**IN THE COURT OF APPEAL OF NEW ZEALAND**

**I TE KŌTI PĪRA O AOTEAROA**

**CA430/2020**
**[2022] NZCA 325**

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| BETWEEN | AOTEAROA WATER ACTION INCORPORATED<br>Appellant |
| AND | CANTERBURY REGIONAL COUNCIL<br>First Respondent |
| AND | CLOUD OCEAN WATER LIMITED<br>Second Respondent |
| AND | RAPAKI NATURAL RESOURCES LIMITED<br>Third Respondent |
| AND | NGĀI TŪĀHURIRI RŪNANGA<br>Intervener |

| | |
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| Hearing: | 17 and 23 August 2021 |
| Court: | Kós P, Cooper and Brown JJ |
| Counsel: | J D K Gardner-Hopkins for Appellant<br>P A C Maw and L F de Latour for First Respondent<br>W A McCartney for Second Respondent<br>E J Chapman for Third Respondent<br>J M Appleyard and R E Robilliard for Intervener |
| Judgment: | 20 July 2022 at 10.30 am |

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**JUDGMENT OF THE COURT**

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**A The appeal is allowed and the decision of the High Court is set aside.**

**B The Council's decisions granting consents CRC180728 and CRC180729 to Rapaki and CRC182812 to Cloud Ocean are set aside, with the further consequences set out at [132] below.**

**C The Council must pay AWA's costs calculated for a standard appeal in band A, together with usual disbursements.**

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**REASONS OF THE COURT**

(Given by Cooper J)

**Table of Contents**


| | Para No |
|---|---|
| **Introduction** | [1] |
| **Factual narrative** | [10] |
| *Overview* | [10] |
| *The Rapaki consents* | [11] |
| The five bore consent | [12] |
| The three bore consent | [16] |
| Section 127 application | [20] |
| An application to use water | [26] |
| Processing the applications | [29] |
| *The Cloud Ocean consents* | [41] |
| The deep bore consent | [64] |
| *Aotearoa Water Action Inc* | [72] |
| **The Regional Plan** | [76] |
| **First issue — is water bottling a use of water?** | [86] |
| **Second issue — must applications for take and use be considered together?** | [98] |
| **Analysis** | [110] |
| **Result** | [135] |


## Introduction

[1] Under s 14(2) of the Resource Management Act 1991 (the RMA) no person may "take, use, dam, or divert" water (other than open coastal water) "unless the taking, using, damming, or diverting is allowed by subsection (3)." Under subs (3)(a)

the taking, using, damming, or diverting may be expressly allowed by national environmental standards, rules in a regional plan or proposed regional plan, or resource consents.

[2] In this case resource consents were historically granted to take and use water for the purposes of a freezing works and a wool scour, respectively. Those consents were subsequently transferred to Rapaki Natural Resources Ltd (Rapaki) and Cloud Ocean Water Ltd (Cloud Ocean), pursuant to s 136(2)(a) of the RMA. Both Rapaki and Cloud Ocean now seek to take water in reliance on the rights previously granted, not for the purposes of the freezing works and wool scour, but for the purposes of bottling the water and selling it.

[3] In a non-notified process the Canterbury Regional Council (the Council) granted consents for this to occur. The applications for the consents were advanced as applications to change the use to which the water could be put, and the Council considered it was appropriate to proceed in that way, in reliance on the existing rights to take the water. Once the consents to use the water for bottling were granted, the new "use" consents were amalgamated with the existing "take" consents and the Council's records were altered in an administrative process to show that Rapaki and Cloud Ocean had consents to take and use water for bottling purposes.

[4] Aotearoa Water Action Inc (AWA) is an environmental advocacy group initially formed to oppose the present consents.[1] It commenced an application for review in the High Court challenging the grant of the consents. Nation J held that the Council had acted lawfully in granting the consents and doing so on a non-notified basis.[2] AWA now appeals.

[5] The principal issue raised by AWA's appeal is whether it was lawful for the Council to grant consent for the water bottling activities without granting new consents in each case to take the water. As framed by Mr Gardner-Hopkins, who appeared in this Court as counsel for AWA, the broad question is whether a consent to "use" water

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1 We give further details concerning Aotearoa Water Action Inc at [72]–[74].

2 *Aotearoa Water Action Inc v Canterbury Regional Council* [2020] NZHC 1625, [2020] NZRMA 580 [High Court judgment].

under s 14 of the RMA can be sought and granted without an associated application to take water for the same use. He submits applications for "take" and "use" must be considered together. That is an issue which has not previously been directly addressed by this Court. The issue arises because here the take consents relied on were granted for different purposes. There are contextual aspects of the question in terms of the Council's Land and Water Regional Plan (LWRP) and the particular circumstances of this case which make it necessary to give a more detailed account of the factual setting, to which we will shortly turn. Underlying the argument is the fact that in the relevant catchment the water has been fully allocated (save for group or community supply and non-consumptive taking) and a new application to take water would, for this reason, be prohibited under the LWRP.

[6] Another issue raised by the appeal is whether the activity of water bottling actually involves the "use" of water under s 14 of the RMA. AWA contends it does not; under s 14(2) a water bottling consent can only be for the "take" of water for the particular purpose of water bottling and once the water is taken for that purpose and put into a pipe or network of pipes it is no longer "water" as defined in the RMA. We address other arguments raised by AWA below.

[7] AWA's position on the appeal is broadly supported by Te Ngāi Tūāhuriri Rūnanga Inc (the Rūnanga), a party given leave to intervene in the High Court, against the opposition of Ocean Cloud and Rapaki.[3] In that Court, the Rūnanga were allowed to make written submissions and provide an affidavit from Associate Professor Rawiri Te Maire Tau. Dr Tau addressed the perspective of the Rūnanga as the body holding mana whenua over the land and water relevant to the proceeding. In this Court, we heard from Ms Appleyard on behalf of the Rūnanga. She argued that in processing the application the Council had failed to have regard to, or had inadequate information to consider, effects on cultural values arising from the water bottling activity.

[8] The respondents oppose the appeal. They argue the High Court's judgment should be upheld and the appeal dismissed.

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3 *Aotearoa Water Action Inc v Canterbury Regional Council* [2019] NZHC 3187, [2020] 2 NZLR 359.

[9] We note that the High Court determined as a preliminary question that commercial water bottling was not within the scope of the resource consents transferred to Rapaki and Cloud Ocean.[4] There was no appeal from that decision.

**Factual narrative**

*Overview*

[10] Rapaki and Cloud Ocean became the holders of the relevant resource consents for the take and use of water pursuant to s 136(2)(a) of the RMA as a result of acquiring the sites for which the consents were granted. In view of some of the arguments on appeal it is necessary to set out the complicated history of the consents.

*The Rapaki consents*

[11] There were two consents, referred to in the evidence as the "five bore consent" and the "three bore consent", because they enabled water to be taken from respectively five and three separate bores.

The five bore consent

[12] The five bore consent was originally a water permit granted by the Council under s 21(3) of the Water and Soil Conservation Act 1967 to Canterbury Frozen Meat Co Ltd. It was referred to in the Council's records as CRC900359.[5] The term of the consent was from 2 November 1990 to 30 April 1997. It was a consent to take up to 14,512 cubic metres of water per day at a maximum of 238 litres per second from the five bores "for meat processing purposes", in "connection with" land at "Belfast Road, Belfast".

[13] That consent was replaced by CRC971556 granted under what was then s 105 of the RMA to Primary Producers Co-Operative Society Ltd to take water from the five bores "for industrial use". Its term was from 28 November 1997 to 1 July 2032.

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4 *Aotearoa Water Action Inc v Canterbury Regional Council* [2018] NZHC 3240, [2019] NZRMA 316 at [148].

5 The Council assigns resource consents a unqiue six figure number with the prefix CRC.

This consent specified particular rates of extraction and volume-limits in respect of each of the five bores.

[14] A notice of transfer of this resource consent to Rapaki under s 136 of the RMA was provided to the Council on 6 September 2016. The Council form used provided for a "full transfer" of the consent.

[15] On receipt of the transfer, the Council issued a new consent, CRC172245, on 16 September 2016. It authorised the take of groundwater from the five bores for industrial use, subject to the same rates of extraction and volumes as had applied under CRC971556. The consent was to apply from 7 September 2016 and expire on 1 July 2032.

The three bore consent

[16] The three bore consent was also granted under the Water and Soil Conservation Act, and commenced on 13 March 1969. The actual permit was not in evidence, but a summary of what was referred to as NCY700281F was provided, referring to the consent location as cnr Blakes Road and Belfast Rd, Belfast. The permit was to "take from two 150mm bores and one 100mm bore for operation of freezing works and processing of its products". No limits as to volume or extraction rate were stated, and there were no conditions.

