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

Under the	**SENIOR COURTS ACT 2016**
Between	**TE RŪNANGA O NGĀTI AWA**
	Appellant
And	**BAY OF PLENTY REGIONAL COUNCIL**
	First Respondent
And	**OTAKIRI SPRINGS LIMITED**
	Second Respondent

SUBMISSIONS ON BEHALF OF OTAKIRI SPRINGS LIMITED ON APPEAL BY TE RŪNANGA O NGĀTI AWA

Dated: 8 September 2023

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

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MAY IT PLEASE THE COURT:

1. SUMMARY OF ARGUMENT

1.1 The case for Te Rūnanga o Ngāti Awa (**TRONA**) is that the Otakiri Springs proposal is for *"too much water to be sold, too far away"*. In its first appeal, TRONA adduced expert tikanga and other evidence to support that case, but the Environment Court (**EC**) preferred the evidence on the same subject of other experts (including in Ngāti Awa tikanga) and dismissed the appeal.

1.2 Errors alleged in subsequent appeals have been correctly addressed in the High Court (**HC**) and Court of Appeal (**CA**). In any event, at the heart of TRONA's appeal there are evidentiary findings which preclude any questions of law arising for consideration or which render any questions of law which do arise moot.

1.3 As for *"too much water"*, the undisputed evidence was that the groundwater aquifer at Otakiri is an abundant, renewable water source. It will not be materially affected by Creswell's proposal in a physical[1] or metaphysical (mauri) sense.[2] The EC also heard that TRONA entities hold consents to take more water from the nearby Tarawera River for dairying.[3]

1.4 The EC tested the tikanga evidence going to TRONA's contention that the mauri of water, and therefore the ability of Ngāti Awa to exercise kaitiakitanga, would be harmed by bottling and export (perhaps from Aotearoa or from the rohe of Ngāti Awa; it has not been explained how far away TRONA would consider to be *"too far"*, nor how much is *"too much"*[4]).

1.5 The *"too much, too far"* case was rejected on the evidence, with the EC finding that:

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[1] T*e Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2019] NZEnvC 196, [2019] 21 ELRNZ 539 (**EC interim decision**) at [68] **[[05.0038]]**, [70] **[[05.0038]]**, and [319] **[[05.0075]]**.
[2] EC interim decision at [134] **[[05.0048]]** and [158] **[[05.0051]]**.
[3] EC transcript at 362 **[[201.0362]]**.
[4] EC interim decision at [96] **[[05.0041]]**.

(a) *"there is no loss of mauri from the water"* arising from bottling and export;[5] and

(b) as such, bottling and exporting water would not unreasonably prevent the ability of Ngāti Awa to exercise kaitiakitanga.[6]

1.6 At issue before this Court is whether the HC erred in upholding the EC's decision in relation to the negative tikanga effects.[7] No error was made; the HC correctly observed that the EC majority, while noting a jurisdictional and practical difficulty for a consent authority to control exports of bottled water, also considered the kaumātua evidence and made clear findings that such activity would not adversely affect mauri or kaitiakitanga. As the HC observed:[8]

> *(…) the [EC] majority did consider the cultural effects of export. Given the nature of the effects – metaphysical cultural effects on the iwi appellants – the majority was necessarily considering the effects in New Zealand. Further, the majority's factual finding – that 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 – applies not only to exports but also to removal of water from the local area to other parts of New Zealand.*

1.7 These are findings which it was reasonably open to the EC to make.

1.8 The CA correctly dismissed TRONA's appeal on other grounds. TRONA's assertion that plastic waste adversely affects the exercise by Ngāti Awa of kaitiakitanga, not advanced in the EC, is largely answered in counsel's submissions on the appeal by Sustainable Otakiri Incorporated; any such effects, if they were capable of assessment, are not properly attributable to a consent to take groundwater for bottling. Further, it was incumbent on TRONA to raise

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[5] EC interim decision at [156] **[[05.0050]]**.
[6] EC interim decision at [158] **[[05.0051]]**.
[7] The CA refused leave to appeal on a number of questions regarding tikanga effects (including one asserting that only evidence adduced by an iwi authority could conclusively determine the tikanga of that iwi), on the basis that these were essentially challenges to factual findings. See *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2021] NZCA 452 (**CA leave decision**) at [17] – [18] **[[05.0154]]**.
[8] *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2020] NZHC 3388, [2020] 22 ELRNZ 323 (**HC decision**) at [118] **[[05.0108]]**.

such effects as an issue for determination at first instance or before the EC, which it did not.

1.9 TRONA also argues that the planning instruments are ill-equipped to assess the effects of bottling and exporting water, so the EC should have directly considered Part 2 of the Resource Management Act 1991 (**RMA**) in a way that might have altered the outcome. TRONA's argument before the EC related to efficiency and possible future allocations of water for cultural takes of water. The argument now relates to plastic bottles and alleged effects on te mauri o te wai of bottling and export. Either way, the Courts below correctly found there to be no relevant gaps in the planning framework.

1.10 Even if there were gaps, nothing in the RMA plans, central government direction regarding water, or Part 2 of the RMA supports the outcome sought by TRONA, particularly given the explicit findings that bottling and exporting water does not, in fact, adversely affect mauri or kaitiakitanga.

1.11 As such, this Court, too, should dismiss TRONA's appeal.

2. STRUCTURE OF SUBMISSIONS

2.1 The legal framework and key principles for this Court's decision are set out in counsel's submissions in SC 1/2023. The structure of these submissions is follows:

(a) **Section 3** sets out the factual background relevant to this appeal;

(b) **Section 4** addresses 'Ground 1' of TRONA's appeal, which asserts that the EC did not properly assess whether exporting water in plastic bottles would have negative tikanga effects on te mauri o te wai and on the ability of Ngāti Awa to be kaitiaki;

(c) **Section 5** addresses 'Ground 2' regarding Part 2 of the RMA; and

(d) **Section 6** briefly addresses materiality and the relief sought by TRONA.

3. RELEVANT FACTUAL BACKGROUND

3.1 The relevant facts are largely not in dispute and are summarised succinctly in the decisions of the EC majority,[9] HC,[10] and CA.[11]

3.2 To recap briefly, the Awaiti Canal groundwater aquifer originates in the central North Island and flows deep underground to the sea off Whakatāne. Special geological conditions allow access to a highly productive part of the aquifer at Otakiri, where three water bottling plants (including Otakiri Springs) and municipal water supply infrastructure are clustered.[12]

3.3 In 2017 Creswell NZ Limited (**Creswell**) applied for the relevant approvals under the RMA to expand the Otakiri Springs plant, which has operated since 1994. In terms of water allocation, a relatively small increase was sought,[13] but production will be significantly increased due to efficiencies provided by modern equipment, to be housed within a large new plant building. Expanding the plant will result in a large influx of jobs in a location where jobs are scarce.[14]

3.4 Creswell developed its proposal factoring in feedback provided through respectful and meaningful engagement with tangata whenua, other local people, the Councils, and other stakeholders.[15]

