IN THE SUPREME COURT OF NEW ZEALAND SC 75/2012

[2013] NZSC Trans 6

BETWEEN **WEST COAST ENVIRONMENT NETWORK INCORPORATED**
Appellant

AND **BULLER COAL LIMITED**
First Respondent

SOLID ENERGY NEW ZEALAND LIMITED
Second Respondent

ROYAL FOREST AND BIRD PROTECTION SOCIETY OF NEW ZEALAND
Third Respondent

AND **WEST COAST REGIONAL COUNCIL and BULLER DISTRICT COUNCIL**
Submitters

Hearing: 12 – 13 March 2013

Court: Elias CJ
McGrath J
William Young J
Chambers J
Glazebrook J

Appearances: D M Salmon and D E J Currie for the Appellant
J E Hodder QC and B G Williams for the First Respondent
A C Limmer for the Second Respondent
P D Anderson for the Third Respondent
J M van der Wal for the Submitters

CIVIL APPEAL

MR SALMON:
May it please the Court, Salmon with Mr Currie for the Appellant.

ELIAS CJ:
Thank you Mr Salmon, Mr Currie.

MR HODDER QC:
May it please the Court, Hodder with Mr Williams for Buller Coal, the First Respondent.

ELIAS CJ:
Thank you Mr Hodder, Mr Williams.

MS LIMMER:
May it please the Court, Ms Limmer for the Second Respondent.

ELIAS CJ:
Thank you Ms Limmer.

MR VAN DER WAL:
May it please the Court, Mr van der Wal for the Buller District Council and the West Coast Regional Council.

ELIAS CJ:
Thank you Mr van der Wal.

MR ANDERSON:
May it please the Court, Mr Anderson for Royal Forest and Bird Protection Society of New Zealand Incorporated.
ELIAS CJ:
Thank you Mr Anderson. Yes Mr Salmon.

MR SALMON:

This is an orthodox case advanced by the appellant, applying orthodox statutory interpretation principles. It identifies up front that this is not the same case that this Court decided in *Greenpeace* litigation some years ago and which two of Your Honours are familiar with in the Court of Appeal decision on the same point. I lost both of those and it was a loss that related to the wording of section 104E Resource Management Act 1991 which is not engaged by the application in this case.

The appellant advances a case centred around a couple of simple propositions. The first is that prior to the 2004 amendment of the RMA, climate change considerations were in play in all contexts under the RMA.

The second proposition is that the Amendment Act –

ELIAS CJ:

Were they specifically referred to?

MR SALMON:

No they were not specifically referred to Your Honour but they were understood to by the Courts and by the legislature, embraced by the wider environmental language of the RMA, and I'll come to that point –

ELIAS CJ:

Yes.

MR SALMON:

– Mr Hodder's rightly identified that I have not yet put before you cases showing that climate change considerations were in play outside discharge application contexts.

ELIAS CJ:

Yes.

MR SALMON:

And I've distributed some material to my learned friends showing that, in fact, it was across the board and I can hand that up shortly. And in developing that proposition, Your Honour, I will come to the RMA and demonstrate why the broad language of that Act embraces general climate change considerations.

The second proposition is that the Amendment Act specifically and in terms removed local authorities' abilities to consider climate change considerations in very narrow specified circumstances, and those are express circumstances under sections 104E and 70A. They were where the application was to do with something that would otherwise contravene section 15 or 15B. In other words, an application to emit something, the power station, the large emitter of some sort.

The third proposition is that absent those exclusions from the ability to consider climate change, nothing else was removed and for anything else to be removed from the ambit of consideration of local authorities, express amendment is required.

In support of what I submit is a plain English interpretation of the text of the Act, consistent with its purpose, the Amendment Act that is, and consistent with the text and purpose of the RMA itself, you will have put before you and their address in my submissions, some extrinsic legislative history materials. I don't put undue weight on those but I do note them up front because they show one thing without any doubt at all and that is that from the very earliest stage of the development of the Amendment Bill, right through to its passage, including specific discussion in the House on this point, it was clearly intended and understood that aspects of regional authority and local authorities' abilities to consider climate change remain live. And I don't like to note extrinsic material as up front because it can sometimes suggest a lack of confidence in the express terms argument but I note it because my learned friends advance a case which in many ways sets up the purpose argument as a Trojan horse for wholesale change to the RMA in a way the Amendment Act didn't effect in terms.

When advancing the argument that the purpose of the Amendment Act is clear in the way that my learned friends do, I do submit it's incumbent of the parties and the Court to be quite clear about what Parliament thought in all of its dealings on this issue and there can be, respectfully, no doubt what so ever that Parliament believed some issues were remaining live.

So those are the broad propositions. Your Honours will have read the submissions and I don't intend to go through those in detail unless it would assist the Court. What I intended to do was briefly summarise the agreed statement of facts because we're lucky to have no factual disputes and, indeed, a clear agreement about the

implications of this particular project before the Court, and then go through the terms of the RMA very generally, and briefly the Amendment Act and then deal with the arguments my learned friends have put up as to why there's a hidden amendment in the Amendment Act in some form or other, or some extraterritoriality issue that undermines the appellant's case.

ELIAS CJ:
What's the principal provision of the RMA that you rely on? Is it section 104?

MR SALMON:
It is You Honour.

ELIAS CJ:
So you say that climate change was, what did you say, "In play," because of section 104, because of its breadth?

MR SALMON:
Yes, Your Honour, and not just that but when I come to it, it will clear Your Honour from the extrinsic materials, the legislative history that Parliament believed it was in play when passing the Amendment Act and, more particularly, Your Honour, the Amendment Act makes no sense at all unless climate was generally in play, so to speak. In other words there was no mischief to address at all under the Amendment Act unless, in general terms, climate change implications were in.

I mentioned some further materials. I've handed round –

ELIAS CJ:
And are you going to take us to authority in which the Environment Court or the Courts have decided that climate change was a relevant issue under section 104?

MR SALMON:
Yes.

ELIAS CJ:
Yes.

MR SALMON:

And, in fact, it might be sensible if I hand up now what I've handed out to my learned friends.

ELIAS CJ:
Yes.

MR SALMON:
Environment Court decisions are not succinct, so what I'm handing up is a –

ELIAS CJ:
Well is there any authority other than Environment Court authority on this point.

MR SALMON:
No, not that I'm aware of, Your Honour. It does not seem to have been a point that anyone's taken to the contrary. In other words, it doesn't even seem to have been suggested that the wide definition of "environmental effects" under the RMA would not incorporate these considerations.

WILLIAM YOUNG J:
I thought there was one case. Was it *Taranaki Energy Watch Inc v Taranaki Regional Council and New Plymouth District Council* HC Auckland W039/2003, 16 June 2003 [Pohokura]? Wasn't there one case that goes the other way?

MR SALMON:
There may be. In which Court You Honour?

WILLIAM YOUNG J:
An Environment case. I thought one of those on the other side of the debate cited a case.

MR SALMON:
Sorry, I understand that. Sir, some have decided that the consequences are too remote or de minimis or lack the causal nexus. One thing I will be coming to is, my learned friends say, and I'll address this, that in this case, the connection between

digging up this coal and it being burnt, despite an agreed statement of facts that it will be burnt, lacks sufficient nexus or is too remote.

One of the obvious points here that I make is we've agreed it will happen in the agreed statement of facts, I can come to that, but also that's a question for the factual Tribunal as to whether something is too remote, how significant it is and so on.

So Sir, if the question, You Honour's question was reframed as, is there a case in which any Court has said, prior to *Genesis Power Ltd v Greenpeace New Zealand Inc* [2008] NZSC 112, [2009] 1 NZLR 730, that any part of the RMA and its scheme, prohibits consideration of the implications on climate change of an activity? I'm not aware of any case saying that. And indeed it would be, respectfully, an extraordinary interpretation of the pre-amendment RMA that saw it prohibiting consideration of climate change implications.

ELIAS CJ:
Mr Salmon, won't you have to focus a little bit more closely than you have done on the language of section 104 and, in particular, on the meaning of "environment" and "effects".

MR SALMON:
Your Honour, yes, and I intend to go through that section. It's a section that specifically and expressly refers back to part 2 of the RMA –

ELIAS CJ:
Yes.

MR SALMON:
– so, in fact, it's a window into the wider principles of sections 5, 6 and 7 and I do intend to go to those.

ELIAS CJ:
Yes.

MR SALMON:
Can I just note, though, Your Honour? I don't want to shy away from my other two submissions on this point which is the mischief of the Amendment Act was to

address the perception that the House had that absent the Amendment Act, all of climate change was in play and considerations under the RMA.

So I don't think my learned friends suggest for a moment that, but for the Amendment Act there would be a prohibition. Sorry, I've put that the wrong way around but Your Honour will follow what I mean, and –

ELIAS CJ:
Yes but could that not be because what the Amendment act was concerned with was emissions or dealing with – sorry discharges, dealing with climate change in relation to discharges. You are advancing the more remote, if I might use that expression, the more remote question of ultimate use?

MR SALMON:
Yes and no, Your Honour. With respect, that's not quite right. The Amendment Act is not dealing with discharges in some general term. It's dealing with discharges that would otherwise contravene section 15 or 15B. In other words, discharges for which one needs a permit.

ELIAS CJ:
Yes.

MR SALMON:
And Your Honours may or may not recall, unfortunately I do, but Ma'am, it recalled the genesis of section 104A. You had language around industrial or trade premises and the history of that was very much clearly about identifying the big emitters and centrally planning where one puts a smoke stack for power generation for a national grid. One can immediately see why that might be something dealt with at the national level. Where it is doesn't matter nearly so much as how many in the national coordination of, say, power generation.

But it was very much restricted to that section 15 and 15B threshold. It's expressly so. And I mention that because as I will come to, and I do need to come to it, in the House and in the pre-*Hansard* materials, the example comes up of traffic and climate change.

Take the hypothetical of a subdivision proposal that's far too far from Christchurch. There'll be thousands of extra litres of petrol burned putting it there than building up where people work. This was an example of something that was expressly debated in the House as being kept alive for consideration and that highlights, Your Honour, that important point that there we have a direct emission from a vehicle in New Zealand that Parliament intended to be able to be considered in an application not to drive a car, not to build a car, but to build some houses in a certain place, and so what that highlights, Your Honour, is it was seen that all sorts of in New Zealand direct emissions would remain in play, I use that term, and the only things that wouldn't were those that needed specific discharge consents.

WILLIAM YOUNG J:
What would happen – say the coal was intended to be burned in New Zealand. Would greenhouse gas emissions be a material consideration to an application tomorrow?

MR SALMON:
Yes.

WILLIAM YOUNG J:
Even though they – what if there was a combined application to extract and burn coal?

MR SALMON:
Under the present form, I understand the wrinkle Your Honour is identifying. My learned friend has pointed to it too. Under the present lay of the land, there would be an application to the regional authority for a discharge consent in which it was irrelevant. There would be an application for the mining to the other authority in which it would be relevant. Now, my learned friends say there's duplication and so on and so forth in all of the possibilities of multiple consideration that were an ETS, national-level consideration on the one hand and a local authority consideration, but that very example Your Honour has brought up is an example of where the system immediately anticipates all sorts of duplication, not in climate change, but the mere fact that one has to apply for a discharge consent to one authority and the other consent to another shows that this is a world in which there are wrinkles and there is duplication. So, Sir, I don't say that's a sensible, long-term position that it will be

relevant to one or the other, and I don't need to. I do say that it is the express intent of Parliament.

ELIAS CJ:
Well, your argument really has to be that there is a careful legislative balancing which the Courts should observe because it's probably a result of a number of compromises in the political process.

MR SALMON:
Yes, although the compromises were not even debated. They were expressly intended from the start, but yes, Your Honour, I do say that. I'd rather start, though, if I might, in an even more orthodox position, which is that text may yield to some degree to clear purpose, but the text is so clear here that the only place in which climate change as a consideration is prohibited is a section 15 or 15B context, in other words, an application discharge. It's expressed something extraordinary would be needed to delete those words from the Act, and I start on that context by saying –

ELIAS CJ:
Sorry, what words from the Act?

MR SALMON:
Well, perhaps – could we go to the Amendment Act, Your Honour? I'll explain what I'm saying there. This is at tab – I think a loose copy has been filed by Mr Hodder very helpfully, but it's at tab 12 of his casebook. The operational changes appear in part 2 of the Amendment Act, and just dealing for now with the text before I get into purpose, each of those operational changes under section 6, 70A, 70B, 104E. The two that matter for our purposes and the two that were in issue in *Greenpeace* were 70A and 104E, and the key words – perhaps if I go to section 104E, that's the discharge permit version of section 104(1). It doesn't apply here and it doesn't apply because of the second and third and fourth lines. When considering an application for a discharge permit or coastal permit to do something that would otherwise contravene section 15 or section 15B. Now, it's common ground we are not one of those. It's common ground that this section doesn't apply in terms. If it is somehow said – and with respect to him, this is what the Environment Court Judge held – that somehow the purpose provision in this Amendment Act with the assistance of this Court's comments as to what that purpose was in a very different context in the *Greenpeace* case, somehow that purpose provision functioned to mean this

Amendment Act applied not just in section 15 or 15B contexts but in all contexts. I don't think I'm oversimplifying the Environment Court Judge's reasoning to say that effectively what he held was that the purpose provision somehow operationally functioned to change the RMA in other sections.

Now, in doing so he was persuaded in part by my learned friend's reliance on statements this Court made in *Greenpeace* that I'll come to because they do not involve a finding that section 3 means more than it really does, respectfully, but also by the proposition that my learned friend appears to advance. I didn't argue it in the Environment Court, but from what I can tell, that section 23 of the Interpretation Act, which Your Honours will know says provision in any amendment if deemed part of the principal Act somehow means that that section 3 purpose provision is drafted onto the RMA with full force in a way that influences interpretation of other sections, if Your Honours follow that. I'll come to why, but that is just wrong. The Environment Court seems to have gone down that path, followed by the High Court.

ELIAS CJ:
Well, the purpose provision isn't carried through into the RMA, is it?

MR SALMON:
No, it's not. There's a deeming provision in the –

ELIAS CJ:
It's not a purpose for a new inserted part.

MR SALMON:
Correct, and indeed Your Honour described it in the *Greenpeace* case as a spent purpose provision, paragraph 41, perhaps. I'm not holding Your Honour to that in terms, but it reflects the point that this is a purpose provision that describes this Amendment Act and nothing more. It was not an amendment to the purpose provisions of the RMA and it is certainly not, and could never be, a Trojan horse for amending section 104(1) which is the section that applies in this case.

McGRATH J:
So far, Mr Salmon, your test of the argument really runs like this, does it? We, as a Court, are restricted by the text. We can't – the text limits us and when you look at

section 104E, the direction not to have regard to the effects of the discharge of climate change plainly on the text applies to a situation other than this case.

MR SALMON:
Correct.

McGRATH J:
That's the key point. Never mind purpose. Purpose cannot supplant text due to the limiting characteristics of text.

MR SALMON:
Correct, Sir. There are limits to it, and this is not a case of an errant comma or a clumsily-worded catch-all phrase or an ejusdem generis problem. This is a fundamental component of the major operational provision. The respondents are really saying – and they're saying it less here because they're moving to extraterritoriality arguments and so on – that they are running a case, that there is a blanket prohibition on considering climate change issues.
The transport example that was raised in *Hansard* is out according to them. In saying so, they are crossing out multiple lines of section 104E or – and it's important we're intellectually honest about that – they are saying that section 3 somehow amended section 104, the purpose provision somehow amended section 104. That is – I don't want to make a straw man of it, but that is what Judge Newhook in the Environment Court effectively held. The purpose of the Amendment Act was so clear, and it's really become part of the RMA, that the RMA has been amended.

ELIAS CJ:
If we're – if we end up being with you on this, your further proposition, though, is that the meaning of section 104 is not before the Court because the Environment Court and the High Court didn't get to it. Is that what you'd say?

MR SALMON:
Well, no, it's that this case does not involve an application under section 104E.

ELIAS CJ:
No, no. I'm talking about section 104, the one that you say in which climate change is in play.

MR SALMON:

And Your Honour's question about it? Sorry, I've misunderstood.

ELIAS CJ:

Because it does rather sort of jump out that there may be a big stretch to say that section 104 covers the effects here but you say, as I understand it, that that is not before us because that is a matter –

MR SALMON:

Oh, no, I wasn't meaning to say that. No, I'm sorry.

ELIAS CJ:

I see.

MR SALMON:

I've spoken unclearly. I accept that one of the issues that this Court will address is whether or not pre-reform section 104(1) engaged climate change considerations. I accept that.

ELIAS CJ:

All right. Thank you.

WILLIAM YOUNG J:

But Justice Whata did focus on 104, didn't he?

MR SALMON:

He did, but he did so in a schematic way that, with respect to His Honour, is not reflective of one interprets –

WILLIAM YOUNG J:

Yes, but what he did say that effects on climate change of – associated with the material produced by the activity is not an effect for the purposes of section 104?

MR SALMON:

Yes, he did, following a line of reasoning regarding the extraterritoriality and so on. Can I note His Honour said something very interesting in the context of his judgment,

though, and I will keep coming back to it because it is the hard question or one of them that my learned friends will not be able to answer. It is this. At the end of his judgment, Justice Whata came back and said it's quite possible that point emissions like the traffic ones, the transport ones, which I focused on in argument before him –

WILLIAM YOUNG J:
Non-point?

MR SALMON:
Non-point, sorry.

WILLIAM YOUNG J:
And a few submissions?

MR SALMON:
Yes. Now, he accepts that they're in play, and perhaps one of the reasons for that is because –

WILLIAM YOUNG J:
That they may be in play.

MR SALMON:
May be in play. Perhaps one of the reasons for that is that it was so clear, respectfully, from the Parliamentary materials that the House expected them to be. That was a matter that was discussed with him on the day. Perhaps that's why he did it, but it raises a very difficult question which is why some and not others? Absent some territoriality restriction on the RMA, which isn't there, there really is no reason. Now –

WILLIAM YOUNG J:
This is an area at which my knowledge of the authorities becomes a bit threadbare, but I thought that in the Christchurch case the Environment Court said that they're not really interested in emissions in terms of global climate change because it's too indirect and it's immeasurably small. They were interested in emissions on the local Christchurch environment.

MR SALMON:

By the Christchurch case, Your Honour means...

WILLIAM YOUNG J:

The one you've just handed up.

MR SALMON:

Right, but again I think that's a question of fact-finding as to what weighs in and what does not. Would you like me to address those two authorities now?

WILLIAM YOUNG J:

No, just in own time. I'm not sure that the authorities on non-point diffuse emissions are necessarily entirely on point, are they, because they concern the local environment as well as arguments about global climate change.

MR SALMON:

Yes and no. To the extent that there's a concern about particulars or something like that that'll be a local concern, but a greenhouse gas concern is by definition, and this is –

ELIAS CJ:

It's everybody's concern.

MR SALMON:

Exactly, and it's non-bordered. It is a global concern.

WILLIAM YOUNG J:

Yes, I understand that, but I thought what the Judge said in the Christchurch case was that it wasn't the global change – the global change was not on the table because it was too indirect and too small, immeasurably small.

MR SALMON:

Yes, one of them said might be too small, but You Honour, the point I'm making is that is a factual finding as to the extent and remoteness. Perhaps if I can engage with that focusing briefly on how cases are decided on issues like this under the RMA before the Amendment Act and then deal with the Amendment Act's change. Would it be permissible to spend a little bit of time on that Your Honour?

ELIAS CJ:
Yes.

MR SALMON:
Section 104 I've mentioned the Act or excerpts of it are at tab –

ELIAS CJ:
Sorry, I just was thinking about your answer to that question. You say whether it's too remote is a factual assessment.

MR SALMON:
Yes.

ELIAS CJ:
It's not a matter – not a definitional matter under section 104?

MR SALMON:
Correct, and as I'll come to, there are all sorts of indications, and this has been written about by commentators. I'll come to two of those criticising Justice Whata's decision. The Act does not function in the jurisdictional way that Justice Whata has described it. It is true that only consent activities or applications for consent in New Zealand can be considered, but that does not mean that the Act can't consider environmental effects that occur elsewhere as a result and come back to haunt us. And, indeed, the Act includes a number of pointers to show that it goes beyond the 12 mile or the 200 mile limit. I'll come back to that if I may?

Dealing briefly with the first line of questions that Your Honour, the Chief Justice put to me at the outset of today, how wide is section 104? I noted that section 104 is subject to part 2, and that's a mandatory subject to part 2 with mandatory regard to be had to subsection A. "Any actual and potential effects on the environment of allowing the activity." It's been recognised and it's clear that this is the widest possible language, "any actual and potential effects."

So putting aside the jurisdictional point or the territoriality point for a moment.

ELIAS CJ:
What's that? Is that section 7 that you're referring to?

MR SALMON:
That section 104(1)(a), Your Honour.

ELIAS CJ:
I see.

MR SALMON:
"Any actual and potential effects." So the wording of 104 is incredibly broad and the way the Tribunals have behaved at first instance shows all sorts of factors are taken into account however fuzzy, however difficult, they're weighed in in a way that is not an actuarial exercise where each thing needs to be quantified with a number but a balancing of all sorts of factors, some scientific, some cultural and some spiritual. These tribunals are the home of fuzzy propositions and difficult to assess concerns. So I note that for a moment because when my friends say, "Oh, this will be hard. It's hard to assess climate change," the first thing we have to recall, and keep in mind that this is the place where hard things are assessed.

part 2 is expressly referred to in section 104 and that's sections 5, 6 and 7 of the Act. So they're mandatory considerations and they include, in section 5(2)(c) a requirement that resources are managed, and this is the principle to sustainable management, "Avoiding, remedying or mitigating any adverse effects of activities on the environment."

So when we read cases in which something is said to be slightly too remote or de minimis or lacking nexus, that's a finding that there's not really a discernible adverse effect by that tribunal, not a finding that there is some sort of statutory exclusion of clear environmental effect. In other words if, on my case, the matter is being dealt with at the first instance and it's determined that there is little impact on the global climate of this project, well then that goes to weight. If it's determined that there's a lot it may be given more weight, but that's an exercise for a Court, respectfully, other than today and it doesn't solve the statutory interpretation problem.

But the language again at 5 is very broad, "Any adverse effects."

ELIAS CJ:
Is activities defined?

MR SALMON:

I can hear Mr Currie looking for that, Your Honour, but –

ELIAS CJ:

No, don't worry, it's not.

MR SALMON:

It's not.

ELIAS CJ:

That's okay.

MR SALMON:

I don't think there's any doubt though that activities would capture the proposed coal mine. The argument my learned friends make is somehow, because the burning is further away, or someone else does it, it's out of consideration and that's a proposition that's failed in cases before now in the Environment Court and I'll come to those.

ELIAS CJ:

Yes, you'll have to come to those.

MR SALMON:

Yes and I will, also helpfully addressed in the Baillie article that I've annexed in my supplementary bundle of authorities, the author from Otago University there summarises, better than I could, the principles that show that, by reference to case law, consequential effects are in. Again the traffic ones with subdivision be what they may.

So the argument that it's consequential does not, with respect, help my learned friends. Their best argument and in my submission, their only possible argument, is that somehow there are territorial limits on what can be considered under the RMA, and I'll come to that too. In my submission it's wrong, but there's nothing magic about the fact that there's someone in between this activity and the harm, nothing magic at all. So I'll come to that case in a moment, Your Honour, and to the article.

I just note, again, at section 7, while we're on it, over the page. Again, mandatory matters that must be had regard to when exercising powers under section 104(1), and they include kaitiakitanga, ethic of stewardship, concepts that again just emphasising that point that these things aren't all discreet direct factual issues.

ELIAS CJ:
Sorry, you're referring to – section 7, yes.

MR SALMON:
Section 7, and I'm partly anticipating the argument Mr van der Wal will make for the councils which is, "This will be hard for us, as a council, to run a hearing like this because climate change is slightly uncertain." Well, I've argued issues around kaitiakitanga, stewardship and related issues very equally as hard and others there are similarly amorphous, uncertain and broad, but two that are very specifically engaged here are (c), (d) and (f), and "(f) maintenance and enhancement of the quality of the environment," again it must be, with respect, that climate change and harm to the climate is relevant there.

So that's the Act, very broadly speaking, prior to amendment and, as I'll come to, the amendment was focused very much and very specifically and consciously on not amending all of that.

I said I'd come to the cases. The first is in my small casebook at tab –

McGRATH J:
So you've finished with section 104.

MR SALMON:
Yes Sir, I have. Tab 2 of my casebook is *Beadle v Minister of Corrections* EnvC Wellington A74/02, 8 April 2002 and this is only an excerpt. These are very long decisions, so I've tried to avoid cluttering you with paper where I can. Paragraphs 88 through to 91 notes the, at 88, "General thrust towards having regard to the consequential effects of granting resource consents, particularly if they are environmental effects for which there is no other forum, but with limits of nexus and remoteness. Of course the weight to be placed on them has to be case-specific," et cetera, et cetera. And then half way down –

ELIAS CJ:

I'm sorry, could you –

McGRATH J:

I'm sorry, you stopped too fast, Mr Salmon.

MR SALMON:

I apologise.

McGRATH J:

Some of us are not complete familiar with this legislation.

ELIAS CJ:

This – what are you –

MR SALMON:

This is a case that deals with – this is the consequential –

ELIAS CJ:

This isn't what you just handed up is it?

MR SALMON:

No, no, no. This is – apologies, Your Honour.

ELIAS CJ:

I see, thank you. Yes, supplementary – I'm sorry, what tab?

MR SALMON:

I'm moving quickly just because I anticipate You Honours do not want to spend their life in Environment Court decisions but I will slow down.

Tab 2 is the *Beadle* case, and this is cited in the Otago University article I'll come to in a moment, as authority for the proposition that consequential effects are still relevant under the RMA and paragraph 88 holds the general proposition about consequential effects. Part way through paragraph 90, half way through, "They must also be entitled to prove that the facility would have adverse effects on the environment that should be offset against positive benefits, and indeed to prevail

over them. To preclude submissions in evidence along those lines would be to deprive the Court of the opportunity to make a judgment based on a more complete understanding of the proposal. So, for what difference it may turn out to make, we hold that in deciding the resource consent applications we are able to have regard to the intended end use of a corrections facility and any consequential effects on the environment that might have, if not too uncertain or remote. But we will also need to bear in mind the nature of the consent sought to avoid turning proceedings about earthworks and streamworks into appeals about use of land for the facility."

So it doesn't become a case about whether there should be a coal burning plant in China, and I'm not running that case now. And it's not a case in which my clients have ever suggested that the local authorities here could control that, but it is a case where that effect is relevant, just relevant.

So that *Beadle* case is one example of the consequential point but the others are legion and littered through the types of considerations that are usually in play in resource consent applications. Traffic reports are almost always obtained for any subdivision, any supermarket development, whatever, and they are classically consequential too. The same nexus argument could be made there but is not because the Resource Management Act factual enquiry is far more nuanced than a direct damages type of causation.

CHAMBERS J:
Can you just help us with *Beadle*? What was exactly in issue in that case.

MR SALMON:
It was a Northland prison Sir, and it was just whether the, as I understand it, the Tribunal could take account of the impact on the environment of a prison being there once built when deciding whether it should be allowed to break ground so to speak. So should it be limited to the impact of building on the land or a wider consideration of impact, judging by its end use.

WILLIAM YOUNG J:
So what were the consents actually sought there?

MR SALMON:

I think they were to build Sir. I've got the full copy here and I can have a look again Sir. I don't have it in the casebook. Perhaps I could fix that.

WILLIAM YOUNG J:
I'm looking at para 90. They were consents for earthworks and streamworks to create the site. This is the first sentence of 90.

MR SALMON:
Yes, yes, I'm aware of that one Sir. I'm just not sure if there were more consents sought but they were not consents as to whether or not there should be a prison in Northland, if Your Honour follows.

WILLIAM YOUNG J:
And then 91, "So we hold that in deciding the resource consent application, we are able to have regard to the intended end use of a corrections facility and any consequential effects on the environment but we must avoid turning proceedings about the earthworks and the streamworks into appeals process about the use of land for that facility."

MR SALMON:
Yes. In other words, it's not an opportunity to decide in terms whether or not there should be a prison in Northland, but it is an environment in which that wide ranging definition of environmental effects, and understanding environmental effects, involves consideration of the true end consequences on the environment of the activity.

ELIAS CJ:
So is this submission that – really that there are a number, a multitude of factors which the decision maker has to take into account and you can't exclude one even though it may not be a substantial focus because I suppose it would be possible to say that, because one of the issues I think, I don't know whether it's under section 7 is whether a resource is renewable or not and whether using it now is the best use of that resource or whether you need to husband it for future use. On your argument it would be a relevant consideration in that, would it, that using it, mining it now means it would inevitably be burnt under modern conditions, so that that might be a factor in whether you lock it up for a while?

MR SALMON:

Yes.

ELIAS CJ:

Is that –

MR SALMON:

That's one of the types of factors. I don't want to burden Your Honours by anticipating what might be said in an Environment Court hearing.

ELIAS CJ:

No, no, I understand that because it – but I'm trying to feel for how it could be relevant to other matters that need to be balanced without dominating the hearing, without making it a question about whether emissions should be permitted in China.

MR SALMON:

Well, one of the answers, Your Honour, if we can step back slightly from this case is to bear in mind the way in which these decision making processes work which, as I've said, is not like a civil case where one adds some numbers together and reaches a certain outcome or take negligence, causation and loss and it almost mathematically follows the chain down.

Resource consents become battles about whether there's a snail somewhere, or whether something should be near a school and do they dominate? Well, yes and no. They become a focus at the hearing but nothing requires the Tribunal to give primacy to any one thing. They are balancing the most awful basket of nebulous concerns.

ELIAS CJ:

Incommensurables.

MR SALMON:

Yes, and if my learned friends are saying, "Well, this one's hard." They deal with much harder every day, every day.

WILLIAM YOUNG J:

But, just what is – it's a matter of, I suppose, interest to me as to what the end result is intended to be. Is it that because of the impacts on climate change of burning coal, the mining of coal should be, effectively, banned until a technology is in place for complete carbon sector sequestration?

MR SALMON:

And I'm not sure if Your Honour's asking me what my client's position is?

WILLIAM YOUNG J:

Yes, that's your client's position. Is that your –

MR SALMON:

No, I'm not even sure I'm in a position to say exactly what my client's position at a consent hearing would be. It is not – one thing I can say Sir, it is not saying, as my learned friends seem to straw man it so to speak, we are not saying that the Tribunal will be able to control foreign emissions.

WILLIAM YOUNG J:

No, but I know you can't, but you can only limit foreign emissions by preventing coal being extracted for the purpose of burning.

MR SALMON:

Yes.

WILLIAM YOUNG J:

So if your client's argument is successful all the way through the process, that is successful here, successful in the Environment Court, the consequence would be that the impact of burning coal is such that its extraction shouldn't be permitted.

MR SALMON:

Yes and no Sir. Obviously there's success and there's success. The principal success is, is this relevant and is it a factor?

WILLIAM YOUNG J:

Just one other. When coal is extracted there is some methane released into the atmosphere isn't there?

MR SALMON:

Some I think, Sir.

WILLIAM YOUNG J:

Is a discharge consent required for that?

MR SALMON:

I think it may be. Let me check that Sir. But dealing with that success point Sir. Success is this is a factor just as the trees nearby, the jobs that might create, the impacts on local communities, where the roads will need to be built. All those things are factors. Success in this case involves this being one of those factors and it is for that tribunal to determine the impact it has. It may say, "Well little or no way." It may say, as in the Christchurch case, Your Honour, Justice Young pointed to, well, this just doesn't seem big enough, and that answers all of the floodgates concerns that my learned friends might put up about small cases becoming waylaid by climate size. Put aside the fact that there's no contention about the core of it now because it's been recognised in legislation.

Assume it might be something where there's contention. It won't arise in most cases where it's small. So it'll only be in the big ones where it's a factor, and even then it will just be a factor. Could be disregarded, could be outweighed by jobs, could be outweighed by who knows what, in the same way that a wonderful renewable energy project could be outweighed by concerns that it's in some place of spiritual value for local iwi. Again, a delicate weighing process. Can I note, while I'm on it, that at tab 3 of my bundle of authorities there is a case *Environmental Defence Society (Inc) v Auckland Regional Council* (2003) 9 ELRNZ 1 (EnvC). That's one example of a pre-amendment consideration of climate change where climate change was in play, so to speak. The relevant pages are 15 and 16, concluding at paragraph 65. It's just one example of – and I don't think there's any dispute that this was the law pre-amendment, but I note in briefly. The case involves recognition of the greenhouse effect, the possibility of climate change, and lets it in, and it's those two pages concluding on paragraph 65.

McGRATH J:

Which paragraphs are you highlighting on pages 15 and 16?

MR SALMON:

The evidence is summarised on the left-hand column, Sir, and then the argument on 65, a conclusion regarding greenhouse effect, which in context is a finding that it's in.

CHAMBERS J:

Was this a case that led to the statutory amendment?

MR SALMON:

I'm not sure if it did or not, Sir. There were others. Can I note my learned friend makes the point in his submissions in reply to mine that I haven't identified a case outside the discharge permit context in which climate change was in, and he develops an argument at his paragraph 4.4 that this supports the idea that Parliament couldn't have envisaged any climate change considerations arising from local authorities except in the context addressed by section 104E. In other words, they thought that's all there was and therefore they snubbed that out and intended to snub everything out. So I don't think it's disputed that this case is what it is, which is evidence that climate change was in play for discharge application contexts.

The supplementary materials I've handed up address that submission from Mr Hodder that I haven't identified to Your Honours cases in which outside the discharge permit context climate change was in play. So that's what I've handed up in which Justice Young has asked me at least some questions about.

WILLIAM YOUNG J:

Right. Well, this is a discharge consent.

MR SALMON:

Which is?

WILLIAM YOUNG J:

The one you've taken us to.

MR SALMON:

This is. EDS is discharge.

ELIAS CJ:

So the ones you've handed up which you saw address Mr Hodder's point is the *Suburban Estates Ltd v Christchurch City Council* EnvC Christchurch C144/2004, 1 October 2004, and the extracts that you've handed up, is it?

MR SALMON:

That's right, Your Honour, and what Mr Currie has prepared there is excerpts from both cases and a stapled set of the key pages drawn from those cases. They're 300-odd pages long which is why I haven't given you the full copies. But they reflect what, with respect, what one would expect pre-amendment, which is this impact on the environment which is now recognised and understood by scientists as relevant to the wide-ranging RMA inquiry, and respectfully –

WILLIAM YOUNG J:

Just looking at the Christchurch one, I mean, I know you've cited from it but it's 265, page 127. Now, I know you'll say it's factual, it's what's said there is a reference to the facts in the case at hand but it does say, does indicate that they're not interested in greenhouse gases globally in their conclusion – I know they've engaged with the argument. 265(ii), "The effects of all rezoning on greenhouse gas emissions is so small they cannot be adequately measured."

MR SALMON:

I apologise, Sir, but I don't read that in any way as saying that there's no interest in global greenhouse gas emissions, just that this case, which involves probably not a lot of emissions, has a minimal impact on greenhouse gases.

WILLIAM YOUNG J:

But wouldn't that be said of any specific project? I know the definition of effects includes cumulative ones, but that could apply here too.

CHAMBERS J:

Your point, though, is it's not ruled out as a matter of law.

MR SALMON:

Correct.

WILLIAM YOUNG J:

Ruled out as a matter of fact.

CHAMBERS J:

Maybe, yes.

MR SALMON:

In which case, Sir, it will be if you apply to have a gas fire in your house. That would be de minimis or so small but –

WILLIAM YOUNG J:

But cumulatively, with all the other greenhouse gases in the world, which would be an available argument on an expanded – on an extensive reading of effects –

MR SALMON:

Well, I'm not sure it's right to say it's ruled out, is it, Sir? Isn't it that it's not given much weight because it's so small?

WILLIAM YOUNG J:

Yes, on the facts.

MR SALMON:

One belching cow might not be given much weight, but a major change with millions of them may, and yes, the Act does identify specifically that cumulative effects with significant consequences are in.

WILLIAM YOUNG J:

So why would you say – how would you exclude it on the cumulative effect, the definition of the cumulative effect? Why would you say greenhouse gas produced by this project are of no moment but when assessed with all other greenhouse gas emissions in the world the cumulative effects are significant?

MR SALMON:

Well, Sir, I'm not for a moment saying it would be excluded, and that's the distinction I'm seeking to draw. I'm saying it would be given little weight.

ELIAS CJ:

In the balancing.

MR SALMON:
In the balancing.

ELIAS CJ:
Which brings in the benefits of what is proposed, as well?

MR SALMON:
Yes. Mr Currie's bach out here would result in one more vehicle hour per month in the Christchurch region, very little weight on whether someone should have a bach. A major subdivision with 10,000 cars driving an hour each way to Christchurch might be given more weight, might be given more time in the hearing and should be given more weight, but again, addressing Your Honour Justice Young's question, it is always a question of weight for the factual Tribunal.

ELIAS CJ:
I was just having a look at the Climate Change Response Act, because some of the cases you've taken as to, as you say, are pre the Amendment Act, but surely the legislative changes that came in as part of the amendment, including the Climate Change Response Act, have some sort of legislative values about climate change in them, do they?

MR SALMON:
Well, they do. Whether they're interpretative aids to Your Honour, I'm not sure that they are. They don't amend the RMA. But more particularly, I'm not sure – if one were to say to this interpretation exercise it's relevant to look at general Government policy, well, with respect, two things come out, one going my way and one going Mr Hodder's. One is that climate change is alarming and something must be done about it and it impacts us here in New Zealand. Even the RMA acknowledges that because it expressly requires us to plan for it. And the other, Mr Hodder would say, is at least some of it is meant to be dealt with at the national, not local, level. Now, both are right. But this is the danger, with respect, of taking Judge Newhook's approach to statutory interpretation and starting at the wrong end, which is broad policy statements can lead one to depart woefully, with respect, from the text.

I lost the *Greenpeace* case because the text was difficult for me and this Court identified, understandably, that the policy indications helped swing the balance against me. But we began with the text. My learned friend has put the Climate

Change Response Act in his bundle and he may make submissions about it I need to reply to, but for my part all it does is confirm general policy trends which are already before the Court. Climate change is alarming, we should do something about it, and some of it, at least, might be nationally co-ordinated. But the question in this case is, how much? Shortly I will come to what Parliament actually thought about that. But before I move on from my bundle of authorities, can I draw Your Honours' attention to a very helpful article which helps us civil lawyers who don't spend a lot of time in the Environment Court see how RMA processes work. This is tab 10 of the casebook and it's an article from Sarah Baillie of the University of Otago. It deals, in my submission, correctly and persuasively with a number of the floodgates concerns or however one might describe it in the arguments that my learned friends put up to say this will be too hard or cause problems.