[17] Subsequently, on 30 November 2001, Primary Producers Co-Operative Society Ltd was granted consent CRC012609, to "take and use groundwater" from the three bores at a rate not to exceed 70 litres per second. The consent was to expire on 31 August 2035. It is relevant to note that the conditions imposed included the following:

> 2) An investigation of the efficiency of water use arising from the exercise of this consent over a period of one year commencing 1 June 2002, shall be carried out. The consent holder shall provide a copy of the investigation results to Environment Canterbury by 1st September 2003.
>
> The investigation shall: monitor total water use and total production; identify the types of use; measure the proportion of water in each type of use; identify those areas where there is potential to reduce water consumption and the means of achieving the reduction.

3) The consent holder shall take all reasonable steps to implement those water conservation measures identified in condition (2).

[18] According to the evidence of Dr Philip Burge, the Council's Principal Consents Advisor, this consent was transferred under s 136 of the RMA to Silver Fern Farms Ltd on 12 November 2015 (retaining the same CRC number), and then transferred again, on 20 November 2015, to Silver Fern Farms Management Ltd with the reference CRC163841. A notice of transfer to Rapaki under s 136 of the RMA was received by the Council on 6 September 2016. Once again, this was a full transfer of the consent, "[t]o take and use groundwater from three bores", at 66 Belfast Road, Belfast.

[19] On 9 September 2016, the consent was reissued under a new number CRC172118. It granted Rapaki a permit to take and use groundwater at 66 Belfast Road from the three bores at a rate of up to 70 litres per second, for a term expiring on 31 August 2035. The conditions that were previously attached to CRC012609, including conditions 2 and 3 quoted above, were repeated.

Section 127 application

[20] Section 127 of the RMA enables the holder of a resource consent to apply to a consent authority for a change or cancellation of a condition of the consent. The provisions of the RMA relevant to resource consent applications[6] apply to an application under s 127 as if it were an application for a resource consent for a discretionary activity.[7]

[21] On 13 July 2017, Rapaki submitted an application to the Council under s 127 to "change or cancel a condition of a resource consent" in relation to both the five and three bore consents. The application stated that it sought a "[c]hange of conditions of CRC172245 and CRC172118 to allow the use of water for bottling purposes." The application stated that the change in use would result in a "very high efficiency of use of water", and that the overall proposal would result in a "reduction in contaminant being discharged to the environment". Rapaki asserted in the application that there were no relevant policies in the LWRP. It then said:

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6 Sections 88–121.
7 Section 127(3)(a).

> It appears that the LWRP does not concern itself with the use of water rather [it requires] that the volume of water taken is reasonable for the intended use (policy 5.65). As the take is already consented this is not applicable.

[22] An assessment of environmental effects was included with the application. That assessment recorded:

> Water taken under permit CRC172245 and CRC172118 is currently consented to be used for industrial use in this process water is taken from the Christchurch aquifer and discharged to the Bexley treatment plant / Waimakariri.
>
> The effect of the take is therefore fully consumptive on the Christchurch aquifers – i.e. no water is returned to the groundwater system through the currently consent[ed] process.
>
> Under the proposed bottling scenario, the take of water will remain with some wash-down water going to the Aquifer via the [Christchurch City Council] system.
>
> An imp[ortant] consideration is that this proposal will result in there no longer being a discharge of polluted water as associated with the current consented use.

[23] The assessment concluded:

> In conclusion the effects of the change in use will have no additional negative effects, but will result in several positives. These include:
>
> - A very high level of water use efficiency. There will be very little wastage of the water taken.
> - An improvement in environmental impact as polluted water associated with the existing consented use will no longer be discharged to the Bexley treatment ponds.
> - The creation of jobs.
> - Investment in the Christchurch economy.

[24] On 19 July 2017, the consent planning business support team at the Council contacted the Rūnanga as an interested party, by sending an email to the address on file for the Rūnanga which was associated with Ms Amy Beran. The email noted that the subject site of the proposal was in a "silent file" area: an area identified as requiring special protection as a result of the presence of significant wāhi tapu (sacred places) or wāhi taonga (treasured possessions). A copy of the relevant application documents and the location of the proposal were hyperlinked in the email. The Rūnanga was requested to respond by 26 July 2017, but no response was received. Consequently,

Council officers concluded that the Rūnanga had no specific concerns about the proposal.

[25] Given the unusual nature of the application, Council officers and in-house counsel discussed how it should be processed. As explained in the affidavit of the Dr Burge, three different options were considered:

(a) not processing the application at all on the basis that commercial water bottling fell within the scope of the "industrial use" permitted by the existing five and three bore consents;

(b) processing the application as one for a change of conditions, in the form in which it had been submitted; or

(c) processing the application as an application for a new use of water, the take of which had already been authorised by CRC172245 and CRC172118.

An application to use water

[26] Ultimately, the Council decided the application should be processed as an application for a new use, influenced by the wording in s 14 of the RMA. That section provides:[8]

> **14 Restrictions relating to water**
>
> …
>
> (2) No person may *take, use, dam, or divert* any of the following, unless the taking, using, damming, or diverting is allowed by subsection (3):
>
> (a) water other than open coastal water …
>
> …

[27] Council officers concluded that the separate references to "take" and "use" meant that a new use of water could be considered independently from a "take" of water, provided the relevant RMA considerations were taken into account. Because

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8 Emphasis added.

the "take" component of the original five and three bore consents had previously been exercised, Council officers considered the taking of the water formed part of the existing environment against which the new use applications would be assessed.

[28] The Council decided to treat the application as if it sought two consents, to use the water taken under CRC172245 and CRC172118 respectively. Two new CRC numbers were allocated to the applications: CRC180728 and CRC180729 respectively.

Processing the applications

[29] Two reports dated 31 July 2017 were prepared under s 42A of the RMA by the Council's Principal Consent Planner, Mr Matt Smith, in relation to each application. In both cases, Mr Smith concluded that the "proposed use for bottling is … outside the scope of the original application". Accordingly, the applications were treated as applications for new water permits to use water under s 88 of the RMA. Mr Smith stated that in each case, the new use consent would be amalgamated with the existing consent, resulting in one consent to "take and use" water. As the LWRP related only to the take *and* use of water, Mr Smith recorded that the activity was classified under the "catch-all" provision in r 5.6 as a discretionary activity.[9]

[30] Mr Smith agreed, in relation to both applications, with Rapaki's assessment that the proposed change in use would result in a highly efficient use of water and that the overall proposal would result in a reduction in contaminant discharged into the environment. He also agreed that there were no relevant policies in the LWRP relating to use, and that no person would be affected by the change. He agreed with the conclusions in the assessment of environmental impacts submitted by Rapaki, and noted his view that there would be "several benefits" to the change in use. In light of the activities allowed under the existing consents, he considered that "no additional adverse effects [were] likely to occur".

[31] Mr Smith concluded that neither public nor limited notification was required and recommended that the applications be processed on a non-notified basis.

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9 We refer in more detail to the relevant Land and Water Regional Plan (LWRP) provisions below.

He recommended that the proposed consents expire on the same date as their existing counterparts, and that they be subject to certain conditions including the installation of a water meter and recording device and a process for reviewing the conditions of consent.

[32] A delegated decision-making panel consisting of Mr Paul Hopwood, Principal Consent Advisor, and Dr Burge dealt with both new use applications and the corresponding amalgamations in a decision dated 8 August 2017.

[33] The panel agreed with Mr Smith's assessment that public notification was not required under s 95A of the RMA because, among other things, the effects of the proposed use on the environment would be no more than minor and there were no special circumstances that required the application to be publicly notified. Although the panel noted the "public interest in water bottling and allocation of water", they did not consider that factor alone amounted to a sufficient basis to require public notification. As to limited notification under s 95B, the panel agreed that there were "no adverse effects on any person" nor any affected protected customary rights groups.

[34] After considering Mr Smith's recommendations, the panel granted the substantive applications on the conditions outlined by Mr Smith. This resulted in the grant of two new consents "[t]o use water" taken from the five and three bores: CRC180728 and CRC180729 respectively.

[35] Those consents were then amalgamated with the original "take and use" consents for the five and three bores, and new consents were issued on 11 August 2017. In relation to the five bores, CRC180311 granted a water permit "to take and use water" (the amalgamated five bore consent). Similarly, CRC180312 granted a water permit to "[t]o take & use water" from the three bores (the amalgamated three bore consent). In both cases, the terms of the new amalgamated consents provided that "[w]ater shall only be used for commercial bottling operations".

[36] Both of the consents granted on 11 August 2017 were very brief. CRC180728 granted Rapaki a water permit "[t]o use water" at Belfast Road and Factory Road, Belfast. It had a commencement date of 11 August 2017, and an expiry date of

1 July 2032. It included a further statement that it was "subject to the following conditions":

> In addition to uses listed under CRC172245, water taken under CRC172245 may also be used for commercial bottling operations.

