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

**SC 1/2023**

between

**SUSTAINABLE OTAKIRI INCORPORATED**
Appellant

and

**WHAKATĀNE DISTRICT COUNCIL**
First Respondent

and

**CRESWELL NZ LIMITED**
Second Respondent

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# SYNOPSIS OF SUBMISSIONS FOR SUSTAINABLE OTAKIRI INCORPORATED

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**SC 2/2023**

between

**TE RŪNANGA O NGĀTI AWA**
Appellant

and

**BAY OF PLENTY REGIONAL COUNCIL**
First Respondent

and

**CRESWELL NZ LIMITED**
Second Respondent

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## SYNOPSIS OF SUBMISSIONS FOR SUSTAINABLE OTAKIRI INCORPORATED

## MAY IT PLEASE THE COURT

## I. INTRODUCTION

1. This appeal concerns an application by Creswell NZ Limited (**Creswell**), processed erroneously as a variation to an existing land use consent under s 127 of the Resource Management Act 1991 (**RMA**) (rather than as a new application), to enable the expansion of a water bottling plant located in Otakiri, in the Whakatāne District of the Bay of Plenty (**Project**). The application to vary the consent was granted by the Environment Court as consent authority for the Whakatāne District Council.

2. The expansion will see the plant take 1,100,000m$^3$ of groundwater each year[1] and increase its bottling capacity from 8,000 bottles/hour to 154,000 bottles/hour.[2] This scale of production is enabled by the construction of an industrial blow-moulding facility on the site that can manufacture up to 144,000 single use plastic bottles/hour. The manufacturing operations are consented to run 24 hours a day, seven days a week.[3] In total, the consents allow for the creation of tens of billions of plastic bottles during the term of the consent,[4] all of which will eventually be disposed into the environment. Annually, consents will allow the bottling of 4 times more than the total amount plastic water bottles exported from New Zealand in 2019.[5]

3. The Project has the potential to have significant adverse effects on the environment, but those effects have been ignored in the process to date. Plastic pollution has now been identified as one of the world's most pressing environmental issues.[6] The United Nations has recently called the

[1] The existing consent provided for groundwater takes of 1,200m$^3$ per day for bottling, 158m$^3$ per day for irrigation, and 1,580m$^3$ per day for frost protection. The variation would instead allow 5,000m$^3$ per day to be taken for bottling only [**206.1758**] with it being projected to take up to 1,100,000m$^3$ per year. While the application indicates that the total proposed annual production is expected to be "in the order of 580 million litres", the total annual volume able to be taken under the consent for bottling is substantially more [**206.1758**].

[2] This reflects an increase 2,000 bottle/hour increase for the existing bottling line, and the installation to two new high-speed bottling lines each producing 72,000 bottles per hour [**206.1758**].

[3] Crewswell Application, Appendix E, "Operational Summary" at 2 [**401.0152**].

[4] Iti s proposed that some 2,436,120 plastic bottles are made each day, along with 15,840 glass bottles: Creswell Application, Appendix E "Operational Summary" at 3.3 [**401.0154**].

[5] Affidavit of Nicolette Winona Gladding in support of application for leave to bring civil appeal dated 4 February 2021 at [6(j)] [**402.0569**].

[6] This proceeding is timely. In 2023, for its 15th World Environment Day, the United Nations Environment Programme focused on plastic pollution, using the hashtag #BeatPlasticPollution. See, for example, United Nations Environment Programme, "Everything you need to know about plastic pollution" (25 April 2023), available at: https://www.unep.org/news-and-stories/story/everything-you-need-know-about-plastic-pollution. See also, Affidavit of Nicolette

environmental impacts of plastic production and pollution "a catastrophe in the making".[7]

4. The appellant, Sustainable Otakiri Incorporated (**SOI**), submits that the Court of Appeal erred:[8]

   (a) in answering the first question at [23] of its judgment as "no" because it (i) misapplied s 104(1)(a) of the RMA; (ii) placed undue emphasis on the legality of the ultimate disposal of the bottles when the focus should have been on the effects of production/disposal; (iii) ignored the inevitability that all plastic created by the activity will ultimately be disposed as waste; and (iv) placed undue weight on the Supreme Court's decision in *West Coast ENT v Buller Coal*;[9]

   (b) in answering the second question at [67] of its judgment as "no" because: (i) this question was consequential on the answer to question one; and (ii) it wrongly considered that the Environment Court was not required to seek evidence on plastic pollution despite one of the Commissioners having seen this as necessary;

   (c) in answering the fourth question at [113] of its judgment as "no" because it: (i) adopted a strained interpretation of the definition of "rural processing activity" over the clearly engaged definition of "industrial activity"; (ii) adopted a mutually inconsistent position of both finding that the water bottle manufacturing plant was a "rural processing activity" but also that it was ancillary to a "rural processing activity" (without correctly analysing what that means); and (iii) failed to assess the consequences of its interpretation for the coherence of the Plan; and

   (d) in failing to allow the appeal having answered the fifth question as "yes" on the basis that the Environment Court's decision was otherwise lawful.

5. These submissions address these matters in the following order:

   (a) first, a brief factual and procedural background;

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Winona Gladding in support of application for leave to bring civil appeal dated 4 February 2021 at [6(g)] to [6(k)] [**402.0569**].

[7] UN News, "Nations sign up to end global scourge of plastic pollution" (2 March 2022, United Nations), available at https://news.un.org/en/story/2022/03/1113142.

[8] *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2022] NZCA 598 (**CA Judgment**) [**05.0156**].

[9] *West Coast ENT Inc v Buller Coal Ltd* [2013] NZSC 87, [2013] 1 NZLR 32.

(b) second, the plastics issue, addressing both s 104(1) of the RMA and the Environment Court's approach to evidence on this issue; and

(c) third, the arguments relating to the activity status of the proposal under the Whakatāne District Plan, including the Court of Appeal's failure to quash the consent on planning grounds.

## II. FACTUAL BACKGROUND AND PROCEDURAL BACKGROUND

### A. History of bottling on the site

6. On 10 December 1991 a land use consent was granted to "establish a mineral bottling plant" on the site in Otakiri.[10] The property was a six-hectare kiwifruit orchard with a packing shed.[11] The owners sought to convert the packing shed into a small-scale mineral water bottling operation, and did so by applying for a new resource consent.[12] Notably, the Council report for that consent recorded, inter alia, that the water was to be obtained from a bore for which there was an existing consent and that there was no issue with the amount of water to be taken for bottling purposes.[13] Importantly, while the report writer was satisfied that a rural location was needed because, in 1991, "to satisfy export criteria the water is required to be bottled at source", it was understood that "the applicant does not intend expanding into other industrial activities on the site".[14] Overall, the report writer was satisfied that the proposal was unlikely to diminish the character of the surrounding rural locality.[15]

7. The result was that a small-scale water bottling plant currently operates on the site with a bottling capacity of 8,000 bottles per hour. The bottles used in that operation are not manufactured on site.

### B. Creswell's proposal

8. In September 2017 Creswell applied to the Whakatāne District Council for a variation to the existing land use consent and a new land use consent for the expansion of the Otakiri Springs Water Bottling Plant.[16] Around the same time

[10] [**206.1879**].
[11] [**206.1883**]
[12] [**206.1883**].
[13] [**206.1886**].
[14] [**206.1884**].
[15] [**206.1884**].
[16] [**206.1745**]. This is an extract of the application only. The full application, including appendices, is in the supplementary bundle filed by SOI with these submissions at [**401.0001**].

it also applied to the Bay of Plenty Regional Council for water take consents increasing the amount of water to be taken, and relating to earthworks and stormwater discharge.[17]

9. The variation to the District Council consents was granted, and was upheld on appeal to the Environment Court,[18] High Court[19] and Court of Appeal.

