

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 82/2022

BETWEEN CLOUD OCEAN WATER LIMITED

Appellant

AND AOTEAROA WATER ACTION INCORPORATED

First Respondent

(Continued next page)

**LEGAL SUBMISSIONS ON BEHALF OF CANTERBURY REGIONAL
COUNCIL
15 March 2023**

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*Counsel for the Second Respondent certify that this submission contains
no suppressed information and is therefore suitable for publication.*

AND CANTERBURY REGIONAL COUNCIL

Second Respondent

AND SOUTHRIDGE HOLDINGS LTD

Third Respondent

AND NGĀI TŪĀHURIRI RŪNANGA

Intervener

MAY IT PLEASE THE COURT**TĒNĀ, E TE KŌTI**

- 1 The Canterbury Regional Council (**Council**) was the decision-maker in respect of the three resource consents that are the subject of this proceeding.
- 2 The purpose of these legal submissions is to assist this Honourable Court in its understanding of the context concerning the relevant regional planning framework in Canterbury.
- 3 However, the Council does not take a position on the ultimate issue to be determined. The Council takes a neutral position and will abide the decision of this Honourable Court in respect of the three resource consents quashed in the Court of Appeal.

Background and key findings of the Court of Appeal

- 4 The extended factual background to this case is set out in both the Court of Appeal's decision and the chronology and is not repeated here.
- 5 The salient detail for the purposes of these submissions is that in the case of each of the three resource consents, the Council had processed an application for an additional use of water (in reliance on an existing allocation), under rule 5.6 of the Canterbury Land and Water Regional Plan (**LWRP**).
- 6 While previous planning frameworks in Canterbury separately regulated the taking and use of water,¹ Rule 5.128 of the LWRP regulates the "take and use" of groundwater in a single combined rule.
- 7 On a plain reading of this rule and taking into account the other rules in the LWRP separately regulating the take *or* use of water,²

¹ Affidavit of Philip Burge, 16 August 2019, at [34]: [[201.0044]].

² See for example rules 5.121 – 5.122 of the LWRP: [[304.0153]].

the Council officers concluded that the use of the word “and” in this rule meant it was unable to consider a new standalone “use” under Rule 5.128.³

- 8 The LWRP provides a separate rule for activities that are not otherwise managed under the LWRP in a catch-all rule, being rule 5.6. Rule 5.6 provides:⁴

Any activity that—

(a) would contravene sections 13(1), 14(2), s14(3) or s15(1) of the RMA; and

(b) is not a recovery activity; and

(c) is not classified by this Plan as any other of the classes of activity listed in section 87A of the RMA

— is a discretionary activity.

- 9 It was under this rule that the Council processed and granted each of the resource consent applications to use water for water bottling.

- 10 The issue key to the Court of Appeal’s decision was whether the Council was required to consider the applications for the “take” and the “use” of water together. Alternatively framed, this question could be expressed as whether the Council’s decisions to process separate resource consent applications for the “use” of water (subsequently amalgamated with the existing take and use consent) were lawful.

- 11 In making its decision to allow Aotearoa Water Action’s (**AWA**) appeal, the Court of Appeal made the following findings:

[110] We do not consider that the High Court erred in its interpretation of s 14 of the RMA. In particular, the prohibition in s 14(2) that “[n]o person may take, use, dam, or divert” treats each of those activities disjunctively. There is no reason, given the drafting, to treat “take” as necessarily combined with “use”, any more than there is to treat “take” as necessarily linked to “dam” or

³ Affidavit of Philip Burge, dated 16 August 2019, at [40]: [[201.0045]].

⁴ LWRP, Rule 5.6: [[304.0109]].

“divert”. All of the activities are subject to the same prohibition unless authorised by subs (3).

...

[113] But it does not necessarily follow from the drafting of ss 14 and 30 that the Council is able to grant a separate consent for a use and a separate consent for a take. Whether or not that is possible will in our view depend on the terms of the regional plan and the controls it contains in relation to water. In this case, the LWRP as has been seen refers variously to “taking or use” and “taking and use”. We consider the different wording is important and must have been intended. Thus, where the expression used is “taking or use of water” the plan contemplates that there might be an activity involving one or the other or both. Where the expression used is “taking and use” the intent appears to be that the activity will involve both.

...

[129]... Here, the necessary resource consent was a consent to take and use water, because that is the activity that the rule contemplates. We do not consider it can be legitimate to proceed on the basis that the plan contemplated stand-alone take and use consents given the drafting of the relevant rules.