3.5 Counsel for TRONA now set out what they consider to be the key relevant facts to the issues on appeal, which require comment in two respects:

(a) On the plastic waste issue, counsel for TRONA imply that TRONA advanced a case in the EC regarding the effects of

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[9] EC interim decision at [1]-[30] **[[05.0027]]**.
[10] HC decision at [3]-[15] **[[05.0087]]**.
[11] *Te Rūnanga o Ngāti Awa v Bay of Plenty Regional Council* [2022] NZCA 598 (**CA decision**) at [1]-[21] **[[05.0158]]**.
[12] Evidence-in-chief of Michael Goff (29.03.2019) at [30]-[31] **[[203.0872]]**, [45] **[[203.0875]]**, and [67] **[[203.0880]]**; EC transcript at 105 **[[201.0105]]**.
[13] The previous consent allows takes of up to 2,938m^3 per day, split between uses for water bottling (1,200m^3 per day), irrigation (158m^3 per day), and frost protection (1,580m^3 per day): evidence-in-chief of Malory Osmond (29.03.2019) at [34] **[[202.0726]]**. Creswell's consent allows a maximum of 3,000m^3 per day when averaged across each year, or up to 5,000m^3 on any one day: evidence-in-chief of Malory Osmond (29.03.2019) at [37] **[[202.0726]]**.
[14] Evidence-in-chief of Mark Cox (29.03.2019) at [26]-[33] **[[402.0627]]**.
[15] The EC commented on Creswell's *"genuine and meaningful attempt to involve the immediate community, hapū and iwi in the development of the project"*; EC interim decision at [89] **[[05.0040]]**.

plastic usage on kaitiakitanga, with which the other parties and the EC did not engage, by reference to:

(i) a comment made by a TRONA witness regarding a reduction in TRONA's plastic usage in its Whakaari / White Island Tour operations as evidence of its kaitiakitanga; and

(ii) TRONA's expressed regret that Creswell adduced little direct evidence regarding the potential adverse environmental effects of plastic bottles, and that the EC did not seek such evidence.

(b) Second, a key issue before the EC was whether Creswell's proposal would *"erode te mauri o te wai"*. The summary of the EC process and relevant tikanga evidence presented for TRONA implies a failure by the EC to engage properly with the issue, stemming from an evidentiary mismatch.

3.6 In both cases, counsel's summary does not reflect the true position. As explained further below, plastic waste was simply not put at issue by TRONA at first instance or before the EC. Conversely, the EC and the parties engaged directly and thoroughly with the potential for Creswell's proposal to affect te mauri o te wai and kaitiakitanga.

4. END-USE EFFECTS – PLASTIC BOTTLES AND EXPORT

Alleged tikanga effects of plastic bottles

4.1 Counsel's submissions in SC 1/2023 address the jurisdictional overview section of the EC majority's judgment and explain why, with respect to potential effects associated with plastic packaging:

(a) the EC majority (and the HC and CA) correctly stated and considered established legal principles on consequential effects;

(b) the Courts below correctly applied those legal principles to the issue of plastic waste (noting that such application is not a question of law amenable to appeal); and

(c) the fact that no party put plastics at issue before the EC counts against the appellants succeeding on this point.

4.2 As found by the Courts below, including in the HC where the effects of plastic bottles in tikanga terms were considered, the adverse effects of consumers discarding plastic bottles are too indirect or remote to be attributable to these consents.

4.3 Further, as noted above, the factual summary presented by counsel for TRONA implies that TRONA advanced a case in the EC regarding the effects of plastic usage on kaitiakitanga, with which the other parties and the EC did not engage. This was not the case; TRONA did not put plastic waste at issue at first instance or before the EC.

4.4 On the contrary, in preparing its resource consent application, Creswell sought the views of TRONA and other iwi to inform the assessment of effects. The Cultural Impact Assessment prepared by TRONA did not mention plastic waste.[16] Nor was it raised in the appeal to the EC,[17] identified in pre-trial statements of issues,[18] traversed in written evidence for TRONA, or the subject of legal argument.[19] As noted by the HC, *"the impact of plastic bottles was not part of TRONA's case as argued before the Environment Court, just as it was not part of SOI's case"*.[20]

4.5 TRONA's pursuit of the issue has therefore never been based on a properly (or at all) notified set of contentions which has been cogently (or at all) supported by evidence. Rather, TRONA seeks to coat-tail on Commissioner Kernohan's own-motion objections in his minority judgment in the EC which itself, with respect, had no grounding in any evidence or submissions made by any party. At the same time the EC also heard, and noted in its decision, evidence:

[16] Te Rūnanga o Ngāti Awa Cultural Effects Assessment – Otākiri Springs (April 2018) **[[402.0666]]**.
[17] Te Rūnanga o Ngāti Awa EC Notice of Appeal (3.07.2018) **[[101.0031]]**.
[18] Joint memorandum of counsel on regional consents (25.01.2019) **[[101.0067]]**, Memorandum of counsel for Ngāti Awa regarding outstanding issues (22.03.2019) **[[101.0122]]**.
[19] As noted in the submissions on SC1/2023, for TRONA to raise this issue would have been novel; counsel are unaware of any RMA case in which plastic packaging has been considered a relevant effect of production, retail, or other activities.
[20] HC decision at [89] **[[05.0103]]**.

(a) that TRONA itself had not ruled out its own possible future involvement in water bottling;[21]

(b) that TRONA's commercial interests had expressed an interest in buying Otakiri Springs;[22] and

(c) regarding TRONA's commercial interests in other industries heavily reliant on plastic packaging, such as fisheries and the dairy industry.[23]

Alleged tikanga effects of exporting water for consumption overseas

EC and HC decisions

4.6 The EC majority's jurisdictional overview also addressed the 'end use' of exporting bottled water. It did so by reference to the political controversy of foreign-owned companies bottling water in New Zealand and exporting it overseas without paying royalties,[24] which was echoed in TRONA's case of *"too much water being sold, too far away"*. TRONA's key concern, as paraphrased by the EC, is *"sending the water away to people whose tikanga are different"*,[25] identified by Dr Mason as *"ngā Hainamana"*.[26]

4.7 The EC thus evaluated whether the downstream activity of exporting water to overseas markets to be consumed by foreigners was relevant for the EC to consider.

4.8 The EC majority analysed this question (and associated concerns expressed about *"commodifying water and selling it overseas for profit"*[27]) through the rubric of 'end use' effects. Having correctly summarised those principles at [59] to [61], it observed that:[28]

[21] EC transcript at 362 **[[201.0362]]**.
[22] EC transcript at 333 **[[201.0333]]**.
[23] EC transcript at 362 **[[201.0362]]**.
[24] EC interim decision at [40] **[[05.0031]]**.
[25] EC interim decision at [96] **[[05.0041]]**.
[26] EC transcript at 377 **[[201.0377]]**.
[27] Evidence-in-chief of Hohepa Mason and Te Kei Merito (29.04.2019) at [33] **[[204.1242]]**.
[28] EC interim decision at [64] **[[05.0037]]**.