Beginning on page 12, a brief section on sustainable management and the policies and principles that apply there, and noting that from a perspective such as the RMA it would be very surprising if an inadvertent amendment was made or a backdoor amendment to undermine the very thrust of the Act and deal with probably the biggest environmental concern of our time.

Section 104(1)(a) is then dealt with, and in particular on the right-hand column of page 12 the author deals with this nexus concern and half way down the page in responding or dealing with Justice Whata's reasoning notes that Beadle case, which I've already taken the Court to, dealing with the same point. That is that it's a question of nexus and remoteness and the Environment Court dealing with, "The direct effects of exercising the resource consents, which are inevitable or reasonably foreseeable, and the effects of other activities that would inevitably follow from the granting of consent."

So there's nothing unusual about me saying consequential effects of what's being authorised, things that will happen if we do this, albeit not right there and not by these people, are relevant.

The author then refers to a case that I've put in the casebook in case it helps, which are the Australian cases, at the bottom right-hand side of page 12, *Gray v Minister for Planning* [2006] NSWLEC 720, which was a coalmine, the wider foreign emissions were regarded as relevant to the consent process for the coalmine. Just an example

that there's not some invisible territorial limit on environmental effects that pretends that the air stops at our boundaries.

Then on the next page the overseas effects issue is dealt with again, in my submission, sensibly and persuasively. Noting – I'll come to it in time – the Select Committee, this is half way down the left-hand column of page 13, specifically considered the jurisdictional limits and chose not to deal with only effects "in New Zealand". I'll come to that Select Committee Report because it's important. The author concludes, well, on those concerns that's not how the RMA works and it's not how it's written.

Also, perhaps, just while I'm on that bundle of authorities and finally tab 9 may be of assistance to the Court. I've mentioned it in my submissions but it's a seminar paper by – one of the authors is the co-authors of Burrows and Carter on statutory interpretation, which we both cite. It takes a case example of what the authors suggest is a misapplication of the rules of statutory interpretation by Justice Whata, pages 37 through to 39. It's not always good when an appeal takes a little bit of time to agree on the bundle to go to the Court, but it did give time for at least one commentator to write about Justice Whata's decision, and I do adopt what those authors say, with respect, their arguments about the way in which the section 3 purpose tail has wagged the operational dog is, respectfully, right.

The final point, just on dealing with the contextual interpretation of the RMA and the Amendment Act, is this. When my learned friends assert as loudly as they can that the purpose of the Amendment Act is clear, what they really mean is just that the section 3 purpose provision was stated in broad and generalistic terms. But as Your Honours have noted, the section 3 purpose provision was not effected as an amendment to the principal Act, in other words, the principal Act's purpose provisions stay the same, so that any purpose-based analysis of what the Amendment Act does needs to take account of a purpose-based analysis of the Resource Management Act, and as the author of that Otago University paper notes, it would be striking if major environmental effects like climate change were not covered by the Resource Management Act. In a sense, it's like one of those Bill of Rights cases. It would require clear language to take away a key right. One would expect clear language to take away the biggest environmental hit of our time. Candidly, one would.

And we have clear language in the Amendment Act and it doesn't go as far as my friends want. So the submission there of their s – focus on section 3 and its broad wording is first and foremost, that is just one purpose indicator amongst any.

The second submission is the one I've already mentioned which is, it's only a purpose provision that describes the Amendment Act anyway.

ELIAS CJ:
I'm sorry. I've lost where, in the materials, we find the Amendment Act. Please remind me.

MR SALMON:
It's in Mr Hodder's large bundle, tab 12.

ELIAS CJ:
Thank you.

MR SALMON:
Now I've dealt in some detail with the weight that was given to that section 3 purpose provision in the Amendment Act in the Courts below and that's at paragraph 4.9 through to 4.17 of my submissions. I don't seek to repeat those unless any aspect of it would assist Your Honours. I note that, as noted by Burrows and Carter, this is paragraphs 4.10 to 4.12, purpose provisions are only a précis. This is quoting from the passage cited at 4.12 of my submissions, "May sometimes not accurately cover the whole scope of the Act, and individual provisions may go beyond it." In other words the help but do not control interpretation, and that may be one context in which Your Honour used the term "spent" in the *Greenpeace* decision. That purpose provision helps us explain the Amendment Act but not more.

The next point, and I address it briefly because it seems to have had impact in the Courts below, is the submission that's made with less force here than it was in the Courts below which is, this is just me rerunning the *Greenpeace* case or in the lower Courts someone else.

ELIAS CJ:

Sorry, before you get on to that, you, just looking at the statutory provisions, you do – the Amendment Act does more than simply enact the provisions in part 2 of the Amendment Act.

MR SALMON:
Yes.

ELIAS CJ:
It also introduces those significant interpretation provisions.

MR SALMON:
Section 7I and J.

ELIAS CJ:
Yes.

MR SALMON:
Yes, yes Your Honour, that's right.

ELIAS CJ:
So, which you must be presumably relying on in part.

MR SALMON:
Well, we all do, Your Honour, and we spent more time again in that *Greenpeace* case where it was perhaps slightly more on point given the issue in section 104E.

I think my learned friends say that that purpose provision in section 7 – let me find them, Your Honour. I think my learned friends will say, the fact that section 7 was amended to include the mandatory consideration of the effects of climate change, and a distinction is rightly made between the effects "of" and the effects "on", if Your Honours follow that, and a reference to the mandatory consideration to have regard to the benefits to be derived from the use and development of renewable energy, I expect my learned friends are really saying something like, if they were going to say that you could also have regard to the peril that is climate change, in

general terms, it would be said there. Now, my answer to that is it was already said. It was already part of the scheme of the Act, but I think that's what my learned friends will say about that. Again, that's not really how statutory interpretation works but I think that's what they're saying.

And interesting point to note there while we're on it Your Honour, and again it's dealing with this in terrorem submission that this will be terrible for regional authorities and will involve too many facts. A mandatory consideration is now the effects of climate change. So there's a parliamentary intention that local authorities will have to understand the science fully, not just understand how many grams or kilograms or tonnes of Co2 will be released, but understand their effects on things like tidal levels so they can plan for water rises. And I just mention that while we're on this section, Your Honour. It's an extraordinary to say that Parliament cannot have intended councils to grapple with the science of climate change when, on a mandatory basis, they're required to deal with not only what it is but what it will do. A similar point made about J. It requires understanding the science of climate change and, again, shows that local authorities are trusted with the task.

I was going to briefly address –

CHAMBERS J:

If, as you say, the effects of climate change was already a factor, why did they go to the bother of amending section 7?

MR SALMON:

The extrinsic materials help us understand that Sir, but section 7 doesn't actually say either way climate change is in or out. What it says is, and this context I'm talking about Sir, the effects on climate change. So a distinction is drawn and has been drawn in *Greenpeace* Your Honour, you may not recall it, between should councils look at whether burning this coal will affect the climate. That's the effects of the activity upon climate change and, separately, should they consider the effects of climate change on the environment? Would the tides rise?

His Honour, Justice Young, then president of the Court of Appeal focused quite quickly on that in the argument in the Court of Appeal, Your Honour may recall, but it's not one where I did well in saying that the effects "of" climate change meant the effects "on" climate change. So, I think the answer is that was specifically telling the councils, and the extrinsic materials show this, get ready for it. Have a positive

obligation to go out there and plan for tide rises. Don’t build in low lying land, whatever they might do, but that’s why that was put in.

CHAMBERS J:
I see.

MR SALMON:
The rhetorical my learned friend won’t necessarily find easy to answer, respectfully, is if it was intended that there be a prohibition on considering climate change, why wasn’t that put in section 7? It would have been the right place to put it, with respect, either there or section 104(1), or a completely differently worded 104E. We’ve got to deem Parliament to be competent and understand this and it wasn’t done.

ELIAS CJ:
But in interpreting the amendments to section 7, surely one does look at the purpose provision in section 3 of the Amendment Act?

MR SALMON:
Yes, one looks at it. Yes Your Honour.

ELIAS CJ:
Yes, all right, so you’re –

MR SALMON:
I’m not saying it’s irrelevant to the interpretation.

ELIAS CJ:
No, I see.

MR SALMON:
I accept it’s relevant. What I’m saying is it’s a broadly framed term that doesn’t just – even on the face of the Amendment Act, Your Honour, it mis-states what the Amendment Act does, and it does that – the easiest example of that is section 104E. The issue in the *Greenpeace* case was this. To what extent are climate change issues available to be argued regarding renewable energy projects? The exception under 104E, and it was common ground there, and still common ground, that in renewable energy applications climate change considerations can be argued. So

104 actually keeps alive some, even for discharge consent applications, if Your Honours follow.

Now section 3, in terms, conflicts with that, its general wording does not describe the full nuances of section 104E, if Your Honour follows that point?

ELIAS CJ:
Yes.

MR SALMON:
And that's exactly as one would expect because the Parliamentary Council's office have never understood that they might be interpreted as affecting reforms in their purpose provisions. There is pointers in there, there is guides and I'm, respectfully, not aware of any case in which it's been argued that they're operative.

Now my friend doesn't go that far, he doesn't say it's operative, but when one analyses the argument, it has to be that the purpose provision is operative.

In that context, very briefly Your Honours, in the *Genesis* case did make some comments about the purpose provision in section 3 in the context of construing section 104E. Judge Newhook, respectfully, was perhaps sidetracked into thinking that might have been some binding pronouncement as to the wider meaning of section 3 and the extent to which it governed other interpretation issues. I just want to briefly note, respectfully, that that is not how, certainly, I read the decision. Justice Wilson's handling of that point was specifically, I think, paragraph 55 of his judgment, specifically about using that purpose provision or identifying the purpose of the Act as an aid to interpreting the specific section in question there.

CHAMBERS J:
Which paragraph?

MR SALMON:
I think paragraphs 55 and 56, tab 4 of Mr Hodder's casebook.

CHAMBERS J:
Yes.

MR SALMON:

So you'll have quoted to you a statement about the general purpose of the Act, which was to nationalise consideration of climate change issues, but it's misleading to present that to any Court without noting that that was a general statement, like the purpose provision was general, put forward to consist the construction of the specific sections being dealt with, sections 70A and 104E and it's not, with respect, open to read that as a definitive determination of the wider purpose of the Amendment Act. So that's dealing briefly with the *Genesis* case.

The wider purpose I've dealt with in the context of dealing with the RMA and I'd like now, with the Courts leave, spend slightly more time than I normally might on extrinsic materials.

Now my learned friend will bend over backwards to persuade the Court not to –

McGRATH J:

We're at page 10 of your submissions are we now?

MR SALMON:

That would be right Sir.

McGRATH J:

Yes, okay.

MR SALMON:

And if Your Honours have read those, I won't spend forever on them but can I note regarding, on page 11, I've cited from two Cabinet Minutes.

ELIAS CJ:

But I'm not sure why we're looking at Cabinet Minutes.

MR SALMON:

Yes, and I anticipated that Your Honour might ask me that. Can I note? I put them in because Your Honours are being asked to make certain inferences regarding Parliament's intention. The position as I read the Burrows and Carter text is that they are usually not referred to.

And I was going to make this submission, if I may, on admissibility? And I'm aware I have –

ELIAS CJ:
Well I really don't want to look at them. I think we should look at the parliamentary materials, myself Mr Salmon.

MR SALMON:
Yes.

ELIAS CJ:
And I had understood you, really, in your oral submissions to say that the parliamentary materials take you there.

MR SALMON:
Yes they do. They absolutely do. All I want to draw Your Honour's attention to – I don't want to spend long reading it out or anything like that is, as I read the cases, the proposition is they are usually not referred to because they're fairly remote from the actual parliamentary process and, candidly, like most extrinsic materials, they're often not very helpful.

And all I want to alert Your Honours to is, to the extent that you're minded to look at them, the Cabinet Minutes way back in 2002, show a clear intention to preserve a range of climate change considerations for consideration under the RMA. So it dates back to then. I don't take it further than that, Your Honour. I focus more on *Hansard* and on the Select Committee reports.

McGRATH J:
You wouldn't want to, would you, because your argument is inviting us to adhere to principles of statutory interpretation as they're best understood at the moment?

MR SALMON:
Yes, absolutely they are Sir. I suppose I'm mindful of this, Sir. My learned friend will, in a very persuasive way, as he did in the High Court, spend time telling this Court that the purpose of Parliament is clear and there's nothing to suggest that anything

was intended to be preserved and in the interests of having everything before this Court, for what it is worth, I identify those as clear and unequivocal statements of government policy that were the genesis of the legislation. Don't take it further than that Sir, and yes I do, Your Honour, the Chief Justice, make the submission that I don't need to, but in the interests of having it in front of you, it's there.

In turning to *Hansard*, I might refer briefly to the *Genesis* decision again. My learned friend has put, in his supplementary casebook, in which transcript from the *Greenpeace* argument is included, showing that the Court wasn't minded to hear a great deal of extrinsic material then, and I was objecting to it then, so that wasn't something that I resisted Sir. In that context Justice Wilson, in his judgment, did, in fact, rely on it. That was the majority decision. And he relied on it saying something that is logically and legally very sound, with respect, and it's at page 62 of that judgement, tab 4.

His Honour said –

CHAMBERS J:
Sorry, where at?

MR SALMON:
We're at tab 4 of Mr Hodder's casebook, the *Genesis* Supreme Court decision.

CHAMBERS J:
Oh yes. It was the page number that -

MR SALMON:
Page 752, paragraph 62.
CHAMBERS J:
Para 64, yes.

MR SALMON:
62 Sir.
CHAMBERS J:
Yes.

MR SALMON:

62, "When moving the second reading of the Bill, the Honourable Judith Tizard, as the Minister responsible, told Parliament," et cetera, and the Minister said something that helped Genesis Power here, but it's His Honour's comments about the context of *Hansard*, this material here. "It is simply not tenable to suggest that the Minister would have made this statement if the intention of the Committee had been to make a significant policy change by widening the exception so as to apply it to all rules and applications, whether or not they involve renewable energy. It is equally untenable to suggest that all members of the Select Committee would have acquiesced by their silence in the statement of the Minister if it had not been correct. The words of the Minister, therefore, provide compelling confirmation that the purpose of sections 70A and 104E remained as it had been originally." And logically that's right. It's very pertinent when looking at my page 11 of my submissions, paragraph (c), the statements in the House from Jeanette Fitzsimons, who was Chair of the Select Committee, on point, and I've bolded the words in the middle.

The Member notes that the Bill removes certain emissions from first and second and third line, power stations and industrial plants, "When they are giving consents for air discharges." This is because it is easier to deal with those things at a national level than a local level. I am very glad to see that the removal of carbon dioxide emissions from chimney stacks from the purview of regional councils does not absolve any local authority from taking account of the climate change effects of the other things that they do. The Bill specifically provides that councils should still consider the effects on climate change of their other decisions. Those decisions are legion. When a supermarket wants to locate a long way from town the council has a right to consider how many more vehicle kilometres will have to be travelled for people to get to that supermarket if it is away from where people live and away from public transports routes. A council can take climate change into account in its responsibilities for provider for public transport and in its responsibilities to design more sensible urban form whereby land use activities are located close to public transport corridors and public transport nodes in order to reduce the need for travel, and also in its provision of facilities for walking and cycling, in order to reduce greenhouse emissions from burning fossil fuels.

Now, Justice Wilson's comments are apposite. My learned friend included on the Minister's speech from that section of *Hansard*, so I've included it in tab 8 of my bundle. Your Honours will see that, aside from the point that this was the Chair of the select committee, and Justice Wilson's comments about the unlikelihood of the –

the Minister must describe an Act applied equally to the Chair of the select committee, that's the first point. The second point is that, as the balance of that excerpt of *Hansard* shows, the responsible Minister stayed in the house and was there till the end for the vote. So, in terms of the answer I might have for my learned friends that Ms Fitzsimons may have spoken from her own perspective and not that of the house, there is not one objection to the point she made regarding what is saved by this Bill, not one point of disagreement at all from any of the parties who spoke after, and even the Minister responsible stayed in the house.

If I recall right, the answer my learned friend gave to that point in the High Court was that Ms Fitzsimons must have been talking about health concerns arising from traffic, not about greenhouse gas effects, but whether or not that's an argument now is not right. That was a speech about councils retaining the ability to look climate change implications of all activities other than discharge permits, it's a state –

CHAMBERS J:
What – I'm sorry.

MR SALMON:
It's a statement in the house that exactly aligns with the interpretation that my clients is advocating here today.

CHAMBERS J:
What do you say is the provision in the Bill which Ms Fitzsimons must have had in mind when she said the Bill specifically provides that councils should still consider the effects on climate change?

MR SALMON:
I suspect that what Ms Fitzsimons is doing is using slightly politician-speak for, "The Bill doesn't affect –" I can't speculate as what would have been in her mind, Sir, and we can't call evidence from her now.

CHAMBERS J:
The point I'm getting at is, there isn't a specific provision that you can point to?

MR SALMON:

No, there's not, Sir, in the Amendment Act, no there's not. There is a specific provision in the RMA, which is section 104, but no, Sir, I accept there's nothing in the Amendment Act, and in that sense that gloss from the member is, is a bit of a gloss.

ELIAS CJ:
Well, is it a reference to section, the new section 7 provision, the –

CHAMBERS J:
That's what I wondered.

GLAZEBROOK J:
Yes, that's what I was wondering.
ELIAS CJ:
Yes.

MR SALMON:
But it goes further than section 7.

ELIAS CJ:
Yes, because it refers to effects on climate change, yes.

MR SALMON:
Yes.

WILLIAM YOUNG J:
Perhaps she mis-read it.

ELIAS CJ:
But maybe –

GLAZEBROOK J:
Yes.

ELIAS CJ:
But maybe it was not thought that there was a –

WILLIAM YOUNG J:

May have read it the same way – sorry, she may have read it same way you did.

MR SALMON:

Well, Sir – Sir, I'm going to go to more than *Hansard*, because if she did, so did the select committee and so did the select committee reports. It's not a one-off. I quote those select committee reports over the page. There is no escaping, I'm afraid, there really is no escaping the fact that the House and the select committee believed the same interpretation that my client is advancing today, there is no doubt about that at all. There is no explanation that can be advance for how traffic implications on climate change would remain live, if Mr Hodder's interpretation is right, it cannot be.

So the House believed that some things remained live, and I've referred over at D and E to the select committee reports. They dealt with the industrial and trade premises reference – this is paragraph D, going over onto page 12 my submissions – and then there's a reference at the end of that quote, "We consider the specification is unnecessary because the intent of this cause is to prevent consideration of effects on climate change of any discharge needing a consent. The effects of greenhouse gas emissions from transport can still be considered in land use planning."

GLAZEBROOK J:

Sorry, where are you reading from now?

MR SALMON:

This is the top of my page 12 quoting from the Select Committee report.

McGRATH J:

Sorry, what page is that at again?

MR SALMON:

That's my submission, Sir, bottom of page 11.

McGRATH J:

Yes, I've read it in your submissions but I just want to look at the Select Committee –

MR SALMON:

Oh, tab 10, Sir.

McGRATH J:

Tab 10, thanks.

MR SALMON:

Of Mr Hodder's bundle.

McGRATH J:

Yes, page 5.

MR SALMON:

Page 5.

McGRATH J:

Thank you.

CHAMBERS J:

And that's through section 104?

MR SALMON:

Yes. It wasn't broken and they did not try to fix it Sir, if I could put it that way?

While I'm on that page Sir, over the page on page 6, I mentioned before in the extraterritoriality point that that, that author of the Otago University paper mentioned a passage in this report. It relates to the removal of the words, "In New Zealand," over on page 6 of that Select Committee report under the heading "Words in New Zealand Unnecessary." That's, again, an indication that this was not intended to have some fine tuned and unreal focus on our environmental air or water as being somehow frozen at the 12 mile limit. And I note finally –

CHAMBERS J:

Just pause there a minute will you?

MR SALMON:

Certainly Sir.

CHAMBERS J:

Have we got the Bill itself?

ELIAS CJ:

Yes it's in Mr Hodder's bundle. 10.

WILLIAM YOUNG J:

Eight.

MR SALMON:

Tab 8.

CHAMBERS J:

So this is referring to clause 6. I'm just trying to see what –

MR SALMON:

The change, Sir, was that clause 6 of the original draft referred to, "From industrial or trade premises." So the comments are made in a context that's probably slightly by the by for today's purposes. It's the payload of the comments that counts.

CHAMBERS J:

It was quite a major change in the Select Committee.

MR SALMON:

Sorry, I've misread that Sir. I'm quite wrong about that.

CHAMBERS J:

There's quite a major change in the Select Committee to clause – that section 70A.

MR SALMON:

Yes.

CHAMBERS J:

And the words, "In New Zealand," are dropped.

MR SALMON:

Yes.

CHAMBERS J:

And just tell me again, what is the significance, do you say, of the dropping of the words, "In New Zealand"?

MR SALMON:

The significance is that that was a time to say that effects of a more global nature were out. So that passage records that the regulatory jurisdiction for which applications can be considered are New Zealand specific. The RMA stops at the 12 mile limit in terms of what needs a consent, but it's not necessary to say effects or wider implications are limited to New Zealand, and one can immediately understand why when one considers both climate change issues and, indeed, river pollution issues, acidification of ocean issues. These things are interconnected.

CHAMBERS J:

Right.

MR SALMON:

So I'm noting that by way of saying that was a conscious decision not to limit the focus on effects to New Zealand. Other points can be made about it which I'll come to in due course in dealing with that extraterritoriality point in detail.

The final passage from the Select Committee report we were on is at page 2. I've quote it at page 12 of my submissions but it's an express reference to the prohibition, this paragraph 5.4(e) of my submissions being, "When making rules in regional plans or determining air discharge consents."

So where I leave those extrinsic materials is here. It is not, respectfully; open to my learned friend to say that the policy mandate of the Amendment Act was clear in such a didactic way when the extrinsic materials show that to be wrong.

Dealing with the remoteness point, I've mentioned the agreed facts and I won't spend long on remoteness because we've touched to some degree already. Have Your Honours spent time reading what's been agreed here? If not I can go to it or I can summarise it briefly but it makes today relatively easy.

ELIAS CJ:

Sorry, are you talking about the agreed facts?

MR SALMON:

Yes.

ELIAS CJ:

I'd like to be reminded where we find them most conveniently.

MR SALMON:

They're in the – about the –

WILLIAM YOUNG J:

They're at tab 11.

MR SALMON:

The case on appeal.

ELIAS CJ:

Yes.

MR SALMON:

Final tab.

ELIAS CJ:

Yes.

MR SALMON:

There are only a few points that are probably material in terms of the dialogue we've had today. One is, it is anticipated, this is at paragraph 7, that this coal will be exported. I don't, from my part, see that as relevant to the interpretation issue or to the case in the way that my learned friends do, but I note it.

WILLIAM YOUNG J:

Well actually, that's because you say that the same – the case would fall to be determined the same way if the coal was to be burnt in New Zealand?

MR SALMON:

Yes, yes, and sorry, there's one gloss to that, if I may Sir, just while we're on it because my learned friend will say, well how unfair that there might be duplication

because the ETS might apply to burning it here, or to even selling it here. Why should they face a double dipping and have to deal with it under the RMA.

So very briefly on that. It is, of course, open to a consent authority to have in mind that the ETS will apply if it's sold here and not elsewhere. That would be relevant in terms of weighing up the net impact but, more particularly, while it's on my mind, Her Honour, the Chief Justice, in the *Genesis* case dealt with the idea that that sort of duplication would be a problem, at paragraph 41 of her judgment dealing with the extent to which the argument might undermine the setting of national emissions standards for greenhouse gases and so on. "Nor does it leave -" this is at paragraph 41, "Nor does it lead to duplication of -"

CHAMBERS J:
Just pause a moment so we can get it?

MR SALMON:
Certainly Sir.

McGRATH J:
What tab are we at again?

MR SALMON:
We're at tab 4 of the big casebook from Mr Hodder Sir.

McGRATH J:
And paragraph?

MR SALMON:
41, pa –

ELIAS CJ:
This was the point of disagreement, though, wasn't it?

MR SALMON:
It was one of them, Your Honour, yes.

ELIAS CJ:

Yes.

MR SALMON:
You mean between you and the majority?

ELIAS CJ:
Yes.

MR SALMON:
Yes, although the majority didn't put as much weight on that point as it did on the policy findings regarding the intent of the amendment and those extrinsic legislative history materials. And that was a parenthetic dealing with the point that arises from Justice Young's question. Dealing with the agreed statement of facts, paragraph 9, Solid Energy was not required to and did not apply for any discharge permit relating to the discharge of greenhouse gases. Similar -

CHAMBERS J:
So that's an answer, is it, to the question about mining itself releasing methane is it? That doesn't require a discharge permit.

MR SALMON:
It seems, yes, that seems to be the case, and a similar position, although the export locations are limited more to China, back the preceding page regarding Buller's Escarpment mine.

But the material facts, in my submission, are those at paragraph 13, which have been very sensibly agreed key points regarding the use of the coal and the impact on climate. And it's been agree at paragraph 13 that climate change is a serious global issue, that the coal mine at the site will probably result in the subsequent discharge of carbon dioxide from the combustion of that coal, that there probably – I don't confess to understand. It's clear from the preceding pages that it'll be burned for steel production. So it's going to be burned and then, third, carbon dioxide is a known greenhouse gas. The RMA deems it to be anyway, so that's really for completeness. But the point there is, there is certainty that in this case, even if not in others, this coal will be burned and will produce Co2.

So a remoteness submission from my learned friends has to deal with the fact that we've agreed that this is going to be burned, will produce Co2 and that there's a climate change implication. And then the other point on remoteness – I can see it's 11.30, is that that is an issue for the Tribunal at the factual level once it's heard it all. Respectfully, it's not a jurisdictional threshold for this Court's question, which is one of interpretation.

Does that suit as a time for a break Your Honour?

ELIAS CJ:
Yes, where do you want to take us? Have you really concluded your submissions Mr Salmon?

MR SALMON:
Nearly Your Honour. I wanted to deal briefly with extraterritoriality and the suggestion this is too hard. I've largely covered it and then that will be it.

ELIAS CJ:
Excellent thank you.

COURT ADJOURNS:11.31 AM

COURT RESUMES: 11.51 AM

MR SALMON:

I've had the opportunity to sound out the answer to Justice Young's question regarding the methane release from the mine and I think the answer, helpfully provided by Mr van der Wal, is that the consent for discharge is not required for methane released inadvertently or during the mining because the premises aren't an industrial trade premise and therefore section 15 isn't engaged. So there might be another case in point of the sort of emission that has climate change implications. It's a domestic one that's swinging in the balance on this interpretation point. I hope I've got that right, Mr van der Wal will correct if I have not.

Very briefly on territoriality, I won't repeat what I've covered already and I do, as I say, adopt what is said in that Baillie article in my casebook. I noted in mentioning that that she and I would identify aspects of the Act that show a focus on the environment that goes beyond the 12 mile limit. Examples that occur just within the dialogue of today would include section 7(i), the effects of climate change are inherently linked to behaviours of atmosphere and oceans outside the 12 mile limit. Section 104E and its exception requiring the Environment Court to look at the benefits of renewable energy in a climate change context involved by definition within the outside, just New Zealand and the global environmental context. And also, although we're not here yet, Your Honours will recall that the other part of the Amendment Act was permissive and enabled authorities to apply national environmental standards, once put in place, regarding rules to protect from climate change and so on. It's obviously anticipated that, at that point, whoever's right on today's interpretation, councils, local authorities, will look outside the 12 mile limit and look at the global environmental impact.

ELIAS CJ:

Well why do you say that? What's the statutory peg that that hangs on?

MR SALMON:

The peg is that it's impossible, as a matter of logic Your Honour, to contemplate the effects on climate change or the benefits to climate change of a renewable energy application without looking globally.

ELIAS CJ:

I just wondered if there are some statutory pointers to that and I also wondered whether in that respect it's necessary to look at the legislation from which you get the definition of climate change, the other Act.

CHAMBERS J:

The Climate Change Response Act.

ELIAS CJ:

Thank you, the Climate Change Response Act, and in connection with that, because there is an international framework behind that, I wondered in terms of your extraterritoriality argument whether there is anything in that context that you need to take us to. I mean whenever we have statutes which have a genesis in an international agreement, it's normally important to look at that. I don't know whether there is anything that helps here.

MR SALMON:

Perhaps one thing that will help again, I'm sorry to go back to it again, but is that Baillie article which does deal with international obligations that underscore this. But also, in page 13, that's the article at tab 10 of my casebook, the author refers to one section of the RMA that suggested –

ELIAS CJ:

Sorry tab?

MR SALMON:

Tab 10 of my casebook.

McGRATH J:

Page 13, is it?

MR SALMON:

Yes, yes Sir.

CHAMBERS J:

Now Ms Baillie refers to the Kyoto Protocol. Has that effectively been incorporated into New Zealand law by the Climate Change Response Act?

MR SALMON:

As I understand it Sir, yes.

CHAMBERS J:

So when she – so doesn't that reinforce the point that the Chief Justice has just been making to you, that we really do need to have a look at that Act in order to put these two pieces of legislation together.

MR SALMON:

Well, respectfully I'm unsure which two pieces of legislation Your Honour is talking about.

CHAMBERS J:

The Climate Change Response Act and the Resource Management Act.

MR SALMON:

Right and the reason for my hesitance is I can see in conceptual terms why the Climate Change Response Act might help one interpret the Amendment Act which post-dated it. Respectfully I'm not sure it can help us inform whether there should be some narrowing of the original definitions in the RMA that pre-dated it. It's not a pedantic point, I'm just highlighting –

CHAMBERS J:

Yes, I'm not saying it would narrow it, I'm saying it simply might –

MR SALMON:

Or bear on it.

CHAMBERS J:

– inform, it might help.

MR SALMON:

Yes, yes it might.

CHAMBERS J:

It might help your case, I don't know, because I don't know enough about the Act.

MR SALMON:

And I'll need to look at that and perhaps come back to that in reply if I may Sir. But the point about the timing I think is one I'm bound to observe. It maybe of more assistance in interpreting Parliament's intention in the Amendment Act than in the original RMA.

McGRATH J:

It's the 2002 Act, isn't it?

MR SALMON:

Yes.

McGRATH J:

And you're not making any definite commitment to a submission at present so perhaps we should wait to see if you raise it later.

MR SALMON:

Well the submission I was instinctively going to make in response to Her Honour the Chief Justice's question is the definition of the, the environmental definition in the RMA, are as broad as one could possibly imagine and the reasons why are manifest and clear that a wide definition of environment was intended, it's very wide. It includes Treaty concerns, cultural issues, all sorts of things. It's the widest possible definition of environment and the starting point submission it sounds almost too simplistic but how could that not, but for reform, incorporate a major environmental threat.

ELIAS CJ:

I'm not, this isn't a trick, but the for example the content of the national plan, because in terms of discharges the reason that's taken away from regional and local authorities is because it's to be dealt with nationally. So what can be dealt with nationally, because that may have some implications for whether some international co-operation is envisaged, which would not be adverse to the argument that you're putting to us, that outside that area of discharges you can look at effect on environment.

MR SALMON:
Yes –

ELIAS CJ:
On, whatever it is, global warming or whatever. However it's described in the legislation.

MR SALMON:
And please be assured Your Honour my hesitation is not because I sensed a trick but rather because I want to give you a helpful submission and I think I need time to work through the question and perhaps deal with it on reply.

ELIAS CJ:
Yes I'm perfectly happy for that but can you answer me in terms of what could be consistently with the Resource Management Act taken – how could the National Plan deal with these matters under the Resource Management Act?

MR SALMON:
A national environmental standard?

ELIAS CJ:
Yes.

MR SALMON:
In hypothetical terms Your Honour?

ELIAS CJ:
Yes, what are the provisions?

MR SALMON:
They're not in place yet Your Honour. My point is that the Amendment Act provided a structure, and this was the only point I was trying to make at that point in my submissions, it provided a structure whereby for discharge applications local authorities could not look at it –

ELIAS CJ:
Yes.

MR SALMON:

– no go, but said it is a go once there's a national environmental standard that you can implement. So for discharges the envisaged approach is national co-ordination, as Ms Fitzsimons put in the House, these big emitters, it makes sense to do them nationally, a national environment standard will be put in place which then the authorities can implement so that there's consistency in integration and so on.

ELIAS CJ:

Yes.

MR SALMON:

And I don't have a clever prediction of exactly how it will flip through.

ELIAS CJ:

Are you saying there is no national standard yet set, is that the position? But are there provisions under the Act which enable the settling of national standards?

MR SALMON:

Yes and the Amendment Act anticipates them. We haven't focused on them because they're mostly by the by, but the making of rules, sections 70B and 104F of the Amendment Act. Yes, and Mr Hodder suggests I mention rightly, section 42 of the principal Act.

ELIAS CJ:

It is dreadful legislation.

MR SALMON:

Nobody wants to read this Act unless they have to Your Honour.

ELIAS CJ:

No.

MR SALMON:

Section 43. It provides for regulation prescribing –

CHAMBERS J:

I don’t think I quite understood this. So is what you’re saying, Mr Salmon, that under section 104E there’s this prohibition with regard to when you’re dealing with a discharge but there isn’t in place yet any national standard?

MR SALMON:

Correct, correct. So –

CHAMBERS J:

I see.

MR SALMON:

So the question Justice Whata put to me was, “Give me a normative explanation for why Parliament would have limited this reform to only those big industrial emitters?” Now I think there is one and I think Ms Fitzsimons put it in the House, and it makes complete sense. When one is deciding where we have a major emitter like Huntly number 2, the next major gas burner, it makes sense to consider that nationally. Not just because it’s such a big emitter but because its role is national, any big power plant.

CHAMBERS J:

Yes, but my point is, did Parliament envisage that this national standard would be made much more quickly than, in fact, has occurred then?

MR SALMON:

I’m sure more quickly than it has occurred, yes. One would hope so, yes, or imagine so. I should put it that way.

ELIAS CJ:

Well, is there anything in the legislative framework which indicates that in setting national environmental standards, it’s permissible to be a good global citizen?

MR SALMON:

Well, the empowering provision enabling the making of Orders in Council, including environmental standards, is section 43 of the Act which is broadly framed. One would imagine that in effecting any Order in Council, the executive would have in

mind the suite of international obligations, including those mentioned in Ms Baillie's article. So that's only a partial answer because I can't point to a specific statutory direction but I believe I will be able to in reply and if perhaps I can come back to it, I will be –

ELIAS CJ:
Yes thank you.

MR SALMON:
– at least of slightly more assistance then, but wrapping up, because I'm nearly finished, unless Your Honours have questions.

The essential point I was seeking to make about the national environmental standards is that it is a clear and express anticipation of this reform that while the ability to look at certain climate change issues was being taken away from local authorities, it wasn't forever and it may be given back, just in a coordinative way. And I labour that point because you will hear, not so much from the first respondent but from others, this is going to be really hard and no one could have intended local authorities to look at it. They absolutely did. They just intended for the big dischargers to do it in a coordinated way.

The final point I'd like to leave on. I do submit that this is a simple statutory interpretation exercise and thus some of the hard questions are worth asking one more time. My learned friends say that somehow the Amendment Act removed climate change from consideration in more than just discharge permit contexts, and I asked early on the rhetorical question that we certainly didn't hear an answer to in the High Court. Which words of the operation provisions of the Amendment Act effected that change? It cannot be section 104A because that's in terms limited to sections 15 and 15B discharges and, respectfully, it can't be the purpose provision which is plainly not intended to be operative.

And that's really, with respect, where a statutory interpretation question starts. Which words mean this? If they mean something absurd or patently contrary to express purpose or ascertainable purpose, or something so contrary to what Parliament understood in *Hansard*, then yes, it is open to this Court to consider the extent to which those words enable some other interpretation, but it's a novel proposition to say that we should rewrite them whole scale, and my learned friends are. At the

moment they're saying that there is a blanket prohibition on considering greenhouse gas discharges. They are saying that one should ignore the first three lines of section 104E.

WILLIAM YOUNG J:
All right, what role does the Crown Minerals Act 1991 have on all of this because if a permit is needed that covers coal doesn't it?

MR SALMON:
Yes.

WILLIAM YOUNG J:
And a permit is needed to mine the coal?

MR SALMON:
Yes Sir.

WILLIAM YOUNG J:
And what's the basis on which – presumably the Minister makes the decision. What's the basis the Minister decides whether coal should be mined?

MR SALMON:
I think there's been amendment to that Act which limits the number of considerations but it's a fairly recent amendment again. That's not in the materials right in front of me here, Sir, and I haven't looked at that for a while.

WILLIAM YOUNG J:
Right. What I'm just interested in is in what forum, if any, is there usually debate as to whether mining coal is a good thing or a bad thing?

MR SALMON:
Sometimes the Supreme Court, Sir.

WILLIAM YOUNG J:
Yes.

MR SALMON:

And the House. Right now Sir, if you give a serious answer to an important question. Right now, the question of whether, on greenhouse emissions levels, it depends on today.

WILLIAM YOUNG J:

Right, so you say it's on the table in the Environment Court but is it also on the table for the Minister?

MR SALMON:

My recollection is that that's been – that it's out Sir, but that's only a recollection from another case –

WILLIAM YOUNG J:

Okay.

MR SALMON:

– I would need to check.

WILLIAM YOUNG J:

Okay, thank you, and can I ask one other question?

MR SALMON:

Certainly Sir.

WILLIAM YOUNG J:

Let us say that the respondent's can't point to a particular word that changes the section 104 or any of the other provisions of the Act, would it be appropriate for the Environment Court, in considering the greenhouse gas emission argument, to allow for maybe a policy that greenhouse gas emissions are for the National Government and not for local authorities?

MR SALMON:

Would it be permissible as a matter of admissibility to take account of that policy?

WILLIAM YOUNG J:

Just when applying that when determining the case to say yes, the greenhouse gases are there. We have to recognise that. On the other hand we also have to recognise that there is an apparent policy that greenhouse gas emissions in terms of climate change will be dealt with by the National Government.

MR SALMON:

Absent express statutory authorisation of that, my instinctive answer would be no Sir, but if I might be given the time again to check that with someone who deals with the RMA more regularly than me?

WILLIAM YOUNG J:

Okay, thank you.

MR SALMON:

Thank you Sir. Your Honour, are there any further questions or...

ELIAS CJ:

No. Thank you, Mr Salmon.

Now I didn't ask what order counsel had expected to address us and are you to go next Mr Hodder.

MR HODDER QC:

I am, Ma'am but if there's anything that the Royal Forest and Bird wanted to say, I should hear that first before I start.

ELIAS CJ:

Yes, that's Mr Anderson.

MR ANDERSON:

Thank you, Ma'am. I have no submissions to make. I'm simply here to assist the Court in whatever way possible and don't wish to be heard.

ELIAS CJ:

Thank you Mr Anderson.

