to abstract or use water for other activities".[13] The challenges of full and over-allocation of abstraction permits are noted,[14] along with the need to "phase out" overallocation.[15] Also noted are the important hydrological connections between surface water and groundwater in Canterbury.[16]

20. The drafters observe that the purpose of the RMA is the promotion of sustainable management of natural and physical resources, and that this "involves managing the resources of the Canterbury Region in ways that

[8] Canterbury LWRP at 8 (**304.0030**).
[9] At 8 (**304.0030**)
[10] At 9 (**304.0031**).
[11] At 9–10 (**304.0031**).
[12] At 10 (**304.0032**).
[13] At 10 (**304.0032**).
[14] At 11 (**304.0033**).
[15] At 17 (**304.0039**).
[16] At 12 (**304.0034**).

provide for the needs of current and future generations",[17] with emphasis routinely placed on ensuring sufficient clean drinking water supplies.

21. Taken together, the purposes evident in the introduction to the LWRP help to explain why the drafters chose, in r 5.128, to regulate the take and use of groundwater together. It also explains why the Court of Appeal's interpretative approach must be right. Regulating the take and use of groundwater together best ensures that the competing values recognised by the drafters are able to be assessed and accommodated, as is the drafters' recognition that these values and environmental conditions change over time. In short, r 5.128 is an embodiment of the type of integrated, values balancing, sustainable management approach envisaged by both the drafters of the LWRP and the RMA.

22. In this connection it is significant that a Regional Council's functions under s 30(1)(a) of the RMA are the establishment of objectives, policies and rules to achieve the integrated management of the natural and physical resources of their region. Section 63(1) provides that the purpose of a regional plan is to assist the Regional Council in carrying out its functions.

The structure of the plan

23. The drafters of the plan explain its structure.[18] Objectives identify the outcomes or goals for land and water resources in the Canterbury region, to achieve the purposes of the RMA. The objectives are implemented by the policies and rules in the plan. The LWRP states that objectives can conflict, and no single objective should be read in isolation.[19] Importantly, the objectives implement objectives and limits in the National Policy Statement for Freshwater Management.[20]

24. Policies comprise strategic policies and specific policies. Strategic policies apply to all activities and provide an "overall direction for the integrated management of land and water".[21] Specific policies are outcome-based and provide guidance on the outcomes expected by the LWRP including as part of resource consent processing, and to "provide the rationale for the rules, and the status which is given to activities in the rules".[22]

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[17] At 27 (**304.0049**).
[18] At 35–36 (**304.0057**).
[19] The LWRP goes on to refer to an "overall broad judgment" but this must of course be read in light of this Court's judgment in *Environmental Defence Society Inc v King Salmon* [2014] NZSC 38, [2014] 1 NZLR 593 and the judgment of the Court of Appeal in *R J Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, [2018] 3 NZLR 283.
[20] Canterbury LWRP at 36–37 (**304.0058**).
[21] At 35 (**304.0057**).
[22] At 35 (**304.0057**).

25. The rules implement policies, as required by s 67(1)(c) of the RMA, and have the effect of regulations.[23] The rules determine whether an activity requires a resource consent and, importantly, "an activity needs to comply with all relevant rules in the Plan, unless the rule itself states otherwise".[24]

26. The LWRP observes that while it is intended, in the future, to manage all land and water activities in the Canterbury Region, there continue to be several specific separate regional plans for different areas that prevail with respect to those areas.[25]

Objectives

27. The LWRP directs that the objectives must be read in their entirety and considered together, and while in any particular case some may be more relevant than others none are more or less important.[26]

28. Taken together—as directed—the objectives evidence an intention to ensure integrated sustainable management of Canterbury's natural resources and the need to strike a balance between competing values and uses of those resources. This accords with the narrative purpose of the LWRP described in the introduction. It is also consistent with the decision of the drafters—as endorsed by the Court of Appeal—to regulate the take and use of groundwater together. Regulating this activity in this way ensures that the values and effects associated with the water resource and the use of that resource can be considered in a holistic and integrated way.

Policies

29. The LWRP also directs that its policies—which implement its objectives—must be read in their entirety and considered together.[27]

30. Again, taken together, the strategic policies (4.1 to 4.8) evidence concerns about the need to manage both the taking of groundwater and the use of groundwater, including its effects on the water resource; and the needs of people and their communities.

31. The specific policies relating to the abstraction of water (policies 4.49 to 4.64) and the use of water (policies 4.65 to 4.59) are highly integrated. "Use"

[23] At 36 (**304.0058**).
[24] At 36 (**304.0058**).
[25] At 38–39 (**304.0060**).
[26] At 55 (**304.0077**) noting the same qualifier as above, n 19 and that in those cases the Courts held that tensions should be resolved and that in some cases a very directive policy could be determinative in doing so.
[27] At 58 (**304.0080**).

concerns are prevalent throughout policies relating to abstraction, for example use as community water supply in policy 4.49;[28] the "national benefits" of use for hydro-electricity generation and irrigation in policy 4.51;[29] and the need for irrigation uses to comply with a Farm Environment Plan in policies 4.61 and 4.62.[30] Similarly, "abstraction" concerns are prevalent throughout policies relating to use, such as the need to assess the rate, volume and seasonal direction that is reasonable for the intended use in policy 4.65;[31] effects of irrigation abstraction on the availability of winter flows for storage and ecosystem recovery in policy 4.66;[32] and as to overallocation in policy 4.67A.[33] These matters all generally support a deliberate approach by the drafters of the plan to treat the activity of taking and using groundwater together in some instances, and this supports the interpretation of r 5.128 taken by the Court of Appeal.

Rules

32. Rule 5.128 implements these objectives and policies, consistently with the narrative purpose of the LWRP, by regulating the taking and use of groundwater together subject to four conditions and on the basis of restricted discretionary matters concerning the taking of water (i.e. matters 1A, 3, 4, 5, 7, 10), the use of water (i.e. 1, 2, 8, 11) or both (i.e. 6, 9).[34]

33. As the Court of Appeal found, the language and structure of r 5.128 is consistent with it meaning what it says: the activity of taking and using groundwater is to be considered together according to the regulation provided for that activity in the rule. The deliberate use of "take and use" can be contrasted with the deliberate use of "take or use" elsewhere in the LWRP, for example rr 5.121 and 5.122, which regulate the "take or use" of water from hydroelectric canals or water storage.[35] This drafting reflects the conceptual ability to use this water without taking it (i.e. through an instream use), in contrast to groundwater.

