IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI O AOTEAROA **SC 2/2023**

BETWEEN	**TE RŪNANGA O NGĀTI AWA**
	Appellant
AND	**BAY OF PLENTY REGIONAL COUNCIL**
	First Respondent
AND	**CRESWELL NZ LIMITED**
	Second Respondent

SYNOPSIS OF SUBMISSIONS FOR TE RŪNANGA O NGĀTI AWA

28 JULY 2023

Counsel certify that, to the best of their knowledge, the Appellant's submissions are suitable for publication and do not contain any information that is suppressed.

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SUMMARY OF ARGUMENT

He taonga tuku iho te wai
Water is an inherited treasure[1]

1. Te Rūnanga o Ngāti Awa's (**Ngāti Awa**) appeal concerns a vexed area of law and public policy: namely, the effects of water bottling, its limited regulatory controls and, in this case, the interaction with tikanga and relevant considerations under Te Tiriti o Waitangi.

2. Creswell NZ Limited's (**Creswell**) application is to take, bottle and export vast quantities of water, specifically, 1.1 million cubic metres of water annually, over the life of the 25-year consent for commercial water bottling.[2] This water will be put into 3.7 million bottles per day (equating to 1.3 billion bottles per year for the next 25 years)[3] and an unknown proportion exported overseas. These are significant adverse effects on the environment. Ngāti Awa submits that such effects can, and should, be considered under section 104(1)(a) of the Resource Management Act 1991 (**RMA**). This is particularly so where, as in this case, the adverse effects will not be considered under any other environmental regulatory regime.

3. Creswell's consents were granted at a time where the Bay of Plenty Regional Council's (**Regional Council**) planning framework was incomplete, the National Policy Statement for Freshwater Management 2014 (amended 2017) had recently been released (which, among other things, strengthened the position of Te Mana o te Wai), and there was (and continues to be) heightened scrutiny over how to appropriately manage the effects of activities such as water bottling through the RMA. In addition, there is no national direction on this type of activity (i.e. water bottling).

4. Ngāti Awa's position in this appeal continues to be a simple and holistic one. The resource consent application to take, bottle and sell water is "for too much water to be sold too far away".[2] To Ngāti

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[1] This whakatauki has been taken from the Joint Brief of Dr Hohepa (Joe) Mason and Dr Te Kei (O Te Waka) Merito, 29 April 2019 (Environment Court) (**Joint Brief**), at [28] **[[204.1241]]**.
[2] *Te Runanga o Ngati Awa v Bay of Plenty Regional Council* [2019] NZEnvC 196, (2019) 21 ELRNZ 539 (**Environment Court Decision**) at [23] per Kirkpatrick J and Commissioner Buchanan **[[05.0029]]**.
[3] Environment Court Decision at [327] **[[05.0076]]**.

Awa, the adverse effects of Creswell's water bottling are detrimental to te mauri o te wai and the ability of Ngāti Awa to be kaitiaki.

5. Ngāti Awa submits that the analysis needs to start with the Environment Court Majority's judgment[4] in which two fundamental errors arise. These errors have been carried through in both the High Court[5] and the Court of Appeal:[6]

   (a) First, the Environment Court Majority applied an erroneous approach to considering the negative tikanga effects of export and plastic bottles (the "end-uses" in this case), those effects being on te mauri o te wai and Ngāti Awa's ability to be kaitiaki. The Majority instead determined that the end-use (or consequential) effects were too remote and outside the scope of section 104(1)(a).[7]

   (b) Second, the Environment Court Majority failed to have recourse to Part 2 of the RMA when assessing the application notwithstanding an incomplete planning framework which did not address the negative effects of water bottling as an activity. Instead, the Majority found that a Part 2 assessment "would not add any value"[8] to their decision-making. This was despite the clear directions from the Privy Council in *McGuire v Hastings District Council* that sections 6(e), 7(a) and 8 are "strong directions to be borne in mind at every stage of the planning process."[9]

6. These errors were material to the grant of consent to Creswell and resulted in an erroneous application of section 104 of the RMA, as well as a narrow application of the *ratio* of the Court of Appeal in *RJ*

[4] The Environment Court Majority being Judge Kirkpatrick and Commissioner Buchanan. Commissioner Kernohan gave a minority decision.
[5] *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2020] NZHC 3388, (2020) 22 ELRNZ 323 (**High Court Judgment**) **[[05.0080]]**.
[6] *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2022] NZCA 598 (**NZCA Judgment**) **[[05.0156]]**. Noting the Court of Appeal did not consider the tikanga effects of the end-uses.
[7] Environment Court Decision at [66] **[[05.0038]]**.
[8] Environment Court Decision at [170] **[[05.0052]]**.
[9] *McGuire v Hastings District Council* [2002] 2 NZLR 577 (PC) (***McGuire***).

Davidson in respect of when reversion to Part 2 of the RMA is permissible.[10]

7. How the effects of water bottling should be considered within the RMA framework requires this Court's guidance. This is particularly so where there are no other rules outside of the RMA that deal with the effects of water bottling activities, as is the case here. This case also engages tikanga and how negative tikanga effects should be properly considered, not only in the context of water botting activities, but generally under the RMA. Any such guidance would also be relevant in the context of the current resource management reforms, including across the proposed lengthy transition period.[11]

8. Ngāti Awa's position on each ground of appeal can be summarised as follows:[12]

   (a) **<u>Ground One</u> - Proper approach to negative "end-use effects":** Ngāti Awa submits that the end-use effects are not ancillary in nature but intrinsically linked to the water take granted. That is, the production and export of water in plastic bottles would not occur without the water take; they simply cannot. Accordingly, the end-use effects are not "too remote" as deemed by the Environment Court Majority but rather are "actual and potential effects on the environment of *allowing* the activity" (emphasis added) and must be properly considered under section 104(1)(a) of the RMA. Specifically:

      (i) **Export**: Ngāti Awa submits that the export of wai outside of Aotearoa negatively effects te mauri o te wai and the ability of Ngāti Awa to be kaitiaki of their taonga. The High Court erred in determining

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[10] *R J Davidson Family Trust v Marlborough District Council* [2018] 3 NZLR 283 (CA). The Court of Appeal in *R J Davidson* considered the application of the Supreme Court's decision in *Environmental Defence Society Inc v The New Zealand King Salmon Co Ltd* [2014] 1 NZLR 593 to the resource consent context and specifically consideration of consent applications under section 104(1) of the RMA.

[11] *See* Natural and Built Environment Bill (186-2), clauses 5(10), 6(2) – (3). At the time of writing, the Natural and Built Environment Bill and Spatial Planning Bill are at Committee of the Whole House and third reading is anticipated to occur prior to 31 August 2023, as the last sitting day of this Parliament. The transition periods currently range from the day after Royal Assent and up to as long as 10 years from enactment.

[12] The Supreme Court granted leave to Ngāti Awa to appeal on these grounds in *Sustainable Otakiri Incorporated v Whakatāne District Council* [2023] NZSC 35 **[[05.0019]]**.

that despite the jurisdictional error,[13] the Environment Court Majority considered the tikanga effects in its assessment of the water take. The Majority did not consider the tikanga effects from an end-use perspective and made no factual findings in that regard. To do so, would have been to frustrate the Majority's own jurisdictional conclusion. Any purported consideration of the negative tikanga effects was limited to the physical sustainability of the water take itself. It cannot be reasonably said that the Majority properly considered the negative tikanga effects of the end-use on a close reading of the Majority's judgment.[14]

(ii) **Plastic Bottles**: Plastic is a pervasive issue in Aotearoa. The production, use and export of plastic bottles create environmental effects that Ngāti Awa says impacts its ability to be kaitiaki, including for those reasons set out in the submissions of Sustainable Otakiri.[15] The lower Courts have consistently ignored the effects of plastics and narrowed their consideration to disposal, rather than impacts of production itself and negative tikanga effects on Ngāti Awa as kaitiaki. To disregard the effects of billions of plastic bottles on the environment cannot be the intention of section 104(1)(a) particularly when those effects will not be considered elsewhere.