(a) exporting water from New Zealand is an ancillary activity not controlled under the Bay of Plenty Regional Natural Resources Plan (**RNRP**);

(b) no party had suggested that controlling exports of water falls within the functions of Bay of Plenty Regional Council (**BOPRC**) under section 30 of the RMA;

(c) exporting water is otherwise lawful; and

(d) refusing consent to Creswell would have *"no effect on all other instances where (…) water is exported, whether in its natural form or as a component of other exports"*.

4.9 The EC majority drew conclusions:

(a) at [65], that *"we do not think that on an appeal in relation to a particular proposal to take water we can, by our decision, effectively prohibit (…) exporting bottled water. Such controls would require direct legislative intervention at a national level."*

(b) at [66], that *"in this case, the end uses of putting the water in plastic bottles and exporting the bottled water are matters which go beyond the scope of consideration of an application for resource consent to take water (…)"*.

4.10 The HC considered that the EC majority *"went too far"* at [66], with Gault J perhaps interpreting it as a ruling that the EC had **no ability at all** to consider the potential effects of exporting water, including in terms of the tikanga of Ngāti Awa.

4.11 When read in context, however, that is not the intended meaning and effect of the passage. For one, no party had asserted that the EC was entirely barred, in a jurisdictional sense, from considering the alleged effects of exporting water on mauri and kaitiakitanga, and indeed TRONA and Creswell adduced expert evidence on that very issue (discussed in more detail below). The EC majority must have

considered itself able to evaluate those alleged tikanga effects, because it did so in some detail.[29]

4.12 More likely, in context, is that the EC majority reached its conclusion at [66] in light of all the evidence it had heard, analysed later in the judgment. Applying 'end use' principles enables such an evaluation of whether effects are attributable to a proposal, in the circumstances. By inference, the evidence regarding the environmental effects of Creswell's proposal, including of kaumātua with different views as to how the customary beliefs and practices of Ngāti Awa might be applied to the relatively modern activity of exporting water to China and other countries, influenced the EC majority's jurisdictional finding.

4.13 That is, TRONA's evidence simply did not convince the EC majority that exporting water and its consumption by people living in, say, China, could give rise to a relevant adverse environmental effect, as opposed to being primarily a political concern. No logical or sufficiently strong nexus between the activities of taking and bottling groundwater and the alleged effect was established.

4.14 Moreover, TRONA did not make a concerted effort to demonstrate such a nexus. Its case was that export (generally) harms the mauri of the water;[30] as discussed below, this was framed as a sustainability concern, with water and its mauri moving away from and thereby depleting the local water cycle / system and its associated mauri.

4.15 TRONA did not seek to prove any other connection between extracting groundwater at Otakiri and alleged effects arising from its consumption overseas. For example, it was not explained:

(a) why the different tikanga of foreign people might make their consuming water from Otakiri a relevant environmental effect (and on what basis TRONA understands other tikanga to differ, how the tikanga of people overseas who may consume the water should be determined, and so on); and

[29] EC interim decision at [71]-[86] **[[05.0038]]** and [96]-[109] **[[05.0041]]**.
[30] The EC majority dismissed that assertion, which it held not to be founded on a widely-held customary belief sufficient to warrant refusing consent; EC interim decision at [156] **[[05.0050]]**.

(b) whether it would make a difference if the water were consumed by people with similar tikanga to Ngāti Awa (and, if so, why).

4.16 The express observations by the EC majority at [64] underpin its implicit finding that no sufficient connection was proven by TRONA. It is correct that:

(a) the relevant regional plan does not direct a consent authority to treat exporting water as giving rise to relevant effects;

(b) regional councils do not exercise any functional control over exporting products (which is a common and lawful economic activity); and

(c) refusing consent to Creswell would not affect all other exports of products containing water from New Zealand.

4.17 The EC majority also noted the practical difficulty for a council to control the movement of goods outside of the region or New Zealand; in its words: *"As we have already found in relation to our jurisdiction, we cannot control the export of water from the rohe"*.[31]

4.18 As such, the EC majority did not err in applying 'end use' principles to the question of whether the consumption overseas of Otakiri Springs water was relevant to consider; it correctly found that it was not.

TRONA's case on tikanga was met with evidence evaluated by the EC

4.19 Even if the EC majority did make a legal error in finding that export and consumption of the water overseas was not relevant to consider, the error would not be material and there would be not point in directing the EC to reconsider it. That is because, as Gault J correctly observed, the EC majority squarely considered and made findings on the evidence relating to TRONA's case that Creswell's proposal would *"erode te mauri o te wai"* and therefore harm kaitiakitanga. As the CA noted:[32]

[31] EC interim decision at [158] **[[05.0051]]**.
[32] CA decision at [111] **[[05.0195]]**.

We think it is clear that the [EC] had dealt directly with the case that was presented to it and the same is true of the [HC] in considering the matters which were the subject of argument there.

4.20 Counsel for TRONA assert that the EC failed to engage properly with the issue and imply that the expert evidence on point was mismatched, with the witnesses talking past one another. This does not reflect the true position; rather, the parties engaged directly with that issue (and all others advanced by the appellants).

4.21 Evidence on tikanga matters was adduced from three esteemed members of Te Kahui Kaumātua o Ngāti Awa, the body formally tasked with advising TRONA on matters of tikanga and mauri[33] (but which had not been asked by TRONA to advise on the tikanga implications of water bottling).[34]

4.22 The implied mismatch relates to the evidence of Dr Mason,[35] on the one hand, and Mr Eruera, on the other. Dr Mason is said to have taken a *"holistic approach"* to considering the proposal and its effects. Mr Eruera is said to have focussed on *"physical sustainability"* of the water take. That is not the case; Mr Eruera's evidence addresses in detail whether bottling and exporting water might affect its mauri, as well as kaitiakitanga.

4.23 The EC, sitting at Te Mānuka Tūtahi Marae, engaged directly with the evidence of the three kaumātua, as is plain from the analysis in its decision.[36] It accepted Mr Eruera's evidence that any such effects could be managed in accordance with Ngāti Awa tikanga.

4.24 That the issues identified by TRONA were squarely met with evidence and considered by the EC can be traced through the relevant documents, as summarised below.

4.25 Early in the EC process, counsel for TRONA advised that the outstanding issues to be determined (following expert caucusing) were

[33] Charter of Te Rūnanga o Ngāti Awa (15 December 2018) at [4.4]-[4.5] **[[402.0788]]**.
[34] EC interim decision at [99] **[[05.0042]]**.
[35] Dr Mason's written evidence was co-authored by Dr Te Kei Merito.
[36] EC interim decision at [71]-[86] **[[05.0038]]**, [92]-[94] **[[05.0041]]**, and [96]-[109] **[[05.0041]]**.

