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COMMERCIAL WATER BOTTLING UNDER THE RESOURCE MANAGEMENT ACT: *OTAKIRI SPRINGS*

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Abstract

Commercial water bottling is a highly contentious yet rapidly growing industry. This paper analyses the use of the Resource Management Act 1991 in a resource consent application for a significant expansion to a commercial water bottling operation, in order to ascertain what regulation of the industry looks like under the Act. This paper argues that the local authority, and the Environment Court on appeal in Otakiri Springs*, missed three key gateways under the Act; unlawfully alleviating the applicant of several layers of scrutiny that it should have been subject to. Firstly, wrongful determination of the application as a variation to an existing consent rather than an application for a new consent meant consideration of its effects were overly narrow. Secondly, incorrect classification of the activity type under the Whakatāne District Plan meant further necessary statutory triggers were not activated. Thirdly, and most significantly, the Environment Court artificially restricted the meaning of "effects" so that the 1.35 billion disposable plastic bottles per year resulting from the operation were not considered as an effect on the environment to be had regard to under s 104(1)(a) of the Act. In focussing on the exercise of the Court, this paper highlights how decisions under the Act can allow for such adverse environmental outcomes. In turn, this paper contributes to an established body of work questioning the appropriateness of the Act in general.*

Keywords: *"Commercial Water Bottling", "Resource Management Act 1991", "Plastic Pollution", "Water", "Resource Consent".*

Contents

I Introduction

A Overall Argument

This essay critically analyses key aspects of the 2019 *Otakiri Springs* Environment Court case. The case centres on an application for a resource consent by Creswell NZ Limited (Creswell) which would allow a commercial water bottling plant to expand significantly.

I argue that the local authority, and the Environment Court on appeal, misinterpreted the law under the Resource Management Act (RMA) on several different occasions which led to an unjustifiably narrow approach in considering the resource consent application. This means that several key "gateways" were missed; instead of entering through these gateways, the Court wrongly circumvented them, meaning that they did not consider what they should lawfully have considered. This gave an advantage to the resource consent applicant in many respects; as the unlawfully narrow approach taken relieved the commercial water bottling operation application from several layers of scrutiny that it would have been subject to if the missed gateways had been correctly entered.

The first gateway was missed when the Court wrongly determined that the consent application was for a variation to an existing consent, rather than requiring that a new consent application be made. Missing this key gateway blinkered the Court in its analysis by not allowing it to consider the proposed activity in its entirety.

Secondly, the commercial water bottling operation was classed as the incorrect type of activity under the Whakatāne District Plan. The operation should have been classed as an industrial activity rather than a rural processing activity. The key consequences of missing this gateway were that the consent application was, wrongly, not required to be fully publicly notified or to pass through a further statutory test.

Finally, the Environment Court missed the gateway which would have required the full picture of the effects of the commercial water bottling plant on the environment to be considered. Instead of interpreting the effects which are able to be considered by the decision maker as those which will inevitably flow from the operation, the Court unduly restricts effects as not including things that will inevitably flow from the activity. This prevents the

Court from considering the more than a billion plastic bottles that this operation would produce annually.[1] I argue that omitting such a consideration is untenable.

B Importance of Issue

Plastic pollution is a global issue. This global nature is shown by the fact that areas of the Tasman Sea, which is located in a part of the world with relatively low population, receives the highest impact of global plastic pollution.[2] When properly disposed of, single use plastics, for example plastic bags and bottles, end up in landfill; however when they are not, they end up polluting land and marine environments (see Appendix A for details).[3] Despite the 2019 United Nations Basel Convention offering some hope that plastic waste will be more cooperatively managed,[4] at present regulation of plastics is in practice left completely to individual state governments.[5] Commercial water bottling contributes to this global issue as water is generally bottled into disposable plastic bottles. It is difficult to imagine the scale of the plastic pollution crisis because it is just so vast. For example, the activity proposed by Creswell in this consent application will allow for 154,000 plastic bottles to be manufactured per hour for the next 25 years.[6] This is just a tiny proportion of the New Zealand-wide manufacture of plastic bottles for commercial water bottling.[7]

The water take itself has also become a political and factual issue in parts of New Zealand. Key concerns centre on potentially reduced levels of freshwater availability in the future (see Appendix B for details), with a particular eye to the effects of climate change, and the idea of foreign companies taking a resource for export without paying for it in any form.[8] There has been considerable media attention around the issue, and public protests in some areas, most significantly in Christchurch during March 2019.[9] Although New Zealand's water bottling industry may be seen as small right now, it is growing astronomically fast. As noted in "Our Freshwater 2020", as of 2018 resource consents had been granted that "would enable recently

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[1] *Te Runanga O Ngati Awa v Bay of Plenty Regional Council* [2019] NZEnvC 196 at [24].
[2] Dr Durgeshree Raman "Single use plastic ban: the first step" (2018) 12 BRMB 153 at [4].
[3] At [3].
[4] Tom Miles "U.N. clinches deal to stop plastic waste ending up in the sea" *Reuters* (online ed, Geneva, 11 May 2019).
[5] Raman, above n 2, at [7].
[6] *Te Runanga O Ngati Awa v Bay of Plenty Regional Council*, above n 1, at [18].
[7] Ministry for the Environment & Stats NZ *New Zealand's Environmental Reporting Series: Our freshwater 2020* (ME 1490, April 2020) at 59.
[8] Cate Broughton "Christchurch water protest attracts thousands" *The Press* (online ed, Christchurch, 9 March 2019).
[9] Above.

established businesses to take and export almost 400 times more water than current exports."[10] Therefore, the fear is that an unregulated commercial water bottling industry is allowed to expand exponentially and at the cost of other water users.

Despite these issues, the Government response has been practically non-existent (see Appendix C for details).