(b) **Ground Two - When reversion to Part 2 is required**: In this case, the effects of water bottling engage tikanga effects that are not contemplated by the incomplete[16] planning framework. Ngāti Awa submits that where the

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[13] The High Court accepted that such tikanga effects are capable of consideration under section 104(1)(a) and therefore the Environment Court Majority "went too far" in determining end-use effects were outside of scope. *See* High Court Judgment at [142] **[[05.0112]]**.

[14] Ngāti Awa submits that the Environment Court Majority did not consider any end-use effects including those negative tikanga effects.

[15] *See* Synopsis of Submissions for Sustainable Otakiri Incorporated, 28 July 2023 at [18] and [19].

[16] The planning framework being incomplete was accepted by the High Court, see High Court Judgment at [167] **[[05.0117]]**.

effects of an activity are not contemplated by the planning documents, there must be an ability to revert to Part 2 of the RMA and engage the "multi-dimensional Māori provisions"[17] that must "…be borne in mind at every stage of the planning process"[18] Ngāti Awa has the right and responsibility to advocate, as kaitiaki, for mana over water in the Ngāti Awa rohe (region). The Mataatua Declaration makes that clear.[19] This is a central component of the Part 2 analysis pursuant to sections 6(e), 7(a) and 8 that the Environment Court Majority did not undertake. Cases that engage the "strong directions"[20] within Part 2 as this case does, warrant reversion back to Part 2.

9. Ngāti Awa's position is that the matter should be referred back to the Environment Court for further consideration.[21]

NGĀTI AWA

10. Ngāti Awa is an iwi of the Mataatua waka with its rohe located in the Eastern Bay of Plenty.

11. Section 13 of the Ngāti Awa Settlement Act 2005 (the **Settlement Act**) provides for a definition of those who whakapapa to Ngāti Awa.[22] The Ngāti Awa area of interest is provided for in the Ngāti Awa Deed of Settlement[23] and a description of the Ngāti Awa rohe is set out in the Preamble to the Settlement Act.[24]

12. Te Rūnanga o Ngāti Awa, for and on behalf of Ngāti Awa, is the post-settlement governance entity, the mandated iwi organisation for the purposes of the Māori Fisheries Act 2004, and the iwi authority for the purposes of the RMA. Te Rūnanga is made up of 22 hapū

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[17] Justice Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 Waikato Law Review 1 (***Lex Aotearoa***), p.18. Tā Justice Williams refers to the Māori provisions in the RMA as "multi-dimensional".
[18] *McGuire* at [21].
[19] Mataatua Declaration on Water **[[303.0886]]**.
[20] *McGuire* at [21].
[21] Given Ngāti Awa's grounds of appeal, Ngāti Awa submits it would be appropriate for the Environment Court bench to include a Māori Land Court judge or Māori Commissioner with knowledge of tikanga. Whilst requested, the Environment Court bench did not include a Māori Land Court judge or Māori Commissioner.
[22] Ngāti Awa Claims Settlement Act 2005, section 13.
[23] Deed of Settlement to settle Ngati Awa Historical Claims, 27 March 2003, Area of Interest (Attachment 1.1), p.40. Creswell's application area for its proposed expanded water-bottling plant falls within Ngāti Awa's area of interest.
[24] Ngāti Awa Claims Settlement Act 2005, Preamble.

representatives, who are elected by their hapū every 3 years. The broader Te Rūnanga Group also includes other groups and entities.

13. Ngāti Awa advances this appeal in its role as a representative organisation and kaitiaki, to protect its wai (water), an inherited taonga (treasure) and the taiao (environment), from the effects of a large-scale water bottling development. Ngāti Awa does so acknowledging its responsibilities to present and future generations of Ngāti Awa whānau whānui to ensure water quality and water quantity are available to sustain those generations to come. This duty is encapsulated within the Mataatua Declaration on Water, to which Ngāti Awa is a signatory.[25] The Mataatua Declaration also explicitly recognises that:[26]

> IV. While all humans living in Aotearoa have a right to life and therefore to water, the indigenous peoples of the land have rights based on the Treaty of Waitangi and on aboriginal title to the use of their waters in their tribal regions.
>
> V. As good citizens of the land and in exercising our rights as tangata whenua, we the people of Mataatua recognise the need to share our water and to so manage it for the long term benefit of all peoples.

14. Ngāti Awa continues to be guided by their tikanga, and the Mataatua Declaration, in its approach to this case.

RELEVANT FACTS TO THE ISSUES ON APPEAL

15. At the centre of this case is Creswell's regional consent to take and use a maximum of 5,000 m^3 of groundwater per day (1.1 million cubic metres per year) for commercial water bottling for a term of 25 years.[27] This will increase the volume of water bottled annually from approximately 2 million litres currently to approximately 345 million litres (with the first line operational) and approximately 580 million litres annually when fully operational.[28] This water will be put into 3.7 million bottles per day (equating to 1.35 billion bottles per

[25] Mataatua Declaration on Water **[[303.0886]]**.
[26] Mataatua Declaration on Water **[[303.0886]]**.
[27] Extract of Otakiri Springs Water Bottling Plant Expansion Resource Consent Application and AEE (Regional consents) (**Consent Application**) **[[206.1587]]**. See also Consent number RM17-0424-WT.01 annexed to the Environment Court's final Decision on Conditions in *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2020] NZEnvC 089 (26 June 2020), p. 16.
[28] Consent Application, section 4.1 **[[206.1584]]**.

year for the next 25 years).[29] The activity is to operate 24 hours a day, seven days a week.[30]

16. The regional and district consents sought by Creswell will enable it to significantly develop and expand the existing water bottling facility at 57 Johnson Road, Ōtākiri; currently owned and operated by Otakiri Springs.

17. Ngāti Awa appealed the council level decision granting consent to the Environment Court. The Environment Court heard the appeals against the regional and district consents jointly. Ngāti Awa was supported by and presented evidence from:

    (a) the esteemed Ngāti Awa pūkenga, Dr Te Kei Merito MNZM and the late Dr Hohepa (Joe) Mason QSO;[31]

    (b) the then Manahautū (Chief Executive) of Te Rūnanga o Ngāti Awa, Leonie Simpson;[32] and

    (c) Bridget Robson, an expert planning witness.[33]

18. The evidence of Drs Merito and Mason was clear; "Mā te tūtohu a Creswell e tānoanoa ai te mauri o te wai" (Creswell's proposal will erode te mauri o te wai).[34] This erosion will have a negative effect on the ability of Ngāti Awa hapū to be kaitiaki and in a manner which is outside of their control.[35] Drs Merito and Mason took a holistic approach to their consideration of the activity and its effects; articulating the extraction of the wai, to be bottled and sold overseas, as part of the effects on the ability of Ngāti Awa to be kaitiaki.[36] This also reflected the effects as seen through the lens of the Mataatua Declaration on Water (**Mataatua Declaration**) which affirms Ngāti Awa's rights and responsibilities within its own

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[29] Environment Court Decision at [327] per Commissioner Kernohan **[[05.0076]]**. See also Consent Application, at section 4.1 **[[206.1584]]**.
[30] Consent Application **[[206.1586]]**. See also Environment Court Decision at [20] **[[05.0029]]**.
[31] Joint Brief **[[204.1231]]**.
[32] Brief of Evidence of Leonie Te Aorangi Simpson, 29 April 2019 **[[204.1207]]**. Counsel note that Tūwhakairiora O'Brien (current Tumuaki (Chairman) of Te Rūnanga o Ngāti Awa and hapū representative for Te Pahipoto) also presented evidence as a section 274 party at the Environment Court in support of Ngāti Awa's position and in opposition to Creswell's application **[[204.1260]]**.
[33] **[[204.1184]]**.
[34] Joint Brief at [32] **[[204.1242]]**.
[35] Joint Brief at [34] **[[204.1243]]**.
[36] Joint Brief at [32] – [34], [60], [67] – [72] **[[204.1242 – 1243]], [[204.1255]], [[204.1256 – 1258]]**.

constitutional framework to advocate for mana over water in its rohe.[37]

19. As described by Leonie Simpson in answers to cross-examination, Ngāti Awa has made deliberate choices to remove plastics from its operations when possible, which is reflective of its role and responsibilities as kaitiaki.[38] Ngāti Awa submits that it is also an exercise of their mana to make such a decision.