"limited to (a) planning and (b) tikanga effects".[37] The latter were particularised as follows:

> *(a) Notwithstanding the agreement reached between the parties with respect to hydrogeology, based on the evidence of TRONA's Ngāti Awa tikanga experts, there will still be effects on the mauri of the wai that remain. (…)*
>
> *(c) According to TRONA's tikanga experts' kōrero, kaitiaki of the wai will be affected by the proposed activity.*
>
> *(d) The ability of Ngāti Awa, through TRONA as the recognised iwi authority, to be kaitiaki is equally diminished by the activity.*

4.26 Creswell's evidence-in-chief, filed subsequently, included that of Mr Eruera. After explaining his ability to speak with authority regarding Ngāti Awa tikanga (including his role on Te Kāhui Kaumātua) and commenting on Creswell's engagement with iwi, Mr Eruera addressed various potential effects on te mauri o te wai and kaitiakitanga, as follows:

(a) the mauri of water in the aquifer, and the potential for it to be affected by overextraction (which will not occur);[38]

(b) the mauri of water bottled and exported from the rohe;[39]

(c) kaitiakitanga (albeit the precise nature of TRONA's concerns in that regard were unclear to him at that time);[40] and

(d) how mauri can be restored and kaitiakitanga exercised.[41]

4.27 Next, the evidence of Dr Mason and Mr Merito for TRONA also discussed various potential effects in terms of Ngāti Awa tikanga. While counsel for TRONA now assert that the EC majority incorrectly focused on sustainability (and inappropriately conflated physical and metaphysical effects), that criticism is unwarranted because the witnesses themselves were clearly concerned that the extraction of

[37] Memorandum of counsel for Ngāti Awa regarding outstanding issues (22.03.2019) at 2 **[[101.0123]]**.
[38] Evidence-in-chief of Hemana Eruera (29.03.2019) at [11] **[[202.0694]]**, [46] **[[202.0699]]** and [47] **[[202.0700]]**.
[39] Evidence-in-chief of Hemana Eruera (29.03.2019) at [12] **[[202.0694]]** and [50] **[[202.0700]]**.
[40] Evidence-in-chief of Hemana Eruera (29.03.2019) at [54]-[61] **[[202.0701]]**.
[41] Evidence-in-chief of Hemana Eruera (29.03.2019) from [62] **[[202.0702]]**.

groundwater and its export would deplete and fail to sustain its *"mauri for Ngāti Awa"*. Key passages in the evidence demonstrating this (with emphasis added) include:

> *Creswell's Proposal will erode te mauri o te wai. When the wai leaves our shores to be sold overseas its mauri for Ngāti Awa is lost. This effect is due to* ***the amount of water being taken out of the system*** *to then be bottled and sold (a lot of it overseas).* ***Not enough water has the opportunity to re-enter the system as a whole. The Proposal is therefore able to be distinguished from other activities such as irrigation.*** *Given the nature of the Proposal, the effects on te mauri o te wai are unable to be avoided.*[42]
>
> *Creswell's Proposal is like a blood transfusion to others outside of our eco-system.* ***The wai is being taken out without an opportunity to re-enter our system. There is no reciprocity for the environment for the wai to be sucked out without giving enough an opportunity to re-enter the water cycle.*** *If we allow the wai to go to whenua ke, the mauri o te wai departs. The mauri cannot be restored at this point through karakia (or any other methods to restore the mauri).*[43]
>
> *If there were amendments to Creswell's Proposal (particularly in relation to how much water is being taken and what happens to it), and* ***the water stayed within our water cycle for the system and our own people****, that may not erode the mauri o te wai as it would be staying with Papatūānuku. These considerations are often a matter of degree.*[44]

4.28 The evidence also discusses sustainability in terms of the life-sustaining properties of water (including for food sources).[45]

4.29 Ms Robson, a planner giving evidence for TRONA, interpreted this evidence as follows:

> *If used locally, water stays in its local water cycle. If it is physically removed by a long distance it cannot be returned to its part of this water cycle. TRoNA's tikanga experts have determined this to have a*

[42] Evidence-in-chief of Hohepa Mason and Te Kei Merito (29.04.2019) at [32] **[[204.1242]]** and [60] **[[204.1254]]**.
[43] Evidence-in-chief of Hohepa Mason and Te Kei Merito (29.04.2019) at [63] **[[204.1255]]**.
[44] Evidence-in-chief of Hohepa Mason and Te Kei Merito (29.04.2019) at [64] **[[204.1255]]**.
[45] Evidence-in-chief of Hohepa Mason and Te Kei Merito (29.04.2019) at [40] – [41] **[[204.1244]]** and [44] **[[204.1247]]**.

detrimental effect on te mauri o te wai and the ability of Ngāti Awa to be kaitiaki of the water.

4.30 Ms Robson attempted to link the alleged effect to the RMA plans.[46]

4.31 Creswell filed rebuttal evidence on 10 May 2019. Given TRONA's witnesses' references to the local water cycle and the asserted difference between water takes for irrigation and for bottling, that included evidence of a hydrogeologist, Mr Goff, on that point.[47]

4.32 Mr Eruera also prepared rebuttal evidence that deals directly and extensively with Dr Mason's evidence that exporting water harms its mauri, including the key passages identified above.[48] Adopting the blood transfusion analogy, Mr Eruera opined that Ngāti Awa sharing water with other people in a sustainable way was mana- and mauri-enhancing, for kaitiaki and the broader environment alike.[49]

4.33 The EC majority engaged directly and extensively with the evidence on these issues – as envisaged by this Court in *Trans-Tasman Resources Limited*[50] – at [71] to [86], [93] to [109], and tikanga matters are the focus of its evaluation of the asserted effects (among other matters) in light of the planning provisions from [110] to [170].

4.34 These passages speak for themselves and demonstrate the thoroughness of the EC majority's consideration. To answer various criticisms of counsel for TRONA, it is not the case that the EC majority failed to *"grapple with"* the evidence of Dr Mason, or that it did not assess *"the impact of the export by its own admission"*. And the EC majority clearly explained why it preferred the evidence of one kaumātua over others. This was clear to the HC and the CA.

4.35 On the face of it, the only error of law which might possibly be argued is that the EC did not agree with and accept the evidence of Dr Mason in preference to that of Mr Eruera. But that, if it be an error (which is denied), is not an error of law. It could only be an error of fact. As an

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[46] EC interim decision at [137]-[140] **[[05.0048]]**.
[47] Rebuttal evidence of Mike Goff (10.05.2019) at [9]-[22] **[[203.1065]]**.
[48] Rebuttal evidence of Hemana Eruera (10.05.2019) from [5] **[[202.0709]]**.
[49] Rebuttal evidence of Hemana Eruera (10.05.2019) at [13]-[16] **[[202.0710]]**.
[50] *Trans-Tasman Resources Limited v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] NZLR 801 at [71]-[86], [93]-[109] and [110]-[170].

error of fact, it could also amount to an error of law if it were to have been sufficiently egregious to fulfil the *Bryson* criteria. The *Bryson* criteria in that regard are based on *Edwards v Bairstow*. That case requires, as but one way of expressing the very restrictive bar to error of fact propagating to legal error *"a view of the facts which could not reasonably be entertained"*.[51] No real attempt is made at demonstrating this.