MR HODDER QC:

Please the Court, what I propose to do on the basis that it's of some assistance to the Court is to offer an overview, which I hope will be relatively short. So something about the structure of the RMA, which I regard as being particularly important in this matter and possibly mention the context of the Climate Change Response Act 2002 as part of that, and then I wanted to focus more detail on the 2004 Amendment, what it actually does. It does a number of things all which we suggest point in the same direction. That is to say that the High Court judgment and the Environment Court judgment were correct to the extent that, if it's helpful, I might touch on legislative history although, with respect, it doesn't take us a great distance and then there are one or two other minor matters I might deal with, but depending how we go that could be a relatively brief overall set of submission on the basis the Court's had a chance to read out written synopsis.

So the overview point, if I can put it this way, and I'm going to have to explain some of this by reference to the structure of the Resource Management Act. There are three points on which the parties are agreed. The first point is that Buller Coal did not require a discharge permit and does not seek one. That's in the agreed statement and you've seen that at paragraph 5.

It's also agreed that the concerns of the appellant are about, in effect, industrial discharges to air from burning coal for industrial purposes, and you can find that in paragraph 12 of the agreed statement. Again there's no doubt that that's what their concern is. And importantly in its written submission, although not getting any air time this morning, the appellant also agrees at section 15 is the Court provision and the Act that deals with discharges to air. And we agree, as I say, with those propositions but there is a consequence of those propositions which is that the arguments advanced for the appellant are incompatible with those particular propositions.

If their concerns are about industrial discharges to air, by which I mean the discharges to air are greenhouse gases on an industrial scale, then the place where the Act deals with those is section 15. And section 15 now provides a prohibition unless there's a regional, or it always did provide it, there's a prohibition unless there's a regional rule or a resource consent. And the relevant kind of a resource consent is a discharge permit.

In terms of regional rules, section 70A and section 70B make it clear there is no regional rule that applies in this period, at least until there are national standards on the point, which there aren't. And in terms of discharge permits, they are controlled by sections 104E and 104F and they exclude consideration of greenhouse gas discharges. So the point that I'm making and which is, with respect, not really addressed in the way the case has been put to the Court for the appellant is, when there are concerns about discharges of contaminants to air and contaminants include what comes from the combustion of coal, there's a statutory path to follow. You have to get around section 15, you make an application under section 88 and section 87 for a discharge permit and it's governed by section 104E and 104F. Now that's the logic of what the Act and the structure requires but it's agreed that Buller Coal doesn't need a discharge permit and we say that, effectively, is the end of it.

What we do have is an elegant argument but, with respect, an unsound argument to try and sidestep that clear statutory path that goes from section 15 to section 104E, and what we say about that attempt to sidestep that path is that it ignores the language of section 104 and in particular the language that I wish to focus on when I come to that is the word "activity". It ignores the scheme of the RMA, which is a limited local authority role and distinct types of resource consent, remembering that Buller Coal and Solid Energy are seeking land use consents, not discharge permits. The very fact of the enactment of section 104E on the topic of industrial scale greenhouse gas discharges and the explicit policy of the 2004 amendment as stated in section 3 of that amendment.

And it's that attempt to sidestep that comes back to the question that was posed by Justice Young and which we've raised in our own submissions, that you finish up with something which is very curious and, forgive me for repetition, but if Buller Coal had decided to build a coal-fired power station at the mine and sought a discharge permit, greenhouse gas discharges could not be taken into account because of section 104E. But, says the appellant, they didn't do that. They're actually just mining the coal, not generating any greenhouse gases in that activity but because there's no power station being built there, the councils are required to have regard to the possibility of discharges by someone else, somewhere else before a land use consent can be required and, with respect, the Court hasn't had a convincing explanation of why Parliament could possibly have intended that outcome. That does take us into the territory of an absurdity which the Court should not attribute to the legislature.

CHAMBERS J:
Isn't the absurdity here, Mr Hodder that no national standard has been promulgated?

MR HODDER QC:
I'm not sure about absurdity Sir. It's certainly the point where we would respectfully suggest that the appellant's complaint lies. The appellant's complaint really lies against the fact that there hasn't yet been a national standard, not that the Courts below got the interpretation of the legislation wrong. Now there's no doubt that the Amendment Act and the new section 104E and section 70A are until and unless there are national standards. So there effectively are two regimes created by the 2004 amendment. The first one, in our submission, takes away the local authority role, except in relation to renewable energy applications where it can be a plus, and that's what happens in the meantime. Subsequently at some stage under section 43 there is the scope to make a national standard by Order in Council and then whatever that says will set the baseline for what it is that regional councils and the local councils may do.

ELIAS CJ:
Well that's all discharges.

MR HODDER QC:
Yes. And that's really what we're talking about here with respect Your Honour.

ELIAS CJ:
Well –

MR HODDER QC:
The only reason we're here –

ELIAS CJ:
Well I wonder. I mean as you rightly say the consent is, in fact, what consent is it, it's a land use consent is it?

MR HODDER QC:
Yes Ma'am. Under section 87 there are categories of consent, section 87 of the RMA, and the two ones that are most relevant for our discussion are (a), which is the

land use consent, which is what both Solid Energy and Buller Coal have sought, and I think it's (e) which is the discharge permit which is what you need for contaminants being discharged into air.

ELIAS CJ:
You're not seeking that?

MR HODDER QC:
No we're not seeking that.

ELIAS CJ:
So you're only seeking a section 87(a) consent.

MR HODDER QC:
Because we just want to mine the coal not to burn it.

ELIAS CJ:
Yes but in considering whether you should be granted a land use consent the considerations that the environment Court is required, or all decision makers are required to take into account, include the fact, don't they, that this is a non-renewable resource and matters of that sort, and really what's being put up against you is that it is a relevant consideration in deciding whether that land use consent should be granted, that the effect of consent now will be that the coal will be consumed now, rather than perhaps husbanded until a time when emissions can be better controlled, or they can be assessed in a national context as of benefit. Is it necessary to – are these not relevant considerations in the scheme of the Act?

MR HODDER QC:
A couple of points. The first is that the argument, the first time the argument has been put is when Your Honour put it to counsel as far as I can recall from the discussions in both the Environment Court and the High Court so the question of saving the coal for a day when there are better coal burning technology hasn't been put.

ELIAS CJ:

Well all I'm saying is that it could be a relevant consideration in the scheme of all the factors that have to be weighed up in the land use consent that consuming now is going to contribute to greenhouse effects.

MR HODDER QC:

Well that really is another way of putting the same point, that the appellants have put, which is that you go directly to the effects of a current form of coal combustion, even though that's not the activity that the applicant is engaged in and that's the point where we've taken issue with it. So I think the same answers we give to the appellant's actual argument is the same as the argument that Your Honour is putting to me. That when one goes back to the Act and its structure and goes to what the 2004 amendment achieves, what you don't finish up with is a situation where there is an activity, a first activity, that is to say in this case coal mining, where you take into account the consequences of a second, separate activity, which is coal combustion, for which, if it were in New Zealand, you would require a separate consent.

Now we challenged in our submissions, as the Court may recall, the appellant to produce an authority about that and we got two authorities, both of which had nothing to do with applications for consents. They're not resource consent cases. They're about planning and designations. So in our submission we still don't have that position. That matter has not been specifically and squarely addressed. It does fall for this Court but it doesn't have the benefit of any considered thoughts from the Courts below in relation to that except insofar as, in particular Justice Whata, addressed some of those matters in his judgment.

ELIAS CJ:

What are the range of considerations that the Environment Court can take into account in the land use determination?

MR HODDER QC:

Matters that go to the use of the land –

ELIAS CJ:

Yes.

MR HODDER QC:

In a more direct sense.

ELIAS CJ:
But they are to do with the exploitation of the resource here –
MR HODDER QC:
Yes.

ELIAS CJ:
– are they not. Are these just the matters to be found in section 7, 8 and 9, those considerations?

MR HODDER QC:
Well there's a range of –

ELIAS CJ:
7, 8.

MR HODDER QC:
The whole of part 2 is relevant at its broadest. The issue that Justice Whata confronted and which the Court itself you will have to confront is that there's no doubt that there's extremely broad language used in the Resource Management Act. There's also no doubt that the 2004 Amendment Act Parliament thought it was doing something meaningful and it's the reconciliation of those two propositions that creates the issue that's now before the Court.

CHAMBERS J:
Well isn't the answer to your conundrum though, Mr Hodder, possibly this? If you built the power station next to you and you needed a permit to discharge, what Parliament envisaged in 2004 is that there would be a national standard which would govern that and for that reason 104E limits what the consent authority must do. For all other matters it envisaged that 104 would operate in the normal way because it was thought that a national standard couldn't cover every minor discharge into the air. Now the answer to the conundrum is that those who are big dischargers, and who would normally need the permit for that, they have got a windfall at the moment because the executive has never got around to making the regulations that were envisaged. But that doesn't mean that for those who don't need a permit that this climate change is off the radar for 104 applications and considerations.

MR HODDER QC:

Yes and that's effectively the argument the appellant has been advancing.

CHAMBERS J:

But what, but that's the answer to your conundrum. You say well their complaint is against the Government but the answer is possible well they may have a complaint against the Government for doing nothing but there isn't an absurdity in the position at all.

WILLIAM YOUNG J:

Well let's perhaps assume that your client has applied for a combustion consent as well as the land use consent. The combustion consent goes first. It's granted because greenhouse gas emission is irrelevant. So you've got your consented plant beside the mine. You would be unenthusiastic I guess if objectors to the coal mining proposal came along and said, aha, we weren't allowed to raise this on the discharge application but we can raise climate change, greenhouse gas arguments in relation to the mining proposal.

MR HODDER QC:

I think that's a safe prediction. It's a different perspective of the same conundrum.

ELIAS CJ:

But if you go back to section 7, and if we're dealing with it simply as a land use application to extract a non-renewable resource, the decision maker has to take into account all the matters in section 7 which include the efficiency of the end use of energy –

MR HODDER QC:

Yes.

ELIAS CJ:

Which include any finite characteristics of natural and physical resources and in which the effects of climate change are identified as being of significance. Why is it not possible to consider, in relation to the extraction determination, that this is going to deplete a finite natural resource and contribute to the problems of climate change.

MR HODDER QC:

I think –

ELIAS CJ:
If it does.

MR HODDER QC:
Section 7(i), which Your Honour has just read in relation to the effects of climate change –

ELIAS CJ:
Well I know that's the effect of climate change –

MR HODDER QC:
Quite.

ELIAS CJ:
But one can extrapolate from this that Parliament was concerned about climate change.

MR HODDER QC:
And that's not in dispute. So the agreed statement accepts that climate change is a matter of concern.

ELIAS CJ:
Yes.

MR HODDER QC:
The question is who's going to do it essentially and that's the fundamental question which I think, probably most straightforward, I come back to by reviewing the Amendment Act and in part, just before I forget Justice Chambers' question, we will be saying and submitting that Parliament contemplates the two regime process, not that there's some inappropriate gap or interregnum windfall as Your Honour put it in the period. Both section 70A and section 104 stated in quite plain terms –

ELIAS CJ:
Sorry section 8?

MR HODDER QC:

These are the new provisions inserted by the Amendment Act.

ELIAS CJ:

Yes.

MR HODDER QC:

That's section 70A about rules and section 104 about consents. Both of those are stated in plain, effectively unqualified terms. There is then a permissive section that follows in each case 70B and 104F that says if regulations are made, then the local authority has the power to do something up to the scope of those national regulations. It's not the same thing as in some cases where the Court may have been concerned, or Courts have been concerned that there's clearly a gap in the process at the administrative level where they've just fallen between the cracks. Here it's perfectly possible for section 70A to operate without 70B being in place and likewise 104E and 104F.

GLAZEBROOK J:

Can I just put the argument as I think you're putting it and then, as I understand it, and then see whether this is what you're arguing. That what – reading the purpose requirement and the wording, local authorities can't take account of those emissions that would require a discharge permit, either by the person asking for consent or consequential users. So that what you're saying, as I understand it, is that what, leaving aside the extraterritoriality, so let's assume the coal is being burnt in New Zealand, but if it was being burnt either by the person asking for consent or a consequential user and would, if it was, require a discharge permit then the purpose of the Amendment Act is to take that out of the purview of local authorities?

MR HODDER QC:

Yes that's the proposition on the basis of a consequential user is a user other than the person seeking the land use consent.

GLAZEBROOK J:

Exactly so it's either – because that would fix up your conundrum and also the way that it was put by Justice Young in that you wouldn't be able –

MR HODDER QC:

Yes.

GLAZEBROOK J:

– to slip those two off so you're only, you're looking at the end use and seeing whether it would require a discharge permit, leaving aside the extraterritoriality because obviously burning coal in China does not require a New Zealand discharge permit.

MR HODDER QC:

Yes Ma'am. And the key to that, we say, remains the idea of the concept of activity under section 104. So whilst – perhaps two points I should make at this stage, they're I think reasonably clear in our written submissions. The first is that we say that the word "activity" in section 104 has a meaning. So when it says activity it means the activity, the applicant is going to do something. What is the something we're going to do? We're going to mine coal. So is that a limiting word. In our submission it is a limiting word, at least in circumstances such as we have here, where there is a plainly evident further activity, clearly contemplatable, which may or may not be regulated under New Zealand law, sorry, may not be regulated depending on whether it's under New Zealand law, that would certainly require a discharge consent, and we don't know what the position is in some overseas jurisdiction where the coal may ultimately be combined. So we say that in those circumstances, which is why we challenged for authority to the contrary, there's no authority that says if you have activity 1, and they're seeking a land use consent, you take into account the consequences of activity 2 which requires a discharge consent that nobody is asking for.

GLAZEBROOK J:

Yes although the way I put it you don't need that argument, you can still have consequential effects taken into account in anything other than – or consequential effects taken into account except where those consequential effects need a discharge permit, which I must say I find a more attractive argument than trying to limit the matters that can be taken into account as consequential matters.

MR HODDER QC:

In the end, I imagine for our purposes it doesn't make a lot of difference –

GLAZEBROOK J:

Yes.

MR HODDER QC:
– but I appreciate the subtlety, and the argument is clearly open. It's not quite the way we put it in our written submissions –

GLAZEBROOK J:
No I understand that.

MR HODDER QC:
– but I accept it's there.

GLAZEBROOK J:
It was really the first time, the first time I'd understood it that way was the way that you put it in terms of the discharge permits which, I must say, I found an argument that was possible to marry both the purpose provisions and the wording of the statute, in a way that isn't quite so obvious in that more broad sense and also, in terms of environmental effects it's very limiting, the activity to just exactly what you're doing, doesn't seem to me to be the way that broad language is interpreted in saying what the effect of the activity might be.

MR HODDER QC:
I probably can't disagree with that and don't need to, so perhaps there's nothing else I have to say on that. Perhaps one other thing, to go back to the fundamentals about why we're here. Why we're here is because the appellant is concerned about industrial scale discharge greenhouse gases from burning coal, i.e. discharges to air of contaminants, in the language of the RMA. That's why we are here and, in our respectful submissions, why we have a 2004 amendment in front of us is that the debate about that is not a matter for local authorities, at least not until there's some national standards in place and those go to the matters that the Court has seen reference to in terms of consistency and expertise and those are reasons why those matters are taken away from local authorities.

So the key point actually comes back to the decision making processes under the Act, rather than the substantive merits of greenhouse gas discharges and particular forms of coal combustion. What we say is it's absolutely plain, from the amendment

Act, that what was trying to be done and we say, successfully done, was to take out from the local authority purview, questions about discharge gas, so GHG discharge controls, until and unless there were national standards and that, as a point that Justice Chambers made, there had in fact been a series of cases where there had been a lot of debate about that, including one in Taranaki, they'd been mostly industrial developments that preceded this amended, had been attended by reasonably complex hearings and the difference which you've actually got in the case before you, is whether or not you have lot of evidence about climate change.

So the way this case has proceeded so far is it's gone through a substantive hearing without evidence of climate change, based on the Environment Court and High Court rules, it's not sort of on hold until we find out whether it requires to back again and do that again but the logic underpins the amendment we say, undoubtedly was that that kind of debate is the very kind of debate that Parliament didn't want to have in local authorities who were making all these consent decisions, at least until they had the benefit of national standards. As the Court will have seen from our written submissions and it's in the materials –

CHAMBERS J:

That's where I would disagree with you in the sense – I'm merely testing propositions but "at least until", rather, isn't the reason Parliament thought that was because they envisaged very quickly that there would be national standards. Otherwise there's no logic about removing climate change which is a major effect presumably, of discharges into the air. There would be no reason for removing that, except for the fact there was going to be a national standard in place.

MR HODDER QC:

Well that –

WILLIAM YOUNG J:

Maybe they thought it was an inappropriate debate anyway, at local level.

CHAMBERS J:

No but it's going to be at local level because they envisaged that councils would make rules to conform with the standard, didn't they?

MR HODDER QC:

But the standards, obviously we don't know what the standards are because they haven't promulgated but the standards, one assumes, are meant to overcome the problem that this Act is designed to deal with. That is to say that you don't have to have these debates because national standards decided what and how much and how you measure these matters but I think the response to the proposition Your Honour Justice Chambers has put to me about, Parliament clearly intended in effect not to be an interregnum, is not really consistent with the way in which the legislation is written.

Had it been the case, then section 70A would not have come into force until there were national standards in place and likewise, section 104E but they come into force immediately. Not only that, they revoke all existing regional rules that address the question of climate change and that's the effect of sections 8 and 9.

So the idea was that, apart from some transitional protections in section 8, section 9 makes it clear that the two functions which local authorities have that deal with climate change, they have regional rules and I'll come to this shortly but effectively, they're entitled to make regional rules that deal with climate change under section 30 and it's part of their responsibilities under section 68(3), both of which are mentioned by the way in section 70A. And their other role is in relation to resource consents and what we say is, Parliament clearly contemplated that if there is going to be problem about industrial scale discharges of contaminants, it would arise under the section 15 through to section 104E path and, at this point, 104E would bite and the discharge debate would go away until such time as national standards were in place and it's that which we say the appellants seek to sidestep and we say the sidestep is simply inappropriate.

So can I go back to the beginning of the Resource Management (Energy and Climate Change) Amendment Act 2004? We provided a loose blue copy but it's also in the main bundle whichever is more convenient to members of the Court. Plainly enough from the title, it was dealing with two topics, energy and climate change, in particular dealing with renewable energy and climate change and there's some overlap and there's some separation between them.

Clearly, what was contemplated was that there were going to be some new provisions about energy and in particular renewable energy and there were going to

be some new provisions about climate change and effectively this case is about how effective the climate change changes were.

So, it was going to come into force promptly, so back to the section 8 and 9 points that I was just addressing in response to Justice Chambers' point. Section 3 is the purpose. My learned friend seeks to discount the purpose by saying well, it's in very broad terms but what we say the Court is entitled to do is to treat the purpose provision, section 3, as disclosing not just what but why the substantive provisions are there.

So what my learned friend says effectively is, they've misdescribed the what. We say what this is partly doing is describing the why. Now the first part, let us say paragraph (a) of section 3 of the amendment, is dealing with the matters that largely finish up in section 7, efficiency of the end use of energy, that doesn't require addressing greenhouse gases, effects of climate change depends on the meaning of "of" and it's now common ground that "of" is different from "on" and of the things like floods and higher tides, it's the downstream effect of climate change not the causes of climate change –

ELIAS CJ:
Are you going to take us to the definition of climate change in the RMA?

MR HODDER QC:
I can.

ELIAS CJ:
Well it's just that looking at it, if it were wholly what happens as a result of climate change, it's a little difficult to see that there is such an expanded definition because it is change that's attributed directly or indirectly to human activity that alters the composition of the global atmosphere and that is in addition to natural climate variability observed. What's the point of that expanded definition, if it's just how the climate is changing and how you have to respond to that?

MR HODDER QC:
Well in effect the definition, it seems a perfectly appropriate definition with respect, is neutral to the effect of whether it's talking about what causes it about what comes

from it. That's the work that the words "on" and "of" are doing and, as I say, it's now common ground –

ELIAS CJ:
Well why is it important to attribute it directly or indirectly to human activity if the human activity that contributes to it is not the subject of concern under the RMA?

MR HODDER QC:
I'm not entirely sure I've grasped that question Your Honour?

ELIAS CJ:
Well I just don't see that it's nec – if it's wholly whatever comes your way, you have to take into account that the tides are rising, so you don't want to have too much coastal development, why does it matter whether it's attributed directly or indirectly to human activity?

MR HODDER QC:
In that context it doesn't but the reason it's a focus of human activity is revealed by the rest of it, it's attempting to identify something which goes beyond natural changes. That's the only purpose I can see in the definition so it's –

ELIAS CJ:
Well how is a decision maker – you say decision makers have to take into account only what is happening in terms of climate change.

MR HODDER QC:
The effect –

ELIAS CJ:
Isn't that your submission?

MR HODDER QC:
The effect of the Act is that, well the effect of the Amendment Act was that local authorities were required to take particular regard to the effects of climate change, of climate change, in addition to other matters. So to the extent they weren't having a regard to the future and saying there maybe rising tides or greater flooding

frequencies that was the matter of particular regard it wasn't inconsistent with anything that was there before, it was a focus of attention on those consequences.

ELIAS CJ:

Well I'm not sure the particular regard needs to be so confined that the land use consents which may contribute to the human activity altering the composition of the global atmosphere, isn't directly contemplated, subject, of course to the restriction in relation to discharges into air which it's envisaged will be dealt with by way of the national standards.

MR HODDER QC:

Our written submissions don't address the on/off point of that really it's still an issue because it wasn't, it isn't an issue that's part of the appellant's case, but I can as I go through the amendment and some of the legislative materials point out where the distinction is clearly identified in that context there. But the reason that the appellants agree is because it is clear from that material, including also some of the ways in which there are definitions in the climate change response legislation, that there is a distinction drawn between the effects on climate change and the effects of climate change, that is to say the upstream and downstream, there's climate change itself as a defined set of circumstances. Whether the definition is adequate or difficult is not a matter that really has been raised prior to this in the proceeding.

ELIAS CJ:

If you look at the definition is it such a stretch to say that decision makers have to take into account, or pay particular regard to, human activity that alters the composition of the global atmosphere.

CHAMBERS J:

And just to add to that, doesn't your client's activity of mining, or doesn't it potentially contribute indirectly to the alteration of the composition of the global atmosphere in that the only reason for mining coal is ultimately to burn it?

MR HODDER QC:

In order, the Chief Justice's question the answer is no. To Justice Chambers' question, well that's the whole point that the appellant is making. That it can take into account indirect propositions.

CHAMBERS J:

Well that's in the definition that's why I was picking up the words the Chief Justice had just read to you from the definition.

MR HODDER QC:

And with respect to both of Your Honours you're enlivening the definition to a role it doesn't have. It's supposed to be a statement of a phenomena, not an active proposition.

ELIAS CJ:

You've got to read the whole statute, don't you –

MR HODDER QC:

Well, of course but –

ELIAS CJ:

Yes.

MR HODDER QC:

But in terms of what the definition is doing it is trying to define a phenomenon. Other provisions are just saying what that phenomenon means. Some say you take into account what's causing the phenomenon, some say you take into account the consequences of the phenomenon occurring. How the phenomenon is defined doesn't really affect those operative provisions for our present purposes.

WILLIAM YOUNG J:

It's also, in a sense, a legislative acceptance of the phenomenon.

MR HODDER QC:

Yes.

ELIAS CJ:

Well except that definition looks to what causes it and –

MR HODDER QC:

For definition purposes?

ELIAS CJ:

– decision makers have to take particular regard if you lift that up and put it into section 7.

MR HODDER QC:

Or of section 3(a)(ii), the same language is there, but that's the questions of , so the effects of. So the effects of the phenomena. The phenomena, I'm sorry to repeat myself –

ELIAS CJ:

Well –

MR HODDER QC:

– that's defined.

ELIAS CJ:

I just wonder though whether the phenomena is not human activity that alters the composition of the global atmosphere. I mean that does seem to be quite significant in terms of the argument on territoriality.

MR HODDER QC:

With respect the submission is no. The definition has a number of elements to it, the fundamental one of which is a change, that is to say a physical change to climate, to which you have attached a causation aspect. It simply goes to define the phenomena. So when one comes to the phrase "effects of" it is the effects of the phenomena occurring, that happen to be caused in a particular way and has a particular consequence and clearly it's framed in terms of a global atmosphere because the kind of climate change that is the source of international governmental concern does have global implications. That's the nature of the phenomenon.

I was back at – I can go back to section 3, having provoked really with section 3(a)(ii) reference. I'm not sure I can add very much to that but that's the answer to it. So (a)(i) the efficiency of the end use of energy, and if I can just flag. We say that's relevant to things like transport. So the example my learned friend says, well if you're going to build one house some distance from the city, that's one thing but if you're going to build a suburb, that's a different thing. Well, the answer is yes it is. In that case the efficiency of the end use of energy among other things.

GLAZEBROOK J:

How does it go to that, I'm sorry? I –

MR HODDER QC:

How efficiently are you using energy?

GLAZEBROOK J:

Well it's a consequential effect of the activity.

MR HODDER QC:

Yes, and we don't disagree with that, but it goes to what's called urban form and various parts of the RMA jurisprudence acknowledged in the High Court judgment as well.

GLAZEBROOK J:

It's just that I don't see that as being the efficiency of the end use of the energy because I would have thought –

MR HODDER QC:

It's not a major point for my argument. I –

GLAZEBROOK J:

No, no it's just I just thought –

MR HODDER QC:

– obviously see it differently, but I do see it as being efficient to have cars travelling less distance if you're planning a subdivision. I don't have any – and we don't attempt to interfere with that process that is undertaken by councils but the point about it is, it's not about greenhouse gases, it's about the use of energy.

GLAZEBROOK J:

Well isn't it about both? Well you say it's just – well I suppose, for myself, as you don't need a discharge permit, I would have thought you can take those into account in terms of emissions but –

MR HODDER QC:

Yes, well that may be the point why I'm taking a different perspective.

GLAZEBROOK J:

Yes, I think it probably is when I think about it.

ELIAS CJ:

What about the ethic of stewardship?

MR HODDER QC:

It's a fine phrase.

ELIAS CJ:

Yes. I'm just thinking about these terms in section 7 but why is it not consistent with the ethic of stewardship to worry about the implications of climate change in considering a land use consent to mine a non-renewable resource?

MR HODDER QC:

At one level it probably isn't. If we go back one step, the ethic of stewardship is one of those general provisions that applies across the entire RMA. The issue that we submit this case is concerned with about who makes the decision and who has to take it into account, and the proposition for the respondents and, in particular, Buller Coal in my case, is that this is about the decision maker, and we say that when it comes to making national standards, the ethics of stewardship will be factors to be taken into account under section 43, which is where you get the national standards in the form of regulations made. But we say it doesn't extent to confer a role on local authorities, which the whole point of the 2004 amendment was to take away, at least until there were national standards. Now I appreciate –

ELIAS CJ:

Well that's for discharges, but what about for land use consents?

MR HODDER QC:

Well if we're talking about something other than discharges I don't have a context in which to respond but in general terms, they must be relevant but to the extend to the discharge permit track, they get into the conflict, we say, with the structure of the Act as to who decides it and how you apply for it. How do you apply for activity consents?

So I need to make it clear, there is no part of the respondent's case that says climate change is not a problem. There's no part of the respondent's case that says climate change is not a problem. There's no part of the respondent's case that says that climate change has been excluded from the purview of the RMA. The question is, how is it dealt with by the various organs that have responsibilities under the RMA? And what we're saying is that the 2004 amendment was a clear indication that the effects on climate change of particular activities would be dealt with by either regional rules or discharge permits and that they would exclude consideration of climate change until national standards were in place. That's the short point.

And that really brings me to somewhat circuitously perhaps to 3(b) of the Amendment Act which says reasonably plainly, "The purpose of this Act is to amend the principal Act to require local authorities to plan for the effects of climate change" which goes back to the discussion I was having with the Chief Justice a little earlier, and we say the use of the word "of" there is clearly in contract to "to", which was the most relevant one. "The purpose of this Act is to amend the principal Act to require local authorities 'not' to consider the effects on climate change of discharges into air of greenhouse gases." And as we will see, that's subject to two exceptions which the amendment itself provides for.

The first, which is the one that this Court dealt with in the *Genesis Power* case, as did the Court of Appeal, is where there is an application which is designed to utilise renewable energy in which case it is a positive tick because you're using renewable energy rather than something else.

And the second is when section 104F comes into play, where there are national standards in place and the local authority can then proceed to do something consistently with those, that is to say, no more or less restrictive than is necessary to implement the regulations or to write a rule that's no more or less restrictive under section 70B.

Now we say, that purpose statement cannot be ignored and the appellant's argument must ignore it because it requires councils to do the exact opposite of the purpose statement says. What the appellant's want is a conclusion from this Court that says local authorities will consider the effects on climate change of discharges in dealing with greenhouse gases, outside the two exceptions provided in the Amendment Act

itself, and we say they haven't come up with a persuasive reason why the Court should take that surprising step.

WILLIAM YOUNG J:

Well the purpose statement wouldn't be true would it?

MR HODDER QC:

Would it be completely contradicted?

WILLIAM YOUNG J:

Yes. So it may be based on an assumption as to how broad an approach should be taken to effects in – associated with activities.

MR HODDER QC:

Yes. Your Honour's reference to assumption I think underpins our submissions. We say Parliament assumed that the role of local authorities in relation to industrial scale levels of discharges of greenhouse gases was covered by making regional rules under section 30 and section 68, or in granting resource consents where there were discharge permit applications and we say that's a perfectly sensible thing for Parliament to have thought because it correctly defines the way in which the Act works.

So what have they done? They have attacked, as it were, the provisions dealing with regional rules, which is where regional councils can make rules about climate change and they have provided an explicit provision in section 104E, which forms part of the suite of matters that go to decisions on resource consents, and the argument for the respondents is that you cannot read section 104 in isolation. It must be read with all the other provisions from about section 104 to 119, which impinge on decision making on resource consent applications and it must be read sensibly with sections 104E and F. If you do that you finish up with a narrower view of activity that – where I was discussing in part in the exchange with Justice Glazebrook.

So then we turn to the substantive provisions. We start with section 6 of the amendment which inserts new sections 70A and 70B and the reason for this comes from section 30 of the Resource Management Act itself.

GLAZEBROOK J:

You weren't mentioning section 5?

MR HODDER QC:

Sorry section 5?

GLAZEBROOK J:

Of the Amendment Act.

MR HODDER QC:

Sorry, quite right.

GLAZEBROOK J:

You didn't have to mention section 5. I just wondered whether you had anything to say about it.

MR HODDER QC:

They are the reflection of section 3(a). The purpose statements 1, 2 and 3 there are effectively reflected in those changes to section 7. So, each of those three matters carry through again. So I've nothing additional to say about that, it's just that that section 5 is what gives effect to section 3(a). That's the proposition.

Your Honour's quite right. I skipped over that without saying what I meant to say.
In terms of section 6, it is driven by the terms of section 30 of the Amendment Act. Now the RMA is a rather extended piece of prose and we've included quite a lot but not necessarily everything in the tab inside the bundle, but I think we have included section 30 in the bundle, which one finds then at tab 13 of the large bundle. And the relevance of section 30 is in section 31 we find this power about making rules and control. In paragraph (d)(iv) there are references to discharge of contaminants, and likewise –

GLAZEBROOK J:

Sorry, I think I've just missed – you're in section 31 still?

MR HODDER QC:

Section 30(1), Ma'am. Section 30(1)(iv) and paragraph (f), you'll see references there to discharges of contaminants. That's the power and responsibility that's

conferred on regional councils. And then if we've included section 68, which I hope we have –

ELIAS CJ:
We don't include climate change, because in section 104E the rules are set for local or regional effects.

MR HODDER QC:
Well, that particular language you're looking at in section 30(1) hasn't changed by virtue of the 2004 amendment.

ELIAS CJ:
No, but the effect of section –

MR HODDER QC:
There's a superimposition to constraint it.

ELIAS CJ:
Yes, yes.

MR HODDER QC:
That's what I'm really building up to. So section 30(1) is also reflected in section 68(3) which says that in making a rule the regional council shall have regard to the actual or potential effect on the environmental activities including in particular any adverse effect. Then when one comes back to section 70A in the Amendment Act, you'll see that it says, "Despite section 68(3), when making a rule to control the discharge under greenhouse gases under its function under section 30(1), the regional council must not have." That's the context for that particular provision. Regional councils have an ability and a responsibility to make rules that deal with discharges. What section 70A is doing explicitly is to superimpose this constraint on that ability. So that takes that away from regional councils. Local territorial councils have no role –

ELIAS CJ:
Because the rule-setting is going to be done by national standards.

MR HODDER QC:

By national standards, yes. So that's what 70A does. 70B, as I discussed with Justice Chambers, if regulations are made under section 43 then the council may make rules necessary to implement those regulations provided they're no more or less restrictive than, so in effect you're going to be given a blueprint of regulations and local authorities are going to have to replicate them, that's what it effectively amounts to.

Now, I'm pretty sure we don't have section 43 in our extracts from the Resource Management Act under the bundle, but it's a wide, general regulation making power which says the regulations will be called national environmental standards.

So then we turn to – I'll do this briefly, if I may, before the lunch break, at least introduce it – section 7, the next operative provision. Now, this is focused on sections – it inserts matters of Part 6 of the Act, the RMA that deals with resource consent processes and it's in a body of sections, as I mentioned before, that run from about section 104 through to section 119, all of which have various matters that have to be taken into account by decision makers dealing with resource consents.

CHAMBERS J:
Does any provision of the 2004 Act affect section 104, do you say?

MR HODDER QC:
Not directly, but we say 104 has to be read so it's consistent with 104E and F.

CHAMBERS J:
Well, isn't that another way of saying that in effect 104 has been amended by side wind?

MR HODDER QC:
Well, actually, there's two parts to the question. I'll go back. There's no explicit textual amendment of section 104 by the 2004 amendment. That's common ground. We say that either because of the activity constraint, section 104 never extended to the kind of things we're talking about now, where you have another activity that's a downstream activity that requires its own consent. That's our activity 1, activity 2 point. Or alternatively if we have to we say in effect you have to read section 104E in a way that isn't destroyed by section 104 and therefore if there has been an effective amendment, yes, we go that far.

ELIAS CJ:

But the amendment is only in relation to consents for discharges.

MR HODDER QC:

Yes.

CHAMBERS J:

No, but it isn't, though, is it, because it – well, I realise your activity 1, activity 2 argument but it is, in effect, it affects potentially all applications for resource consents.

MR HODDER QC:

Well, I'm not sure that it does. What we have before us is the particular sort of quite special example that the real reason we're here is because all the matters would normally go into a discharge permit claim, but because we don't need a discharge permit claim it's all being loaded onto a land use consent claim. That, we say, is where there's been a distortion of the statutory process. So in the ordinary course, as I was saying at the outset, if you have a concern about discharging to air then you start with section 15 and work your way through the process and you'll finish up at section 104E. Here we have a concern about discharges to air but the appellant says, "No, no, don't start with section 15. Let's start with section 9 and go through a land use consent process and get to section 104, and we'll take refuge there," and we say you can't do that.

CHAMBERS J:

If the Amendment Act had not been passed, and let's suppose for the sake of argument the coal had been going to be used in New Zealand, do you say that the consent authority, when considering the land use consent to mine the coal, could or could not take into account the fact that the coal was later going to be burned in New Zealand?

MR HODDER QC:

The primary argument is that it could not because of the conundrum we described before.

WILLIAM YOUNG J:

There is some authority on that, that where there's activity 1 and activity 2 and both require consents the environmental impacts in relation to activity 2 are dealt with when activity 2 is subject to the consent process.

CHAMBERS J:

Except it's slightly odd, isn't it, in that you, by saying, "Oh, well, we don't look at activity 2. We get all the coal out of the ground," which then makes an absolutely compelling case, one would have thought, the grant to consent for activity 2 after all the coal is now out of the ground.

MR HODDER QC:

Well, the practice as I understand it is that these applications tend to be dealt with together, but the point that we would respond to as re the one that Justice Young made, that if you took – it depends which order you take them in, you finish up with an odd argument, so if you go through the entire process with the coal combustion consent and then you get past that and breathe a sigh of relief then it goes through the land use consent and you go through it all again with different evidence, that just doesn't seem to be the way in which a coherent statute should work.

COURT ADJOURNS:1.03 PM

COURT RESUMES: 2.20 PM

ELIAS CJ:
Yes Mr Hodder.

MR HODDER QC:
Thank you Your Honour. There are perhaps two matters I might mention before I resume my working through of the 2004 amendment. I had forgotten, when the Chief Justice was asking about the question of minerals and whether they might be used now or later, that in the Act, that is to say RMA, section 52A has something to say about that. You'll find that, I'm hopeful, in tab 13 of the main bundle and the extracts in the RMA that are there.

Section 5 is the main purpose description for the Act. That is to say, "The purpose of this Act is to promote the sustainable management of natural and physical resources." Then it goes on in subsection (2) to offer a definition of sustainable management –

GLAZEBROOK J:
I'm sorry, I think I'm on the wrong tab.

MR HODDER QC:
Tab 13 of the large bundle Ma'am.

GLAZEBROOK J:
Thank you.

MR HODDER QC:
And we're looking at section 5 which is page 68 of the statutory page numbers.

GLAZEBROOK J:
Thank you.

MR HODDER QC:
So subsection (2) says, "Means managing the use, development and protection of natural and physical resources," et cetera, "while (a), sustaining the potential of natural and physical resources (excluding minerals) to meet the reasonably

foreseeable needs of future generations," and as I understand it, that has been interpreted by the Environment Court and reads in the ordinary sense so that minerals are outside the sustainable proposition, sort of by definition minerals aren't sustainable –

ELIAS CJ:
Oh, I see, yes, of course, yes, yes.

MR HODDER QC:
Yes. It's possible that the drafters of the Act didn't have a mind, the idea that there would be different technology to deal with it but minerals are by definition a wasting asset, that seems to be how that's been dealt with. The second section –

ELIAS CJ:
Or there's "or at rate", in the main part of subsection (2) which may have some application because this is just "while" on the other hand, so there is a –

MR HODDER QC:
It may be in play, as my friend says.

ELIAS CJ:
Yes, yes.

MR HODDER QC:
Although we would suggest that the general idea is that minerals are dealt with by the Crown Minerals Act regime, on which topic there is no particular specified criteria about how those approvals under the Crown Minerals Act are determined, there's a broad discretion to the Minister.

GLAZEBROOK J:
Certainly the 1991 minerals programme for coal says it doesn't take into account environmental factors at all because that's for the RMA and the health and safety in employment legislation. I don't know whether that's the most recent mineral programme for coal, given that I just looked it up quickly?