[37] CRC180729 was in similar terms, relating to CRC172118. Once again, it had a commencement date of 11 August 2017, and there was a slightly later expiry date of 31 August 2035. And it contained the following "conditions": [10]

> In addition to uses listed under CRC172118, water taken under CRC172245 [sic] may also be used for commercial bottling operations.

[38] The amalgamation of the new consents to use with the existing consents CRC172245 and CRC172118 under CRC180311 and CRC180312 was an administrative step which Dr Burge acknowledged had no formal basis in the RMA. He explained:

> Since the RMA came into force, large numbers of water permits have been obtained on a piecemeal basis as the social and economic requirements of consent holders have changed. These consents have been obtained either via new applications (where there was water available) and/or by the transfer of existing consents.
>
> Transfers of water permits have occurred either as an administrative transfer on sale and purchase of a property (i.e. under section 136(1) or section 136(2)(a) of the RMA), or via a site-to-site transfer (section 136(2)(b) of the RMA). This often results in a complicated web of overlapping and cross-referenced consent documents, which are confusing to administer, both for Council officers and consent holders.
>
> The 'amalgamation' of resource consents is therefore undertaken in some instances in order to simplify the administrative burden for all parties.
>
> In regard to these specific consents, the 'amalgamation' of the Rapaki (and Cloud Ocean) consents was undertaken as a separate decision following the processing, consideration (under the relevant RMA matters as outlined in the s42A and decision reports) and granting of the standalone 'use' permits.
>
> Should the decision to 'amalgamate' the original Rapaki (and Cloud Ocean) consents and the standalone 'use' permits be considered unlawful (but the granting of the separate use permits not unlawful), the consent holders would therefore revert to using the non-amalgamated consents.

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[10] The reference to CRC172245 here must be a mistake; what was intended must have been to refer to CRC172118.

[39] On 14 February 2018 the amalgamated five bore consent was partially transferred to Cloud Ocean, under CRC183763. A new water permit was issued to Rapaki, CRC183761, described as "partial transfer CRC180311 – to take and use water" for a term commencing on 14 February 2018 and expiring on 1 July 2032. It authorised Rapaki "to take and use" a combined total of 5,117,780 cubic metres of water annually from the same bores specified in CRC180311. That figure reflected the total water allocated to Rapaki under CRC180311 (a maximum of 5,317,780 cubic metres per year), less the maximum of 200,000 cubic metres per year which were allocated to Cloud Ocean concurrently (in relation to one of the bores specified in CRC180311) under CRC183763. The water could "only be used for commercial bottling operations".

[40] Although CRC183761 and CRC183763 are not directly challenged in the judicial review proceedings, a successful challenge to CRC180311 (the five bore amalgamated consent) resulting in it being set aside would also defeat any subsequent consents issued in reliance on it.

*The Cloud Ocean consents*

[41] On 1 May 1997, the Council granted to Kaputone Woolscour Ltd a water permit to take groundwater at Station Road, Belfast for "industrial use". The consent, CRC971084 in the Council's records, was to expire on 30 April 2032, and specified a volume not exceeding 4,320 cubic metres per day.

[42] A notice of transfer to Canterbury Land Resources Ltd under s 136 of the RMA was received by the Council on 11 April 2017. The transfer was a "full transfer" of CRC971084. The Council reissued the consent to Canterbury Land Resources Ltd under CRC175585. A subsequent notice of transfer from Canterbury Land Resources Ltd to Cloud Ocean was provided to the Council in April 2017, confirmed by Cloud Ocean in a notice given on 9 May 2017. The Council then reissued the consent to Cloud Ocean on 15 May 2017, under CRC175895. It remained a consent to take water for industrial use, with the same limit of 4,320 cubic metres per day.

[43] On 30 November 2017, Cloud Ocean made an application to the Council for another resource consent. It was submitted in the form of an "Application for

Resource Consent to Take and Use Groundwater" under s 88 of the RMA, and sought "[a] water permit to allow the water taken under CRC175895 to be used for bottling purposes". The application stated that as the proposed use for water bottling was considered to be outside the scope of the original application, the application had been lodged as an application for a new permit to use water. For ease of administration, Cloud Ocean requested that the new water permit be amalgamated with the existing consent.

[44] Cloud Ocean stated the proposed new use sought to achieve the purposes of the RMA by promoting a "very high efficiency of use of water", and a reduction in contaminants being discharged into the environment.[11] An assessment of environmental effects was included with the application. Cloud Ocean stated that water taken under the existing consent was "currently consented" to be used for wool scour purposes, under which water would be taken from the Christchurch aquifer and wastewater discharged to the Christchurch City Council wastewater system. In contrast, using the consent for water bottling activities would "result in there no longer being a discharge of contaminants related to the wool scour activities". In terms of sch 4, cl 6(1) of the RMA, Cloud Ocean stated the proposed change in use:

(a) would not result in a significant adverse effect on the environment;

(b) did not involve the use of hazardous substances or installations;

(c) resulted only in "positive" effects that did not require mitigation;

(d) would not affect any person, and therefore no consultation had been undertaken;

(e) did not require any special monitoring; and

(f) would not have adverse effects that were more than minor on the exercise of a protected customary right.

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[11] Resource Management Act, s 7(b) and (f).

[45] As with Rapaki's application, the application submitted by Cloud Ocean stated that there would be "positive effects" including a high level of water use efficiency, improved environmental impacts and the creation of employment and investment in the Christchurch economy. The assessment stated:

> In conclusion, the effects of including the ability for water taken under CRC175895 to be used for bottling will have no additional negative effects, but will result in several positives.

[46] Council officers assessed the Cloud Ocean application in the same manner as the Rapaki applications. A detailed report was prepared by Mr Carlo Botha under s 42A of the RMA, dated 21 December 2017. It dealt with two applications: CRC182812, an application for a water permit to use water for commercial water bottling; and CRC182813, an application to amalgamate CRC182812 with the existing wool scour consent.

[47] Mr Botha agreed with Cloud Ocean's assessment that no persons would be adversely affected by the applications. He noted that the Council had contacted the Rūnanga, the Christchurch City Council, the North Canterbury District Health Board and Fish and Game New Zealand as interested parties on 4 December 2017, requesting that any response be received by 11 December 2017. The contact address used for the Rūnanga was the same as that which had been used on 19 July 2017 in relation to the Rapaki applications. The only response received was from the Christchurch City Council, which was disregarded as it related to a different bore.[12]

[48] Although Cloud Ocean had not provided a description of the affected environment with its application, Mr Botha noted that, among other matters, the subject site was located within the Christchurch/West Melton Groundwater Allocation Zone (as defined by the planning maps in the LWRP) in which the water was fully allocated. Mr Botha also noted that the subject site was located within a silent file area but was not within a "Statutory Acknowledgment Area or Rūnanga Sensitive Area".

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[12] This was BX24/1577 for which consent was granted on 1 August 2017. The process of obtaining consent for that bore and Cloud Ocean's subsequent application to take and use water from it are discussed below at [64].

[49] As to potential adverse effects on the environment and aquifer, Mr Botha noted that Cloud Ocean had stated that the proposed new use would be "fully consumptive", and would not, unlike a wool scour, result in the discharge of contaminated water. On that basis, Mr Botha concluded that the "effects on the aquifer due to the change in use will be no greater than those allowed by the existing water permit".

[50] Mr Botha then turned to whether there would be any adverse effects on tangata whenua values. He noted that the relevant site was situated within the rohe of the Rūnanga and within a silent file area. However, although the Rūnanga had been approached for comment on 4 December 2017, no response to that request had been received. Mr Botha recorded that he had assessed the proposal against the relevant policies contained in the Manaanui Iwi Management Plan: the iwi management plan for the Rūnanga. Because there would be no effects on the aquifer, other groundwater users and the wider environment additional to those already authorised pursuant to CRC175895, Mr Botha concluded that the proposal for the new use was consistent with the relevant policies in the Iwi Management Plan. Accordingly, he concluded that the proposal would have no additional adverse effects on tangata whenua values beyond what had been previously authorised.

[51] He also agreed with Cloud Ocean that the change in use would have a number of positive effects, including a high level of water efficiency, an improvement in environmental impact due to contaminants not being discharged, the creation of employment and investment in the Christchurch economy.

[52] Turning to public notification under s 95A of the RMA, Mr Botha noted that the application had been "subject to extreme public scrutiny", including a petition to rescind the existing consent on the basis of climate change and public sentiment. As a result of that opposition, Mr Botha gave consideration whether special circumstances existed that would require the application to be notified. He concluded that while public interest was a factor it was not in itself sufficient to constitute "special circumstances" requiring notification.[13] He concluded that notification would not provide additional information that might inform the substantive decision. That was

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[13] Citing *Murray v Whakatāne District Council* [1999] 3 NZLR 276 (HC).

because the public scrutiny and debate focused mainly on the take of water (as opposed to its use) and the take was part of the existing "consented environment" and would remain in place even if Cloud Ocean's application for a new use was declined.