4.36 An alternative approach adopted by TRONA is that, as said above, there was no proper attempt to *"grapple"* with the evidence of Dr Mason and Dr Merito. But this is a variation of the same argument (basically an argument of factual error) and it is subject to variants of the same response:

(a) the EC did grapple with that evidence which may be seen from the passages already cited;

(b) it is just that the adequacy of the EC's treatment of the subject is not satisfactory to TRONA;

(c) that treatment to be a ground of appeal in the present context must not merely be *"less"* than an appellate court would bring to bear itself in the more focussed gaze of appellate consideration and must be more than just a result which the appellate court left to its own devices would not have made; and

(d) it must be shown in *Edwards* v *Bairstow* terms to meet one of the ways in which the House of Lords set out to describe the test.

4.37 A further alternative is that which appears at [8(a)(i)] of TRONA's submissions: that because of the EC's jurisdictional conclusion it blinded itself to the facts. The exact phraseology is that the Majority's jurisdictional ruling *"frustrate[d]"* any review of tikanga effects.

4.38 That is asking the Supreme Court to speculate that the EC's review of the evidence on tikanga may have been different had the ruling on jurisdiction not been made. That is no legal ground of appeal, certainly

[51] *Bryson v Three Foot Six* [2005] 3 NZLR 721 at [26].

not where the EC expressly set out to review the evidence, then did so, then made findings based on it and, importantly, where the appellant does not put forward any basis on which the EC's factual findings *must* be seen as perverse. It is not for the appellant to attribute factual error so grievous that it amounts to legal error (given the high bar) when it has nothing more than guesswork to offer.

4.39 The HC thus made no error in upholding the EC majority's decision in relation to alleged negative tikanga effects.

5. RECOURSE TO PART 2 OF THE RMA WAS UNNECESSARY

5.1 The CA and HC correctly determined that the EC majority was not required, in the circumstances of this case, to have direct recourse to Part 2 in evaluating Creswell's proposal to take and bottle water.

5.2 Consent decision-making under s 104(1) of the RMA entails, in essence, evaluating environmental effects in light of the policy direction provided by the planning instruments, subject (as necessary) to the purpose and principles in Part 2 of the RMA.

5.3 In that context, Part 2 matters are intrinsically linked with effects; sustainable management has, at its heart, enabling beneficial uses of resources while avoiding, remedying, or mitigating adverse effects.

5.4 Moreover, Part 2 matters must not be used as an imprecise touchstone for decision-making, in a way that would circumvent plans. As the EC majority correctly noted:[52]

> *s 5 is not intended to be an operative provision under which particular planning decisions are made and the specific jurisdictional framework of the rest of the RMA and the policy framework of the planning documents under it are not to be circumvented by resort to Part 2 generally.*

[52] EC interim decision at [62] **[[05.0037]]** citing *Environmental Defence Society* v *New Zealand King Salmon Ltd* [2014] NZSC 38 at [21] – [30], [84] – [91], [130] and [150] – [151].

5.5 Rather, per *Davidson*[53] what is required is a 'a fair appraisal of the objectives and policies read as a whole'.[54] Where a plan has been prepared having regard to Part 2 and with a coherent set of policies designed to achieve clear environmental outcomes, the result of a genuine process that has regard to those policies in accordance with s 104(1) should be to implement those policies in evaluating a resource consent application. Reference to Part 2 in such a case would likely not add anything.[55]

5.6 In this case, as discussed above, the EC majority found the environmental effects alleged by the iwi appellants insufficient to justify declining Creswell's water take application, because:

(a) the aquifer at Otakiri is an abundant, renewable source of water; the undisputed expert evidence in the EC was that Creswell's proposed take is sustainable and will not materially affect the aquifer in a physical[56] or metaphysical (mauri) sense;[57] and

(b) TRONA's case before the EC was instead that exporting water adversely affects its mauri and the role of Ngāti Awa as kaitiaki, and that consent should be declined on that basis. This case was rejected by the EC, on the evidence.

5.7 As such, the EC found there to be no effects-based reason to refuse Creswell's application for consent to take water.

5.8 Nor is there any plan-based rationale for refusing consent.

5.9 Plans are statutory documents whose purposes include reliably informing the public how decisions will be made about resources.

5.10 The applicable regional instruments are the Regional Policy Statement (**RPS**) and RNRP including, at the relevant time, proposed Plan Change 9 (**PC9**) to the RNRP. None of those documents signals that

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[53] *R J Davidson Family Trust v Marlborough District Council* [2018] NZCA 316, [2018] 3 NZLR 283; EC interim decision at [139] **[[05.0048]]**, [159] **[[05.0051]]**, and [161] **[[05.0051]]**.
[54] *R J Davidson Family Trust v Marlborough District Council*, above n 53, at [73], citing *Dye v Auckland Regional Council* [2002] 1 NZLR 337 (CA) at [25].
[55] *R J Davidson Family Trust v Marlborough District Council*, above n 53, at [74]; EC interim decision at [62] **[[05.0037]]**, citing *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd*, above n 52, at [21]-[30], [84]-[91], [130] and [150]-[151].
[56] EC interim decision at [68] **[[05.0038]]**, [70] **[[05.0038]]**, and [319] **[[05.0075]]**.
[57] EC interim decision at [134] **[[05.0048]]** and [158] **[[05.0051]]**.

exporting water from a region gives rise to any resource management issue, let alone that exporting water might lead to a consent application being declined.

5.11 The RNRP and RPS have this in common with all other plans around country. So far as counsel's searches reveal, none of them seek to regulate the export of water (or products made with water) from a region or New Zealand, or the use of plastic packaging.

5.12 Nor does any national instrument, such as the National Policy Statement for Freshwater Management (**NPS-FM**[58]), do so.

5.13 As such, even if the EC had found that exporting water for consumption overseas, or the use of plastic bottles, would adversely affect the mauri of the water or kaitiakitanga, as alleged by TRONA, there was no planning basis for that finding to have materially influenced the decision, given the lack of supportive policies in the planning instruments.

5.14 Rather, the RNRP and RPS strongly enable water takes that, like Otakiri Springs', are highly beneficial, efficient, and sustainable.

5.15 The test posited by counsel for TRONA, based on *R J Davidson Family Trust*, is whether the plans furnish a clear answer as to whether consent should be granted.[59] The answer, definitively, is yes. Indeed, the key policy in effect at the time of the EC's decision was explicit: the directive was *"generally to grant"* the application.[60]

5.16 Because the effects and the plans lead inextricably to Creswell's water take application being granted, TRONA's case relies on proving that:

(a) the RNRP and RPS do not contain a coherent set of policies designed (having regard to Part 2) to achieve clear environmental outcomes, such that directly considering Part 2 would help to evaluate Creswell's proposal; and

[58] The relevant version at the time of the EC interim decision was the NPS-FM 2014 (as updated in 2017) **[[301.0001]]**.
[59] Synopsis of submissions for TRONA (28.07.2023) at [78].
[60] Bay of Plenty Proposed Plan Change 9 – Region Wide Water Quantity, Version 8.1 (PC9), Policy WQ P11 **[[302.0515]]**.