34. Rules 5.129 and 5.130 confirm that taking and using groundwater that does not meet the conditions in r 5.128 is either a non-complying or a prohibited activity. In the catchment at issue in this case, which is fully allocated, a new

[28] (**304.0098**).
[29] (**304.0098**).
[30] (**304.0100**).
[31] (**304.0101**).
[32] (**304.0101**).
[33] (**304.0101**).
[34] (**304.0158**).
[35] (**304.0153**).

activity of taking and using groundwater would be a prohibited activity because it would result in the exceedance of groundwater allocation limits.

35. Notably, the rules regulating groundwater do not contemplate an activity that does not involve a standalone use of groundwater.[36] Also notable is rr 5.128 to 5.132 being recorded under a conjunctive section heading ("Take and Use Groundwater") and all rules under that heading using that same conjunctive language (including in relating to *non-consumptive* taking and use of water). The LWRP does not contemplate any situation where there would be an activity that is a use of groundwater without a take, or a take of groundwater without a use, because any such activity is almost impossible to conceive. This further confirms the intention of the drafters of the LWRP to treat these matters together and, as we will see, illustrates the artificiality of the appellant's position in this case.

36. If there were a situation where an activity was truly only a take or use of groundwater, then that activity would not be classified by the plan and r 5.6 would be engaged. In the present case r 5.6 is not engaged on its terms because it only applies in respect of activities that are not classified by the Plan, and that activity here—taking and using water for botting—is classified by the plan in r 5.128, 5.129 and 5.130.

Summary of AWA's affirmative argument

37. To summarise, the Court of Appeal was correct to find that r 5.128 regulates the appellant's activity because:

    (a) The appellant's proposed activity is the take and use of groundwater for water bottling;

    (b) It was open to the Council to regulate take and use of groundwater together and it has done so in the LWRP;

    (c) Rule 5.128 of the LWRP regulates take and use of groundwater as a single activity because that is what r 5.128 says, and the rule provides for matters that bear on both take and use (and leads to important controls in r 5.129 and 5.130 where the conditions in r 5.128 are not met);

[36] Some rules do anticipate an activity that is a take may be connected to things other than just use. For example, r 5.119 (**304.00152**) contemplates that groundwater may be taken for site dewatering and this may come with either an associated "use and discharge".

(d) It would undermine the purpose, coherence and scheme of the LWRP, and the specific regulation in r 5.128 (and r 5.129 and 5.130), if parties could apply separately for consents to "take" and "use" groundwater under r 5.6, where the activity proposed is in actuality a "take and use";

(e) It accords with the scheme, context, purpose, objectives and policies of the LWRP (in light of the RMA) to read r 5.128 as meaning what it says: an activity that is the take and use of water must be considered under that rule (and take and use considered together), and that a consent applicant cannot craft its way around that rule by artificially bifurcating its take and use activity.

ADDRESSING THE APPELLANT'S CASE ON THE LWRP

Overview

38. It has been necessary to begin by setting out AWA's positive argument as to why the Court of Appeal was correct to find that r 5.128 was engaged. This is because the appellant's submissions involves a range of premises and framings that diverge almost entirely from the approach taken by AWA and the Court of Appeal. To that end, it is important that the distinct analytical approach taken by the Court of Appeal, and endorsed by AWA, is not lost in the course of engaging with the appellant's arguments which begin from quite different starting points.

39. At the outset, AWA observes that the appellant variously describes Council's process here as "unremarkable", "orthodox" and "not … unusual".[37] However, the correspondence of counsel decision-makers and the evidence of officials shows that the issues raised provoked substantial internal discussion and debate as to the process to be followed.[38]

Section 14 of the RMA

40. The appellant says that s 14 of the RMA permits councils to separately regulate the "take" and "use" of water.[39] There is no dispute that s 14 of the RMA permits councils to do that. However, s 14 equally does not prevent councils from regulating those matters *together* as a single activity, and that proposition does not appear to be challenged by the appellant.

[37] Appellant's submissions at [5(k)] and [5(l)].
[38] See, Gladding affidavit at [19]–[31]] (**201.0001**) and Burge affidavit at [29] (**201.0043**).
[39] Appellant's submissions at [28]–[30].

41. In the LWRP the Council has chosen to regulate the take and use of groundwater together as a single activity, under a single set of rules, as it is entitled to do.

The existing permits

42. The appellant's submissions repeatedly frame its existing permits as being permits to "take" water.

43. However, neither Cloud Ocean nor Southridge have existing "take permits". Rather, they both have existing "take and use" permits:

    (a) Cloud Ocean has an existing water permit "to take groundwater … for industrial use" (CRC175895);[40] and

    (b) Southridge has existing water permits "to take and use water" or "to take groundwater … for industrial use" (CRC172118 and CRC172245).[41]

44. A key plank of the appellant's case depends upon the assertion that the "take" components of these "take and use" permits can somehow be severed, and then combined with a new and separate "use" permit by a process of "amalgamation" to effectively create a new take and use permit for an entirely different activity and without going through r 5.128. This issue is addressed further below.

45. These existing permits are *not* take consents: they are take and use consents. In an preliminary hearing in this matter—which is not under appeal—the High Court confirmed that:[42]

    (a) When analysing the scope of a consent it was necessary to consider the purpose for which the water was being used;

    (b) Accordingly, water bottling was not within the scope of permits CRC971084, CRC971556, and CRC012609[43] because the purpose of water take and use under those consents was use for a wool scour and a meat processing operation respectively.

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[40] (**301.0089**).
[41] (**301.0016**) and (**301.0009**) respectively.
[42] *Aotearoa Water Action Inc v Canterbury Regional Council* [2018] NZHC 3240 (**101.0001**).
[43] CRC971084 (**301.0083**) being what was transferred to become CRC175895 (**301.0089**) for Cloud Ocean. CRC971556 (**301.0003**) and CRC012609 (**301.0003**) being what was transferred to become CRC172245 (971556 (**301.0009**) being what as transferred, via CRC1638441, to become CRC172118 (**301.0016**) (Southridge's "5 well" and "3 well" consents, respectively).

46. This is important. Water bottling is outside the scope of the existing permits to take and use water. Yet the appellant proposes to extricate the "take" element of those existing consents, for which water bottling is out of scope, and to combine it with a new "use" consent for water bottling.

47. In a sense, the appellant's position is to treat a consent as if it were, and as if it conferred, a property right: because the appellant already has a "take" it should be able to keep that take and attach a new use to it. But the RMA and the LRWP are not a scheme of property rights, they are a scheme of principled and regulated resource management. A resource consent is not property and does not confer property rights.[44] A resource consent permits an activity.