MR HODDER QC:

Well I confess, I haven't looked at it so I can't take the matter further than Your Honour has, although that does imply the –

ELIAS CJ:

I suppose coal –

GLAZEBROOK J:

Because I was wondering whether it did take into account sustainability and management but it doesn't seem to in that particular plan, whether that's the latest one, I've no idea – sorry, minerals programme, whether that's the latest one, as I said, I don't know.

WILLIAM YOUNG J:

It is addressed to obtaining an appropriate return from the resource –

GLAZEBROOK J:

Yes.

WILLIAM YOUNG J:

– which may possibly –

MR HODDER QC:

That's the general thrust –

WILLIAM YOUNG J:

– contemplate this, whether it's better to leave it in the ground or dig it up now?

GLAZEBROOK J:

But only return rather than environmental effects, it seems to be the way it's been interpreted, in that particular plan.

MR HODDER QC:

Yes. Well as I say, I can't take that matter further at this stage –

ELIAS CJ:

Well the evidence in support of the land use application though, presumably includes the economic return both for the applicant and the country, matters of that sort, doesn't it?

MR HODDER QC:
I believe so.

ELIAS CJ:
Yes.

MR HODDER QC:
I must say, I'm not involved in the substantive hearing –

ELIAS CJ:
No, oh, I see. Yes, thank you.

MR HODDER QC:
– but my learned friend Mr Williams is, so if there are questions I can divert them to him.

ELIAS CJ:
Yes.

MR HODDER QC:
Now the other section that I was – is relevant, as I was saying before the luncheon adjournment, is section 91 of the Act and I again think we may have that in the extract as well, that's on page 223 of the statutory page numbering and that simply says that, "One can defer an application for consent if the authority thinks there will be other consents and other applications that are relevant for it." So it's trying to avoid the activity, one coming first and being dealt with before activity two comes along for a consent proposition and it's designed to try and achieve.

There are also provisions in the Act where if certain matters fall before a regional council, one council and other matters fall in front of another council, there are scope for joint hearings and those provisions are also found in part 6. So in many situations, the worst activity one, activity two scenario won't happen but of course that takes us back to the basic proposition, if we have in our conundrum, activity one and activity two consent sought for at the same time in the same forum, then what the appellant says is well, why you can't take into account all this climate change effect in relation to the discharge air which is what people are really concerned about,

you could take it all into account in relation to land use consent by virtue of section 104 and we say that can't be right and if it can't be right then the appeal will fail.

CHAMBERS J:

What if activity two doesn't need a resource consent, for example, cars?

MR HODDER QC:

Yes, that gets you into the more complicated area of diffuse emissions that Justice Whata was talking about and our primary submission is that you just don't there, that activity is the activity that flows directly from what you are doing, with only a very limited penumbra of downstream things that would happen from it but our submission –

GLAZEBROOK J:

But that's just not the way the Environment Court works because they are always looking at the effect of traffic on

MR HODDER QC:

Well I was about to say –

GLAZEBROOK J:

– supermarkets, et cetera, so it just can't be the case, can it?

MR HODDER QC:

We do see – well, as the submission is, that those are activities within the penumbra I'm talking about. Now they're described differently in our submissions than the way they are by Justice Whata, they amount to the same thing, that where there isn't something that's separately consentable like vehicle emissions, then they will be regarded as part of the original activity. So they're a consequence of the original activity and they're not covered by any other regime, as opposed to what we here, where activity one is covered by one regime and if it's at least in New Zealand, activity two is covered by a separate regime –

CHAMBERS J:

Yes but what if activity two –

GLAZEBROOK J:

Where did you get that from the –

CHAMBERS J:

– is overseas?

MR HODDER QC:

I'm sorry?

CHAMBERS J:

What if activity two is overseas?

MR HODDER QC:

Well then you come back to the territorial proposition that says that's a matter of international committee. I'll be coming later to some aspects of the CCR Act but the basic proposition of Kyoto is national sovereignty and international co-operation and a degree of trust but not that we make decisions here, as I think my learned friend said, we don't make decisions here about whether they can burn coal in China or India.

CHAMBERS J:

Yes but we're very much affected by whether they burn coal in China and India.

MR HODDER QC:

And we're dependent, under the Kyoto regime, on people in those jurisdictions taking steps in their own jurisdiction about activities but pre-empting them by refusing to sell them coal is not one of the things that Kyoto contemplates.

GLAZEBROOK J:

Can I just go back to the activity –

MR HODDER QC:

Yes.

GLAZEBROOK J:

because if you are looking at a supermarket for instance, the activity of building the supermarket does not create traffic effects but the activity of running the supermarket does create. So it does take into account consequential economic effects?

MR HODDER QC:

Yes and as does a mine, you take into account the transport associated with mines as well.

GLAZEBROOK J:

Well that's right but what I don't understand is where you say the activity stops?

MR HODDER QC:

At the point where you've gone from transport to a completely separate activity to process or take under some – you're doing something different with a particular resource, in this case the coal. So there's no definition of activity in the Resource Management Act but it's pretty clear from the early sections that activity simply means you're going to do something with something and here, you're doing something with the ground by digging it up and then you're going to do something with the coal once you've got it. That's a separate activity because you're going to do something different with it and what we say is because there's – inevitably, there's bits in between. We say the transport, after you've dug it up, is part of the same activity and obviously there's room for somebody to say well, why don't you go the next step and say that then burning, it's part of the same activity and we say, as a matter of logic and the structure of the Act, that has a separate regulatory process provided for in the Act to deal with it and it is dealt with in that way.

GLAZEBROOK J:

So it's only if there's a separate regulatory process rather than it being just a general effect of the activity?

MR HODDER QC:

Well there could be. I mean, Justice Chambers' point is right, there is not separate regulatory process in New Zealand for export. So it's not going to be universal.

GLAZEBROOK J:

Well I think export is slightly different, it's just I'm trying to get what the submission is in terms of where activity stops. Does activity only stop if there's another regulatory consent necessary?

MR HODDER QC:
That's one of the boundaries.

GLAZEBROOK J:
Or does it just generally stop?

MR HODDER QC:
There's got to be boundaries drawn. One of the boundaries is drawn by separate activity. That's the submission.

GLAZEBROOK J:
Where's the other – I'm just having difficulty because is it a separate activity only if it happens to – say, for instance, you're building a block of flats and some shops, that's not a separate activity then?

MR HODDER QC:
I'm sorry which –

GLAZEBROOK J:
I just don't understand what your boundary of activity is that you say. If there's a second activity that requires another consent then that's a second activity is it?

MR HODDER QC:
Yes.

GLAZEBROOK J:
Is that the submission?

MR HODDER QC:
That's –

GLAZEBROOK J:
I'm just checking what the submission, is it not making a comment.

MR HODDER QC:

Well the submission is that there's a boundary around activity which is not easy to define. One of the boundaries is another activity, that's the easy one. In the area of the per number that I was talking about before, those will be things that are intimately connected with the original activity, so if one's building a supermarket the transport effect of that will be part of it. Likewise a mine, the transport and dust associated with mining activities will be part of the activity. Now there's going to be a question of causation, possibly a fact around that, but that's the central submission.

ELIAS CJ:

The terms of section 7 are to do with functions and powers in relation to managing the use, development and protection of natural and physical resources.

MR HODDER QC:

Yes I see that.

ELIAS CJ:

Is not the natural and physical resource in issue here for coal?

MR HODDER QC:

Well there are going to be a series of degrees of generality. The first resource is the land. Within that, yes, the coal would be a resource. The air is a resource.

ELIAS CJ:

Yes, well the Act does seem to be concerned with the use, development and protection of such resources. It's really just a follow up question to what you were being asked by Justice Glazebrook about what is the activity.

MR HODDER QC:

Well that language is describing the general purpose of the Act, that is to say the whole purpose of the Act –

ELIAS CJ:

Yes, I understand that.

MR HODDER QC:

– section 5 is that –

ELIAS CJ:

But is there something in the consent that is being sought here which suggests it's only confined to disturbance of the land and it's not concerned with the coal resource?

MR HODDER QC:

Yes that's we attached to the end of the submissions the precise rules under which consent had been sought.

ELIAS CJ:

Oh yes, yes.

MR HODDER QC:

They're there in the appendices to our written submissions and they focus on a range of aspects of the mine but they don't go to the, to what one does with the coal itself. They are focused on the immediate earth quirks, vegetation disturbance and associated habitat issues, access, noise –

ELIAS CJ:

Well these are the rules, are they, that are engaged –

MR HODDER QC:

Yes. And the purpose of those rules is to achieve the language Your Honour has just been reading to me from section 7.

ELIAS CJ:

Is there anything in here – is it about –

MR HODDER QC:

It's about the activity of mining. Not what you do but what you've mined.

ELIAS CJ:

No I understand that. It's not just about disturbing the earth though. There must be some sense in which the coal itself is the object of the exercise. I just can't see that initially looking at these rules.

MR HODDER QC:

It’s the underlying premise of the mining itself. What are you mining for? You’re mining for the coal –

ELIAS CJ:
Yes.

MR HODDER QC:
– and everything else is the surrounding, immediate consequences of that mining activity.

ELIAS CJ:
Yes.

MR HODDER QC:
But I thought Your Honour (inaudible) for the coal as being loved properly or something of that kind.

ELIAS CJ:
Well I had understood you to say that in this consent process the Environment Court would be asked to look at the benefits of extracting the coal.

MR HODDER QC:
Economic.

ELIAS CJ:
Yes.

MR HODDER QC:
Yes.

ELIAS CJ:
Which suggests that it’s not just the activity of disturbing the soil that’s the focus of the RMA inquiry.

MR HODDER QC:
Well that’s coming back to the wider issues about the benefits and the balancing, the economic aspects of the job creation, the wealth creation –

ELIAS CJ:

Yes, yes.

MR HODDER QC:

– involved, all taken into account. Those are factored into the general language that you find in part 2.

ELIAS CJ:

Yes. Well I'm just picking up on what, that your answer to me was appendix 1 and I'm just not sure that really –

MR HODDER QC:

Well appendix 1 –

ELIAS CJ:

– it is sufficient.

MR HODDER QC:

Your Honour, I'll backtrack, I think I may have misunderstood Your Honour. To the extent that the overall coal mining land use consent application involves questions of the economics of doing so to justify it, it is part of the idea that that makes sensible management of the resource, ie. to exploit it for these purposes.

ELIAS CJ:

Yes.

MR HODDER QC:

That's correct, for the immediate purpose of the creation of job and the creation of wealth. What they don't do is go so far as to get into what are you going to do with the coal after it's been sold to somebody else, and that's the point –

ELIAS CJ:

Yes.

MR HODDER QC:

– that this appeal is really concerned with. While the Court is looking at those parts of the RMA could I just perhaps draw attention to section 9, which is a couple of pages over, because this is really where we start to get to the structure of the Act that we place significant emphasis on. So section 9 prescribes the restrictions on a use of land which effectively require the land use consent. And so you'll see section 9(1) is concerned with contravention of national environmental standards. Subsection (2) with regional rules. Subsection (3) with district rules. And in this case the purpose of the appendix in the written submissions for Buller Coal sets out the regional rules and the district rules that are in play which in turn require a consent to overcome the basic section 9 restriction.

WILLIAM YOUNG J:

If the district plan said, mining is an unrestricted activity and you can just go for it and do anything incidental to it then this issue wouldn't arise.

MR HODDER QC:

Correct.

WILLIAM YOUNG J:

In relation to the district plan and the same with the regional plan?

MR HODDER QC:

Well we wouldn't be looking at the land use consent –

WILLIAM YOUNG J:

Yes.

MR HODDER QC:

– I mean apart from the incidental disturbance of vegetation et cetera.

WILLIAM YOUNG J:

And these rules are not particularly referable to the economic benefits or otherwise of mining or impacts on the environment by discharge. They're concerned with the local land use environmental impact?

MR HODDER QC:

Yes. Section, in this area it's probably sensible to say something about section 15 while the Court has those parts of the Act close by. As the Court will recall when I started this morning section 9 leads you to a land use consent so described in section 87 and leads through to decisions that aren't affected directly by section 104E. Section 15 deals with discharge of contaminants into the environment and that drives you in the direction of a discharge permit which then brings you within the scope of section 104E. And so you'll see in section 15 the general prohibition you may not discharge a contaminant into water or land et cetera unless the bottom of subsection (1) the discharge is expressly allowed by national and environmental standard or other regulations, a rule in a regional plan or a resource consent. That's the way out.

ELIAS CJ:
Is there no national environmental standard related to mining activity?

MR HODDER QC:
Not for our purposes.

ELIAS CJ:
No.

MR HODDER QC:
But that's maybe what's anticipated.

ELIAS CJ:
Yes.

MR HODDER QC:
So the rule in the regional plan, if there was one, which would have been permissible to have regard to some of these matters under section 30(1) that we looked at before lunch, is now affected by the new section 70A, and then the final route is the resource consent and what we say is what was contemplated in the 2004 amendment was that that particular line was to be covered by section 104E because it was the activity giving rise to the discharge that would be regulated by that process. And what the appellants have as I say is a sidestep which says well we actually are concerned about the matters that section 15 is concerned about, but we're going to

bypass that track and go back to the section 9 land use consent process and say that we can avoid the effect of section 104E.

So it's against those provisions, sections 9 and sections 15, all of which lead to, ultimately, an application. As I say, section 87 defines resource consents in several different ways but most particularly land use consent and discharge permits, and then leads to decisions which are made under a bunch of sections which start with section 104. But they go from 104 through to 19 and if they're relevant, they're all to be taken into account by the decision maker.
And when we go back to the 2004 amendment, that's the point where section 7 of the amendment drops in the new sections 104E and 104F. And again it's reasonably plain, 104E. "When considering an application for a discharge permit or a coastal permit to do something that would otherwise contravene section 15," that is to say it would be producing industrial level discharges into air, "A consent authority must not have regard to the effects of such a discharge on climate change except," in the positive, "Renewable energy."

And then section 104F provides the second contingent exception. If there are regulations under section 43, at that point, then, there can be an application provided that the consent and the terms are sufficient only to implement the regulations, whatever they may be. And again, what the –

CHAMBERS J:
Is there a good reason that you can think of why, if your interpretation was intended, section 104, itself, wasn't amended.

MR HODDER QC:
The one that we've advanced in the submissions and which I adhered to is that had the Court said, notwithstanding section 104(1)(a), or something to that effect, which may be what I think Your Honour's asking, it would've implied that the section 104(1)(a) had direct relevance to an application which was covered by section 104E and we say it's reasonably clear that Parliament didn't expect that to happen. It expected the areas in which these sorts of discharges were of concern would be dealt with by removing the local authorities' powers in relation to regional rules which are going to be a guideline for consents and by taking away the power to issue consents, absent a national environment standard.

And the point that I hadn't made up until now was the connection between the rules that would be laid down in a regional plan or elsewhere as to how you go about approaching these matters and the consent is one of the points that Justice Whata emphasises in his judgment in the Court below.
So, again, we say that the contemplation of the legislature can be fairly taken to be that it contemplated that sections 104E and 104F would be part of the suite of provisions that decision makers would take into account when they were considering resource consent applications and, in particular, they could not interpret section 104 in a way that effectively undermined or ignored section 104E. And to that extent, it does have an impact on section 104 in the way that Justice Chambers was putting to me before lunch.

But you'll see also in section 104F, and the same thing in section 70B that that final phrase in each of them that talks about no more or less restrictive than to implement the regulations, that is the National Environmental Standard. That is what is achieving the consistency, which is at the heart of the complaint which gave rise the 2004 amendment. Now we'll come back to that in terms of legislative materials, but there's no doubt from that, there were concerns about consistency.

Some, it seems from the Regulatory Impact Statement that some authorities had no rules about this. Some did have rules and there was a possibility of having different rules in different parts of the country, and that was one of the contributors to the idea there should be a national consistency, and that's what this amendment was designed to achieve as we submit it. And the force of that, we say, is confirmed by section 9 of the Amendment Act which makes it clear that on the commencement of the Act, all existing rules that focused on discharges into climate would be revoked. It wasn't just a matter of maintaining the status quo. This was a clearing of the decks exercise to enable a clear deck for national environmental standards to apply, subject only to some transitional provisions that they set out in section 8.

ELIAS CJ:

And subject to their being made and the transitional arrangement is not subject to that –

MR HODDER QC:

No, no.

ELIAS CJ:

– which it could easily have been, so it's simply a clearing.

MR HODDER QC:

It's a two way –

ELIAS CJ:

A clearing the deck.

MR HODDER QC:

Yes, well it's a two-regime that I was describing before lunch. The first regime is a cleared deck apart for the positive ability for renewable energy. After that it's whatever the National Environmental Standards provide for.

So in the context of that, can I just mention briefly a couple of other statutes that go to this process. There's been mention made of the Climate Change Response Act 2002 that obviously pre-dates the 2004 amendment. It's also relevant, although we haven't mentioned it in our submissions, partly because I didn't read it till recently, that the Environmental Protection Authority Act of 2011 is interesting because it has a definition in that statute which I wasn't going to provide the Court but the members in there will have access to it. It defines a series of environmental Acts, which includes the Resource Management Act and includes the Climate Change Response Act, and it sets up the EPA as a kind of a super advisor across the board and, again, shows some aspects of trying to give better information available for national centralised decision making.

There was, prior to the 2011 Act, there were provisions in the Resource Management Act recognising the Environmental Protection, I think it was, Agency, maybe Authority at that stage and that's part of the Act the pre-existing provisions when the 2004 amendment was passed that gave the ability for there to be informed national centralised decision making.

So in terms of the –

ELIAS CJ:

I'm sorry, that 2011 Act sounds as if it indicates that all of this legislation is linked. Don't we need to see that?

MR HODDER QC:

Yes. I haven't thought it appropriate to burden you with more paper. For my purposes what it does is to say, firstly, there is this agency which is beefed up in terms of its membership and it's got a general advisory role on national environmental standards but the point that I thought was interesting, which I just mentioned, is that it actually defines environmental statutes and lists a number of them in one of the sections. It's in section 5 of the Act. "Environmental Act means firstly the Climate Change Response Act; secondly, the Hazardous Substances and the Organisms Act; thirdly, the Imports and Exports Restrictions Act; fourthly, the Ozone Layer Protection Act and, lastly, the Resource Management Act. And, yes, it is an indication and I think that there is more to it than just the RMA in this regime. That was the point I was about to make when I come to the CCR Act. But that's another more recent indication that there is a wider perspective on environmental regulation from the central perspective than just the provisions of the RMA and just section 104.

Now in terms of the Climate Change Response Act, once again we haven't thought it appropriate to burden the Court with 400 and something pages of it, almost 500 pages. What we've done at tab 7 of the large bundle is to give you effectively the table of contents and some aspects, or the beginning of the framework convention. And the point of doing that was to enable me, if I could just briefly, to indicate just how the parts of the Act work from table of contents because it does give us some degree of indication of the move towards national policies on these issues.

So just turning through, if we've got the contents. Apart from the preliminary provisions, we have institutional arrangements starting with powers for the Minister.

McGRATH J:
Sorry, what tab are we?

MR HODDER QC:
Tab 7 of the large bundle Sir.

McGRATH J:
Thank you.

MR HODDER QC:

So just, as I say just glancing through the structure of it. Preliminary provisions are followed by parts called institutional arrangements, ministerial powers, the registry – this is about tradable units or Kyoto units. Part 3 on page 4 of the document has an inventory agency and a definition of greenhouse gas for these purposes. And you'll recall that in the 2004 amendment it adopts the definition of greenhouse gas from this Act, again integrating the integration between them. Part 4, the Emissions Trading Scheme, we see this on page 5 of the table of contents, I hope we are spared from any detail about that, but I just wanted to mention the great deal of legislative ink being spilled in creating this scheme.

CHAMBERS J:
Is it because of that scheme, perhaps, that the national standard has never been introduced? In other words, is this the Government's response to the problem?

MR HODDER QC:
In part it will be, in part. But it's still, I think, contemplated there would be a national environmental standard, it's just taking some time and I'm not in a position to give the Court any reliable information about why it's taken the time it has.

At the bottom of page 6 you'll see a reference to the Environmental Protection Agency that I mentioned just a bit before, and the role it has. So we've now got several pages of the table of contents devoted to the ETS scheme and then on page 10 we see the sector-specific provisions, starting off with forestry but including – and this to some extent comes to Justice Chambers' question – if we go to page 12, you'll see something called the stationary energy sector. Now, you don't have any of those provisions in the extract but section 204 does deal with coalmining and the criteria, among others, is 2000 tonnes per year and the question as to whether or not one surrenders units in relation to this. So there is some aspect of the coal industry which is covered by this particular legislation, and it goes, perhaps, to the point that Justice Chambers was making.

Then finally there are things about targets and synthetic greenhouse gas levies on page 13, and on page 15 you'll see the schedule includes the framework convention in the Kyoto protocol.

In terms of the extracts, we have given you under this tab 7 a number of long preambles, but the purpose you'll see on page 21 of the document, section 3, the

purpose of the Act is to enable New Zealand to meet its international obligations under the convention and the protocol. Over the page, to provide for the implementation, operation and administration of greenhouse gas Emissions Trading Scheme that goes to the question of greenhouse gases. So one sees that that is meant to be an important response that at national level 2 you show greenhouse gases. Then at subparagraph C, a separate reference to a levy on specified synthetic greenhouse gases, and you'll remember there's a separate part of the Act concerned with that.

Now, this definition – sorry, this doesn't contain a definition but we'll come to that shortly, section 3A on page 23 has recognition of the Treaty and in particular in relation to decisions of orders in council being made by the Minister or rulings made by the Chief Executive. Those are the matters where consultation is required.

ELIAS CJ:
I see that there's a definition of fugitive coal and gas. Does that mean gas released by the activity of mining coal as calculated in accordance with any regulations made under this Act, so presumably this is where they're going to deal with that.

MR HODDER QC:
Yes, I assume so, Ma'am. You may have seen, Your Honour, on the same page the definition of greenhouse gas. That's the definition that's picked up by the 2004 RMA amendment that then points you in the direction of annex A which I regret I don't think we've got in this extract, but it has a list of half a dozen greenhouse gases by name and by chemical formula with the usual suspects. I'll mention that shortly. The definitions of convention in greenhouse gas are as you would expect. The protocols defined at page 39, then the convention insofar as we've got starts at page 402 towards the end of this extract. The preamble starts at page 404. They are, in the usual diplomatic language, concern about human activities substantially increasing the atmospheric concentration of greenhouse gases. Then just over half way down the page, acknowledging the global nature of climate change calls for the widest possible cooperation by all countries, participation in effect of an appropriate international response. Bottom of the page, recalling all states have a responsibility to ensure that activities within their jurisdiction don't cause damage to the environment of others. On page 405, re-affirming the principle of sovereignty of

states in international co-operation to address climate change, and then recognising that states should enact effective environmental legislation.

Those matters go to the point I was making before, that this Act is a case that the appropriate response to the concerns of global greenhouse gas discharges is one that involves sovereign states in international cooperation, operating under a completely different level from what one expects the Buller District Council to be operating at, with all respect to it, in terms of the matters that we're now addressing in this appeal.

As I said, I didn't by oversight include the actual greenhouse gases that are covered by this Act. They are to be found at page 465 of the document which you don't, I believe, have in annex A with our carbon dioxide, methane, nitrous oxide, hydro fluorocarbons, per fluorocarbons and sulphur hexafluoride. Those are the six named greenhouse gases in annexe A and which are picked up by the definition of greenhouse gas in the 2004 amendment.

So we say that that – recognising the existence in the terms of the 2002 CCR Act and for what it's worth the role of the Environmental Protection Authority there and more recently expanded goes to the point that local inconsistency versus centralised informed decision making is at the heart of the issues that this appeal is concerned with.

Now, I want to turn to the Resource Management Act and a somewhat similar exercise in the table of contents, mostly with some dropping into particular provisions, so if I can invite the Court to turn to our tab 13, unless members of the Court have copies of the Act as a whole, and look at the table of contents.

What we say is that the scheme of the Act is important in understanding the central issue in this case, so we've spent a reasonable amount of time looking at the purpose and principles provisions in sections 5, 6 and 7 and, indeed, 8. Part 3 is the duties and restrictions, which is where the scheme starts to become a bit more specific. So we saw section 9, which has the restrictions on land use, section 15, which have the restrictions in relation to discharges of contaminants. Then over the page, Part 4, we see the whole part is concerned with functions, powers and duties of central and local Government, and the point that's made there in, with respect, made out well in Justice Whata's judgment in the High Court, explains there's a

hierarchy and a distinction between the role of central Government and local authorities under the RMA, and they are spelled out in some considerable detail in the provisions of Part 4.

Turning on to page 5 of the table of contents, Part 4A to be mentioned in passing, most of the provisions have changed given that there's now the new 2011 Act, but there always were provisions for a central advisory agency to Ministers to assist in relation to national standards.

Part 5 of the Act then deals with standards, policy statements, and plans, and this is where we find section 68 that we talked about before, which is the one that entitles regional councils to to have rules that deal with environmental effects and which is expressly subject to section 70A.

And then we come to part 6, which is the resource consents part. And the resource consents part, as I mentioned a short while ago, the way in which one approaches resource consents is partly in the context of the plans which create constraints. And what the 2004 amendment is doing is taking away the plans pending national environmental standards and, we say, taking away the resource consent role, or at least the consideration of this aspect to resource consents, again pending national environmental standards.

Turning then to the part 6 provisions themselves which are set out in the extract you've got, and if one can start with page 204 of the statutory page numbering. Page 204 will find section 87, and section 87 I've mentioned a number of times and I'm afraid I'll do so again because we see it as important as to identifying the scheme and the processes under the Act. Resource consent is the generic phrase that covers all of those then identified, "(a) as a consent to do something that otherwise would contravene section 9," that is there's a breach of a plan. In this Act, called a land use consent, and paragraph, "(e) a consent to do something (other than in a coastal marine area) that otherwise would contravene section 15," that is a discharge permit. And what we say, again repeating myself, is that those then contemplate distinct processes because they're dealing with distinct problems and they have distinct destination and constraints. And we criticise the appellant because it's attempting to hop effectively from a land use consent to get into an argument about things that deal with discharge consents, or concern discharge consents.

In our written submissions we've gone through some of these in some detail. What one d –

ELIAS CJ:

This hierarchy that you've taken us through is concerned with rule making?

MR HODDER QC:

Essentially, yes.

ELIAS CJ:

Yes and there is no rule governing the standards of discharge rates and, in any event, that's not the subject of the application that we're concerned with here. It is only concerned with the land use.

MR HODDER QC:

Correct.

ELIAS CJ:

But in justifying the damage to land or the effects on land, as you've indicated, the proponents have to demonstrate things such as the economic benefits. Why should the decision maker not take into account not measurable detriment to the environment from ultimate use of the coal, but the fact that the end use is going to be something which is a use that is recognised to be bad, as under section 7 kaitiakitanga and the ethic of stewardship is recognised as a good? What's wrong with when you come to do the balancing as to whether the detriment, the infringement or the detriment which requires the consent in the first place is worth the candle? Why shouldn't it be a factor that the decision makers can take into account that this is about coal, which when used, will contribute to greenhouse gas effect?

MR HODDER QC:

Well the question is not that it can't be taken into account. The question is who takes it into account in what process?

ELIAS CJ:

But the process you've taken us to is concerned with what outputs of greenhouse gas will be set for New Zealand. That's the purpose of that. Why isn't it something that is relevant to whether, on balance, the balance comes down in favour, just as the

economic benefits that you produce evidence of will take you down one side of the balance? Why isn't it something that comes into the mix?

MR HODDER QC:

Well partly I think the principal answer is it's the question of institutional competence. The idea that's behind this legislation is that this is not a matter for district local authorities in different parts of the country with different rules.

ELIAS CJ:

But the local authorities really don't enter into this because they're not setting rules here. It's the consent authority which I know is –

MR HODDER QC:

But they will be applying rules and they'll be exercising assessment judgments.

WILLIAM YOUNG J:

They could set a rule on the hypothesis that the appellant's are right. They could set a rule as to the entitlement to mine that would require greenhouse gas emissions to be taken into account.

MR HODDER QC:

I think that's where the logic – the argument takes it.

WILLIAM YOUNG J:

So the Buller District Council could stipulate that as a, effectively a bar to mining.

MR HODDER QC:

Well we would – yes. On its argument, yes.

WILLIAM YOUNG J:

You would disagree. I mean you don't agree they can, of course.

MR HODDER QC:

Yes, yes, and perhaps the other point in response to that –

WILLIAM YOUNG J:

In fact, they might have to, mightn't they? I mean if greenhouse emissions associated with the downstream consequences of mining are material under section 7, then it may be something that they have to address in the industry perhaps.

MR HODDER QC:
It, well it's possible. Also it may be part of the National Environmental Standard.

The other point I was going to make in response to the Chief Justice is really the economic benefits analogy.

ELIAS CJ:
Yes.

MR HODDER QC:
The economic benefits that are considered on a mining application, the economic benefits of them mining, so nobody goes and talks about profits to be made from using the coal, combusting the coal.

ELIAS CJ:
No I understand that but you are talking about a whole lot of values that are being brought into the mix, including aesthetics and stewardship angles which do impact, or the rate of depletion. There are all these things to be weighed. Why not the fact that it's to be used?

MR HODDER QC:
Well, again, I come back to the principal answer of an institutional competence and, partly, the progress through the parts of the Act that I was –

ELIAS CJ:
Sorry, can I just say on that institutional competence? You're not requiring the consent authority to determine whether greenhouse gas emissions are a bad thing because the statute identifies them as being.

MR HODDER QC:
But, with respect, that's not the question. The question is how bad compared to the other factors?

ELIAS CJ:

Well how bad – this is the incommensurability point because how good is the aesthetic that you're seeking to protect under the RMA? I just don't see that it's so absolutely off the table because rule setting for dischargers is clearly something that is not. It is not competent for local authorities or regional councils to enter into.

MR HODDER QC:

And our submission is that the same question of judgment, the same depth of knowledge is required to asses, in the context of a consent application, as it would be to formulate a rule. That's why –

ELIAS CJ:

Well I don't see that really.

MR HODDER QC:

But the same questions of judgement about how much is too much and that's the same question that's going to have to be addressed whether you're creating a rule, with whatever the criteria the rule specified or with or without the benefit of criteria you're trying to do an assessment over all.

And so what I was partly seeking to do by taking the Court through the, at least the part headings of the Act, is the Act moves from a series of really very general statements into a series of processes that are becoming increasingly more specific. They become specific in the context of the rules, particularly that are laid down by regional councils, in our context, and they become case by case specific when they come to particular applications for resource consents.

So while there's a general informing of the decision making process by the original material, in the end the particular hard cases that have to be decided in the application to be determined, are coming through the specific processes and structures of the Act provides not least in part 6. So as I understood what Your Honour, the Chief Justice is putting to me, it is that at each stage a consent authority would revert back to the more general provisions of section 7, et cetera, when its coming to determine a consent application and in my submission most of those should have been filtered into the rule making process before you get there, otherwise every local authority has an almost impossible task of measuring the incommensurables.

Now, in the end, what we say has happened is that, after some expensive litigation around these issues in the 1990s, Parliament in the 2004 amendment has said that those sorts of debates are not sensibly had at the local authority level. They should be had in accordance with national instructions which take away most of those difficult decisions and therefore become very prescriptive as far as the councils are concerned when the second part of the regime comes into effect.

So we're looking at section 87, at different types of resource consents. As we've said in our written submissions that leaves, I think, under section 88 to an application for a resource consent, when one makes an application for a resource consent one is required to provide an environmental assessment so that raises the question of an environmental assessment of what? And the environmental assessment is the activity for which you are seeking consent. That is to say the activity that would otherwise offend section 9 in our case, and we say that reinforces the point about the activity. The appropriate activity for which you should be providing environmental assessment is the activity you are going to undertake. Now that may extend in the case of a supermarket or a subdivision to the transport consequences of it. What we say it doesn't do is, if you're going to launch a coal mine, is it doesn't extend into the environmental assessment of what may or may not be done with the coal in some other jurisdiction and whether they do or don't have particularly sophisticated coal combusting facilities. It's just not feasible, we say, to expect that to be the material that's put before local authority in the West Coast or anywhere else in New Zealand.

And then we come to the suite of decisions, or suite of matters, that must be taken into account by the decision maker and these start around page 240 of the statutory pagination. Then we find section 104 that we've heard a lot about. But the point that we make is that the whole range of provisions that deal with different kinds of matters that a consent authority has to take into account. So what we say is required is that when a consenting authority gets to the point where it's completed all its hearings and is confronting a decision, it needs to have regard to any relevant provision in the suite of provisions that go from section 104 through to about 119, which is then followed by the provision about appeals. And the effect of the 2004 amendment is to insert into that group of, well that suite of provisions, the new sections 104E and 104F.

Now it's our submission that in section 104(1)(a) in terms of talking about the activity, we have the narrow definition of "activity" for which we contend, at least narrow compared to what our friends contend for, and therefore on that theory there is no change. If we're wrong on that we say that you still have to read from the date of this amendment section 104 in the context of the others including 104E and it cannot be the case that you can read 104 and ignore 104E when you're really talking about discharged air concerns.

CHAMBERS J:

Is that right though, Mr Hodder? You talk about this as though they're a suite but for instance when you're dealing with a controlled activity, you look at 104A, there's no need then to look at 104B, 104C.

MR HODDER QC:

It's a select, what's appropriate. I'm not saying they're all cumulative, it's just there's a range of them that were made – more than one provision may bear on a decision is the point I'm making Sir.

CHAMBERS J:

Yes but my point is when we're looking at, so we select the one that's applicable to us and – which of these is your one?

MR HODDER QC:

Well can I give you an example before I get to the one that matters for us?

CHAMBERS J:

Yes.

MR HODDER QC:

If we go to 104D for example.

CHAMBERS J:

Yes.

MR HODDER QC:

104D says that if you have a non-complying activity you have a certain criteria to overcome and if you can't overcome that then you won't get there irrespective of the more general provisions of section 104 itself.

CHAMBERS J:

Oh no I accept 104 feeds into them. What I was questioning was it seems to me it's rather the other way round. We select the one that's applicable to the application that's being made, which in your case, which is it, just remind me which it is?

MR HODDER QC:

We are seeking a land use consent.

CHAMBERS J:

And which of these – is it a controlled activity, a discretionary, what is it?

MR HODDER QC:

Sorry, I'm just checking. Just confirming that, it's a discretionary matter Sir.

CHAMBERS J:

So it's a 104B?

MR HODDER QC:

Yes.

CHAMBERS J:

So we go to 104B and we would then apply 104B and we would take into account the matters from 104 but there would be no need to look at 104A, 104C, 104D, 104E.

MR HODDER QC:

Yes I think that's what's called furious agreement Sir, I agree with that. The proposition is that there is a suite of provisions there, not all of which will be relevant to every decision, but any that are relevant will have to be taken into account and it may not be section 104 by itself.

CHAMBERS J:

Well that's what I'm questioning because each of these is limited in its circumstances as to when it's relevant. It would be quite wrong, wouldn't it, when you had a discretionary activity, for instance, to take into account anything in 104A because you take, 104A is only when you're considering an application for a controlled activity.

MR HODDER QC:

Again I'm not sure that we're at any difference on that. The proposition that comes to bite most clearly when we look at 104 and 104E.

CHAMBERS J:

Yes but we, it's my point, we're not in 104E. We don't have an application for a discharge.

MR HODDER QC:

Yes and my – yes, what I'm inviting the Court to do is to test that by assuming that you did because on the appellant's argument 104E would be overridden or rather that it wouldn't be overridden by the fact there's a 104E application going alongside the land use consent. That's our combined consent scenario. So what we would have, just to go back to coal mine plus power station scenario, is we'd have Buller Coal deciding it's getting into the power business, it seeks a land use consent for its mine, it seeks a discharge permit for its power station, and under section 104E no regard is to be had to the discharge, which is the greenhouse gas discharges. My learned friend say never mind that, under section 104 the land use consent will have regard to the discharge, those discharges, and we say that's why you have to read section 104 in the light of section 104E.

ELIAS CJ:

But it's not about discharging New Zealand, which is what section 104E is concerned with.

MR HODDER QC:

Yes the point – if I'm right on the primary point –

ELIAS CJ:

I'm sorry, you are saying –

MR HODDER QC:

– then yes, if I'm right on the primary point then section 104 is read in the context of the other provisions. The fact that this happens to be an export matter rather than a local consumption matter doesn't change the overall effect of how far the scope of 104 goes. Remember what 104 is being invoked for here is to provide a power to local authorities to get into the climate change debate, boots and all, and we say that's exactly what the 2004 amendment was trying to stop.

ELIAS CJ:

Well it was trying to stop local authorities setting rules.

WILLIAM YOUNG J:

Could not a –

MR HODDER QC:

And there were resource consents.

WILLIAM YOUNG J:

But could not a regional – sorry, a local authority, a territorial authority, set a rule requiring consideration to be given to greenhouse gas emissions in relation to mining applications if the appellants are right?

MR HODDER QC:

If the appellants are right, yes.

WILLIAM YOUNG J:

So that's under section 75 and 76 there would be, on the face of it, a power to deal with that.

MR HODDER QC:

Well actually no there couldn't. Section 68(3) probably, because they'd be relying on section 68(3) to draft the rule.

WILLIAM YOUNG J:

Sorry?

GLAZEBROOK J:

Yes I couldn't see that that was the case because I would have thought this does deal with stopping them doing that.

MR HODDER QC:

Section 68(3) does that.

GLAZEBROOK J:

Yes.

MR HODDER QC:

That take the question back to whether or not –

WILLIAM YOUNG J:

Oh yes I'm sorry but I'm talking about a territorial authority and a land use consent.

MR HODDER QC:

Territorial authorities don't have the same powers to start with as a regional council do on this.

WILLIAM YOUNG J:

They have powers in relation to land use consent so in deciding whether you can disrupt the environment for a mine, and whether the benefits outweigh the detriment, would it not be possible, on the appellant's argument to, for the territorial authority, the district authority to bring in climate change considerations into a district plan. Because that's not –

MR HODDER QC:

If, I think the answer is yes that if the, if on the broader argument the appellant puts forward then one can go back to the part 2 provisions and the board terms and say that's what a plan must be giving effect to as implied by a district – sorry, territorial authority, then you say, if you're asked a question, where does a territorial authority get its power to impose those conditions, they presumably would say, see what the Chief Justice said about section 7 in argument the other day and say that's sufficient to justify us putting those provisions in. I think that's where the argument takes you to.

ELIAS CJ:

Well – all right. I wouldn't have thought that.

GLAZEBROOK J:

Where do we deal with the plans?

WILLIAM YOUNG J:

75 and 76 of the District Plans.

GLAZEBROOK J:
Have we got that?

MR HODDER QC:
I don't think so.

WILLIAM YOUNG J:
I have it on my screen.