### C. The use of s 127 of the RMA

10. Creswell required a land use consent to allow the expansion of the existing water bottling plant and to construct the associated facilities. Rather than seek fresh consents, Creswell applied to vary its existing land use consent under s 127 of the RMA (being an application to vary the consent originally granted in 1991). The District Council, the Environment Court, and the High Court all agreed that the application could be considered under s 127.

11. The Court of Appeal took a different view. It held that s 127 of the RMA "was not intended to authorise an application for resource consent to a new activity" and was instead intended "to authorise an application to change or cancel conditions attached to the activity for which consent was originally granted".[20] A condition might be changed or varied, but it must be the same activity as originally consented that continues.[21] In this connection it was the specific activity originally consented that needed to continue, not merely an activity of the same "kind" as the original activity.[22] It held that in the present case "it was not just a question of scale or degree" but instead "the activity originally consented to will essentially be replaced. The conditions will be substantially changed, but they will control what is really a new activity".[23] The Court of Appeal was correct on this issue.

12. However, the Court of Appeal found the erroneous reliance on s 127 by the previous decision-makers was not determinative because they had treated the proposal as one which required consent as a discretionary activity. The Court of Appeal considered that was correct based on its findings that the activity was properly classified as a "rural processing activity",[24] and so

[17] CA Judgment at [17] [**05.0164**].
[18] *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* (2019) 21 ELRNZ 539 (EnvC) (**EnvC Judgment**) [**05.0024**].
[19] *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* (2020) 22 ELRNZ 323 (HC) (**HC Judgment**) [**05.0080**].
[20] CA Judgment at [186] [**05.0218**].
[21] At [186]-[187] [**05.0218**].
[22] At [187] [**05.0218**].
[23] At [191] [**05.0219**].
[24] At [192] [**05.0220**].

appears to have concluded that it did not matter whether the application was assessed under s 127 or as an application for a new consent.

13. Neither respondent has contested the Court of Appeal's finding on s 127 in this Court, either by way of cross-appeal or notice to support on other grounds.

## III. EFFECTS ON THE ENVIRONMENT FROM PLASTIC PRODUCTION

### A. Introduction

14. SOI submits that the effects of plastic pollution arising from the Project's production of billions of plastic water bottles were effects that were required to be considered under s 104(1)(a) of the RMA.[25]

15. The majority of the Environment Court, the High Court, and the Court of Appeal held that these matters could not be considered under the RMA. In the Environment Court, Commissioner Kernohan dissented and would have considered issues of plastic pollution.[26] Commissioner Kernohan also correctly observed that "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".[27]

### B. An issue of production, not disposal

16. As will be discussed in greater detail below, the Court of Appeal's reasons focused on the question of whether the end use—specifically the *disposal*—of the billions of plastic bottles to be made by the Project were relevant to consideration of the application to vary the consent.

17. SOI respectfully submits that the Court of Appeal adopted the wrong starting point. The issue does not arise from the method of end use or disposal of the bottles, rather it arises from the creation of those plastic bottles in the first place.

18. Disposal of plastic into the environment is an *inevitable* and direct consequence of creating plastic products (i.e. bottles) and taking water to fill them. While some plastic might be able to be recycled several times (and the

[25] The plastic to be used is set out in Appendix E (Operational Summary) of Creswell's AEE. The plant will produce 1180 pallets of fille plastic bottles per day and 20 pallets of glass bottles. PET plastic will be used. Assuming 1% reject packaging, it will also directly produce 6m$^3$ plastic compacted waste daily [**401.0154**].
[26] EnvC Judgment at [322] and following [**05.0076**].
[27] At [346] [**05.0078**].

recyclability of Creswell's bottles is not precisely known, because neither the Council nor the Environment Court sought that information) all plastic has a finite commercial life before it inevitably becomes waste.[28] All plastic ever made will eventually end up in the environment: by being burned, by being put in landfill, or by otherwise being disposed into the environment (with recycling only delaying these outcomes).[29] Plastic items in landfill and in the environment will eventually break down into environmentally pervasive plastic particles, microplastics or even smaller particles.[30] Put shortly, there is no way to ultimately dispose of plastic that does not have an actual or potential effect on the environment. Most of plastics ever produced are still in existence in some shape or form.[31]

19. Plastic, once in the environment, has numerous pervasive environmental effects.[32] When burned, plastics (which are petroleum derived products) release carbon dioxide, toxic gases and plastic particles.[33] When disposed in landfills or the environment, plastics eventually break down into smaller and smaller pieces.[34] Larger plastic pieces are often mistaken by animals, especially seabirds, fish and marine mammals, as food, with fatal consequences.[35] Smaller pieces and microplastics have now been found to have contaminated every place on the surface of earth,[36] and are increasingly found in the bodies of animals including humans.[37] The United Nations and the international community has identified plastic pollution as one of the most serious environmental threats facing the world.[38]

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[28] Royal Society Te Apārangi "Plastics in the Environment Te Ao Hurihuri – the Changing World" (Royal Society Te Apārangi, Wellington, 2019) at 17 [**402.0588**].
[29] Royal Society Te Apārangi, above n 28, at 12-17 [**402.0583**]. Even then, very little virgin plastic is recycled. Leading research on this issue has estimated that only around 9% of all virgin plastic ever made has been recycled, with 12% being incinerated and 79% accumulating in landfills or the environment. As the authors also explain "Recycling delays, rather than avoids, final disposal". See Roland Geyer, Jenna R Jambeck and Kara Lavender Law, "Production, use, and fate of all plastics ever made" (2017) 7(3) Scientific Advances. See also, Affidavit of Nicolette Winona Gladding in support of application for leave to bring civil appeal dated 4 February 2021 at [6(g)] recording the findings of the Royal Society Te Apārangi, above n 28 [**402.0568**], at 11 that in 2015 146 million tonnes of plastic packaging was produced and 141 million tonnes was discarded as waste to landfill.
[30] Royal Society Te Apārangi, above n 28,at 23-27 [**402.0594**].
[31] At 28 [**402.0599**].
[32] At 26-28 [**402.0597**].
[33] At 15 [**402.0586**].
[34] At 23 [**402.0594**].
[35] At 31 [**402.0602**]. United Nations Environment Programme, "World Migratory Bird Day: birds globally threatened by plastic waste" (9 May 2019, United Nations), available at https://www.unep.org/news-and-stories/press-release/world-migratory-bird-day-birds-globally-threatened-plastic-waste.
[36] Affidavit of Nicolette Winona Gladding in support of application for leave to bring civil appeal dated 4 February 2021 at [6(k)] [**402.0569**] citing the findings of the Royal Society Te Apārangi, above n 28, at 3 [**402.0574**].
[37] Royal Society Te Apārangi, above n 28, at 31 [**402.0602**].
[38] The United Nations Environment Assembly of the United Nations Environment Programme, in UNEP/EA.4/Res.14, noted with concern "that the high and rapidly increasing levels of plastic

20. It is of course not for this Court to reach conclusions on the nature and scale of these effects, or what they might mean for the consent. Rather, SOI identifies these issues simply as context for its legal submission that the Council was required to consider and investigate these matters under s 104(1)(a) of the RMA in the context of a consent to use land to produce billions of plastic bottles over several decades.