48. Here, the existing consents permitted the taking and use of water to operate a wool scour and a meatworks respectively. That is the scope of those consents. The appellant does not have a free standing "take" consent that it can deploy for other uses as it wishes. Rather, the "take" elements of its existing consents are inextricably imbued with the purposes for which those takes were granted, being the use purposes on which those existing consents were sought. Those permits—and the takes associated with them—were assessed and granted on the basis that they would be used for a wool scour and a meatworks, not for a bottling operation.

49. The appellant's attempts to dissect and repurpose these existing consents is perverse and inconsistent with the scheme of the RMA and the LWRP as a system of resource management. At the time the existing consents were granted, the wool scour and the meatworks were likely substantial employers and economic and social contributors, and that might have justified the take and use granted in a way that is not, for example, justified by water bottling operations (notably, the restricted discretion under r 5.128 would today prevent consideration of economic benefits). It is appropriate that take and use is considered together, and it cannot be assumed that because a take was, in the past, found to be justified for a particular use, that the take is also justified for a different use today.

The activity

50. Another example of the delicate framing used in Cloud Ocean's submissions is the assertion that its proposed activity is only to "use" groundwater because that is what its consent application says.[45]

[44] Resource Management Act 1991, s 122(1).
[45] Appellant's submissions at [36]–[39], [51]–[52].

51. The problem with this submission is that it ignores the reality of what Cloud Ocean is proposing to do: taking water to use for bottling. The Court of Appeal correctly preferred an approach that looked at the substance of Cloud Ocean's activity when considering what rule of the LWRP was engaged, rather than following a strategically framed and artificially bifurcated consent application.[46]

52. Cloud Ocean's submissions embrace a creative legal formalism over the text, purpose, context and coherence of the LWRP. Cloud Ocean submits that a council is required to consider a consent application solely on the framing of the activity described in that application: "what is proposed by the applicant is a matter of fact" and "what is proposed, is proposed" such that "a rule either applies or it does not".[47] This means that, on the appellant's case, there is nothing preventing an applicant carefully slicing and dicing its activity into component parts to avoid undesirable regulatory consequences in the LWRP. The Court of Appeal correctly found that this cannot be what the drafters of the plan intended, and it would undermine the coherence and scheme of the LWRP as whole.[48]

53. The key point is that however Cloud Ocean might have framed its consent application to try to navigate a way around r 5.128, the reality is that its proposed activity is a take and use of water.[49] The LWRP regulates the activity of take and use of water as a single activity under r 5.128.

54. It would be a remarkable outcome, undermining the scheme and coherence of the LWRP, if councils were bound by the *framing* of an activity in a consent application, even if that were incomplete or inaccurate.[50] Rather, the application of the plan should be determined by a substantive assessment of the activity proposed to be undertaken.

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[46] Court of Appeal judgment at [132] (**101.0233**). This is consistent with a long line of authorities to the effect that consents authorise activities not breaches of rules, for example, *Arapata Trust Limited v Auckland Council* [2016] NZEnvC 236 at [35]; *Marlborough District Council v Zindia Ltd* [2019] NZHC 2765; [2020] NZRMA 216 at [37]; and *Duggan v Auckland Council* [2017] NZRMA 317 at [37].

[47] At [39(c)] and [51].

[48] Court of Appeal judgment at [130]–[131] (**101.0232**).

[49] It is also telling that the standard consent form used by Cloud Ocean to apply for its "use only" consent is headed "CON200: APPLICATION FOR RESOURCE CONSENT TO TAKE AND USE GROUNDWATER" (**301.0092**).

[50] See *AFFCO New Zealand Ltd v Far North District Council (No 2)* [1994] NZRMA 224 ("Good resource management practice requires that in general all the resource consents required for a project should be carefully identified from the outset, and applications for all of them should be made at the same time so that they can be considered together or jointly").

"Amalgamation"

55. The appellant's argument appears to be that it was able to bifurcate the "take" aspect of its existing "take and use" consent to operate a wool scour, to obtain a separate "use" consent for water bottling under r 5.6, and then have the Council combine or "amalgamate" those separate permits together to "create …new Take and Use permits" for water bottling.[51]

56. The problem with this submission is that there is no concept of "amalgamation" of permits in either the LWRP or the RMA. The Council has acknowledged the lack of any legal power to "amalgamate" consents, with one of its witnesses, Dr Burge, admitting that this process had no formal basis in the RMA and that it was an "administrative" step only.[52] Dr Burge acknowledged that this really meant that there were two "standalone" permits.[53] In the Court of Appeal, counsel for the Council was recorded as responsibly conceding that "amalgamation did not alter the rights conveyed by the consents".[54] Viewed in this light, the Court of Appeal was content to accept that an *administrative* amalgamation might be legitimate, but that depended on the underlying consents being lawful.[55]

57. AWA respectfully takes a different view: absent a power to "amalgamate" consents, it is not lawful for the Council to do that.

58. Regardless of the answer on that issue, the key underlying point holds: an administrative amalgamation, whether lawful or not, cannot alter the substance of the underlying consents. This shows the appellant's position to rely on a fiction: that "amalgamation" can enable a "take" permit to be carved out of an existing "take and use" permit, and then be combined with a new "use" permit to create a new "take and use" consent without r 5.128 being engaged. It also relies on amalgamation to transform the "take" component of its existing consents, which the High Court has found do not include water bottling within their scope, in to a "take" that somehow does apply to water bottling. All told, what the appellant relies on *is* a substantive

[51] Appellant's submissions at [20]. Cloud Ocean's ultimate consent, CRC182813, being the product of "amalgamation", is described as a consent "to take and use groundwater" (**301.0156**).
[52] Burge affidavit at [47] (**201.0046**).
[53] Burge affidavit at [49] (**201.0047**). However, the artificiality of the Council's approach (and the position advanced now by the Appellant) is illustrated by Dr Burge's acknowledgment that no separate "use" only consent (i.e. CRC182812) was ever actually issued because it was "immediately amalgamated" into CRC182813 which is described as a "take and use" consent: Burge affidavit at [63] (**201.0049**).
[54] Court of Appeal judgment at [109] (**101.0226**).
[55] Court of Appeal judgment at [132] (**101.0233**).

transformation—of both the existing permit and the "new" permit—and that is not something permitted by the RMA or by the LWRP.