- 12 Given the findings of the Court of Appeal on this issue, these submissions provide further context to the planning framework in Canterbury. In light of the Council’s neutral position, these submissions do not address any of the matters raised in AWA’s Notice that Judgement will be supported on other grounds.

Planning framework in Canterbury

Planning context

- 13 Regional plans are prepared by regional councils under the Resource Management Act 1991 (**RMA**), in order to assist a regional council to carry out its functions under the RMA.⁵
- 14 Regional plans must be prepared and changed in accordance with the council’s functions under the RMA, the provisions of Part 2, a national policy statement, New Zealand coastal policy statement, national planning standard, and any regulations.⁶

⁵ RMA, s 63.

⁶ RMA, s 66.

- 15 A regional plan is required to state the objectives for the region, the policies to implement the objectives, and the rules (if any) to implement the policies.⁷
- 16 Regional plans must give effect to any national policy statement, any New Zealand coastal policy statement, a national planning standard, and any regional policy statement.⁸ Regional plans are not to be inconsistent with a water conservation order, or other regional plan for the region.⁹
- 17 In the Canterbury region, there are a range of relevant planning documents.
- (a) In terms of the regional planning documents, the Canterbury Regional Policy Statement 2013 (**RPS**) sits first in the hierarchy.
- (b) The role of the RPS is to achieve the RMA's purpose "by providing an overview of the resource management issues of the region and policies and methods to achieve integrated management of the natural and physical resources of the whole region".¹⁰ The RPS may identify methods to implement policies, but not rules.
- (c) Below the RPS sit a number of regional plans. Under the RMA, regional councils are not required to have regional plans (other than the requirement to have a regional *coastal* plan).
- (d) There are seven regional plans which regulate water in Canterbury.¹¹

⁷ RMA, s 67.

⁸ RMA, s 67(3).

⁹ RMA, s 67(4).

¹⁰ RMA, s 59.

¹¹ The other regional plans not mentioned in these submissions are the Regional Coastal Environment Plan for the Canterbury Region and the Canterbury Air Regional Plan.

- (e) The Canterbury Land and Water Regional Plan (**LWRP**) is the regional plan with the broadest application in the region.
- (f) There are six other regional plans that apply to specific catchments:
 - (i) Hurunui Waiiau River Regional Plan;
 - (ii) Opihi River Regional Plan;
 - (iii) Pareora Catchment Environmental and Water Allocation Regional Plan;
 - (iv) Waimakariri River Regional Plan;
 - (v) Waipara Catchment Environmental Flow and Water Allocation Regional Plan; and
 - (vi) Waitaki Catchment Water Allocation Regional Plan.

18 All of parts of the LWRP relevant to this case were made operative on 1 September 2015.¹² At this time, the LWRP replaced the Natural Resources Regional Plan (**NRRP**) in relation to the regulation of the taking of groundwater in the Christchurch West Melton groundwater allocation zone. As is recorded in the Court of Appeal's decision, the NRRP distinguished between rules regulating the take of water, and those regulating the use of water.¹³

19 The LWRP is structured as follows:

- (a) Section 1 concerns the introduction, issues and major responses;¹⁴
- (b) Section 2 explains how the plan works and contains definitions. This includes a Table in Section 2.8 which

¹² These included Sections 1 to 4, all section 5 rules (other than 5.123-5.127 and 5.154-5.158) and all of Section 9. [[304.0017]].

¹³ *Aotearoa Water Action Inc v Canterbury Regional Council* [2022] NZCA 325, at [76]: [[101.0214]].

¹⁴ LWRP, Section 1: [[304.0030]].

explains the relationship between the LWRP and other regional plans controlling land and water in the Canterbury region;¹⁵

- (c) Section 3 contains the objectives. There are 24 objectives. The LWRP directs that the objectives must be read in their entirety and considered together;¹⁶
- (d) Section 4 contains the policies. The policies comprise of both strategic policies (Policies 4.1 to 4.8);¹⁷ sub-region policies; and activity and resource policies. In the activity and resource policies, policies primarily concerning water abstraction are included under the following headings: Abstraction of water (Policies 4.49 to 4.64);¹⁸ Efficient Use of Water (Policies 4.65 to 4.69);¹⁹ and Transfer of water permits (Policies 4.70 to 4.71A).²⁰
- (e) Section 5 contains the region-wide rules. Rules 5.1 to 5.6 are under a heading “General Rules”.²¹ Rule 5.1 provides that any activity must comply with all applicable rules in Section 5 (with exceptions). Rule 5.2 provides that any rule on the same subject matter in the relevant sub-region zones in Section 6 to 15 prevails over the relevant rule in Section 5. Rule 5.6, which is the rule that the Council processed the three resource consent applications the subject of these proceedings under, is found within the “General Rules” section of the LWRP.
- (f) The remaining rules in Section 5 are set out under specific “activity” headings. The rules regulating the take *and* use of

¹⁵ LWRP, Section 2: [[304.0057]].