[53] After concluding there were no affected persons required to be notified under s 95B, Mr Botha recommended that the application be decided on a non-notified basis. He recommended that the substantive application should be granted, with certain conditions relating to the rate and volume of the water, monitoring and a process for review of the consent conditions.

[54] A decision on notification and the substantive Cloud Ocean application was made by Dr Burge as delegated decision-maker on 21 December 2017. Dr Burge noted that opposition had been voiced by members of the public, and that a letter had been received by the Council on 15 December 2017 from Mr Peter Richardson, a solicitor of Linwood Law, on behalf of "certain parties" that had instructed the firm in respect of their concerns with the application. The "interested parties" to whom Mr Richardson referred would later become AWA. In his letter, Mr Richardson canvased various concerns about Cloud Ocean's application and the Council's treatment of it, including the alleged incompleteness of Cloud Ocean's application in terms of sch 4 of the RMA, the Council's separation of the "take" and "use" of the original consent, and the fact the wool scour consent was not being utilised and thus should not be treated as part of the existing environment

[55] Dr Burge dealt with those concerns as a "preliminary matter". While acknowledging the issues raised by Mr Richardson, he stated:

> … exercised consents (and granted consents that are likely to be exercised) form part of the existing environment in terms of considering further applications under the RMA. I consider that the fact that the take is already consented needs to be taken into consideration when processing this application for a change in the use of that water.

[56] Dr Burge noted that as the holder of CRC175895, Cloud Ocean was entitled to re-establish the wool scour "at its full rate of take" without requiring any further consideration by the Council. Although acknowledging Mr Richardson's statement that Cloud Ocean had shown no indication of doing so, Dr Burge noted that "the fact

remains that if the consent holder chose to do so, they could and the Council would have no grounds to prevent that". He concluded:

> Having given consideration to the matters above, I conclude that the effects of the take form part of the existing (consented) environment, and are outside of what should be examined in regard to the proposed change in the use of water. The application has therefore been processed and considered as a new water permit to use water (CRC182812).

[57] Turning to the question of notification, Dr Burge agreed with Mr Botha's assessment of the adverse environmental effects in the s 42A report and adopted his conclusions. Dr Burge also accepted Mr Botha's assessment that the activity should be classified as a discretionary activity under r 5.6 of the LWRP.

[58] Dr Burge recorded that in addition to the matters discussed by Mr Botha in his s 42A report, there had also been "some public concern about the effect of increased numbers of plastic bottles" on the environment. Dr Burge noted that he had considered whether conditions could be imposed to address that issue. Given the number of intervening parties involved prior to the ultimate disposal of a plastic bottle, Dr Burge was of the view that it was difficult to see how imposing a condition related to the end disposal could reasonably be considered "'directly' connected to the 'activity'" as required by s 108AA of the RMA. He noted that if Cloud Ocean were held responsible for the disposal of plastic bottles, that line of reasoning could equally be applied to all activities related to the use of water which involved plastic packaging in the end product. Were consent holders held responsible for the actions of "significantly removed" third parties, that would effectively shut down most industries that required plastic packaging on the basis of the actions of a third party.

[59] Dr Burge concluded:

> While I consider that the proliferation of plastic bottles in the environment is an issue, it arises due to inappropriate disposal of those bottles by the end user. It is unreasonable to prevent applicants from obtaining a consent for an activity on the basis that third parties outside their control might dispose of the packaging (in this case plastic bottles) inappropriately. This would be an unreasonable expectation for any party who wished to make use of a natural or physical resource, not just water bottles.

[60] He then turned to whether there were "special circumstances" requiring public notification. Like Mr Botha, Dr Burge concluded that notification would not provide

additional information that might inform the substantive decision, and thus public notification on the basis of special circumstances was not required. He also agreed with Mr Botha's reasoning on limited notification under s 95B and concluded that the application should proceed on a non-notified basis.

[61] Dr Burge adopted Mr Botha's discussion of the matters in s 104 of the RMA in terms of the substantive decision. He concluded that as the effects of the change in use would be no more than minor and the proposal was consistent with the relevant provisions in the planning documents, the proposal would (subject to conditions) achieve the purposes of the RMA. Dr Burge therefore granted the applications with the conditions recommended by Mr Botha and for a period consistent with CRC175895, the original wool scour consent.

[62] Consent CRC182812 was then issued, commencing on 22 December 2017. It granted consent to what it described as an "Application for Change in Conditions", and stated it was to "change condition in CRC175895 - to take groundwater … for industrial use." The consent was granted in these terms:

> Water taken under CRC175895, may also be used for commercial water bottling operations as consented by CRC182813.

It was granted for the period to 30 April 2032.

[63] CRC182813 (the amalgamated Cloud Ocean consent), was issued concurrently, commencing on 21 December 2017. It granted a consent to "take & use groundwater" with a volume not exceeding 4,320 cubic metres per day, and 1,576,800 cubic metres annually. Condition 3 provided that "[w]ater shall only be used for commercial water bottling operations".

The deep bore consent

[64] On 11 July 2017, Clemence Drilling Contractors Ltd had submitted an application for a resource consent on behalf of Cloud Ocean "to construct a bore" on the same site as the wool scour consent. The application was granted on 1 August 2017, resulting in consent CRC180265, authorising Cloud Ocean "to install a bore" (the deep bore consent). A 186 metre deep bore was drilled pursuant to that consent.

As the deep bore consent did not authorise the take of water, on 23 October 2018 Cloud Ocean applied for a variation of its amalgamated consent to enable water to be taken from the original 33.1 metre deep bore or the new 186 metre deep bore.

[65] The Council accepted the application could appropriately be processed as an application to change the conditions of CRC182813 (the Cloud Ocean amalgamated consent) pursuant to s 127 of the RMA.

[66] Mr Jason Eden prepared a s 42A officer's report dated 3 December 2018. While stating that he agreed with Cloud Ocean's assessment that there would be no parties affected by the proposal, for "completeness" he addressed the concerns raised by a number of interested parties who had been informed of the consent application by the Council. These parties relevantly included the Rūnanga, on behalf of which a response had been provided by Mahaanui Kurataiao Ltd on 28 November 2019, and AWA. The Rūnanga opposed both the application and the existing activity. They recorded that they considered themselves an affected party. Mr Eden also noted that a further response had been received from Dr Te Marie Tau, outlining the Rūnanga's concerns with water bottling. However, Mr Eden stated that he did not consider that issue could be assessed because they did not arise from the application; the effects to be assessed were "restricted to those arising from the proposed change".

[67] The concerns expressed by the Rūnanga were addressed by Mr Eden in his assessment of actual and potential effects. He stated:

> It is my view that the concerns held by Ngā Rūnanga relate more to effects that were required to be considered for the grant of the original consent, as the concerns raise[d] relate primarily to the allocation and the use of the water. Those matters are not in my view effects which arise from the change of conditions proposed.
>
> Acknowledging the concerns raised by Mahaanui Kuratai[a]o Ltd and Dr Te Maire Tau, as the application is for a change of conditions, the scope of effects able to be considered are those that arise directly from the change sought.
>
> I have concluded that there will be no change in cumulative effects, stream depletion and the wider environment outside that currently authorised by CRC182813 due to the abstraction rate and volumes remaining the same. Effects on surrounding groundwater users have furthermore been considered as less than minor.

> I consider that effect of the change of conditions proposed will be less than minor on Ngā Rūnanga and [t]angata [w]henua values.

[68] As to AWA's opposition, Mr Eden concluded that as AWA did not own bores or land within the vicinity of the proposed take, it was not an "affected party" for the purposes of the application for a change of conditions.

[69] After considering the relevant policies in the Canterbury Regional Policy Statement 2013 and rules in the LWRP, Mr Eden turned to the issue of notification. He considered no special circumstances existed that would require the application to be publicly notified. Nor did he consider limited notification was required pursuant to s 95B of the RMA. Mr Eden recommended that the application be granted on a non-notified basis.

[70] Both notification and the substantive application were considered in a decision of an Independent Hearings Commissioner, Richard Fowler QC, dated 12 December 2018. Mr Fowler agreed with Mr Eden's recommendation that the application should be granted on a non-notified basis, subject to conditions.

[71] As Dr Burge acknowledged, if CRC182813 (the amalgamated Cloud Ocean consent) were quashed the subsequent variation enabling water to be taken from the deeper bore would also fall away, with the result that Cloud Ocean would be required to reapply for a variation of the "pre-amalgamation water permit" (CRC175895) to enable water to be taken from the deeper bore. There is no direct attack on CRC182813 in the present proceeding.

*Aotearoa Water Action Inc*

[72] AWA was incorporated on 5 February 2018 for the purpose of challenging the consents granted to Rapaki and Cloud Ocean. A member of AWA, Nicolette Gladding, explains how AWA has the wider purpose of "protect[ing] New Zealand's freshwater resource[s]" and has focused on "water sovereignty" and, in particular, the growth of the water bottling industry in New Zealand. AWA is concerned to ensure there is sufficient water to meet increasing domestic needs resulting from climate change and

population growth. It is also concerned about the effects of increased numbers of plastic bottles in the environment.