20. Creswell also presented cultural evidence from Hemana Eruera MNZM. Mr Eruera's evidence was that the application does not affect te mauri o te wai. Mr Eruera's contention being that, as the wai moves, so too does the mauri and any detrimental effects can be restored;[39] in the end all things return to Papatūānuku.[40] Despite this, Mr Eruera also accepted that if ancestral water was removed overseas, then it would no longer be *ancestral* water.[41] Ngāti Awa submits Mr Eruera's evidence focused on the physical sustainability of the take in terms of the aquifer levels and global water cycle, as well as the positive effects of employment on Ngāti Awa.[42]

21. This can also be observed in answers to cross-examination by Mr Eruera:[43]

> Q. I've just got one last question, Mr Eruera, and it just concerns and I don't want to sort of overstress it, but the difference between conceptually your evidence on tikanga and the evidence of Dr Mason and Mr Merito, am I correct in saying that your view is the positive effects of the employment boost the mauri of Ngāti Awa such that there's no effects on te mauri o te wai?
>
> A. Well the positive aspects of the mauri o te wai to the positive aspects of the appointment is a positive outcome for Ngāti Awa.

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[37] Mataatua Declaration on Water **[[303.0886]]**. See also Brief of Evidence of Leonie Te Aorangi Simpson, 29 April 2019, at [50] and [51] **[[204.1221]]**.
[38] Environment Court Transcript **[[201.0369]]**.
[39] Statement of Evidence of Hemana Eruera Manuera, 29 March 2019 (Environment Court) at [11] – [12] and [44] – [47] **[[202.0694]]** and **[[202.0699 – 0700]]**.
[40] Statement of Evidence of Hemana Eruera Manuera, 29 March 2019 (Environment Court) at [12], [50] **[[202.0694]], [[202.0700]]**. See also Statement of Rebuttal Evidence of Hemana Eruera Manuera, 10 May 2019 (Environment Court) at [10] – [11] **[[202.0710]]**.
[41] Environment Court Transcript **[[201.0242 – 0243]]**.
[42] Statement of Evidence of Hemana Eruera Manuera, 29 March 2019 (Environment Court) at [47] – [52] **[[202.0700 – 0701]]**.
[43] Environment Court Transcript **[[201.0236]]**.

22. Commissioner Kernohan also questioned Mr Eruera on plastic bottles:[44]

> Q. So my question is what is the nature of the mauri of a plastic bottle?
>
> A. Well the same as the mauri of the pen. It still retains its own mauri its in a different element, a different aspect of like the living and the deceased are mauri.
>
> Q. But a plastic bottle doesn't return to the land, except as landfill.
>
> A. Well it has (inaudible 11:32:29), it has its own mauri. The water that was n it will have its own mauri.
>
> Q. So have no concern that the water is going into a plastic bottle, hundreds of thousands of plastic bottles?
>
> A. Yeah.
>
> Q. You quote your father's words in 48, "The law will always address the law. The environment will care for the environment. Therefore, mankind needs to address the wrongs to the law and to the environment." Mankind needs to address the wrongs to the environment?
>
> A. Yeah, yeah.
>
> Q. So how does that fit with –
>
> A. Well that's a part of the, the respect of – like we have on the runanga, we have our environmental group that actually can be applying those aspects of correcting it. If it's been degraded or damaged, then that's what we are offering that we can actually restore it through – first I said karakia, then I said through the resources we have or make ourselves, that's how we can apply to correcting the environment.

23. Accordingly, an element of this case is how the lower Courts treated conflicting cultural evidence presented by Creswell (via Mr Eruera) and Ngāti Awa (via Drs Merito and Mason). Ngāti Awa does not shy away from the differing perspectives presented within the evidence given by those with Ngāti Awa whakapapa and has stressed throughout these proceedings the need to recognise and respect whanaungatanga relationships as between Ngāti Awa kin. Nor is Ngāti Awa attempting to challenge the factual findings made by the Environment Court in relation to the physical effects of the take i.e. the hydrogeological. Rather, Ngāti Awa submits that (1) the Environment Court Majority did not consider the tikanga effects of the end-uses and (2) the manner in which tikanga effects are understood and assessed is a question of approach (and law), not a challenge to the correctness of any preferred evidence. This then has a bearing on how the evidence on end-use effects is conceived

[44] Environment Court Transcript **[[201.0239]].**

and applied. Counsel address the conflicting evidence further under the issue of materiality at paragraphs 55 to 58.

24. Notwithstanding that conflict, all tikanga witnesses agreed that "mauri" refers to the definite living essence and character of things,[45] it is the respective hapū that are kaitiaki with Te Rūnanga o Ngāti Awa,[46] and kaitiakitanga is described as the concept of guardianship.[47] There was also undisputed evidence from hydrogeologists that confirmed the take is within the available allocation and the biophysical effects will be minimal.[48] Ngāti Awa pūkenga confirmed that this conclusion on the biophysical effects did not resolve the negative tikanga effects on te mauri o te wai.[49]

25. Despite the production, use and export of plastic bottles being a central part of Creswell's application, no evidence on the effects of plastic bottles was brought by Creswell. The issue of plastic bottles was primarily raised through questioning by Commissioner Kernohan and in cross-examination by counsel during the hearing of Ngāti Awa's appeal against the regional water take consent. We agree with counsel for Sustainable Otakiri: it is regrettable that there is little direct evidence on the effects of plastic bottles on the environment.[50] Ngāti Awa submits that it was open to the Environment Court to seek further evidence and it did not do so because it considered the effects out of scope.[51]

26. The Environment Court was split on whether or not to grant Creswell consent. The Environment Court Majority granted consents. Commissioner Kernohan refused to grant consents, largely due to the consequential effects of the 'end use' when considered through

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[45] Joint Brief at [52]-[53] **[[204.1251]]**; Statement of Evidence of Hemana Eruera Manuera, 29 March 2019 (Environment Court) at [44] **[[202.0699]]**.
[46] Opening Legal Submissions for Te Rūnanga o Ngāti Awa, 22 May 2019, (Environment Court) at [46](b) **[[101.0191]]**; Statement of Evidence of Hemana Eruera Manuera, 29 March 2019 (Environment Court) at [58] **[[202.0702]]**; Joint Brief at [54]-[55] **[[204.1252]]**.
[47] Joint Brief at [54] **[[204.1252]]**; Statement of Evidence of Hemana Eruera Manuera, 29 March 2019 (Environment Court) at [54] **[[202.0701]]**.
[48] Environment Court Decision at [67] - [68] **[[05.0038]]**. See also the Joint Statement of Groundwater Experts, 1 November 2018 **[[202.0610]]**.
[49] See Memorandum of Counsel for Te Rūnanga o Ngāti Awa regarding outstanding issues, 22 March 2019 at [6(a) – (b)] **[[101.0124]]**; Joint Brief at [62]-[63] **[[204.1255]]**.
[50] See Synopsis of Submissions for Sustainable Otakiri Incorporated, 28 July 2023 at [21].
[51] The Environment Court Majority did not therefore engage with section 104(6), which allows an application for resource consent to be declined on the grounds that there is inadequate information to determine the application.

an analysis of Part 2 of the RMA in particular. Importantly, the Environment Court Majority only considered the effects of end-use in the "Jurisdictional Overview", focusing on *whether* the Court had jurisdiction to consider end-use effects under section 104(1)(a) of the RMA. The Environment Court Majority found that consideration of the export and plastic bottles effects, including from a tikanga perspective, was beyond scope.[52]

27. Ngāti Awa (and others)[53] appealed the Environment Court Majority Decision to the High Court, challenging the proper approach to the end-use effects analysis under section 104(1)(a) and the rejection of recourse to Part 2.[54] While the High Court considered that, as a matter of law, the Environment Court Majority went too far in determining the end use of exporting water was beyond scope of the decision-maker,[55] the Court ultimately upheld the Environment Court Decision on the basis that the Majority considered the cultural effects in any event.[56] Ngāti Awa says this was an error of law and addresses this at paragraphs 55 to 58.