II Background and Overview of Issues

This case involves various claims against Creswell NZ Limited. Creswell applied to the Whakatāne District Council and the Bay of Plenty Regional Council for a range of consents which would "enable the expansion of an existing water extraction and bottling operation" currently operating at 57 Johnson Road, Otakiri, as Otakiri Springs.[11] Creswell's purchase of the property was subject to those consents being granted.[12] The most significant consent applications were to the Regional Council for the taking of groundwater for water bottling,[13] and to the District Council for the variation of conditions of the existing land use consent as well as for new consents.[14] These applications were granted,[15] and upheld by the Environment Court, 2:1.[16] They are now being appealed to the High Court.[17]

The consents would allow for a peak daily water take of 5,000 cubic metres or 1.1 million cubic metres annually,[18] construction of a new 12.9 metre high warehouse-style building[19] and an adjoined truck container loading area,[20] and a 30-month construction programme for upgrading surrounding roads as well as for "site earthworks and equipment installation."[21] Two new high-speed bottling lines would increase the site's bottling capacity from 10,000 to 154,000 bottles of water per hour.[22] This equates to 1.35 billion plastic bottles of water per

[10] Ministry for the Environment & Stats NZ, above n 7, at 59.
[11] At [1].
[12] At [2].
[13] At [3]
[14] At [4].
[15] At [6].
[16] At [321].
[17] Charlotte Jones "Lawyers round off arguments in water bottling appeal" *New Zealand Herald* (online ed, Whakatane, 31 July 2020).
[18] *Te Runanga O Ngati Awa v Bay of Plenty Regional Council*, above n 1, at [23].
[19] At [17].
[20] At [17].
[21] At [19].
[22] At [18].

year, for the next 25 years.[23] A new bore at a depth of 228 metres would be drilled to enable this increased water take.[24]

The site is located in the Whakatāne district in the Bay of Plenty region, three kilometres southwest of Otakiri. The surrounding area is characterised by "both pastoral and horticultural land uses", as well as a number of "smaller rural-residential lifestyle properties."[25]

In this case, te Rūnanga o Ngāti Awa appeals against the consent granted for the taking of groundwater because of its adverse effects on te mauri o te wai (the life force of the water), and on the ability of Ngāti Awa to be kaitiaki (guardians) of the water.[26]

Sustainable Otakiri Incorporated, a group composed of residents living nearby the water bottling plant, appeals against the consent granted for the variation of conditions for the existing land use consent and against the new consents.[27] In particular, Sustainable Otakiri focuses on:[28]

- The Court's jurisdiction to grant the application under s104(3)(d) and s 127 RMA;
- the definition and status of the proposal under the Whakatāne District Plan;
- the consistency of the proposal with the relevant planning instruments;
- the proposal's effects on rural character and amenity, the general wellbeing of the community, and the loss of productive land;
- and the extent to which the District Plan identifies alternative locations and zonings for the proposed site.

III Change to Existing Consent or New Consent

A Environment Court

Sustainable Otakiri submitted that in hearing the resource consent proposal, the Commissioners made a legal error "in assessing the application as a variation of conditions under s 127 RMA, as opposed to a new activity under s 88 RMA" and that this "gave

[23] At [327].
[24] At [24].
[25] At [25].
[26] At [7].
[27] At [8].
[28] At [9].

advantage to Creswell".[29] This advantage would arise "where the changed activity is fundamentally different or has materially different adverse effects", or "where the activity is non-complying and should be subject to the thresholds of s104D RMA."[30]

Sustainable Otakiri further submitted that "the nature, scale, intensity and effect of the proposed water bottling plant… were so markedly different from those provided for in the original consent as to be inconsistent with the concept of expansion."[31] Therefore, the proposal was a new activity "requiring fresh examination of its activity status under the Whakatāne District Plan rather than as a variation of conditions to the existing consent under s 127 RMA."[32]

In its decision, the majority of the Environment Court downplays the distinction between a new consent application and a variation to an existing consent on the basis that the difference between applying under one or the other is "more apparent than real."[33] This is because "if this proposal had been made under s 88 and declined, the applicant would still hold the original consent, so its position would be no different to having an application under s 127 RMA declined."[34] Therefore, the majority believes that "the real assessment must be of the effects of expanding the water bottling operation."[35] Regarding such effects, the majority concludes that while the intensity and scale of the effects will increase, "the character of the adverse effects of the expanded activity would be the same as for the existing activity."[36] Accordingly, the Court concludes that the proposal is "for the expansion of an existing activity" rather than for a new activity.[37]

B Critique: Change to Existing Consent or New Consent?

Looking at s 127(3)(b), it is clear that if a change to an existing resource consent is applied for, only the "effects of the change or cancellation" are taken into account when assessing the resource consent under ss 88-121.[38] This means that in a s 104(1)(a) determination where the consent authority must have "regard to – (a) any actual or potential effects on the

[29] At [175].
[30] At [176].
[31] At [187].
[32] At [187].
[33] At [182].
[34] At [182].
[35] At [182].
[36] At [196].
[37] At [194].
[38] Resource Management Act 1991, s 127(3)(b).

environment of allowing the activity",[39] the effects of the already consented activity are "deemed to form part of the existing environment and therefore disregarded."[40] In other words, the RMA does not step back and look at the proposed activity holistically in light of the environment it is proposed to operate in.

In contrast, s 88 is silent as to the existing environment.[41] Accordingly, when a local authority or a Court considers "any actual or potential effects on the environment of allowing the activity",[42] under s 104(1)(a) RMA, there is nothing preventing it from having regard to effects on the environment of the new proposed activity as a holistic whole, notwithstanding that a consent with the same character already exists on the site subject to the new consent application. As such, it would be a stretch to say that s 88 this performs the same deeming function with regard to effects as does s 127(3)(b). Indeed, in an area such as environmental management and planning which the RMA legislates for, it is important that opportunity for local authorities to apply new and updated knowledge is provided for. This is because scientific findings around the environment are constantly being updated. Therefore, when a new consent is applied for under s 88, the RMA gives the decision maker an opportunity to step back and consider the proposal holistically. This is in contrast to where an application for a variation to an existing consent is made under s 127, where a decision maker is resigned to accept the effects from what has already been consented to, sometimes decades before, as if they did not exist.

It should be noted that the "permitted baseline" principle, which would allow a decision maker not to consider the effects from an already consented activity, could be brought into a new consent application decision; reducing the difference between applications under s 88 and s 127.[43] However, this does not reduce the importance of the conceptual distinction between the different application mechanisms.