21. That said, it is regrettable that there is little direct evidence of these matters before the Court: the primary evidence is that of Ms Gladding for SOI in support of its application for leave to appeal to the Court of Appeal, which referred to a report by the Royal Society of New Zealand.[39] This situation is a product of how the proceeding has progressed. Creswell did not put any evidence of these matters before the Council, and nor did the Council seek any. In the Environment Court, Commissioner Kernohan wished to see such evidence, but was in the minority. Subsequent appeals to the senior courts have been limited to questions of law. That leaves this Court having to consider the legal questions largely in the abstract—the failure of the Environment Court to seek this evidence is raised as a discrete error.

22. Nevertheless, it is respectfully submitted that the mechanisms of plastic pollution and the effects of plastics in the environment are so well-known and notorious that this Court can have regard to them. It is not clear that Creswell seriously disputes at least the high-level propositions raised here, although Commissioner Kernohan did record that "Creswell expressed little concern for the life cycle of the new plastic bottles they are creating nor of the final destination of their disposal".[40]

### C. Breaking down s 104(1)(a) of the RMA

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

24. Decisions on s 104(1)(a) have frequently failed to place significance on the word "allowing", and have instead tended to apply the section as if it read in a way that only required consideration of "the effects of the activity".[41] SOI

pollution represent a serious environmental problem at a global scale, negatively impacting the environmental, social and economic dimensions of sustainable development".

[39] Affidavit of Nicolette Winona Gladding in support of application for leave to bring civil appeal dated 4 February 2021 [**402.0564**].

[40] EnvC Judgment at [333] [**05.0077**].

[41] In *West Coast ENT Inc v Buller Coal Ltd*, above n 9, at [128] a majority of this Court took the view that the language of s 5(2)(c) ("…effects of activities on the environment") was similar to that used in s 104(1)(a) ("…effects on the environment of allowing the activity").

submits that the environmental effects from plastic bottles made, filled and sold by Creswell are actual or potential effects on the environment of *allowing* the activity. That is, the use of land and water to manufacture plastic bottles and to fill them with water are integral to allowing the construction and operation of the water bottling plant and its bottle making facility. The consent allows the activity that produces the plastic products and the effects associated with those products.

25. Also relevant is:

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

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

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

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

26. To that end, it is also necessary to situate this interpretative exercise alongside Part 2 of the RMA, which describes its purpose. The purpose is broadly expressed to be the promotion of the sustainable management of natural and physical resources. The definition of sustainable management is well known to this Court and it has held that s 5(2) must be read as an integrated whole.[42] Also important are the matters in s 7 to which decision-makers must have regard. These extend to kaitiakitanga, the ethic of stewardship, the intrinsic value of ecosystems, the maintenance and enhancement of the quality of the environment, and any finite characteristics of natural and physical resources.

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

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

### D. West Coast ENT v Buller Coal: tangibility and directness

28. The Court of Appeal held that consideration of end use was controlled by this Court's judgment in *West Coast ENT v Buller Coal*,[43] and that this decision greatly restricted the consideration of end use effects under s 104(1)(a).[44]

29. In *West Coast ENT v Buller Coal* this Court considered the issue of whether the end use of coal (i.e. being burned to release carbon dioxide) was a matter to be considered under s 104(1)(a) for a land use consent. A majority of this Court held that consideration of those effects was barred by s 104E, and that those effects were insufficiently "direct"[45] and "tangible"[46], and were "too remote",[47] to be considered under s 104(1)(a). While the majority recognised that consent authorities have "sometimes" taken into account "effects on the environment which are consequential on allowing the activity for which consent is sought" this would be more likely where the consequential effects "are not directly the subject of control under the RMA" and would involve questions of fact and degree.[48]

30. First, SOI submits that the *ratio decidendi* of *West Coast ENT* is best understood as being the majority's reasoning on s 104E of the RMA. The majority interpreted s 104E as precluding any consideration of effects from the discharge of greenhouse gases, whether or not associated with discharge consents.[49] That context is not present in this case (and the section has now been repealed). SOI respectfully submits that the balance of the majority's reasoning on s 104(1)(a) and "end use" effects is best understood to be *obiter*

[43] *West Coast ENT Inc v Buller Coal Ltd*, above n 9, at [50].
[44] At [51].
[45] At [117]–[119].
[46] At [121]–[127].
[47] At [117] (referring to the view of the High Court to that effect).
[48] At [119] (referring to *Beadle v Minister of Corrections* EnvC Wellington A074/2002, 8 April 2002 where the Environment Court held that it was able to have regard to the intended end-use of a proposed land use consent as a corrections facility, so long as the effects were not too uncertain or remote).
[49] At [168]-[176].

*dictum*. In any event, this Court is of course not precluded from now charting a different path.

31. Second, SOI respectfully submits that the majority's reasoning on s 104(1)(a) and "end use" effects in *West Coast ENT* was incorrect and should be reconsidered. SOI respectfully supports the minority reasoning of Elias CJ and her observations that concepts of "directness", "tangibility" and "remoteness" are not derived from, and cut against, the provisions of the RMA.[50]

32. Third, for the reasons stated, an interpretation of s 104(1) that accords with its text, context and purpose is consistent with plastic pollution being considered when someone seeks to use land or water to create plastic products that will eventually be disposed in the environment. It would be remarkable if New Zealand's primarily environmental legislation has nothing to say about the production of a major environmental pollutant, being plastic products.

33. These reasons are supported and furthered by SOI's responses to the five "conceptual difficulties" identified by the Court of Appeal, addressed below.

## E. The Court of Appeal's five "conceptual difficulties"

34. The Court of Appeal concluded that s 104(1)(a) did not permit the environmental effects of plastics produced by the plant to be considered as part of the consent decision. It relied on five "conceptual difficulties" with taking these effects into account.[51] SOI addresses each in turn.

### *1. First "difficulty"—a consent is not needed to dispose of plastic bottles; it is "inconceivable" that the RMA would require consideration of the disposal of every product sold in a plastic bottle or a plastic container*

35. SOI submits that the Court of Appeal begins its analysis by focusing unduly on disposal and end use. The relevant question is: under the RMA, what effects need to be considered in connection with Creswell's application for resource consent to construct a plastic bottle manufacturing and filling plant? That question does not turn on whether the separate activity of disposing of plastic bottles requires a resource consent under the RMA. By analogy, a resource consent for a shopping mall or supermarket will involve consideration of wider traffic effects on the capacity of the roading network,

[50] See, for example, at [87]–[93] (including observing that the remoteness arguments in that case were "impossible to reconcile with the terms of s 3, Part 2 and s 104 of the Resource Management Act").
[51] CA Judgment at [56]-[61] [**05.0176**].

despite there being no need for any of the customers to obtain resource consents to drive to the mall.[52]

36. The Court of Appeal was also wrong to suggest that it would be "inconceivable" for the RMA to apply in this way given a "societal context in which "plastic bottles are pervasively used".[53] SOI respectfully disagrees.

37. First, these effects would only be considered where they are the effects of allowing an activity which is subject to a consenting process,[54] and where that activity involves a classification that allows those matters to be considered. That is, this regulatory application would not extend to "every" plastic product or every activity using or making plastic products.