28. Ngāti Awa (and others)[57] appealed to the Court of Appeal which ultimately granted leave to Ngāti Awa in respect of three questions of law.[58] The issues heard were on the end-use effects of plastic bottles, whether further evidence should have been required on the effects of plastic bottles and whether reversion back to Part 2 of the RMA was necessary.[59] The Court of Appeal ultimately found in a similar manner to the High Court and Environment Court Majority in respect of the end-use effects of plastic bottles and Part 2 of the

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[52] Environment Court Decision at [66] **[[05.0038]]**.
[53] Appeals against the Environment Court Decision were filed by Sustainable Otakiri, the Ngāti Pikiao Environmental Society Incorporated, Te Rūnanga o Ngāi Te Rangi Iwi Trust and Ngāti Tūwharetoa (Bay of Plenty) Settlement Trust.
[54] At the High Court, Ngāti Awa also had a separate ground of appeal related to the incompleteness of the planning framework. This was not pursued as a separate ground at the Court of Appeal but rather was relevant to the Part 2 ground of appeal.
[55] High Court Judgment at [142] **[[05.0112]]**.
[56] High Court Judgment at [117] – [119] **[[05.0107 – 0108]]**.
[57] Namely, Sustainable Otakiri, Ngāti Pikiao Environmental Society Incorporated and Te Rūnanga o Ngāi Te Rangi Iwi Trust.
[58] See *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2021] NZCA 354 at [4] **[[05.0142]]**. Note that Sustainable Otakiri Incorporated, Te Rūnanga o Ngāi Te Rangi Iwi Trust and Ngāti Pikiao Environmental Society Incorporated were also granted leave on various questions of law. Ngāti Awa was declined leave to appeal on the tikanga effects of end-use.
[59] The Court of Appeal refused to grant leave on the tikanga effects of export. See *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2021] NZCA 354 at [5(2)] **[[05.0143 – 0144]]**; *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2021] NZCA 452 at [14] – [18] **[[05.0154 – 0155]]**.

RMA.[60] Namely, that the end-use effects of export and disposal of plastic bottles were too remote and that reversion to Part 2 was not required.[61]

29. Accordingly, the current state of the law as interpreted by the Environment Court Majority in this case enables large scale effects on the environment from plastic bottles and export to be unaccounted for under a regime created to promote the sustainable management of natural and physical resources.[62]

GROUND ONE: NEGATIVE TIKANGA EFFECTS OF EXPORT AND PLASTIC BOTTLES NOT PROPERLY CONSIDERED

30. This Court is being asked to consider whether the "effects" of end-uses of the water take in this context (export and plastic bottles) can be properly considered under section 104(1)(a) of the RMA.

31. Ngāti Awa submits that they can and should be considered, particularly when the effects are intrinsically linked to the water bottling activity for which consent has been granted. Further, to separate the take from the activity would be contrary to the text of section 104(1)(a). In that regard, Ngāti Awa agrees with Sustainable Otakiri that the effects of "allowing" the activity must be relevant in this case.[63]

32. In respect of plastic bottles, Ngāti Awa endorses and adopts the submissions of Sustainable Otakiri from paragraphs [14] to [56]. Ngāti Awa says further that the effects of plastic bottles have a direct impact on Ngāti Awa's ability to be kaitiaki.

Statutory Framework – The RMA

33. Section 104(1)(a) of the RMA requires a consent authority, "subject to Part 2",[64] to have regard to "any actual and potential effects on

[60] Noting that the Court of Appeal also considered whether the Environment Court should have sought further evidence on the issue of plastic bottles. The Court held that because the disposal of plastic bottles was too remote to be considered an 'effect' under section 104(1)(a) of the RMA, then accordingly, the answer to question 2 had to be 'no'. See NZCA Judgment, at [67] – [79] **[[05.0179-0180]]**.
[61] NZCA Judgment at [54] – [61] and [109] **[[05.0176-0178]]** and **[05.0194]]**.
[62] RMA, section 5.
[63] Synopsis of Submissions for Sustainable Otakiri Incorporated, 28 July 2023 at [24].
[64] Which contains "the purpose and principles" of the RMA and importantly, sections 6(e), 7(a) and 8.

the environment of allowing the activity" for which consent is required.

34. Relevantly, "effect" is defined to include "any positive or adverse effect" and "any cumulative effect which arises over time or in combination with other effects".[65] That is "regardless of the scale, intensity, duration, or frequency of the effect". It also includes potential effects, both of "high probability" and those which, while of low probability, have "a high potential impact".[66]

35. "Environment" is defined to include "ecosystems and their constituent parts, including people and communities", "all natural and physical resources", "amenity values" and "the social, economic, aesthetic, and cultural conditions which affect the matters stated… or which are affected by those matters".[67]

Approach of the lower Courts

36. The Environment Court Majority were primarily concerned with the issue of nexus and remoteness when considering *whether* end-use effects could be considered under section 104(1)(a) as a jurisdictional issue and *how*.[68] Accordingly, the Majority only substantively engaged with the question of end-use effects in its 'Jurisdictional Overview'.

37. The Environment Court Majority determined that while "the water would not be taken if it could not be bottled, and the proposed volume would not be taken if it could not be exported",[69] consideration of end-use effects in this case went beyond the scope of section 104(1)(a) of the RMA.[70]

38. Notwithstanding the finding of a direct nexus between the water take and the end-use effects, the Majority:

(a) failed to consider the end-use effects of the activity in its assessment of the environmental effects required under section 104 of the RMA (noting that Creswell did not provide

[65] RMA, section 3.
[66] Ibid.
[67] RMA, section 2.
[68] Environment Court Decision at [59] **[[05.0036]]**. The Majority relying on the precedent in *West Coast ENT Inc v Buller Coal Ltd* [2013] NZSC 87, [2014] 1 NZLR 32 (***Buller Coal***).
[69] Environment Court Decision at [65] **[[05.0037]]**.
[70] Environment Court Decision at [66] **[[05.0037]]**.

evidence on the effects of the end-use of plastic bottles or scale of export, nor was it considered in the Applicant's Assessment of Environmental Effects);[71] and

(b) equated the requirement to undertake an assessment of environmental effects of the end-use (which the Environment Court did not undertake) with effectively prohibiting either the use of plastic bottles or the export of bottled water (again, all without evidence on the nature and scale of the export or plastics).[72]

39. The Minority decision from Commissioner Kernohan also accepted the nexus between the water take and end-use effects, but then went on to apply that nexus to the statutory framework. A step Ngāti Awa submits was the correct approach to take. Commissioner Kernohan was also specifically concerned about the manufacture and use of plastics bottles, as well as disposal of plastic bottles on the environment.[73]

40. On appeal, the High Court accepted that the Majority's jurisdictional decision "went too far"[74] in respect of not having scope to consider the tikanga effects of the end-uses. Notwithstanding that, the High Court found that the error was not material as the Majority had subsequently considered the tikanga effects in the assessment of the take, namely, the water cycle.[75]

41. The Court of Appeal did not consider the tikanga effects of end-use. In respect of the effects of plastic bottles, the Court of Appeal started from the proposition that consideration of end-use was permissible under section 104(1)(a).[76] This is distinct from the approach taken by the Environment Court Majority which unduly narrowed its consideration of the end-uses in this case for want of jurisdiction.