[73] Ms Gladding states that AWA first became aware of the consents sought by Cloud Ocean in May 2017, and initially all communications with Council officers were made in the context of the Cloud Ocean proposal. In the course of that correspondence, AWA became aware of the Rapaki consents.

[74] On 30 January 2018, before the application for judicial review was filed, counsel for AWA, Ms Steven QC, wrote to both Rapaki and Cloud Ocean in the same form. In her letters to both companies, Ms Steven stated that the consents purporting to allow the "take and use" of water for bottling purposes would be challenged by judicial review, and that "[a]ny works undertaken by you in furtherance of implementing those consents is now at your own risk". A statement of claim was filed in the High Court at Christchurch on 5 March 2018.

[75] In addition to this summary of the process that was followed it is necessary to say something about the Regional Plan provisions relevant to the process followed by the Council.

**The Regional Plan**

[76] Dr Burge noted that the Council's previous Regional Plan, called the Natural Resources Regional Plan, clearly distinguished between rules regulating the take of water, and those regulating the use of water. The current plan, the Canterbury LWRP, replaced the Natural Resources Regional Plan and contains specific rules which control the "taking or use of water", and other rules that control the "taking and use of water".

[77] Rule 5.120 refers to:

> The taking of water from groundwater for the purpose of de-watering for carrying out excavation, construction, maintenance and geotechnical testing and the associated use and discharge of that water …

[78] There are two rules concerning water in canals and water storage facilities. Rule 5.121 controls the "taking or use of water from irrigation or hydroelectric canals or water storage facilities" providing that it is a permitted activity if certain conditions are met. Rule 5.122 provides that if the conditions are not met, then the "taking or use" of the water is a discretionary activity.

[79] Rule 5.123 is about the "taking and use of surface water from a river or lake". That is a restricted discretionary activity provided certain conditions are met. The Council has restricted the exercise of its discretion to a number of matters, as follows:

> 1A. The rate, volume and timing of the take; and
>
> 1. The actual or potential adverse environmental effects on water quality, including whether the activity, in combination with all other activities, will alter the water quality allocation status of the relevant catchment; and
>
> 2. Whether the amount of water to be taken and used is reasonable for the proposed use. In assessing reasonable use for irrigation purposes, the [Council] will consider the matters set out in Schedule 10; and
>
> 3. For water used for irrigation, the management of water allocation and resulting nutrient discharges on individual farms; and
>
> 4. The potential effects on groundwater recharge where the groundwater allocation zone is fully or over allocated as set out in Sections 6 to 15; and
>
> 5. The availability and practicality of using alternative supplies of water; and
>
> 6. The effects the take has on any other authorised takes or diversions; and
>
> 7. The potential to frustrate or prevent the attainment of the regional network for water harvest, storage and distribution, shown on the Regional Concept diagram in Schedule 16; and
>
> 8. The reduction in the rate of take in times of low flow and restrictions to prevent the flow from reducing to zero as set out in policies to this Plan; and

9. Whether and how fish are prevented from entering the water intake; and

10. The provisions of any relevant Water Conservation Order; and

11. The proximity and actual or potential adverse environmental effects of water use on any significant indigenous biodiversity and adjacent dry land habitats; and

12. Where the proposed take is the replacement of a lawfully established take affected by the provisions of Section 124-124C of the RMA and is from an over-allocated surface water catchment, the reduction in the rate of take and volume limits to enable reduction of the over-allocation; and

13. Where the water is to be used for irrigation, the preparation and implementation of a Farm Environment Plan in accordance with Schedule 7 that demonstrates that the water is being used efficiently.

[80] Rules 5.124 and 5.125 then provide as follows:

5.124 The taking and use of surface water from a river or lake that does not meet one or more of the conditions of Rule 5.123, excluding condition 1, is a non-complying activity.

5.125 The taking and use of surface water from a river or lake that does not meet condition 1 in Rule 5.123 is a prohibited activity.

[81] Rule 5.125C is a special rule dealing with hydroelectricity generation associated with particular named schemes. This rule refers to the "take and use of water."

[82] Rule 5.126 is about the "non-consumptive taking and use of water from a lake, river or artificial watercourse and discharge of the same water" to the same source. That is established as a restricted discretionary activity, provided certain conditions are met. Where the conditions are not met, the non-consumptive taking and use of the water is a non-complying activity pursuant to r 5.127.

[83] Rule 5.128 provides that the "taking and use of groundwater is a restricted discretionary activity" provided certain conditions are met. It is this rule that is most relevant in the present case. The conditions are as follows:

1. The take is from within a Groundwater Allocation Zone on the Planning Maps; and

2. Unless the proposed take is the replacement of a lawfully established take affected by the provisions of section 124-124C of the RMA, for stream depleting groundwater takes, the take, in addition to all existing consented surface water takes, does not result in any exceedance of any environmental flow and allocation limits set in Sections 6 to 15 for that surface waterbody in accordance with Schedule 9; and

3. Unless the proposed take is the replacement of a lawfully established take affected by the provisions of section 124-124C of the RMA, the seasonal or annual volume of the groundwater take, in addition to all existing consented takes, as determined by the method in Schedule 13 does not exceed the groundwater allocation limits for the relevant Groundwater Allocation Zone in Sections 6 to 15; and

4. Unless the proposed take is the replacement of a lawfully established take affected by the provisions of sections 124-124C of the RMA, the bore interference effects on any groundwater abstraction other than an abstraction by or on behalf of the applicant are acceptable, as determined in accordance with Schedule 12.

***The exercise of discretion is restricted to the following matters:***

1A. The rate, volume and timing of the take; and

1. Whether the amount of water to be taken and used is reasonable for the proposed use. In assessing reasonable use for irrigation purposes, the [Council] will consider the matters set out in Schedule 10; and

2. The availability and practicality of using alternative supplies of water; and

3. The maximum rate of take, including the capacity of the bore or bore field to achieve that rate, and the rate required to service any irrigation system; and

4. The actual or potential adverse environmental effects on surface water resources if the groundwater take is within a surface water catchment where the surface water allocation limit, as set out in Sections 6 to 15 is fully or over allocated; and

5. Unless the proposed take is the replacement of a lawfully established take affected by the provisions of sections 124-124C of the RMA, the actual or potential adverse environmental effects the take has on any other authorised takes, including interference effects as set out in Schedule 12; and

6. For stream depleting groundwater takes, the matters of discretion under Rule 5.123; and

7. Whether salt-water intrusion into the aquifer or landward movement of the salt water/fresh water interface is prevented; and

8. The proximity and actual or potential adverse environmental effects of water use to any significant indigenous biodiversity and adjacent dryland habitats; and

9. The protection of groundwater sources, including the prevention of backflow of water or contaminants; and

10. Where the proposed take is the replacement of a lawfully established take affected by the provisions of Section 124-124C of the RMA and is from an over-allocated groundwater allocation zone, the reduction in the rate of take and volume limits to enable reduction of the over-allocation; and

11. Where the water is being used for irrigation, the preparation and implementation of a Farm Environment Plan in accordance with Schedule 7 that demonstrates that the water is being used efficiently.

[84] Rules 5.129 and 5.130 provide as follows:

5.129 The taking and use of groundwater that does not meet one or more of conditions 1 or 4 in Rule 5.128 is a non-complying activity.

5.130 The taking and use of groundwater that does not meet one or more of conditions 2 or 3 in Rule 5.128 is a prohibited activity.

[85] The Council considered that neither the Rapaki nor the Cloud Ocean consents were appropriately dealt with under any of the provisions above, including r 5.128. Rather, the Council processed the applications as discretionary activities under r 5.6, which provides as follows:

Any activity that—

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

(b) is not a recovery activity; and

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

— is a discretionary activity.

**First issue — is water bottling a use of water?**

[86] It is logical to deal with this issue first: if the argument made by Mr Gardner-Hopkins is correct, the consequence would be that the Council could not grant a consent for the activity of water bottling, since that would not be a use contemplated by s 14 of the RMA.