(b) Part 2 supports the consent being declined.

5.17 Neither of these assertions bears scrutiny, and the CA and HC were correct to uphold the EC's rejection of TRONA's case in this respect.

5.18 As the HC correctly observed,[61] no general criticism was made of the planning instruments in the EC. No party asserted that the plans had been prepared without regard to Part 2. No party alleged that the plans contain anything other than a coherent set of policies designed to achieve clear environmental outcomes, or indeed that any relevant resource management issue is not addressed in the RNRP or RPS. The CA rightly found the planning provisions to be *"comprehensive"* in nature.[62]

5.19 While TRONA now asserts that ss 6(e), 7(a), and 8 must be considered over and above the RNRP, before the EC its case was more focused. Indeed, as observed by the EC and HC,[63] the expert planners giving evidence on the regional planning instruments – including Ms Robson for TRONA – all agreed during caucusing that:

> *the regional plans provided adequate coverage of s 6(e), 7(a) and 8 (…)*[64]
>
> *in terms of the adequacy of the regional planning framework, the plans provide comprehensive provisions regarding kaitiakitanga*.[65]

5.20 TRONA's case in the EC centred on the alleged effects of exporting water on mauri and kaitiakitanga, but no party asserted that the RNRP was deficient because it fails to regulate the export of water (or indeed the packaging used). The EC majority alluded to this in its 'jurisdictional overview':[66]

> *The regional plan addresses the issues relating to the taking of water from aquifers comprehensively. There is no assertion that the plan has*

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[61] HC decision at [158] **[[05.0114]]** and [177] – [178] **[[05.0120]]**.
[62] CA decision at [110] **[[05.0194]]**.
[63] EC interim decision at [168] **[[05.0052]]**; HC decision at [178] **[[05.0120]]**.
[64] EC interim decision at [168] **[[05.0052]]**; Joint witness statement of regional planning experts (14.05.2019) at 40 **[[202.0685]]**.
[65] Joint witness statement of regional planning experts (14.05.2019) at 24 **[[202.0669]]**. The planners also agreed that *"the application for groundwater take is sustainable and consistent with Regional Plan Objectives and Policies regarding allocation"*; EC interim decision at [123] **[[05.0046]]**.
[66] EC interim decision at [63] **[[05.0037]]**.

been prepared other than competently in relation to this particular activity.

5.21 The HC endorsed this finding and held, by reference to Part 2, that *"the planning framework is [not] incomplete merely because it does not regulate the export of water"*.[67] That finding must be correct, because none of the provisions in Part 2 specifically direct local authorities to regulate water exports (or packaging).[68]

5.22 TRONA's case in the EC instead focused on two specific alleged deficiencies in the RNRP, one of which (regarding the efficient use of water, a s 7(b) matter) is no longer pursued.[69]

5.23 The remaining point, as now articulated, is that the RNRP and RPS do not *"contemplate water bottling"* and therefore do not *"adequately address the end-use effects in this case"*, bearing in mind:[70]

(a) the principles expressed in the Mataatua Declaration;

(b) tino rangatiratanga (as a principle encompassed by section 8); and

(c) the importance of wai as a taonga.

5.24 The EC and HC were correct to reject this case, including because:

(a) As a general proposition, the RNRP and RPS deal comprehensively with Māori values, as summarised by the CA[71] and the HC,[72] and allow for effects on mauri, kaitiakitanga, and Treaty principles to be considered fully in consent processes. The RNRP does not restrict decision-makers' ability to consider such matters. Accordingly, the EC, as consent authority, duly evaluated all of the evidence and arguments put forward

[67] HC decision at [177] **[[05.0120]]**.
[68] This may explain why no party in this case has identified any plan, past or present, of any of the 78 local authorities in New Zealand, that has sought to regulate those activities.
[69] TRONA argued before the EC that the RNRP is not equipped to assess the efficiency of a water take where the water is exported, which appeared to be based on a misunderstanding that the *"local water cycle"* would be affected by Creswell's take. It was rejected by the EC (EC interim decision at [161] **[[05.0051]]**) and has not been pursued further: HC decision at [166] **[[05.0116]]**.
[70] Synopsis of submissions for TRONA (28.07.2023) at [61] and [83]. Counsel for TRONA also refer (at [66] and [68(b)] to the RNRP having been subject to Plan Change 9, which was relevant to Creswell's application but has since been withdrawn. This was the basis for an argument advanced by TRONA in the HC and CA, no longer pursued, that the RNRP was in a "state of flux" and therefore required Part 2 to be considered directly.
[71] CA decision at [19] **[[05.0165]]** and [110] **[[05.0194]]**.
[72] HC decision at [159] **[[05.0115]]** and [171] – [172] **[[05.0118]]**.

regarding cultural matters (including those based on the Mataatua Declaration[73]).

(b) In those Courts, TRONA had not offered any specific criticism of the provisions of the RPS and RNRP, such as of the section of the RPS dealing with Iwi Resource Management or the Kaitiakitanga Chapter in the RNRP. TRONA now asserts (without giving specifics) that those instruments focus on biophysical effects, but they also contain wide-reaching references to metaphysical and relational matters such as mauri and kaitiakitanga.

(c) TRONA also makes the general assertion that the plans *"do not contemplate water bottling"*, but they clearly do regulate takes of water from the ground or surface waterbodies, for all purposes. TRONA's point is really that the alleged end-use effects of water bottling – plastic bottles and export – are not highlighted by the plans as valid concerns to be considered by decision-makers. As noted above, this appears to be true of all RMA plans – despite the fact that beverages have long been bottled throughout New Zealand (and water has been bottled at Otakiri Springs since the early 1990s) – so is not an unusual or egregious omission.

(d) TRONA effectively asserts, in reliance on *McGuire*,[74] that the importance of ss 6(e), 7(a), and 8 is such that decision-makers must consider those provisions directly, irrespective of whether or not the plans give effect to them. However, to do so would:

(i) serve no practical purpose; the RNRP and RPS clearly 'put in play' all of the cultural matters raised by the parties to this case – the mauri of water, kaitiakitanga, and the Treaty principles – and these were thoroughly evaluated by witnesses and the EC;

[73] EC interim decision at [152]-[155] **[[05.0050]]**.
[74] *McGuire v Hastings District Council* [2001] NZRMA 557 at [21].

(ii) weaken the plans and planning processes through which councils, iwi, and others have given effect to ss 6(e), 7(a), and 8 in local contexts around the country; and

(iii) undermine public confidence in those plans and processes.