Current state of the law as to end-use

42. The leading decision as to consideration of end-use effects is the Supreme Court judgment in *West Coast ENT Inc v Buller Coal Ltd*

[71] Environment Court Decision at [334] **[[05.0077]]**.
[72] Environment Court Decision at [64] and [65] **[[05.0037]]**.
[73] Environment Court Decision at [331] and [333] **[[05.0077]]**.
[74] High Court Judgment at [142] **[[05.0112]]**.
[75] High Court Judgment at [142] **[[05.0112]]**.
[76] NZCA Judgment at [49] **[[05.0174]]**.

(***Buller Coal***).[77] Ngāti Awa agree with counsel for Sustainable Otakiri that *Buller Coal* has been relied upon to restrict the consideration of end-use effects in this case. The Supreme Court in *Buller Coal* confirmed that whether or not end-use effects or 'consequential effects' of allowing an activity is relevant under section 104(1)(a), will be a matter of nexus and remoteness.[78]

43. The circumstances of *Buller Coal* were unique. The case concerned whether or not a decision-maker could consider the effects on climate change of discharges into the air of greenhouse gases, when that discharge arises from the subsequent combustion of coal that was extracted as part of resource consents. Critically, the case turned on the impact of the then section 104E of the RMA, which prohibited having regard to the discharge into air of greenhouse gases, and the effects of climate change. Such a prohibition does not exist in this case.[79]

44. The question remains, however, as to *what* the appropriate bounds are for considering "actual and potential effects on the environment of allowing the activity" under section 104(1).

45. Counsel submit that the minority reasoning of then Elias CJ in *Buller Coal* assists the Court in considering such bounds. It should be preferred to the Supreme Court Majority reasoning given the weight placed on section 104E, again, a factor which does not exist in this case. Specifically, Elias CJ held:[80]

> Section 104(1)(a) is concerned with the "actual and potential effects on the environment of allowing the activity", including future and cumulative effects, regardless of their scale. The "environment" is defined to include "ecosystems".[81] That includes the single ecosystem which makes the phenomenon of global climate change possible. Small contributions which accumulate with other contributions in such an ecosystem have been treated as "effects" within the scope of ss 104(1)(a) and 3 of the Resource Management Act in decisions of the Environment Court…[82]

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[77] [2014] 1 NZLR 32. Noting this case was referred from the High Court directly to the Supreme Court (such that there is no Court of Appeal decision to draw upon).
[78] *Buller Coal* at [119] citing *Beadle v Minister of Corrections* EnvC Wellington A074/2002, 8 April 2002 (***Beadle***).
[79] Acknowledging the amendments to the RMA under the Resource Management Amendment Act 2020 which repealed section 104E, effective from 30 November 2022.
[80] *Buller Coal*, at [74] per Elias CJ.
[81] RMA, section 2 (definition of "environment").
[82] *Environmental Defence Society Inc v Taranaki Regional Council* EnvC Auckland A184/2002, 6 September 2002 at [24]; and *Environmental Defence Society Inc v Auckland Regional Council* (2003) 9 ELRNZ 1 (EnvC) at [63] – [65].

46. Elias CJ also considered the implications of the Environment Court case in *Beadle and Wihongi v Minister of Corrections* (***Beadle***; also commonly referred to as the Ngawha Prison case). *Beadle* concerned consents being sought for earthworks and streamworks, where the 'end-use' was a corrections facility and the relevant consequential effect was the "stigma of Ngawha Springs as a prison town and risks of harm from escaping inmates".[83] The Environment Court in *Beadle* determined that consequential effects of granting resource consents should generally be considered, especially if they are environmental effects that will not be considered elsewhere. However, the effects must not be too uncertain or remote.[84] The Court in *Beadle* discerned a "general thrust towards having regard to the consequential effects of granting resource consents, particularly if they are environmental effects for which there is no other forum, but with limits of nexus and remoteness."[85]

47. Elias CJ went on to hold, when considering whether the effects of climate change were "too remote": [86]

> The exception [which, counsel notes, is the status quo in this case because there are no restrictions as there were in Buller Coal] also confirms the approach taken under ss 5 and 104 of the Resource Management Act which recognises the merits of a proposal must be assessed by taking into account matters that detract from the benefits claimed. The exercise in assessing "sustainable management" is otherwise one-sided.

48. The Supreme Court Majority went on to address tangibility, particularly in relation to a demonstrable linkage between an effect and a project (noting the climate change context). In this case, the use of billions of plastic bottles and export of water taken by Creswell *will* happen and therefore the end-use effects from those activities will occur. Ngāti Awa submits the Court of Appeal was wrong to find that for plastics to be considered they would need to produce a "deleterious effect" to be tangible.[87] In that regard, Elias CJ in *Buller Coal* held that "tangibility" was not a concept derived from the RMA and was perhaps an aspect of any remoteness argument.[88] Her Honour went on to consider that greenhouse gases which contribute to the overall greenhouse effect would be captured

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[83] *Beadle* at [74].
[84] *Beadle* at [91].
[85] *Beadle* at [88].
[86] *Beadle* at [90].
[87] NZCA Judgment at [63] **[[05.0178]]**.
[88] *Buller Coal* at [89] per Elias CJ.

by "cumulative effects" in section 3(d) of the RMA.[89] Ngāti Awa submits that not only did the Court of Appeal not have the evidence before it to consider the overall effects of plastic on a global scale, the impact of billions of plastic bottles cannot reasonably be said to be de minimis.

Sufficient Nexus in this case to consider end-uses

49. Ngāti Awa says that the end-use effects of the activity satisfy the nexus and remoteness test (whether under *Buller Coal* or not) and are so intrinsically linked to the activity that consideration *must* be possible under section 104(1)(a) of the RMA.

50. In that regard, this is not a case where the resource taken (water) is used as part of, or ancillary to, an activity for the ultimate production of a good (such as the production of milk may be seen to be ancillary to an irrigation consent). Rather, the water *is* the product and one which will be sold overseas and in plastic bottles.[90] Consider: could Creswell deliver the product (plastic bottles of water) without the water take? The answer must be no. Would Creswell commit to such a quantity of take without the ability to export? The answer must also be no.[91]

51. Additionally, once plastic bottles are created, they have environmental effects regardless of the manner in which they are disposed of. Ngāti Awa agrees with Sustainable Otakiri that the Court of Appeal unduly narrowed its consideration of plastic bottles to a disposal issue rather than considering the effect of the bottles being created through production.

52. Assessed against the elements of section 104(1)(a), Ngāti Awa submits that the effects on te mauri o te wai and Ngāti Awa's ability to be kaitiaki are "actual" effects on the environment of "allowing" the activity. They are not theoretical.

53. Further, as put by Sustainable Otakiri, decisions under section

[89] *Buller Coal* at [90] per Elias CJ citing *Environmental Defence Society Inc v Taranaki Regional Council* EnvC Auckland A184/2002, 6 September 2002 at [24].
[90] Noting the specific quantities, type or proportion of plastic bottles was not proffered by the Second Respondent in its Assessment of Environment Effects or in evidence at the Environment Court. Mr Michael Gleisner only indicating in answers to questions from Commissioner Kernohan "We intend to bottle in glass, recycled plastic, rPET and PET and that depends on the market and also on the customer, the customer and demand, whatever." See Environment Court Transcript, **[[201.0075]]**.
[91] Environment Court Decision at [65] **[[05.0037]]**.