Accordingly, the majority are incorrect in stating that there would be no difference in terms of how adverse effects are assessed either as a new consent, or as a change to an existing

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[39] Section 104.
[40] *Te Runanga O Ngati Awa v Bay of Plenty Regional Council*, above n 1, at [179].
[41] Resource Management Act, s 88.
[42] Section 104.
[43] Ceri Warnock and Maree Baker-Galloway *Focus on Resource Management Law* (2nd ed, LexisNexis, Wellington, 2019) at 227.

consent.[44] Therefore, Creswell benefitted from the effects of the existing water bottling plant being "disregarded".[45]

C Critique: "Expansion" or New Activity?

The scale of the proposed "expansion" suggests the activity should be treated and consented as a new activity.[46] Commissioner Kernohan's timeline of consents highlights the snowball effect that can occur when a resource consent is allowed to be modified to one which has a completely different purpose than that of the original consent.

The original consent granted in 1979 was "for the purpose of orchard and shelter belt irrigation and frost protection"[47] for a kiwifruit orchard.[48] In 1991, the consent was modified to allow for "commercial bottling of water for export and domestic sale."[49] In 2011, the allowable water take was increased,[50] and in 2016 consent was granted for drilling a new bore.[51] The current requested consent variation would increase plastic bottle output by a factor of 20; from 185,000 to 3.7 million bottles per day.[52] As Commissioner Kernohan states:[53]

> It is highly unlikely that the initial granting of the resource consent in 1991… could or would have anticipated… "a major expansion of the plant or updating of plant machinery" by a factor of twenty (20).

Accordingly, it is strange to characterise this as a mere variation, given the substantial change envisaged goes well beyond the "scope or reasons" for the original consent.[54] In fact, the kiwifruit orchard for which the original water consent was granted no longer exists.[55] That being so, it would be unfair to the local community to miss out on the full public notification that would otherwise be required, just because an essentially new proposed activity is characterised as a change to an existing one. A discussion of public notification follows in Section IV of this essay.

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[44] *Te Runanga O Ngati Awa v Bay of Plenty Regional Council*, above n 1, at [254].
[45] At [179].
[46] At [194].
[47] At [338].
[48] At [342].
[49] At [338].
[50] At [339].
[51] At [339].
[52] At [340].
[53] At [341].
[54] At [343].
[55] At [342].

D Section 88: Practically Obsolete?

The 2018 *Aotearoa Water Action Inc v Canterbury Regional Council* High Court case dealt with similar issues. There, Kaputone Wool Scour Ltd operated on a site now occupied by Cloud Ocean Water Ltd.[56] In 1985 Kaputone obtained a permit allowing a take of 4,320 cubic metres of water per day for "scouring NZ wool second stage process".[57] This consent was transferred to Cloud Ocean in 2017.[58] The High Court stated "the 'substance or gist' of the relevant applications were to take water for… the needs of a freezing works and a wool scour",[59] and consequently refused to allow a consent for wool scouring to be used for the materially different purpose of water bottling.[60]

It appears as though the reason for the different outcomes between *Otakiri Springs* and *Aotearoa Water Action* is that in the latter, the respondents sought to use the original, unchanged consent for the new purpose of commercial water bottling,[61] whereas in *Otakiri Springs*, Creswell sought to vary the consent.[62] Therefore, the s 127 RMA process for variation allows a particular consent to be changed to fulfil a completely different purpose no matter how different in nature, rendering the s 88 process by which new consents are issued unused and unneeded.

IV Class of Activity

A Definitions under the Whakatāne District Plan

Before considering in detail the views of Sustainable Otakiri and the Court in relation to the categorisation of the activity class, it is necessary to consider the relevant definitions. Under the Whakatāne District Plan, "industrial activity" is defined as "the production of goods by manufacturing, processing… assembling or packaging."[63] A "rural processing activity" is defined as "an operation that processes, assembles, packs and stores products from primary

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[56] *Aotearoa Water Action Inc v Canterbury Regional Council* [2018] NZHC 3240 at [9].
[57] At [10].
[58] At [23].
[59] *Aotearoa Water Action Inc v Canterbury Regional Council*, above n 56, at [126].
[60] At [148].
[61] *Aotearoa Water Action Inc v Canterbury Regional Council*, above n 56 at [5].
[62] *Te Runanga O Ngati Awa v Bay of Plenty Regional Council*, above n 1, at [173].
[63] Whakatāne District Council "Operative District Plan 2017" (21 June 2017) <https://www.whakatane.govt.nz/documents/council-plans/operative-district-plan-2017> at 21-9.

productive use".[64] and "primary productive use" is defined as "rural land use activities that rely on the productive capacity of land or have a functional need for a rural location such as agriculture".[65]

B Sustainable Otakiri Submissions

Sustainable Otakiri believes that the water bottling proposal is in the "industrial including manufacturing activities" activity class under the Whakatāne District Plan, not the rural processing activity class.[66] If this was the case, given the specific zone – the "Rural Plains zone"[67] – the activity would need to be assessed as a "non-complying activity" which "would require a new application that would be fully publicly notified and subject to the gateway tests under s 104D RMA."[68] In other words, Sustainable Otakiri contends that an error was made in categorising the activity as a rural processing activity, which led to an easier consenting process than it would have been subject to if it was correctly classed as an industrial activity. Counsel's reasons for submitting the activity was "industrial" were that each step in the water bottling process fitted with the definition of industrial activity.[69] That production lines were used to process the water, which was packaged into plastic bottles that were "manufactured on site", and then stored and loaded onto trucks, as well as the "large scale" of the building and the "volume of shipping containers" were all key indicators the activity was industrial.[70]

C The Consequences of the Missed Gateway

The RMA creates a system with "six categories of activity", ranging from least to most restricted.[71] Non-complying activities are more restricted than discretionary activities, as they must pass through the additional s 104D gateway.[72] S 104D provides that a consent authority can only grant consent for a non-complying activity if:[73]

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[64] Above at 21-19.
[65] Above at 21-16.
[66] *Te Runanga O Ngati Awa v Bay of Plenty Regional Council*, above n 1, at [200] and Whakatāne District Council, above n 63, at 3-12.
[67] *Te Runanga O Ngati Awa v Bay of Plenty Regional Council*, above n 1, at [197].
[68] At [197].
[69] At [206].
[70] At [206].
[71] *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38 at [16] per Arnold J.
[72] Resource Management Act, s 104D.
[73] Section 104D.