38. Second, the RMA allows consideration of all sorts of effects of allowing an activity (including economic and employment benefits). There is no principled basis to consider the economic benefits of plastic production while disregarding the inevitable adverse environmental effects of those same plastics, not least because plastic pollution is a source of social harm.[55]

39. Third, the issue is only one of consideration. The outcome of taking into account plastic pollution associated with land and water uses which will produce plastic products will not necessarily be that such activities are not consented at all. Rather, a Council would need to turn its mind to how those effects might be mitigated, remedied or avoided, including through imposing appropriate consent conditions. There are any manner of alternatives and substitutes which can be employed to enable products to be produced and packaged in a way that reduces plastic production and pollution.[56] That might include, for example, conditions requiring the consent holder to shift to, or explore, alternative packaging materials over time or taking measures to reduce plastic use. In the present case, these issues were entirely ignored. As Commissioner Kernohan observed:[57]

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[52] See, for example, in *Progressive Enterprises Ltd v North Shore City Council* [2009] NZRMA 386 (EnvC) at [8] live issues included adverse traffic effects. They also included "whether there will be significant social and economic effects on the amenity of existing North Shore centres as the result of patronage being drawn away from them by the proposed supermarket". See also *Progressive Enterprises Ltd v North Shore City Council* [2006] NZRMA 72 (HC) and *St Lukes Group Ltd & Ors v North Shore City Council* [2001] NZRMA 412 (EnvC).
[53] CA Judgment at [56] [**05.0176**].
[54] And, of course, there are often many of effects of an activity that do not need consent but which are considered as part of an application. For example, vehicles operating on a public road from a site being consented do so lawfully without a consent, but their effects (noise, dust, vibration) are routinely considered as part of a consent process for that site.
[55] Royal Society Te Apārangi, above n 28, at 35 [**402.0606**].
[56] See, for example, Royal Society Te Apārangi, above n 28, at 36 [**402.0607**]; United Nations Environment Programme, *Turning off the Tap: How the world can end plastic pollution and create a circular economy* (UNEP, 2023).
[57] EnvC Judgment at [333] [**05.0077**].

> No information was provided about responsibilities for re-cycling plastic bottles or the potential of bio-degradable or compostable water containers and any possible future development or use of such. No comment was passed on other methods of delivering water. Apparently Creswell accepts no responsibility for the disposal (or apparently even the re-cycling) of the plastic bottles manufactured by them, once used for carrying their water.

40. It is far from "inconceivable" that these matters could or would be considered as part of a consenting process.

*2. Second "difficulty"—a consent holder cannot control how a consumer disposes of plastic bottles*

41. The Court of Appeal reasoned that consent holders could not, and should not, "nominally be regarded as responsible for the unlawful or problematic disposal of plastic bottles by third parties".[58] Again, this proposition begins from a wrong premise. The issue is not "unlawful" or "problematic" disposal of plastic products, rather it is their creation. There is ultimately no environmentally safe or "non-problematic" means of disposing of plastic: even accounting for recycling and reuse, plastic pollution is an environmentally inevitable consequence of creating and using plastic. Ultimately, plastic pollution is only avoided by not creating plastic.

42. In any event, the Court of Appeal was wrong to hold that the consent holder does not control the actions of the consumer. The consent holder has control because it is the consent holder, and not the consumer, who determines the packaging material used for the products it is supplying to the market. It is the consent holder, and not the consumer, who has the choice whether to use alternative materials in its products.[59] To again use the more familiar example of traffic effects associated with a consent to build a shopping mall or supermarket: the consent holder does not control how or when its customers drive to and from its site, but it does have some control over the location and number of carparks, the design of internal roads and intersections, and interfaces with alternative modes of transport.[60] The consent holder will be expected to address traffic effects in the way it deals with these matters. Another example would a condition addressing concerns about the effects of additional people parking on nearby streets by requiring the consent holder to provide staff or resident carparks, bicycle storage or end of use facilities, despite the consent holder having no control over where its staff or residents actually choose to park or how they choose to travel.[61]

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[58] CA Judgment at [57] [**05.0177**].
[59] Royal Society Te Apārangi, above n 28, at 36-37 [**402.0607**].
[60] Again, see, for example, *Progressive Enterprises Ltd v North Shore City Council* [2009] NZRMA 386 (EnvC) where public transport connections were considered (at [33]-[38]).
[61] Simply by way of example, in *Panuku Development Auckland Ltd v Auckland Council* [2020] NZEnvC 24 at [348]–[364] consideration was given parking requirements including the provision

*3. Third "difficulty"—The disposal of plastic bottles into the environment in New Zealand is already regulated*

43. The Court of Appeal held that the availability of "lawful" disposal at roadside collections and landfills, and offences under the Litter Act 1979, meant that there was already alternative "legislative control", and this suggested that the issue should not also be controlled under the RMA.[62]

44. First, this reasoning again ignores the inevitability of plastic pollution. Environmental effects associated with plastic pollution do not arise only from "unlawful" disposal (i.e. littering), it arises from plastic being disposed into the environment. That might be through some other means, which might be lawful (e.g. landfill or burning).

45. Second, there is nothing in the RMA to suggest that it matters whether the effects of allowing an activity are lawful or not: the Court of Appeal's approach is to impose another a restrictive gloss on the language of s 104(1)(a) and the defined terms it uses. It is well established, for example, that RMA conditions can control road use despite the existence of other legislation.[63]

46. Third, the general availability of recycling and landfill schemes, and the criminalisation of littering, hardly amount to a comprehensive legislative scheme that might be reasonably seen to entirely displace consideration of the effects of plastic pollution under the RMA. Indeed, the situation can be directly contrasted with the facts of *West Coast ENT* where Parliament had enacted a statutory emissions trading scheme; had expressed an intention that emission would otherwise be regulated by national policy statements; and had expressly precluded the consideration of certain effects under the RMA for that reason.

*4. Fourth "difficulty"—disposal of plastic bottles in foreign jurisdictions, whether lawful or not, is too remote*

47. The Court of Appeal reasoned that disposal of plastic bottles overseas might or might not be by means of recycling or otherwise lawful disposal, and that issue was "too remote to be taken into account by a consenting authority acting under the RMA in New Zealand".[64]

of resident parking, retail staff car parking, and bicycle parking in addition to the availability of public transport in the context of traffic and parking effects.

[62] CA Judgment at [58] [**05.0177**].

[63] *Double R Developments Ltd v Western Bay of Plenty DC* [2018] NZEnvC 197 at [36].

[64] CA Judgment at [59] [**05.0178**].

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

49. Moreover, and as already discussed, the inevitability of plastic pollution makes the precise method of disposal almost irrelevant. A consent authority will be able to consider ways to avoid, remedy or mitigate plastic pollution without needing to understand precisely how the plastic products will be disposed of in other parts of the world. It can do this by, for example, imposing conditions requiring the consent holder to adopt or explore alternative packing options or reducing plastic use.

*5. Fifth "difficulty"—even if the adverse effects of exporting bottles could be considered, it would be impossible to quantify, or to assess the legality of disposal, and it is not a matter fairly and reasonably related to a consent to take water*

50. The Court of Appeal held that, in any event, where plastic products are exported the effects of disposal would be "impossible to quantify", and "a condition that attempts to control the disposal of plastic overseas could not be justified as fairly and reasonably related to a consent to take water".[65]

51. Again, the issue of plastic pollution is not one of disposal alone. SOI does not submit that consent authorities in New Zealand should be making consent conditions seeking to control disposal of plastic overseas. Rather, it submits that consent conditions can be made that control the amount of plastic created by the consent holder's factory, and that way limit the amount of plastic pollution associated with allowing the water bottling plant.