59. Moreover, here the "amalgamation" decision on the Cloud Ocean consent *did* have a substantive effect and was not simply administrative. If one compares the conditions of the "use" consent component (CRC182812[56]) with the "take" consent component (CRC175895[57]) it can be seen that almost all of the conditions in the "amalgamated" consent (CRC182813[58]) are new and do not reflect the underlying consent conditions in the individual "take" and "use" consents.[59] The effect of the amalgamation can only be characterised as creating a new "take and use" consent without applying r 5.128. This is confirmed by the Council's own documents, which rejected a subsequent effort by Cloud Ocean to amend the conditions of CRC175895 because "this resource consent has been **replaced** by resource consent CRC182813" (emphasis added).[60]

Effects under r 5.6 and r 5.128

60. At [40] to [44] of its submissions the appellant submits that r 5.6 was a "higher hurdle to surmount" because "the range of considerations is unfettered" (albeit, the appellant later submits that the range of considerations are fettered when it comes to plastic pollution).

61. The argument is illusory because it depends on the flawed premise that take and use do not need to be considered together. What the appellant's approach prevents is an ability (or requirement) for the consent authority to assess what take is suitable for the proposed use, and to then calibrate the take accordingly; or even to determine whether a take should be allowed at all for that use. The appellant points to there being an existing take which is able to be fully utilised for its existing use (i.e. to operate a wool scour). But that take has been assessed and set *for that use*.[61] The relevant issue is

[56] (**301.0163**).
[57] (**301.0089**).
[58] (**301.0156**).
[59] Condition 3 of CRC182813 provides that water *shall only* be used for bottling, whereas the only condition of CRC182812 provides that water *may* be used for bottling. Condition 2 of CRC182813 includes take restrictions that are not present in condition 1 of CRC175895. Conditions 4 through 7 of CRC182813 regulate measurement of flow (i.e. take) but are not in the underlying "take" consent CRC175895. Conditions 2 and 4 of CRC175895 are not in CRC182813. Condition 8 of CRC182813 is similar, but not identical to, condition 3 of CRC175895.
[60] (**302.0003)**. The Commissioner's subsequent decision on a revised variation application similarly referred to the "amalgamated" CRC182813 as a "consent … to take and use groundwater" (see **302.0126** at [1]]).
[61] For example, the 1997 and 2001 renewal applications for what became the Southridge consents focused extensively on explaining and justifying the use of water for slaughtering and cooling at the freezing works (**303.0039**) and (**303.0010**).

not the definition of the existing environment, but rather what take if any is appropriate for any new use. That can only be addressed by considering take and use together and r 5.128.

Role of rules in a plan

62. At [45] to [47] of its submissions the appellant says that the Court of Appeal's approach is to have rules drive policies or objectives, or to "let the rule decide what the proposal is, rather than the application itself". This is not what the Court of Appeal's decision does. Rather, it looks at the reality of what the applicant is doing: the activity is taking and using water, not using it only.

The role and application of r 5.6

63. As discussed, a core part of the appellant's submission is that it is the consent applicant that gets to frame its "activity" or "proposal", meaning it can slice and dice its way around specific regulations in the LWRP. So here, despite there being no dispute that a "take and use" consent is ultimately needed, the appellant says it was entitled to frame its activity as being a "use" only and that the Council was required to approach its application on that basis (with the consequence that r 5.128 did not apply). As noted, the Court of Appeal rightly rejected this artificial approach.

64. The consequence of the appellant's argument, however, is that it says there is no specific rule governing its "use only" activity meaning that the so-called "catch-all" r 5.6 applies.[62]

65. The description of r 5.6 as a "catch-all" is not apt. On its terms, r 5.6 is not a "catch-all" because it only applies when an activity "is not classified by this Plan as any other of the classes of activity listed in section 87A of the RMA". Rule 5.6 is better described as a "residual" rule.

66. This point is important because it again demonstrates the artificiality of the appellant's approach. Rule 5.128 provides that the *activity* of "taking and use of groundwater" is a restricted discretionary activity. As a matter of fact, the appellant does propose to take and use groundwater for water bottling and there is no other way to describe what the appellant is intending to do. Even on the appellant's case there is no dispute that it ultimately ends up with a "take and use" consent, albeit it says this is achieved through a combination of new and existing consents, and "amalgamation". The reality is that the LWRP has regulated and classified the activity of "taking and use

[62] Appellant's submissions at [48]–[50].

of groundwater" in r 5.128 (and in rr 5.129 and 5.130) and that means that r 5.6 does not apply on its terms. For reasons already explained, including by the Court of Appeal, it would create incoherence if that classification could be avoided by allowing a consent application to artificially bifurcate the framing of that activity.

67. In response to this, the appellant submits that if the drafters of the plan had intended to prohibit the artificial approach they advance, then the drafters would have done that expressly. However, the better view is that the drafters saw no need to say any more than what they had said in the LWRP because they had expressly regulated the activity of take and use of groundwater together in r 5.128. The introduction to the LWRP explains that "an activity needs to comply with all relevant rules in the Plan, unless the rule itself states otherwise".[63] That is, had the drafters intended the artificial approach advanced by the appellant, then they would have provided for that in the rules. They did not.

Section 91 does not overcome the logical flaw in the appellant's argument

68. The Court of Appeal correctly identified a major logical flaw in the appellant's position. If an applicant could skirt the detailed requirements of r 5.128 by applying for a "use" only consent under r 5.6, then an applicant could also skirt the detailed requirements of r 5.128 (and rr 5.129 and 5.130) by applying for a "take" only consent under r 5.6.[64] The specific conditions and regulations included in r 5.128 would be functionally otiose because they could always be avoided by a dissected application, each part of which would only be considered in isolation under r 5.6.

69. The appellant's "answer" to the logical problem identified by the Court of Appeal is to point to s 91 of the RMA (at [53] to [56]).[65] Section 91(1) provides:

> (1) A consent authority may determine not to proceed with the notification or hearing of an application for a resource consent if it considers on reasonable grounds that—
>
> (a) other resource consents under this Act will also be required in respect of the proposal to which the application relates; and
>
> (b) it is appropriate, for the purpose of better understanding the nature of the proposal, that applications for any 1 or more of those other resource consents be made before proceeding further.

[63] (**304.0058**).
[64] Court of Appeal judgment at [130]–[131] (**101.0232**).
[65] Appellant's submissions at [53]–[56].

70. Section 91 provides no solution to the appellant's logical quandary. Even if the Council exercised its s 91 power when faced with a standalone "take" application—and there is no requirement that it do so—there is nothing on the face of s 91 to suggest that this could change the framing of the applications for what the appellant, on its case, would have to say are two separate activities (one activity being a "take" and one being a "use", neither being a "take and use"). There is also no requirement for applications to be heard together, and s 91 only allows earlier applications to remain on hold until further applications are made.