104(1)(a) have frequently failed to place significance on the word "allowing".[92] It is a strained interpretation of section 104(1)(a) to on one hand say positive effects of employment are direct effects, but on the other hand say the effects of the activity itself (bottling water) are too remote to be considered. Nor does it follow when considering the definition of "effect" which includes any future effect.[93] Ngāti Awa therefore endorses the submissions of Sustainable Otakiri on the five conceptual difficulties the Court of Appeal posited for considering the effects of plastic bottles under section 104.[94]

54. The bottling component of the water-take activity goes to heart of the ability of Ngāti Awa to be kaitiaki. Ms Leonie Simpson confirmed this in answers to both cross-examination questions and questions from Commissioner Kernohan in relation to plastic bottles. Ngāti Awa were making conscious decisions at that time about plastic due to their concerns about the environmental impact given their role as kaitiaki.[95]

Materiality

55. Counsel accept that where an error of law has been found, it must be material to the decision under appeal in order for relief to be granted.[96] Further, "[t]he test of materiality "is one of judgment rather than proof to a standard"."[97]

56. Ngāti Awa submits that the error made by the Environment Court Majority in determining it did not have jurisdiction to consider the tikanga effects of export was a material error and one which could not be rectified, as the High Court held, by the Majority's later references to the sustainability of the water take.[98] In counsels' submission, any purported further consideration by the Majority of the tikanga effects of the water take was:

(a) inherently flawed by its scope conclusion; and

(b) constrained to findings on the physical sustainability of the

[92] Synopsis of Submissions for Sustainable Otakiri Incorporated, 28 July 2023 at [24].
[93] RMA, section 3(c).
[94] Synopsis of Submissions for Sustainable Otakiri, 28 July 2023 at [34] – [52].
[95] Environment Court Transcript **[[201.0369]]**.
[96] *Manos v Waitakere City Council* (1995) NZCA 212/94 at 6.
[97] *Manos v Waitakere City Council* (1995) NZCA 212/94 at 6.
[98] High Court Judgment at [118]-[119], [142] **[[05.0108]]** and **[[05.0112]]**.

water take itself, not on the end-use effects raised by Ngāti Awa for the reasons set out below.

57. Importantly, the High Court held that, had the Majority not made those subsequent factual findings on the tikanga effects of the take, the Court would have remitted the issue.[99] The specific factual findings cited by the High Court therefore require careful analysis.

"…there is no loss of mauri from the water as the water remains within the broad global concept of the water cycle and is returned to Papatūānuku irrespective of where it is used"[100]

(a) Ngāti Awa submits that this conclusion of the Court is focused on the physical sustainability of the take premised on concepts of water cycles and the physical return of wai to the land. This frame is reinforced by the Majority's conclusion that Mr Eruera's evidence "is consistent with the biophysical western science understanding of all water as part of a constant replenishing global cycle".[101] However, this analysis becomes quickly circular as Mr Eruera himself premised his views here on the hydrogeologists evidence that the water supply will not be depleted through Creswell's extraction.[102] We do not challenge the evidence of Mr Eruera as his view, however, it is relevant to determining whether or not the Environment Court Majority did in fact consider the effects on te mauri o te wai of the export, a matter Ngāti Awa submits the Majority did not do.

(b) The conflation of sustainability and cultural matters with biophysical effects was recently at issue before the Supreme Court in *Trans-Tasman Resources Limited v The Taranaki-Whanganui Conservation Board*.[103] Ultimately, the Supreme Court concurred with the Court of Appeal's analysis and held that what was required by the Environmental Protection Agency's Decision Making Committee was "to indicate an understanding of the nature

[99] High Court Judgment at [208] **[[05.0127]]**.
[100] High Court Judgment at [112] **[[05.0107]]** citing the Environment Court Decision at [156] **[[05.0050]]**.
[101] Environment Court Decision at [102] **[[05.0043]]**.
[102] Statement of Evidence of Hemana Eruera Manuera, 29 March 2019 at [43] and [47] **[[202.0699 – 0700]]**.
[103] *Trans-Tasman Resources Limited v The Taranaki-Whanganui Conservation Board* [2021] 1 NZLR 801.

and extent of the relevant interests, both physical and spiritual, and to identify the relevant principles of kaitiakitanga said to apply."[104] The Decision Making Committee did not do so and this was an error of law. Counsel submit that a similar conflation occurred in this case by the Environment Court Majority in assessing cultural effects through a biophysical sustainability lens. The Court did not grapple with the evidence of Drs Mason and Merito as they had said they could not and then they did not; rather, the Majority simply addressed Mr Eruera's evidence framed within a sustainability context.

"…the project will not unnecessarily prevent the exercise of kaitiakitanga by Ngāti Awa in its rohe"[105]

(c) Drs Merito and Mason presented evidence that the ability to appoint someone to the Kaitiaki Liaison Group (for the purpose of monitoring) does not mitigate the impacts on te mauri o te wai and in turn Ngāti Awa's ability to exercise their kaitiakitanga.[106]

(d) Critically, this conclusion was specifically caveated on the Environment Court Majority's jurisdictional conclusion i.e. that the Majority "cannot control the export of water from the rohe."[107] Therefore, it cannot have assessed the impact of the export by its own admission.

"Considering the export of this water, we do not find any reason why, if the take is sustainable, the export would not be. Any use of the water, particularly a consumptive use, will have generally similar physical effects.... In terms of the evidential basis on which we might refuse consent to the increased take because of its intended purpose for export, we do not see any sufficient connection in this case, either in terms of physical or metaphysical effects of export, for basically the same reasons as our assessment of the physical and metaphysical effects of the take"[108]

(e) When read in context, this conclusion was limited to the

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[104] Ibid at [161] per Ellen France and William Young JJ. See also Williams J at [297] endorsing the approach of Ellen France and William Young JJ.
[105] High Court Judgment at [113] **[[05.0107]]** citing the Environment Court Decision at [158] **[[05.0051]]**.
[106] Joint Brief at [69] **[[204.1257]]**.
[107] Environment Court Decision at [158] **[[05.0051]]**.
[108] High Court Judgment at [114] **[[05.0107]]**, citing Environment Court Decision at [107] **[[05.0043]]**.

physical sustainability of the take on the aquifer, and not premised on the effects that the export itself will have on te mauri o te wai.

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

58. In addition, if the Supreme Court finds that the effects of plastic bottles and export should have been considered (including tikanga effects), the error of the Environment Court Majority and High Court is material. No factual findings were made on the tikanga effects of the end-uses, namely export and plastic bottles. Ngāti Awa submits that remitting this decision back to the Environment Court under this ground is not futile.

GROUND TWO: ERROR IN FAILING TO REVERT TO PART 2

59. To date, the Supreme Court has not had to consider the meaning of "subject to Part 2" in section 104(1) in the context of a case that squarely engages the "multi-dimensional Māori provisions" in sections 6(e), 7(a) and 8.

60. Ngāti Awa submits that the circumstances of this case require the decision-maker to revert to Part 2 of the RMA and specifically sections 6(e), 7(a) and 8. Such an approach is consistent with the Privy Council's comments in *McGuire v Hastings District Council* that the "multi-dimensional Māori provisions"[109] are "strong directions, to be borne in mind at every stage of the planning process".[110]

61. Ngāti Awa says that the multi-dimensional Māori provisions are critical to an assessment of effects in this case, particularly as neither the plans, nor the higher order documents, contemplate

[109] *Lex Aotearoa*, p.18.
[110] *McGuire v Hastings District Council* [2001] NZRMA 557 (***McGuire***) at [21].

water bottling and therefore the planning documents did not properly provide a framework for assessing the effects of the water bottling activity.

62. Ngāti Awa has the right and responsibility to advocate, as kaitiaki, for mana over water in the Ngāti Awa rohe (region). The Mataatua Declaration makes that clear[111] and reversion to Part 2 enables the matters Ngāti Awa say are critical to be properly examined.

Statutory and planning frameworks

63. Assessments under section 104(1)(a) are "subject to Part 2" of the RMA.[112] Critically, Part 2 contains the "multi-dimensional Māori provisions":[113]

    (a) Section 6(e) declares the relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga as a matter of national importance, and requires all persons exercising functions and powers under the RMA to recognise and provide for the relationship as a matter of national importance.

    (b) Section 7(a) requires all persons exercising functions and powers under the RMA, in relation to managing the use, development, and protection of natural and physical resources, to have particular regard to kaitiakitanga.

    (c) Section 8 imports the principles of the Treaty of Waitangi and provides that "[I]n achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi)."