5.25 Other arguments put forward by TRONA are equally unfounded:

(a) TRONA seeks support from Cr Kernohan's dissenting opinion, which was based on a view that plastic effects are contrary to the RMA's purpose. However, it contains no analysis of the RNRP and does not mention (and fails to adhere to) the guiding principles from *King Salmon* and *Davidson*.[75]

(b) TRONA asserts that the EC failed to have regard to the Mataatua Declaration, which it considers central to a Part 2 analysis. But the EC heard evidence from various witnesses about that document and clearly took it into account.[76]

5.26 As such, the EC and HC were correct to find that the regional planning documents relevant to Creswell's proposal *"provide adequate coverage of ss 6(e), 7(a) and 8"*, *"recognise and provide for the relationship Māori have with water"*, *"provide for tangata whenua values and tikanga"*, and *"themselves required consideration of the principles of the Treaty"*.[77] As observed by the CA, the documents:

> *"reflect an apparently comprehensive set of provisions dealing with issues relevant to the relationship of Māori with water, te mana o te wai and relevant Te Tiriti o Waitangi/Treaty of Waitangi principles. The latter include provisions recognising tino rangatiratanga and the degradation of mauri. The planning documents refer extensively to both the biophysical and metaphysical dimensions of activities relating to water."*[78]

5.27 The weight given to those matters was for the EC to determine.

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[75] Moreover, both the EC and HC correctly held that the absence of express regulation of plastic use in the Whakatāne District Plan did not create any 'gap' requiring reversion to Part 2 (as accepted by Sustainable Otakiri's planner in the EC).
[76] EC interim decision at [37] **[[05.0031]]**, [81] **[[05.0040]]**, [87] **[[05.0040]]**, [146] **[[05.0049]]**, and [152] - [155] **[[05.0050]]**.
[77] HC decision at [178] **[[05.0120]]**; EC interim decision at [168]-[169] **[[05.0052]]**.
[78] CA decision at [109] **[[05.0194]]**.

5.28 Furthermore, TRONA has still not explained how it would have assisted the EC in its evaluation, or how it could have affected the outcome of this case, to refer directly to Part 2. As the CA noted:[79]

> *"The appellants assert an error as a result of the Courts not referring in addition to pt 2, but we are left unclear as to what that might have added to the analysis carried out by reference to the planning documents."*

5.29 TRONA now states that the correct approach would have been:

(a) first, *"properly [to] conceive of the Ngāti Awa evidence (…)"* including as to end-use effects, as being capable of consideration, which would have allowed the EC to request further information from Creswell about the effects of plastic bottles; and

(b) second:

> *"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."*

5.30 That submission closely resembles a complaint that the EC preferred other evidence on Ngāti Awa tikanga over that of witnesses called by TRONA. The EC did squarely consider TRONA's evidence about end-use effects (which did not address plastic bottles) and did not find it persuasive.

5.31 Moreover, the plans provide comprehensive coverage of the multi-dimensional Māori provisions in Part 2, so it remains unclear what additional support TRONA perceives is to be found in ss 5 to 8.

5.32 If TRONA's case is that Creswell's proposal would damage its relationship with water (a s 6(e) matter), and/or adversely affect its kaitiakitanga in respect of water (to which particular regard must be

[79] CA decision at [109] **[[05.0194]]**.

had under s 7(a)), then its case cannot succeed because, having established before the EC that Ngāti Awa consider all water to be a taonga,[80] TRONA failed to establish, as a matter of fact, that Creswell's proposal will adversely affect the relationship of Ngāti Awa with that taonga or kaitiakitanga.

5.33 As to s 8 (noting that the Treaty principles are imported in totality by the planning framework[81]), the CA and HC correctly rejected that the EC had made any error in this regard. While TRONA now refers to tino rangatiratanga (as articulated through principles expressed in the Mataatua Declaration), TRONA's appeal to the EC was clearly not about ownership of water or decision-making authority over it. As the EC recorded, TRONA accepted that its case was *"not about the ownership of water or any broader constitutional issues"*.[82]

5.34 Even if those points had been openly advanced by TRONA, which they were not, the potential implications for the EC's decision-making have not been explained. The EC found that all water within or passing through the rohe of Ngāti Awa is considered a taonga of that iwi. Ngāti Awa witnesses did not seek to establish, in addition, that Ngāti Awa owns the water or exercises rangatiratanga over it. It has not been explained how, if those matters had been advanced, the EC might have factored them into its decision-making, in the context of an RMA regime that tasks regional councils with allocating water and deciding applications for consent to take it.

5.35 While the EC's assessment may not have resulted in the preferred outcome for the appellants, the law is clear that the s 8 duty to take into account the Treaty principles does not afford iwi a right of veto.[83]

5.36 The EC majority:

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[80] EC interim decision at [84] **[[05.0040]]**.
[81] Bay of Plenty Regional Policy Statement, Part 2 (Issues and Objectives), Topic 2.6 (Iwi Resource Management) at 2.6.2 **[[302.0312]]**.
[82] EC interim decision at [35] **[[05.0031]]**; see also HC decision at [105] **[[05.0105]]**; see also the memorandum of counsel for Ngāti Awa regarding outstanding issues (22.03.2019) at [2] **[[101.0123]]** which specifies TRONA's remaining issues (planning and tikanga effects).
[83] *Watercare Services Ltd v Minhinnick* [1998] 1 NZLR 294 (CA) at 307. See also *Gock v Auckland Council* [2019] NZHC 276, (2019) 21 ELRNZ 1 at [177]-[178] where it was submitted (and the Court accepted) that *"a settled line of authority (…) establishes that the RMA does not confer on Tangata Whenua or Kaitiaki a power of veto over use or development of natural and physical resources."*

(a) correctly understood that TRONA's case was *"not about the ownership of water or any broader constitutional issues"*;

(b) relied on the planners' advice (including that of Ms Robson for TRONA) that direct resort to section 8 was unnecessary;

(c) heard no evidence from any iwi asserting ownership of the aquifer or the water within it;

(d) found no adverse effects on mauri or kaitiakitanga; and

(e) applied the law as it is, reflecting BOPRC's role in allocating and otherwise regulating water takes through the RNRP and other relevant instruments that give expression to Part 2 in this region.

5.37 In summary, there is nothing in Part 2 (or indeed in the RNRP, RPS, or NPS-FM) that supports the outcome sought by the appellants, particularly given that exporting water does not, in fact, adversely affect its mauri or the ability of Ngāti Awa to exercise kaitiakitanga. None of those documents validates or seeks to regulate the end-use effects alleged by TRONA.

5.38 Stepping back, TRONA's position appears to be that the RNRP is incomplete because it fails to reflect the stance that TRONA has recently taken opposing water bottling.[84] That stance is political in nature and it has been found to have no basis in the tikanga of Ngāti Awa. As such, while TRONA must accept (as it did before the HC) that iwi do not have a right under the RMA to veto development, it effectively invites the Court to give iwi that right. The law does not support such an outcome.

6. MATERIALITY AND RELIEF

6.1 Even if this Court could discern any failing by the CA (or the EC or HC) in considering the regional planning instruments or its treatment of Part 2 matters, such an error must be material before relief will be

[84] Notwithstanding that TRONA's chief executive told the EC that the iwi had not ruled out bottling water itself in future; EC transcript at 362 **[[201.0362]]**.

granted.[85] The materiality threshold would not be met here because of the EC's strong evidentiary findings in relation to cultural effects.