71. The appellant attempts to overcome this problem by creating the concepts of "precursor" and "postliminary" activities. Neither concept is found in the RMA or the LWRP or, it appears, the authorities. The appellant asserts that if presented with a "take" only application under r 5.6—take said by the appellant to be an activity that is "precursor" to a use—the Council can somehow use s 91 to transform the "take" application and a separate "use" application into a "take and use application". However, there is nothing in s 91 to support, let alone compel, this outcome. Moreover, this submission (at [55]) cuts directly against the appellant's prior submission (at [51]) that a consent application is to be assessed by the Council the basis that "what is proposed, is proposed" and that it is not for the consent authority to "re-write" the application.

72. The appellant then argues that the "postliminary" nature of "use" means that a "take" must have been sought prior—in which case it says r 5.128 will apply by virtue of the necessary addition of the "postliminary" "use" application—or the take will be one that is already permitted.[66] The logic here is difficult to parse: in the immediately preceding paragraph of its submissions the appellant advanced the argument that the "preliminary" nature of a "take" consent means it is unlikely to be granted without a concurrent "use" consent.[67] This begs the question of why there would ever be a prior "take" consent without the connected "use" element. All of this circles back to one of the key artificial premises of the appellant's case: that it has an existing "take" consent, when in fact it has an existing "take and use" consent for a different and inconsistent use. Even if the appellant were right, the scope of its existing "take" consent would be limited to the purpose of the wool scour, and water bottling would be out of scope.[68]

[66] Appellant's submissions at [56].
[67] Appellant's submissions at [55].
[68] As found at the preliminary stage by Churchman J (**101.0001**).

73. The appellant's submission is especially artificial when it comes to groundwater. Unlike surface water, which might conceivably be the subject of various instream non-consumptive uses that do not involve a take, the spatial features of groundwater mean that it must be taken to be used. When this is appreciated, it becomes obvious why the drafters of the plan decided to regulate the "take and use" of groundwater together as a single activity.

74. Section 91 provides no answer to the logical problems the Court of Appeal identified as arising from the appellant's position.

Can there ever be standalone "take" or "use" consents?

75. None of this is to say that there might not be some activities that are truly standard alone takes without a use, or standalone uses without a take. So, there may be circumstances where an activity is only a "take" or only a "use" and as such it would not be regulated by a "take and use" rule meaning that the those standalone activities are not otherwise classified by the LWRP and r 5.6 is engaged. The problem for the appellant in the present case is that the appellant's activity is one that involves both take and use, and so is not one of these activities.

76. Consider, for example, a non-consumptive instream use of water flowing through an irrigation or hydroelectric canal: perhaps a salmon farm or a waterwheel. Rules 5.121 and 5.122 regulate the taking or use of water from irrigation or hydroelectric canals. Where certain conditions are met, the taking or use of water from these canals is a permitted activity, and if they are not met then it is a discretionary activity. Neither rule, however, contemplates a use only, like the salmon farm or the waterwheel, meaning that such an activity is not otherwise classified by the plan and the residual rule in r 5.6 applies.

77. This example stands in marked contrast to the activity in the present case. In the present case there the activity is both a take and use because the appellant wishes to take groundwater and use it to put into bottles. Taking and using groundwater is regulated by r 5.128.

Prohibited status of the water bottling applications

78. There is no dispute that the relevant Groundwater Allocation Zone (**GAZ**), Christchurch West-Melton, is regarded as fully allocated by the Council.

79. The appellant makes two arguments. First, the appellant says that it is possible to obtain new consents in a fully allocated GAZ provided there is

no increase in the amount of water allocated.[69] That may be conceptually true if the Council's position is correct. The appellant then submits that "this is easily achieved by an applicant concurrently surrendering their existing allocation and seeking that it be regranted in the new consent".[70] The submission begs the question of why the appellant has chosen not to take this "easy" step here and has instead appealed to this Court. The reason appears to be that applications to take and use water are considered on a "first come, first served" priority basis.[71] That means if there are other, earlier, applications in the queue, then any surrender of the appellant's existing consent could see water reallocated to those applications first.[72] Indeed, the approach of the appellant and the Council—in relying on a hybrid of a new use and an existing take—enabled this issue to be avoided.

80. Second, the appellant submits that the Christchurch West-Melton GAZ has no allocation limit, and that accordingly prohibited status under r 5.128 cannot apply as it only applies if an applicant proposes to exceed a relevant allocation limit.

81. The problem with this submission is that the Christchurch West-Melton GAZ *does* have an allocation limit, and the Council has determined that it is fully allocated. The allocation limit is recorded in r 9.6.2. The rule is headed "Groundwater Allocation Limits" and commences with the words "The following groundwater allocation limits are to be applied when reading policies and rules in Sections 4, 5 and 9". In view of these words, there can be no doubt r 9.6.2 is a "groundwater allocation limit" for the purposes of r 5.128 because that is what r 9.6.2 says.

82. Rule 9.6.2 then provides:

> In general, no additional water is to be allocated from the Christchurch West-Melton Groundwater Allocation Zone shown on the Planning Maps except for group or community water supply as set out in Rule 5.115 or for non-consumptive taking and use as set out in Rules 5.131 and 5.132.

83. The appellant places key emphasis on the introductory words "in general" which it says means that there is no "firm limit" and that the rule "does not completely preclude an application for further allocation being granted",[73]

[69] Appellant's submissions at [59(b)(i)].
[70] Appellant's submissions at [59(b)(i)].
[71] See, for example, *Central Plains Water Trust v Ngai Tahu Properties Ltd* [2008] NZCA 71.
[72] Notably, Dr Burge takes a different view in his affidavit, being that there cannot be additional parties "in the queue" because further takes from the Christchurch West-Melton GAZ are prohibited because it is fully allocated: Burge affidavit at [91] (**201.0054**). As discussed in the following paragraphs, this point would also defeat the Appellant's argument.
[73] Appellant's submissions at [59(b)(ii)]–[61].

meaning, it says, that condition 3 of r 5.128 is not engaged and its proposed activity would not be prohibited under r 5.130 if those rules did apply.

84. The appellant's approach ignores the balance of the words in r 9.6.2. Those words explain that the starting point is that no additional water is to be allocated in the Christchurch West-Melton GAZ. However, an exception is created for group or community water supplies and for non-consumptive taking and use. The words "in general" are best read as qualifying the phrase "no additional water is to be allocated" to reflect the fact that the rule then provides that additional water may be allocated for the limited purposes stated. This is also the Council's view.[74]

85. The appellant's approach would also be perverse to the scheme of the LWRP. The Christchurch West-Melton GAZ is a main source of Christchurch's drinking water, and the LWRP's focus on meeting drinking water supplies is consistent both with a general position that no allocations within the GAZ may be made, save for drinking water supplies.