[87] In order to place the argument in context it is appropriate first to set out s 14 of the RMA. It provides as follows:

> **14 Restrictions relating to water**
>
> (1) No person may take, use, dam, or divert any open coastal water, or take or use any heat or energy from any open coastal water, in a manner that contravenes a national environmental standard or a regional rule unless the activity—
>
> (a) is expressly allowed by a resource consent; or
>
> (b) is an activity allowed by section 20A.
>
> (2) No person may take, use, dam, or divert any of the following, unless the taking, using, damming, or diverting is allowed by subsection (3):
>
> (a) water other than open coastal water; or
>
> (b) heat or energy from water other than open coastal water; or
>
> (c) heat or energy from the material surrounding geothermal water.
>
> (3) A person is not prohibited by subsection (2) from taking, using, damming, or diverting any water, heat, or energy if—
>
> (a) the taking, using, damming, or diverting is expressly allowed by a national environmental standard, a rule in a regional plan as well as a rule in a proposed regional plan for the same region (if there is one), or a resource consent; or
>
> (b) in the case of fresh water, the water, heat, or energy is required to be taken or used for—
>
> (i) an individual's reasonable domestic needs; or
>
> (ii) the reasonable needs of a person's animals for drinking water,—
>
> and the taking or use does not, or is not likely to, have an adverse effect on the environment; or
>
> (c) in the case of geothermal water, the water, heat, or energy is taken or used in accordance with tikanga Maori for the communal benefit of the tangata whenua of the area and does not have an adverse effect on the environment; or
>
> (d) in the case of coastal water (other than open coastal water), the water, heat, or energy is required for an individual's reasonable domestic or recreational needs and the taking, use, or diversion does not, or is not likely to, have an adverse effect on the environment; or

(e) the water is required to be taken or used for emergency or training purposes in accordance with section 48 of the Fire and Emergency New Zealand Act 2017.

[88] It is also necessary to note the definition of "water" in s 2 of the RMA:

**water—**

(a) means water in all its physical forms whether flowing or not and whether over or under the ground:

(b) includes fresh water, coastal water, and geothermal water:

(c) does not include water in any form while in any pipe, tank, or cistern

[89] Mr Gardner-Hopkins submits that in this case the proposals in each case involve water being taken from the ground, pumped to the bottling site in pipes and, after a filtering process, placed into water bottles. He argues that, once taken from the ground at the outset of this process, the water is no longer within the definition, because it is in a pipe and para (c) of the definition excludes it. Mr Gardner-Hopkins claimed that, the bottles in which it is placed are within the concept of tank or cistern, and consequently not water at that point either. It follows that the water is not water that can be the subject of a resource consent under s 14(3)(a) since the prohibition in subs (2) would not apply. The Council was not entitled to grant consent for a separate water bottling use, and then seek to amalgamate it with the existing "take *and* use consents" for the freezing works and wool scour. The argument is that any new consent would have had to be for a fresh take for an activity comprising the combined *taking* of water *for the purpose* of water bottling. And that consent could not have been granted, because of the fact that water in the catchment is fully allocated and that would be prohibited under the LWRP.

[90] For the Council, Mr Maw noted that this issue had not been directly addressed in the High Court, nor raised in the grounds of appeal. He submitted the argument relied on an artificial distinction between water bottling and other activities in which water was piped, such as irrigation. It was not appropriate to treat the bottles in which the water was placed as equivalent to tanks or cisterns, because that would be contrary to the dictionary definitions of those terms.

[91] We have not been persuaded by Mr Gardner-Hopkins' argument on this point. We consider the relevant statutory provisions are to be construed on the basis that the water, once taken from the ground, is not water while it remains in the pipe. Once it leaves the pipe it is water again, for the purposes of the statute. We do not accept that a bottle is to be regarded as a tank or cistern for the purposes of the definition.

[92] The definition of "water" is an important provision in the RMA, because it is central to the provisions controlling not only the taking and use of water (s 14), but also those controlling the discharge of contaminants into water, whether directly or indirectly (s 15(1)(a) and (b)), and the discharge in the coastal marine area of harmful substances from ships or offshore installations (s 15B). The controls set out in these provisions are matched by the allocation of functions to regional councils under s 30(1)(e) and (f) of the Act, and the obligations in respect of regional policy statements and plans set out in pt 5, subpt 3 of the Act. The definition appears to have been carefully drafted to ensure that it is appropriate for the various contexts in which it has to be applied under the Act.

[93] The first thing to notice about the definition of water is that it is intended to be broadly inclusive. By virtue of para (a) it extends to water in all its physical forms, and "whether flowing or not" and "whether over or under the ground". The terms "fresh water", "coastal water" and "geothermal water" are specifically included by para (b). These kinds of water are referred to in other specific provisions of the RMA, and have their own definitions in s 2. Possibly, without the reference to them in para (b) there might have been doubt about whether they were within the concept of "water in all its physical forms", but any such doubt is removed by the specific words of para (b). In the circumstances we see para (b) as expressly including kinds of water that would have been included under para (a) in any event.

[94] After these broad statements of what is included in the definition of water, para (c) of the definition then creates an exclusion. It is for water (as has been broadly defined) "while in any pipe, tank, or cistern". The natural and ordinary meaning of this provision is that for the period in which the water is in a pipe (or tank or cistern) it is no longer water. But once it is no longer in the pipe (or tank or cistern), it is no longer excluded.

[95] We think it would be a strained use of language to describe water placed in a bottle as having been placed in a tank or cistern. According to the *New Zealand Oxford Dictionary*, a "tank" is "a large receptacle or storage chamber usu[ally] for liquid or gas".[14] A "cistern" is defined as "a tank for storing water, esp[ecially] one in a roof space supplying taps or as part of a flushing toilet".[15] These words are not synonymous with bottle, which is defined as "a container, usu[ally] of glass or plastic and with a narrow neck, for storing liquid".[16]

[96] We do not think it matters in this case that the water is placed in a container once it leaves the pipe, and so will not have a direct effect on the environment once that happens. While many uses of water result in a discharge into the environment, discharges are dealt with under s 15(1) of the Act; it is not possible to limit the ordinary meaning of "use" on the basis that the water is used for the purpose of bottling and not discharged.

[97] In the circumstances we conclude that when water leaves the pipe and enters the bottle, that amounts to a use of water covered by the prohibition in s 14(2) of the RMA, unless s 14(3) applies.

**Second issue — must applications for take and use be considered together?**

[98] Mr Gardner-Hopkins submitted that the primary issue is whether the Council had the ability to grant a resource consent to "use" water for bottling purposes, separately to the authorisation to take the water so used. He argued that under the LWRP both take and use are to be considered together and because the water in the relevant catchment has been fully allocated any new application for consent to "take and use" would be prohibited.

[99] The High Court held that there was nothing on the face of ss 14 or 30 of the RMA which suggested the ability to grant a resource consent to "use" water was in

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14 Graeme Kennedy and Tony Deverson (eds) *The New Zealand Oxford Dictionary* (Oxford University Press, Melbourne, 2008) at 1147.
15 At 200.
16 At 127.

any way limited with the effect that a use permit could only ever be granted as part of a "take and use" consent.[17]

[100] We have earlier set out s 14. Section 30 sets out the functions of regional councils, to be exercised for the purpose of giving effect to the RMA. One of the functions set out in subs (1)(e) is:

> (e) the control of the taking, use, damming, and diversion of water, and the control of the quantity, level, and flow of water in any water body, including—
>
> (i) the setting of any maximum or minimum levels or flows of water:
>
> (ii) the control of the range, or rate of change, of levels or flows of water:
>
> (iii) the control of the taking or use of geothermal energy:

[101] The Judge considered that it was implicit in the drafting of both ss 14 and 30 that there could be a consent for either use or take separately. He found support for this view in this Court's judgment in *Central Plains Water Trust v Ngāi Tahu Properties* which he treated as authority for the proposition that separate applications could be made for the take or use of water.[18] The Judge also referred to a decision of the Environment Court in *P & E Ltd v Canterbury Regional Council*, noting that Court had not considered it unusual for applications for consent to use water to be dealt with separately from a hearing "over the application for a take".[19]

[102] He also observed that some provisions in the LWRP dealt with taking and use of water conjunctively, others referred to the taking or use "disjunctively". He rejected an argument put to him on behalf of AWA that use of the water for commercial bottling was not a use in the sense referred to in s 14 or other relevant sections of the RMA, but was instead simply the "purpose of the take".[20] He considered the suggested interpretation was at odds with the terms of the original consents and noted that, in the decision on the preliminary question, the High Court had found that the scope of the

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17 High Court judgment, above n 2, at [104].
18 At [111], referring to *Central Plains Water Trust v Ngāi Tahu Properties* [2008] NZCA 71, [2008] NZRMA 200.
19 At [114]–[115], referring to *P & E Ltd v Canterbury Regional Council* [2015] NZEnvC 106 at [9].
20 At [122]–[131].

use for which the takes had originally been granted was limited by the use for which the consents had originally been sought: for a meat processing plant in the case of the Rapaki consents, and a wool scour in the case of the Cloud Ocean consent.[21] He determined that the use of water now proposed for commercial bottling was a use of water in terms of s 14, and able to be the subject of an application for consent "to a change of use".[22]

[103] He concluded:

> [132] I have thus concluded that s 14 is to be interpreted in accordance with what appears to be its plain meaning. Section 14 permits a council to consider an application for a change of use from an already consented take without requiring it to be treated as an application for both a take and use consent.
>
> [133] There was no error in the Council processing the applications as applications for approval of a change in the use of water from already consented takes without having to consider whether it should also approve those takes.