¹⁶ LWRP, Section 3: [[304.0077]].

¹⁷ LWRP, Section 4: [[304.0080]].

¹⁸ LWRP, Section 4: [[304.0098]].

¹⁹ LWRP, Section 4: [[304.0101]].

²⁰ LWRP, Section 4: [[304.0102]].

²¹ LWRP, Section 5: [[304.0109]].

groundwater are contained in Rules 5.128 to 5.132.²² There are also other rules that regulate the take and use of water in certain circumstances (for example, Rule 5.115 regulates the taking and use of water (including groundwater) for a community water supply²³).

- (g) Sections 6 to 15 set out specific rules for the different parts of the region. The rules relating to the Christchurch-West Melton sub-region are contained in Section 9 of the LWRP. There are no specific rules in Section 9 relating to the take and use of groundwater applicable to these proceedings, although section 9 does contain the groundwater allocation limit for the Christchurch West-Melton Groundwater Allocation Zone.²⁴
- (h) The LWRP also contains a number of Schedules. These include Schedule 19, which sets out Ngāi Tahu statutory acknowledgment areas as required under the Ngāi Tahu Claims Settlement Act 1998.²⁵

Interaction with other regional plans in Canterbury

- 20 The case before this Court concerns the interpretation and application of rules in the LWRP, principally Rule 5.6 and Rule 5.128. However, the other regional plans relating to water in Canterbury (and how those regional plans interact with the LWRP) may have a bearing on the Court's consideration of the issues it is required to determine, including in relation to the Court of Appeal's findings at [113] and [129] set out at paragraph 11 above.
- 21 The purpose for addressing the relationships between the LWRP and the other plans that the Council is responsible for administering, is to ensure that this Court is aware of the potential

²² LWRP, Section 5: [[304.0158]].

²³ LWRP, Section 5: [[304.0150]].

²⁴ LWRP, Section 9: [[305.0016]].

²⁵ LWRP, Schedule 19: [[306.0063]].

implications of its decision for the interpretation of plans other than the LWRP.

- 22 In the Council’s view, these are matters relevant to the interpretation of plans, and the intention that can or should be read into the specific wording used.
- 23 While the Council takes no position on what the correct interpretation is, and will abide the decision of the Court, it seeks to ensure that the resulting interpretation can be consistently applied across its planning framework, providing certainty to both resource consent applicants and Council staff administering the various plans. This reflects the need for people and communities to be able to order their lives under planning documents “with some assurance”.²⁶
- 24 Section 2.8 of the LWRP contains a table explaining the relationship between the LWRP and the other regional plans.²⁷ The relationship between the LWRP and some of the other regional plans, as they relate to the regulation of water are explained for the Court’s context as follows. Some of these interactions are explored in the Technical Advice Note prepared by the Council following the Court of Appeal’s decision.²⁸
- 25 In particular, the Waimakariri River Regional Plan (**Waimakariri Plan**) only contains rules relating to the “take” of water, and not its use (in relation to certain water bodies).²⁹

²⁶ *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] 2 NZLR 597, at [10].

²⁷ LWRP, Section 2.8: [[304.0060]].

²⁸ Canterbury Regional Council, “Technical Advice Note: Implications of Court of Appeal decision in *AWA v CRC* [2022] and next steps for consents”, dated 19 August 2022: [[201.0086]].

²⁹ Waimakariri Plan, Rule 5.1 manages the take of water. Rule 5.2 manages the “use, damming and diversion” of water in the tributaries of the Waimakariri River, but does not manage the use of water outside the bed of the tributaries of the Waimakariri River.

- 26 The LWRP also contains a statement that it does not apply to activities managed under the Waimakariri Plan:³⁰

Except for policies and rules in the sub-region sections of the proposed Land and Water Regional Plan that specifically address the repair of earthquake damaged land on individual sites used for residential activities, any objective, policy or rule on the same subject matter in the Waimakariri River Regional Plan prevails over the objectives, policies and rules contained in this Plan.