GLAZEBROOK J:
All right. I have it here.

MR HODDER QC:
That does take it rather wider than Parliament thought, certainly had thought in terms of the 2004 amendment, because I think – well, I'm submitting that in that context Parliament assumed that the only issue that was going to arise about climate change was going to be either a regional rule, not a territorial rule, or under a consent, and it was trying to deal with both of those, that is a consent that was sought under section – or to get around section 15.

ELIAS CJ:
A consent for discharge of greenhouse gases in New Zealand?

MR HODDER QC:
Yes. And the sidestep, with respect, it's an ingenious sidestep that says gosh, that's very interesting, you've managed to put a stop to having to consider those when there's a direct section 15 based application that has got nothing to do with a separate activity for which a section 9 consent based application is required.

CHAMBERS J:
But that's because – we keep coming back to this – Parliament clearly envisaged that there'd be a national standard for the section 15 circumstance. It never envisaged open slather for section 15.

WILLIAM YOUNG J:
Well, it did for a while.

GLAZEBROOK J:

A district plan has to give effect to any national policy statement under 75, so I would have thought that deals with the issue in any event once you have a national policy statement, so I wouldn't have thought there was that gap that Justice Young was indicating if this was working as it ought to be working.

MR HODDER QC:

That's my second part regime. For the moment I'm on the interim regime which I wanted to protest against Justice Chambers' proposition. It does – it contemplates two regimes. It clearly does contemplate there will be a period where there's nothing other than the prohibition that it creates. That's why there's an immediate effect of abolishing the regional rules and no immediate requirement for a national standard to replace them. Now, it may be there was a general or low level or background expectation, but from the statute we have to, in our submission, take the proposition that contemplated two possible regimes. One was the simple revocation plus the renewable energy exception. The other was the full national environmental standard base.

CHAMBERS J:

Well, I'm wondering if Parliament may have thought, "Okay, we'll have a brief hiatus," because whether there was another evil they were trying to deal with which was extended Environment Court hearings with expert evidence about climate change which was considered undesirable and regional councils fiddling around with this –

MR HODDER QC:

We'll come to those in the materials. But the other point that Parliament may well have contemplated and, indeed, was probably being told by Ministers in the debates, or was being told, was that the climate change control legislation was working its way into the system. So there were a number of responses to climate change. One of them is to run an ETS type system which is what the 2002 Act is designed to do under whatever timing and whatever principles it has. The other one, which is where the appellants want to go, is to say, well, we can effectively choke off the problem by refusing to allow coalmining because it has these effects downstream.

CHAMBERS J:

Was the ETS in force by March 2004?

MR HODDER QC:

I don't know that, Sir. I can make enquiries.

ELIAS CJ:

But suppose the benefits were pretty marginal, so the balance is fairly even. Why should it –

MR HODDER QC:

Which activity are we talking about?

ELIAS CJ:

The land use.

MR HODDER QC:

Ignoring the use of the coal?

ELIAS CJ:

Well, I'm not sure that you can, myself. But suppose it were pretty evenly balanced in terms of environmental impacts and your client is saying, well, there's going to be a lot of foreign exchange earned or something like that. Why should it not be a permissible submission that this will have an impact on greenhouse gas emissions, that that's the end or significant factor? What I am, I suppose having difficulty with is why it can't be looked at at all, because the standard setting regime is all about setting the rules, and it's all about emissions of greenhouse gases in New Zealand. That's what the section 104E concern is about, but there are general background factors which go into the overall assessment of merit in the application. Why shouldn't, given the statutory acknowledgement that greenhouse gases are to be avoided if possible. Why shouldn't that be something that is taken into account?

MR HODDER QC:

I think the answer comes back into the structure and the competence that this is an attempt to create a bright line, clearing decks, whichever metaphor one wants to have, in a statute that's not particularly marked by bright lines. It's true. But this, in our submission, can be properly interpreted as an attempt to lay down a bright line about that. There will not be debates on that topic, at least in this type of context,

and as I say, that follows both from the text and it's also reasonably clear from the legislative materials which I was about to move to, if that were convenient to the Court.

So those legislative materials are in our bundle and I've got nothing to say about Cabinet papers, although the Court will have seen in memorandum the other day objecting to them, but in terms of the legislative materials, the original explanatory note can be found at tab 8 of our bundle. I want to refer to this plus the Select Committee report back, essentially, is the primary documents the Court can have regard to. So the Government Bill you have at tab 8 is both the explanatory note, the regulatory impact statement, and the draft of the Bill as introduced. The general policy statement that you can see on the first page is reasonably clear, and we say supportive of the general approach that we are taking. It's to give effect to a climate change policy package which requires explicit consideration of the effects of climate change and a renewable energy exercise of functions and powers, and then it specifies three objectives, greater weight to the value of renewable energy, greater weight to considering the effects of climate change – that's effects of climate change, for example, potential increase in flood risk, rise in average sea levels and rainfall patterns and again expressing the difference between "of" and "on", and then despite the second objective to remove climate change as a consideration when considering industrial discharges of greenhouse gases as these emissions are best addressed using a national mechanism.

As the Court has already heard, during the course of the legislative process that constraint on industrial discharges was removed. All discharges were covered by these provisions, and we say that's a perfectly fair summary of what was intended, no major ambiguities or qualifications are required with that.

If we turn to the regulatory impact statement that commences on page 3 and the third paragraph picks up some of the aspects that are relevant here. "The RMA does not explicitly provide for improved energy efficiency, the use of renewable energy, or planning for the effects of climate change, for example, sea level rise. It would be contrary to the effects-based nature of the RMA to specify" –

GLAZEBROOK J:
Sorry, I think I've just lost where you are.

MR HODDER QC:
I'm in tab 8 page 3. I'm in the third paragraph under the heading, "Regulatory impact," commencing, "The RMA does not explicitly".

GLAZEBROOK J:
Thank you. I've got it now.

MR HODDER QC:
"It would be contrary to the effects-based nature of the RMA to specify particular activities as being desirable, but it is appropriate to highlight particular matters that should be given consideration," and if I interrupt, that's really where the section 7 editions come from. It then goes on to say, "In relation to discharges to air, the definition of 'contaminant' includes greenhouse gases. Therefore, regional councils can, in theory, develop plans to permit discharges or specify that such discharges require resource consents to avenues of control. It's arguable that consent could be required or that conditions could be imposed. To date, few councils have controlled greenhouse gases. The condition requiring mitigation of emissions imposed in relation to Stratford was unusual. It was recently removed at the instigation of an applicant."

On page 4, we have the statement of the problem and a need for action, and the first paragraph sets a preamble to the two matters that feature in the title. The second paragraph, "The extent to which there area barriers in current regional and district plans has not been quantified, but the need for national direction in this area has been expressed by a number of councils and local government planners who have repeatedly requested central government to provide them with a stronger mandate and legally relevant guides to take climate change effects and the benefits of renewable energy into consideration."

And then the last two paragraphs before the next heading. "The problem in relation to industrial greenhouse gas emissions is that there is a current lack of clarity regarding the role of regional councils under the RMA. This is led to the Environment Court hearing debates on whether regional councils should control greenhouse gas emissions and by which means. Interested stakeholders have contested these controls. Where there is Environment Court decisions do not create consistency and only High Court decisions provide precedent, there could be more expensive and

time consuming litigation. Emitters will also potentially face double controls on their emissions when national climate change policies, including a climate change and through local rules and consents."

Now I haven't, up to this point, mentioned the double controls point. It's kind of – it's inherent in the centralisation process but that's – it goes with the consistency proposition.

ELIAS CJ:

Just further up, I don't think you referred to it, but that recent decisions from the Environment Court, efficient use of energy from minerals is not a matter included in section 7B. Did that lead – I'm now lost in terms of the legislative history. Did that lead to the inclusion?

MR HODDER QC:

Yes, that's why section 7 now has a reference, "The efficient...

ELIAS CJ:

"Use of energy from minerals."

MR HODDER QC:

It just says, "The efficiency of the end use of energy," on the assumption much energy comes from minerals.

ELIAS CJ:

But is this the policy it's directed at? What is said here, "Efficient use of energy from minerals and that omission needs to be corrected so that efficient use of energy is a matter to be considered."

MR HODDER QC:

As I understand it that goes to the proposition that gives you the new section 7(ba). That's the efficient use of energy. So I don't know. I can't take that much further.

ELIAS CJ:

Yes but the mischief it's directed at seems to be the fact that efficient use of energy from minerals was thought not to be covered by section 7(b).

MR HODDER QC:

Yes. And I'm sorry, I can read that but I can't take it any further as to how that's – what underpins that in more detail.

ELIAS CJ:

Well does it not – maybe it doesn't, but doesn't it suggest that the efficient use of the coal, the end use of the coal is a matter that's required to be taken into account under section 7?

MR HODDER QC:

No not in our submission.

ELIAS CJ:

No.

MR HODDER QC:

There's nothing –

ELIAS CJ:

Is that not what this is referring to?

MR HODDER QC:

Not from what I understand.

ELIAS CJ:

And if not, what is it referring to?

MR HODDER QC:

As I understand it, it's talking about encouraging efficient use of energy but whether or not coal is the most efficient use of energy for a particular purpose is not a matter that's cropped up in this particular matter at all. That's competing uses of energy or competing energy sources but the idea that whether or not the coal was going to be used efficiently by whoever finally uses it is certainly not something that's inside the ambit of –

ELIAS CJ:
No, I understand that.

MR HODDER QC:
Then there's a series of options are discussed. The climate change matters are discussed on page 6 of the document, discussing the series of options, amending the RMA, the National Policy Standard, reliance on voluntary uptake, and then over the page, on page 7, the options for industrial greenhouse emissions. And that whole section is, I think, relevant to what we are concerned with. National Guidelines, the last paragraph, the national guidelines, these are the non-binding guidelines, were not preferred since they have no statutory power, little certainty and ongoing costs have been incurred by councils consents, applicants and submitters and higher and unnecessary compliance costs. And so the first option listed at the top of page 7 is the option that is pursued.

On page 9, again you find the heading "Industrial Greenhouse Gas Emissions" and there are some laments about the legal costs involved and various applications that are set out on page 9 and across into page 10, and then, I must say I'd forgotten this, but in terms of Justice Chambers question, at the bottom of the page –

CHAMBERS J:
Sorry which page now?

MR HODDER QC:
I'm on page 9 at this stage Sir.

CHAMBERS J:
Nine, thank you.

MR HODDER QC:
The last paragraph, an immediate amendment to the RMA will not create a policy vacuum for the reasons it then sets out.

CHAMBERS J:
Sorry, what are the national price mechanisms to which it's referring? Is that the ETS?

MR HODDER QC:
I believe so.

ELIAS CJ:
What does the last bullet point mean, "Greenhouse gas emissions not being controlled through the RMA at present"?

CHAMBERS J:
Because most councils didn't have policies on it I think.

ELIAS CJ:
I see.

MR HODDER QC:
It goes back to the point at the bottom of page 3 where they said most councils don't have anything about this.

ELIAS CJ:
Yes.

MR HODDER QC:
So they didn't think they were removing a great deal of rules.

ELIAS CJ:
Yes.

CHAMBERS J:
Do you happen to know what, in the third bullet point, is meant by the expression, "NEGOTIATED GREENHOUSE AGREEMENTS AND PROJECTS", all with capital letters?

MR HODDER QC:
I'm afraid not. I've assumed that they're part of the CCR legislation regime. I don't understand that to be part of the RMA.

CHAMBERS J:

I see.

MR HODDER QC:
And then the last item on the page is the expected cost savings for industries and individuals to emit greenhouse gases or make submissions, and talking about oil refineries, coal, power stations, cement producers, et cetera. And to the extent that producing compliance costs is part of the overall policy behind the legislation then the way the appellant wants to argue the case is those compliance costs will come back through section 104 which, again, is part of the sidestep that we're critical of.

And the next tab, tab 9, we have, as my learned friend said, just the Minister's introductory speech on this Bill. We didn't include any other members' material, and in this, the Minister is saying pretty much what's in the explanatory note towards the top of page 7584, the first paragraph supports the Government's climate change energy policy through amendments to the RMA, recognising the Government's preference for national coordination of controls on greenhouse gas emissions.

And then when it says, "Greater emphasis to climate change and Resource Management Act planning," I think there is a confusion here in various points of the legislative process between the idea of the effects "of" climate change and the effects "on" climate change. Remembering this elevates into section 7, the effects of climate change which were referred to in the explanatory note being things like sea levels and flooding, et cetera, and that greater emphasis line, I think, is about, is fairly read to be that.

GLAZEBROOK J:
I have somewhat of a difficulty seeing because climate change causes those things as well as – I'm just not sure of this "of" "on" thing I have to say because if climate change causes increased tide levels, then apparently you can't take that into account but you can take account of the fact that it might already have increased them. I think it's putting far too much "of" and "on".

WILLIAM YOUNG J:
Well you can take your account back to tide levels "may" increase as a result of future climate change.

GLAZEBROOK J:

But not as a result of the activity that will actually cause them to rise. It seems to be putting an awful lot on "of" and "on" and frankly doesn't seem to be supported by what Parliament thought it was doing in the explanatory note.

MR HODDER QC:

Well, given the timing I'd simply invite the Court to look again at the explanatory note. In our submission, it does draw a distinction between those things.

GLAZEBROOK J:

Not the way I read it, at all. It does talk about tide change and increased sea levels, but if that's caused by the particular activity rather than take account of an activity that's already caused by it, it seems to me to be putting an awful lot on "of" and "on". That's all.

MR HODDER QC:

In each case in the explanatory note where there's reference to the effects of climate change, all the examples are downstream from the phenomenon itself.

GLAZEBROOK J:

Well, why are they downstream? Because if they're caused by the phenomenon, so if you accept that the emission of greenhouse gases causes a rise in sea level, then why is it downstream?

MR HODDER QC:

It's downstream because the phenomenon is already occurring or may occur.

GLAZEBROOK J:

Well, you're making it worse in increasing that phenomenon.

MR HODDER QC:

That is the different issue. That's the effects on.

GLAZEBROOK J:

No, I don't see it, myself.

MR HODDER QC:
This is rather going back to the discussion that I had with the Chief Justice before lunch, but the phenomenon is the phenomenon. It has consequences. It has causes. The effects of is about the consequences. The effects on is about the causes. Those consequences can be future, so if a local authority is going to consent – I think we had the example before – to a whole series of houses being built at sea level, then that's sort of unwise in the context of expectation of the consequences of climate change. They themselves have nothing to do with the effects on climate change, and that's where they become relevant, and they also don't require the same –

GLAZEBROOK J:
Can't see it myself but I understand the submission. It just doesn't make any sense to me.

MR HODDER QC:
Let me put one more point to the proposition, which is that that also goes to explain why you don't have the debate about that in the local authority level, why you take that role away from local authorities. There doesn't need to be a debate that says do you or do you not have houses at sea level because of a risk of rising sea levels or greater flooding? That doesn't require any minute international analysis of what does and doesn't cause climate change. I won't take the matter further, but we say it's clear from the legislative materials that that distinction is there. As I say, the understanding I have is that that view is common across the parties.

Now, I'm sorry to do this, Your Honour, but the same point is made in the third paragraph on page 7584 by the Minister. The first sentence is saying what I'm saying, I think. So the last paragraph – because the coordinated, national approach that I've been referring to, collectively these changes to the RMA will support existing Government policy on energy efficiency, renewable energy, and climate change, provide national leadership, clear responsibilities, reduced administration, compliance and participation costs, et cetera, et cetera. Then we say all that makes sense on the approach taken in the Courts below. None of it would be achieved, or very little of it would be achieved, if one takes the appellant's approach to these matters.

Then under the next tab we have the report back from the Select Committee. I think you were taken to the purpose, the definition of climate change. It perhaps goes in part to answer the Chief Justice's questions from this morning about what was the point of the definition. That seems to be what's there. It's in a heading, and I'm sorry to be coming back – I'm on page 2 of the document at page 10, Your Honour. Why is there a definition of climate change been inserted? It has a particular significance for our purposes. Probably not. The next section I would have invoked, but I've probably exhausted it with Justice Glazebrook and the questions of planning for the effects of climate change.

Then moving on to page 5 of the Select Committee's report, I think we mentioned in our written submissions the heading, "Council is prevented from controlling greenhouse emissions from any source," and we say that's an accurate capturing of what the Select Committee did. What the Select Committee did was to remove the original limitation to industrial discharges in section 70A and section 104E, and you'll see there under the heading, "The bill is introduced removes the ability of regional councils to consider the effects on climate change from discharges into air from industrial trade premises. Many submitters thought that specifically identifying those may leave regional councils in the position of being able to control greenhouse emissions from other sources." That wasn't the idea, so they expanded the definition of it.

Then the next paragraph, "We consider the specification, that is to say the limit to industrial and trade is unnecessary because the intent of the clause was to prevent consideration of effects of climate change of any discharge needing a consent." And then we come to a sentence which I'm not sure my learned friend took you to or not but, "The effects of greenhouse gas emissions from transport can still be considered in the land use planning." I think the paragraphing, actually, is confusing everyone. It reads on, "It is important to ensure there is ongoing potential for local management of domestic emissions. However, we consider that domestic emission management is more likely to be designed for the mitigation of human health benefits which is not affected by the Bill. We therefore recommend deleting the words 'industrial trade premises' from all clauses of the Bill and replacing the words as they are in section 7A."

So what I understand that provision to mean is to say that the effects of greenhouse gas emissions from transport can still be considered in land use planning, it's just not their effect on climate change. If one reads that collectively, all those are reasons that lead to the proposition as to why they're deleting "industrial trade premises" and applying or preventing councils from preventing greenhouse gas emissions from any source.

Now, my learned friend puts some weight on a passage from the chairperson of the Select Committee in his submissions. I have nothing that I can usefully say about that. I invite the Court to give weight to what the Minister says in the speech, the various ministerial speeches on the topics, but the basic point I think was made –

CHAMBERS J:
So does that mean on your submission, for instance, if one was mining coal and there was evidence that dust got into the air, for instance, through the mining process, which may have health implications that could be taken into account?

MR HODDER QC:
Yes, and I believe we saw one of those for our work, so you do get a – it would be an issue that would apply, but it has a health factor which goes to it.

So my learned friend's argument says that you have to have regard to the greenhouse gas components of the effect on climate change. We say you can have regard to emissions from vehicles in terms of health and efficiency, but not in terms of climate change. That's the point of distinction between us.
Now, I'm not sure there's much between the parties in relation to the terms of this Court and the Court of Appeal in the *Genesis Power* litigation. We accept that that case was focused squarely on section 104E, but we do submit that the identification of the policy of the 2004 amendment was accurately contained in that passage from Justice Wilson in the majority judgment in paragraphs 55 and 56. And in that context, can I just perhaps mention – this is at tab 4 on page 751 of the report. The underlying policy of the Amendment Act was to require the negative effects of greenhouse gases causing climate change to be addressed not on a local but on a national basis on enabling the positive effects of the use of renewable energy to be assessed locally or regionally. We say that fairly describes the effect of the 2004 amendment, and while the issue that we're not concerned with wasn't being squarely addressed by the Court at that time, actually the policy remains the same. It's the

same policy that's relevant in this process, and then paragraph 56 picks up the point where the majority and the minority disagree. In the end the majority came to the view that the text and purpose support the interpretation that the exception in section 70A and 104E applies only to applications founded on the renewable energy use.

So we say that the policy is correctly involved there. We've also referred in our written submissions, but I won't take the Court to it, to passages in the Court of Appeal judgment to which Justices Young and Chambers in this Court were party. That has a section on the policy context which we say is again directly applicable here. I think it starts around paragraph 23 and goes through to the conclusion. As we see it there's no material difference in the policy approach taken in the Court of Appeal in that case, the Supreme Court in this – and the appeal on that case, and what we're contending for in the case now before this Court.

So what I then wanted to do if I could and I probably won't finish this evening but I won't take that long tomorrow is to invite the Court to look at Justice Whata's judgment. As the Court knows we rely on that judgment and the passages that I want to draw attention to are the main reasoning provisions which commence, and this is to be found in the case on appeal. It's also in the loose green copy we provided to the Court. It commences at paragraph 39 and runs through for the next 10 or so paragraphs. So there's about three or four pages there where the Court's reasoning are set out in detail and we say that the Court, this Court is entitled to, and should, endorse the approach taken by His Honour there.

What I might say before I turn to the specific paragraphs is that one of the features of that judgment and we would say, what we attempted to do in our written submissions, is to focus on the provisions of the Act, the RMA, in some detail to provide the context in which these things arose. The feature of the submissions for the appellant is that they have little to say about the other provisions in the RMA. There's a tunnel focus on section 104 one might say. And the same is true of the article by Ms Baillie which is relied on which says what my learned friend would want it to say. Again it doesn't look at the structure of the Act, it doesn't look at the various provisions and processes under the Act, it just says the Act ought to be concerned about climate change. Well it is concerned about climate change, it's just how it does it that matters, and that's the issue that is now before the Court.

So what, at paragraph 39 the High Court says he doesn't consider the assessment of effects under section 104(1)(a) includes consideration to the effects of climate change which is obviously the submission advanced by my learned friend for the appellant and then gives five reasons. The first of which is the express purpose of the Amendment Act and there's probably not much else to say about that that hasn't already been traversed thus far. There can be no doubt that the purpose of the Amendment Act was to remove this topic from local consideration we say and so the policy is pretty clear.

The second proposition in paragraph 41 acknowledges that, "Is not literally subject to an amending enactment, it is subject to the scheme of the RMA, as amended by the Amendment Act 2004." And that's really what our rather extended part 6 of our written submissions is designed to elaborate on.

And what His Honour says, and goes on to say in the next page, is that the way in which this is carried out is by the Minister or regional councils, by reference to the sections he cites, section 15, section 30, section 68 and then the other sections that come from the 2004 amendment. And in the result, he describes, "No reasonable rule can control or require consent for a discharge into air of greenhouse gases solely for its effects on climate change, except in accordance with a national environmental standard."

And then importantly, "There is no other express method by which a local authority may require consent for those discharges. The jurisdiction therefore to consider the effect of air discharges under section 104(1)(a) must be implied and collateral to the exercise of the other local authority functions." Now that's the point which is obviously in issue before the Court that we say that His Honour has got it right. When there is an issue about discharge of air of contaminants it arises in the context of discharge consent applications. That's the orthodox way in which the Act works. It's only when you attempt to sidestep that you get the problems that the appellant creates and the conundrum which it has no serious answer too. To try and elevate section 104(1)(a) into providing a separate jurisdiction to consider all those matters that section 104E takes out about discharges to air, which is what this is really about, is, we say, not a step that the Court should take and it's a step that the High Court refused to take.

His third point, which is another matter we emphasise in the written submissions, is the limitation to activity. Justice Whata gives this less weight probably than we would by way of the submission but this is the, kind of raises the boundary issues that I was discussing with Justice Glazebrook earlier in the day and he sort of makes the point, "Taken literally, industrial discharges of contaminants," which is the problem that the appellant is concerned about, "Will not be allowed by the grand of the land use consent." They will, "Need to be allowed by an environmental standard, a regional plan... or by separate air discharge resource consent." And we say that is an important proposition, that when you have a discharged air problem, section 15 is the governing provision. That's where it should be considered, that's the context in which it should be considered, and it's to be dealt with either by national standard, which we don't have, by regional rule, which has been excluded by section 70A, or by resource consent, which is subject to section 104E. The only way of escaping from that relatively straightforward proposition about how you deal with discharges to air, is to do an end run and say, let's not, let's forget about section 15, let's try and do it under section 9 and section 104 and we say you can't do that.

Paragraph 43 is the point that some members of the Court have been raising in various ways with both my learned friend and myself where His Honour says, "I accept that it is common for consent authorities to take into account the effects of downstream activities, for example increased vehicle traffic and associated pollution arising from allowing a development." He describes it as, "Diffuse or non-point pollution... not normally amenable to regulation by way of air discharge consenting." And he says, "Regional and district policies and rules will often contemplate district-level management of diffuse emissions, through urban form planning strategies." And by "urban form" I understand him to mean that you put your suburbs not too far away from where people are going to work for example. "This overlapping jurisdiction is concordant with the Act's promotion of integrated management, with the result that the reach of section 104(1)(a) is extended by the policy framework to consider such effects."

Now the air discharges he's talking about are discharges which have health effects, or they may have efficiency effects in terms of the efficient use of fuels and resources. But what they don't have to do is go to the question of climate change. So they could be legitimately considered quite apart from the question of climate change and one rather suspects that the impact on climate change is even more miniscule than usual but that's the point. You can take into account these

emissions. Those are the emissions we say are being referred to in the Select Committee's Report.

Then he concludes in that paragraph on the next page, "But where, as in this context, regional jurisdiction to control the effects of greenhouse gases has been conditionally removed," by conditionally pending any national standards, "the normative basis for ongoing district level management of industrial discharges is weak." As my learned friend said, he was pressed by Justice Whata for what was the reason for this. Why would you do it this way? Why would you allow section 104 to bring in all the stuff that section 104E is trying to keep out for present purposes? And with respect there was no convincing answer there, and Justice Whata didn't find one, and there's no convincing answer, with respect, being offered to this Court today.

Paragraph 44 refers to the submission that there was a "broad or unfettered discretion" under section 104. Clearly that's a very wide proposition. Justice Whata says it's "Intuitively attractive…ongoing district level management of greenhouse gas… via consenting processes would jar heavily against the carefully constructed framework of the Act dealing with air discharges," the point that I have been attempting to make in the course of our submissions.

And then 45, again the point that we've been attempting to make, the RMA's different decision making levels. "National, regional and district level functionaries with carefully scripted, overlapping and interlocking functions… overlaid by the policy of the Act to achieve integrated management of resources." And with respect we endorse and adopt that. That this appeal, really we say, depends upon who's doing the particular regulations, not the fact that there should be some regulation or how it's being done, or that such regulation is important. But what, in our submission, the appellants have to overcome, and can't, is that the whole purpose of the 2004 amendment was to take that away from local authorities until such time as they had national guidance, which they still don't have. The alternative is, as the preparatory materials indicate, you'd have some councils with no rules, some councils with rule A, some councils with a separate rule again and a great deal of expensive litigation about it. While it may seem unsatisfactory, as Justice Chambers has really been raising with me, that there is no national environmental standard yet, one could say that central Government is excused on the basis that it's taking some steps about this problem under the climate change control legislation which does cover, as we saw, stationary energy sources.

In the course of that paragraph, into paragraph 45, there's reference to the hierarchy over the page. Andin the final paragraph, paragraph 46, "The appellants' concern that this…unduly inhibit the ability of district councils to mitigate the effects on climate change… is misplaced. Significantly, the Amendment Act 2004 did not remove consideration of those effects from the RMA. Rather it accorded primacy to national regulations by requiring regional policies… to align with national environmental standards."

Now interpolating I accept that at this stage we don't have the national environmental standards but the clearing of the decks exercise was undertaken and climate change remains relevant under the overall environmental fabric, particularly as administered nationally and centrally.

Now His Honour goes on and says, "Furthermore, the Amendment Act 2004 removed the jurisdiction to consider the effects of discharges to air of greenhouse gases on climate change. It did not remove from consideration the effects of diffuse air pollution at a localized scale." That, he says, remains there. But the point that I understand the passage to be saying is that's not about climate change, that's just because they are emissions that may have an effect. And he comes to his conclusion in paragraph 47.

Now Your Honours, I think we've got to 4 o'clock. If it's convenient for the Court –

ELIAS CJ:
What do you want to take us to tomorrow?

MR HODDER QC:
I was going to answer the adoption of the Baillie article in a few minutes but if the Court were to indulge me for a few minutes in the morning I'd probably be more efficient then than I would be now.
ELIAS CJ:
Yes, that's fine. So you expect to be –

MR HODDER QC:
No more than 15 minutes.

ELIAS CJ:

Yes, that's fine. Thank you very much.

COURT ADJOURNS:4.02 PM

COURT RESUMES ON WEDNESDAY 13 MARCH 2013 AT 10.02 AM

ELIAS CJ:
Yes Mr Hodder.

MR HODDER QC:
Good morning and thank you Your Honour. I've asked the registrar to provide members of the Court with one more piece of paper from me at least which is an extract from the Climate Change Response Act that I took the Court to yesterday, at least took the Court to the table of contents and what I've given because I thought it might be helpful to complete what I was attempting to convey yesterday, is I reproduced the parts of the contents and what I've given you are in fact the top left subpart 3 of part 6, about the stationary energy section and then on the second page, you will see there at the end the schedules, we have Schedules 3 and 4.

So if one turns over to page 353 of the statutory pagination as it were, that is where we find these parts of the Climate Change Response Act that deal with things like coal. Section 204 is talking about participants, participants in the emissions trading scheme with respect to mining coal or gas. This particular section sort of sets the scene and has a threshold for 2000 tonnes of mining a year to become part of the scheme.

Perhaps more interesting, for present purposes, is section 207 a couple of pages on, that's page 355 and you'll see there that, "A person who mines more than 2000 tonnes a year is not required to surrender units in respect of carbon dioxide emissions from coal that is exported, is required to surrender units in respect of any coal seam gas emissions that result from the activity," and that was the leakage we talked about yesterday briefly.

Over on the next page, there's scope for those –

ELIAS CJ:
So is A referring to the emissions through use of the exported coal?
MR HODDER QC:
Yes, it must be.

ELIAS CJ:

Yes.

MR HODDER QC:

Yes, emissions from coal exported.

ELIAS CJ:

Yes.

MR HODDER QC:

To the best of my knowledge, there's no emissions during the course of transport.

ELIAS CJ:

No.

MR HODDER QC:

No. So that's what I understand it to be and the last point, that I didn't mention yesterday, over the page at section 209, you see reference to registration by purchasers of coal. So those who purchase coal come into the scheme, or they can come into the scheme. At 212, on the next page 358, is also relevant to that, "A participate who mines coal isn't required to surrender units for people who purchase that coal in New Zealand." Then the two schedules relate to the coal miners and the coal purchasers effectively for these purposes.

Now that is perhaps a slightly more technical way of explaining what is in the case on appeal, in terms of the agreed statement, at the very of the agreed statement in paragraphs 15, I think, pages 15 and 16 summarise that as being the agreed position. So it's tab 11 of the case on appeal, on pages 4 and 5 of the document. You'll see the references, the discussion in paragraphs 15 and 16 are effectively a summary of what I've just been pointing to in the Act itself.

CHAMBERS J:

Mr Hodder, while we're looking at other related legislation, I wonder if I could just draw to your attention to see what, if any, relevance this has. I decided to try to look up regulations made under section 43, to see what national environmental standards look like which are act envisaged and I did come across the Resource Management (National Environmental Standards for Air Quality) Regulations 2004 which were made in September 2004 which is about three months, I think, after our Act has been

passed and they are made under section 43 and, while only part of them seems to refer expressly to greenhouse gas emissions, these regs do set out various standards for air quality and I'm wondering if these are the Government's response to the 2004 Act and, in fact, we haven't got that vacuum that at least has been concerning me.

It's possible, if these are the response, that they perhaps help you, in that there doesn't appear to be anything expressly which would cover the actual mining situation but I don't know if you've considered these at all?

MR HODDER QC:
I regret to say that I haven't Sir. I would envisage that they are part of a response, it seems to be unlikely they're a complete response.

CHAMBERS J:
Yes.

MR HODDER QC:
The materials that we have access to, such as the Parliamentary materials and Ministerial speeches talking about a packaging of proposals.

CHAMBERS J:
Yes.
MR HODDER QC:
It wasn't clear precisely what that package was, that this was simply regarded as part of the package. So it seems a fair inference, as Your Honour has suggested, that those regulations are part of it.

CHAMBERS J:
That was another question I sort of had in mind, as to whether you knew what the form of the package is that's referred to in the explanatory note to the Bill?

MR HODDER QC:
There's nothing more explicit that I have seen in the *Hansard* material about what that package comprises, than one finds in either the explanatory or in the Ministerial speech and those are still reasonably vague and so I am unable to take the matter really any further on that.

CHAMBERS J:

Yes. Anyway, I refer it to counsel. It may be it's not the response but it at least arguably, is at least part of the response to the 2004 Act.

MR HODDER QC:

Yes. Well if we turn it the other way round, it seemed unlikely it wasn't part of the response, given the timing.

CHAMBERS J:

Yes, yes.

MR HODDER QC:

At least that much could be said. Now Your Honours, I said yesterday I had only a few matters to touch on and that remains the case. The first of those was really to complete reference to the High Court judgment which I had discussed the main part of that really yesterday, that is the discussion of His Honour Justice Whata, from paragraphs 39 through to 47 which is where he sets out his five reasons for disagreeing with the submissions made by my learned friend then and here about the role of section 104. He then – if the Court has that – he then goes on to discuss section 7I and that is the "on" "of" issue that we were traversing in various ways yesterday. That point isn't the subject of this appeal, that is to say that the appellant accepts there is the distinction and as I said yesterday the distinction is expressed in various ways in the explanatory note and the Select Committee Report.

He then goes on to discuss overseas discharges in paragraphs 51 to 53 where he confronts squarely the proposition that, well, shouldn't we be concerned about overseas discharges and says that effectively you have a tension between the idea that sustainable management could be as wide as the entire global environment and the fact that there has to be a jurisdiction for local authority to be found somewhere in the statute, and his central point is in paragraph 52 of the judgment where he says the starting point is section 15 and as the Court will appreciate we also emphasise and adopt His Honour's approach that section 15 is pivotal in the scheme of the Act insofar as discharges to air are concerned, and that's what the Act contemplates, that that becomes the central focus of concerns about discharge to air.

It seems no great point in me reading or commenting on those paragraphs. We simply agree with His Honour on what he says in paragraph 51 to 53 and note that we have also dealt with some aspects of extraterritoriality in our submissions in paragraph 6.36 to 6.37, including the reference to this Court's judgment in *Poynter v Commerce Commission* [2010] NZSC 38, [2010] 3 NZLR 300, and I'm not sure that there's anything else that I need to add to that.

The next point that I wanted to touch on just briefly was that – and again, the reference to submissions that I don't propose to repeat – yesterday we spent some time talking about activity and Justice Glazebrook was asking me how I would define activity and the boundaries of it. We attempt to do that in the written submissions. Partly, I think, the matter I didn't really respond about yesterday is the local aspect of activity that we see as important, and that's in our submissions beginning at paragraphs 315 and 322 where we discuss the terms of the RMA. That's pages 8 and 9 of our written submissions. We come back to it at paragraph 611 to 621 and those are pages 19 to 21 of the written submissions. The basic idea is that the way in which the Act is focused in particular there's reference to schedule 4 there in the RMA, what is being looked for in the environmental assessment is something that's essentially localised and it's incompatible with the idea that the applicant for the land use consent, for example, is required to go and produce effects about what is happening with global climate change from emissions in China or India. So again, I don't propose to repeat that because we have spent some time on it in the written submissions. That's one of the points where we effectively elaborate on the reasoning of the High Court.

That takes me to the post High Court judgment commentary, as it were, that my learned friend referred to in his submissions and which he has included in his bundle of materials. There are two of those, the Court may recall. One is the New Zealand Law Society seminar extract, which is at tab 9 of the appellant's bundle, and the other one is the Bailie article which is in the following tab.

In terms of the one at tab 10, which is the Carter and McHerron booklet from the Law Society seminar, it criticises both the Environment Court decision and the High Court decision, the Environment Court on page 37 and the High Court on page 38. In the first of the Environment Court, that's a more direct decision. Our submission is simply that the Environment Court was entitled to take the terms of section 3 of the 2004 amendment is a clear statement of legislative policy as to which of the RMA

decision-makers was to regulate discharges of greenhouse gases for climate change effects, and not only that, that was supported by the legislative materials to which His Honour, Judge Newhook's attention was drawn.

As far as the High Court critique on page 38 is concerned, the criticism there is again that section 3 of the 2004 amendment, the purpose statement has overridden more express provisions, in our submission – and these are points that have partly been made already – there is not a recognition in this commentary that section 3 is a description of why, not just what, is going on in the amendment and if that proposition that I'm asserting is accepted, then that explains why section 3 does have real force. There's no commentary in here about the legislative materials which we say we enforce that particular purpose, and the suggestion really is made that there is too much complexity in the new sections 104E and F and 70A and B if all that was meant was a simple proposition that local authorities could not have regard to the greenhouse effects – sorry, the climate change effects of greenhouse gas discharges. But that, with respect, is itself an oversimplification. The point that isn't made here, and which I've been emphasising yesterday, is that the 2004 amendment is targeting the sources of local bodies' regulatory powers in this area. Those sources of power are section 15 about discharges to air, and sections 13 and 68 about rule making in regional rules. Those are the matters that give the jurisdiction. Those are the matters that are targeted. It wasn't a simple matter just to superimpose a separate proposition about local authorities.

CHAMBERS J:

I suppose one aspect that the learned authors may have overlooked is your activity 1, activity 2 analysis in that the difficulty they highlight is removed if that analysis is correct because the discharge will be caught by the relevant section.

MR HODDER QC:

Yes, and the same proposition, if one comes at it from the other direction, is that that explains the pivotal role of section 15 in terms of discharges to air. If that is the concern, section 15 is critical. There's one point that really follows on from that, and it partly relates to the point that Justice Young made to me yesterday. That is that if one takes the general language that we find in section 104 and you also find in section 68(3), and you also find in section 76(3) about district rules as opposed to regional rules, then you would still have jurisdiction for a territorial authority to have rules about climate change effects of greenhouse gas discharges. That just doesn't

seem consistent with what is being achieved at all. In effect, one could do an end run around section 104E if that wide language which you could find in other places, among other places, section 76(3), is sufficient to found this kind of obligatory jurisdiction in local authorities.

So with respect –

GLAZEBROOK J:
Well, you couldn't do it under 68(3), could you, because hasn't that been expressly –

MR HODDER QC:
Quite. But the point would be that 76(3) isn't expressly dealt with –

GLAZEBROOK J:
Well, no, but it is subject to national – 76(3) is subject to national standards, though, so...

MR HODDER QC:
But section 104E starts straight away. Section 70A starts straight away before national standards are in place.

WILLIAM YOUNG J:
I mean, there aren't any national standards, so on the face of it, it did seem to me that if the broad approach is taken to sections 5 and 7, carrying them through to sections 68 and 75, local authorities should be regulating by reference to the potential for consented activities to produce downstream the climate change effects.

MR HODDER QC:
Well, the point I didn't make yesterday is exactly the same language we find in 68(3) we find in, I think it's 76(3) and again in 104(1)(a), which is obviously the focus of the appellant's concerns here.