86. The appellant's submission that r 9.6.2 creates some general ability to allocate new groundwater takes within the fully allocated Christchurch West-Melton GAZ beyond the exceptions recorded in r 9.6.2 is inconsistent with the text, scheme and purpose of the LWRP and would support overallocation.

87. Accordingly, an application for the take and use of groundwater within the fully allocated Christchurch West-Melton GAZ (other than under rr 5.115, 5.131 or 5.132) would be prohibited in accordance with r 5.128(3) and r 5.130.

IS WATER BOTTLING A USE OF "WATER"?

88. As noted, the first respondent no longer pursues this aspect of its application to support the decision of the Court of Appeal on other grounds.

SECTIONS 95A AND 104(1)(A) REQUIRE CONSIDERATION OF EFFECTS ON THE ENVIRONMENT OF THE PLASTIC BOTTLES PRODUCED FROM ALLOWING THE ACTIVITY

89. This argument is advanced in the alternative that this Court allows the appeal and finds that an application to "use" groundwater for water bottling

[74] Burge affidavit at [85]–[86] (**201.0053**); Davie affidavit at [38] (**201.0075**).

could be made and considered separately from a take under r 5.6 (i.e. that use did not need to be considered alongside take under r 5.128).[75]

90. AWA submits that the consent decisions were unlawful because they failed to take into account, under ss 95A and 104(1)(a) of the RMA, the effects on the environment of allowing groundwater to be used for water bottling; specifically, the effects on the environment from the plastic bottles that will be created and distributed as a result of allowing the groundwater use.[76] AWA says that this consideration was required both under s 104(1)(a) and, as a consequence, for the purpose of notification under s 95A(8) (which requires notification in accordance with s 95D where "the activity has or is likely to have adverse effects on the environment that are more than minor").[77]

91. Cloud Ocean's bottling operation involves the onsite pre-forming and blowing of plastic bottles for filling.[78] AWA submits that an effect of allowing Cloud Ocean's use of groundwater for water bottling will be that plastic bottles will be created and distributed, and the plastic from those bottles will inevitably end up in the environment and will have effects on the environment. Moreover, the more water that is allocated to the activity, then the more plastic will be created to serve it.

Approach of the decision-maker

92. The s 42A report for the Cloud Ocean consents did not address the issue of plastic pollution,[79] and neither did the application.[80] The issue was, however, raised by a member of the public and was therefore considered by

[75] Counsel observe that the issues in this case are raised in connection with consents to use groundwater. Similar issues may arise in connection with consents to use land. In that connection, counsel observe that these issues are squarely raised in that context and in relation to s 104(1)(a) of the RMA in an application for leave to appeal to this Court in *Sustainable Otakiri Incorporated v Whakatāne District Council* SC 1/2023.
[76] While the consent does not authorise the activity of making bottles, as a matter of fact that making of bottles will be a consequence of a consent to use water for water bottling.
[77] Section 95A(8) uses different language to s 104(1)(a). However, it submitted that logically the effects to be considered for the notification decision under s 95A must be the same effects required to be substantively considered under s 104(1)(a), save that s 95A explicitly limits the relevant effects for notification purposes to *adverse* effects only. To that end it is submitted that issues relating to tangibility, directness and so on discussed below must be common to the two sections.
[78] Cloud Ocean's website records that "Cloud Ocean Water is the only water bottler in New Zealand to pre-form and blow their own bottles on site": https://www.cloudoceanestate.com/the-cloud-ocean-water-story. It is also a matter of public record that in 2019 ECan identified various issues with Cloud Ocean's facility including discharge of plastic beads used in bottle making: https://www.stuff.co.nz/business/113123818/cloud-ocean-water-fined-for-environmental-breaches-at-christchurch-water-bottling-plant.
[79] (**301.0131**) at [22]–[54], and in particular [41]. Also at [97]–[99] (as to s 104(1)(a)).
[80] (**301.0113**) asserting that "the change in use will not result in any the [sic] actual or potential effect on the environment".

Dr Burge in his notification and consent decision.[81] Dr Burge focused on the issue of *disposal* of the bottles, finding that such issues were not directly connected to the activity of putting water into the bottles.[82] Dr Burge took the view if issues of disposal by end users were relevant then no consents could be granted for activities involving packaging as those end user effects could not be "avoided, remedied or mitigated".[83] He concluded that the "inappropriate disposal of bottles by the end user" was not something he could consider in his decision-making.[84]

93. Dr Burge determined that there was no basis for notification under s 95A,[85] and he granted the consent without considering the effects from plastic bottles in his s 104(1)(a) analysis.[86]

Breaking down s 104(1)(a) of the RMA

94. AWA submits that a close analysis of the text s 104(1)(a) of the RMA is required. Section 104(1)(a) requires decision-makers to have regard to "any actual and potential effects on the environment of allowing the activity".

95. Judicial authorities on the meaning of s 104(1)(a) frequently failed to place significance on the word "allowing", and instead tended to apply the section as if it read in a way that only required consideration of "the effects of the activity".[87] AWA submits that the environmental effects from plastic bottles made, filled and sold by the appellant (and Southridge) are actual or potential effects on the environment of *allowing* the activity. That is, the use of water for water bottling is an integral part of the water bottling operation, and there is no reason to suggest that the water bottles would be made by Cloud Ocean if it could not use groundwater to fill them.

[81] (**301.0148**).
[82] (**301.0152**) at [30]–[31].
[83] (**301.0152**) at [32]–[35].
[84] (**301.0152**) at [36].
[85] (**301.0153**) at [43].
[86] (**301.0154**) at [50]–[52].
[87] In *West Coast ENT Inc v Buller Coast Ltd* [2013] NZSC 87, [2013] 1 NZLR 32 at [128] a majority of this Court took the view that the language of s 5(2)(c) ("…effects of activities on the environment") was similar to that used in s 104(1)(a) ("…effects on the environment of allowing the activity"). Notably, in the present case, the formal decision granting the "use" only consent CRC182812 and the "amalgamated" consent CRC182813 failed to correctly identify the test under s 104(1)(a), instead only identified that any adverse effects on the environment "of the activity" would be minor: (**303.0142**) and (**303.0146**) respectively.

96. Also relevant is:

(a) the reference in 104(1)(a) to "any actual or potential" effect, which supports a legislative intention that this enquiry is characterised by breadth rather than narrowness;

(b) relatedly, the expanded definition of "effect" in s 3 to include "any … adverse effect", "any … future effect" and "any … cumulative effect", all of which naturally tend to engage on the inevitable need to dispose of plastics produced by allowing an activity which creates and distributes plastic products;

(c) the wide definition of "environment" in s 2, extending to "ecosystems and their constituent parts, including people and communities" and with no explicit geographic limitations; and

(d) the fact that Parliament has expressed s 104(1) to be subject to Part 2 of the RMA, meaning those purposes and principles are engaged in a primary way.