- 27 This leaves a vacuum where there is no specific rule within either the Waimakariri Plan or the LWRP seeking to control the use of water outside the bed of a tributary of the Waimakariri River.³¹
- 28 In this case, as the taking of water is managed by the Waimakariri Plan, and this specifically prevails over the LWRP, an application could not be made for both “take and use” under the LWRP.
- 29 This leaves two potential interpretative outcomes:
- (a) The “use” of water is considered under the rule equivalent to rule 5.128 for surface water in the LWRP (despite this rule being framed as for the “take and use” of surface water), while the “take” is considered under the Waimakariri Plan;
 - (b) Rule 5.6 (the general rule) of the LWRP is used to consider applications for water taken under the Waimakariri Plan, but used outside the bed of a tributary of the Waimakariri River, despite the “take” being controlled by the Waimakariri Plan.
- 30 Different consequences of the Court of Appeal's decision apply to other regional plans. In the case of the Hurunui Waiau Rivers Regional Plan (**Hurunui Plan**), similar to the LWRP, it uses the phrasing “and” and “or” throughout the Plan, in different rules,

³⁰ LWRP, section 2.8: [[304.0060]].

³¹ The Opihi Plan contains a similar rule structure, so has not been separately addressed.

including in Rule 2.3 which regulates the “taking, diverting, using **and** discharging of surface water”.³²

- 31 While the Court of Appeal’s decision was specific to the LWRP, the Court’s reasoning regarding the interpretation of regional plans (and in particular the intention that can be read into the use of “and” or “or” within a rule framework) is applicable to other plans.
- 32 Applying this reasoning to Rule 2.3 in the Hurunui Plan may lead to an outcome, where only an activity encompassing all four activities listed in the rule (of which it is difficult to conceive of an example) could be lawfully considered through that rule framework.
- 33 Rule 2.3 cannot have been intended to manage taking, diverting, using and discharging of surface water as a single activity, as in some instances the use and discharge of water may be mutually exclusive (for example, the water may be consumptively used before it is able to be discharged).
- 34 While a proper interpretation of this Rule may be that where resource consent is required for any of the listed activities then they must be applied for together, this (at least on its face) appears to be inconsistent with the Court of Appeal’s reasoning, as a resource consent would not be granted for all of the listed activities at once.

Plan interpretation regarding allocation limit

- 35 The submissions on behalf of Cloud Ocean Water address the allocation limit provided in Section 9 of the LWRP regarding the Christchurch-West Melton Groundwater Allocation Zone.

- 36 Section 9.6.2 of the LWRP states:³³

³² For example, Rule 2.3 in the Hurunui Plan states that the “taking, diverting, using **and** discharging of surface water” (emphasis added) is a restricted discretionary activity, subject to meeting the conditions.

³³ LWRP, section 9.6.2: [[305.0016]].

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.

- 37 The submissions on behalf of Cloud Ocean state that it is possible to obtain new consents (within the Christchurch West Melton Groundwater Allocation Zone) provided there is no increase in the amount of water allocated.³⁴ The Council's position is that applicants must "work within" the amount of allocation already provided for non-group and community supplies, such that it is possible to apply for (and for the Council to grant) new consents, subject to there being no increase in the amount of water allocated.³⁵
- 38 However, Cloud Ocean's submissions also suggest that the limit in Section 9.6.2 is not a firm limit and does not completely preclude an application for further allocation being granted.³⁶
- 39 The Council agrees that the limit in section 9.6.2 does not preclude resource consent being granted for group or community water supply or non-consumptive taking and use. However, it disagrees with the submission that new allocations (absent the surrender of an existing allocation) could be made for the take and use of water for purposes other than group or community water supply, or non-consumptive use.
- 40 For context, the uncontested affidavit of Dr Davie, as relied on by the High Court, sets out detail as to the groundwater allocation status in this particular zone:³⁷

³⁴ Submissions on behalf of Cloud Ocean Water Ltd, dated 22 February 2023, at [59(b)(i)], relying on provision 9.6.2 of the LWRP.

³⁵ Affidavit of Philip Burge, dated 16 August 2019, at [87]: [[201.0053]].

³⁶ Submissions on behalf of Cloud Ocean Water Ltd, dated 22 February 2023, at [60].

³⁷ Affidavit of Timothy Davie, dated 16 August 2019, at [30]-[35]: [[201.0073]]; see also High Court Decision at [18]: [[101.0116]].