We say that general language cannot confer a specific regulatory jurisdiction which the point of the 2004 amendment was to take away.
In terms of the Baillie article, which is at tab 10, that is – regrettably doesn't have a discussion of the structure and scheme of the Act and the particular role of section 15 in the different paths. It is very much focused on section 104 at that higher level and

the more general language one finds in part 2, but it doesn't really focus on the sources of regulatory power. It doesn't refer to the legislative materials that indicate the purpose here was to try and achieve consistency and avoid local authorities' inconsistencies, and nor does it recognise that those materials indicate there was a concern about dual controls, and in fact the article positively welcomes the prospect of dual controls. Now, that's a view, but with respect, it's not a view that stands up to the scrutiny that the matter received in the High Court judgment and hopefully in this Court.

Then it also observes that the settled law that you can take end use effects into account under section 104. We resist that proposition.

The author cites the *Beadle* and *Cayford v Waikato Regional Council* NZEnvC Auckland A127/98, 23 October 1998 cases. They aren't decisions that directly decide the point, they contain observations to that effect but we remain in the position where there is no authority before the Court that says, "If activity one is what the land use consent is being applied for, the discharge effects of activity two are relevant to it." That simply isn't decided by those cases, nor by the cases that were provided by my learned friend for the appellant yesterday.

This article also appears to be the source of the New South Wales case that's included in the appellant's material. Mr learned friend Ms Limmer, I think, is going to deal a bit more with that but I simply observe, as one would expect and as my learned friend said, it is Australian, it is an entirely different statutory scheme and in particular there, there was an explicit requirement for a detailed greenhouse gas assessment –

WILLIAM YOUNG J:
The Minister had required it and it's been distinguished subsequently on that base, I think.

MR HODDER QC:
Yes. The Queensland Courts have taken a different approach, suggesting it be very cautious but this case, there was a requirement that there be a detailed greenhouse gas assessment and the issue is whether it was scope one, scope two, or scope

three and scope three was the one that required the emissions from the end user to be taken into account. In the end, the Judge said scope three was within in but once we describe that debate, it's got a long way away from anything under the RMA. So, with respect, that doesn't take us very far.

So if the Court pleases, I would like to sort of conclude by going back to the Minister's speech which is in – which I meant to take the Court to directly yesterday, it's at tab 9 of our large bundle of authorities. So tab 9 of the respondent's large bundle and on page 7584 of the *Hansard* report, we're in the third full paragraph commencing, "With regard to climate change," and what I want to draw attention to is the last two sentences of that.

"The amendments, i.e. the new sections that have been inserting into the Act, 17A, B, 104E, F. Those amendments do not indicate a lack of Government concern about greenhouse gas emissions. On the contrary, we propose them because greenhouse gas emissions are so important they should be managed through national mechanisms, namely those in our climate change policies."

Then it goes on to explain the two exceptions to that, that's the positive tick if there is a renewable energy exercise which is the one that – sorry, this is the second exception. The first exception is the one where national standards are being incorporated in or accorded proper weight by the local rules.

Now in our submission, nothing changed from the time that Bill was introduced to the form that is now before the Court in it's enacted nature and that was the key to it. The point is not the greenhouse gases are unimportant of the RMA, they are important but they're important so that they are dealt with through national mechanisms and the whole point of the appeal by the appellant is to try and have them dealt with at a local level. We say that that is the difficulty about it and so, on the basis of the text and purpose of the 2004 amendment, our submission is that the effect of it was to remove from local authorities any regard to climate change effects of greenhouse gas discharges, unless they were covered by the exceptions that are referred to in the Minister's speech. Along the way, that would remove expensive litigation about these issues which is also a matter of concern.

So when my learned friend says, "But it's just a question of fact," what he means is, these will be litigated case by case, time and time again, the very issue that the

current Buller Coal matter is now suspended, waiting the decision of this Court as to whether one goes back and has an argument about greenhouse gases, with its associated time and cost.

So as I have said, possibly too often, how submission is that the 2004 amendment targets the sources of local authority jurisdiction which are the regional rules, that's what we get from sections 30 and 68 and the discharge consents which comes from section 15 and is now governed by section 104. Having done that, Parliament couldn't reasonably have been expected to think that there was a backdoor way of achieving a new regulatory power under section 104 and it's simply wrong to superimpose climate change considerations in a way which circumvents section 104E, when the concern is in fact about discharges to air.

So I can leave the matter, for my purposes, in terms of the question. There's always – the debate's half about how you frame the question. So my learned friend says to you, "The question is, what part of the 2004 amendment amends section 104, where's the bit that changes that exactly?" Of course, there's no textual amendment to 104, the question is more subtle but we say it's also a myopic way of defending the question. The correct question is, how can it be said that the 2004 amendment leaves local authorities with a general but indirect regulatory power over discharges to air? We say there is no answer to that question and that is the case for the first respondent.

Now Your Honours, I appreciate it's taken a long time perhaps to get to that point but, if there are any questions, I'm happy to try and answer them.

ELIAS CJ:
No, now questions Mr Hodder, thank you.

MR HODDER QC:
As Your Honours please.

ELIAS CJ:
Ms Limmer.

MS LIMMER:

May it please the Court. Solid Energy finds itself in a very similar factual situation to that of Buller Coal and, for that reason, it supports and adopts many of the arguments you've already heard on behalf of the first respondent. In saying that, there are a few distinctions between the factual situations of the two respondents. Primarily, Solid Energy's particular application is at a different stage in the consenting process. It has just gone on appeal to the Environment Court, so in the first two hearings it was still at counsel level, it's now been appealed. The only appeals in fact held against it is one by Solid Energy itself and that just seeks some changes to a handful of technical conditions, the other appeal is by Forest and Bird.

Just to give some context to why this issue is important to the appellant and Forest and Bird, the outcome sought by Forest and Bird in that appeal for taking into account the effects on climate change, is conditions it would avoid remedy or mitigate the effects of discharging greenhouse gases for the end use, or the decline of consent if appropriate conditions cannot be imposed. Now that appeal is presently on hold pending the outcome of this decision.

Having described that, I just wish to, before I elaborate on the written submissions filed, cover a few issues that arose out of questions yesterday. The first one can be dealt with shortly, it just regards the Crown Minerals Act regime and there were a couple of questions around what that encompasses. The first point to make is that in respect of coal, it is a mineral that can be either privately or Crown owned, so not every coal mine requires a Crown mineral permit if you own the coal –

ELIAS CJ:
I can't remember, is coal under the Crown Minerals Act?

MS LIMMER:
It is, where the coal is Crown owned.

ELIAS CJ:
It is, yes but it's not a Crown mineral?

MS LIMMER:
Sometimes it will be and sometimes it won't be. It depends whether it has specially been reserved to the Crown through one mechanism or by coincidence of timeliness when the land was alienated.

ELIAS CJ:

Is it only Crown owned coal that is a Crown mineral?

MS LIMMER:

That's correct.

ELIAS CJ:

So it's only that that's under the Crown Minerals Act?

MS LIMMER:

That's correct. So gold, or gold, for example, is a Crown owned –

ELIAS CJ:

Yes, yes, I –

MS LIMMER:

– mineral and not all coal is, so not every –

ELIAS CJ:

– and I think –

MS LIMMER:

– coal mine will need both –

WILLIAM YOUNG J:

Are these coal mines involving Crown coal, or not?

MS LIMMER:

Yes, as far as I understand it.

ELIAS CJ:

It's on DOC land or something, is it?

MS LIMMER:

Certainly the Buller Coal one is on DOC land. The Solid Energy one is actually on state coal reserve.

ELIAS CJ:

I see.

MS LIMMER:

So the land stages is slightly different but they are governed by mining.

ELIAS CJ:

Yes but it's the land status that determines Crown ownership, is it?

WILLIAM YOUNG J:

Timing.

MS LIMMER:

Not always. It's even more complicated than that some –

ELIAS CJ:

All right. It's probably a wrinkle we don't need to bother ourselves with.

MS LIMMER:

Yes, yes but the relevant point I think, in response to some of the questions, is that there is nothing in the Crown Minerals Act that requires an environmental assessment of the activity of coal mining and that is really a function of the fact that the Crown Minerals Act and the Resource Management Act were passed through the House in tandem, and they were to reform the law that related to mining up to that time, which was that when you got your coal mining license under the Mining Act, you got your environmental approvals as well. So you didn't need to go back to a district council or regional authority as they were then and get any further approvals. So at the time that the Resource Management Act was passed, there was a specific intention to split off that environmental assessment and the allocation of coal functions. So the property rights in coal arise from a Crown Minerals Act but the ability to use the land in a manner that would enable you to get the coal arises from the Resource Management Act.

ELIAS CJ:

Yes thank you, that's helpful.

MS LIMMER:

The second issue, and it's one that's already been touched on by my friend this morning, is whether the sections were repealed. The greenhouse – the ability to take into account greenhouse gas emissions was repealed in reliance on any yes fairly swiftly filling any perceived policy vacuum that might arise.

And just in response to that I wanted to draw the Court's attention to the words in the – at tab 8 of the large bundle and the explanatory note, and you've already looked at it yesterday but on page 9, at the bottom of page 9, it does talk about the risk of creating a policy vacuum. But it talks about the policy vacuum and the risk of it being prior to a carbon pricing mechanism coming into play. So it is not concerned about a policy vacuum being created between repeal of the sections and an NES coming into force, but rather between repeal of the sections and a price on carbon coming into force. And in my submission that is consistent with the policy at the time which was that the principal mechanism for addressing greenhouse gas emissions in the New Zealand context and for playing New Zealand's part in its international cooperation around dealing with climate change, was through the pricing mechanism and that was eventually embodied in the Climate Change Response Act and the emission trading scheme.

CHAMBERS J:
Are the regulations to which I referred this morning, are they regulations which would come within section 70B, namely regulations made under section 43? Well, we know they're that, to control the effects on climate change of the discharge into air of greenhouse gases.

MS LIMMER:
Yes Sir, in part. There is that specific section in the particular environmental standards you referred to that deals with greenhouse gases from landfills and that would be a qualifying national environmental standard. And interestingly, just on that particular NES, earlier that year in May 2004, there was a specific draft NES just for greenhouse gas emissions from landfills and it seems that what happened was that that was absumed in the bigger air quality NES that Your Honour found last night.

CHAMBERS J:
Oh, I see, there was a draft of these that...

MS LIMMER:

There was a draft one for landfills and that was promulgated in May 2004. Now that never went any further and that is –

CHAMBERS J:

Well that is picked up, though, isn't it, by these?

MS LIMMER:

Yes, that's right, that's correct. It's fair to observe that the main thrust of the operative NES, that 2004 document, has very much been towards matters such as PM10 emissions and a particular matter from wood burners and that is where they have really bitten.

CHAMBERS J:

Although, of course, some of those other matters, the activities referred to which are restricted in theory in various ways, are activities which do contribute to effects on climate change don't they?

MS LIMMER:

That's right because often a discharge from a source will have an effect on more than one matter such as vehicle emissions, for example, which are never a particularly localised effect. That is quite irrelevant to any greenhouse gas emissions.

So the point – my submission, rather, on that is that the policy vacuum is really concerned with the effect of these economic instruments for controlling New Zealand's greenhouse gas emissions, rather than any particular reliance on the fact that the RMA would ultimately end up being the effective control mechanism for these matters.

CHAMBERS J:

From your knowledge of being a solicitor at Solid Energy, can you help us as to whether the third bullet point of those four you've just been referring to –

ELIAS CJ:

Sorry what page is this?

CHAMBERS J:

This is page 10 of the explanatory note of the Bill.

ELIAS CJ:

Yes.

CHAMBERS J:

The early development and management of negotiated greenhouse agreements and projects, do you know whether they were developed and brought into force?

MS LIMMER:

Yes Sir, I can probably help you a bit with that. The negotiated greenhouse agreements policy was put forward in 2003 and it was done so in the context of what was then going to be a carbon tax. There were only ever two negotiated greenhouse agreements negotiated and what it meant is that someone who is going to be emitting and, therefore, having to pay a carbon tax could go in advance to Government and say they had another way of dealing with it. They wanted to go down another path. They reached some agreements with Government about what they were going to do to manage their emissions and in return they would be exempt from the carbon tax that was seen to be coming at that time. There were only ever two companies that, in fact, ended up with a negotiated greenhouse agreement and the projects referred to were effectively opposite. So they were like your wind farm and geothermal and landfill gas capturing projects where they could go to Government and say we're going to do this. It's going to save generating power from a coal fire power station because we will have our wind farm and in return they would effectively get carbon credits for doing that. So it would be, in itself, it would be a subsidy.

CHAMBERS J:

These were sort of ad hoc agreements in anticipation of a general carbon tax policy?

MS LIMMER:

That's quite right.

CHAMBERS J:

So is it your submission that, in fact, the vacuum has been filled by a number of mechanisms, that being one, these regulations being another and by the carbon tax regime, is that how it's been dealt with?

MS LIMMER:

To an extent Sir. The – I should say, though, that the negotiated greenhouse agreements and projects policies only stayed in place until 2005 because at that time the idea of a carbon tax was wiped after the general election. Then what came in its place was at that promulgation of the Emission Trading Scheme and that wasn't introduced until 2008, so there was a hiatus between 2005 and 2008, and then the actual ETS pricing didn't take effect until, for the coal industry, until 2010 was when use – miners such as Solid Energy had to commence making payments or surrendering credits.

So it had been a slightly shifting sand but I think my submission is more the economic disincentive to emitting greenhouse gases was seen as the primary mechanism for meeting New Zealand's obligations in the international climate change manner rather than relying on the RMA to come up with another way of dealing with it other than through specific consent applications or planning rules. So the NES mechanism was certainly mentioned as a national mechanism that could be useful but it wasn't the primary tool that Government was relying on to control these types of emissions.

And just as a final point on that particular topic, I would note that the very matter of these sections came before Parliament again over 2006, 2007 and 2008 when a Bill was introduced to repeal the very changes that had gone in, in 2004, and in 2008 despite, and even noting that there still wasn't an NES, Parliament decided to keep these provisions in the Act. So four years on, without an NES, Parliament is still of the view that the Emissions Trading Scheme, and it had only just been introduced then, so it hadn't been passed into law but that that would really be the ultimate answer.

McGRATH J:

So what was the form in which Parliament took that view, expressed that view?

MS LIMMER:

That was in the Select Committee Report on the Resource Management Climate Protection Amendment Bill 2006, and I do actually have some copies of that. It's a very short document.

McGRATH J:

I don't think that's necessary, but the Select Committee recommended that no action be taken?

MS LIMMER:

That's right. They recommended that the 2004 amendment stay in place, notwithstanding that the argument was run that there hadn't been the action, if you like, of NES undertaken.

CHAMBERS J:

Is that the Bill that introduces the Emission Trading Scheme, or is that a different...

MS LIMMER:

That was a different Bill, so this was this particular Bill that I'm referring to, the Resource Management Climate Protection Amendment Bill.

CHAMBERS J:

What is the name of the Act that introduced the Emissions Trading Scheme?

MS LIMMER:

It would be an amendment to the Climate Change Response Act, and I think it was, actually, just the Climate Change Response (Emission Trading Scheme) Amendment Act, but I'm not entirely sure.

GLAZEBROOK J:

Did you say you had copies of the Select Committee Report?

MS LIMMER:

On the second Resource Management Amendment Bill, yes, I do.

GLAZEBROOK J:

Because I wouldn't mind a copy of that.

ELIAS CJ:

All right. We're not dealing with the Bill but perhaps we'll take that in.

MS LIMMER:

Yes, thank you.

GLAZEBROOK J:

Well, just in the sense that it was looking at the 2004 amendment.

ELIAS CJ:

Yes, post-enactment. We'll have to think about what, if any –

GLAZEBROOK J:

It may not have any significance, no.

ELIAS CJ:

Is there anything in it that you rely on in your submissions?

MS LIMMER:

Well, Ma'am, the only reason I draw it to the Court's attention is because it was expressly before Parliament in 2008, or the Select Committee, at least, in 2008, as to whether these sections that had been inserted in 2004 remained appropriate in light of the fact that there had not been national action such as an NES that perhaps had been desired by a particular sector of the community and the Select Committee's conclusion was notwithstanding that we now had a firm proposal for an Emissions Trading Scheme that had just been introduced to the House and that they felt it would be inappropriate to take the sections back out of the Act when the Emissions Trading Scheme looked like it was going through.

CHAMBERS J:

So in effect as matters developed and Governments changed the initial way of dealing with this problem, which had been by way of a standard, got replaced by –

ELIAS CJ:

By way of a carbon tax, I think, was the submission.

MS LIMMER:

That was my submission, yes.

CHAMBERS J:

Yes, a standard in the carbon tax got changed to a different mechanism.

MS LIMMER:

Yes, although I would say that fundamentally the mechanisms were still economic disincentives to discharging rather than disincentives through the resource management process.

The –

ELIAS CJ:

You can pass those in through the registrar later.

MS LIMMER:

Yes. It's only five pages, the Select Committee Report, and there is the explanatory note which is also only five pages, so it would probably be helpful to have them both. They're not lengthy.

ELIAS CJ:

Yes, thank you.

MS LIMMER:

The other question that arose briefly yesterday, Your Honour the Chief Justice raised it with respect to section 70A and the amendment to that regarding the efficiency of the end use of energy. I think that it may be of some assistance to turn to tab 10 of the big bundle and pages 4 and 5 deal with the fate of that proposed amendment and you will observe that in fact that provision was changed quite markedly from what was proposed. It deleted the reference to minerals, and the Select Committee sought to clarify that what is being referred to in that section is the end use of energy but that it does not relate to the efficiency of conversion from the primary source, and in clarifying that, the committee also notes that in respect of seven sections –

ELIAS CJ:

Can you explain that a little? It's not terribly clear to me what that distinction is.

MS LIMMER:

Certainly. The distinction is, for example, if I use the example of transport fuels, it's not the efficiency of converting the raw product to a fuel that is of any concern under the Act, but it is the efficiency of ultimately using the fuel, for example, driving longer distances than you need to by having settlements that are remote from centres rather than consolidated around them. That is a context where section 70A has been discussed by the Courts before, and other than that, the Select Committee does just note that sections 7(b) and (g) have both been found by the Environment Court to be irrelevant to minerals as a result of that section 5(2)(a) excluding minerals from the need to sustain their potential for future generations, so that just expands a bit on the point that my friend was taking you through yesterday.

ELIAS CJ:
They say that it's been held that because of section 5(2)(a) and the exclusion of minerals it follows that section 7(b) does not apply to minerals?

MS LIMMER:
And (g), Ma'am, so at the top of page 5 of the Select Committee Report, they just summarise it in one sentence, "The Environment Court has issued decisions that specifically exclude minerals and mineral-derived energy from consideration in respect of section 7(b) and (g) of the Resource Management Act.

ELIAS CJ:
That's a fairly bold statutory interpretation. It may be that it's a necessary implication of section 5(1)(ii) but it's not immediate obvious to me.

MS LIMMER:
I think, Ma'am, there have been quite a few Environment Court decisions considering the implications of 5(2)(a) for matters of assessment under section 7, and really what they get to is the point that the Act is simply not concerned with how quickly or otherwise these minerals are used up. It's not looking to eke them out or ration them to make sure they're going to be available in 20 years' time. That's just not a matter that this Act is concerned with, and in fact that's where the RMA –

ELIAS CJ:
And that's never been taken on appeal to the High Court?

MS LIMMER:

Not that I’m aware of, Ma’am. All the authorities I’m aware of are Environment Court.

And that is probably where there is some interactions with the Crown Minerals Act, because in fact the efficiency of the use of the mineral in terms of extraction is a matter that is of prime consideration under the Crown Minerals Act so they, under the Crown Minerals Act, the Government wants to make sure that New Zealand gets as much bang for its buck as it can out of allocating these permits, and therefore that the minerals are extracted efficiently and not wasted.

CHAMBERS J:

Has the Environment Court proceeded on the basis that it’s not its business to make the business decisions for the owners of resources, whether it’s better for them to realise them now or later as a matter for whoever owns the resource?

MS LIMMER:

That's right.

GLAZEBROOK J:

So they confine themselves, presumably, to the environmental impacts of the particular extraction at the time rather than the future generation because of that exclusion, is that basically the...

MS LIMMER:

That’s effectively the point that they’ve got to, so they are concerned with making sure that how the minerals are obtained or extracted is done is a sustainable management fashion, that they are not concerned with actually sustaining the potential of the mineral.

ELIAS CJ:

But the Crown is, under the Crown Minerals Act.

MS LIMMER:

In the sense that they are concerned to make sure that the mineral is efficiently extracted, so there is no waste, so they get the maximum return for their mineral estate.

ELIAS CJ:

As owner?

MS LIMMER:
As owner of the mineral, yes.

ELIAS CJ:
I see, yes.

MS LIMMER:
The final point that I just wanted to touch on, from discussions yesterday, was the appellant's reference to the Baillie article and I know my friend has just talked to you briefly about that and I only have two short comments on it. My comment is that the article itself comes from a particular viewpoint, it's not an impartial examination or evaluation, if you like, of the law surrounding this particular appeal and that is evident in the fact that it hasn't for example, evaluated the scheme of the Act or how this particular section 104 sits in it. The author herself notes, at the top of page 13, that she hopes that in future the New Zealand Courts will adopt a similar approach to the *Gray* in New South Wales decision that's referred to.

The only reason I draw it to the Court's attention because that decision is included in the bundle, is there is in fact a very recent Queensland decision from March last year, that goes entirely the opposite way and it decides that the very same types of emissions that were argued in the *Gray* case are not relevant on a coal mining application. Now obviously both of those decisions have been decided under different legislation. The New South Wales legislation is different from the Queensland legislation. There are Federal Court decisions that also go either way under the common law legislation that's applicable.

So my submission on that point is simply that it is evident that there is no one size fits all in terms of an environmental assessment for coal mining and what is relevant really does seem to turn on the particular words of the statute.

WILLIAM YOUNG J:
There's very similar arguments though that were deployed and particularly in the debate about the *Gray* case and then it's coloured by the fact that in the *Gray* case that the Judge was making a decision in respect of an assessment had been directed to address greenhouse gas consequences.

MS LIMMER:

Yes, quite right and I think there are other distinctions. The actual part 3A of the New South Wales Act that that case, or that application came forward under, has since been repealed. I think that was some time last year and it is quite different from the remainder of the Act, in that it is not a triggered, the need for authority is not triggered by any particular planning rule but rather it is when a project is deemed to need an authority by virtue of its size effectively, or its scale. So in – and within the Act that it appears the type of authority being considered there was quite different as well.

WILLIAM YOUNG J:

What's the Queensland case, have you got the reference for that?

MS LIMMER:

I do and I actually have – it's very long. I have extracts of it that discuss the greenhouse gas part. It's *Xstrata Coal Queensland Pty Ltd v Friends of the Earth – Brisbane Co-op Ltd (No 2)* [2012] QLC 67 –

WILLIAM YOUNG J:

All right.

MS LIMMER:

– from the Land Court in Queensland and it effectively traverses all the same arguments and just reaches a different conclusion.

ELIAS CJ:

All right, we'll take that in as well, thank you.

MS LIMMER:

Thank you Ma'am. I apologise for the length of it but it is an extremely long decision.

ELIAS CJ:

Yes. Are those simply extracts, did you say?

MS LIMMER:

All that I provided is the one section that deals with the arguments and conclusion.

McGRATH J:
Are you able to pinpoint anymore than that?

MS LIMMER:
The conclusions part of the extract I have provided, effectively just outline why, in the particular wording of that statute which required an assessment of the effects of the activity, assessing the end use wasn't relevant.

Those are the points that I wish to discuss from yesterday and, other than that, I was just going to expand on a couple of points in my written submissions, without repeating what has already been covered.

One of the first matters that I wish to address is the limits on discretion under section 104(1)(a) and in the written submissions, I have submitted that there have always been some limits, it is not an unfettered or unlimited discretion as to what you take into account and I've referred to the wording itself which draws a link between the effects that fall for assessment and the activity and Mr Hodder has addressed on that.

I also draw to the Court's attention one more item of statutory context from that put for by the first respondent which is section 91 of the Act and my submission in respect of section 91, is that it illustrates that there must be some limits under the section 104(1)(a) assessment, otherwise it wouldn't be necessary to give the council a power to defer consideration of one application pending application for other related activities. If in fact, you could just go forth and assess the effects of the activities that might emanate, you wouldn't need to defer consideration of one application until others had caught up.

GLAZEBROOK J:
Can I just – do you – well, perhaps if I ask you this just generally. What do you say activity is?

MS LIMMER:
The activity, in my submission, in the context of section 104, is the action that triggers the need for resource consent. So in the case of –

GLAZEBROOK J:

And what about consequential effects of that, so where do you draw the line in terms of the consequential effect? I think we sort of got, with Mr Hodder, up to anything that might need a consent on its own which I was quite attracted to as a concept and, in this case, the discharge consents effectively.

MS LIMMER:

Yes and section 91 certainly provides support for that activity because it gives you an express power to require that the other applications for other activities be made and effectively heard together after that.

The submission I made in my written submissions, attempting to put the expressions in simple language was effectively a but for test, in terms of consequential effects, in that the only effects that are relevant, the effects of allowing the activity, are those that wouldn't arise but for the activity and the examples that I would give to illustrate that are your traffic movements to a new supermarkets for example, they wouldn't arise but for the establishment of that supermarket or –

GLAZEBROOK J:

But it doesn't much help you with the coal extraction though because you can say the downstream effects wouldn't happen without coal?

MS LIMMER:

Yes and the distinction that I draw in respect of that is that the end use of coal – sorry, I'll get this round the right way. It is the end use of coal that dictates the mining of coal, not the mining of coal that dictates the end use. So we could pull coal out of the ground for 50 years for example but that is not going to compel anybody to use it. If there is no demand there, the mining of coal is not going to cause it to be used. Whereas for example, the establishment of a subdivision –

ELIAS CJ:

But if there wasn't any demand, that would be a significant feature in the resource consent, wouldn't it?

MS LIMMER:

If there wasn't any demand, the activity simply wouldn't occur –

WILLIAM YOUNG J:

You wouldn't dig it out of the ground.

ELIAS CJ:
No but in terms of the arguments and the balance to be struck by the decision maker, one of the considerations that is always in play is whether there is a need for the product of the activity?

MS LIMMER:
To a degree Ma'am. The need really drives the assessment of the benefits, rather than actually proving a pure need and there is –

ELIAS CJ:
No, I accept that. It goes to whether, on balance, granting a consent is of benefit within the scheme of values provided for by the Act.

MS LIMMER:
Yes and interesting, that brings me onto the second point that I was going to make. Perhaps if I can move onto that which relates to Your Honour's questions yesterday on that very point, about claiming the benefits of the end use but not being able to assess the detriment of it and you may have observed that in the *Beadle* extract that was given to you by the appellant yesterday which is – I'll just find the tab. Well, in fact, it's at tab 1 of the big bundle as well, and it's at paragraph 90 of the decision and the Environment Court there was grappling with something of a similar issue in that it was concerned with the fairness of the Minister in that case claiming the establishment of the detention centre as a benefit for the community, but the appellants on the resource consents not being able to bring forward the disbenefits of the establishment of that land use.

My submission in respect of that bringing the argument back to the particular applications in question for Solid Energy at least, the benefits that are claimed through the resource consent process are not benefit of the end use. The benefits are those of extracting the coal in terms of how many jobs that will create and how much money will go into the local economy from the creation of those jobs, from the use of machinery, from the employment of contractors. The benefits are all related to the specific activity of extraction. They do not extend to the benefits of how many jobs will be created in the steelmaking factories overseas or how much wealth will be

generated to those communities from being able to use the coal in the steelmaking process.

GLAZEBROOK J:
What about just selling the coal? Is that a benefit that's taken into account or not?

MS LIMMER:
Well, it's, in the sense that you won't mine it if you can't sell it but then you won't have the adverse effects of actually mining either. So the benefits still come back to the assumption that it's going to be mined. If it's going to be mined benefits will be from the actual mining process, not the using coal in some other process.

GLAZEBROOK J:
Mr Hodder was also talking about the low key, well, domestic issues but also the very local issues in terms of the scheme of the Resource Management Act. Do you have anything to say specifically about that because what you're talking about there are benefits, pretty local benefits that you're talking about?

MS LIMMER:
Yes, and those are the – from the cases that are presented in support of these applications. Those are the principal benefits. They are localised benefits.

GLAZEBROOK J:
So you would support Mr Hodder's submission that that's effectively the scheme of the Resource Management Act to be looking at, well, for the local decision makers to be looking at the localised environment effects which, of course, can, if they're big enough, spill over I suppose but...

MS LIMMER:
Yes of course and yes, I do support that submission –

ELIAS CJ:
But the context includes matters of national interest. There is that hierarchy, so I wonder really, isn't it wholly contextual? It depends what benefits are being claimed for the activity, what counter detriment will have to be assessed.

MS LIMMER:
Yes.

ELIAS CJ:
So that if, for example, the idea was that the coal would be used in New Zealand, the fact that there is need for it would be very relevant.

MS LIMMER:
I submit that would be relevant to the person's application who would be using the coal. If, for example, it were a coal-fired power station, they would bring that into evidence. The need for the power and the fact that it could provide a stable base when renewables can't, for example, would be something they would call in evidence in support of their application.

ELIAS CJ:
But there must be both really, and I'm just trying to think of – the only example that's jumping to mind is a case about mining, if that's the right term to use, of clay used in some sort of industrial process and it was highly relevant that there was no other source of that clay and that was a factor that went to the disruption of the land and, therefore, to the land use assessment.

MS LIMMER:
Yes.

ELIAS CJ:
So it must be – it is wholly contextual. It just depends what benefits are being put forward by the proponents for the decision maker to weigh doesn't it?

MS LIMMER:
Yes, and that is a fair observation and my submission was really directed to drawing that distinction between in the case of at least coal mining. There's not the benefits of the end use that are put in issue by the applicant, but rather the benefits of the activity for which consent is sought.

The other comment in respect of the *Beadle* case and I think Your Honour, Justice Chambers, had a question yesterday about the context for it, and the context is highly relevant, in my submission, for the Court's findings on that case. It was, in

fact, two separate appeals. One of which related to the designation for the land use, so the change to the plan that would allow the prison facility and appeals against the earthworks and streamworks that would enable the construction of the facility. So there were two separate appeals but they were being heard jointly before the Environment Court in this case. And prior to the Judge's discussion about the relevance of the actual end use to the assessment of the resource consents, he had already found that he would take into account, on assessment of both, the designation and the resource consents, a totality of evidence presented. So evidence presented under one appeal could be taken into account on the other but that the final decision would have to be made with respect to the particular requirements of the different sections of the Act. And the judgment itself notes that, and it says in a few different places for what difference it may turn out to make, we take into account or we say that it may be possible to take into account the effects of the end use within limits of nexus and remoteness effectively.

And how that actually ended up being dealt with, and I have provided some additional paragraphs to the registrar earlier this morning for you, is –

ELIAS CJ:
Could you just hold on and we'll see whether we've got that.

MS LIMMER:
An of those additional extracts, I propose to draw your attention specifically to paragraphs 835 and 836 and at 836 in particular the final sentence, "There is, as a matter of law, we hold that the submitters –

ELIAS CJ:
Sorry, what is this again? I just want to put a label on it.

MS LIMMER:
Sorry. This is more from the *Beadle* decision. So these are just – it's a 200 plus page decision in itself, and these additional paragraphs really show you how, in what the Judge did with his earlier finding on the relevance of end use. Paragraph 836, the last sentence is, a matter of law the Court held that the submitters were not entitled by a side wind from their joining the appeal against the resource consents to

advance their own case about the effects of the designation being the thing that would authorise the establishment of the detention facility.

And further, at paragraphs 882, the Judge decides that as the resource consent application is related to earthworks and streamworks, not to the use of land for the proposed prison and carrying out the direction under section 104(1)(a), the Court had regard to the effects of allowing the earthworks and streamworks, not to the effects of allowing the prison.

And finally at 886, the Court just concludes on that topic by noting that the appellants, the submitters and appellants are not entitled to make a separate case under the appeals against the resource consents for streamworks and earthworks, in respect of use of land in the prison," but it concludes that it wouldn't have made a difference either way to the –

CHAMBERS J:
As a matter of interest, did the Environment Court manage to break the 1000 paragraph mark?

MS LIMMER:
I actually can't recall. It felt like that when I was reading it.

GLAZEBROOK J:
Can you just help me on what the effect of that is? Does that mean that they weren't really considering the end use when they were considering the land use consents?

MS LIMMER:
They weren't –

GLAZEBROOK J:
I know they looked at all of the evidence but if they – they seemed to be saying, we're not really taking the end use into account for the land use permits. We are taking it into account for the appeal on designation. Is that your understanding of what –

MS LIMMER:

That's right. That is where the ultimate conclusions –

ELIAS CJ:

And they say that's a matter of law.

MS LIMMER:

Yes, they do and the types of effects that they were because if the adverse effects of the prison were summarised in 885, the ones that were being advanced were effects such as the escape of inmates and social effects and fear in the community, typical detention centre type opposition and it is those effects that the Court, at 886, declined to have regard to in the context of the resource consents but obviously they were relevant of the designation of the land use.
The submission that I made in my written submissions regarding the *Beadle* case, is that there have always been limits on how far the assessment of consequential effects under section 104(1)(a) can go and I submit that in the case of extracting the coal, the consequential effects do not extend to the use of coal.

And to provide some common law context to the 2004 amendments, I drew the Court's attention to the Pohukura gas field case which was decided in 2003. That is the only authority under section 104(1)(a), apart from decisions such as the *Environmental Defence Society* decision that was put to you yesterday which discussed direct discharges of greenhouse gases to air. The Pohokura decision is –

ELIAS CJ:

Where do we find that?

MS LIMMER:

That is in the large bundle at tab 6 and the similarities in that case is that it was for the extraction of minerals, it was oil and gas. Some of it –

ELIAS CJ:

That's the *Taranaki Energy Watch* case, is it?

MS LIMMER:

Yes, yes.

ELIAS CJ:
Yes.

MS LIMMER:
Some of the mineral extracted would be used domestically and some of the mineral extracted would be exported. It was agreed by all the parties that case, that the end use of the minerals extracted would result, or would likely result in greenhouse gas emissions. The Court declined to have regard to the effects of those greenhouse gas emissions on the basis that they were not effects of the activity that it was considering.

At paragraph 84 of that decision, was the Court's ultimate conclusion on the point, where it found that, "The environmental effects of the end use of the energy potential of the gas to be produced is too remote to be taken into account in deciding the resource consent applications for discharges of contaminants from the production station and the onshore drilling site."

GLAZEBROOK J:
What's the permitted baseline, sorry?

MS LIMMER:
Permitted baseline, as it's been codified now, is simply what you can do as of right under a planning instrument.

GLAZEBROOK J:
Oh, okay.

WILLIAM YOUNG J:
Or what is happening already as of right?

MS LIMMER:
Well that's part of the existing environment.

WILLIAM YOUNG J:
Yes, okay, thank you.

MS LIMMER:

Yes. So the environment – in combination, the permitted baseline is just what you can do under the plans as of right but the definition of environment, as it's been interpreted, captures anything that is actually already occurring or there in the environment.

WILLIAM YOUNG J:

Right. Yes, so the word "baseline" has sometimes been unhappily used in relation to existing environment?

MS LIMMER:

Yes, and that is – because it developed from common law first, and then it was codified to make it clear that it was only the permitted baseline if it was in a planning instrument, so there was some confusion in the case prior to the clarification.

Aside from the Pohokura decision and the one – the EDS decisions particularly regarding Otahuhu sea and Stratford power station, there are, as far, in my submission, as I have been able to find, there are no other decisions regarding greenhouse gas emissions under 104(1)(a) and the only other decisions that do deal with them are in respect of land use planning, and I just want to talk about that phrase a bit because it occurs throughout the extrinsic materials that you've been referred to in terms of explanatory notes and *Hansard* and the Select Committee Report and in my submission the phrase "land use planning" has a particular meaning in the Resource Management Act context. It is not the same thing as land use consenting. It means the preparation of planning instruments, objectives, policies, or rules, and planning instruments are created in the matters that are to be had regard to in their creation are quite distinct from the matters that are to be had regard to on assessing a resource consent. It is for that reason that requirements to note that are the extract that was put before you yesterday by the appellants. Notices of requirements end up changing the plan so they, too, are not brought about by the need for a resource consent. They're not triggered by the breach of a rule in a plan. Rather, they bring forward their own proposal to make a change to a plan similar to what a proposed plan change for a new residential development might do.

ELIAS CJ:

Does that mean that – I'm sorry, I'm just trying to – does that mean that end use is taken into account only in land use planning cases, is that what you're saying?

MS LIMMER:

My submission is really focused toward the expressed statements in the extrinsic material about retaining some control over vehicle emissions via land use planning, and my submission is that that particular phrase does not evidence or support a conclusion that there was a desire to control greenhouse gases in a consenting process.

ELIAS CJ:

So we should understand it to mean be a reference to regulation setting under the –

MS LIMMER:

Yes, that's the point of my submission. It's just in resource management and practice the two functions, planning and consenting, are quite distinct, and the matters that you consider on making decisions about plans, are a lot broader. They're very much cut in the phrases of integrated management rather than the effects of activity-type perspective which is brought about by section 104(1)(a).

ELIAS CJ:

Is there some crossover when you're talking about a wholly discretionary use? For example, the supermarket.

MS LIMMER:

Well, the criteria are still different, so when council makes a decision, for example, a district council needs to go to section 74 and that lists the matters it must have regard to, and that takes it back to its functions under section 31, the cost benefit analysis under section 32, and of course part 2, which is common to both, but they are quite different matters that they have to have regard to, including consistency with adjoining plans and consistency with higher statements and consistency with dealing with management planning, so there's a really broad gambit of far more fulsome policy matters that are to be had regard to in the planning process, as compared to the consenting process which I submit is very much focused on the action that you are undertaking that breaches a particular rule.

And it is really my point about the Pohokura decision, the EDS decisions, and the absence of any other authority around greenhouse gas emissions under section 104(1)(a). That leads me to my final submission that it wasn't that Parliament deliberately chose not to amend section 104(1)(a) so as to reserve some sort of residual discretion over these greenhouse gas effects, but rather it didn't perceive a need to amend section 104(1)(a) because it believed, based on all the authority that had arisen to date, the common law since 1991 around the section, that it had addressed the forum in which these types of effects would be considered when it removed the ability of regional councils to consider them on discharge consent applications.

That's all the submissions I have to make, unless the Court has any further questions.

ELIAS CJ:
No, thank you, Ms Limmer. That's been very helpful.

Yes, Mr van der Wal.

MR VAN DER WAL:
May it please the Court, firstly I have a number of materials which I'm not sure I'll be referring to directly, but are footnoted extracts from the legislation which appear in my written submissions and I have handed those up in the event the Court needs to refer to them, and in addition to that there is an extract from section 32 of the Act, again, to which I refer.

ELIAS CJ:
Does the registrar have these?