> It is satisfied that either— (a) the adverse effects of the activity on the environment… will be minor; or (b) the application is for an activity that will not be contrary to the objectives and policies of— (i) the relevant plan.

Sustainable Otakiri contends that the proposed water bottling operation is a non-complying activity,[74] and that the majority incorrectly classes it as a discretionary activity.[75] The consequence of this is that the proposal missed out on the scrutiny of s 104D; scrutiny which could be the difference between a decision maker granting consent, and not granting consent.

Further, Sustainable Otakiri submits that if the proposal was correctly classed as an industrial and therefore non-complying activity, it would need to be fully publicly notified.[76] This would require the local authority to give "full public notice" of the application.[77] Any member "of the New Zealand public can make submissions on a fully notified application."[78] Therefore, failure to notify this application "locks the public out" of submitting their views and as such prevents the local authority from gauging the mood of the community regarding the particular proposal.[79] Again, the difference between an application being fully publicly notified and not may prove to be crucial to the outcome.

D Majority View and Critique

The majority begin their evaluation of this issue by indicating that industrial activity, as defined in the Whakatāne District Plan, stated above, "implies taking resources and processing or using them to manufacture or otherwise to produce goods that are different from the resource", before going on to say that "the principal element of this kind of industrial activity is the processing or manufacturing."[80] However, a plain reading of the definition does not support a view that this definition is as narrow as producing goods that are different from the resource; as it provides that goods may be produced simply by "assembling" or "packaging" them.[81] This appears to encompass the process of bottling water.

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[74] *Te Runanga O Ngati Awa v Bay of Plenty Regional Council*, above n 1 at [197].
[75] At [228].
[76] At [197].
[77] Warnock and Baker-Galloway, above n 43, at 201.
[78] At 201.
[79] At 202.
[80] *Te Runanga O Ngati Awa v Bay of Plenty Regional Council*, above n 1, at [217].
[81] At [217].

The majority then identifies the key difference between industrial activities and rural processing activities as that the latter "must have its starting point from a primary productive use", whilst industrial activities can "involve any type of material, good or product."[82] A primary productive use, as previously defined, is one which relies "on the productive capacity of land", or has "a functional need for a rural location".[83] A "functional need" is defined in the Draft New Zealand Planning Standard as "the need for a proposal or activity to traverse, locate or operate in a particular environment because the activity can only occur in that environment."[84] The majority's view is that if it were to be "assessed as a new activity",[85] the application should be "assessed as a rural processing activity,"[86] meaning it would not be subject to the s 104D gateway tests nor would it need to be publicly notified.[87] It justifies this by stating that there is a functional need for the water bottling operation to occur at this site, based on notions of the "assurance of access" to the water in this particular area,[88] and the requirement that the water be bottled at the source in order to be marketed as spring water.[89]

However, the majority seems to mistake the need for a rural location in general, with the need for a particular location which happens to be in a rural area. Even if there were a functional need for the bottling operation to occur in the particular location which the consent proposal relates to (which happens to be in a rural area), this does not equate to there being a functional need for the bottling operation to occur in a rural location *because* the activity can only occur in such an environment generally.[90] For example, a water bottling operation could well occur in an urban area which has underground aquifers, as is demonstrated by the Cloud Ocean water bottling plant which operates at a site in Belfast, a suburb of Christchurch.[91] Such a view is supported by Commissioner Kernohan for the minority, who states "water can be available from many locations… It is not exclusively a rural production activity."[92]

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[82] At [219].
[83] Whakatāne District Council, above n 63, at 21-16.
[84] Ministry tor the Environment *21 Definitions Standard – Recommendations on Submissions Report for the First Set of National Planning Standards* (ME 1404, April 2019) at 3.43.1.
[85] *Te Runanga O Ngati Awa v Bay of Plenty Regional Council*, above n 1, at [228].
[86] At [228].
[87] At [197].
[88] At [225].
[89] At [213].
[90] Ministry tor the Environment, above n 84, at 3.43.1.
[91] *Aotearoa Water Action Inc v Canterbury Regional Council*, above n 56, at [37].
[92] *Te Runanga O Ngati Awa v Bay of Plenty Regional Council*, above n 1, at [345].

In response to Sustainable Otakiri's submissions that the building itself, and activities on the production line and around the site demonstrate that the activity is of an industrial nature,[93] the majority accepts that such activities are "industrial activities within the range of the definition" but that they are "ancillary to the principal activity" which is the "extraction of water."[94] The majority appear to regard such activities as irrelevant to their determination of the activity status of the water bottling operation. However, it is clear, and the majority does acknowledge that "without the production of water, they [ancillary activities] would not occur."[95] Therefore, because such activities must inevitably occur as part of the water bottling operation, they should unquestionably be considered in the determination of the operation's activity status.

It follows that the activity should be categorised as an industrial activity rather than a rural processing activity. In sum, firstly, the definition of industrial activity does not imply that the good produced must be manufactured or changed in order to be different from the raw resource. Secondly, there is no functional need for water bottling to always take place in a rural location. Finally, the use of production lines, the packaging, storing and loading onto trucks of the water and the scale and characteristics of the building point towards the activity being industrial. Accordingly, the activity should be assessed as a "non-complying activity" which would require a new application which is publicly notified and subject to the s 104D RMA gateway tests.[96]

V S104(1)(a) – "Actual and Potential Effects on the Environment"

A The Court's Jurisdiction and Parties' Contentions

S 104(1)(a) of the RMA requires that:[97]

> When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2, have regard to– (a) *any actual and potential effects on the environment of allowing the activity.*

[93] At [206].
[94] At [226].
[95] At [226].
[96] At [197].
[97] Resource Management Act, s 104(1)(a).