97. To that end, it is also necessary to situate this interpretative exercise alongside Part 2 of the RMA, which describes its purpose. The purpose is broadly expressed to be the promotion of the sustainable management of natural and physical resources. The definition of sustainable management is well known to this Court and it has held that s 5(2) must be read as an integrated whole.[88] Also important are the matters in s 7 to which decision-makers must have regard. These extend to kaitiakitanga, the ethic of stewardship, the intrinsic value of ecosystems, the maintenance and enhancement of the quality of the environment, and any finite characteristics of natural and physical resources.

98. AWA submits that, read together, s 104(1)(a), its defined terms, and the purpose and consideration provisions of Part 2 are consistent with a decision-maker being required to take into account the effects on the environment—in the form of inevitable plastic pollution—of allowing an water to be use in an activity that will create and distribute plastic products. Nothing in those legislative provisions evidences a Parliamentary intention that such matters can or should be excluded from consideration. Their exclusion undermines the comprehensive resource management framework

[88] *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 at [62], [96].

established by the legislation. AWA submits that these conclusions, and defined terms, necessarily flow through to s 95A.

***West Coast ENT*: tangibility and directness**

99. In *West Coast ENT v Buller Coal* this Court considered the issue of whether the end use of coal (i.e. being burned and releasing carbon dioxide) was a matter to be considered under s 104(1)(a) for a land use consent. A majority of this Court held that consideration of those effects was barred by s 104E, and that those effects were insufficiently "direct"[89] and "tangible"[90], and were "too remote",[91] to be considered under s 104(1)(a). While the majority recognised that consent authorities have "sometimes" taken into account "effects on the environment which are consequential on allowing the activity for which consent is sought" this would be more likely where the consequential effects "are not directly the subject of control under the RMA" and would involve questions of fact and degree.[92]

100. AWA submits that the concepts of "directness", "tangibility" and "remoteness" are inappropriate and are glosses to the text and scheme of the RMA. In that way, AWA respectfully supports the minority reasoning of Elias CJ in *West Coast ENT* and her observations that these concepts are not derived from, and in fact cut against, the RMA.[93]

101. At a practical level, the application of concepts of indirectness, intangibility and remoteness seem all too frequently to be applied in an inconsistent and unprincipled way (reflecting, it is submitted, those concepts being inappropriate glosses on the RMA).

102. That is well illustrated in the present case. The s 42A report for Southridge's consents (CRC180312 and CRC180729) under r 5.6, took into account the following as part of its assessment of social, economic or cultural effects:[94]

> The effect of the change to include commercial water bottling as a use of water taken under CRC172118 (and CRC172245) will have a positive effect due to the creation of additional jobs (projected to be 240) and allow [sic] for infrastructure development such a proposed in-land port for Lyttelton Port Company.

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[89] *West Coast ENT Inc v Buller Coal Ltd*, above n 87, at [117]–[119].
[90] At [121]–[127].
[91] At [117] (referring to the view of the High Court to that effect).
[92] At [119] referring to *Beadle v Minister of Corrections* EnvC Wellington A074/2002, 8 April 2002 where the Environment Court held that it was able to have regard to the intended end-use of a proposed land use consent as a corrections facility, so long as the effects were not too uncertain or remote.
[93] See, for example, at [87]–[93] (including observing that the remoteness arguments in that case were "impossible to reconcile with the terms of s 3, Part 2 and s 104 of the Resource Management Act").
[94] (**301.0044**) and (**301.0035**).

103. Similarly, the s 42A report for Cloud Ocean's consents included, under s 104(1)(a) the "positive effects" of "the creation of jobs" and "investment in the Christchurch economy".

104. It would be remarkable if the consideration of the effects of allowing a use of groundwater can include speculative claims about potential job creation from the water bottling facility, and the potential for the transport of the bottles created by the plant to support the development of in-land port infrastructure or unspecified wider economic investment, yet could not include the fact that the those same plastic bottles will inevitably end up in the environment.[95]

105. It is impossible to reconcile with the purposes and principles of the RMA an approach which allows speculative considerations of additional employment and economic activity from allowing groundwater to be used for the production of bottled water to be considered as a relevant effect on the environment, but for the inevitable plastic pollution associated with allowing that same activity to be treated as too intangible or remote.[96] As Elias CJ observed in *West Coast ENT* the approach to ss 5 and 104 of the RMA must be assessed by taking into account matters that detract from claimed benefits, and that the exercise of assessing "sustainable management" should not be one-sided.[97]

106. It is respectfully submitted that, faced with a particularly challenging case, the majority of this Court took a wrong turn in *West Coast ENT* with profound consequences on the application and integrity of the RMA. AWA respectfully submits that this Court was wrong to impose glosses of tangibility, directness and remoteness on the language of ss 3 and 104(1)(a) and that the better view is that the sections should be left to be applied as Parliament drafted them and in light of Part 2 of the Act.

The Court of Appeal's decision in *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council*

107. The appellant responds to the first respondent's plastics argument by relying on the recent decision of the Court of Appeal in *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council*.[98] That case also concerned challenges to

[95] Viewed another way, issues relating to plastic waste and plastic disposal are surely just as much "social" or "economic" effects on the wider community as these economic benefits for the purposes of Sch 4 of the RMA.
[96] To be clear, the definition of "effect" is such that assessments of likelihoods or risks of effects can be considered on the totality of the evidence. The issue here is the inconsistent application of those principles.
[97] *West Coast ENT Inc v Buller Coal Ltd*, above n 87, at [88].
[98] *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2022] NZCA 598.

consents to take water, and for land use granted, for a water bottling facility and its associated plastic bottle blow-moulding plant. One of the arguments raised—a matter first raised by a minority of the Environment Court—was whether the consideration of environmental effects of allowing that activity should have included consideration of plastic pollution. The Court of Appeal rejected that view on the basis of five "conceptual difficulties"[99] set out in the appellant's submissions.[100]

108. AWA submits that both the reasoning of Dr Burge (when making decisions under ss 95A and 104)[101] and the Court of Appeal's judgment in *Te Rūnanga o Ngāti Awa* begin from a wrong premise. They approached the issue from the premise that plastic pollution depended on whether the plastic bottles were properly disposed of and that this was an end use issue only. On the contrary, AWA submits that plastic pollution is an *inevitable* consequence of creating plastic products and is therefore a front-end issue. While some plastic might be able to be recycled several times (and the recyclability of Cloud Ocean's bottles is not known, because the Council did not seek that information) all plastic has a finite commercial life before it inevitably becomes waste. All plastic ever made will eventually end up in the environment: by being burned, by being put in landfill, or by otherwise being disposed into the environment.[102] Plastic items in landfill and the environment will eventually break down into environmentally pervasive plastic particles, microplastics or even smaller particles. Put shortly, there is no way to ultimately dispose of plastic that does not have an actual or potential effect on the environment.