MR VAN DER WAL:
Yes. Your Honours will have read my written submissions and I do not intend to take the Court through those. Following, as I do, from my two learned friends for the first and second respondent, I'm in a position to adopt their submissions on the matters

they have covered and will not re-cover those issues or go back to those matters in any detail.

Perhaps it would assist the Court more if I spoke merely to a number of practical matters that arise from the perspective of the consent authorities, which actually have to administer these provisions, Your Honours. In terms of particularly the matters which have arisen, the questions from this Court, in this regard I wish to commence first of all by emphasising that I am here for the two consent authorities and they will be faced with these conundrums a number of times and it is for that reason that I've concentrated specifically on the practical matters which arise and those two consent authorities are principally – well, they are entirely creatures of statute, and underpinning my submission, really, is the key issue that as a principal of administrative law one cannot understand what discretions they should be exercising without understanding the creature of statute, and in that regard I'll go through the provisions that explain what these particular consent authorities are and what purposes they were set up, and he has taken the Court to sections 30 and 31 which, in my submission, are the defining sections and they do appear at tab 13 of the first respondent's bundle and particularly sections 30 and 31. Those commence with the words, "In their district," for the district council and, "Within its region," for the regional council and, in my submission, that underpins the focus of the activities and perhaps before I continue with my further submissions, being of the more practical nature as they are, they will not, as it were, address one particular pivotal matter in which the case may turn in terms of the principal matters of the purpose but they are rather those further indications which may assist the Court in terms of understanding and putting into context those submissions, which my friends have already made.

And so the critical issue here is that we do have, as Mr Hodder has explained too, essentially different consent authorities with two different roles. One is essentially a land use planning consent authority and the other deals with those particular matters in section 30(1) and if I may characterise those? Those are principally environmental quality type issues, such as discharges, and when we get to discharges and contamination of land, air or water, one principally thinks about the regional council and it is the consent authority which employs officers with expertise in those particular areas typically, whereas one would expect to find the district council employing officers with land use planning expertise. Now those, again, are not determinative but they provide some background because they flow out of what – the types of creatures at sections 30 and 31 have created in the effect. What each can

be expected to look at, and perhaps I can move then to the first issue which has arisen from Her Honour, Justice Glazebrook's questions about the activity and I would agree, respectfully, with what my friend, Ms Limmer has said on this point, but perhaps I could elaborate to some extent that from the consent authority's point of view, the activity really pivots on that conduct, be it an overt act or an omission, that ends up contravening one of those sections, 9, 10, 12, 13, 14 or 15.

And in that regard I am aware that the Court of Appeal has in the mid '90s turned its mind to whether coastal occupation was an activity in that sense and –

GLAZEBROOK J:
Were the what, sorry?

MR VAN DER WAL:
Coastal occupation, and it found that because it did something which would otherwise contravene section 12(2)(a), it was an activity as such. It made some overt comments as to whether it wasn't quite sure whether that put the limit on the activity as such but my submission is that because the definition of occupation has been changed since then to make it clear that it is an activity, those particular observations as to whether that is the end of – whether the activity is limited to the two of them. You add aspect become less helpful and from the consent authority's point of view it really does turn on the question as to whether the applicant is doing something, be that a positive act or an omission which would contravene one of those sections and that is important for the consent authority because it has the obligation to enforce its own plan and, indeed the provisions of the Act, and that can be found in section 84.

GLAZEBROOK J:
Which case were you referring to there, sorry? Did you give us the –

MR VAN DER WAL:
It is *Port Otago v Hall* [1998] 2 NZLR 152 (CA), [1998] NZRMA 199. I do not have a copy of that as this matter arose as a result of questions.

GLAZEBROOK J:
No, the name's fine.

MR VAN DER WAL:

Yes.

GLAZEBROOK J:
But you didn't have a citation?

MR VAN DER WAL:
I don't have that I'm afraid. So in terms of the activities and the contraventions of those sections, that becomes important because section 338(1A) makes it an offence to do something which contravenes one of those sections and then when the local body undertakes the prosecution, one of the key matters the Court looks at is harm done and, again, it seems, with respect, difficult to imagine that a District Court in sentencing would accept that the increase of global warming type gases is the harm done by –

ELIAS CJ:
But no one's seeking a consent to discharge into air, and the threshold question of whether there's need to get a consent is not in issue either because clearly there is. So I must say, I find this emphasis on what – the activity is mining. The question for the Court is whether in assessing that activity whether it should be permitted, it is possible to take into account the end use of the coal extracted. That's really it isn't it?

MR VAN DER WAL:
Well, Your Honour, my submission comes really from the point that, yes, that is the question but it is – the answer to that is influenced by what is the council expected to control and what has it been given the tools to control and to manage, and so perhaps I can take the Court back to how those sections work because that ability to control, certainly in terms of sections 9 and then those other sections such as section 15(2) and section 15(2A), which deal with discharges which are lawful in default unless there is a rule saying that they shall not occur, or that they require a consent. That's the one scenario in which consents are triggered and the other one is the default scenario under section 15(1) and other sections like that, and that's the section that covers industrial trade premises, is that there shall be no discharges unless there is an express permission in the plan or additional regulation or a resource consent.

Now the reason for making that distinction, Your Honour, is that the default scenario is that these land uses aren't controlled, and those particular types of discharges. So those from areas other than industrial trade premises that the Act is quite happy for those to happen without triggering the need for a resource consent at all unless there are cogent reasons for the regional district council to intervene and to require resource consents for that.

Now in terms of the activities that gave rise to this declaration, those are not only land use activities. There is a bundle, and the regional council has to decide whether, or had to decide whether, to grant consents under section 15 to discharge contaminant to land and to water. Under section 14, whether to defer taking dam water. Under section 13, whether to disturb the lake of – a bed of a lake or river and all of those matters are thrown in with the bundle along with the section 9 consents which it triggered. And on that point, Your Honour, if it were only the activity of mining that were being undertaken, then in accordance with the rule which is attached to – which is included at appendix 1 of my friend, Mr Hodder's submissions, that activity would be a restricted discretionary activity. And in accordance with section 104C, the effects on climate change would not arise.

WILLIAM YOUNG J:

I've been trying to work out how they do arise. Is the argument the other way that in deciding whether the adverse effects of the disturbance to the vegetation, for instance, are justified, the applicant will be saying, well look at the economic benefits and do the objectors then say, well look at the disbenefits? So your benefits are –

ELIAS CJ:

Need to be offset.

WILLIAM YOUNG J:

– the weight to be attached as part of the offset by any disbenefits. Is that the argument?

MR VAN DER WAL:

Well I find it difficult to see how the Court, how a council could go down that route without actually impinging on section 104C, which requires it to restrict its discretion to those particular issues, though, and it seems – I can understand that it's perhaps an argument limiting the size of the benefit rather than a direct adverse effect.

WILLIAM YOUNG J:

Yes well it's really not an adverse effect in itself, relevant adverse effect in itself. It's a counter-argument to the economic benefit. That's how I assumed it would work but I'm not 100% sure.

MR VAN DER WAL:

I think, in that regard, certainly the drafters of the plan, and that is the point I'm really making, would not have, in my understanding, perceived those matters arising. I would defer –

ELIAS CJ:

Why does that matter, because it's the application that you're having to deal with?

WILLIAM YOUNG J:

Because it's a restricted discretionary activity the consent authority has directed to the matter specified in the plan.

MR VAN DER WAL:

That's correct, yes.

WILLIAM YOUNG J:

But you get off – this hanging off this is because the applicant relies on benefits you get arguments, oh, it's just benefits.

ELIAS CJ:

Yes.

MR VAN DER WAL:

Yes. I will say that I hadn't turned my mind to that matter in detail in terms of that point of looking at the issue, so I don't have a ready answer to that proposition.

ELIAS CJ:

I've just noticed the time. We should perhaps take the morning adjourned now. Is that convenient?

MR VAN DER WAL:
Certainly, Your Honour.

COURT ADJOURNS:	**11.37 AM**

COURT RESUMES: 11.57 AM

MR VAN DER WAL:

Thank you, Your Honour. We had reached the point – and I had pointed out to the Court – that but for the other applications that were necessary this would have been a restrictive discretionary activity of the mining itself. However, I think we can get away from the issue we just raised because –

ELIAS CJ:

You mean mining without any of the matters that are identified in appendix 1, is that right?

GLAZEBROOK J:

What did you say, but for...

MR VAN DER WAL:

But for the other applications that were also required.

ELIAS CJ:

Like affecting the wetlands and things?

MR VAN DER WAL:

Yes, and there's one in particular that for the land use side, the district planning side of things, has a certain footprint which is over the actual structure holding back the water, which contravenes the location rules in the rural chapter of the district plan, and that renders that part of the application fully discretionary, and as a result through the bundle of case law that has arisen the entire proposal is considered.

ELIAS CJ:

I see.

MR VAN DER WAL:

And the same effect arises from the regional council consents which are all bar one, I think, fully discretionary so those consents require to discharge contaminant, to dilute

water, to disturb the bed or the lake or river. All of those are fully discretionary, which leads me to the next part of –

ELIAS CJ:
Sorry, the damming and what else did you say is fully discretionary?

MR VAN DER WAL:
All of those activities for which the regional council is the consent authority, and so those are the activities which would, without consent, otherwise contravene sections 13, 14 and 15, and so we are speaking of the disturbance of the beds of lakes and rivers, section 13, the damming diverting taking and using of water under section 14, and the discharging of contaminants to land and to water under section 15, and all of those are fully discretionary and –

ELIAS CJ:
So the application is treated as if fully discretionary?

MR VAN DER WAL:
Correct, Your Honour, and so –

ELIAS CJ:
We don't have a pound of flesh mentality here. If you spill blood as well you don't have an entitlement.

MR VAN DER WAL:
That's correct. The reason I make that is because it fits in with section 102 of the Act which requires or enables consent applications to two different consent authorities for the same matter to be heard at the same time, and that's indeed what happened with this matter and with the Solid Energy matter, and all of those consent applications were bundled up into one consent hearing with one common consent hearing panel, but even if that were not the case, the regional council would be hearing its side and that leads me to one of those key issues and it goes back to one of the key issues that arose at the outset, is the issue of going ahead and getting all your one type of consent, your regional council consents without having to worry about climate change and then moving on to the land use. That scenario, in my submission, is highly unlikely because the regional council itself is already having to grapple with other section 15 consents, and it seems to me, just from a practical point of view, to

make things incredibly difficult for the regional council, all the Commission is hearing in the whole bundle how they can avoid contravening section 104E in terms of throwing out climate change effects for the discharge part of it, but then bringing them back in, through all the other – and it's only the air discharge part – if there were actually an application before this Court in the bundle to discharge greenhouse gases to air. So that's my principal point in showing how these things –

ELIAS CJ:
It would be a different inquiry, though, wouldn't it? Because then you'd have to measure the effect and so on if it were permitted, so – whereas here it simply goes into the mix in the assessment of whether overall consent should be granted.

MR VAN DER WAL:
Well, I'm dealing with a scenario perhaps if there were a proposal for constructing something which both took the coal and burned it or processed it in some way where it released greenhouse gases. At that stage, the effects of releasing the greenhouse gases would be part of the effect before the panel, and yet that panel would be specifically prohibited from looking at those effects on greenhouse gases when it's looking at the air discharge permit, but when we're looking at the water discharge permit that may be required or the land use consent, it has to look at it again in the same consideration.

ELIAS CJ:
But it's a different inquiry. It wouldn't be required to measure the exact impact or the exact effect of the discharge, but that's not necessarily the same thing as saying that in the land use consent one of the factors in the mix isn't the general effects of greenhouse gases.

MR VAN DER WAL:
Yes, I understand, and again, as I said at the outset of my submissions, it's not an absolute knockout. It's an indication that there would be difficulties – and what I'm saying is a simple council hearing panel trying to deal with this matter may well struggle to make that distinction, and it's not a reason of itself, but it's an indication, Your Honour, and I don't think I can take it much further than that, and in terms of the regulatory setting, my friends have commented on those, but I just wish to visit those

again. The way that land use effects arise is by a district council putting in place a district rule, and the way those effects from a locations other than industrial trade premises arise is by a regional council putting in a place a rule requiring those consents. The reason I have provided the Court with section 32 is that for those rules to be accepted, the Court must be satisfied or the consent authority in the first instance must be satisfied that they represent the most appropriate way of achieving the council's functions and duties, and in my submission that really colours – that gives an indication that would we normally be expecting district councils to be dealing with consents on these issues? Probably not, because of the limitations of section 32 in terms of it were trying to put in place rules to control climate change through land uses, it being a discharge-related matter that it seems difficult to conceive that one would satisfy the test that it was the most appropriate mean of dealing with it. One would suggest it would go through the regional plan, which leads me to a related point in terms of the fact that section 75(2)(b) in relation to district plans prevents them from being inconsistent with regional plans for a matter listed for section 30(1) which includes the management of discharges to air. And so in terms of that, where the regional plan is expressly prohibited from controlling the land use – beg your pardon, discharges to air on the basis of climate control – beg your pardon, of climate change, it seems odd, again, to have a district plan in that sense being inconsistent by going there and putting in place rules. So we might have, if a regional plan attempted to include a rule under section 15(2) to prevent the discharge of carbon monoxide from burning fossil fuels in burners in homes for the reason that they cause climate change that would not be permissible. However, on my friend's argument, a rule preventing land uses involving those same types of burners would be permissible and that seems contrary to the way the Act works, as my friend has so well submitted, Your Honour.

Perhaps I can just then move to some of those further difficulties. That was the other point, I think it was, Your Honour Justice Glazebrook mentioned was the difference between the effects of climate change and the effects on climate change.

Now, for a local authority administrating or granting resource consents and making planning rules, the difference is very significant. It is whether when one comes to the issue of making, granting consents or making rules it becomes very difficult for a condition to be lawfully imposed which controls what the end use of the actual substance is going to be. There are practical difficulties in terms of that, because the numerous factors and the need for direct connection between the actual activity

being controlled and the effects and the conditions. And the same would go in terms of rules.

ELIAS CJ:
I think I tend to agree with that, but what's the necessary linkage between not being able to impose conditions? Is there a linkage in the Act between not being able to impose conditions and the consent decision? There may be. I'm not sure.

MR VAN DER WAL:
Well, to the extent that rules and plans are able to include conditions but only the types of conditions which would be capable of being imposed under section 108 on resource consents. So that flows through to the types of things – reasons why consents would be required and the types of matters that would be treating the resource consent and so – and that, that – but again, it's one of those indications that, in my submission, shows it was never the intent for councils to be controlling that because then surely, they would be given the tools to do so. However –

ELIAS CJ:
If they can't plan for it, they can't impose conditions to the same effect in a consent, that's really what you're saying –

MR VAN DER WAL:
Correct.

ELIAS CJ:
– but my question and I'm indicating that I think I agree with that but does that mean that the consideration is irrelevant in the consent process because it couldn't lead to a condition but it might be a factor in the declining of the application, unless there's some necessary connection between the ability to impose conditions and the ability to decline consent?

MR VAN DER WAL:
Well, there isn't in my understanding, a direct connection but Your Honour, it comes more from the more practical issues which arose at the outside again, what is it that the end outcome would be if it could be considered, would that be a refusal of the consent? If that would be the case, one would expect, in the scheme of the Act, the council to be able to put a rule in place saying, no activities which allow coal, or

whatever, fossil fuels which can be turned into greenhouse gases shall be extracted because they can – and as I understand it, that becomes problematic and therein lies the connection but it is not as, I wish to stress, it's not as direct as saying that it can never decline for a matter for which it can't impose a consent, a condition. In fact, that often is the result, it comes to the conclusion, we can't control this by a consent so then we'll refuse consent. We can't control this by way of a condition, then we'll refuse confuse but it seem to me odd, where that consent should be refused for a matter which essentially is outside the core areas that this particular council is managing. I think that's about as far as I can take that particular matter Your Honour and –

ELIAS CJ:
Mr van der Wal, I've just also been thinking about your idea of the coal burners and land use. If you had a subdivision consent for a big residential subdivision, the council can rightly say any emissions from open fires, or log burning, or in enclosed things, are irrelevant because they are dealt with, they are controlled. Here, the effect on greenhouse gases is not controlled.

MR VAN DER WAL:
Well Your Honour, in response to that, they may not be –

ELIAS CJ:
So you can't so it's irrelevant. I mean, I'm not saying what use you can make of it for the moment, I'm just saying that you can confidently say that the wood fire burners issue is irrelevant to the land use consent there.

MR VAN DER WAL:
Well it may not necessarily be excluded by the fact that a resource consent is required because, up until the introduction of the National Environmental Standards for Quality Air, in most regions, apart from the Canterbury region with its obvious problems with PN 10, I'm pretty sure that it was in the *West Coast* reason, no consent was required and it only arises under section – because it's not industrial premises. So the starting point of the Act is that no consent would be required –

ELIAS CJ:
But that's because there's a legislative judgment, if you talk about the plan as being a legislative instrument, there's a legislative judgment that it's not a problem.

MR VAN DER WAL:

Well the Court of Appeal has looked at that in the past and it was in *Juken Nissho Ltd v Northland Regional Council* [2000] 2 NZLR 556, [2000] NZRMA 410 (CA) –

ELIAS CJ:

Oh yes.

MR VAN DER WAL:

– and it characterised those activities which are controlled by section 15(1) and 12(1) which are unlawful in the default as being assessed as higher risk and so they should require a consent in the default, whereas those which require a –

ELIAS CJ:

Sorry, they should require a consent, what, in respect of?

MR VAN DER WAL:

In the default. So the starting point, in the absence of any plan?

ELIAS CJ:

Yes.

MR VAN DER WAL:

A discharge to air from industrial or trade premises requires a resource consent as does discharge to land which may enter water.

ELIAS CJ:

Yes.

MR VAN DER WAL:

However, a discharge to air from production land, or from residential land, does not require a resource consent, unless there is a rule or a national environmental standard requiring consent and so, that was the point that I was making to Your Honour.

ELIAS CJ:
I see, yes, I understand that, thank you.

MR VAN DER WAL:
Yes. So that – and so for quite some time the Act existed in that scenario, where no consent would have been required for the log burners, or the coal burners, or whatever they were and so, it just – rounding off that section on the difficulties. In contrast, the effects of climate change are very easy for the councils to manage. They are able to put in place minimum floor levels, hazard zones. You need a particular type of consent if you want to build in this particular area because our scientists tell us that within the next 50 years, or next 100 years, climate change is going to cause sea level to rise to this, or we're going to increase the size of detention ponds for subdivisions because our scientists are telling us that climate change is going to lead heavier rainfall events, more intensity, et cetera. Those are really easy matters for regions and districts to control which contrasts again, with the effects on climate change which again – and the point of that is to demonstrate that there are good practical reasons why the effects on climate change should be excluded by the effects of should not.

Perhaps then, my final point really is to get to the point my friend made, in terms of the Parliamentary speeches and he emphasised that if we take away the ability to consider resource consents, or climate change related effects under section 104, then nothing is left. In my submission, that cannot be right, with respect because in the first place, transport planning, while some of it may impact on district and regional planning processes, a lot of it is undertaken by the regional council under its local government functions which are completely unaffected by the statute and so it's more than free to design bus routes which minimise the discharge of greenhouse gases.

The same would go, in section 75(4), a district plan can include methods other than rules for implementing policies and objectives. So the council is permitted to have non-regulatory methods and so, the only point of that is to show that something does remain and perhaps – I'm not sure whether this will be of assistance to the Court, just in terms of the matters that can be controlled under the Crown Minerals Act, my understanding is indeed that there is no specific limit and I did, in the High Court, bring to High Court's attention that for uranium the minerals plan there had basically said uranium shall not be mined and that seems to be – for more than just getting the best bang for your buck reasons but seems to be a policy reason that there is

inherently something nasty about uranium which means it is better left in the ground and my submission is that, certainly in terms of the coal that the Crown owns, it is in a better position to – it's of the view that there's something inherently nasty about coal which has it better left in the ground, that is the place to address it.

Those are my submissions Your Honours. If the Court has any further questions, I'm happy to...

ELIAS CJ:
No thank you Mr Van der Wal.

MR SALMON:
Your Honours, I'll try to be done in time for lunch. There are a few matters on which I do want to follow up following my learned friend's very helpful submissions. First, is to address the wider schematic review of the legislation undertaken in particular by Mr Hodder but just generally to draw the Court's attention to a couple of points of clarification or of timing, and in doing so I understand the Court's interests, and the parties interest, in understanding both the policy framework at the time of the amendment and now. But it is, in my submission, important that we bear in mind the state of the legislation then and in that context in particular the Climate Change Response Act and the passages Mr Hodder has taken you to are largely post the 2004 amendment. At the time of the Climate Change Response Act there was no ETS and you've asked about that so I'm just clarifying.

ELIAS CJ:
But statutes have to be taken as always speaking or whatever the current language in the Interpretation Act is.

MR SALMON:
Yes. But the notion that at the time that Parliament passed the 2004 amendment, it had in mind an ETS –

ELIAS CJ:
Yes.

MR SALMON:
– is demonstrably wrong.

ELIAS CJ:
Yes.

MR SALMON:
And putting in front of you today those excerpts from the Climate Change Response Act as you might have noted they were enacted in 2008. The ones that Mr Hodder handed up in separate form. So at the time of the amendment, I don't want to spend to long on it but –

GLAZEBROOK J:
Sorry what was –

MR SALMON:
He handed up some loose excerpts from the Climate Change Response Act.

GLAZEBROOK J:
Oh the Solid Energy, whatever it was called.
MR SALMON:
Whichever the sections were I just noted –

WILLIAM YOUNG J:
It's the stationary energy section.

MR SALMON:
Yes, not the solid energy.

WILLIAM YOUNG J:
So did they replace it, they're all new, are they?

MR SALMON:
A lot of it is new Sir. Now I haven't gone and done a detailed review of the Acts, such as would mean I was putting more hundreds of pages in front of you, but my brief check on it last night suggests that as at 2004 that Act was really just about implementing initial reporting back obligations under the international conventions. In other words it wasn't a response, in the manner that it is now, and it wasn't a gap-filler in the manner that's been the subject of of dialogue, especially with

Justice Chambers. So in my respectful submission it really doesn't assist you to look at the modern version of the Climate Change Response Act in working out what Parliament was intending to do in the 2004 Amendment Act. To the extent it does we will need to get the early version of the Act and in that respect I don't think anyone is submitting it will help. So I just note that a slight retreat from the full exploration that Mr Hodder has undertaken of what the law is now might be appropriate in understanding Parliamentary intention then.

The next point in that respect is that –

GLAZEBROOK J:
What about Ms Limmer's point that what was in contemplation at that stage was the carbon tax proposal?

MR SALMON:
There was a contemplation of carbon tax, of course, one of the immediate problems with that is it wouldn't capture some of the exact behaviour here that we're concerned about. It would not capture foreign exported coal, at all.

WILLIAM YOUNG J:
Presumably because it was anticipated that that would be addressed in the jurisdiction in which the coal was burnt?

MR SALMON:
No I wouldn't accept that Sir.

WILLIAM YOUNG J:
You don't –

MR SALMON:
I don't think we could deem Parliament to expect that all third world jurisdictions, and we've got agreed facts as to where this is going, we quickly implement their obligations under those treaties.

GLAZEBROOK J:
Although the –

MR SALMON:

And I mean it with all due respect Sir but I really don't think we can just assume Parliament would be so unrealistic.

WILLIAM YOUNG J:

Well what about, the Kyoto restrictions, would they apply to coal that was exported? Would they be engaged by exports of coal?

MR SALMON:

I would have to check that Sir but we're out of that now –

WILLIAM YOUNG J:

Yes.

MR SALMON:

And I don't think –

WILLIAM YOUNG J:

But we were in it in 2004?

MR SALMON:

We, yes Sir, I would have to check that, if I May. Mr Currie may be able to hand me a note from that or address (inaudible) suggesting would have been caught at the time unless they happened to go to a country with a regime. And in that sense it's unreal to suggest that Parliament expected they would be caught, anytime in the near future, and that's just a practical submission responding to what is, respectfully to my learned friends, speculation, that Parliament might have thought it would be okay in India or China. So it was –

GLAZEBROOK J:

Well I don't know that the submission was that they thought it might be okay. Wasn't the submission that the whole of the Kyoto and in fact all of the international relations are based on national sovereignty and therefore it's not up to one country to regulate what happens in another country?

MR SALMON:

I'm not sure it involves a principle that it's not up to one country to regulate what happens in another country in the broad sense that we're dealing with it today. Yes it is true that no country seeks to make rules covering what happens elsewhere except in extreme cases, sex offence tourist and stuff, but this is not a case of trying to regulate what happens there at all. This is a case, akin to whether one sends arms to a rogue state. It's entirely expected, and understandable, that a Government would at time decide to take proactive steps, or allow a local authority to take proactive steps to solve a problem that is not otherwise being solved. Now that is not to say that if a local authority can take these factors into account, the local authority would ignore the fact that the export destination happened to be one with regulations that would, in my submission, be relevant but that doesn't –

CHAMBERS J:

It might be thought a little odd though that Parliament envisaged that the Buller Regional Council was going to consider what use – what the rules were in China, say, or India or the like and was going to hear evidence on that topic in order to make an assessment as to whether the end use was going to be properly contained or not.

MR SALMON:

Well, with respect Sir, that's one of the easiest things to address in front of one of these tribunals out of any of the possible topics we've heard of and I don't want to get back into detail that goes beyond reply but these tribunals are expected – a tribunal in Southland made up of farmers has to hear about kaitiakitanga. A tribunal in Golden Bay has to hear about fine tuned economic analysis. My learned friend for the councils has just said, it's easy to deal with the effects on climate change. Now let's just stand back for a moment and look at what that really means. He is submitting to this Court it's easy not just to predict that the tide will rise, but to predict when and how high, in our hearing, in these tribunals. To work out how high the tide will rise, one must know how many kilograms, tonnes of Co2 are going to come out and when. To work that out one must know where from, model everything. Scientists could argue about that forever and it is harder, it is in terms harder to analyse exact right – size, or height of the tide rise, than to analyse the issues that my client is submitting here today should be put forward which are, respectfully, much more akin to the general propositions that the Chief Justice has identified. To put it another way, planning how high the sea will rise involves all of the science that is at the heart of my client's concern and then more, and indeed it's commonly understood, and

commented on, the hardest thing to predict is how high the tide will rise. There are quite concrete predictions about even temperature rises but modelling those in terms of impact on ice and so on, it's hard. So my learned friend is saying we are comfortable with this much harder topic. Please do give us one component of that to consider in the context of applications. So, Sir, respectfully I don't accept that it's that much to ask of these tribunals and I do embrace the proposition that's being put forward today, and yesterday, that what is really being asked of the councils is to consider what is recognised in statute to be a danger and a harm, often in very general or generic terms, and factor it in. So it is a strong submission from the appellant that that is not putting a huge burden on the councils. It is no longer a controversy. Given the state of the statute books it's no longer open to anybody to deny climate change in front of a council, as I read the statute books. It's a given that it's bad.

So the controversy has moved on in general terms and absent some very strange and nuanced argument which in my submission will arise more in the context Mr Van der Wal is saying is easy. It's not going to be hard.

The other point, and I made this yesterday but very briefly, even on the best case that my learned friends advance, the councils are still looking at the science that arises on my client's case because it will either come up if the NES comes through or it will definitely come up under the exception under 104E and by that I mean every time there's an application for a renewable energy plant which deals with the exception, that I lost on in Greenpeace, that exception involves looking at the relative benefits of renewable energy in climate change terms. Answering that relative benefits question involves saying well how much Co2 does it avoid burning, producing, and how much good does that result in. Councils have to do this, even on Mr Hodder's best case. So even if it is understood that it's hard –

WILLIAM YOUNG J:
Are there examples of this for instance in the wind farm cases?

MR SALMON:

Not that I've had direct experience of Sir. I know Mr Currie's been dealing with the wind farm case but I'm one of these people who's never actually caused a thousand paragraph judgment and hopefully –

ELIAS CJ:
You might provoke one here. Be careful.

MR SALMON:
I think that requires consent.

ELIAS CJ:
It requires a level of industry that might be absent.

MR SALMON:
With its own carbon footprint.

So, no Sir, I'm not aware of that modelling being done but I do recall the robust debate about how it would be done in the early hearing, even if Your Honour may not. But the point that emerged then, and that I make now, I don't want to spend undue time on it is you cannot, one cannot analyse the relative benefits of renewable energy without getting into the very debate that Mr Hodder says, really without any legislative footing to say it, Parliament didn't want councils going hear. And that's the starting point. Parliament absolutely intended councils to go near this issue sometimes. The question is when.

Dealing with a couple of other issues that relate to queries raised, either while I was on my feet and couldn't answer then, or since. The Chief Justice one of my learned friends about the minerals restrictions, section 5(2)(a), and there's a passage that – I don't want to spend undue time on it but a passage from Salmon on resource management regarding 5(2)(a) which helps give some flesh to the queries Your Honour asked. And if it's convenient I'll read it out. It's brief. "While natural and physical resources, including minerals, have to be managed sustainably, there is no duty to manage the use of minerals so as to sustain their potential to meet the foreseeable needs of future generations. The exclusion of use of minerals from 5(2)(a) makes it clear that the use of minerals and especially the activities of extracting them are to be managed sustainably in every other way, ie. safeguarding the life support capacity of air, water, soil and ecosystems and avoiding, remedying

or mitigating any adverse effects of activities upon the environment, see para," and then there are two case references which I can provide if it helps. It think –

ELIAS CJ:

But you don't have to eke them out because actually that coal may be more valuable to our children than it is to us?

MR SALMON:

Correct. It's not a family trust fund.

ELIAS CJ:

No.

MR SALMON:

No one's thinking of the grandchildren but that doesn't mean that the – some of the implications of Your Honour's question don't arise. For example, one of the hot topics regarding coal and so on is let's wait till we have sequestration technology. In other words, the ability to capture Co2. Again, common knowledge.

Now that's not something that's precluded by that section because that's not about preserving it for future generations. That's Your Honour's question. Could we hold off till the time's right for some other reason other than preservation? Does Your Honour follow that submission?

ELIAS CJ:

Yes.

MR SALMON:

And I think that must be right, with respect. The mischief of section 5(2)(a) is simply to stop people hoarding for no reason other than to hoard.

The next point was one that I failed to answer because I couldn't find my note on it but Your Honour asked about indications of a global focus on the Resource Management Act. I had, in fact, handed you up the note I was looking for which was attached to the single page summary of the *Medical Officer of Health v Waimakariri District Council* EnvC Christchurch C122/05, 24 August 2005 case. The second page there includes references to sections 2, 45 and 142 of the RMA. One of those,

Your Honour, the Chief Justice identified yesterday with Mr Hodder which is global atmosphere in section 2. Section 45 (2)(b) refers to having regard to, "New Zealand's interests and obligations in maintaining or enhancing the aspects of the national or global environment." Again an understanding of the environment being what it is, not something bound by the 12 mile limit. And the same point in 142(3)(a)(i), (iv) and (v).

In terms of those international obligations, they're conveniently summarised, if nowhere else, in the Baillie article at tab 10 of my casebook, on the final page. Probably the only material thing to note, other than the quoted terms of the UNFCCC is that it was both signed up and ratified well before the 2004 Amendment Act. So one of the questions was, to what extent might the Court take account of international obligations when construing Parliamentary intention in the Amendment Act? These obligations were in place at the time of the Amendment Act.

ELIAS CJ:
Sorry, what was the tab?

MR SALMON:
Tab 10, Your Honour.

ELIAS CJ:
Thank you.

MR SALMON:
And now just briefly on those international obligations. My learned friends have said well it would be crazy if some of this was left alive for council consideration and that would be absurd and at odds with clear Parliamentary policy. One clear intention that emerges from the legislation generally is to address climate change and, thus, it would be surprising if material gaps were intended.

Another is that the RMA, and my learned friends have spent a lot of time on the back end functional or procedural steps in the RMA, but I do submit we need to come back to the front end. It has some very, very broad core principles in part 2 that involve a very, very broad understanding of the environment, and it should, I think, go without saying that as understanding of the environment increases, as the understanding of

links between Co2 release and climate change change, so too will the application of those environmental terms, but they are very broad and they do not stop at the jurisdictional limit of New Zealand in their understanding of the environment.

So that, in my submission, is the place to start in construing amendments to the RMA, is with the fundamental principles at the front end of the Act. My learned friend's have done a very skilful job of walking through both the RMA and its scheme and related legislation and advancing the submission of, well this just will be hard or this shouldn't be this way but with all respect to them, and it was a skilful presentation, that is a submission to a Select Committee, not a submission to this Court on an issue of statutory interpretation of what it should be is, respectfully, for another forum.

So the question is what is it? What is section 104E and what is section 104(1)(a) and does section 3 prevail to change their interpretation? And in there the first question, and the one that, in my submission, is confronted most by Mr Hodder's case because, as I understood in Ms Limmer's submissions at least, she acknowledged that in some way the Act kept alive local authorities' abilities to consider climate change, consequences of such things as traffic. So I don't necessarily put her in this basket but for Mr Hodder, the first question that his position confronts is, did Parliament intend to remove all consideration of any climate change issues in the Amendment Act or just some? And in that context my learned friend again, very skilfully, went to several pieces of the extrinsic materials, and I do need to go back to them because he took the Court to some parts of the Select Committee reports and *Hansard* without possibly reading on a little and I would like, if possible, just to burden your time, briefly making sure that those are before you.

The first is tab 8 of his casebook, the Select Committee report. And I'll just go to two passages to illustrate what, in my submission, is a consistent distinction made in these reports and in *Hansard* and in the Amendment Act.

ELIAS CJ:
Sorry, what was that tab?

MR SALMON:
That's tab 8 of Mr Hodder's primary casebook. And the distinction I'm coming to is the one that distinguishes the discharge permit applications that regional authorities

deal with and all the other applications that are perhaps dealt with by district authorities because what comes through is a continuous understanding both in the Select Committee and with the Minister that this Act was taking discharge permits away from regional authorities. So when the specifics are addressed the term "regional authority" arises.

The first example is page 4 of that Select Committee report, the fourth paragraph down on page 4 beginning, "The problem..."

GLAZEBROOK J:
Sorry, what page?

MR SALMON:
Page 4 of the Select Committee report at tab 8. "The problem in relation to industrial greenhouse gas emissions is that there is a current lack of clarity regarding the role of regional councils under the RMA." Now the regional councils, as the Courts identify, are the ones who deal with discharge consents. "This has led the Environment Court hearing debates on whether regional councils should control greenhouse gas emissions and by which means." Again, regional council quite specifically identified.

CHAMBERS J:
Does this mean your emphasis on regional councils that you accept that insofar as Buller's application involved the district council's plan that the district council couldn't take into account greenhouse effects.

MR SALMON:
The District Council can in a consent application, so I'm certainly submitting and the pr –

CHAMBERS J:
But this was a restricted discretionary activity wasn't it? That's what Mr Hodder has submitted to us.

MR SALMON:
I think that's right.

CHAMBERS J:

Well doesn't that mean, under 104C that the District Council was entitled to consider only those matters?

MR SALMON:

Sorry, I think I'm being told that's wrong.

CHAMBERS J:

Well I thought we'd got to the position that because some were wholly discretionary, the whole is treated as discretionary.

MR SALMON:

And I'm getting fierce nods from stage left.

ELIAS CJ:

From your left.

CHAMBERS J:

Oh, so Mr Hodder's paragraph 2.6 is not right then?

ELIAS CJ:

Well it's true about some of the constituent consents but not overall.

WILLIAM YOUNG J:

Well is it true of the district council consents but not the regional council consents?

MR SALMON:

Paragraph 2.6?

ELIAS CJ:

Mmm, I don't think it is, I think it's – because that's where you get your –

MR SALMON:

I've misunderstood Your Honour's question initially. I took it to be building off Mr van der Wal's comment about how there's a slight disconnect between what might

happen under 104C and what might happen here under 104(1)(a) but I think we're very clearly dealing with a 104(1)(a) application.

WILLIAM YOUNG J:

Sorry, what, in relation to district council – well –

CHAMBERS J:

Well 104(1) is, as it were, restricted by 104C if that applies.

MR SALMON:

If it applies.

CHAMBERS J:

Well Mr Hodder submitted to us that, at least with regard to the matters the district council had to consider, it was so restricted –

GLAZEBROOK J:

We were told by Mr van der Wal, that wasn't the case and it was wholly discretionary because there are some reservoir consents, I mean, I didn't fully understand –

WILLIAM YOUNG J:

But isn't that regional plan?

GLAZEBROOK J:

I don't – that's not what I understood from what he said but –

WILLIAM YOUNG J:

Perhaps we should ask Mr van der Wal.

ELIAS CJ:

Yes, would you mind clarifying?

MR VAN DER WAL:

Your Honours, what Your Honour Justice Glazebrook has explained is how I'd answered the question. Had it been only an application for the land use activity in the district plan of mining, then it would be a restricted discretionary activity. However, because it was made alongside a number of other consents, including a district council land use consent to construct a structure which did not –

CHAMBERS J:

I see, I see –

MR VAN DER WAL:

– comply with bulk and location requirements it then, by virtue of bundling, became fully discretionary.

CHAMBERS J:

I see, thank you, that makes that clear.

MR SALMON:

Thank you Your Honours and –

WILLIAM YOUNG J:

Say it had been a restricted discretionary activity, would your position still be the same, that the greenhouse gas effects of mining would be material?

MR SALMON:

At a consent stage, yes.

WILLIAM YOUNG J:

That effectively is a detriment or disbenefit that offsets the benefits asserted by the applicant?

MR SALMON:

Precisely Sir.

CHAMBERS J:

But you would have to point to a specific discretion which had been left in that regard in the plan, wouldn't you, that's the point of 104C?

MR SALMON:

Yes, I think that's right and I suppose we're not dealing with a specific plan where I can or need to find a provision. We are – and my apologies if I'm limited in how I can answer in counterfactuals but we are dealing with a case where 104 itself applies.

WILLIAM YOUNG J:

But it makes it seem a bit odd that because a reservoir is to be built that infringes the bulk and location standards in the district scheme, climate change arguments associated with mining come into play?

MR SALMON:

Yes. Well it may be that there are oddities that arise all the time –

ELIAS CJ:

Because of the benefits claimed for it.

WILLIAM YOUNG J:

Mmm.

MR SALMON:

It's an oddity in itself that it becomes wholly discretionary, that's the way the RMA works but that doesn't provide a backdoor route, respectfully Sir, for introducing an implied amendment to some of the section of the Act. Should – I will –

ELIAS CJ:

It's not just the reservoir, is it? I mean, I thought the vegetation and so on, was part –

GLAZEBROOK J:

No, the vegetation I think is part of the discretionary activity for mining, is that, does that –

ELIAS CJ:

No.

GLAZEBROOK J:

– or is there something further on vegetation?