- (a) 369 million cubic metres of water a year flow through the Christchurch aquifers;
 - (b) 152 million cubic metres a year is allocated for use by people living and industries based in Christchurch (this is the maximum amount that can be used);
 - (c) Of that 152 million cubic metres, 82 million cubic metres per year is allocated to Christchurch City Council, with 73.6 million cubic metres distributed to households and small businesses. The remaining 70 million cubic metres is allocated to commercial businesses (industry, hospital, golf courses, limited agricultural irrigation).
- 41 Dr Davie's evidence carefully explains that the LWRP does potentially enable further allocation for group or community water supply under a consenting framework.³⁸ His evidence is also clear that any such application would need to demonstrate that the further take does not cause a decline in aquifer levels and that the water use is reasonable.
- 42 It is not inconsistent with the scheme of the LWRP (or indeed the version of the National Policy Statement for Freshwater Management that the LWRP was prepared to give effect to) to provide for a narrative limit (rather than a numeric one). The narrative limit still provides a limit; simply because it is expressed through words rather than numbers, it still stands that it is not allowed to be exceeded.
- 43 Through the narrative limit, section 9.6.2 provides that while there may be additional water available for allocation, any new allocation of water is effectively reserved for specific uses (i.e. group or community supply) and the Council has to consider cumulative effects on a case-by-case basis.

³⁸

Affidavit of Timothy Davie, dated 16 August 2019, at [38]: [[201.0075]].

- 44 Therefore, whether further allocation could in fact be granted under the LWRP rules in this zone depends on the activity for which it is sought.
- 45 Guidance on the meaning of this particular provision may be able to be taken from the documents produced through the hearing process on the LWRP.³⁹
- 46 The recommendation report produced by the Independent Hearing Panel that heard submissions on the LWRP (that was subsequently adopted as the Council’s decision)⁴⁰ provides some insight as to the intention behind the allocation limits and the use of the phrase “in general”:

[265] We have already discussed the appropriateness of retaining a Prohibited Activity status for any exceedance of the water allocation limits set in the LWRP. The additional issue raised by submitters is a claimed lack of robustness in the groundwater allocation limits. Be that as it may, they are still limits and in the context of the NPSFM they denote the “maximum amount of resource use available”. Reverting to a Non-Complying activity status for Rule 5.104 as notified (recommended Rule 5.130) could result in a continuation of problematic ‘environmental creep’, where applications to exceed the limits are repeatedly granted. That would defeat the purpose of the limits, and it would not give effect to the NPSFM. Such an ad hoc approach would also compromise the objectives of the LWRP, particularly those that seek to address the over-allocation of groundwater. For these reasons we favour the retention of Prohibited Activity status. Such a classification is appropriate and consistent with the LWRP’s objective of phasing out over-allocation of groundwater and addressing cumulative effects on a catchment wide basis.

[267] The aggregates industry submitted that declaring the Christchurch-West Melton Zone (chapter 9 of the LWRP) to be fully allocated would not give effect to the NPSFM. It was argued that there is very little evidence of analysis that would justify a prohibited activity classification for that GAZ; and that the analysis that had been undertaken for that zone instead related to the difficulty in assessing what the total groundwater take actually is. We were told that there is little land suitable for quarrying available, and that prohibited activity status would result in aggregates being sourced from further afield at greater cost.

³⁹ *Brownlee v Christchurch City Council* [2001] NZRMA 539 (EnvC), more recently cited in *Brial v Queenstown Lakes District Council* (2021) 23 ELRNZ 529 (HC).

⁴⁰ Report and Recommendation of Hearing Commissioners on LWRP (adopted by Council as its decision on 5 December 2013), at [265] – [268] and [328].

[268] In response to the aggregate industry concerns, and as discussed later in this report, we recommend that non-consumptive takes under recommended Rules 5.131 and 5.132 be allowed in this Zone (see section 9.6.2 of the LWRP).

...

[328] In addition, consistent with our view on prohibited activities described above, we recommend that Rule 9.6.2 should be amended as follows:

“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 and non-consumptive taking and use as set out in Rules 5.131 and 5.132.”

- 47 From this decision it is apparent that the addition of “in general” was to cover off the exceptions provided in the limit itself in relation to community water supply and non-consumptive taking and uses, rather than providing an avenue for other activities to seek additional allocation over and above what is already consented.

Conclusion

- 48 The Council is abiding the decision of the Supreme Court.
- 49 However, counsel appear before this Court primarily to assist the Court on issues of plan interpretation and administration, issues on which the Council as regulator has a particular interest.
- 50 The Council is eager to ensure that the decision on the interpretation of the LWRP is made in knowledge of the full context, and to provide the opportunity to explore any particular matters of concern to this Honourable Court in this respect prior to it making its decision.

Dated this 15th day of March 2023

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P A C Maw / L F de Latour
Solicitor for Second Respondent