52. Moreover, it is speculation to say that effects cannot be quantified because consent authorities have not asked the question.[66] In any event, the RMA does not require "quantification" of effects for them to be relevant under s 104(1)(a). Consent authorities are frequently required to consider effects that are not easily quantified, or which are not capable of quantification.

[65] At [60] [**05.0178**].
[66] Although even at a general level, it can be relatively confidentially stated that plastic products will most likely not be recycled as globally only 14 to 18 percent of plastic waste is currently recycled: Royal Society Te Apārangi, above n 28, at 16 [**402.0587**].

### F. Juxtaposing consideration of benefits with plastics

53. The Court of Appeal held that consideration of plastic pollution from plastic bottles produced at the site was prohibited because it was too remote, too indirect, too difficult to quantify and outside the control of the consent holder.

54. While Creswell provided no information whatsoever on plastic pollution or how that might be mitigated through its operations, it was content to commission a firm of economists to model the economic and employment *benefits* of its project.[67] Likewise, the Environment Court was content to consider a range of beneficial effects including "investment in plant and supporting infrastructure including upgrading of a local road, intersections and footpaths" and "forecast" employment opportunities resulting in an "increase from the current 8 fulltime equivalent staff (FTE) to 60, with flow-on effects increasing this to 145 FTEs".[68] It accepted evidence that "the increase in employment and the potential supply opportunities that the project will bring will have a significant impact on the wellbeing of the local community".[69]

55. It is unlikely that Parliament intended these types of positive effects to be considered under s 104(1) but not the inevitable and significant adverse environmental effects associated with the plastics produced by the same activity to generate them.

### G. Result

56. SOI submits that the appeal should be allowed on the basis that relevant effects were not considered under s 104(1).

## IV. THE STATUS OF THE PROPOSED ACTIVITY (COURT OF APPEAL QUESTION 4)

57. The fourth question before the Court of Appeal was:[70]

> Did the High Court err in finding that the Environment Court correctly determined that the activity status of [Creswell's] proposal was a discretionary "rural processing activity", rather than a non-complying "industrial activity" including "manufacturing", under the terms of the Whakat[ā]ne District Plan?

[67] BERL "Otakiri Springs Employment Impact Assessment" (June 2017) [**401.0165**].
[68] EnvC Judgment at [90] [**05.0041**].
[69] At [95] [**05.0041**].
[70] CA Judgment at [113] [**05.0195**].

58. The Court of Appeal agreed with the courts below that the activity status of Creswell's proposal was as a discretionary "rural processing activity" under the Whakatāne District Plan (**WDP**).

59. SOI submits that the Court of Appeal erred, and that the appropriate activity status was as a non-complying "Industrial including manufacturing activit[y]".

### A. Legislative context

60. SOI's appeal relates solely to the Environment Court's decision to vary the conditions of the district land use consent, standing in the shoes of the Whakatāne District Council.

61. Under s 87(a) of the RMA, a "land use consent" permits something that would otherwise contravene s 9. Relevantly, s 9(3) of the RMA provides that "no person may use land in a manner that contravenes a district rule unless the use—(a) is expressly allowed by a resource consent … ".

62. Section 76 of the RMA provides that a district rule is a rule included in a district plan for the purpose of a territorial authority "(a) carrying out its functions under this Act; and (b) achieving the objectives and policies of the plan … ". Section 75(1)(c) provides that rules in district plans implement policies, and policies implement the objectives for the district. Section 75(3) also confirms that a district plan must "give effect to" the relevant regional policy statement (**RPS**) and s 75(4) provides that a district plan must not be inconsistent with a regional plan for any matter specified in s 30(1) (which describes the functions of the Regional Council).

63. A district plan is an important instrument, as this Court has recognised.[71] When interpreting the meaning of a provision in a district plan, it is appropriate to consider its context, including the relevant objectives and policies.[72] While the courts have recognised that resource consents authorise "activities" (as sought and applied for in a consent application),[73] rather than authorising breaches of specific rules, it is the case that the rules in a plan typically trigger the need to obtain resource consent, the terms on which consent can be granted, and the relevant activity status.[74]

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[71] *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] 2 NZLR 597 at [10].
[72] *Powell v Dunedin City Council* [2004] 3 NZLR 721 (CA) at [35]; *J Rattray & Son Ltd v Christchurch City Council* (1984) 10 NZTPA 59 (CA) at 61.
[73] *Arapata Trust Limited v Auckland Council* [2016] NZEnvC 236 at [35]; *Marlborough District Council v Zindia Ltd* [2019] NZHC 2765, [2020] NZRMA 216 at [37]; and *Duggan v Auckland Council* [2017] NZRMA 317 at [37]
[74] Section 87A.

### B. A question of law

64. The appeal arises from an appeal limited to questions of law. SOI does not seek to relitigate or challenge any factual assessments made by the Environment Court. Rather, this aspect of its appeal turns on the proper interpretation of the WDP, as it did in the Court of Appeal. Questions of interpretation are quintessentially questions of law.

### C. The "activity"

65. A small water bottling plant currently operates on the site, with a bottling capacity of 8,000 bottles per hour. Land use consent for that activity ("to establish a mineral bottling [sic] plant") was granted on 10 December 1991.[75]

66. Creswell's proposal seeks to preserve (and expand) the existing bottling operation while introducing the following new elements:[76]

(a) An industrial blow-moulding facility (not currently present on the site) to manufacture plastic bottles, with a capacity to manufacture some 144,000 bottles per hour;

(b) Two new high-speed bottling lines to "match" the manufacturing speed of the plastic bottle blow-moulding facility, each capable of filling 72,000 bottles per hour;

(c) A new two-story building to house these activities, which will be 12.9m high with a ground floor areas of 16,800sqm;

(d) A new gas-fired boiler and chimney stacks / cooling towers;

(e) A new container and transport "depot", allowing for the storage and movement of up to 100 twenty foot-equivalent unit containers (no such facilities are currently present on site).

67. The new plant will dwarf the much smaller existing facility. The new industrial blow-moulding bottle manufacturing facility is necessary for the high-speed bottling lines to operate. It is not clear whether bottles could be manufactured elsewhere, moved onto site, and then somehow be introduced to the production lines. Even if it were possible, it would introduce other effects that would need to be considered (such as additional truck movements, and storage requirements).

[75] [**206.1880**].
[76] See, for example, [**401.0014**].

### D. Relevant activity statuses and the Plan

68. The Project is situated in an area classified as the Rural Plains Zone (**Zone**) by the WDP. The WDP classifies the status of activities by reference to the zone within which they are located, as set out in the Activity Status Table in r 3.4.1. Relevantly, it provides:

(a) "industrial including manufacturing activities" are non-complying within the Zone;[77]

(b) a "rural processing activity" is discretionary within the Zone.[78]

69. The WDP defines "Industrial Activity" to mean:

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

70. "Manufacturing" (as used in both the activity table and the definition of "industrial activity") is not defined. The ordinary meaning of that word is "make (something) on a large scale using machinery".[79]

71. The WDP defines "rural processing activity" to mean:

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

72. Accordingly, a Rural processing activity requires a "primary productive use" producing a "product" that is then processed, assembled, packed or stored.

73. "Primary productive use" is defined as follows:

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

### E. The approach of the Court of Appeal

74. The Court of Appeal began with the definition of "rural processing activity". It considered that the word "operation" "embraces different activities" involving

[77] Item 25 [301.0090].
[78] Item 37.a [301.0091].
[79] *Concise Oxford English Dictionary* (11th ed, 2006) definition of "manufacture".