ELIAS CJ:

Mr van der Wal? Sorry.

MR VAN DER WAL:

Your Honours, from memory, I'm fairly certain that the remainder of the district council applications would have been restricted discretionary and it –

GLAZEBROOK J:

And that includes considerate but because of consideration of vegetation, is that right? Or is that something –

]

MR VAN DER WAL:

And that would include consideration, that matters to which restriction – the discretion has been restricted includes vegetation removal –

GLAZEBROOK J:

Vegetation.

MR VAN DER WAL:

– yes. However, all of the applications bar one I think, there was one controlled activity for the regional council but it was a minor matter. The rest were all fully discretionary and so even but for that – if the only application to the district council had been for mining, by virtue of section 102 and the joint hearing and the resultant bundling with the regional council consents, it is likely that overall a proposal would have been considered as fully discretionary.

GLAZEBROOK J:

So even if it's a bundling with regional and district and there's nothing in the district, it would still be discretionary, is that right?

MR VAN DER WAL:

Correct.

GLAZEBROOK J:

Right, thank you.

MR VAN DER WAL:

As long as the land use consent is triggered by the discretionary – by the district plan the – when there is a joint hearing for one proposal, the most restrictive activity status generally prevails.

ELIAS CJ:

Sorry, we'll try not to interrupt you anymore.

MR SALMON:
Not at all Your Honour, I'm hopeful that Mr van der Wal's very helpful and succinct summary will find its way into Environment Court decisions one day. The path I was on was just briefly to go through several of the intrinsic pieces and I was in tab 8 of Mr Hodder's casebook at page 5 and again, we're confronted again and again, we've given the proposition, given Parliament intended to take everything away, how can Mr Salmon submit that some might still be there, that section 104 might empower a position that defeats the purpose of section 104A? Well my learned friend didn't spend time on this part of this page which is the large paragraph, after the bullet points, under the heading "Climate change," and it's material probably partly for the reference to industrial air discharges because one of my submissions is it's clear this was what intended but it's also sensible to say, the thing we will nationalise consideration first on is the large smoke stacks, the huge infrastructural projects that could be anywhere because they connect to the grid but the last sentence is the most important, "The ability to control land uses for climate change purposes remains unchanged."

Now my learned friends might say well, that's referring to the ability to plan for the effects of climate change but that was the result of new wording, planning for the effects of climate change. This is something that remains unchanged and it goes into Ms Fitzsimons' speech which was plainly acceptable to the Minister and not answered by my learned friends which is, her example in the house was building a big supermarket and seeking consent for it. "The councils will be able to decide whether the traffic implications for greenhouse gases and climate change are acceptable." So the select committee saw that being unchanged and so did Ms Fitzsimons and thus it's – there's just not a footing to say that Parliament intended to remove everything, no footing at all.

The next piece on the intrinsic materials is at tab 9, the Minister's speech –

GLAZEBROOK J:
Can I just ask you. They did take out the industrial air discharge so – in the process, so is that just, I mean, the difficulty with making that submission is that it's not just related to – on the basis of that passage, it isn't just related to industrial, it says generally?

MR SALMON:

Well it in fact is Your Honour but through the backdoor because the definition of discharges that constitute – that come within section 15 or 15B, bring us back to industrial or trade premises, if Your Honour follows?

GLAZEBROOK J:

All right, so it's based on – so it comes back to your definition of –

MR SALMON:

It's defined in another way in fact –

GLAZEBROOK J:

– the wording of section 15?

MR SALMON:

Yes –

GLAZEBROOK J:

All right, thank you.

MR SALMON:

– the skill of Parliamentary counsel perhaps. The Minister's speech, the first point about the Minister's speech, my learned friend quoted from it and I'm at tab 9, the substantive page and on 7584, "The first thing I note is neither in this speech nor at the end of the reading, did the Minister disagree with the," only statement in the House on this debate directly on point which was Ms Fitzsimons, I can go back to it if you need but it will probably be in your mind and it's in my submissions and it's clear.

So the first point is, Mr Hodder says well, I prefer the Minister's speech and ask you to as well. He said he had nothing to say about Ms Fitzsimons speech. Respectfully, that means something but more than that, the Minister had nothing to say about Ms Fitzsimons and, as Justice Wilson noted in the *Greenpeace* decision, it really does beggar belief that if she was misstating the select committee's views, as a chair of the select committee, nobody would have said anything.

So the first point is the Minister must have – must be deemed to agree. The second point specifically on this page in this paragraph is my learned friend took you to the

initial lines of the paragraph beginning, "With regard to climate change," and also read out the final three lines. I would like just to spend a moment on the missing part, in case it wasn't noted by the Court, five lines down beginning, "However the Bill also reflects the fact that some discharges of greenhouse gases are best dealt with using regional mechanisms – national mechanisms rather than localised Resource Management Act decisions. Clauses 6 and 7 insert new sections that specifically provide that when making rules and considering consent applications relating to the discharge of greenhouse gases from industrial or trade premises, a regional council must not have regard to the effects of those discharges on climate change." So some discharges, not –

WILLIAM YOUNG J:
Yes but that's because it's restricted to industrial or trade premises at that stage.

MR SALMON:
But it still is Sir because the way the sections came in for consents means that it is only, the prohibition in 104E only arises for applications to discharge required because they would otherwise contravene sections 15 or 15B. You recall Mr Van der Wal, I think it was, explained why –

WILLIAM YOUNG J:
Isn't that because the councils can't make rules restricting other discharges on greenhouse, for greenhouse gas reasons?

MR SALMON:
They could then.

WILLIAM YOUNG J:
They could then but they can't, but as a result of this legislation they can't?

MR SALMON:
But Sir that's dealing with rules. If we might, just for a moment, deal with –

WILLIAM YOUNG J:
Yes but a consent would only be required if it's in breach of a rule. Other than in relation to trade or industrial premises?

MR SALMON:

Well no Sir. For an application like this a consent is required to dig up.

WILLIAM YOUNG J:

Yes, I know that –

MR SALMON:

No I'm not meaning to be cute –

WILLIAM YOUNG J:

I'm talking about, I mean we're sort of going around in a bit of a circle because the legislation changed a bit, but a consent is required for discharges to air from trade and industrial premises.

MR SALMON:

Yes.

WILLIAM YOUNG J:

Or, at this time, as otherwise required by regional rule.

MR SALMON:

Yes.

WILLIAM YOUNG J:

And the regional councils can no longer make those rules based on greenhouse gas implications.

MR SALMON:

Yes, yes, and I do understand Your Honour's question now. The point I'm trying to make is that nevertheless this passage from the Minister is saying two things. One, it is not saying all decisions, it is saying some decisions, and that's in the first line from those I read out. The second is that he, like the Select Committee, and like Ms Fitzsimons, is talking about discharges from industrial or trade premises, the big emissions. If one were to take the theme that in my submission emerges it's the big chimney stacks, the big power plants, these things are plainly better planned at the national level and in that context the reference following in that paragraph regarding

the two exceptions, that's just a description of the two exceptions to the 104E prohibition, because the 104E prohibition is limited to discharges that require consent, it's a narrowed set of exceptions to a narrow prohibition, if Your Honours follow that. But the core point is there's Parliament, there's the Minister not saying all discharges but some.

The next passage, very briefly, is at tab 10 on page 2. The purpose paragraph, two thirds of the way down that paragraph, "It therefore removes the power of regional councils to consider the effect of greenhouse emissions on climate change when making rules in regional plans or determining air discharge consents." Now again the language of regional councils, a distinction which would have been understood by the Select Committee, and defined by relating to air discharge consents.

The next is at page 5. My learned friend went to this passage under the heading, "Councils prevented from controlling resources," and so on, but made a submission that, in my respectful submission, is without foundation, not just by reference to statutory materials but simple scientific fact. Two things. One, he suggested it was mandating regulation of greenhouse gases but just, the note I took was quote, "But just not regarding climate change." There is no legislative concern about greenhouse gases except regarding climate change. And that links to a second point. Your Honour Justice Chambers asked a question of Mr Hodder when he made the submission that really it was about health concerns from climate change and coal dust came up in another section, another moment. Those issues are confusing two very distinct, and clearly distinct, treated as distinct in the legislation, phenomenon. One is the gases that are harmless to us but circulate up at the upper limits of our atmosphere and heat the planet. Those are greenhouse gases. They are not poisonous and they're not toxic. They're not a concern in the regulation of Christchurch's smoky environment or car particularate emissions, or anything like that, and on the other hand the things that cause lung problems and so on which are the particularates.

Now I haven't, I confess, had a chance since Your Honour Justice Chambers raised the regulation under section 43 but my understanding of it from general knowledge is that that is a regulation designed to deal with non-greenhouse gas concerns and particularates and those are the things that give people asthma or make Christchurch cloudy. They are –

CHAMBERS J:
It does deal with greenhouse gas emissions at landfills.

MR SALMON:
Yes, with that specific exception, I apologise Sir. What I was leading to is also to note Sir that the gap that Your Honour noted and suggested may have been filled, I anticipate that, absent that particular focus on landfills, they will not meet the requirements of section 70B to be something that can be looked at by the council which is that its regulation's made to control the effects on climate change of the discharge into air of greenhouse gases. It will only qualify under that in relation to landfills.

But the core point was, just to backpedal a bit from what, respectfully, is an extraordinary submission, that there was a health concern driving the Resource Management (Energy and Climate Change) Amendment. That's just not a submission that has a factual or logical foundation and if there were any doubt about that Ms Fitzsimon's speech makes it clear that that's not right.

In that respect, just briefly while I'm on the health point, my learned friend suggested that Justice Whata was concerned with health effects when saying the non-point diffuse emissions might still be in. I won't go to it but I direct the Court to paragraph 58 of that judgment which makes clear he is not talking about health effects. He is talking about a climate change context and saying he leaves that open. It's about greenhouse gases and it's about whether it infringes the policy of the Amendment Act. It's not some off the point comment about regulating for health effects.

The related point to come to, and I anticipate one of the issues that is troubling the Court, is the slight disjunct between when councils might look at these and when they might not, and that disjunct is inherent in the case I'm advancing. Sometimes they can and sometimes they cannot look at greenhouse gas emissions and their effect on climate change. Mr Hodder says that that's illogical and can't have been intended. I say well that's what the Act says. He makes the submission I haven't explained the normative basis for it, the logical reason why Parliament would take some and not all away.

Putting aside the fact that Parliament did not take it all away, on any analysis of the words, to the extent I haven't clearly articulated the logical explanation for Parliament's goal, here is my best attempt at one off the cuff and without notes. Parliament has chosen to take a category of emissions that's easily defined. Discharges that need consent. That happens to capture the biggest and most problematic emissions that New Zealand can control. These include the smoke stacks, the big burners, and so on. It has taken that confined category of applications and said, these we will deal with nationally, and as Ms Fitzsimons notes in her *Hansard* speech, that makes no sense. One co-ordinates whether one puts a smoke stack down by an aluminium smelter or instead uses hydro or whether one rebuilds Huntly with gas or whatever.

So that's a defined category that captures most of the big New Zealand based pollutants. It also captures the New Zealand based pollutants in a jurisdictional sense because no one will ever come under that category who is burning abroad. And that's actually a sensible point to note because those are again things that can be controlled nationally. And thirdly, it does so in a way that identifies that it's taking a problem away only from regional councils and that legislative history that I've gone to shows the Select Committee and Parliament knew it wasn't taking anything away from district authorities, just the regional, and it wasn't taking away non-discharge consents.

The final point to note, in terms of Your Honour Justice Chambers' comments about the NES, is this. Parliament gave a little bit as it took away in the Amendment Act because it said, "If things come back under the NES, then they can be looked at." But there's a perfect dovetailing of what's given back under section 104F, which is, "We're taking away your ability to look at climate change when 15 or 15B apply. We're giving it back but again expressly only in relation to something where 15 or 15B applies."

If my learned friends are right that somehow more was taken away than 15 or 15B, are they saying that 104F is also a mistake, or are they saying that Parliament has permanently taken away the ability to consider vehicular emissions from a subdivision, but even if regulations are made under section 43 dealing with those it still doesn't come back under 104F. In other words, I made the submission and said that it was a rhetorical question my learned friend wouldn't answer, and he didn't.

Which words are we striking out of 104E? To make the Act make any sense, he actually also needs to strike words out of 104F.

So the Amendment Act represents a pragmatic removal of certain issues from the councils. I ask the question, rhetorically, why does that not make sense? Why is it illogical to leave some things with the councils? Well, the Select Committee and the House noted some things are better done there. A particular subdivision in a particular context near a particular town with local knowledge and consultation and all of those things as to whether it's needed or where it's needed, that makes every bit of sense to leave with the council. There is the rub of the problem. Mr Hodder has put up a hard case. We don't always say it anymore, but hard cases make occasionally bad law. It's a straw man to say "application 1, application 2", this is something that was also going to be caught at the discharge stage. But whatever the interpretation taken today is also applies to the easy ones, the vehicular emissions, and no one can really submit today that they're not intended to remain with the local authorities. That was, respectfully, clear. But other examples, for example, a West Coast coalmine proposed with the intention not to export and not to burn in an industrial trade premises, but just to shove it in sacks and sell it at dairies.

CHAMBERS J:

I know there are a lot of cases which say that you can take into account the amount of traffic that is generated by a planned activity. Are there cases which say it's the emissions from that traffic which you can take into account?

MR SALMON:

I'm not aware of cases.

CHAMBERS J:

The point I'm wondering about if one is looking at the overall context the real reason that you're worried about traffic traditionally in resource management terms is just more cars on the road and that sort of thing. Emissions is presumably being dealt with, with regard to motor vehicles, by a completely different regime of, for instance, making them more environmentally sound than they have traditionally been, catalytic converters, that sort of thing. So it's possible that emissions from traffic isn't part of the resource management scheme, that's what I'm really asking.

MR SALMON:
Yes and no. Catalytic converters are, yes. They're on a separate regulation. They're also dealing with particularates rather than greenhouse gases, just for clarity, and that distinction matters because of the health concerns.

But the fact that they might be regulated in some ways doesn't take away the ability for council – so, in fact, if I might work with your catalytic converter question, because we've had the proposition put to us, not in these terms, but there shouldn't be duplication. One shouldn't have to jump a regulatory problem here and the same factual problem here, application 1, application 2. The answer is, we do it all the time. Taking your example specifically, Sir, there's a regulation saying put catalytic converters in. That does not absolve the councils from the ability to say, "Traffic here will cause smog in a windless wet valley." They can definitely say that. It's not a greenhouse gas issue, so I'm dealing with something that's neutral. They can definitely say that despite the separate regulation. Why not here? My learned friends say, "Well, application 1 and application 2, we shouldn't have to deal with it twice." It would turn RMA law and practice on its head to recognise that as a rule. Parties have to apply for building consents, land use consents, and discharge consents. They probably have to get something out of the Boilers, Lifts and Cranes Act all at once, all the time, and it has never been the principle that those various applications involve a tug-of-war between authorities as to who deals with traffic volumes. Respectfully, I think that is at least one of the answers, the application 1 and application 2 point, I understand the concern. It's probably open to application 1, the authority hearing that, to say, "Well, this will be dealt with well over there in the factual context that applies in application 1." That might be right, it might be wrong, but it is not right, as a matter of elementary RMA law, to say, "If it might be dealt with elsewhere, it can't be dealt with here."

GLAZEBROOK J:
Can I just say that I didn't understand that to be the argument? What I understood the argument to be is, if you are restricted from looking at it in a context where one would have thought it was directly relevant because it's been thought that it's better dealt with nationally rather than regionally, why would you then think or impute to Parliament an intention for it to be dealt with somewhere where it's not so directly relevant and which you're then going to have it dealt with by, effectively, the wrong authority so it's not a duplication argument, it's a, why would it be prohibited in one

instance where it might be thought more directly relevant, and at the same time allow it in a context where it can only be less directly relevant?

MR SALMON:

Yes, and what I was endeavouring to do was to give some examples of contexts that aren't perhaps so sympathetic to that submission, to highlight the perils of my learned friend's submission. He puts up the extreme case that the coal might be burned here in a boiler right beside it and wouldn't it be crazy if the regional authority could not look at discharges from the smokestack but somehow could take them into account locally. That's one extreme case. I understand why the Court is reacting to that and asking the legitimate question, "Could that have been intended?" My answer is, "It's what's written."

WILLIAM YOUNG J:

You were going to go to the other example of the coal that is to be sold in dairies. Now, prior to 2004, the burning of coal in open fires could be regulated by regional councils. It can't since 2004, but it can be regulated by national standard.

MR SALMON:

It can't, for climate change reason, yes, Sir.

WILLIAM YOUNG J:

Yes, for climate change reasons, yes, can for other reasons. Is it – would it really be right for a regional council or considering applications associated with mining to say, "Well, we don't really think that coal should be burned in domestic premises because of the effect on climate change," when that's something that they're not entitled to make a rule about but can be addressed nationally by a national standard?

MR SALMON:

Well, it is.

WILLIAM YOUNG J:

You say yes, I think.

MR SALMON:

I say yes because it's the law, but also yes as a matter of logic. It's not inconsistent with saying, "Keep dealing with this on an ad hoc basis, but rules will be for us.

Across the land, rules will be for us." But I put the selling bags of coal in supermarkets or whatever as one example. Might we take the traffic one for a moment, because it is the one that Parliament intended to stay alive?

ELIAS CJ:

Can I just enquire, will you be a little time yet, Mr Salmon? I'm not trying to speed you up, but I'd just like to know whether we should take the adjournment.

MR SALMON:

I have notes that only go for half a page – sorry, a page and a half but they're not long notes. But I think it might depend on how many questions I face.

COURT ADJOURNS:1.09 PM

COURT RESUMES: 2.18 PM

ELIAS CJ:
More extrinsic aids.

MR SALMON:
None from me, although my heard lifted for a moment there.

CHAMBERS J:
You can't get too many.

MR SALMON:
I'm not going to mention anymore. I can assure you of that, unless they're helpful, the ones in front of you, Your Honour.

The point I was at before we broke was attempting to ask you to engage on easier examples than the extreme that Mr Hodder puts up of an application to do something here which is also accompanied by a discharge application, the application 1 and application 2 point.

And I mentioned the one of coal being dug up just to be burnt, sold in bags but can I put forward another one that's been raised by the Court yesterday which is, as is clear, no consent is required for this mine, even for its methane discharges. Now methane discharges in landfills we know have been dealt with under the NES, but not for this mine. So there's a direct effect of this mine that is not a discharge permit application activity and that if my learned friends are right, is simply not caught.

CHAMBERS J:
Why don't you need a discharge permit?

MR SALMON:
Not an industrial or a trade premise as I understand it. So it's going to come out and there is going to be no regulatory oversight on that at all at the consent stage.

ELIAS CJ:
There's some disagreement being expressed on that, is that right?

MR VAN DER WAL:
Your Honour, simply my submission was that, and perhaps at this point I did refer previously to section 15(1)(d), it is section 15(1)(c) which deals with discharges to air from industrial trade premises, and yet the – as I explained this morning, the default position is that a resource consent is required from those, yet prior to –

GLAZEBROOK J:
I'm sorry I just missed – if you could just repeat that. I'm sorry I just missed what you said.

MR VAN DER WAL:
Yes. The default position is that a discharge to air permit is required for a discharge to air from industrial or trade premises and not from other premises and under section 15(2) or (2A), a regional council can impose a rule to require a discharge permit and a regulation can be made. However, since the Amendment Act, that rule can no longer be adopted for the reasons of climate change.

CHAMBERS J:
Is a mine industrial premises as defined?

MR VAN DER WAL:
My understanding is that it's not and my clients have not required discharge to air permits under section 15(1)(c).

ELIAS CJ:
Yes, I think that does accord to what you were saying Mr Salmon, I'm sorry.

MR SALMON:
No not at all, Your Honour and I'm, again, trying to be concise. I took the liberty in checking, in a break with Mr van der Wal yesterday that we were on the same page on that, so...

ELIAS CJ:
I see, thank you.

MR SALMON:
If there were shakings of heads, I had at least tried to avoid –

ELIAS CJ:
It may have been an affirmative head shake.

MR SALMON:
Or I suspect someone thinking they could have said it better. Next time. So that's an example of a raging gap in this scheme if my learned friends are right.

Why? What in the words allows for that gap, given that it seems accepted that but for the Amendment Act there would be the ability to take account of it. Which words in the Amendment Act took methane the worst, or one of the worst greenhouse gases, many times worse than Co2? What took that emission out of any regulatory oversight at all by the councils which express words? Now the answer is no express words. So we're being asked to imply some into the Act or the Amendment Act in a way which is contrary to the primary thrust to the Resource Management Act which was to have regard to adverse effects.

And I put these proposals because again and again the – this is not an onus case, but in a sense the onus is being put on me by my learned friend to say explain why Parliament would have wanted this. That's not the right way round because this is not a debate in the House. The correct question is, why would the express words of this Act not mean what they say? And the Amendment Act did not take away the ability of either of these councils to worry about that methane gas. Nothing in the express words took that away, and to discern an intention that Parliament intended no one have oversight in that is difficult given the extrinsic materials showing that Parliament intended matters outside the discharge permit context made in council hands.

So there is another example –

CHAMBERS J:
Well, isn't the answer, though, that you can take that into account but not insofar as it's having an effect on climate change?

MR SALMON:

Which, Sir, is not to take it into account for all intents and purposes. I don't think anyone's suggesting that has a negative effect but in relation to climate change. But if I put it this way, Sir, it is a negative effect on climate change. We know that because it's a defined greenhouse gas. It's harming the environment, and we know that because there's statutory recognition of that harm. It's an adverse effect. It's, thus, relevant. It's direct. It could not be, in any sense, said to be not part of the activity, which is one of the arguments I'll come to in a moment. So it's direct, it's there and it's linked, and the only thing the Amendment Act said is if this happens to be an application for a discharge permit, don't look at it.

It's not, and I turn the onus around say what could have made Parliament inadvertently take that away from a regional authority or a local authority, I should say?

WILLIAM YOUNG J:

Well it's quite likely that Parliament didn't think that greenhouse gas emissions would be taken into account otherwise than in respect of the discharge permits. Now leave aside the car example for a moment because I accept there's an argument about that, but the pattern of authority suggested that greenhouse gas emissions associated with activities downstream of a land use consent being sought were not taken into account by the Environment Court, probably as a matter of fact rather than law.

MR SALMON:

And I was about to say, Sir, I think that's – I wouldn't accept that statement in its entirety Sir. Firstly, I was going to come to that *Taranaki* case which my learned friends went to the earlier part of. In the second part of that decision, I won't distract you with it now unless you wish to see it, in the final paragraphs there's a reconsideration of climate change effects in a different context regarding replanting obligations and there's a finding that it's de minimis and doesn't justify a condition. So it's slightly unsafe to take that *Taranaki* case as laying out some sort of rule. It is a fact based interpretation of the point.

As I endeavoured to show, there are other cases in which it has been taken into account but perhaps if I can put it this way, Sir, in answering that? I don't accept, and I submit that nor should this Court, that Parliament had some sort of limited or frozen

understanding of what the environment was. By the time of this Amendment Act, it understood that part of the environmental ambit of the Resource Management Act was climate change.

The definition of "environment" in the Resource Management Act is not frozen in time. It's one that embraces whatever our modern understanding of environment is. Once we understand a biodiversity problem it's in. Once we understand greenhouse gas problems, they're in. The next one might be ocean acidification which is different from greenhouse gas. They're in until they're expressly excluded. So that's part of the answer.

The second part, Sir, is the way you're characterising the dialogue that Parliament had, or what was in Parliament's mind does not, with respect, fit with what was being said. It was not saying the only thing that we will leave is cars. I can put it higher than that. It was saying, the only we are taking away is discharge permit applications. The rest will stay. And it went wider than cars in terms of suburban planning but also in language it said "some" of this will be taken away.

WILLIAM YOUNG J:
Well if you look at section 3 of the Amendment Act, section 3(b), local authorities include regional councils and territorial authorities doesn't it?

MR SALMON:
Yes.

WILLIAM YOUNG J:
That should really have, in relation to (b)(ii) at least can be confined only to regional councils.

MR SALMON:
Yes, which I say it implicitly is.

WILLIAM YOUNG J:
All right. The other point I wanted to raise was just related to that. Do you accept that the expression that's in 104(1)(a), "Actual and potential effects on the environment of allowing the activity," also appear in the rule making section, section 68(3) and 76(3).

MR SALMON:

Yes Sir.

WILLIAM YOUNG J:

So is it the case that on your argument the regional and district councils should have been making rules associated with greenhouse gas emissions which would occur downstream of activities such as mining?

MR SALMON:

I think where they might run fowl is that in rule making capacities their rules need to be not inconsistent with the regional plans.

WILLIAM YOUNG J:

Well let's look at the regional plans.

ELIAS CJ:

And they're regionally based.

WILLIAM YOUNG J:

Well let's look at the regional plan.

MR SALMON:

And the regional plans can't cover climate change which is –

WILLIAM YOUNG J:

Well why not?

MR SALMON:

– because there's a prohibition on making rules.

WILLIAM YOUNG J:

No but they could have a rule as to climate change in relation to any earthworks, diversions or whatever of water which are associated with mining.

MR SALMON:

They could.

WILLIAM YOUNG J:
Yes, but they could say anything that has to do with mining requires consideration of discharge of greenhouse gases of the product that's mined, associated with the combustion of a product that's mined.

MR SALMON:
You're saying though – sorry, so that I understand the question.

WILLIAM YOUNG J:
All right, let us say they need a consent to build earthworks and that's a regional council consent, all right? Earthworks associated with a mine are, on your approach, wouldn't the regional council when making rules about earthworks associated with mines have to take into account the combustion of the product of the mine and its impact on climate change?

MR SALMON:
And I think the answer would be but for section 70A.

WILLIAM YOUNG J:
But that's only dealing with discharge consents, isn't it?

MR SALMON:
Well no it's not Sir because section 70A has not been limited to section 15 and 15B.

WILLIAM YOUNG J:
70A, "When making a rule to control the discharge into air of greenhouse gases," but what about when making a rule to control the extraction of the ground of products which when burnt will have an impact on greenhouse gases?

MR SALMON:
Right, well I think then arguably it could. The only reason I was hesitating Sir is I wasn't sure whether you were seeking the response that identified that section 70A doesn't (inaudible) with 15 and 15B in the way the other sections do.

CHAMBERS J:

But it does, doesn't it?

MR SALMON:

In what way Sir?

CHAMBERS J:

Well isn't it tied to the section 15 discharge into air circumstances?

MR SALMON:

I'm not sure that it is Sir because it's just indexed to section 30(1)(d)(iv) and (f) –

CHAMBERS J:

If it isn't –

MR SALMON:

– which are generic.

CHAMBERS J:

– I would have that cut across your argument for the reasons Justice Young has just been putting to you, because if you're saying you can't make a rule about that, it's rather odd then that you can nonetheless take it into account on 104.

MR SALMON:

Well two parts. I owe it to this Court to be clear about what I'm saying about this section, both in terms of what's in it and not, and I'm identifying that section 15 and 15B aren't mentioned expressly because I put a lot of weight on where they are. The second point I would make to that Sir is it doesn't lack sense. If one recognises that a distinction was to be made between macro planning and case by case basis consent applications it might make sense. For example, should the country, on a wholesale basis, ban open fireplaces for climate change concerns. One can imagine that that would be something that would be dealt with nationally while local authorities wouldn't be left to deal with that on an ad hoc basis. Christchurch can do it because of particularates, because it's got a unique situation, but that might be something that's more generally dealt with. So one local authority is saying yay and another nay, might be seen as quite different from whether or not they should be allowed on a case by case basis to say, this development here will have huge climate change implications that it needn't have and on a case by case basis you can take that into account.

CHAMBERS J:

Are there other instances though where you can take into account an effect for the purposes of 104 where you can't also make a rule relating to that effect if you wanted to.

MR SALMON:

And my answer to that right now is I don’t know. I can see if one can be dredged up but the position that this is in is that it is of an amendment that, I can sense Your Honours see, has a wrinkle in it, or at least what appears to be an inconsistency. I’m submitting it makes sense but it flows from express wording in the Act. It does make sense. But more particularly Sir, and I’m sorry to come back to this point, that is a concern that might drive reform or clarify in legislation. It is what the Act says and the choice to put section 15 and –

CHAMBERS J:

I’m just finding it an odd proposition that there might be some effects which you must or may take into account under 104 which you’re prohibited from putting into a plan. Now that doesn’t mean you have to put it in your plan but you were prohibited from putting it in your plan that would, for a start it would cut right across restricted discretionary activities in 104C.

MR SALMON:

And I think there are two possible answers to that. One requires me to explain to you why I think Parliament might have done that. The other is that the omission of the words 15 and 15B in 70a is an oversight, and that would address Your Honour’s query, and that, to my mind, is quite possible, I’m just noting that they’re not expressly there. My learned friends say, hey take that omission and use it to effectively be a Trojan horse for removing the express references to section 15 and 15B and all the other operational sections. That’s actually a much more extreme proposition. So that –

ELIAS CJ:

In all cases where there’s a national environmental standard the regional authority wouldn’t be able to make a rule, would they?

MR SALMON:

Correct.

ELIAS CJ:
What's that, is that section 43 is it?

MR SALMON:
Section 70B, if regulations are made under section 43 to control the effects on climate change of the discharge into air of greenhouse gases, a regional council may make rules that are necessary to implement the regulations et cetera. Now there's the same arguable point that that's intending to be discharges per 15 and 15B but addressing Justice Chambers' question, that's one answer which is that that may be intended to mean discharge applications per 15 and 15B. The other is again, to attempt to put better than I think I did before Sir, the explanation for why it makes – why it's not a shock to us that Parliament might leave with local authorities the ability to consider climate change implications as they arise on a case by case basis, while also saying for general rule making this is not a local issue in terms of macro decisions like should we abandon gas fire power in houses or gas fire stoves or any of those things.

CHAMBERS J:
Chief Justice, I think the answer to your question maybe section 43B.

ELIAS CJ:
Thank you.

MR SALMON:
And my apologies for not answering that well enough Your Honour.

CHAMBERS J:
No, that's all right.

ELIAS CJ:
I think I interrupted an answer you were giving so that's fair enough.

MR SALMON:
So if I might come back to methane and the lack of a, the lack of any provision that removes that consideration from the local authorities, that's one example and yes it seems clear that there's at least some acceptance from the respondents that traffic is

in when it has a climate consequence that flows from say a subdivision. That seems to be common ground and we would be really twisting the language of this Act, in the face of clear *Hansard* on point, to say otherwise. What is it that means that those consequential traffic implications are in but the methane that's less consequential and more direct is out? And respectfully the answer is there is nothing in the Act, there's just a policy objection to the express words of the Act. But it's a policy objection that's based on concerns other than what is in the frame for the statutory interpretation task which is what was the RMA and what was it for. What do we know that the Amendment Act was for? Not what Buller Coal say it should be for but what do we know it was for. And that is to take some, but not all, of the consideration away.

From there I wanted to briefly address the activity cut-off discussion that in particular Justice Glazebrook had with my learned friends. At what point does something become too disconnected. If traffic is in, why is coal being burnt elsewhere out, and in my submission, and in line with the authorities and standard RMA practice in law, the test would be one for on the facts. It would be one of remoteness and we have an agreed statement of facts here which says it will be burnt, we know where, in broad terms. If somehow on the facts a tribunal, a factual tribunal, decides that it's too remote, or sufficiently remote to give less weight, well so be it, but that's a factual inquiry for them. But the answer to that cut-off question, respectfully, is not some magic interpretation of the activity in terms, because that's never what's happened in the RMA, and that can't sit with basic principles like look at traffic effects. Or, more particularly, look at particulates effects from fires. These sort of consequences have never been too remote to be considered and we can draw a direct analogy between fires causing particularates and fires causing greenhouse gases. One can't be sufficiently proximate and the other two remote. So the answer, in my submission, is the activity cut off is not a cut off? The question is, is there a causal link between the cause and effect, and there is, and how remote is it, and if it's more remote should less weight be given to it. The RMA and the entities that have to operate on it involve the presumption that that's just done all the time.

In that context can I note, very briefly, my learned friend Ms Limmer suggested that there was some distinction to be made between say the traffic and the coal mine in terms of whether there was demand caused for coal by the mining. Again respectfully that's not quite the way we look at it. The question is just, is it going to result in some environmental impact? More traffic here, more traffic up a hill, longer

car miles, or people burning more coal. If, as a matter of fact it is, then there's an effect of the activity and that's always been how the RMA works.

The other point that's been engaged on over the last few days and I've dealt with it briefly, is the activity one and activity two point. I made the submission before that if the Court were to take the view that the RMA required choosing one forum in which issues could be raised rather than duplicating, that would be turning RMA law in practice on its head and I didn't mean that disrespectfully but it is true and it's important that I emphasise it. There's no double jeopardy concept in RMA at all. There is no objection in principle to parties having to show their business case, so to speak, in front of the regional council and in front of the district council. They do bundle applications, as a practical matter, to avoid having to say it twice but it is still relevant to say it in both applications and, as I noted before, they'll have to say a lot of the same things and deal with a lot of the same issues in other applications, whether under the Crown Minerals Act, the Building Act, or whatever.

So there is no principle in RMA law that a matter can only be relevant in one context and that each hoop one must jump through must be unique and not duplicate another hoop. They are duplicated as a matter of fact. IN that respect, just a reference to that that's in the materials before you, the *Beadle* case which is tab 1 of Mr Hodder's casebook contains a few paragraphs on point. Some are on this point I'm making now and some I'll just note because they're relevant to what I've already said.

The first is paragraph 78 which is on my prior point about end uses, whether it could relevant and for the Tribunal to decide when and how. So that's the point I was making before. Paragraph 85, over the page, on page 21, "In *Pokeno Farm Family Trust v Franklin District Council* EnvC Auckland A037/9, 24 March 1997, it was held that the fact that a particular activity is authorised under another resource consent or by an council's plan, does not preclude the effects of that activity from being assessed in the context of a related proposal," and –

GLAZEBROOK J:

Sorry, what paragraph was that?

MR SALMON:

That's paragraph 85.

GLAZEBROOK J:

Thank you.

MR SALMON:

And I'm noting these because they happen to be in *Beadle*, it's a point that is broadly established across the authorities and by RMA practice generally. Paragraph 88 as well, over on page 22, "A general thrust towards having regard to the consequential effects of granting resource consents, particularly if they are environmental effects for which there is no other forum but with limits of nexus and remoteness. Of course, the weight to be placed on them has to be case specific." No regard to matters intrinsic to the Act. "An appeal on one topic cannot be turned into an appeal on the other and consequential effects may be too slightly connected for the consent sought and too remote."

It's not a case where the fact that they're going to be dealt with elsewhere removes them from consideration and it would be an unworkable regime if that was the case.

The next point and essentially my last, or second to last point, is to engage on an observation that Justice Young made yesterday in dialogue with my learned friend Mr Hodder which was, if the appellants are right well that would make, I think the words were, that would make the purpose provision not true, or the purpose provision would not be true and I wanted to reflect on that for a moment because it's already not true, on either side's interpretation of the case, it's already too didactic in terms, even –

WILLIAM YOUNG J:

You say it's not true because of the car emission point?

MR SALMON:

Even if – let's imagine I'm wrong about the car emission and that's – it's not true because of the exception under 104E, that's expressly at odds with 3B(2). It's not true because the moment the NES comes in, local authorities will be considering that, if it comes in.

Now that might sound like a pedantic point but it's an important point which is this. My learned friend says, look at the purpose clause, indeed, look at nothing else for a while and become enamoured with how clear and didactic this narrow clause is and

assume that it's intended to be controlling. This is the clause. It's the tablet that's come down from the mountain with the commandment on it.
If it's right and it must be, therefore section 104E and 104 must be different but I submit we need to take a step back from an interpretation that seeks to make controlling a short purpose clause. This clause is and this is trite, a aid to interpret the other clauses but particularly, it's a clause that we're charged with interpreting in context because context goes both ways and here it's relevant to note that there's a word in clause 3(b)(ii) "discharges" which read in context might just mean discharges that would otherwise contravene section 15 or 15B.

In other words, read in context, section 3B(2) is just describing in general terms what's been done here which is paraphrasing section 3B(2), "Requiring councils not to consider the effects of climate change of applications for discharge permits to discharge greenhouse gases."

Now we can stand here and say, if Parliament had meant that they should have written it more fully, written purpose clause that effectively restates the whole Act but that's an unreal submission. This purpose clause is typical of all purpose clauses, it's general. It doesn't describe the exceptions, it doesn't describe the NES possibility and it doesn't describe the fact that the removal of jurisdiction is limited to discharges per section 15 and 15B but it does use the word "discharges" and in context, that means something.

So I come back to the text I have submitted and it's not hyperbole that a lot of what you've heard from my learned friends is a reform submission. I understand it, I can hear what they're saying, I'm not saying they're right but I understand it but the task that we respectfully are charged with, is interpreting the text as it is and the moment it is acknowledged that it doesn't involve a blanket prohibition, in my submission, it becomes inevitably clear that there is no nuance that will some how allow us to leave cars in and methane in and respectfully, they must be in but some how preclude coal and I say that whether the coal is to be burnt here or overseas.

I understand why the question is asked, should it be different for coal that is to be burnt or a discharge application will be needed? I understand the question. In this case, it will be exported somewhere that has absolutely no greenhouse gas controls, none.

My learned friend says that's not right. Those countries have signed up to protocols but they have not put in place controls, as I understand it but, what I was about to say, is that's not the point. The point is just, do the words of the Act cut it out or not and, in my submission, they do not.

Your Honours, do you have any further questions?

CHAMBERS J:
I've got one procedural question which I know is a rather flat note to finish on but, by what means was the application for the declaration brought before the Environment Court, is there a provision in the Resource Management Act, or was it effectively a question as to the admissibility of evidence?

MR SALMON:
I don't know the answer to that and it was Geoffrey Palmer who argued that. Could Mr – section 310. I do know the answer to that Sir.

CHAMBERS J:
Section 310?

MR SALMON:
Application for a declaration, under section 310.

CHAMBERS J:
Of the Resource Management Act?

MR SALMON:
I am told, of the Resource Management Act. I can have a look at that. Mr Anderson was involved in that, as I believe Mr Williams was Sir, I wasn't.

CHAMBERS J:
Ah, I see, thank you. I just wondered if it had any bearing on what our powers were, that was all. Yes, 310, 311. Ah, that you very much, that's all I wanted to know. Thank you.

MR SALMON:

Thank you Sir.

ELIAS CJ:
Did you have more –

WILLIAM YOUNG J:
I have no questions.

ELIAS CJ:
All right, thank you. All right. Thank you counsel. Thank you for the excellence of the quality of the submissions we've had from all counsel. We will reserve our decision on the matter. Thank you.

COURT ADJOURNS:2.48 PM