[104] Mr Gardner-Hopkins accepted that there could be separate applications for consent to use water and to take water, and that s 14 did not always require those applications to be sought together or at the same time. However, he argued that in the circumstances of this case take and use were necessarily to be considered together partly because the original take consents had been granted for a particular purpose and the new purpose now proposed could not be considered on its own without fresh consideration of whether a take was appropriate.

[105] He submitted that the existing take had been granted for a very specific purpose, and it would be against the policy of the RMA for that take to be relied on or utilised for a different purpose. The volumes for which consent was originally granted had been considered and granted with the particular purpose in mind. So too, the benefits of that take, what the water would be utilised for, and how much water was needed for that particular purpose were all integral to the grant of the consent. He maintained that where a new activity is proposed, consent should be sought for both the take and the use together so that the consent authority can consider whether the take is appropriate as well as the use in terms of any efficient use of that take or

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21 At [123], referring to *Aotearoa Water Action Inc v Canterbury Regional Council*, above n 4.
22 At [131].

any other effects of the use arising. In the present case, there should have been a fresh application for a take and use so that both were able to be considered together. The problem arising from the fact that water in the existing catchment was fully allocated with the result that no further take consent could be granted could be overcome by surrender of the existing take consent. Alternatively, application could be made for a new take and use consent, but on the basis that if it were granted the earlier consent would be surrendered, or the two would simply not be exercised together.

[106] For the council, Mr Maw supported the reasoning in the High Court judgment. He submitted that s 14 of the Act referred disjunctively to "take, use, dam, or divert" and submitted there was nothing on the face of the section to suggest that it should be read as regulating "take *and* use" together as opposed to damming or diverting, which are regulated as separate activities. He submitted a plain reading which incorporates "or" between each of the words in the section is consistent with the balance of the section and argued that there was no reason why a "take and use" of water could only be dealt with together, but damming or diverting water could be separately authorised. He emphasised the difference between a water permit and a land use consent, because a water permit is "allocative" in nature. He submitted the RMA regulates the allocation of water on a first in, first served basis and the water allocated to Cloud Ocean and Rapaki could not be reallocated to anyone else for the term of the existing consents which he submitted was the effect of s 30(4) of the RMA. He submitted that this Court's judgment in *Central Plains Water Trust v Synlait Ltd* was consistent with the idea that "take" and "use" can be separately regulated.[23]

[107] Mr Maw derives support from the provisions of the RMA dealing with the transfer of water permits. He referred in particular to s 136(2)(b) which provides that the holder of a water permit granted other than for damming or diverting water may transfer the whole or any part of the holder's interest in the permit "to another person on another site, or to another site, if both sites are in the same catchment … aquifer, or geothermal field" where the transfer "is expressly allowed by a regional plan" or "has been approved by the consent authority that granted the permit on an application

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23 *Central Plains Water Trust v Synlait Ltd* [2009] NZCA 609, [2010] 2 NZLR 363.

under subsection (4)". Such an application is to be considered as if it were an application for resource consent.[24] Mr Maw maintained that this provision would enable a new use to be ascribed to an allocation of water, without affecting the priority of the allocation. He argued that the ability to transfer the permit recognised the existence of the allocation although the use on a new site would not be within the scope of the existing permit. Thus the Act would apparently allow an allocation of water to be used for a different purpose on a different site, subject to an assessment of the effects.

[108] Mr Maw accepted that the transfer provisions do not deal with the situation where water allocated to a site is to be used for a different purpose at the same site, noting that the Act allowed the transfer of the whole permit as an "administrative post box exercise" under s 136(3). But he contended that the Council here had adopted what he described as an "'elegant' solution" to enable allocated water to be used for a new purpose, whilst ensuring that all of the effects of that new use were assessed. He argued that a holistic consideration of take and use was only required when there was both a proposal for a new take and a new use; a different approach such as that adopted by the Council was appropriate where the existing take was relied on. He argued that none of the authorities relied on by AWA established that, where a component of a proposed activity is already authorised, it is unlawful to grant a further resource consent for new, unauthorised components relying on the existing consent. In circumstances such as the present, granting a new use permit would still enable all relevant effects of the use to be considered and he argued that the Council could control the effects of the new use through its power to impose conditions. In that way the scale of the new use could be limited to what was appropriate.

[109] Mr Maw also rejected criticisms of the amalgamation process which the Council had adopted. He submitted that the amalgamation did not alter the rights conveyed by the consents and the Council's decision had made it clear that what was granted was an additional use in reliance on the existing allocation.

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[24] Section 136(4)(b).

**Analysis**

[110] We do not consider that the High Court erred in its interpretation of s 14 of the RMA. In particular, the prohibition in s 14(2) that "[n]o person may take, use, dam, or divert" treats each of those activities disjunctively. There is no reason, given the drafting, to treat "take" as necessarily combined with "use", any more than there is to treat "take" as necessarily linked to "dam" or "divert". All of the activities are subject to the same prohibition unless authorised by subs (3).

[111] Again, the drafting of s 14(3) relates to each of the activities individually. Thus a person will not be prohibited from taking, using, damming or diverting water. The statute does not require a linkage between any one or more of those actions.

[112] The High Court also based its reasoning on the provisions of s 30(1)(e) of the RMA which, as noted above, relevantly provide for functions controlling activities in relation to water. Once again, it is the individual actions that are referred to, namely "taking, use, damming, and diversion of water".

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

[114] Consistently with that r 5.128 is preceded by a heading, namely "Take and Use [of] Groundwater". The opening words of r 5.128 itself provide "[t]he taking and use of groundwater *is* a restricted discretionary activity …".[25] The use of this singular "is" suggests that "taking and use" is to be regarded as one activity.

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[25] Emphasis added.

[115] We acknowledge that the conditions on restricted discretionary activity status that immediately follow provide particular requirements in relation to the take of the water. Thus, under condition 1, the take must be from within a groundwater allocation zone on the planning maps. Where condition 2 applies the take must in addition to all existing consented surface water takes "not result in any exceedance of any environmental flow and allocation limits set [out] …". Condition 3 contains a similar restriction to ensure that the "seasonal or annual volume of the groundwater take, in addition to all existing consented takes, as determined by the method in Schedule 13 does not exceed the groundwater allocation limits for the relevant Groundwater Allocation Zone …". Again, condition 4 contains a condition concerning "bore interference effects" once more related to the take.

[116] While the conditions do not relate to the use of groundwater, they are expressed as conditions relating to the "taking and use of groundwater" at the outset of the rule, and do not detract from the proposition that it is the taking and use which together constitute the restricted discretionary activity. The drafting in effect amounts to an expansive definition of the "take" component of the "taking and using" activity. It does not indicate that each may be consented to separately.

[117] That conclusion is underlined when reference is made to the matters to which the Council has restricted the exercise of its discretion, which then follow. These are the matters which the Council will take into account when deciding whether or not to grant consent to the defined restricted discretionary activity. Significantly, as set out above, these include:

> 1. Whether the amount of water to be taken and used is reasonable for the proposed use. In assessing reasonable use for irrigation purposes, the [Council] will consider the matters set out in Schedule 10 …

[118] We consider this creates a direct linkage between take and use. The amount of the take has to be assessed to see whether it is reasonable for the proposed use. The question of what is reasonable in an area where the water is fully allocated is obviously intended as a control mechanism to ensure that no water is taken beyond what is appropriate for the proposed use. If the take is treated as an activity separate to the use, it is unclear how the reasonableness criterion could be applied. Where the use is, as here, water bottling and the proposal is to bottle all of the available water

under the existing take consent, it is unclear how the amount of water bottled could be controlled. We say that because on the approach of the Council, Rapaki and Cloud Ocean the consented volumes of the take are a given. That is a consequence of separating out the take and use components of the proposed activity. In our view that subverts the evident intent of r 5.128 read as a whole.

[119] Similar reasoning is prompted by other discretionary considerations set out in the rule, namely the "availability and practicality of using alternative supplies of water". It is clear this is intended to involve a consideration of whether an alternative supply of water is available for the proposed use of the water. That cannot be genuinely considered if the water take is not before the Council when considering the "use" component of the application: it would necessarily be an irrelevant consideration, because the applicant can say that it already has a consented supply. Other discretionary considerations, dealing with the maximum rate of take and potential adverse effects on other authorised takes would also be otiose where there is reliance on a pre-existing use consent. We do not think it is a satisfactory answer to say that these matters must be assumed to be satisfactory because there is an existing consent. In our view the intent of the rule is that all relevant matters will be able to be considered in relation to the application for consent and use.