"products from primary use".[80] In particular, it considered that the word "operation" was "sufficiently broad to embrace activities other than those specifically listed in the definition" as well as activities involving processing, assembling, packing and storing (being the activities specifically referred to in the definition).[81]

75. The Court then concluded that the land use in question should be considered by reference to its "single main purpose" of extracting and bottling water.[82] It considered that it would be "artificial" to separate extraction and bottling, and that the word "operation" was apt to cover a single activity that embraces a number of elements.[83]

76. Alternatively, the Court of Appeal considered that "the land use activities that are necessary for the extraction may properly be regarded as ancillary to the operation.[84] It also agreed with the High Court that the blow-moulding of plastic bottles was "ancillary" to the extraction activity.[85] It considered that, although the definition of "rural processing activities" did not refer to "ancillary activities", the word "operation" was sufficiently broad to encompass them.[86] Indeed, it held that the word "operation" was sufficiently broad to "cover everything that is involved in processing, assembling, packing and storing products, including forming up the packaging used to contain the product".[87]

77. The Court of Appeal considered that it was possible—and of no moment—that the Project might fall *both* within the definition of "rural processing activity" and within the definition of "industrial activity" because it held that the WDP does not intend to exclude activities "in the nature of industrial activities from the ambit of rural processing activities".[88]

### F. The proper activity status of the project is non-complying

78. SOI submits that the proposed activity ought to have been classified as a non-complying activity on the basis that it is properly classified as an "Industrial including manufacturing activit[y]" under the terms of the WDP. All elements of the Project fit comfortably within that definition, and the blow-moulding (manufacturing) can only fit within that definition.

[80] At [146] [**05.0206**].
[81] At [146] [**05.0206**].
[82] At [147] [**05.0206**].
[83] At [147] [**05.0206**].
[84] At [149] [**05.0207**].
[85] At [149] [**05.0207**].
[86] At [150] [**05.0207**].
[87] At [150] [**05.0207**].
[88] At [154] [**05.0208**].

79. The correct starting point is item 25 in the activity table in r 3.4.1 of the WDP.[89] The table does not use the bare defined term "industrial activities"—that term being the focus of the Court of Appeal's reasoning—rather it uses a variation of that term that emphasises the inclusion of manufacturing activities within that activity type (namely, "Industrial including manufacturing activities").

80. It is then instructive to turn to the definition of "industrial activity":[90]

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

81. The first paragraph of the definition expressly encompasses "manufacturing", and specifically the production of "goods" "by" that "manufacturing". The Project involves the production of goods—being plastic bottles—by manufacturing those bottles. To the extent the Project involves the construction and use of a blow-moulding plastic bottle manufacturing plant, it involves an activity that falls squarely within the meaning of "Industrial activity" and "industrial including manufacturing activities" as defined and used in the Plan. Moreover, the daily production of millions of plastic bottles would be a "manufacturing" activity on any ordinary meaning of that term.

82. The processing, packaging and storage of the water also fit within the "Industrial Activity" definition. As do other aspects of the Project including the servicing, testing, and cleaning of vehicles and/or equipment, and the warehousing of materials and goods.

83. A "rural processing activity" is defined in the Plan as follows:[91]

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

84. There are clear similarities between the definitions of Rural processing activity and Industrial activity. Both refer to "processing", "assembling" and "packing/packaging". However, "manufacturing" has been excluded from the

[89] [**301.0091**].
[90] [**301.0286**].
[91] [**301.0296**].

definition of “Rural processing activity”. SOI submits that omission is deliberate and meaningful.

85. Additionally, by contrast to an “industrial activity”, a “rural processing activity” is one that involves doing something with “products from primary productive use”. The distinction between the definitions is fundamentally that “industrial activities” are producing “goods”, whereas a “rural processing activity” concerns the narrower activity of processing of primary products that have already been produced. This is evident, for example, in the definition of “industrial activity” confirming that it includes the milling of timber (because it produces a good, being milled or dressed timber). By contrast, a depot that only stores logs would be a rural processing activity because that activity does not create goods, rather it simply processes or stores products from primary productive use (being logs).

86. The Court of Appeal adopted a linguistically strained interpretation of the definition of “rural processing activity” in order to reach a different conclusion that cast that definition extremely broadly. The Court of Appeal held that the word “operation” in the definition of “rural processing activity” was sufficient to encompass a broad range of activities involving “products from primary productive use” including not only activities stated in the definition (i.e. processing, assembling, packing or storing) but any other activity so long as that additional activity was “carried out in relation to the ‘product’”.[92]

87. The Court of Appeal’s approach involved reading the word “operation” as entirely subsuming and overriding the specific categories of activities included in the definition; rendering them superfluous. It also ignores the omission of “manufacturing” from the Rural processing activity definition. On the Court of Appeal’s reading the definition might as well have been drafted: “Rural processing activity means an operation involving products from primary productive use”. However, that is not how the definition was drafted.

88. SOI submits that the word “operation” is introductory; it sets the scene of the specific activities described later in the definition. The drafters have not used “operation” as some all-consuming general category. Instead, the drafters have defined a class of specific activities, being the processing, assembling, packing and storing of products from primary productive use. Those activities are introduced by reference to them taking place in the context of an operation, but the relevant scope of the Rural processing activity is described by the specific terms used.

[92] CA Judgment at [146] [**05.0206**].

89. The Court of Appeal's interpretation also jars against other textual and contextual indicators:

(a) The Court of Appeal's approach would mean that, despite the Plan expressly using the milling of timber as an example of an "industrial activity", the milling of timber is actually a "rural processing activity". Contrary to the Court of Appeal's reasons, it is not possible for an activity to simultaneously be *both* an industrial activity and a rural processing activity, because those activities are given different statuses in the activity status table in r 3.4.1. Even if the same activity could meet both descriptions, ordinary RMA principles would result in the more restrictive classification being applied (here, non-complying, as an industrial activity).

(b) Also notable is the second sentence of the definition of "rural processing activity", which extends the definition to include "wastewater treatment facilities associated with and within proximity of the Edgewater [sic] Dairy Manufacturing Site".[93] Having expressly included this additional specific activity it can be inferred that the drafters of the WDP did not consider (or at least doubted) that the wastewater treatment facilities associated with the Edgecumbe Dairy Manufacturing Site would otherwise come within the definition. That is presumably because wastewater treatment is not "processing, assembling, packing or storing" the product of primary productive use. Activities at the Edgecumbe Dairy Manufacturing Site are generally treated in a *sui generis* way in the WDP, likely reflecting the plant's significance to the local economy,[94] and that includes within the activity status table in r 3.4.1 (see row 62) which refers to the specific provisions of Chapter 6.[95]

90. The WDP itself contains a clear focus on protecting versatile land and soils to protect the use of rural land for rural production:

(a) Objective 26 of the RPS provides that: "The productive potential of the region's rural land resource is sustained, and the growth and efficient operation of rural production activities are provided for";[96]

[93] The reference to "Edgewater" in the definition appears to be a typographical error. Read in context with the balance of the WDP, it appears that this ought to have been a reference to the "Edgecumbe" Dairy Manufacturing Site.
[94] See r 1.5.3 [**301.0058**].
[95] Rule 6.2.12.1 [**301.0134**] provides numerous activities "relating to the processing and production of milk-related productions" at the "Edgecumbe Industrial Site" are permitted activities. Notably, none of these activities include the manufacturing of packaging material.
[96] [**302.0350**].