The issue this gives rise to is, in essence, whether the manufacture and use of up to 154,000 plastic bottles per day and the resulting plastic pollution is an effect "on the environment of allowing the activity."[98] The Court frames this question in a way that alienates plastic bottle production from the groundwater take itself: as whether matters "beyond the particular activity for which consent is sought" and whether the "end use of whatever may be produced by that activity [groundwater extraction] or the effects of other activities for which consent is not required" should or may be considered by a consent authority, or on appeal, a Court.[99]

The Environment Court majority, Judge Kirkpatrick and Commissioner Buchanan, sets out the boundaries of its jurisdiction, stating "the scope of the Court's jurisdiction over these appeals is within the ambit of the RMA: it does not have general jurisdiction."[100] Te Rūnanga o Ngāti Awa urged the Court to consider the consents applied for in a holistic way, taking into account the bottling of the water and its export, as well as the actual take from the aquifer.[101] In response, counsel for the Regional Council and Creswell submitted that the matters of export and the damaging environmental impacts of plastic waste were not within the Court's jurisdiction – but rather were political issues to be determined at a national level.[102] Therefore, what exactly the Court has jurisdiction to consider is a key issue in the case.

B The Meaning of "Effects"

1 Thesis

This essay will prove that, rather than correctly interpreting the effects on the environment which can be considered by the decision maker as those which will inevitably flow from the operation, the Court unduly restricts interpreting effects so as to exclude considering things that will inevitably flow from the activity. The result is that the Court missed a key gateway which would have required a decision maker to consider the full extent of the effects on the environment.

It should be noted that, although using plastic bottles when bottling water is not inevitable in a general sense due to existing alternatives to plastic, Creswell have no plans to use such

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[98] Section 104(1)(a).
[99] *Te Runanga O Ngati Awa v Bay of Plenty Regional Council*, above n 1, at [34].
[100] At [32].
[101] At [36].
[102] At [39].

alternatives.[103] The Director of Creswell, Mr Gleissner, did not provide any information about "the potential of bio-degradable or compostable water containers and any possible future development of such"[104] and Creswell "accepts no responsibility for the disposal of the plastic bottles manufactured by them, once used for carrying their water."[105] Therefore, it must be assumed that Creswell will use plastic bottles for all bottling and export activities.

This essay will prove that an approach to "effects" which encompasses plastic production and pollution should be taken by firstly, analysing the flaws in the majority's reasoning, secondly, undertaking statutory interpretation, and thirdly, canvassing other Courts' interpretation of "effects" under s 104(1)(a) to allow for a comparison with the Environment Court's interpretation in *Otakiri Springs*.

2 The majority's consideration of previous cases

In reaching its position, the majority canvassed previous cases, firstly considering *Beadle and Wihongi v Minister of Corrections* (the Ngawha Prison case).[106] In this case, the Environment Court stated that:[107]

> From reviewing all those cases, we discern 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.
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> …
>
> 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.

This shows that the Court found the previous case law pointed towards taking into account the relevant environmental effects resulting from the granting of resource consents, as long as those effects were not too remote or uncertain in relation to the consents.

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[103] At [333].
[104] At [333].
[105] At [333].
[106] At [46].
[107] *Beadle v Minister of Corrections* [2002] NZEnvC 196 at [88] and [91].

The majority in *Otakiri Springs* then went on to consider *Aquamarine Ltd v Southland Regional Council (Aquamarine Ltd)*. In *Aquamarine Ltd*, the Court found that the passage of trucks and the potential for discharges of ballast water into the Coastal Marine area were "reasonably foreseeable effects" of allowing the consented activity – bottling water from Doubtful Sound.[108] Interestingly, the majority in *Otakiri Springs* in its summary of the law from this case, focusses on the fact that the consent applicant proposed exporting freshwater, and that this was not considered as an effect on the environment under s 104(1)(a) of the RMA; only the passage of the tankers carrying the water in the immediate vicinity of the bottling site was.[109] If this is an attempt to distinguish *Aquamarine Ltd* from the present case, it fails to do so, as the Rūnanga urge the Court not only to consider the export of the water, but the actual bottling of it.[110] The filling of plastic bottles with the water – the take of which is subject to consent – is in this case an inevitable effect;[111] whereas the potential for discharges from transport associated with a water bottling operation which could pollute the coastal marine area as in the *Aquamarine Ltd* case, is merely a reasonably foreseeable effect.[112] Therefore, there are in fact stronger, not weaker, grounds for considering the particular effects of the proposal under s 104(1)(a) in *Otakiri Springs* than in *Aquamarine Ltd*.

Therefore, I suggest that the cases the Environment Court majority canvasses do not support a narrow interpretation of "effects" under s 104(1)(a).

3 The majority's conclusion

The majority then proceeds to its finding in the present case. It concedes that the end uses of bottling water into plastic containers, and then exporting these, are not only foreseeable, but completely rely on the taking of water,[113] and that the effects of plastic bottle production and export on the environment are adverse.[114] However, despite ostensible agreement that the criteria of s 104(1)(a) are accordingly fulfilled, the majority refuses to find that the bottling and export of water are matters to be considered under s 104(1)(a).

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[108] *Te Runanga O Ngati Awa v Bay of Plenty Regional Council*, above n 1, at [52].
[109] At [52].
[110] At [36].
[111] At [333].
[112] At [52]
[113] At [65].
[114] At [64].

4 Flaws in majority reasoning about "effects"

The majority in *Otakiri Springs* provide key planks of reasoning as to why "effects" under s 104(1)(a) should be interpreted narrowly to exclude those associated with bottling and export.