109. It is regrettable that there is no information on these issues squarely before this Court, but that is because the consent application did not provide it,[103] the consent was not notified, and the Council did not seek any information, thereby leaving the issue to be instead determined on Dr Burge's assertions. It is of course not for this Court to consider or assess these effects, or what they might mean for the consent. Rather, AWA identifies these issues

[99] At [56]-[61].
[100] Appellant's submissions at [77].
[101] (**301.0148**).
[102] Even then, very little virgin plastic is recycled. Leading research on this issue has estimated that only around 9% of all virgin plastic ever made has been recycled, with 12% being incinerated and 79% accumulating in landfills or the environment. As the authors also explain "Recycling delays, rather than avoids, final disposal". See Roland Geyer, Jenna R Jambeck and Kara Lavender Law, "Production, use, and fate of all plastics ever made" (2017) 7(3) Scientific Advances.
[103] A point made by Linwood Law in its initial correspondence to the Council about this issue: (**301.0124**) at [8] and (**301.0125**) at [13(ii)].

simply as context for its legal submission that the Council is required to consider and investigate these matters under s 104(1)(a) of the RMA.

110. The following sections address the five objections identified by the Court of Appeal in *Te Rūnanga o Ngāti Awa* (which broadly align with Dr Burge's concerns in this case), broadly using the framing of the summary of these objections in the appellant's submissions.

Permission is not needed under the RMA to dispose of plastic bottles, and it is "inconceivable" that the RMA would require consideration of the disposal of every product sold in a plastic bottle or a plastic container

111. This proposition also begins from a wrong starting point. The issue here is the consideration of the effects of allowing the activity being consented; that does not turn on whether those effects require permission under the RMA or not. Moreover, and as noted, the Court of Appeal was wrong to direct its focus to how plastics are disposed of, when it is submitted that the effects are connected to the creation of plastic products.

112. The Court of Appeal was also wrong to suggest that it would be "inconceivable" for the RMA to apply in this way. AWA respectfully disagrees. First, these effects would only need to be considered where they are the effects of an activity which is subject to a consenting process,[104] and involve a classification that allows those matters to be considered (that is, this regulatory application would not extend to every plastic product). Second, and as noted, the RMA allows consideration of all sorts of effects of allowing an activity (including economic and employment benefits) and it is difficult to distinguish those matters from the fact that producing and selling plastic products will also have environmental effects. Third, the issue is only one of consideration. The outcome of taking into account plastic pollution will not necessarily be that activities involving plastic products are no longer consented. Rather, Council would need to turn its mind to how those effects might be mitigated, remedied or avoided, including through appropriate consent conditions.

A consent holder cannot control the actions of a consumer

113. Again, this proposition comes from a wrong premise. Plastic pollution does not turn solely on how a plastic item is disposed of. As noted, plastic

[104] And, of course, there are often many of effects of an activity that do not need consent but which are considered as part of an application. For example, vehicles operating on a public road from a site being consented do so lawfully without a consent, but their effects (noise, dust, vibration) are routinely considered as part of a consent process for that site.

pollution is an environmentally inevitable consequence (albeit potentially taking differing forms) of creating and using plastic.

114. The short point is that the consent holder can control the actions of a consumer because the consent holder is choosing to use the plastic in the products it is supplying to the market. It is the consent holder, and not the consumer, who has the choice whether to use alternative materials in its products.

The disposal of plastic bottles into the environment in New Zealand would be unlawful under the Litter Act 1979 and therefore it is already regulated

115. Again, this proposition ignores the inevitability of plastic pollution. Plastic pollution does not arise only from "unlawful" disposal (i.e. littering), it arises from plastic being disposed into the environment. That might be through some other means, which might be lawful (e.g. landfill or burning). Moreover, there is nothing in the RMA to suggest that it matters whether the effects of allowing an activity are lawful or not: the Court of Appeal's approach is to impose a restrictive gloss on the language of s 104(1)(a) and the defined terms it uses.

The disposal of plastic bottles in foreign jurisdictions, whether lawful or not, is too remote

116. AWA refers to its earlier submissions on the idea of "remoteness" as an inappropriate gloss on the language of the RMA, and its earlier submissions that a focus on disposal is misplaced. In any event, the proposition begs the question rather than answering it: unless and until councils make enquiries of consent applicants about these matters, who is to say whether relevant information is too remote or difficult to find.

Even if the adverse effects of exporting bottles could be considered, it would be impossible to quantify, or to assess the legality of disposal, and it is not a matter fairly and reasonably related to a consent to take water

117. AWA relies on the same points already made:

(a) The ultimate environmental effects of producing plastic products are inevitable, and do not turn on the nature of disposal for any particular bottle, or the legality of that disposal (and the RMA says nothing about legality in connection with effects on the environment).

(b) It is speculation to say that effects cannot be quantified because consent authorities have not asked the question. In any event, the RMA does not require "quantification" of effects for them to be

relevant under s 104(1)(a). It is notable that in the present case the consent authority was content to consider an effect as vague as "investment in the Christchurch economy" without any effort at quantification.

(c) It is difficult to see why the plastic pollution associated with creating plastic bottles is not "fairly and reasonably related" to a consent to take and use water to fill plastic bottles, but effects on jobs, the economy, and the potential development of an "in-land port" to transport the bottles are "fairly and reasonably related".

118. AWA respectfully invites this Court to hold that the Council was required to consider the effects on the environment of allowing the activity as it related to plastic pollution in applying ss 95A and 104.

CULTURAL EFFECTS OF WATER BOTTLING

119. Counsel have conferred with counsel for the intervener, and to avoid duplication will leave this issue to be addressed by the intervener.

120. However, AWA does wish to comment on the appellant's position that issues relating to the cultural effects of water bottling were not put in issue in the statement of claim. While cultural issues were not directly referred to in AWA's amended statement of claim, the pleaded matters involved a broad challenge to the Council's consideration of effects on the environment of allowing the activity relating to notification.[105]

COSTS

121. AWA brings this proceeding in the public interest and in the context of consent decisions that were not publicly notified but were of significant public concern. It wishes to have the opportunity to be heard on costs.

Dated 14 March 2023

D A C Bullock / S G T Ma Ching
Counsel for the First Respondent (AWA)

[105] ASOC at [82.1] and [82.2] (**101.0057**).