(b) Policy UG18B of the RPS is entitled "Managing rural development and protecting versatile land".[97] It explains that rural production is production that is reliant on retaining and protecting rural and soils, rather than any production that simply happens to occur in a rural area.

(c) Method 52 of the RPS implements policy UG18B in the following terms:[98]

> Provide for the sustainable management of versatile land: Local authorities shall provide for the sustainable management of versatile land for rural production activities.
>
> Implementation responsibility: Regional council and city and district councils.

(d) Creswell's site is zoned "Rural Plains" in the WDP. Strategic Objective 4 provides that: "The rural character of the District is retained and rural productive capacity is provided for." This strategic objective is implemented, most relevantly, by Policy 1 and Policy 2 which have a protective focus:[99]

> **Policy 1** To ensure that rural zones continue to be utilised for rural production activities, … .
>
> **Policy 2** To enable primary productive use in the Rural Plains Zone and to protect land in that zone from further subdivision, development and activities that could detract from its primary production focus.

(e) Similarly, the description of the Rural Plains Zone states:[100]

> 3.1.1.1 The Rural Plains Zone includes land which has the potential for high value production due to the inherent characteristics of the land including high ratings for versatility under the New Zealand Land Resources Inventory System (i.e. versatile land). The primary purpose of this zone is to retain the characteristics of the finite land resource and protect the rural production potential and economic growth of the District. There is also a need to provide for other activities which have a fundamental need to be located within the zone.

(f) Objectives Rur1 and Rur2 in the Rural Chapter (Chapter 7) also emphasise the protection of rural land for primary productive uses and which enhances rural character.[101] This is inconsistent with the construction of a blow-moulding plant making plastic bottles.

(g) Mining and Quarrying are listed as examples of 'Primary Productive Use' and these are anticipated in the Rural Plains Zone. However, rule 3.4.1.1(37) ties the activity status of 'processing of minerals' to

[97] [**302.0351**].
[98] [**302.0421**].
[99] [**301.0064**].
[100] [**301.0079**].
[101] [**301.0142**].

the definition of "Mining" rather than "Rural Processing Activity".[102] Rules under 11.2.5 then set out the requirements for all mining and quarrying activities (including processing activities) to restore the site and specifically the soils.[103] The activity can occur on rural land (within limits) but the soil must be protected for future generations.

91. Taken together, these objectives, policies and rules indicate a planning approach directed at protecting soil productivity and rural production within the Rural Plains Zone. Here, a 5.5ha kiwifruit orchard on versatile land is effectively being turned into a factory, warehouse and depot. An interpretative approach that reads the definition of "Rural processing activity" so broadly as to include associated manufacturing or industrial activities, enabling the industrial scale production of goods, is inconsistent with the goals of the Plan. The interpretation advanced by SOI results in those activities being given a "non-complying" status, which is consistent with the protection of rural land for rural productive purposes intended by the Plan. Accordingly, the gateway test in s 104D would apply, meaning a consent could be granted only where the effects of the activity on the environment are minor, or where the Project is not contrary to the objectives and policies in the WDP.[104]

### G. A "single main purpose"?

92. The Court of Appeal then considered that the land use associated with the Project involved "an overall proposed activity of which all the individual elements form part: … the single main purpose of the land use is the extraction and bottling of water" such that "it does not matter that both extraction and bottling are involved, and it would be artificial to separate them".[105] It found that this assessment confirmed its view that the appropriate activity description was "rural processing activity".

93. The problem with this reasoning is that it neglects to specifically consider the bottle manufacturing aspects of the Project. The Project is not simply extracting water and using it to fill bottles, it is also manufacturing the plastic bottles that are to be filled. While it might be artificial to separate water extraction and bottle filling because those things might typically be done in proximity, the same cannot be said for manufacturing the plastic bottles.

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[102] [**301.0091**].
[103] [**301.0155**].
[104] Importantly, while the Environment Court found (at [320]) that the effects of the Project were no more than minor, that assessment was coloured by the finding that the activity was rural processing. The Environment Court acknowledged that if the activity were instead characterised as "industrial" then its assessment would be impacted (at [316]) [**05.0075**].
[105] CA Judgment at [147] [**05.0206**].

94. Moreover, the Court of Appeal's "single main purpose" analysis is problematic. It is not grounded in the language or scheme of the WDP, which is more categorical. The better view is that, at most, the Project involves several different types of activities, and each component needs to be considered according to its treatment and status in the WDP, or on the basis of the most restrictive status.[106] Here, that is non-complying because the Project involves an industrial activity, being the manufacturing of plastic bottles. Such an approach would accord with the usual practice under the RMA.

### H. Manufacturing plastic bottles is not "ancillary"

95. Having concluded that the Project was properly characterised, according to its "single main purpose", as a "rural processing activity", the Court of Appeal appeared to rely on an alternative basis for its judgment. It reasoned, in any event, that "the land use activities that are necessary for the extraction may properly be regarded as ancillary to the operation".[107] The Court of Appeal considered that the blow-moulding of plastic bottles was "ancillary" to the extraction activities that were "rural processing", and therefore it considered that the bottle manufacturing was also "rural processing".

96. The Court of Appeal acknowledged that "ancillary activities are not specifically referred to in the definition of 'rural processing activity'" but considered that to be of "no moment, because of the breadth of the definition and in particular the word 'operation'".[108] Here again, the Court of Appeal adopted a strained interpretation of the word "operation" in the definition of "rural processing activity" to do far more work than the drafters of the Plan could have intended. The Court held that not only does "operation" include any number of additional activities (beyond those listed) associated with products of primary use, but it also includes activities that are "ancillary" to those additional activities.

97. The WDP defines "ancillary" as follows:

> **Ancillary** means small and minor in scale in relation to, and incidental to, the primary activity and serving a subordinate but supportive function to the primary activity. An activity that is of a scale, character or intensity that is considered independent of the princip[al] activity is not ancillary.

98. Importantly, the definition of "ancillary" in the WDP is simply a definition of a *word*. The definition does not itself create some new, additional, or modified class or concept of "ancillary" activities. Rather, the substantive effect of the

[106] See overview of "bundling" in *Protect Aotea v Auckland Council* [2021] NZEnvC 140 at [17].
[107] CA Judgment at [148] [**05.0207**].
[108] At [150] [**05.0207**].

word “ancillary” must be derived from how that word is used in the balance of the WDP.

99. The Court of Appeal recognised that “ancillary activities are not specifically referred to in the definition of ‘rural processing activity’”.[109] Put more directly, “ancillary activities” are not included in the definition of “rural processing activity” *at all*. There is no general concept of “ancillary activity” in the WDP.

100. The use of the word “ancillary” elsewhere in the WDP shows that the drafters have used the word to explicitly expand categories to also embody ancillary activities or elements. There is no general or freestanding concept of “ancillary activities” found in the WDP. This is significant because it shows that the word “ancillary” has been used deliberately in the WDP, typically as an adjective to qualify or expand specific terms or concepts. The omission of the word “ancillary” from the definition of “rural processing activity” is therefore a material one. For example:

(a) Rule 3.1.12.1 describes the Light Industrial Zone as permitting “some retail activities … where they are either small-scale or ancillary for the convenience of workers”.[110] Here, the use of the word “ancillary” gives content to what is permitted within the Light Industrial Zone.

(b) Rule 3.1.15.1 describes the Active Reserve Zone as applying to certain “public reserves used for passive and active recreation, and ancillary uses primarily within urban areas”.[111] Here, the use of the word “ancillary” gives content to what constitutes the Active Reserve Zone.