Firstly, the majority seem to regard as relevant the fact that refusing consent in this instance will not stop water bottling and export from occurring in the many other instances where consent of this kind has been granted.[115] Without any supporting evidence, they state that "the scale of the proposed operation in this case would be a small component of the total bottling and export activities in New Zealand."[116] Why the majority thinks that other operations similar to the one being considered here are at all relevant, is unclear. The logic that it will not make a difference to the environment whether this consent is approved or not, as the adverse environmental effects from this operation are only a drop in the bucket, defeats the purpose of the resource consent process which provides that each activity is to be considered individually, in accordance with the law.[117]

Secondly, Judge Kirkpatrick and Commissioner Buchanan imply that a finding that the bottling and export of the water are matters which must be considered under s 104(1)(a) would "effectively prohibit either using plastic bottles or exporting bottled water."[118] They state that "such controls would require direct legislative intervention at a national level."[119] However, a finding that bottling and export must be considered under s 104(1)(a) would not prohibit such activities; they would merely be required to be considered in consent applications involving them. The weight to be given to such matters would be a matter for the decision maker. Therefore, the majority, in allowing the appeal on this matter, would only be taking an incremental rather than a monumental step in regulating water bottling activities, when compared with the potential effect that legislative intervention could have. This type of development of the law is within the role of the Courts.

Therefore, the majority's key reasons for interpreting "effects" narrowly are not based on sound logic.

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[115] At [64].
[116] At [64].
[117] Warnock and Baker-Galloway, above n 43, at 212 – 213.
[118] *Te Runanga O Ngati Awa v Bay of Plenty Regional Council*, above n 1, at [65].
[119] At [65].

5 *Minority view*

The minority focuses more on the issue of plastic pollution. Commissioner Kernohan in the minority argues that approving this consent application goes against the purpose of the RMA.[120] The Commissioner states that it is relevant to consider how the project would "meet the sustainable management purposes of the Act,"[121] as well as citing other relevant principles in the RMA including, "s 7(b), the efficient use and development of natural and physical resources," "s 7(aa) the ethic of stewardship;… and s 7(f) maintenance and enhancement of the quality of the environment".[122] The Commissioner then outlines the damaging effects that plastic has on the environment when it is disposed of, before pointing out that Creswell have not proposed any actions which would avoid, remedy or mitigate the environmental effects of plastic.[123] He then refutes the notion that the production of plastic bottles falls outside the Court's scope in determining this resource consent application; stating that "the Court is responsible for interpreting and determining questions of environmental law as directed by the RMA",[124] and that this is required because "the sustainable management purposes of the Act especially under s 7 are under challenge from this proposal."[125] This argument rebuts the majority's view that the end use of the water taken is not to be considered under the RMA. Although Commissioner Kernohan does not explicitly state it, his arguments hint at the idea that the effect of plastic pollution is not too remote to be considered under s 104(1)(a) as an "actual or potential effect on the environment."[126] In any case, the Commissioner's judgment is certainly not consistent with the majority's view of the s 104(1)(a) issue. Further, Commissioner Kernohan rejects the majority's reasoning regarding the plastic from this operation only representing a drop in the bucket of wider plastic pollution, and that therefore the project should be allowed; stating that whether the project is in line with the purposes of the RMA is what really matters.[127]

Commissioner Kernohan's reasoning is much more in line with what is required under s 104(1)(a) in terms of what can be considered as an "effect" of the activity.[128]

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[120] At [331].
[121] At [329].
[122] At [330].
[123] At [331] and [332].
[124] At [335].
[125] At [335].
[126] Resource Management Act, s 104(1)(a).
[127] *Te Runanga O Ngati Awa v Bay of Plenty Regional Council*, above n 1, at [336].
[128] Resource Management Act, s 104(1)(a).

6 Statutory interpretation

A statutory interpretation analysis of s 104(1)(a) sheds some light on what Parliament intended to be included in a determination of what counts as any "actual and potential effects on the environment" of allowing an activity.[129] It is timely to restate the provision in full:[130]

> When considering an application for a resource consent and any submissions received, the consent authority must, subject to Part 2, have regard to–
> (a) any actual and potential effects on the environment of allowing the activity.

Firstly, it is important to ascertain what the word "effect" was intended to mean. Section 3 of the RMA outlines what Parliament intended. S 3 states:[131]

> In this Act, unless the context otherwise requires, the term ***effect*** includes—
> **(a)** any positive or adverse effect; and
> **(b)** any temporary or permanent effect; and
> **(c)** any past, present, or future effect; and
> **(d)** any cumulative effect which arises over time or in combination with other effects—
>
> regardless of the scale, intensity, duration, or frequency of the effect, and also includes—
> **(e)** any potential effect of high probability; and
> **(f)** any potential effect of low probability which has a high potential impact.

The language of this provision makes it clear that "effect" was intended to be interpreted broadly. The use of "any" before each category of effects shows that Parliament did not intend to limit what is deemed as an effect. S 3(c) includes in the definition of effect "any past, present or future effect", which suggests that even effects from the past which have not continued into the present and will not continue into the future are included; highlighting the wide interpretation Parliament intended. Additionally, there are no minimum requirements around "scale, intensity, duration or frequency" in order for an effect to be included in the s 3 definition. Finally, potential effects are also included in the s 3 definition, meaning that that effects which are merely at risk of occurring are deemed as "effects" for the purpose of the

[129] Section 104(1)(a).
[130] Section 104(1)(a).
[131] Section 3.

RMA. Any doubt as to whether potential effects were intended to apply in s 104(1)(a) determinations is removed by explicit reference in s 104(1)(a) to "potential effects."[132]

Turning to the effect in question, plastic pollution falls well within the definition of effects under s 3 RMA. It is an actual rather than potential effect, given that plastic does not easily break down and will inevitably affect the natural environment by virtue of being produced. Estimates for how long plastics take to completely break down "range from 450 years to never."[133] Plastic production must therefore be considered as an effect for the purposes of the RMA.

Parliament's decision to define what an effect includes in s 3 displays a clear intention that this definition was intended to apply to RMA provisions which concern effects, such as s 104(1)(a). Further, Elias CJ in *West Coast Ent Inc v Buller Coal Ltd* emphasises the broad nature of the definition, finding that "nothing on the face of the legislation limited the range of effects to be considered under s 104(1)(a)."[134]

Secondly, it is important to ascertain the intended meaning of the term "environment." The term is defined under s 2, as follows:[135]

> **environment** includes—
> (a) ecosystems and their constituent parts, including people and communities; and
> (b) all natural and physical resources; and
> (c) amenity values; and
> (d) the social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) or which are affected by those matters.