6.2 As outlined above, the EC heard competing evidence on tikanga and regional planning matters. The EC thoroughly considered the key alleged tikanga effects, of exporting water on mauri and kaitiakitanga and made numerous findings, set out in an **Appendix** to this synopsis.

6.3 The findings are so clear that it is implausible that TRONA's case in relation to cultural effects, how the plans give effect to cultural considerations, and Part 2 could succeed in the EC in a way that would lead to any different outcome.

6.4 This is also relevant to the question of relief, given that TRONA seeks referral back of matters to the EC for reconsideration.

6.5 Otakiri Springs Limited therefore respectfully seeks that TRONA's appeal be dismissed.

6.6 Otakiri Springs Limited seeks costs in the event it succeeds but in either event asks to be heard on costs for various reasons including that issues may arise from the unusual features of this appeal. These include its substitution as an appellant and the fact that no party raised the plastics issue at first instance. It asks that Creswell as the second respondent also be heard in the event any issue arises relating to its position.

DATED this 8th day of September 2023

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J B M Smith KC / D G Randal / E L Bennett

Counsel for the second respondent

[85] *SKP Inc v Auckland Council* [2020] NZHC 1390, [2021] 2 NZLR 94 at [35] citing *Manos v Waitakere City Council* [1996] NZRMA 145 (CA) at 148 (see *Manos v Waitakere City Council* (1995) NZCA 212/94 from 5).

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Legislative material

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APPENDIX – ENVIRONMENT COURT FINDINGS GOING TO MATERIALITY OF ANY ERROR

Even if this Court could discern any failing by the CA (or the EC or HC) in considering the regional planning instruments or its treatment of Part 2 matters, the materiality threshold would not be met here because of the EC's strong evidentiary findings in relation to cultural effects.

The EC's findings on point include the following:

(a) Exporting water does not adversely affect te mauri o te wai:

we prefer the evidence of Mr Eruera that te mauri o te wai is retained as water passes through its many forms before returning to Papatūānuku to begin its journey again within the earth's water cycle.[86]

(b) There is no loss of mauri from bottling and exporting 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;[87]

[any] adverse effect that may be perceived by members of Ngāti Awa has not been shown to be of a nature and scale that warrants refusing consent on this basis alone.[88]

(c) Te Kāhui Kaumātua had not been asked to advise on water bottling:

[it] may have been useful for the Court to have had the benefit of the collective wisdom of TKK applying traditional values and knowledge to this modern issue. In the absence of this we have no evidence of a coherent widely held belief within Ngāti Awa regarding the adverse metaphysical effects of taking water for bottling and export.[89]

(d) While the view of Drs Mason and Merito was that taking too much water for bottling and export would result in a loss of mauri:

no explanation was provided as to what constitutes 'too much' in this context and what differentiates the proposed take from other existing or

[86] EC interim decision at [103] **[[05.0043]]**.
[87] EC interim decision at [156] **[[05.0050]]**.
[88] EC interim decision at [156] **[[05.0050]]**.
[89] EC interim decision at [100] **[[05.0042]]**.

potential takes, such as for local water supply or horticultural / agricultural support.[90]

(e) Further:

No evidence was adduced to reconcile the asserted requirement for the return of the bottled water to Papatūānuku, at least within Aotearoa, in order for its mauri to be retained, with circumstances where other commodities heavily reliant on water from within the rohe, such as milk, meat and horticultural commodities are exported to all parts of the world. We understand that Ngāti Awa commercial enterprises hold consents for greater volumes and rates of take of water than that proposed by Creswell, taken from highly sensitive and culturally significant surface water resources such as the Tarawera and [Rangitaiki] Rivers. We were not provided with any explanation as to the nature of any loss of mauri in these circumstances or how kaitiakitanga is exercised.[91]

(f) It is not clear how future provision for tikanga in allocation limits would assist in protecting mauri from exporting water.[92]

(g) There will be no adverse metaphysical effects on the aquifer itself, and the proposed conditions of consent will ensure the ongoing ability of the hapū and the iwi of Ngāti Awa to exercise kaitiakitanga;[93] further:

The project will not unreasonably prevent the exercise of kaitiakitanga by Ngāti Awa in its rohe.[94]

(h) No waahi tapu or sites of significance to Ngāti Awa will be affected.[95]

(i) The consent conditions are *"appropriate to help protect the sustainability of the resource and its mauri and mana"*.[96]

[90] Nor did TRONA provide any explanation of how far is *"too far away"* for water to be sold.
[91] EC interim decision at [96]–[97] **[[05.0041]]**.
[92] EC interim decision at [163] **[[05.0052]]**.
[93] EC interim decision at [134] **[[05.0048]]** and [158] **[[05.0051]]**.
[94] EC interim decision at [158] **[[05.0051]]**.
[95] EC interim decision at [151] **[[05.0050]]**.
[96] EC interim decision at [108] **[[05.0044]]**.

(j) Creswell made *"a genuine and meaningful attempt to involve (…) hapū and iwi in the development of the Project"*.[97]

(k) Creswell's planner *"provided the only comprehensive examination of the proposal against the relevant national and regional planning instruments"*[98] and *"the application is consistent with [them]"*.[99]

(l) The planners agreed that the *"groundwater take is sustainable and consistent with [RNRP] Objectives and Policies regarding allocation"*;[100] nor was there any dispute that the proposal is consistent with regional objectives and policies regarding the recharge of the aquifer, quality of the groundwater, effects on other users, effects on surface water features, saline intrusion, and land subsidence.[101]

(m) The planners agreed that *"the regional plans provided adequate coverage of s 6(e), 7(a) and 8"*, and there is *"no need for recourse to Part 2 matters to address tikanga concerns"*.[102]

(n) The proposed take will not materially affect the aquifer at Otakiri, which is an abundant source of fresh water, in a physical sense.[103] Further, *"the groundwater resource in the Awaiti Canal aquifer is sufficient to enable the taking of the amount of water taken by Creswell, as well as the existing takings of other entities engaged in the same activity and, perhaps, future takings by anyone for the same or a similar purpose."*[104]

(o) The take represents a *"highly efficient use of the resource"*.[105]

(p) In terms of the 60 jobs secured and 145 flow-on jobs created, the *"economic and social benefits of the project will be significant"*.[106]

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[97] EC interim decision at [89] **[[05.0040]]**.
[98] EC interim decision at [110] **[[05.0044]]**.
[99] EC interim decision at [165] **[[05.0052]]**.
[100] EC interim decision at [123] **[[05.0046]]**.
[101] EC interim decision at [129] **[[05.0047]]**.
[102] EC interim decision at [168]–[169] **[[05.0052]]**.
[103] EC interim decision at [68] **[[05.0038]]**, [70] **[[05.0038]]**, and [319] **[[05.0075]]**.
[104] EC interim decision at [106] **[[05.0043]]**.
[105] EC interim decision at [161] **[[05.0051]]**.
[106] EC interim decision at [95] **[[05.0041]]**.