[120] It can be seen that consistent with r 5.128, the wording of rr 5.129 and 5.130, quoted above, also treats taking and use as one activity. This is significant in the case of r 5.128, because the non-complying activity status it creates is where the "taking and use of groundwater" does not meet either or both of conditions 1 and 4 in r 5.128. Those conditions both relate to the water take. Yet, the non-complying activity status arises for both the taking and use. And again, in the case of r 5.130, the prohibited activity status arises where there is a failure to meet one or both of conditions 2 and 3 in r 5.128. While the conditions referred to are those relating to location of the take and groundwater allocation limits, the drafting of r 5.130 is not restricted to the take aspect of the activity.

[121] If separate consents were possible for taking and using, the drafting could readily have left the "use" aspect out of both rr 5.129 and 5.130. The provisions could have each provided that the taking of water that does not meet the relevant conditions

is non-complying and prohibited. If the plan had contemplated separate consents for the taking and use necessary for one activity, that would surely have been the approach adopted. But it consistently treats both together.

[122] By contrast to these rules, the drafting of other rules in the LWRP uses the expression "taking *or* use". This is the case with rr 5.121 and 5.122 (concerning the taking or use of water from irrigation or hydroelectric canals or water storage facilities). We see no reason to conclude that the difference in wording is not intentional.

[123] We see our approach as consistent with s 30(1)(e) of the RMA. While that provision enables regional councils to control the taking, use, damming and diversion of water, there is nothing in the drafting that prevents a regional council from exercising control by treating taking and use as matters which are linked for the purposes of its regional plan. There is also nothing in s 30(4) which suggests a different outcome. The thrust of that subsection is apparent from its opening words, providing that a rule in a regional plan allocating a natural resource may allocate the resource in any way subject to various qualifications then set out. There is nothing in the subsection which could found an argument that the regional council may not have a rule that regulates take and use together.

[124] The High Court was influenced by this Court's decision in *Central Plains Water Trust v Ngāi Tahu Properties*.[26] In that case, predecessors of the Central Plains had made an application in 2001 for consent to take water from the Waimakariri and Rakaia rivers which it intended to use to irrigate an area of some 60,000 hectares. Its application explained the purpose for which the water was to be used, but did not seek consent for the use at that stage. Subsequently, Ngāi Tahu Properties Ltd made an application both to take water from Waimakariri River and to use it for irrigation purposes, over an area of 5,659 hectares. Central Plains then lodged a further application, to take water from a new proposed location further up the River. The Council treated this as an amendment to the original application rather than a new application. But the Central Plains application was placed on hold because the

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[26] *Central Plains Water Trust v Ngāi Tahu Properties*, above n 18.

Council considered it was not ready for notification in the absence of the application for consent to use the water.

[125] The question arose as to which application should be considered as having priority for the allocation of the water. The Environment Court decided that the issue was to be determined on the basis of which application was first in a form appropriate for notification.[27] The High Court endorsed that view.[28] Randerson J considered that while there could be applications where it was unnecessary or inappropriate to consider all resource consent applications together, in the case before the Environment Court, it was correct to conclude it would be artificial to separate the water take from the applications relating to the end use of the water.[29] That meant the Council had been correct to place the Central Plains application on hold. In those circumstances, Ngāi Tahu's application should have priority, because it was in a form in which it could be publicly notified.[30]

[126] This Court, by a majority, took a different view. It held that the Central Plains application contained sufficient information as to the intended use of the water to enable a proper consideration of the application to take water, even though the application for consent to the use of the water had not been made.[31] This meant that Central Plains should not lose priority for the allocation of the water to the Ngāi Tahu application, even though the latter had applied for both consents in one application. The essential basis of the judgment is encapsulated in the following paragraph:

> [80] It is sufficient to record my answer to question (a): An application for resource consent to take water which is not disqualified by unreasonable delay and which, although recognising the need for subsequent use applications could not as filed be rejected as a nullity, takes priority over an application which relates to the same resource and which, although complete in itself, was filed later by a party with knowledge of the earlier application …

[127] The decision is about priority between different applications, and the circumstances in which an incomplete application may lose priority to a later one. It is not a decision which says anything about whether or not applications separately made

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27 *Re Ngāi Tahu Property Ltd* EnvC Christchurch C104/06, 21 August 2006.
28 *Central Plains Water Trust v Ngāi Tahu Properties Ltd* (2006) 13 ELRNZ 63 (HC).
29 At [40].
30 At [69].
31 *Central Plains Water Trust v Ngāi Tahu Properties*, above n 18, at [70]–[71] and [76].

in respect of the same overall activity can properly be considered separately.[32] As Nation J recognised, the case is not authority for the proposition that a council may consider an application for consent to take water separately from an application to use the water which is to be taken, although he did see it as authorising the making of separate applications for the take and use of water.[33]

[128] While that might theoretically be correct these observations are not decisive in the current context. Here, for the reasons we have given, the LWRP creates one activity, namely the taking and use of water. Both elements require consent under the RMA but here it must be remembered that the relevant consent provisions of that Act are those in pt 6, not s 14. Under s 87, a resource consent is relevantly defined as a consent, among other things, to do something that "otherwise would contravene section 14 (in this Act called a **water permit**)".[34] Section 87A then deals with classes of activities, describing successively permitted, controlled, restricted discretionary, discretionary, non-complying and prohibited activities.

[129] If reference is then made to s 14(2), it may be seen that it operates as a proscription against the taking and use (among other things) of water, unless it is allowed by subs (3); and subs (3) contemplates those activities being expressly allowed by certain standards and rules made under the RMA "or a resource consent". Here, the necessary resource consent was a consent to take and use water, because that is the activity that the rule contemplates. We do not consider it can be legitimate to proceed on the basis that the plan contemplated stand-alone take and use consents given the drafting of the relevant rules.

[130] We note that the Council proceeded on the basis that because there was no rule specifically governing a stand-alone use of water, the application was properly considered by the Council under what Dr Burge described as the "catch-all" r 5.6 as a discretionary activity. We have quoted that rule above. We consider that was a wrong approach in the present context. Because the LWRP provides in r 5.128 for the taking

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32 We think the same can be said of *Central Plains Water Trust v Synlait Ltd*, above n 22, to which we were referred by Mr Maw.

33 High Court judgment, above n 2, at [111]. He noted at [112] Randerson J's observations in *Central Plains Water Trust v Ngāi Tahu Properties Ltd*, above n 28, at [40] that it may not always be necessary for applications for take and use to be considered together.

34 Section 87(d). The emphasis is in the Act.

and use of groundwater as a restricted discretionary activity, and goes on to provide that the taking and use of groundwater that does not meet one or more of the conditions is either non-complying (r 5.129) or prohibited (r 5.130), we do not consider it was open to the Council to consider a stand-alone application for consent for only one of those elements. If it could do that in respect of a use consent, why not a take consent?

[131] If both elements can be separately considered it is difficult to see how the plan can be administered in a way that preserves its integrity. For example, it is clear that under r 5.129, an application to take water that does not comply with condition 4 of r 5.128 should be considered as an application for a non-complying activity. However, under the Council's reasoning it would be said that because the LWRP deals only with take and use together, an application for consent restricted to a take only would be a discretionary activity, because it would not be classified by the plan as any of the other classes of activity listed in s 87A of the RMA. This approach simply does not work given the pattern of drafting adopted in the LWRP, which plainly contemplates both take and use being considered together.

[132] For these reasons we have concluded that the Council did not have the ability to grant a resource consent limited to the use of the water for bottling purposes separately to the authorisation to take the water to be used for that purpose. Under the LWRP it was necessary to consider both take and use together. These conclusions mean that consents CRC180728 and CRC180729 granted to Rapaki and CRC182812 granted to Cloud Ocean were not lawfully granted. It follows that consents granted subsequently (amalgamating those consents with the existing water take consents) that were contingent on the grant of those consents were also unlawful. That result follows from the infirmity of consents CRC180728, CRC180729 and CRC182812, rather than the process of amalgamation and reissue subsequently adopted by the Council. We consider those were legitimate administrative steps, but they were dependent on the lawfulness of the consents treated in that way.

[133] This means that the appeal must be allowed and the decisions of the Council granting the impugned consents set aside.

[134] Having reached that conclusion it is unnecessary for us to go on to consider the other issues raised about the impact of selling water in plastic bottles (raised by AWA and the Rūnanga) and the adverse effects on cultural values arising from the water bottling activity (raised by the Rūnanga). Nor is it now relevant to consider whether the Council's decisions to deal with the applications without requiring notification or limited notification were also unlawful.

**Result**

[135] The appeal is allowed and the decision of the High Court is set aside.

[136] The Council's decisions granting consents CRC180728 and CRC180729 to Rapaki and CRC182812 to Cloud Ocean are set aside, with the further consequences set out in [132] above.

[137] AWA is entitled to costs. We direct that the Council must pay AWA's costs calculated for a standard appeal in band A, together with usual disbursements. Noting that the submissions of the other parties were of limited scope and that the Rūnanga was an intervener we consider it appropriate for other costs to lie where they fall.

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