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[111] Mataatua Declaration on Water **[[303.0886]]**.
[112] The general approach to interpreting the words "subject to" in legislation is that it indicates that "one provision is qualified by the other(s), and also which provision is to prevail in the event of conflict." *See* Ross Carter *Burrows and Carter Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at 601. The Court of Appeal in *RJ Davidson Family Trust v Marlborough District Council* [2018] 3 NZLR 283 (CA) also held that it is not only the inclusion of the words "subject to Part 2" in section 104, but its *positioning* within that section, that establishes the "preeminent role" of Part 2 matters over other considerations (at [47]).
[113] *Lex Aotearoa*, p.18.

64. As confirmed by Lord Cooke in the Privy Council case of *McGuire*, these directions are to be considered in every step of the process:[114]

> The Act has a single broad purpose. Nonetheless, in achieving it, all the authorities concerned are bound by certain requirements and these include particular sensitivity to Māori issues. By s 6, in achieving the purpose of the Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for various matters of national importance, including "(e) [t]he relationship of Māori and their culture and traditions with their ancestral lands, water, sites, waahi tapu [sacred places], and other taonga [treasures]". By s 7 particular regard is to be had to a list of environmental factors, beginning with "(a) Kaitiakitanga [a defined term which may be summarised as guardianship of resources by the Māori people of the area]". By s 8 the principles of the Treaty of Waitangi are to be taken into account. **These are strong directions, to be borne in mind at every stage of the planning process.**
>
> [Emphasis added]

65. Section 5 of the RMA states that the purpose of the Act is to promote the sustainable management of natural and physical resources. The parameters of "sustainable management" are defined in section 5(2) and importantly include safeguarding the life-supporting capacity of water and ecosystems.

66. At the time the Second Respondent lodged its regional consent application, the relevant planning framework included: the National Policy Statement for Freshwater Management 2014 (amended 2017) (**NPSFM**);[115] the Bay of Plenty Regional Policy Statement (**RPS**);[116] the Bay of Plenty Regional Natural Resources Plan (**Regional Plan**);[117] and Proposed Plan Change 9 (**PPC9**).[118] Relevantly, PPC9 was the first of a two-staged approach to give effect to the NPSFM and focused on region-wide allocation and take

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[114] *McGuire v Hastings District Council* [2001] NZRMA 557 at [21]. His Honour Tā (Sir) Williams J writing extra-judicially in *Lex Aotearoa* notes that these provisions of the RMA were "the first genuine attempt to import tikanga in a holistic way into any category of the general law." *See* Justice Joseph Williams "*Lex Aotearoa: An Heroic Attempt to Map the Maori Dimension in Modern New Zealand Law*" (2013) 21 Waikato Law Review.
[115] The NPSFM sets out the objectives and policies for freshwater management, including the national significance of freshwater and Te Mana o te Wai (noting this has since been replaced by the National Policy Statement for Freshwater Management 2020) **[[301.0007]]**.
[116] The RPS provides the overview of resource management issues within the Bay of Plenty region, and policies and methods to achieve integrated management of the natural and physical resources **[[302.0303]]**.
[117] The purpose of which is to promote sustainable and integrated management of land and water resources within the Bay of Plenty, and must give effect to the RPS **[[302.0431 - 0504]]**.
[118] PPC9 **[[302.0505]]**.

and use of groundwater.[119] PPC9 did not change the existing Kaitiakitanga chapter under the Regional Plan and since the Environment Court hearing has been withdrawn in full by the Regional Council.[120]

67. The Environment Court Majority's analysis of the relevant planning framework is instructive as to its focus on biophysical effects of activities on wai, particularly the Regional Plan.[121] A close examination of those parts of the Regional Plan cited by the Environment Court Majority, highlights that these parts of the Regional Plan (1) are squarely focused on biophysical effects and (2) do not anticipate effects such as those that result from the production of plastic bottles to the scale proposed by Creswell.[122]

Approach of the Lower Courts

68. The Environment Court Majority held that reversion to Part 2 would not add anything of value to their decision-making, finding that essentially the planning documents covered the field for matters under section 6(e), 7(a) and 8 of the RMA.[123] The Environment Court Majority reached its conclusion despite also:[124]

    (a) accepting that PPC9 was the *first* in a two-stage approach to give effect to the NPSFM 2017;

    (b) acknowledging that the next phase of the two-stage process is to set limits for water quantity and quality on a Water Management Area basis (and, particularly important, to involve tangata whenua and the community in those discussions pursuant to the NPSFM 2017);

    (c) accepting that the interim limits set by PPC9 have not taken into account cultural values; and

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[119] The expert planners all agreed that PPC9 should hold significant weight given how far through the Schedule 1 process it was. See Environment Court Decision at [29] **[[05.0030]]**.
[120] Public notice of withdrawal of PPC9 **[[102.0358]]**.
[121] Environment Court Decision at [122] – [155] **[[05.0046 – 0050]]**.
[122] Environment Court Decision at [122] – [155] **[[05.0046 – 0050]]**. See also Joint Statement of Regional Planning Experts, 14 March 2019, p. 11 – 15 **[[202.0628 – 0632]]**.
[123] Environment Court Decision at [170] **[[05.0052]]**.
[124] Environment Court Decision at paragraphs [28] – [111] **[[05.0030 – 0044]]**.

(d) not undertaking an analysis of the end-use effects of the activity.

69. The Court of Appeal was satisfied that the circumstances of the case supported the approach of the Environment Court Majority in not referring to Part 2.[125] In coming to that conclusion, the Court noted that there may be risk associated with adopting this same approach for issues of concern to Māori about commercial water bottling.[126] However, they were reassured by:

(a) The "apparently comprehensive" provisions in the planning documents in relation to "the relationship of Māori with water, te mana o te wai and relevant Te Tiriti o Waitangi/Treaty of Waitangi principles."[127]

(b) That it was unclear what different outcome could be reached if reference to Part 2 had been made, despite counsel submitting that the consent could have be declined on the basis of a Part 2 analysis.[128]

(c) That it was irrelevant that the planning framework may later change.[129]

70. The Court went further in saying that, in light of the submissions and the evidence, it was not open to the Environment Court to undertake "a free-wheeling" examination of Part 2 in search of omissions from the relevant plan.[130] With respect, the Court is required to undertake a Part 2 assessment. In any event, *RJ Davidson* does not require omissions to be identified as a gateway test for reversion to Part 2 as is addressed further below.

71. The Environment Court Majority cites what it considered were the relevant sections of the planning documents on matters of importance to Māori (including the statement in the NPSFM on the national significance of freshwater and Te Mana o te Wai), and commentary in the RPS and Regional Plan on mauri and kaitiakitanga.[131] Each of these references speak, in counsels'

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[125] NZCA Judgment at [108]-[111] **[[05.0193 - 0195]]**.
[126] NZCA Judgment at [110] **[[05.0194 – 0195]]**.
[127] NZCA Judgment at [109] **[[05.0194]]**.
[128] Ibid.
[129] Ibid.
[130] NZCA Judgment at [110] – [111] **[[05.0194 – 0195]]**.
[131] Environment Court Decision at [110] - [121] **[[05.0044 – 0046]]**.

submission, to the active relationship between tangata whenua and the environment in the maintenance of mauri, and the balancing on mauri tangata and mauri wai. The Majority then goes on to note with approval the evidence of Ms Osmond, Mr Goff and Mr Eruera that there would be no adverse effects (informed by their conclusions on end-use effects) but many economic and social benefits.

72. The Environment Court Majority also seemed to have placed significant weight on the second agreed statement of planning witnesses with respect to sections 6(e), 7(a) and 8.[132] The High Court also placed emphasis on all planners agreeing that the plans provide comprehensive provisions regarding kaitiakitanga.[133] With respect, this reliance was overstated. Ms Robson made clear that she was not an expert in tikanga[134] and reinforced a number of times through cross-examination that the planning framework was not complete in her view.[135]

73. Commissioner Kernohan in the Minority did consider that reference to Part 2 was necessary, finding that:[136]

> … the pollution created from the production and specifically end use disposal of plastic water bottles does not meet the objectives and policies of the RMA. Creswell has not provided any evidence as to how the pollution effects of their production and disposal of plastic bottles can be avoided, remedied or mitigated.