(c) The activity status table in r 3.1.4 (row 37.b) explicitly applies different activity statuses to various “rural contractor depots” depending on whether those depots are “ancillary” or not ancillary to the main farming activity on a site and the number of staff employed. This can be contrasted with row 37.a which addresses “rural processing activities” and makes no reference to ancillary activities.

(d) Rule 6.2.10.1(b) makes specific provision for retail activities in Light Industrial and Industrial Zones where that retail activity is “ancillary to an industrial activity … on the same site …”. [112] Here, the word “ancillary” is being used in a deliberate and focused way to expand

[109] At [150] [**05.0207**].
[110] [**301.0081**].
[111] [**301.0081**].
[112] [**301.0134**].

the types of activities that may occur within Light Industrial and Industrial Zones. There is no equivalent for the Rural Plains Zone (the relevant zone in the present appeal).

(e) Rule 6.2.12.1(h) which, in relation to the Edgecumbe Industrial Site, applies permitted activity status to "ancillary activities including offices associated with any permitted activity".[113] Here, again, the word "ancillary" is used deliberately to expand the types of activities that may be carried out on this site, and to give the permitted status.

(f) Definition of "Commercial": "means the provision of a service activity for reward, and includes but is not limited to … storage ancillary to commercial".[114] Here, the word "ancillary" is used to describe an activity.

(g) Definition of "Crematorium": "means a building or part of a building that houses a cremator and may include an ancillary vehicle parking area …".[115] Here, the word "ancillary" is used delineate the bounds of a concept under the plan.

(h) Definition of "Education facilities": "mean land and/or buildings used to provide regular instruction or training and their ancillary administrative, cultural and commercial facilities …".[116] Here, again, the word "ancillary" is used describe certain facilities.

101. There is nothing in the definition of "rural processing activity" evidencing an intention to extend those activities beyond the specific activities listed (processing, assembling, packing and storing) to also include activities that are "ancillary" to those activities (or to other activities that, on the Court of Appeal's reasoning, can be imported through the word "operation"). If the drafters of the Plan intended that, then they would have said so.

102. There is also nothing in the definition of the word "ancillary", or how that word is used throughout the WDP, to suggest that there is some sort of free-standing category of "ancillary activities" that can be tacked on to an otherwise defined category of activities. Instead, a review of the Plan shows the word to have been used in a limited and deliberate way.

[113] [**301.0134**].
[114] [**301.0284**].
[115] [**301.0281**].
[116] [**301.0282**].

103. Elsewhere in the WDP, the drafters have been specific where they have intended to include ancillary activities. By contrast, in the definition of "Rural processing activities" the drafters have identified a set of activities encompassed by the definition (processing, assembling, packing and storing) without extending the definition to include activities that are ancillary to those. For the reasons already stated, it was not open to the Court of Appeal to interpret the word "operation" in a way that encompassed (and rendered superfluous) the specific activities identified in the definition, and also to extend the definition beyond those specific activities to any number of other activities and ancillary activities.

104. In any event, it would be wrong to characterise the blow-moulding activity as "ancillary" as it is that activity that enables the scale of production and the scale and scope of environmental effects: it is a core and *determinative* aspect of the Project, not "minor", "subordinate" or "incidental to" the primary activity (to use the language of the definition).

### I. Water is not a "product" of "primary productive use"

105. To rely on the definition of Rural processing activity there must first be a "primary productive use". In this case, the purported primary productive use is the use of a bore to extract water. The primary product cannot, on the Court of Appeal's approach, be bottled water because the bottling aspect is the Rural processing activity.

106. The Court of Appeal accepted there was some doubt as to whether water could be a "product" based on the definition of "rural processing activity" alone, but it held that doubt was removed when the definition of "primary productive use" was considered.[117] The Court of Appeal considered that water extraction was akin to mining, and that there was a "functional need" for a rural location "because that is where the water is".[118] It held extracting water and putting it in bottles was a "use" because all a "use" required was some form of human agency.[119]

107. SOI submits that extracting water involves no "rural land use activit[y]". The Court of Appeal focused on the word "use" rather than the term used in the definition, which is "rural land use activities". That is, the relevant activity must be rural in nature as well as relying on the productive capacity of the land or having a functional need for a rural location. Here, there is no land use activity

[117] At [151] [**05.0207**]. See definition above, at [73].
[118] At [151]-[152] [**05.0207**].
[119] At [153] [**05.0208**].

that can be characterised as "rural": water is simply extracted from the ground and put into bottles.

108. SOI also submits that water is not a "product". A "product" from "primary productive use" is something derived from production associated with the use of rural land: growing crops or grazing livestock. Here, the Project simply involves piping the water out of an aquifer: there is no primary production nor any "product" produced (until the water is bottled).

109. Mining and quarrying are similarly extractive, but the question of whether there is a "product" does not arise because the processing of minerals and other associated works is included within the definition of "mining" (and quarrying) and so neither rely on the definition of Rural processing activity.

110. Even if this argument were incorrect, and water is a "product", then there is nothing about water extraction which involves a "functional need for a rural location".[120] It so happens that the water sought to be extracted here is located rurally, but there is nothing intrinsic in the activity that means it needs to be done rurally (in contrast to the activities specified, which plainly can only occur in a rural location).

### J. In the alternative, if bottling water is a rural processing activity, then consent for the bottle manufacturing must still be assessed on the basis that it is an industrial activity

111. SOI says that, if some parts of the application were rural processing activities (and therefore discretionary) and some parts were industrial activities (and therefore non-complying) then the consenting decisions needed to "bundle" those activities and apply the most "stringent" activity status to the overall activity.[121]

112. The Court of Appeal avoided this issue altogether by taking such a broad approach to the meaning of "operation" in the definition of "rural processing activity" that the term encompassed all aspects of the project from extraction, to bottling, to bottle making, to storage and warehousing.

113. If, for the reasons already submitted, the Court of Appeal's approach to the interpretation of "rural processing activity" was wrong, then the courts below were wrong not to "bundle" the different activities involved in the project (if some were classified as discretionary and some as non-complying) and to

[120] The National Planning Standards define "functional need" as "means the need for a proposal or activity to traverse, locate or operate in a particular environment because the activity can only occur in that environment".
[121] *Protect Aotea v Auckland Council* [2021] NZEnvC 140 at [17].

then apply the most stringent status (i.e. non-complying). The alternative would be that more stringent classifications could be circumvented by combining those activities with other activities with less stringent classifications. That would undermine the fabric of the planning regime.

### K. Result

114. SOI respectfully submits that the appeal should be allowed because:

(a) the courts below relied on an erroneous interpretation of the provisions of the WDP; and

(b) the Court of Appeal erred in finding that the appeal should not be allowed despite earlier decision-makers treating the application as one capable of being determined under s 127 of the RMA.

## V. ORDERS SOUGHT AND COSTS

115. SOI respectfully seeks orders:

(a) allowing the appeal;

(b) remitting the question of costs in the Court below to be reconsidered by those costs; and

(c) as to costs in this Court.

116. SOI wishes to be heard on costs before any costs order is made against it. While costs in the courts below were awarded against SOI, it maintains that it has brought the proceeding in the public interest and that it has conducted the proceeding reasonably and responsibly.

Dated 26 July 2023

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D M Salmon KC / D A C Bullock
Counsel for Sustainable Otakiri Incorporated

*Counsel certify that they have made appropriate inquiries to ascertain whether these submission contain any suppressed information, they certify that, to the best of their knowledge, the submission is suitable for publication (that is, it does not contain any suppressed information)*

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