As the majority of the Supreme Court in *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* state, this is a broad definition of "environment."[136] The inclusion of amenity values as making up part of the environment has been interpreted by the Supreme Court to mean that "aesthetic considerations constitute an element of the environment." Accordingly, there is no doubt that plastic pollution affects the environment as it is defined – whereby simply discarded plastic within view would constitute an effect on the environment.

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[132] Section 104(1)(a).
[133] Laura Parker "Planet or Plastic" *National Geographic* (online ed, Washington D.C., June 2018).
[134] *West Coast Ent Inc v Buller Coal Ltd* [2013] NZSC 87 at [3] per Elias CJ.
[135] Resource Management Act, s 2.
[136] *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd*, above n 71, at [23].

Of course, the environment is affected in many more ways than this, with ecosystems and their constituent parts, as well as natural and physical resources already suffering clear adverse effects from plastic pollution.

Notwithstanding the evidence that a proportion of plastic bottles will be sold in New Zealand,[137] an important issue in applying s 104(1)(a) here is that, as most of the bottles are for export, the plastic will primarily be disposed of overseas, and therefore will not directly affect the environment in New Zealand. Therefore, there is an argument to be made that this distinction matters: if the effects will occur outside of New Zealand, why should they be considered? The issue with this argument is that as with many environmental effects, plastic does not respect borders. Plastic which is disposed of overseas may well end up inside New Zealand's waters in the Tasman Sea, an area which, as previously stated, is greatly affected by plastic pollution. Plastic initially disposed of in New Zealand may well end up on the other side of the world by virtue of being blown into the ocean and then taken by marine currents. It is analogous to climate change in this respect: the initial effects of greenhouse gas production will most notably be felt in the country from which they are emitted, constituting smog and fumes close to the ground. However, eventually the air pollution will become the entire world's problem as greenhouse gases rise and form a layer above the earth's surface, trapping heat inside. The broad approach indicated by the legislation supports a wide interpretation of "environment."

Further, policy indicates that nothing should turn on whether the environment in New Zealand is directly or indirectly affected. This would create a situation where commercial water bottling operations that export water are not subject to scrutiny regarding the effects of their operation, while those that bottle water for distribution inside New Zealand are subject to such scrutiny. Given the remarkably increased potential for growth in the export market, increased domestic demand for water, and the imminent pressures of climate change, this cannot be what Parliament intended. More generally, the idea that if New Zealand producers send their pollution offshore they should be subject to less scrutiny than they otherwise would be is not conducive to environmental responsibility; it is in fact this mode of thinking that will continue to lead our planet down the path of environmental destruction.

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[137] Bay of Plenty Regional Council and Whakatāne District Council *Decision Report: Creswell NZ Limited Otakiri Springs Water Bottling Plant Expansion* (11 June 2018) at 3[005].

All of these reasons suggest that the plastic pollution which will result from the proposed commercial water bottling operation falls within that which must be considered by decision makers under s 104(1)(a) RMA.

7 Other courts' treatment of "effects" under s 104(1)(a)

Delineating what other Courts have treated as "effects" for the purpose of s 104(1)(a) can help in ascertaining what Courts see as the limits on the scope of s 104(1)(a) in various contexts.

The practice of the Environment Court has been to have regard to "potential cumulative effects" under s 104(1)(a).[138] In *Outstanding Landscape Protection Society v Hastings District Council*, the Environment Court held that a proposed wind farm which would add 37 wind turbines to a ridgeline area where 90 turbines had already been granted consent should be declined, with a significant factor being that "cumulatively with the other two consented wind farms", significant "adverse visual and landscape effects" would result.[139] Additionally, in *Emerald Residential Ltd v North Shore City Council*, the Environment Court upheld a decision refusing consent for what would have been an 11th apartment building on a North Shore site;[140] a key part of the reasoning being that "when considered cumulatively with the effects of what exists… those cumulative effects are more than minor."[141] Therefore, the Courts are willing to view the proposed activity immediately before them in conjunction with existing nearby activities for the purpose of determining the effects of that proposed activity under s 104(1)(a).

Interestingly, in *R J Davidson,* the Environment Court saw itself as required by s 104(1)(a) to consider "likely net social (financial and employment) benefits" that would result if the proposed mussel farm was granted consent.[142] Further, "likely... cumulative effects" on the natural character of the Bay and on the amenity of users of the Bay, and importantly, the "small probability" that King Shag would go extinct were seen as necessary to consider under s 104(1)(a).[143] This tells us the Courts regard any potential effects, ranging from those that have a small probability of occurring but are serious if they do eventuate, to those that are

[138] Warnock and Baker-Galloway, above n 43, at 221.
[139] *The Outstanding Landscape Protection Society Inc v Hastings District Council* [2008] NZRMA 8 at [61].
[140] *Emerald Residential Ltd v North Shore City Council* [2004] RMA0499/03 at [1], [3] and [34].
[141] Above at [32].
[142] *RJ Davidson Family Trust v Marlborough District Council* [2016] NZEnvC 81 at [269].
[143] At [269].

likely to occur, cumulatively or otherwise, as among the kinds of effects which should be considered under s 104(1)(a).

In *Lindis Catchment Group Inc v Otago Regional Council*, the Environment Court considered a range of effects on the environment flowing from a proposed water take from the Lindis River or its connected aquifers under s 104(1)(a) RMA.[144] Among the effects evaluated by the Court were: [145]

> …the duration of low flows and mitigation by flushing flows…; water quality...; water temperature as this relates to fish passage and juvenile mortality…; braided river avifauna [birdlife]…; and native fish and invertebrates.

As such, there was a willingness by the Court to set out a range of current environmental indicators and consider the effects that an action such as varying water flows in a river might have on those benchmarks.

The Supreme Court has noted that, in relation to a resource consent application which would enable the establishment a retail outlet comprising "some 56 shops selling discounted goods,"[146] it was important in the s 104(1)(a) context to assess the application "against any adverse impact it might have on the amenity values of existing shopping centres."[147] Further, In *508 Chapel Road Partnership Trust v Auckland Council*, the Environment Court considered as relevant under s 104(1)(a) increased traffic and resulting effects on the amenity and character of the neighbourhood from a proposal to establish a childcare centre at the end of a small cul de sac in a residential part of southeast Auckland.[148] These cases show that impacts on visual and convenience factors are within the range of effects that Courts believe they have jurisdiction to consider under s 104(1)(a).