74. Ngāti Awa submits that was the right approach when considering the purpose of the RMA and the specific multi-dimensional provisions in sections 6(e), 7(a) and 8.

Reversion to Part 2 post-*RJ Davidson*

75. *RJ Davidson* is the current authority on when a consent authority should undertake a Part 2 assessment under section 104(1). The Court of Appeal in that case grappled with how the Supreme Court's decision in *King Salmon*[137] applied within the context of a resource

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[132] High Court Judgment at [178] **[[05.0120]]**. *See* Second Joint Statement of Regional Planning Experts, 14 May 2019 **[[202.0646]]**.
[133] High Court Judgment at [178] **[[05.0120]]**.
[134] Brief of Evidence of Christine Bridget Robson, 29 April 2020, at [10] **[[204.1189]]**.
[135] Environment Court Transcript **[[201.0271, 0275-0276, 0280, and 201.0297]]**.
[136] Environment Court Decision at [346] **[[05.0078]]**.
[137] *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593 (***King Salmon***) at [88].

consent application which has different statutory directives.

76. The Supreme Court in *King Salmon* was clear that giving effect to the New Zealand Coastal Policy Statement (**NZCPS**) in accordance with section 67(3) of the RMA would also discharge the direction under section 66(1) to change the plan "in accordance with" the provisions of Part 2.[138] The Court could not see any need for reference to Part 2 as a matter of course when interpreting policies under the NZCPS and considered using Part 2 to refuse to apply a policy as contrary to the scheme of the RMA. That is not the case here, rather, Ngāti Awa says the planning framework does not contemplate the effects of the activity sought, being water bottling. The Supreme Court then provided "three caveats" to what it clarified was an "in principle" approach: invalidity,[139] incomplete coverage,[140] and uncertainty of meaning.[141]

77. The Court of Appeal in *RJ Davidson* rejected the notion that Part 2 considerations are only required where there is "invalidity, incomplete coverage or uncertainty".[142] Applying Part 2 can never lead a decision maker to an outcome contrary to the plan or policy.[143] Instead, the Court found that the statutory language means that Part 2 is always relevant to consent decisions but in different ways.[144] Part 2 may already be fairly reflected in a plan but that is not necessarily guaranteed, and the "overall judgment approach" can ensure Part 2 provisions are still reflected.[145]

78. Accordingly, the current test is whether "the planning documents… furnish a clear answer as to whether consent should be granted or declined."[146] The Court of Appeal reinforced that greater flexibility to consider Part 2 is required in resource consent applications, than

[138] *King Salmon* at [85].
[139] Where the NZCPS does not give effect to Part 2, a decision maker may act in accordance with Part 2 (supported by a legal challenge to the lawfulness of the NZCPS). See *King Salmon* at [88].
[140] Where a matter has not been contemplated by the NZCPS and Part 2 would help a decision maker fill those gaps. See *King Salmon* at [88].
[141] Where lack of clarity in any particular policies in the NZCPS means an interpretive aid is required, Part 2 may be used to determine the purpose. See *King Salmon* at [88].
[142] *RJ Davidson* at [74]-[77].
[143] *RJ Davidson* at [74], [78].
[144] *RJ Davidson* at [70].
[145] Ibid.
[146] *RJ Davidson* at [51]. *See also* Daya-Winterbottom, Trevor (2019) *Whither King Salmon?* 12 BRMB 163.

what is provided in *King Salmon* for plan changes.[147] Deficiencies or omissions in the plan is not the gateway test to Part 2. That was recognised by the Court of Appeal in *RJ Davidson* when overturning the High Court decision.

79. The Court of Appeal in *RJ Davidson* expressly stated that the High Court decision to only refer to Part 2 if the plan was deficient in some respect, was:[148]

> … contrary to what was said by the Privy Council in *McGuire* describing ss 6, 7 and 8 as "strong directions, to be borne in mind at every stage of the planning process.

80. In counsels' submission, *McGuire* appropriately reflects the importance of the relationship between iwi, hapū and Māori and te taiao (the environment), a relationship which is defined by whakapapa.[149] To relegate that relationship's relevance to plan making processes only is against the Privy Council's direction and against the language of "subject to Part 2" in section 104(1).

81. Further, in cases which represent such a vast allocation of resources and creation of plastics that are recognised to be pervasive on the Environment,[150] it cannot be that the purpose of the RMA, i.e. sustainable management, gets only a cursory application. Ngāti Awa submits that in the resource consenting context, as opposed to plan changes, it cannot be assumed that issues arising from an activity were contemplated within the planning process and therefore conceptualised against Part 2.

82. The Court in *King Salmon* did not consider the relevance of the commentary in *McGuire v Hastings District Council* for determining when to have recourse to Part 2. *King Salmon* did, however, consider the relevance of Te Tiriti within the scope of section 8.[151] In particular, the principles of Te Tiriti have relevance beyond substantive decision making, in matters of process and the nature of consultation.[152] The Court acknowledged that the implications of Te Tiriti principles must be kept in mind by decision makers *at all*

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[147] *RJ Davidson* at [77].
[148] *RJ Davidson* at [77] citing *McGuire.*
[149] Joint Brief at [38] **[[204.1243 – 1244]]**. See also Justice Sir Joe Williams "He Pūkenga Wai" (paper presented at the annual Salmon Lecture in Wellington, September 2019), p.9 – 11.
[150] See Synopsis of Submissions for Sustainable Otakiri Incorporated, 28 July 2023 at [19].
[151] *King Salmon* at [27].
[152] *King Salmon* at [27] and [88].

times, including when giving effect to the NZCPS.[153] This aligns with more recent jurisprudence on the effect of Treaty clauses in statutory interpretation.[154] The Mataatua Declaration articulates what Te Tiriti means in the context of freshwater for Ngāti Awa.

83. Ngāti Awa submits that the planning framework does not adequately address the end-use effects in this case.[155] This is particularly relevant when considering the principles expressed in the Mataatua Declaration, tino rangatiratanga (as a principle encompassed by section 8) and the importance of the taonga at issue to Māori (wai; water). There is a need for a Part 2 analysis in this case.

WHAT SHOULD HAVE BEEN THE APPROACH TAKEN IN THIS CASE?

84. Ngāti Awa submits that the correct approach in this case was to, firstly, properly conceive of the Ngāti Awa evidence before the Court as holistic and inclusive of end-use effects that were able to be considered under the RMA. This would have resulted in a fundamentally different starting point for analysis than the Environment Court Majority ultimately concluded was correct, which was to determine that it could not consider the end-use effects argued by Ngati Awa in this case.[156] Such an approach would have also allowed the Environment Court to request further information from Creswell about the effects of the plastic bottles.

85. The analysis then should have included a separate assessment of the end use effects before the Court, including the tikanga evidence of Drs Mason and Merito on these matters, to determine whether consent could have been granted. This would have required a Part 2 analysis given the planning framework does not anticipate these effects.

86. Ngati Awa say, if such an approach had been taken in this case, consent should have been declined.

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[153] *King Salmon* at [88].
[154] See *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] 1 NZLR 801 at [146]-[151].
[155] See paragraph 67.
[156] Environment Court Decision at [32] - [66] **[[05.0030 – 0038]]**.

RELIEF SOUGHT

87. Ngāti Awa seeks the following relief:

    (a) findings and / or declarations in favour of Ngāti Awa in respect of grounds one and two;

    (b) that the matter be referred back to the Environment Court for reconsideration in light of the findings of this Court (noting the evidential deficiencies for considering consequential effects of end-use);

    (c) an award of costs in this Court against the Second Respondent; and

    (d) any other relief the Court sees fit.

DATED this 28th day of July 2023

H K Irwin-Easthope / K J Tarawhiti / R K Douglas
Counsel for Te Rūnanga o Ngāti Awa

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