Overall, from these cases, we can ascertain a possible limit on what the Courts will and will not consider under s 104(1)(a). The four groupings identified – potential cumulative effects, effects with varying degrees of likelihood of occurring, effects on other environmental benchmarks, and effects on visual and convenience factors – appear to include relevant effects of plastic production in *Otakiri Springs*.

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[144] *Lindis Catchment Group Inc v Otago Regional Council* [2020] NZEnvC 100 at [1].
[145] At [99].
[146] *Discount Brands Ltd v Westfield (New Zealand) Ltd; sub nom Westfield (New Zealand) Ltd v North Shore City Council* [2005] NZSC 17 at [1].
[147] At [17].
[148] *508 Chapel Road Partnership Trust v Auckland Council* [2019] NZEnvC 189 at [4], [18] and [22].

Firstly, as regards cumulative effects, the plastic pollution does not depend on any other existing operation or occurrence; it will result solely by virtue of the commercial water bottling operation. Secondly, the plastic pollution falls within the limit of an effect which is "likely" to occur; because Creswell plans to only use plastic bottles for its bottling and export activities.[149] In terms of effects on environmental benchmarks, this involves looking at the downstream effects of the proposed consented activity on other environmental indicators. The proposed water take for the purpose of bottling and export will certainly have downstream effects on environments where the plastic ends up; the difference between *Otakiri Springs* and the *Lindis Catchment Group* case being that the effects of taking water from a river are more proximate than those of allowing plastic bottle production. However, the fact that the effects cannot be pinpointed should not prevent them from being had regard to given the level of certainty that they will occur; perhaps this will require a shift from the Court from asking *where* the effects will occur, to asking *whether* the effects will occur. Lastly, visual and convenience factors being within the Court's jurisdiction point towards effects which have both damaging visual and environmental effects as being well within the Court's ambit of consideration.

On balance, effects that Courts in other cases view as being within their jurisdiction under s 104(1)(a) suggest that the effects in *Otakiri Springs* will also be effects. This means that the majority in *Otakiri Springs* took an unnecessarily and unjustifiably narrow approach in refusing to consider the effect of plastic production and pollution under s 104(1)(a) of the RMA.

8 Drawing the threads together

An analysis of the majority's reasoning, along with a consideration both of cases that the majority referred to in their argument and other cases on the issue, and statutory interpretation, all point towards the conclusion that the majority interpreted "effects" under s 104(1)(a) unlawfully. Instead of interpreting "effects" on the environment as those which will inevitably flow from the operation and so as to include the production and pollution of plastic bottles in *Otakiri Springs*, the majority takes an overly restrictive approach so as to prevent a decision maker from having regard to such inevitable effects.

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[149] *Te Runanga O Ngati Awa v Bay of Plenty Regional Council*, above n 1, at [333]

As a result, the Court missed a crucial gateway which would have required a full consideration of the effects on the environment of allowing the operation of Creswell's proposed commercial water bottling plant.

VI Conclusion

The aim of this essay has been to highlight several instances where the Environment Court in *Otakiri Springs* misinterpreted the law, leading to an overly narrow approach in its consideration of Creswell's resource consent application for a commercial water bottling operation. It follows from each misinterpretation that the Court missed a key gateway, and rather circumvented it, meaning Creswell was relieved from the scrutiny it should have been subject to. Firstly, the Court, in upholding the local authority's determination that the resource consent application was for a change to an existing consent rather than requiring Creswell to make a new consent application, blocked a consideration of the aspects of the proposal that had previously gained consent, and therefore blocked a consideration of the application as a holistic whole. Secondly, the Court upheld the finding that the operation was a rural processing activity rather than an industrial activity; meaning that full public notification and a further statutory test were unlawfully omitted from the resource consent process, and therefore that another layer of scrutiny that should have been applied was removed. Finally, the Environment Court unduly restricted the meaning of "effects" in the statute, preventing the decision maker from considering such things as will inevitably flow from the operation, such as immense plastic production and resulting pollution.

The dire environmental consequences of decision making such as that seen in the *Otakiri Springs* case thus far are already well documented. In light of this increasing awareness, it becomes increasingly unconscionable that the law continues to be moulded into a tool which allows for unrestricted environmental degradation to continue; sadly this case suggests that this practice is all but ingrained in decision making under the RMA.

VII Appendices

A Appendix A

In a recent survey, 80% of the samples taken from New Zealand's coastal waters contained microplastics, and the majority of New Zealand fish had ingested plastics.[150] The full health and environmental impacts of microplastics are not yet known; although it is accepted that they threaten human health by contaminating resources and the food chain. The threat to wildlife health is much worse, with one third of seabirds and turtles which wash up dead on New Zealand's beaches having eaten plastic.[151]

B Appendix B

The Ministry for the Environment in its "Our Freshwater 2020" report outlines various factors which point towards increasing future water stress in New Zealand. Demand for water is growing for both of the two largest use categories: irrigation and household use,[152] and annual precipitation was below average in nine of the years from 2000 – 2014, which is consistent with predictions that climate change will make rainfall amounts more unpredictable in the future.[153]

C Appendix C

As of September 2020, the Government has not followed through on its formal pledge made in 2017 to introduce a royalty on bottled water exports during its term.[154] The "Our Freshwater 2020" report by the Ministry for the Environment and Stats NZ contains one mention of commercial water bottling, stating that the industry is "very small".[155]

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[150] Dr Durgeshree Raman "Single use plastic ban: the first step" (2018) 12 BRMB 153 at [4].
[151] At [4].
[152] Ministry for the Environment & Stats NZ *New Zealand's Environmental Reporting Series: Our freshwater 2020* (ME 1490, April 2020) at 57.
[153] At 59.
[154] Sam Sachdeva "Bottled water royalty plans on ice" *Newsroom* (online ed, Wellington, 13 July 2020).
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